

State and Local Procedural Injustices in Environmental Regulation: The Experiences of Tallevast, Florida

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STATE AND LOCAL PROCEDURAL INJUSTICES IN ENVIRONMENTAL REGULATION: THE EXPERIENCES OF TALLEVAST, FLORIDA

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ABSTRACT

Government decisions made at the local and state level are those that most often directly affect communities. Participatory and procedural protections under state and local, rather than federal law, therefore, largely control the ability of grassroots environmental justice advocates to shape government decisions important to their communities. Thus, significant disparities in the standards of procedural justice differ not only by which state an environmental justice community happens to be located in, but also by the type of local government with authority over that community. Frequently, this diminishes the empowerment efforts of communities found in unincorporated areas. The community found in Tallevast, Florida, is one such example of a community whose dedication and struggles to achieve environmental justice have often been thwarted by deficient state and local government procedural protections.

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INTRODUCTION

One of the central themes of environmental justice advocacy is the equity of decision-making processes that affect communities.¹ According to the U.S. Environmental Protection Agency (“EPA”), environmental justice “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards *and equal access to the decision-making process* to have a healthy environment in which to live, learn, and work.”² While federal environmental laws may have deficiencies in regards to environmental justice, most statutes do contain minimum public participation and informational access requirements. Although the details of these participation processes are frequently within an agency’s discretion, many federal agencies have been improving opportunities for addressing environmental justice concerns in their decision-making processes.³

¹ See, e.g., Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REPORTER: NEWS AND ANALYSIS 10,681, 10,682 (2000); Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 288 (1994); Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 778, 808 (1998).

² *Envtl. Justice*, EPA, <http://www.epa.gov/environmentaljustice/> [<https://perma.cc/9BN8-C7EY>] (last visited Nov. 15, 2016) (emphasis added).

³ Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994). See, e.g., Memorandum of Understanding on Environmental Justice and Executive Order 12898 (Aug. 4, 2011) (signed by the heads of eleven covered federal agencies and six participating federal agencies and offices), which resulted in several agencies developing environmental justice strategies. See, e.g., U.S. DEP'T OF AGRIC., ENVIRONMENTAL JUSTICE STRATEGIC PLAN: 2012–2014 (2012); U.S. DEP'T OF TRANSP., DEPARTMENT OF TRANSPORTATION ENVIRONMENTAL JUSTICE STRATEGY (2012). See also EPA, PLAN EJ 2014 (2011); COUNCIL ON ENVIRONMENTAL QUALITY (CEQ), ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997).

Many federal environmental statutes, however, require the EPA to delegate to the States the authority to implement national requirements upon a state demonstrating the capability to administer the federal program. While numerous federal agencies have made efforts to incorporate environmental justice into their decision-making processes, states have increasingly been delegated the primary responsibility for national environmental programs. Ninety-six percent of all delegable federal environmental programs, for example, have been delegated to states, which is nearly a thirty percent increase since 2001.⁴

Although the standards and EPA's discretion to approve or disapprove delegation to the States vary across federal environmental laws,⁵ statutes typically require States to demonstrate equivalency with federal public participation requirements, such as public notice of draft permits, public comments and agency responses, and requests for public hearings.⁶ Under the Resource Conservation and Recovery Act ("RCRA"),⁷ for example, in order to qualify for delegation, "States need not implement provisions identical to" EPA's regulations, as long as the States "establish requirements at least as stringent as the corresponding [EPA] provisions."⁸ In the permitting context, quantitative criteria such as parts per million ("ppm") provide objective standards for EPA to evaluate the "as stringent as" requirement.⁹ Assessing procedural protections, however, is typically more subjective.

With States asserting an increased role in hazardous waste site remediation because of this delegable authority,¹⁰ as well as the siting and permitting decisions traditionally made at the local level, environmental justice communities often operate within state-established procedural requirements. The differences in procedural rights under state and federal regulation may not be significant for some communities, but state processes can have negative implications for many citizens, particularly

⁴ *Delegation by Environmental Act*, ENVTL. COUNCIL OF THE U.S., https://web.archive.org/web/20160324131707/http://ecos.org/section/states/enviro_actlist [<https://perma.cc/6BQA-NDM4>] (last visited Nov. 15, 2016) (96 percent of programs were delegated to states in 2015, compared to 75 percent in 2001).

⁵ See, e.g., ROBERT ESWORTHY, CONG. RESEARCH SERV., FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 10 (2014) ("In some cases, state primacy is almost automatic.").

⁶ See, e.g., 40 C.F.R. § 271.14(x)-(aa) (2016) (RCRA's public participation equivalency regulations).

⁷ See generally 42 U.S.C. § 6901 (2012).

⁸ 40 C.F.R. § 271.14 note (2016).

⁹ *Id.*

¹⁰ See SARAH GRACE LONGSWORTH ET AL., ENVTL. COUNCIL OF THE U.S., STATE DELEGATION OF ENVIRONMENTAL ACTS 9-12 (2016) (calculations by author).

those in states without a commitment to environmental justice or public participation in general. At the substate level, residents of unincorporated areas face even greater procedural inequities compared to those who live in incorporated municipalities. While influences in addition to processes are factors, county governments typically fail to protect of-color and poor unincorporated areas from locally undesirable land uses (“LULUs”) and other environmental burdens.¹¹ The numbers of citizens who end up falling through these procedural cracks, however, constitute a significant portion of the population. In Florida, for example, this includes more than half of the State’s population.¹² The struggle of the community of Tallevast, Florida, is one such example.

I. THE COMMUNITY OF TALLEVAST AND ITS ENVIRONMENTAL THREATS

Tallevast is a small, unincorporated community covering about 1.5 square miles in southern Manatee County, Florida. The community extends two to three blocks both north and south of Tallevast Road, from approximately 15th Street East to 19th Street East. The Tallevast community consists of approximately eighty-four households, which are almost entirely African American.¹³ A majority of these households includes descendants of at least one of Tallevast’s five founding families, who settled the area as turpentiners following the Civil War. Tallevast contains two churches—Mt. Tabor Missionary Baptist and Bryant Chapel Christian Methodist Episcopal Church. Many residents have returned to their extended family and community roots after obtaining their education elsewhere—such as Dr. Clifford “Billy” Ward and his daughter, Dr. Tasha Ward, who operate Ward Family Dentistry in Tallevast.

Although the economic welfare of Manatee County exceeds the average for the State of Florida,¹⁴ Tallevast has often not received the

¹¹ Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1151–55 (2008).

¹² *State & County QuickFacts: Florida*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/12000.html> [https://perma.cc/2UC2-NPHC] (last visited Nov. 15, 2016) (“White alone, not Hispanic or Latino, percent” (2013): Florida: 56.4%, U.S.: 62.6%); *A Quick Civic Review*, FLA. LEAGUE OF CITIES, <http://www.floridaleagueofcities.com/Resources.aspx?CNID=878> [https://perma.cc/88M6-JG82] (last visited Nov. 15, 2016) (“The majority of Floridians—by a small percentage—live in unincorporated county areas.”).

¹³ The entire population of Manatee County (342,106) is 9.3% black. *State & County Quick Facts: Manatee County, Florida*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/12/12081.html> [https://perma.cc/3KRS-CRM2] (last visited Nov. 15, 2016) (2013 est.).

¹⁴ *Id.*

amenities and services provided to other parts of the county. Some streets in the neighborhood remain unpaved, there are no sidewalks in the neighborhood—even along heavily used Tallevast Road—sewer connections were not made until 1985, and many residents did not have access to the public water system before 2004.¹⁵ In 2003, residents held a series of “visioning” sessions and formed the community group Family Oriented Community United Strong (“FOCUS”) in efforts to improve the quality of their neighborhood.¹⁶ Led by President Laura Ward and Vice President Wanda Washington, FOCUS’s mission, and the direction of the entire community, would quickly change.

A. *Discovery of Contamination in the Community*

In 1996, Lockheed Martin Corporation, the world’s largest defense contractor,¹⁷ acquired the former American Beryllium Company (“ABC”) site located on five acres of land at 1600 Tallevast Road as part of its purchase of Loral’s defense electronics business.¹⁸ From 1961 to 1996, ABC was an ultraprecision beryllium machine parts manufacturing facility, where metals were milled, lathed, and drilled, as well as electroplated, anodized, or ultrasonically cleaned, for various components, including parts for nuclear warheads and the Hubble telescope.¹⁹ While the exact source remains unknown, over a period of time encompassing decades, leaks or discharges apparently occurred at a series of “sumps” associated with ABC’s on-site wastewater treatment system, allowing contaminants, primarily chlorinated solvents, to enter the soil and groundwater beneath the facility.²⁰ Sometime in 1999 or 2000, Lockheed Martin discovered the groundwater beneath the ABC property was contaminated by a variety

¹⁵ See, e.g., Erin Bryce & Debi Springer, *A Vision of Tallevast*, SARASOTA HERALD-TRIBUNE H12 (March 13, 2003); Erin Bryce, *Water, Sewer and Paved Roads are on their Way*, SARASOTA HERALD-TRIBUNE H1, H12 (Nov. 3, 2003). Sidewalks along Tallevast Road, however, are currently scheduled for installation in the summer of 2016. See BD. CNTY. COMM’RS, MANATEE CNTY., FLA., RES. B-16-033 (Sept. 15, 2015).

¹⁶ See, e.g., Editorial, *Revitalizing Tallevast: County Commission Should Support Community’s Rebirth*, SARASOTA HERALD-TRIBUNE (Mar. 17, 2003), at A12.

¹⁷ AUDE FLEURANT & SAM PERLO-FREEMAN, *THE SIPRI TOP 100 ARMS-PRODUCING AND MILITARY SERVICES COMPANIES*, 2013 3 (Tbl. 1) (2014) (arms sales: \$35.5 billion; profits: \$2.9 billion; employees: 116,000).

¹⁸ Final Order, *Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp.*, No. 11-0259, 2012 WL 36239, at 1 (Fla. Div. of Admin. Hearings. Jan. 3, 2012).

¹⁹ Recommended Order, *Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp.*, No. 11-0259, at 2 (Fla. Div. of Admin. Hearings Oct. 6, 2011).

²⁰ *Id.*

of pollutants.²¹ The full extent of the contamination is not known as the groundwater has only been tested for a handful of the hundreds of chemicals on the ABC's Material Safety Data Sheet ("MSDS"), but the primary "contaminants of concern" ("COCs")—i.e., those occurring in concentrations exceeding Groundwater Cleanup Target Levels ("GCTLs")—are trichloroethylene ("TCE"), 1,4-dioxane ("dioxane"), tetrachloroethene ("PCE"), cis-1,2-dichloroethene, 1,1-dichloroethene, 1,1-dichloroethane, vinyl chloride, methylene chloride, bromodichloromethane, dibromochloromethane, and 1,1,1-trichloroethane.²²

The concentrations of some of these pollutants were well beyond what is considered safe for human contact, let alone ingestion. Dioxane, for example, which damages the central nervous system, kidneys, and liver and is a probable human carcinogen,²³ has been found in concentrations of 2,710 parts per billion ("ppb"), while the GCTL is 3.2 ppb.²⁴ Even more prevalent is TCE, which also damages the nervous system, kidneys, and liver, as well as the immune system and developing fetuses and is a known human carcinogen,²⁵ found in concentrations of up to 35,000 ppb²⁶—more than 11,000 times Florida's GCTL of 3.0 ppb and 7,000 times the Maximum Contaminant Level ("MCL") under the Safe Drinking Water Act.²⁷

Lockheed Martin maintains that it "immediately notified the Florida Department of Environmental Protection (FDEP)"²⁸ upon discovering the contamination in 2000, but neither Lockheed Martin nor FDEP

²¹ *Id.* at 5.

²² *Id.* at 9.

²³ Nat'l Inst. for Occupational Safety and Health, *1,4-Dioxane*, CTRS.' FOR DISEASE CONTROL AND PREVENTION (last updated July 1, 2014), <http://www.cdc.gov/niosh/ipcsneng/neng0041.html> [<https://perma.cc/64BX-H828>]; *1,4-Dioxane (1,4-Diethyleneoxide): Hazard Summary—Created April 1992; Rev. January 2000*, EPA (last updated Oct. 18, 2013), <https://www.epa.gov/sites/production/files/2016-09/documents/1-4-dioxane.pdf> [<https://perma.cc/25FW-ST99>].

²⁴ *Tallevast, Florida: Background & Timeline*, LOCKHEED MARTIN CORP., <https://web.archive.org/web/20160125122257/http://www.lockheedmartin.com/us/tallevast/efforts/background.html> [<https://perma.cc/2V5G-KD8T>] (last visited Nov. 15, 2016).

²⁵ *Fact Sheet on Trichloroethylene (TCE)*, EPA, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-trichloroethylene-tce> [<https://perma.cc/Z9BP-XT9K>] (last visited Nov. 15, 2016).

²⁶ *Tallevast, Florida: Background & Timeline*, *supra* note 24.

²⁷ 42 U.S.C. § 300f–300j (2012); 40 C.F.R. § 141.61(a)(5) (2016) (MCL for TCE is 0.005 mg/l, or 5 ppb). The Maximum Contaminant Level Goal ("MCLG") for TCE is zero (0). 40 C.F.R. § 141.50(a)(5) (2016).

²⁸ *Tallevast, Florida*, LOCKHEED MARTIN CORP., <http://www.lockheedmartin.com/us/tallevast.html> [<https://perma.cc/K27D-GPGY>] (last visited Nov. 15, 2016).

notified the residents in the community. Initially, Lockheed believed the groundwater contamination plume was limited to five acres in size and did not extend beyond its property.²⁹ At the time Lockheed Martin accepted responsibility for the clean-up by signing a consent order with FDEP in 2004, the plume was then thought to be approximately twelve acres.³⁰ By 2006, however, when FDEP approved Lockheed Martin's third attempt at a Site Assessment Report, the plume of groundwater contamination extended laterally over 200 acres and vertically down to three distinct aquifer systems, composed of seven separate layers of aquifers.³¹

Tallevast residents did not find out about the contamination until September 2003, when Laura Ward looked out her window to see a large drilling rig in her yard. Ms. Ward asked a worker what they were doing in her yard, and the worker responded: "You don't know, but the water is contaminated here."³² Ms. Ward and other Tallevast resident started asking a lot of questions of various government agencies and Lockheed Martin officials. They were less than forthcoming at times, which led Ms. Ward and Ms. Washington to do their own review of public records at the Tampa office of FDEP. After these residents realized the extent of the contamination, they were assured by FDEP and the County that the risk of groundwater exposure was limited because the community was on public water.³³ While many Tallevast households were connected to public water supply lines around 1985, the residences along 16th, 18th, and 19th Streets, as well as parts of Tallevast Road, continued to use water from their private wells for household uses and irrigation.³⁴ When finally tested in 2004, many of these wells were found to be contaminated.³⁵

²⁹ *Id.*

³⁰ Consent Order, Fla. Dep't Env'tl. Prot. v. Lockheed Martin Corp., OGC#04-1328 (July 28, 2004); TETRA TECH, FINAL CONTAMINATION ASSESSMENT REPORT (CAR) 4-9 (May 2003).

³¹ Recommended Order, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 11-0259, at 3, 9-15 (Fla. Div. of Admin Hearings Oct. 6, 2011).

³² Ronnie Greene, *Tiny Toxic Florida Town Takes on a Corporate Goliath*, MIAMI HERALD Aug. 15, 2010, at A1; Mary Ellen Klas, *The toxic town that Florida forgot*, MIAMI HERALD, Aug. 16, 2010, <http://miamiherald.typepad.com/nakedpolitics/2010/08/the-toxic-town-that-florida-forgot.html>; see generally STEVE LERNER, SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES 157-76 (MIT Press ed. 2010) [<https://perma.cc/D8UL-K94K>] (last visited Nov. 15, 2016).

³³ Recommended Order, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 11-0259, at 6, 19 (Fla. Div. of Admin Hearings Oct. 6, 2011).

³⁴ *Id.* at 6.

³⁵ *Id.* at 6 (Fla. Div. of Admin Hearings Oct. 6, 2011); see also Joe Follick, *'Tallevast' Bill Becomes Law: The State Must Give Notice if Contamination Threatens*, SARASOTA HERALD-TRIBUNE, May 25, 2005, at A1.

B. Litigation and Other Legal Strategies

Although FDEP and Lockheed Martin began to hold informational meetings in the community, the failure to inform the community about the contamination made it difficult for the residents to trust or have confidence in the responsible party or the government agency charged with protecting Florida's environment and the quality of life of its citizens.³⁶ Looking for someone to protect their health and other interests, Tallevast residents turned to private attorneys.

Almost from the beginning, litigation began to splinter this close-knit community. Multiple tort suits with different sets of plaintiffs and various claims were filed against Lockheed Martin. In terms of plaintiffs, the largest suit, *Laura Ward v. Lockheed Martin Corp.*,³⁷ in which 272 residents sought damages for contamination of their respective properties and intentional infliction of emotional distress for the failure to notify the community, was filed in 2005. After five years of litigation, Lockheed Martin announced the confidential settlement of an undisclosed amount of damages in 2010, a month before the scheduled trial.³⁸ Ultimately, the case was settled and dismissed at the end of 2011.³⁹

Litigation concerning health impacts has proved even more difficult for the residents. A group of thirty-one residents, not parties to the *Ward* litigation, also filed suit in 2005.⁴⁰ Though the case included claims similar to those of *Ward*, *Alphonso Bradley v. Lockheed Martin Corp.* focused more on health damages.⁴¹ This case was eventually dismissed in 2011.⁴²

³⁶ 1993 Fla. Laws Ch. 93-213, at 2132-33.

³⁷ Compl., *Laura Ward v. Lockheed Martin Corp.*, Case No. 2005-CA-004707, at 1-4 (Fla. 12th Cir. Ct. Sept. 1, 2005).

³⁸ See, e.g., *Ward v. Lockheed Martin Corp.*, No. 8:05-CV-1878-T-17TGW, 2006 WL 889729 (M.D. Fla. Mar. 31, 2006) (order remand of case to state circuit court after Lockheed Martin's attempted removal to federal district court); Christopher O'Donnell, *Settlement is Likely in Tallevast Lawsuit*, SARASOTA HERALD-TRIBUNE, Sept. 5, 2010 at B3 (announcing Lockheed Martin's press release about the settlement, community members declined to comment).

³⁹ Voluntary Dismissal, *Laura Ward v. Lockheed Martin Corp.*, Case No. 2005-CA-004707 (Fla. 12th Cir. Ct. Dec. 20, 2011).

⁴⁰ Compl., *Bradley v. Lockheed Martin Corp.*, No. 2005-CA-005863, at 1 (Fla. 12th Cir. Ct. Nov. 7, 2005).

⁴¹ Notice of Dismissal with Prejudice, *Bradley v. Lockheed Martin Corp.*, No. 2005-CA-005863 (Fla. 12th Cir. Ct. Aug. 31, 2011).

⁴² *Id.*

In 2007, four community members filed a suit seeking class action status for three groups of plaintiffs—employees, families of employees, and residents of the community—for payment of medical monitoring tests for conditions related to beryllium exposure, including berylliosis, a lung disease, and the more severe chronic beryllium disease (“CBD”).⁴³ Class-action status was denied in 2010 and upheld on appeal.⁴⁴ Three family members, the husband who was a janitor, his wife, and brother-in-law who lived with them, each with berylliosis or CBD, also sued Lockheed Martin in 2007 and settled for an undisclosed amount in 2011.⁴⁵

The community’s litigation concerning the contamination, however, was not limited to Lockheed Martin. Unsatisfied with both the documentation of the extent of pollution and the proposed pump-and-treat methodology, which would take between 50 and 100 years to clean up the groundwater, FOCUS and several individual residents challenged FDEP’s approval of Lockheed Martin’s Site Assessment Report (“SAR”) and Remedial Action Plan (“RAP”) in 2011.⁴⁶ After an eleven-day administrative hearing, the administrative law judge ruled against the Petitioners, a recommendation that was approved by FDEP.⁴⁷ After more than two years, the Court of Appeals upheld this decision in a one-word opinion.⁴⁸ FOCUS’s other challenges to the decisions of FDEP and the water management district allowing Lockheed to proceed with its clean-up plan also proved unsuccessful.⁴⁹

⁴³ Compl., Wanda Washington v. Lockheed Martin Corp., No. 07-CA-4765 (Fla. 12th Cir. Ct. July 21, 2007).

⁴⁴ Case Destroyed, Wanda Washington v. Lockheed Martin Corp., No. 2D10-4298 (Fla. 2d Dist. Ct. App., July 24, 2013); Timothy R. Wolfrum, *Judge: No Class Action in Tallevast*, BRADENTON HERALD (Sept. 2, 2010).

⁴⁵ Compl., Beatrice Zeigler v. Lockheed Martin Corp., No. 07-CA-4491 (Fla. 12th Cir. Ct. July 12, 2007); Proposed J. Stip. For Dismissal with Prejudice, Beatrice Zeigler v. Lockheed Martin Corp., No. 07-CA-4491 (Fla. 12th Cir. Ct. May 25, 2011).

⁴⁶ Final Order, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 11-0259, 2012 WL 36239 at 1 (Fla. Div. of Admin. Hearings. Jan. 3, 2012).

⁴⁷ *Id.*

⁴⁸ Family Oriented Comm. United Strong, Inc. v. Fla. Dep’t Env’tl. Prot., 145 So. 3d 833 (Fla. Dist. Ct. App. 2014) (The entire opinion is as follows: “AFFIRMED”).

⁴⁹ *See, e.g.*, Family Oriented Comm. United Strong, Inc. v. Fla. Dep’t Env’tl. Prot., 78 So. 3d 543 (Fla. Dist. Ct. App. 2012) (“Affirmed.”); Family Oriented Comm. United Strong, Inc. v. Dep’t Env’tl. Prot., 60 So. 3d 1061 (Fla. 2d Dist. Ct. App. 2011) (denial of writ petition for injunctive relief); Family Oriented Comm. United Strong, Inc. v. Dep’t Env’tl. Prot., No: 11-01407 (Fla. Div. of Admin. Hearings. 2011) (voluntary dismissal of petition challenging removal of concrete slab serving as a contamination cap following actual removal of said slab); Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp. and SW Fla. Water Mgmt. Dist., No. 12-0546 (Fla. Div. of Admin. Hearings. 2012) (voluntary dismissal of consumptive use permit).

C. *Other Environmental Hazards Threatening the Community*

The groundwater contamination and resulting litigation have not been the only environmental threats to Tallevast. The County Commission decided that Tallevast should also host the new Manatee County Transit Authority bus depot.⁵⁰ The 116,000-square-foot, \$16-million facility is to include a maintenance building, fuel depot, and truck wash station and will host buses, trolleys, ambulances, tractors, bulldozers, sheriff's vehicles, boats, vans, and mowers.⁵¹ Residents are most concerned about the increased traffic and fumes. As summarized by Wanda Washington at a County Commission meeting, "This is not the correct project to bring to this community and it seems as though nobody's hearing us."⁵² Laura Ward added:

"Our families were in that community when no one else wanted to be out there. . . . Manatee County never gave us lights, they never gave you a phone number," she said, adding residents still have trouble getting mail unless they use a Sarasota ZIP code. . . . "We don't want any foolishness like this in our community."⁵³

In addition to the transit facility, Manatee County approved the demolition of a building on another contaminated site in 2015.⁵⁴ This building was previously part of the ABC facility, "until it became too contaminated for the workers, then they moved them next door" to the current Lockheed Martin property.⁵⁵ Although community members have wanted this vacant, dilapidated eyesore removed for years, they had frequently been told that the property was too contaminated to tear down.⁵⁶ As such, residents were concerned about beryllium dust, asbestos, and other toxins being further distributed in the community. The first any of the Tallevast residents learned of the planned removal, however, was when they saw news stories about Manatee County's approval.⁵⁷

⁵⁰ Sara Kennedy, *Manatee County's New Transit Fleet Facility Slated for Tallevast*, BRADENTON HERALD, May 17, 2014.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Wanda Washington, pers. comm. (2015).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Sara Kennedy, *Part of Abandoned Tallevast Plant to be Demolished*, Manatee

II. PROCEDURAL DEFICITS IN FLORIDA'S ENVIRONMENTAL REGULATION

Florida is one of the most contaminated states in the country, currently ranking sixth in the number of Superfund sites on the National Priorities List (“NPL”).⁵⁸ Within Florida, these Superfund hazardous waste sites are nearly four times more likely to be located in a community of color than a white community and are unequally distributed by income and education levels as well.⁵⁹ Other general indicators of environmental burdens in Florida—such as cancer risk from hazardous air pollutants, facilities emitting criteria pollutants, and the release of toxic chemicals—also show disproportionate impacts based on race, class, and education.⁶⁰ Thus, Florida's structural decisions concerning the participation of citizens directly impacted by these environmental burdens have powerful procedural justice implications. Florida, unfortunately, has a history of decision-making processes that not only exclude the affected public from effective participation but also from receiving basic information on environmental risks they may face.

A. *Notification Rules for Residents When Their Property Has Been Contaminated: The “Tallevast” Bill*

When Lockheed Martin began initial clean-up of the ABC site in 2001 with the removal of 538 tons of contaminated soil,⁶¹ Florida law did not require notifying residents whose property was contaminated by another party until *after* FDEP had approved a clean-up plan.⁶² At that time, FDEP approval was the last step of a process that began with FDEP being made aware of contamination spreading onto adjacent properties followed by a formal assessment of the extent of contamination.⁶³

County Official Says, BRADENTON HERALD (Feb. 10, 2015), <http://www.bradenton.com/news/local/article34793730.html>.

⁵⁸ *Final National Priorities List (NPL) Sites—by State*, EPA (last updated Apr. 12, 2016), <http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm> [<https://perma.cc/3L2U-SNSG>] (Florida contains 53 of 1,328 sites).

⁵⁹ *Environmental Justice Summary Report: Florida*, GOOD GUIDE SCORECARD, http://scorecard.goodguide.com/community/ej-summary.tcl?fips_state_code=12&backlink=tri-st#hotspots [<https://perma.cc/NM6D-J537>] (last visited Nov. 15, 2016).

⁶⁰ *Id.*

⁶¹ Ronnie Greene, *Taking the Law Into Their Own Hands: Fence Line Fighting and Environmental Justice, a Journalist's Point of View*, 2 ENV'T'L AND EARTH L. J. 60, 74 (2012).

⁶² See, e.g., Editorial, *Lessons of Tallevast: DEP Plan Overlooks Community's Experience with Contamination*, SARASOTA HERALD-TRIBUNE, July 29, 2004, at A14.

⁶³ *Id.*

In Tallevast's case, FDEP publicly asserted at the time that the agency was unaware that residents in Tallevast continued to use private wells, rather than a public water system, because of poor state record-keeping and inadequate interagency communication.⁶⁴ Nearly a decade later, however, an investigative reporter's review of FDEP records from 2001 and 2002, found the State believed organic compounds "may be migrating offsite" and that government officials "raised concerns about potential impacts to off-site private wells."⁶⁵ The notification delay for Tallevast and the residents' anger at FDEP created an ally in State Representative Bill Galvano (R-Bradenton), despite Tallevast not being included in his Manatee County district.⁶⁶ Representative Galvano called FDEP's failure "abhorrent" and recognized that "[t]he community had a complete lack of trust at that point, and you could not blame them."⁶⁷

Publicly embarrassed by the situation in Tallevast, FDEP initiated rulemaking to require notification of contamination in 2004 and adopted its first notification rule in April 2005.⁶⁸ This rule required a responsible party to notify FDEP within ten days of discovering contamination beyond the boundaries of its property.⁶⁹ It further required that the responsible party provide actual notice to "the appropriate County Health Department and all record owners of any real property into which [contamination above CTL[s] extend[ed]," as well as constructive notice to residents by publication in a newspaper and posting warning signs at the site.⁷⁰ While these notifications had to be made prior to FDEP authorizing the responsible party's final remediation plan, specific time frames during which these notifications must be provided were not required.⁷¹ After the rule went into effect, for example, FDEP estimated it would take about one year to notify all the residents living near approximately 2,500 sites where the contamination had spread to adjacent properties.⁷²

The rule adopted by FDEP had a number of deficiencies, but the lack of a firm deadline for notifying residents of affected properties led

⁶⁴ See, e.g., Follick, *supra* note 35.

⁶⁵ Greene, *supra* note 61 (citing Ronnie Greene, *Small-town Residents Living on Deadly Ground*, MIAMI HERALD, May 3, 2008; Ronnie Greene, *Tiny Toxic Florida Town Takes on a Corporate Goliath*, MIAMI HERALD, Aug. 15, 2010).

⁶⁶ Ronnie Greene, *Village's Residents Live on Deadly Turf*, THE LEDGER, May 11, 2008, at A1.

⁶⁷ *Id.*

⁶⁸ Fla. Admin. Code Ann. r. 62-780.220 (2005) (adopted Apr. 17, 2005).

⁶⁹ *Id.* r. 62-780.220(2).

⁷⁰ *Id.* r. 62-780.220(3), (5).

⁷¹ See *id.* r. 62-780.220(3).

⁷² Follick, *supra* note 35.

Representative Galvano to pursue legislation requiring FDEP to provide notices to affected property owners within a specific time frame.⁷³ Galvano did not want public notification to be “left to [FDEP] discretion.”⁷⁴ The “Tallevast” bill, as House Bill 937 was known, eventually passed unanimously.⁷⁵ The statute required FDEP, not the responsible party, to notify all owners of property at which contamination had been discovered within thirty days after FDEP became aware of the contamination.⁷⁶

“The idea that government had knowledge about [residents’] safety that wasn’t being shared, that’s hard for a community to overcome,”⁷⁷ Galvano said. Wanda Washington said she was “happy that Tallevast was instrumental in helping other people, but. . . [n]ow that the pollution is here, we’re focusing on our health.”⁷⁸

B. Inadequate Technical Assistance and Patchwork Attempts to Address the Knowledge Gap

At the federal level, Congress made well-informed citizen participation an important part of hazardous waste site clean-ups under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”).⁷⁹ Under CERCLA, for example, EPA may provide technical assistance grants (“TAGs”) of up to \$50,000 to groups of individuals which may be affected by contaminants from a facility on the NPL.⁸⁰ TAGs allow communities to obtain technical assistance for “interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action.”⁸¹ The grants may be “renewed to facilitate public participation at all stages of remedial action,” and EPA may waive

⁷³ Editorial, *Give Public Fair Notice: Legislature Should Set Deadline for Reporting Contamination*, SARASOTA HERALD-TRIBUNE, Feb. 28, 2005, at A12.

⁷⁴ Neil Santaniello, *Owners of Fouled Land to Get Letter*, SUN SENTINEL, Apr. 18, 2005, at B1.

⁷⁵ 2005 Fla. Laws 937.

⁷⁶ FLA. STAT. § 376.30702(3) (2005).

⁷⁷ Follick, *supra* note 35.

⁷⁸ *Id.*

⁷⁹ 42 U.S.C. §§ 9601–9675 (2012). See also Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671, 671–72 (1994).

⁸⁰ 42 U.S.C. § 9617(e) (2012) (originally enacted in 1983).

⁸¹ *Id.* § 9617(e)(1).

the \$50,000 limit for sites that are complex or generate a large volume of information.⁸²

Lockheed Martin's ABC facility, however, was not being cleaned up pursuant to the authority of CERCLA. Instead, it would become the first contaminated site remediated under the State of Florida's new global risk-based corrective action ("RBCA") law, which became effective in 2003⁸³ and extended RBCA principles established for the petroleum, brownfields, and drycleaning programs "to all contaminated sites" where responsible parties have been identified.⁸⁴ In general, application of RBCA principles has been embraced by the regulated community "as a streamlined approach that offers a more cost-efficient cleanup process."⁸⁵

Unlike CERCLA, however, public involvement is not an integral part of the State of Florida's hazardous waste remediation program. Other than notification of contamination, public participation in Florida is required to include only a 30-day comment period for local governments and owners and residents of property into which contaminants exceeding GCTLs extend.⁸⁶

1. Insufficient Technical Assistance and the 2004 Consent Order

Although community technical assistance is not required under Florida law, due to the urging of Representative Galvano, the 2004 Consent Order included a provision requiring Lockheed Martin to "fund the oversight and review activities of an independent consulting firm chosen by the Tallevast community group called Family Oriented Community United Strong (FOCUS)."⁸⁷ The Consent Order also required that any data Lockheed Martin presented to the State "must be submitted to FOCUS at the same time they are submitted to [FDEP]."⁸⁸ In addition, FDEP was also to "consider any comments provided by FOCUS concerning any data reviewed by the consulting firm" provided for in the Consent Order.⁸⁹

⁸² *Id.* § 9617(e)(2); 40 C.F.R. § 35.4065 (2016).

⁸³ FLA. STAT. § 376.30701 (2016) (originally enacted in 2003).

⁸⁴ *Id.* § 376.30701(1).

⁸⁵ SUBCOMM. ON AGRIC. & ENVTL. APPROPRIATIONS, H.R. STAFF ANALYSIS, HB 1123 W/CS SITE REHABILITATION, H.R. 108-1123, at 2 (Fla. 2003).

⁸⁶ FLA. STAT. § 376.30701(2)(b)-(d); FLA. STAT. § 376.301(45) ("Temporary point of compliance means the boundary represented by one or more designated monitoring wells at which [GCTLs] may not be exceeded . . .").

⁸⁷ Amend. to Consent Order at GW/CO/0999.2, Fla. Dep't Env'tl. Prot. v. Lockheed Martin Corp., OGC No. 04-1328, (Fla. Dep't. Of Env'tl. Prot. Sept. 21, 2004), https://www.doah.state.fl.us/FLAID/DEP/2004/DEP_04-1328_07012015_113253.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.*

While intentions may have been good, the technical assistance provisions for FOCUS in the Consent Order proved problematic to implement. First, it committed Lockheed to funding activities of FOCUS's consulting firm "up to a maximum of \$25,000 per year" for as long as the contamination plume extended beyond the ABC site.⁹⁰ This amount was established, however, at the time the plume was believed to be twelve acres in size, and the amount was never adjusted when the size of the plume was found to be more than sixteen times larger.⁹¹ Moreover, the Tallevast site is hydrologically complex and involves multiple pollutants.⁹² Thus, Lockheed Martin has produced a staggering volume of data, including quarterly and annual reports from 275 monitoring wells, four SARs, and multiple RAPs.⁹³

Second, the Consent Order provides that "FOCUS shall direct activities of the independent consulting firm," but it does not state who would pay the firm directly.⁹⁴ As a result, Lockheed Martin has paid the consultant's invoices directly, and has never provided FOCUS with an accounting of how much money was spent and on what activities.⁹⁵ If FOCUS wanted the consultant to spend time on something specific, Lockheed Martin would frequently inform the organization that the \$25,000 had already been expended for the year.⁹⁶ Finally, although the Consent Order afforded FDEP, but not Lockheed Martin, the right to approve FOCUS's choice of a consulting firm, FDEP has allowed Lockheed Martin to veto FOCUS's requests to use consultants other than the firm initially selected.⁹⁷

FOCUS had no ability to address these deficiencies without the willingness of both FDEP and Lockheed Martin to reopen the Consent Order. On August 3, 2008, however, Lockheed's Interim RAP groundwater

⁹⁰ *Id.*

⁹¹ TETRA TECH, *supra* note 30, at 4–9.

⁹² *Id.* at 2–7.

⁹³ See Recommended Order at 2, 11, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 11-0259 (Fla. Div. of Admin. Hearings Oct. 6, 2011) (providing a summary of various documents Lockheed Martin has filed with the Fla. Dep't Env'tl. Prot.).

⁹⁴ Amend. to Consent Order, *supra* note 87, at GW/CO/0999.2.

⁹⁵ Juan Carlos Rodriguez, *Jury Orders Lockheed to Pay \$3M to Fla. Community Group*, LAW360 (Dec. 3, 2012 7:31 PM), <http://www.law360.com/articles/398431/jury--orders--lockheed-pay-3m-to-fla-community-group>.

⁹⁶ Court records eventually showed that Lockheed Martin well exceeded the \$20,000 in many years. Family Oriented Comm. See United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, 2011 WL 8192221, at 1 (M.D. Fla. Dec. 17, 2012).

⁹⁷ First Amend. Compl., Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, 2011 WL 8192221, at 10–11 (M.D. Fla. Sept. 6, 2011).

treatment system failed, spilling 5,000 gallons of contaminated water onto the site and adjacent properties,⁹⁸ including the Tallevast Community Center, a youth development organization providing after-school care for children.⁹⁹ The leak occurred less than two weeks after a community meeting in which Lockheed assured the residents that “state-of-the-art ‘double-redundancy’ safety protocols” would prevent such a problem.¹⁰⁰

2. FOCUS’s Technical Consulting Agreement with Lockheed Martin

FOCUS and Lockheed Martin began negotiations to address the worry, anger, and distrust the spill caused in the community.¹⁰¹ These discussions included Lockheed providing FOCUS funds to procure independent testing and monitoring data in the community as well as including such a provision in the new Consent Order for the August spill.¹⁰² When this funding and other issues discussed were not included in the Consent Order, however, FOCUS petitioned for an administrative hearing to challenge FDEP’s approval of said Order.¹⁰³ After FOCUS filed the Petition, however, Lockheed Martin suggested making its relationship with FOCUS more direct without involving FDEP in additional technical consulting funds.¹⁰⁴ These conversations led to a Technical Consulting Agreement (“TCA”) between Lockheed Martin and FOCUS, which was entered into in January 2009.¹⁰⁵

In exchange for FOCUS dismissing the challenge to the spill Consent Order and taking on additional specified duties, Lockheed Martin promised to provide FOCUS with monies to fund independent environmental consulting, environmental, health, and safety monitoring, and

⁹⁸ Amend. to Consent Order, *supra* note 87, ¶¶ 6–7; Gary Taylor, *Tallevast Water Treatment Leaks*, NUCLEAR AND INDIGENOUS ITEMS OF INTEREST ¶ 5 (Aug. 4, 2008), <https://gregornot.wordpress.com/2008/08/04/tallevast-water-treatment-leaks/>.

⁹⁹ Gary Taylor, *supra* note 98, ¶ 5.

¹⁰⁰ First Amend. Compl., *Family Oriented Comm. United Strong, Inc. v. Lockheed Martin*, ¶ 32.

¹⁰¹ Christopher O’Donnell, *Tallevast Cleanup Stalls After Leak*, SARASOTA HERALD-TRIBUNE, Aug. 5, 2008, at B3.

¹⁰² First Amend. Compl., *Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp.*, ¶¶ 35, 39.

¹⁰³ Consent Order, *Fla. Dep’t Env’tl. Prot. v. Lockheed Martin Corp.*, at 8; FLA. STAT. §§ 120.569, 120.57.

¹⁰⁴ First Amend. Compl., *Family Oriented Comm. United Strong, Inc. v. Lockheed Martin*, at 1, 6.

¹⁰⁵ *Id.* at 6.

community organizing related to the contamination.¹⁰⁶ The amount of funds varied based on status of remediation at the site. At the time of the agreement, for example, Lockheed Martin was to provide FOCUS approximately \$550,000 per year until RAP construction was completed. After construction, the amount of funds decreased until remediation ended and Lockheed Martin received a “no further action” approval from FDEP.¹⁰⁷ Based on Lockheed Martin’s estimated RAP construction and 48 to 100-year clean-up time frames, the value of the Agreement to FOCUS would have been between \$5 and \$17 million.¹⁰⁸

After making the first payment of \$275,000 in July 2009, however, Lockheed stopped making payments to FOCUS.¹⁰⁹ Initially, following an audit of FOCUS’s finances, Lockheed Martin claimed FOCUS had breached its duties under the TCA.¹¹⁰ After FOCUS addressed the issues raised by Lockheed Martin, virtually all of which required actions beyond the terms of the TCA, however, Lockheed Martin ultimately stated that the TCA was a “gift” to FOCUS which Lockheed Martin was no longer interested in continuing.¹¹¹

After sending demand letters, FOCUS filed a breach of contract suit in January 2011. After a 4-day jury trial in November 2012, FOCUS received a directed verdict on formation and breach of contract.¹¹² The question of damages suffered by FOCUS went to the jury, which awarded \$3 million in damages—\$1.75 million of the payments Lockheed Martin had not made and \$1.25 million for future economic loss.¹¹³ By the end of the trial, however, because RAP construction was nearly complete and the court had been unwilling to enjoin construction activities over a contract dispute, FOCUS had lost the opportunity to collect the most important data for the residents’ long-term health concerns—air monitoring during demolition of beryllium-contaminated buildings, removing

¹⁰⁶ *Id.* ¶ 44.

¹⁰⁷ *Id.* at 3–4.

¹⁰⁸ *Id.* at 4–8.

¹⁰⁹ *Id.* at 3–4.

¹¹⁰ First Amend. Compl., Family Oriented Comm. United Strong, Inc. v. Lockheed Martin, at 9.

¹¹¹ D. Lockheed Martin Corp.’s Opp. to Pl.’s Mot. for Partial Summ. J., Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, 2012 WL 1982079 (M.D. Fla. Feb. 21, 2012).

¹¹² Family Oriented Comm. United Strong, Inc. v. Lockheed Martin, at 1.

¹¹³ Order, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, 2012 WL 6575348, at 1 (M.D. Fla. Dec. 17, 2012); Judgment in a Civil Case, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, 2012 WL 6677147 (M.D. Fla. Nov. 30, 2012).

existing caps over the groundwater contamination, and soil disturbance from digging trenches and other infrastructure during RAP construction.¹¹⁴ Nonetheless, because the other residents' legal challenges ended in undisclosed settlements or were unsuccessful, this has proven to be the only litigation the community has filed where a court actually found that Lockheed Martin violated the law—albeit contract, rather than environmental, law.¹¹⁵

3. Community Health Assessment

In addition to the difficulties Tallevast residents have had gathering technical information, finding a reliable source able to document the health impacts on the community has further been a challenge. In 2005, Lockheed Martin, insisting that the contamination posed no health risks, began their own toxicology study, as did the Florida Department of Health (“DOH”) and the federal Agency for Toxic Substances and Disease Registry (“ATSDR”).¹¹⁶ Meanwhile, community residents, through FOCUS, took a door-to-door approach, and began compiling information on residents' health,¹¹⁷ with the assistance of graduate student interns from the Florida A&M University Institute of Public Health.¹¹⁸ By 2008, these health studies resulted in another embarrassment for the State government and more frustration for the community.¹¹⁹

The Florida DOH's cancer study, which utilized the Florida Cancer Data System, revealed only four cases of cancer in Tallevast.¹²⁰ This result contrasted starkly to the residents' study—which included tracking cancers and beryllium-related diseases with pushpins on a wall map—that showed more than eighty cancer deaths in the previous twenty years.¹²¹ The ATSDR's conclusions also contradicted those of the Florida DOH. Regarding the groundwater in Tallevast, the ATSDR declared it

¹¹⁴ Order, Family Oriented Comm. United Strong, Inc. v. Lockheed Martin Corp., No. 8:11-CV-217-T-30AEP, Dkt. No. 30 (M.D. Fla. Mar. 15, 2011) (Order denying plaintiff's TRO).

¹¹⁵ Beth Barrett et al., *Lockheed Resolves Toxic Claims*, DAILY NEWS OF L.A., Aug. 4, 1996, <http://chipjacobs.com/articles/environmental/lockheed-resolves-toxic-claims/>.

¹¹⁶ U.S. DEPT. OF HEALTH AND HUMAN SERV., ATSDR, PUBLIC HEALTH ASSESSMENT FOR FORMER AM. BERYLLIUM CO., TALLEVAST, MANATEE CTY., FLA. 4 (2008).

¹¹⁷ Christopher O'Donnell, *State Messes Up Tallevast Study*, SARASOTA HERALD-TRIBUNE, Mar. 25, 2008, at B1.

¹¹⁸ Fran T. Close et al., *Community-Based Internships to Address Environmental Issues: A Model for Effective Partnerships*, 5 PROG. CMTY. HEALTH P'SHIP 77–87 (2011).

¹¹⁹ O'Donnell, *supra* note 117, at B1.

¹²⁰ *Id.*

¹²¹ *Id.*

“a public health hazard. Past long-term use of groundwater with the highest measured trichloroethylene concentrations for drinking and showering by Tallevast residents could have resulted in . . . increased theoretical risk of kidney cancer, liver cancer, leukemia, and lymphoma.”¹²²

The problem with the DOH study, as it turned out, was the result of tracking cancer deaths reported in the wrong ZIP code. Although Tallevast has its own postal ZIP code, very few residents are able to use its ZIP code because the U.S. Postal Service does not deliver mail in the community.¹²³ Thus, most Tallevast residents have P.O. boxes or are otherwise assigned a ZIP code for the neighboring County.¹²⁴ The community was upset that DOH had not worked with them to ensure errors like this did not occur. Wanda Washington was “angry. . . . [N]o one ever came into the community to do a study. If you are doing it from behind a desk, you’re going to miss a lot.”¹²⁵

DOH estimated that conducting an official epidemiological study like the residents’ informal one would cost \$125,000.¹²⁶ With that estimate, Representative Galvano ensured there was a line item in the state budget for that amount earmarked for a Tallevast health study.¹²⁷ Rather than just allow DOH to conduct the study, however, the allocation called for a three-year grant under which DOH would provide FOCUS the funds to hire an independent epidemiologist, with DOH maintaining oversight.¹²⁸

With the initial grant, FOCUS hired Dr. Janvier Gasana, a tenured associate professor at Florida International University Robert Stempel College of Public Health & Social Work, who spent several weekends in the community conducting face-to-face interviews and reviewing medical records of more than 150 residents.¹²⁹ Dr. Gasana’s initial reports demonstrated some startling results. For example:

The age-specific incidence of cancers of concern in Tallevast was more than 2 times as high as what is expected if Tallevast residents had experienced the same incidence rate as the Florida African American population for prostate

¹²² U.S. DEPT. OF HEALTH AND HUMAN SERV., ATSDR, *supra* note 116, at 1.

¹²³ O’Donnell, *supra* note 117, at B1.

¹²⁴ U.S. DEPT. OF HEALTH AND HUMAN SERV., ATSDR, *supra* note 116, at 120–21.

¹²⁵ *Id.*

¹²⁶ O’Donnell, *supra* note 117, at B1.

¹²⁷ U.S. DEPT. OF HEALTH AND HUMAN SERV., ATSDR, *supra* note 116, at 120–21.

¹²⁸ *Id.* at 70.

¹²⁹ See Toni Whitt, *A Weary, Ailing Tallevast Welcomes Spotlight*, BRADENTON HERALD, Apr. 3, 2011.

cancer. The overall cancer incidence among Tallevast residents was 85% higher than among the Florida African Americans. Using the raw numbers, there seems to be an increase of cancers three decades after the start of the chemical plant.¹³⁰

Upon receiving the draft report, DOH began questioning Dr. Gasana's methodology.¹³¹ FOCUS had an independent expert review Dr. Gasana's draft report, who found the methodology acceptable.¹³² Since neither Dr. Gasana nor FOCUS were willing to change the methodology or analysis, DOH refused any further payments to FOCUS, leaving FOCUS unable to pay Dr. Gasana and his team.¹³³ Further, FOCUS was left with a comprehensive health study of the community that, if it were ever to be released, would not have the official stamp of government approval Tallevast had desired.

C. Local Government Procedures

At the federal level, if a government agency undertakes "major Federal actions significantly affecting the quality of the human environment,"¹³⁴ it is required to prepare an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA").¹³⁵ Public involvement is an integral part of NEPA, which has the "twin aims" of informed agency decision-making and ensuring an informed public.¹³⁶ The initial stage of the NEPA process includes scoping, an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."¹³⁷ Since the scoping process requires federal agencies to actively seek the participation of the public, scoping serves as an early notice

¹³⁰ Janvier Gasana, *Health Study of Tallevast Community: Summary of Study Findings*, FLA. DEP'T OF HEALTH (2015) (on file with author).

¹³¹ See Toni Whitt, *Lockheed's Tallevast cleanup plan on trial*, BRADENTON HERALD, June 29, 2011.

¹³² Sources on file with author.

¹³³ Sources on file with author.

¹³⁴ 42 U.S.C. § 4332(A) (2012). Agencies may prepare a more concise environmental assessment ("EA") to determine the impacts of its action are "significant" and thus requiring a full EIS. 40 C.F.R. § 1508.9(a) (2016).

¹³⁵ 42 U.S.C. § 4321. (2012).

¹³⁶ See, e.g., *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

¹³⁷ 40 C.F.R. § 1501.7 (2016).

system for informing the public of the government's intent to pursue a specific project.

At least fifteen states have adopted "mini-NEPA" statutes that vary in restraints on state agency action,¹³⁸ though "[m]ost include similar procedural provisions as NEPA."¹³⁹ In states such as Florida that do not have such a statute, however, public notification of the state or local government's intent to pursue a project can come well after bureaucratic inertia has set in. In addition, the most proximate tier of government for many is the county. These unincorporated areas have often been overlooked by municipal annexation because the "properties offer[ing] lower tax revenues or residents considered undesirable through the lens of racial prejudice."¹⁴⁰ Thus, for citizens who want to be involved in government decision-making processes, a "county government may present special limitations."¹⁴¹

1. Land Use Decisions That Encourage Encroaching Industrial Uses

In 1980, the Manatee County Board of County Commissioners adopted The Manatee Plan,¹⁴² the County's first comprehensive plan required by Florida's Local Government Comprehensive Planning Act of 1975.¹⁴³ The plan designated the future land uses in the Tallevast area as mixed residential containing one-, two-, and multiple-family homes.¹⁴⁴ This designation allowed neighborhood commerce, offices, and agricultural uses as secondary uses that served as support to the primary residential use, but other forms of commerce, light and heavy industrial, and heavy transportation uses were prohibited as inconsistent with Tallevast's residential characteristics.¹⁴⁵ As such, The Manatee Plan sought to

¹³⁸ See David Sive & Mark A. Chertok, *Little NEPA's and the Environmental Impact Assessment Procedures*, ALI-ABA: ENVTL. LITIGATION, 25–26 (2005).

¹³⁹ Kenneth S. Weiner, *NEPA and State NEPAs: Learning from the Past, Foresight for the Future*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,675, 10,677 (2009).

¹⁴⁰ Anderson, *supra* note 11, at 1143.

¹⁴¹ *Id.* at 1145.

¹⁴² See MANATEE CNTY., FLA., ORDINANCE 80-4 (Nov. 14, 1980) [hereinafter The Manatee Plan].

¹⁴³ FLA. STAT. §§ 163.3161–163.3211 (1980). This comprehensive planning act has been amended several times since its passage, and been called the Community Planning Act since 2011. See, e.g., Act of May 31, 1965, §§ 1, 20, ch. 85-55 ("Local Government Comprehensive Planning and Land Development Regulation Act"); Act of May 11, 1993, ch. 93-206; Act of June 2, 2011, § 4 ch. 2011-139 ("Community Planning Act") (codified at FLA. STAT. § 163.3161).

¹⁴⁴ *Id.* pt. 4 at 14, 20 (Fig. 4–6) (Tallevast Sector designated as MIX-1).

¹⁴⁵ See *id.* pt. 4 at 6, 23.

protect the Tallevast Community “from industrial encroachment,” a basis which the County used to support their application for a Department of Housing and Urban Development (“HUD”) Community Development Block Grant (“CDBG”).¹⁴⁶

Awarded in 1983, the County used this \$1 million federal grant to install a sewage collection system, connect residences to county water, pave most of the unpaved roads in the community, provide fire hydrants, and help bring substandard residences up to code through grants and low interest loans.¹⁴⁷ By 1985, concerns about expending the CDBG funds in a timely manner led to the County utilizing “quick-taking” condemnation proceedings to acquire fee simple title and the easements required to widen and pave the roads and provide water and sewer connections.¹⁴⁸ Nonetheless, while the roads were paved, not all of the residences were connected to the County’s sewer and water systems by the completion of the HUD grant.¹⁴⁹

Within a few years of these residential improvements, however, Manatee County began procedures to revise its comprehensive plan.¹⁵⁰ While the revised comprehensive plan, which was formally adopted in 1989, maintained a residential designation for most of the existing Tallevast community, it allocated all of the areas adjacent to the community to light or heavy industrial uses.¹⁵¹ In addition, approximately half of the community was designated as light industrial, despite the fact that it contained only occupied residential homes.¹⁵² Thus, rather than protecting the area from industrial encroachment, Manatee County began the process of encouraging industrial activity adjacent to this historic African American community. Most of this adjacent land that was designated as industrial remained vacant for twenty-five years.¹⁵³ This revised comprehensive

¹⁴⁶ See Bd. of Cnty. Comm’rs, Manatee Cnty., Fla., Manatee County Small Cities Community Development Block Grant Application (HUD Form 4124), pt. I, ¶ 7 (Nov. 4, 1982) [hereinafter CDBG Application] (copy on file with author); HUD, CDBG No. B-82-DH-12-0105 (Feb. 15, 1983).

¹⁴⁷ CDBG Application, *supra* note 146, at pt. II.

¹⁴⁸ MANATEE CNTY., FLA., RESOLUTION 85-73 (Apr. 9, 1985).

¹⁴⁹ Bryce & Debi Springer, *supra* note 15.

¹⁵⁰ See, e.g., PLANNING COMM’N, MANATEE CNTY., FLA., RESOLUTION 88-185 (Aug. 22, 1988) (after several public hearings, recommending adoption of revised comprehensive plan for approval by the Board of County Commissioners).

¹⁵¹ MANATEE CNTY., FLA., ORDINANCE 89-01, MANATEE CNTY. COMPREHENSIVE PLAN, pt. 2 at 65 (Sheet 19) (May 11, 1989) [hereinafter COMPREHENSIVE PLAN].

¹⁵² *Id.*, pt. 2.

¹⁵³ *Id.*

plan has been amended more than 290 times since its adoption in 1989.¹⁵⁴ While some of these amendments did apportion additional lands to residential uses along Tallevast Road, these changes occurred solely on the east side of U.S. 301, the side of the highway where the population is primarily white, and not adjacent to the Tallevast Community.¹⁵⁵

From the late 1980s to the present, on the other hand, Manatee County's vision for the future of the Tallevast Community has continued to be one of an island of low to moderate income, almost entirely African American, residences surrounded by a sea of industrial uses.¹⁵⁶ The County had proposed various improvement projects for Tallevast over the years, but few came to fruition. For example, a proposal to expand the two-lane road through the Community to three lanes, with turn lanes, landscaped medians, a six-foot-wide sidewalk, and a four-foot-wide bicycle lane along both sides of the road was tabled by the County Commissioners in 1999.¹⁵⁷ The County Commission did set aside design funds for a similar proposal in 2003 and the community received a \$180,000 CDBG toward the design and engineering of road paving and water and sewer connections that were not completed in 1985.¹⁵⁸ Any construction activity, however, came to a halt once the contamination was discovered.¹⁵⁹

2. When Encouragement Was Not Enough, the County Finally Brought Industrial Activity into the Community

On December 11, 2012, the Board of County Commissioners for Manatee County held a vote on purchasing 37.7 acres at the corner of

¹⁵⁴ COMPREHENSIVE PLAN, COMPLETE AND UP TO DATE THRU SUPPLEMENT #22 A.2 (Dec. 16, 2014), <https://www.mymanatee.org/home/government/departments/building-and-development-services/planning-zoning/comprehensive-planning-section/comprehensive-plan.html> [<https://perma.cc/E9PD-H22B>]; PROGRAM IMPACT REPORT (July 6, 2006), <https://development.ohio.gov/files/is/HWAPimpactEvaluation.pdf> [<https://perma.cc/TY5G-S7G6>] (The use of a report predating the Ohio AEPS is intended to demonstrate the impact of this program without the larger regulatory scheme in place, and to more closely parallel the Oregon report cited).

¹⁵⁵ MANATEE CNTY., FLA., ORDINANCE 89-01, MANATEE CNTY. COMPREHENSIVE PLAN, pt. 2 at 65 (Sheet 19) (May 11, 1989)

¹⁵⁶ See COMPREHENSIVE PLAN, COMPLETE AND UP TO DATE THRU SUPPLEMENT #22 A.2, at Future Land Use Map 25 of 29.

¹⁵⁷ Erin Bryce, *Tallevast Improvements*, SARASOTA HERALD-TRIBUNE, Nov. 6, 2003, at H1.

¹⁵⁸ *Id.*

¹⁵⁹ Debi Springer, *Tallevast county puts a halt to permits The county goes along with their request for a moratorium*, SARASOTA HERALD-TRIBUNE, (Dec. 8, 2004, 4:23 AM), <http://www.heraldtribune.com/news/20041208/tallevast-residents-put-a-halt-to-permits-the-county-goes-along-with-their-request--for-a-moratorium>.

Tallevast Road and U.S. 301 for the location of the county's new Transit Fleet Facility, or bus depot.¹⁶⁰ The Commission was originally scheduled to vote on the purchase while FOCUS was in court for the TCA, but the Commission agreed to delay the vote for a week to allow the community leaders to attend.¹⁶¹ Community members spoke out against the bus depot in their community, saying they have already suffered enough from pollution and feared a depot will add more. "You're talking about diesel fuels, you're talking about everything that Lockheed brought except beryllium."¹⁶² Residents also asked whether the Tallevast site was the only place it could go and questioned why no one had approached neighbors to discuss the plan in advance of placing the vote on the Commission's agenda.¹⁶³

By the time the community learned of the plans, Manatee County had already secured \$15.9 million in funding for the facility from the Federal Transit Authority ("FTA"). Although Manatee County had originally identified a different location in its State of Good Repair Grant approved by the FTA, negotiations on that site quickly broke down and Manatee County decided to move those efforts to the Tallevast site.¹⁶⁴ Under the FTA's NEPA regulations, any applicant for funds "shall serve as a joint lead agency with the [FTA]."¹⁶⁵ Manatee County completed the NEPA documentation for the transit facility, which it represented to be categorically excluded from NEPA,¹⁶⁶ in May 2012.¹⁶⁷ Since NEPA regulations do not require public participation in categorically excluded actions,¹⁶⁸ the County's decision not to prepare an environmental assessment or an

¹⁶⁰ Sara Kennedy, *Manatee County to Buy Tallevast Land for Bus Depot*, BRADENTON HERALD, Dec. 11, 2012.

¹⁶¹ Sara Kennedy, *Manatee Commissioners to Consider \$4.52 Million Land Buy for Transit Depot*, BRADENTON HERALD, Dec. 10, 2012.

¹⁶² Christopher O'Donnell, *County Buying Tallevast Site for Bus Depot*, SARASOTA HERALD-TRIBUNE, Dec. 13, 2012, at B3 (statement of Wanda Washington).

¹⁶³ Kennedy, *supra* note 160.

¹⁶⁴ Letter from Yvette Taylor, Reg'l Adm'r, FTA, to Ron Schulhofer, Public Works Dir., Manatee Cty. (Oct. 28, 2011) (on file with author).

¹⁶⁵ 23 C.F.R. § 771.109(c)(2) (2016).

¹⁶⁶ The FTA has an established categorical exclusion for "[c]onstruction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic." 23 C.F.R. § 771.117(d)(8).

¹⁶⁷ *See id.*; Bd. of Cnty. Comm'rs, Manatee Cty., Fla., State of Good Repair Grant 5309—Information Required for Probable Categorical Exclusion (May 1, 2012).

¹⁶⁸ *Compare* 23 C.F.R. § 771.118 (FTA requirements for categorical exclusions) *with* 23 C.F.R. §§ 771.119, § 771.121 (FTA requirements for environmental assessments) *and* 23 C.F.R. §§ 771.123–771.130 (FTA requirements for environmental impact statements).

environmental impact statement meant the agencies completed their assessment of the environmental impacts of the project six months before the residents living less than a half-mile from the property even knew about the County's plans.

Despite the local opposition, the Commission voted unanimously to purchase the Tallevast property for \$4.52 million.¹⁶⁹ The Commission assured the community "the facility would be 'green' and would not be a nuisance to its Tallevast neighbors."¹⁷⁰ Commissioner Carol Whitmore seemed to believe she was acting in the community's best interest, stating that the bus depot would be less disruptive than other possible developments. "We were protecting [the property] from becoming a more heavy industrial site," she said.¹⁷¹ "They're not facing the prospect of having a cement plant in the future,"¹⁷² despite the existing zoning for the land not allowing such a heavy industrial use.¹⁷³ The County's project manager said, "It's going to be a nice-looking facility. . . . [t]he county's going to be very proud of it."¹⁷⁴

When the final vote for construction approval arrived in October 2014, Manatee County officials held the public meeting not in Tallevast, but the neighboring county.¹⁷⁵ The public input portion of the meeting was limited to residents writing down their concerns on comment forms that were distributed at the beginning of the meeting.¹⁷⁶ As Laura Ward stated: "This is the wrong project for this community and we've expressed that from the very beginning . . . and it seems as though nobody's hearing us."¹⁷⁷

3. Contaminated Building Demolition

In addition to the ABC facility and the Transit Facility on the eastern edge of the community, Tallevast residents sought for years to

¹⁶⁹ Kennedy, *supra* note 160.

¹⁷⁰ *Id.*

¹⁷¹ O'Donnell, *supra* note 162.

¹⁷² *Id.*

¹⁷³ In 2010, the County Commission rezoned the parcel located at 2411 Tallevast Road from A-1 (Suburban Agriculture) and LM (Light Manufacturing) to the PDC (Planned Development Commercial) zoning district, which does not permit such heavy industrial uses. MANATEE CTY., FLA., ZONING ORDINANCE PDC-04-16(Z)(P) (Oct. 12, 2010); MANATEE CTY., FLA., LAND DEV. CODE § 402.11.

¹⁷⁴ Kennedy, *supra* note 50.

¹⁷⁵ Amaris Castillo, *Tallevast Residents Give County Officials Earful Against Manatee County's New Transit Fleet Facility*, BRADENTON HERALD, Oct. 22, 2014.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

have an abandoned building remaining on the Spindrift-Whogas property on the western border of the community to be removed.¹⁷⁸ Due to the building's former role in beryllium operations, however, residents were concerned that demolition would spread additional toxins into the community.¹⁷⁹ The property's soil is contaminated with beryllium, as well as arsenic, copper, and total recoverable petroleum hydrocarbon ("TRPH"), and its groundwater is contaminated with heavy metals.¹⁸⁰ FDEP, which has assumed clean-up responsibility for the site, expects the SAR will be completed in June 2015,¹⁸¹ with preparation of the RAP to follow.

Thus, the community was caught by surprise upon reading about the permit approval in the newspaper, in which the director of the Manatee County Building and Services Department stated demolition could begin "within a day or two."¹⁸²

We had no idea, we were told some time ago that in order to demolish the building, they would have to take special precautions. . . . DEP has been in charge of evaluations over the past year—they've been very private. . . . [T]hat's what we've asked, that it be taken down, it's an eyesore for the community, but I'm truly surprised.¹⁸³

Beverly Bradley, who lives across the street from the building, summarized the community's feelings.

I would like to see it torn down but I would also like to see it be torn down in the proper way. . . . [O]ur concern is

¹⁷⁸ See Christopher Brantley, *Controversy Surrounds Demolition of Suncoast Building*, WWSB-SBC 7 (Feb. 11, 2015), http://www.mysuncoast.com/news/local/controversy-surrounds-demolition-of-suncoast-building/article_108f7482-b23f-11e4-bb0c-139f6ee847bc.html [https://perma.cc/JE76-WBS3].

¹⁷⁹ See Brantley, *supra* note 178; Aaron Eggleston, *Building Near Tallevast Beryllium Plant to Be Demolished*, MYSUNCOAST (Mar. 3, 2015), http://www.mysuncoast.com/news/local/building-near-tallevast-beryllium-plant-to-be-demolished/article_c08376d8-c228-11e4-b803-a38e6b443a98.html [https://perma.cc/JX2X-WU3W].

¹⁸⁰ SHAW ENVIRONMENTAL, INC., SAR FOR SPINDRIFT-WHOGAS, INC. § 7, p. 1–3 (Draft Aug. 2013). TRPH is found above industrial soil contamination target levels (SCTLs), the others exceed residential SCTLs. *Id.*

¹⁸¹ Sara Kennedy, *Part of Abandoned Tallevast Plant to be Demolished*, BRADENTON HERALD, Feb. 10, 2015.

¹⁸² *Id.*

¹⁸³ Sara Kennedy, *Decrepit Tallevast Building Slated for Demolition*, BRADENTON HERALD, Feb. 11, 2015.

that whatever we have already been exposed, to that we would be exposed to more of it. . . . [T]hey have no idea the extent of what is in that building, other than it's contaminated and I'm sure they know that.¹⁸⁴

While FOCUS sought assurance that proper procedures for the demolition of contaminated buildings were followed, representatives from Manatee County, which issued the permit, and FDEP, who has responsibility for the contaminated soil clean-up, were not forthcoming and disregarded requests for a community meeting.¹⁸⁵ Instead of relying on the County or State agencies to provide assurances for potential health risks, FOCUS funded air monitoring activities during the days on which demolition activities occurred.¹⁸⁶

CONCLUSION

The community of Tallevast and the frustrations it has encountered in its pursuit for environmental justice are not unique. Regardless of their location, all communities seeking just environmental outcomes are confronted with obstacles. Some environmental justice communities, however, face additional impediments if they happen to be located in states that adhere to only the minimum requirements for delegation of authority to administer federal environmental laws. The most obvious of these differences may be substantive—setting pollution standards or implementation plans, for example—or disparate levels of enforcement by the state. Often, however, the possibility of success for an environmental justice community may be determined by the less conspicuous inequities in environmental and administrative procedures between the States. Furthermore, within a state, unincorporated communities whose most proximate level of government is a county, tend to have fewer procedural protections than those located in a municipality.

As one former U.S. Congressman who played an influential role in crafting many of the federal environmental laws enacted in the 1970s stated, “The procedure is of exquisite importance. . . . I’ll let you write the

¹⁸⁴ See Brantley, *supra* note 178.

¹⁸⁵ See E-mail from Ana Gibbs, Fla. Dep’t Env’tl. Prot., to Sally Tibbetts, Dist. Dir., U.S. Rep. Vern Buchanan (Feb. 25, 2015) (copy on file with author); E-mail from John Barnott, Dir., Manatee Co. Bldg. and Development Servs. Dept., to Sally Tibbetts, Dist. Dir., U.S. Rep. Vern Buchanan (Feb. 12, 2015) (copy on file with author).

¹⁸⁶ Christopher O’Donnell, *Beryllium spike raises fear in Tallevast area*, SARASOTA HERALD-TRIBUNE, Feb. 9, 2011.

substance on a statute, and you let me write the procedure, and I'll screw you every time."¹⁸⁷ Procedural fairness and justice may be even more important in the context of environmental justice, with community empowerment being one of the most important strategies for achieving environmental justice.¹⁸⁸ Residents of Tallevast and those similarly situated understand the impacts procedural injustices have on their communities as much as the direct, physical health effects from contamination and other environmental harms.

The difficulties associated with procedural due process¹⁸⁹ and other constitutional claims to remedy environmental injustices often mean litigation is an ineffective tool of last resort; however, two major avenues for addressing procedural injustices could be: (1) EPA utilizing its discretion to more closely scrutinize procedural requirements in the delegation of authority under federal environmental laws,¹⁹⁰ and (2) States recognizing that "a system of transparency, public participation, and collaboration . . . will strengthen our democracy and promote efficiency and effectiveness in Government,"¹⁹¹ and change the laws accordingly. With the latter, unfortunately, those type of changes come only after a major tragedy, too late for at least one community.

¹⁸⁷ *Regulatory Reform Act: Hearing Before the Subcomm. on Admin. L. and Gov't Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 312 (1983) (statement of Rep. John Dingell).

¹⁸⁸ See R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229 (1998); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992).

¹⁸⁹ See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (finding that affording welfare recipients a pre-termination evidentiary hearing promotes "important government interests" because "[w]elfare, by meeting the basic demand of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."); *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (outlining the specific factors the Court will consider in procedural due process challenges). Cf. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

¹⁹⁰ See *supra* note 3 and accompanying text.

¹⁹¹ Office of the President, Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed Reg 4685 (Jan. 21, 2009). Many have questioned the Obama Administration's commitment to this promise. See, e.g., *Obama Transparency*, THE HUFFINGTON POST, <http://www.huffingtonpost.com/news/obama-transparency/> [<https://perma.cc/8GQF-ZMMP>] (last visited Nov. 15, 2016); Paul D. Thacker, *Where the Sun Don't Shine*, SLATE (Mar. 12, 2013), http://www.slate.com/articles/news_and_politics/politics/2013/03/barack_obama_promised_transparency_the_white_house_is_as_opaque_secretive.html [<https://perma.cc/37YN-XD48>]; Josh Gerstein, *President Obama's Muddy Transparency Record*, POLITICO (Mar. 5, 2012), <http://www.politico.com/news/stories/0312/73606.html> [<https://perma.cc/U9CE-UDK4>].