WHEN ALL ELSE FAILS: CAN INDUSTRY MITIGATE ENVIRONMENTAL INJUSTICE IN SOUTHWEST DETROIT?

I. INTRODUCTION

In August 2011, the Environmental Protection Agency (EPA) sponsored a three-day environmental justice conference in Detroit.[1] The purpose of the conference was to stimulate discussion among EPA administrators, local stakeholders, and environmental advocates from around the country.[2] Although the conference was intended to address environmental justice issues on a national level, Detroit's own problems forced their way onto center stage. During the conference, a fire broke out at the Marathon Petroleum Company's refinery in southwest Detroit.[3] Marathon is in the middle of a controversial $2.2 billion dollar expansion that will bring the borders of its refinery even closer to the nearby Oakwood Heights neighborhood.[4] As flames and black smoke billowed high into the air, conference attendees left their sessions to witness the event first hand.[5] For Marathon, the timing could not have been worse.

For residents of Oakwood Heights and nearby neighborhoods on the other hand, the timing could not have been more advantageous. They used the opportunity as a platform to voice their frustrations to a national audience by gathering in their streets to

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[1] *2011 Environmental Justice Conference: One Community – One Environment*, http://www.cleanairinfo.com/ejconference/ (last visited Mar. 14, 2011).
[2] *Id*.
[3] Sandra Svoboda, *Burning Issues: EPA Conference on Environmental Justice Brings Attention to Detroit*, METRO TIMES (Aug. 31, 2011), http://metrotimes.com/news/burning-issues-1.1195766.
[4] John Mcardle, *Health Worries Stalk Neighborhoods in Detroit's 'Sacrifice Zone*,' GREENWIRE (Sept. 12, 2011), *available at* http://www.nytimes.com/gwire/2011/09/12/12greenwire-health-worries-stalk-neighborhoods-in-detroits-86388.html?pagewanted=all.
[5] Svoboda, *supra* note 3.

protest the refinery's expansion.[6] The Oakwood Heights neighborhood is already located in Michigan's most toxic ZIP code,[7] and Marathon's planned expansion will only exacerbate existing pollution issues for residents. Luckily, just a few short weeks after the fire, Marathon announced a plan to buy out the residents of Oakwood Heights in order to create a "buffer zone of green space" between the refinery and the neighborhood.[8] For those willing to move, Marathon's program will provide relief for residents whose legal and political remedies to challenge disproportionate industrialization and pollution have been virtually non-existent.

This Note will focus on the viability of industry efforts, like Marathon's, to mitigate the effects of concentrated pollution in southwest Detroit under the umbrella of corporate social responsibility (CSR). Part II introduces the origins of the environmental justice movement, its relevance to southwest Detroit, and two acute and conflicting problems facing the city: southwest Detroit's dangerously high level of pollution and the city's desperate need for the jobs that industry creates. Although it may seem counterintuitive to look to the polluters themselves as the potential heroes of the environmental justice movement, Part III argues that the lack of available legal remedies leaves southwest Detroiters with few alternatives. Part IV explores the theory behind CSR; why many corporations still engage in it to varying degrees; and how its operation in the environmental justice context has generally resulted in private contract. Part V

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[6] *Id*.
[7] Tina Lam, *48217: Life in Michigan's Most Polluted Zip Code*, DET. FREE PRESS (June 20, 2010), http://www.freep.com/article/20100620/NEWS05/6200555/48217-Life-Michigan-s-most-polluted-ZIP-code.
[8] John Gallagher, *Marathon Offers to Buy Out Detroit Homeowners Near Refinery Amid $2.2 Billion Expansion*, DET. FREE PRESS (Nov. 2, 2011), http://www.freep.com/article/20111102/BUSINESS06/111102038/Marathon-offers-buy-out-Detroit-homeowners-near-refinery-amid-2-2B-expansion.

discusses the potential problems with using CSR in this manner to resolve environmental inequities. Particular attention will be given to Marathon's buyout example. Finally, Part VI concludes that, given the voluntary nature of programs like Marathon's, CSR should not be relied upon to provide a comprehensive solution to environmental injustice in southwest Detroit.

II. BACKGROUND

A. A History of the Environmental Justice Movement

The U.S. Environmental Protection Agency ("EPA") defines "environmental justice" as "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."[9] The environmental justice movement, the fight for this "fair treatment," is a marriage of civil rights ideals and environmentalism. Its origins can be traced back to the 1970s when the public became increasingly aware of the hazards associated with unregulated pollution, and Congress began passing the nation's first environmental laws. Environmental justice advocates demand that everyone be entitled to equal protection and enforcement of those laws.[10]

Although there had been isolated rumblings of such a struggle for years, the environmental justice movement did not capture the attention of the general public or of civil rights leaders on a national scale until 1982. That year, the North Carolina Department of Environment and Natural Resources chose to construct a landfill in the

[9] Robert D. Bullard, et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVT'L L. 371, 375 (2008).
[10] *Id*. at 376.

rural town of Afton, North Carolina. The landfill would hold 60,000 tons of soil contaminated with polychlorinated biphenyl (PCB), a highly toxic and cancer-causing chemical.[11] Not only was Afton overwhelmingly poor, its population was eighty-four percent African American.[12] Local residents organized and called on church leaders, national civil rights leaders, and environmentalists to help them protest the landfill's development. After two weeks of protests, more than 500 people had been arrested.[13]

Although the protests were unsuccessful in stopping the landfill's construction, the fight in North Carolina unified the environmental justice movement and prompted high-profile studies regarding the connection between siting decisions and race. Perhaps the most famous study was that conducted by the United Church of Christ Commission for Racial Justice ("UCC") in 1987. Combining U.S. Census and EPA data, the UCC study found a strong correlation between the number of commercial waste facilities and the percentage of minority residents in a given area.[14] According to the study, sixty percent of the total African American population in 1980 shared their community with a toxic waste site.[15]

Today, numerous follow-up studies have left little doubt about the proximity of minorities to hazardous waste sites and other industrial pollution sources. In fact, a 2009 study suggests that not much has changed since 1987: fifty-eight percent of African

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[11] Robert D. Bullard, *25th Anniversary of the Warren County PCB Landfill Protests*, DISSIDENT VOICES (May 29, 2007), http://dissidentvoice.org/2007/05/25th-anniversary-of-the-warren-county-pcb-landfill-protests/.
[12] *Id*.
[13] *Id.*
[14] David Monsma, *Equal Rights, Governance, and the Environment*, 33 ECOLOGY L. Q. 443, 452 (2006).
[15] *Id*.

Americans still live within one mile of a polluting facility.[16] In September 2005, the Associated Press conducted its own investigation and concluded that African Americans are "seventy-nine percent more likely than whites to live in neighborhoods where industrial pollution is suspected of posing the greatest health danger."[17] There are at least two clear conclusions to be drawn from this data. The first is that the minority population in the United States disproportionately bears the negative environmental impacts of industry. The second is that the environmental justice movement has been largely unsuccessful in abating that disproportionate burden.

B. Life in 48217

Michigan, particularly southwest Detroit, is especially relevant in current environmental justice discourse. Only nineteen percent of the State's minority population lives in a neighborhood without a hazardous waste disposal facility ("TSDF").[18] In fact, more people of color in Michigan live in a community with a TSDF than in any other state in the country.[19] Likewise, residents of ZIP code 48217, the area comprising southwest Detroit, breathe in air that is forty-six times more toxic than the average Michigan ZIP code.[20] The population in 48217 is also eighty-eight percent African American and twenty-five percent live below the poverty line.[21]

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[16] Paul Mohai, et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities*, 99 AM. J. PUB. HEALTH 649 (2009).
[17] Bullard, *supra* note 9, at 393.
[18] Annise Maguire, *Permitting Under the Clean Air Act: How Current Standards Impose Obstacles to Achieving Environmental Justice*, 14 MICH. J. OF RACE & L. 255, 263-64 (2009).
[19] *Id*.
[20] Lam, *supra* note 7.
[21] *Elevated Air Toxin Levels,* DET. FREE PRESS (June 21, 2010), *available at* http://www.gcmonitor.org/img/original/SWDetroitStudy.jpg. The percentage of Detroit residents living below the poverty line is 34%. *See Detroit, Michigan: State & County*

Southwest Detroit is a peninsula of sorts, surrounded on three sides by the cities of Melvindale, River Rouge, and Delray. Although the area covers only 2.3 square miles, residents are also surrounded by some of Michigan's largest industrial plants including the Detroit Salt Company, Inland Water Pollution (hazardous waste collection), Amoco Oil (storage tanks), and numerous cement and asphalt manufacturers.[22] The Marathon Petroleum Company and Detroit's Waste Water Treatment plant lie in the heart of southwest Detroit. In 2008 both facilities began long-term expansion efforts. The city of Detroit is nearly finished adding onto its Waste Water Treatment plant with a new Combined Sewerage Overflow (CSO) facility that will process wastewater and eventually discharge it into nearby rivers and lakes. In addition, Marathon is investing billions of dollars in the expansion of its Detroit refinery in order to import and process Canadian Oil Sands, a fuel source that releases far more sulfur and heavy metals into the air than alternative oil sources.[23] Even Marathon has admitted that its total emissions of criteria pollutants will increase by over eighteen percent once the project is finished.[24] Still, despite the expansion, Marathon is far from the top polluter in southwest Detroit.[25] That title most likely belongs to Severstal Steel and the Detroit Edison coal plant which, when

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Quick Facts, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26/2622000.html (last visited Mar. 14, 2012). The percentage of all Michigan residents living below the poverty line is 14.8%. *Id*. Thus, while residents of 48217 are faring better when compared to the rest of Detroit, they are still one of the poorest areas in the state.

[22] *Id*.

[23] Katherine Yung, *Refinery to Create Jobs, Add Tax Revenues*, DET. FREE PRESS (June 23, 2011), http://www.freep.com/article/20110623/BUSINESS06/106230581/Refinery-create-jobs-add-tax-revenues.

[24] *Id*.

[25] In fact, since 1999, the company has reduced emissions of criteria pollutants by seventy-six percent. *See* Mcardle, *supra* note 4.

compared with Marathon, release staggering amounts of nitrogen oxides (NOx) and sulfur dioxide (SO2) into the air.[26]

Such a dense collection of polluting facilities has serious environmental and health consequences for residents. In 2010, the University of Michigan collected 2006 Toxic Release Inventory (TRI) data from the EPA and combined it with air modeling information in order to determine the amount of pollution falling in every square kilometer of Michigan. The result was a "toxic burden score" for every Michigan ZIP code.[27] While the average toxic burden score in Michigan was 56, southwest Detroit (ZIP code 48217) had a score of 2,576.[28] That means southwest Detroiters, eighty-eight percent of them African American, are breathing in air that is forty-six times more toxic than the average Michigan community. Although the study revealed that the problem is not confined to just one ZIP code (six of the state's fifteen most polluted ZIP codes share a border with 48217), the data for southwest Detroit is especially troubling. Even among Michigan's most polluted ZIP codes, 48217 easily ranked as the most toxic with a burden score fifty-seven percent greater than the second most polluted ZIP code in Michigan.[29] Each additional emissions permit granted by the Michigan Department of Environmental Quality (MDEQ) adds to southwest Detroit's existing pollution crisis.

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[26] According to MDEQ "in 2009, the coal plant produced more than 4,341 tons of NOx and nearly 14,946 tons of SO2" and Severstal "produced about 13,564 tons of NOx and 537 tons of SO2." Mcardle, *supra* note 4. Meanwhile, that same year, Marathon "produced 377 tons of NOx and 95 tons of SO2." *Id*.

[27] Lam, *supra* note 7; *see also Database: Toxic ZIP Code Rankings*, DET. FREE PRESS (June 20, 2010), http://www.freep.com/article/20100620/NEWS06/100619021/Database-Toxic-ZIP-code-rankings.

[28] *Database: Toxic ZIP Code Rankings, supra* note 27.

[29] *Elevated Air Toxin Levels, supra* note 21. Behind 48217, the most polluted ZIP code in Michigan is 48192 (which includes the city of Wyandotte) with a toxicity score of 1475. *Id*.

Although these kinds of statistics are helpful in capturing the attention of outsiders, residents of southwest Detroit have known for quite some time just how polluted their neighborhoods are. Since no state air quality monitors are located in 48217, residents invited out-of-state environmental organizations to teach them how to test the air themselves.[30] In 2009, those tests revealed high levels of methyl ethyl ketone in the air - a chemical that irritates the lungs and nervous system.[31] Just a few months later, residents' air testing showed high levels of lead and other metals.[32] These results ultimately captured the attention of the Michigan Department of Natural Resources and the Environment (DNRE).[33] Based on wind patterns, the DNRE determined the metals came from Severstal Steel and issued violation notices.[34]

In November 2010, foul odors prompted a resident of Pleasant Street in southwest Detroit to take an air sample in her home. The sample revealed the presence of twenty chemicals, including benzene, at levels 1,000 times greater than what the EPA considers safe.[35] The EPA conducted an investigation and found that Marathon Petroleum shared a sewer line with the City of Detroit, meaning that industrial waste from the oil refinery was allowed to mix with municipal waste.[36] After digging up and sealing her basement, the EPA has declared this woman's home to be safe.[37] Nevertheless, residents continue to

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[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] Now MDEQ.
[34] Lam, *supra* note 7.
[35] *Detroit: Benzene in the Sewers….Really?!?,* AIR HUGGER (Mar. 21, 2011), http://airhugger.wordpress.com/2011/03/21/detroit-benzene-in-the-sewers-really/.
[36] *Id*.
[37] *Id*.

complain of metallic dust falling on their houses and yards, constant odors, and persistent asthma and cancer among their families and that of their neighbors.[38]

It is unfortunate that federal and state agencies charged with protecting human health and the environment had to rely on residents to bring air quality violations to their attention. Combined with the Detroit city council's encouragement of Marathon's expansion and its rejection of a moratorium on industrial development in 2010,[39] residents of southwest Detroit must feel as though they are fighting the battle against environmental injustice alone. They have called their side of Detroit an island, a "sacrifice zone" for energy production,[40] and a scientific experiment.[41] Although some area residents have sentimental reasons for staying put, most would move out of the area if they could afford to do so.[42]

C. Detroit's Economic Woes

Arguably, Detroit's downward economic spiral began decades ago with the combined effect of automation in the manufacturing industry, race riots, and white flight to the suburbs.[43] However, the recent economic recession triggered by the sub-prime mortgage disaster in 2008 has turned that spiral into a free fall. Detroit seems to have been particularly hard hit, with an unemployment rate at times as high as twenty-seven

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[38] Lam, *supra* note 7.
[39] *Id*.
[40] Mcardle, *supra* note 4.
[41] Lam, *supra* note 7.
[42] Curt Guyette, *Crude Awakening*, METRO TIMES (July 14, 2010), http://www2.metrotimes.com/news/story.asp?id=15212.
[43] *See generally*, THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (2005).

percent.[44] The city is over twelve billion dollars in debt and does not have enough money to deliver services or meet its payroll costs.[45] The situation is so desperate that for months, it appeared as though a state-appointed emergency manager would be required to oversee Detroit's finances.[46] Pursuant to Michigan law, that manager would have had the power to sell city assets, break union contracts, and overrule local elected officials.[47] However, just hours before the deadline for appointing that manager, the city council entered into a consent agreement with the state of Michigan, allowing the council to retain control but that "impose[s] substantial state oversight of the city's finances."[48] Nevertheless, the appointment of an emergency manager in the future remains a real possibility for Detroit.[49]

For a city on the brink of insolvency, it would have been financially irresponsible and politically disastrous for the city council to adopt a moratorium that would have prevented the kind of economic growth traditionally associated with developments like Marathon's expansion of its Detroit refinery. The expansion project will generate $230

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[44] *Detroit's Unemployment Rate is Nearly 50%, According to the* Detroit News, HUFFINGTON POST (Mar. 18, 2010), http://www.huffingtonpost.com/2009/12/16/detroits-unemployment-rat_n_394559.html.
[45] Matt Helms & Kathleen Gray, *Detroit's New Deal with State Lifts Threat of Manager, For Now*, DET. FREE PRESS (Apr. 5, 2012), http://www.freep.com/article/20120405/NEWS01/204050561; Rochelle Riley, *Detroit City Council Considers Tax Hike, Firefighter and Police Layoffs, to Save City from Insolvency*, DET. FREE PRESS (Nov. 21, 2011), http://www.freep.com/article/20111121/NEWS01/111121016.
[46] Krissah Thompson, *Possibility of Emergency Manager in Detroit Prompts Civil Rights Concerns*, WASH. POST (Jan. 5, 2012), http://www.washingtonpost.com/politics/possibility-of-emergency-manager-in-detroit-prompts-civil-rights-concerns/2012/01/04/gIQATFqYdP_story.html.
[47] *Id*.
[48] Helms & Gray, *supra* note 45.
[49] *Id*.

million in city tax revenues over the next twenty years.[50] It employed 1,300 contract workers at its construction peak in September 2011 and, when complete, it will have created 135 permanent jobs.[51] In fact, given these impressive figures and Detroit's current crisis, it is difficult to blame the council for actively encouraging the development project by offering tax incentives.[52]

The hardship associated with living in an area of concentrated pollution like southwest Detroit is easy to ignore for those who do not live there. In contrast, the economic difficulties Detroit faces are not confined to a handful of neighborhoods. Not only do all Detroit residents suffer from the city's financial collapse, the state of Michigan as a whole does as well.[53] As long as this remains true, it is very likely that politicians facing trade-offs between development in southwest Detroit and environmental justice will favor industrial growth.

III. THE CURRENT LEGAL LANDSCAPE

According to MDEQ, each pollution source in southwest Detroit emits no more than allowed under the terms of its air quality permit. Nevertheless, the University of Michigan TRI study provides irrefutable proof that the low-income minority population of southwest Detroit carries a majority of the state's burden when it comes to harmful emissions. While each individual industrial plant may be operating within the terms of its permit, the cumulative impact of so many pollution sources in one concentrated area is

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[50] Yung, *supra* note 23.
[51] *Id*.
[52] In 2007, Detroit city council granted Marathon a property tax exemption of $176 million dollars over the next twenty years. Guyette, *supra* note 42.
[53] *Detroit Should Work With Gov. Snyder*, LANSING ST. J. (Mar. 15, 2012), http://www.lansingstatejournal.com/article/20120316/OPINION01/303160005/Detroit-should-work-Gov-Snyder.

especially harmful. The result is that residents are breathing in, and getting sick from, air that is forty-six times more toxic than the state's average.[54] Nevertheless, as long as these industries maintain compliance with their permits, they are essentially immune from challenge.

A. State Law

Before leaving office, former Michigan Governor Jennifer Granholm issued ED No. 2007-03, requiring MDEQ to "develop and implement an environmental justice plan for all state agencies."[55] This executive directive has very little teeth and, under new Michigan Governor Snyder, not much has come of it. Although industry can conduct its own, voluntary, environmental justice analysis, MDEQ is not required to use that data in deciding whether to issue a permit. This is the case even if the data reveals alarming racial and economic disparities.[56]

Several state legislatures have developed mitigating strategies beyond mere permit compliance in order to protect environmentally vulnerable communities. At least fourteen states regulate the distance between residential neighborhoods, including schools and homes, and sources of pollution, highways, or contaminated sites.[57] Additionally, a handful of states require industries to complete cumulative impact studies before applying for and obtaining emissions permits from state environmental agencies. For example, before issuing an emissions permit, the Minnesota Pollution Control Agency is required to consider "cumulative levels and effects of past and current environmental

[54] Lam, *supra* note 7.
[55] Maguire, *supra* note 18, at 276.
[56] *See generally, id*.
[57] *Id*. Those states include California, Washington, Georgia, and Minnesota. *Id*.

pollution from all sources on the environment and residents of the geographic area within which the facility's emissions are likely to be deposited."[58]

State congresswoman Rashida Tlaib, a representative of southwest Detroit, introduced similar legislation to the Michigan House of Representatives in 2009.[59] Her proposed bill would require any company applying for a new air permit in disparate impact areas to first pay for a cumulative impact study.[60] Based on the results of those studies, MDEQ could deny or place additional conditions on any requested permit.[61] Representative Tlaib argues that her constituents have a right to know what the combined effect of all emissions are doing to their air and, consequently, to their health.[62] Unfortunately, this proposed legislation did not go very far and ultimately became a non-binding resolution.[63] Still, the efforts of these states and their legislation may serve as a model for Michigan in the future. However, under current Michigan law, individual permit compliance is all that is required of industrial polluters.[64]

B. Legal Challenges, Attempted and Failed

1. Common Law Nuisance

In the absence of a state law remedy, southwest Detroiters have in the past turned to the judicial system for relief from the cumulative effects of industrial pollution. They

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[58] *See generally* Kristie M. Ellickson et al., *Cumulative Risk Assessment and Environmental Equity in Air Permitting: Interpretation, Methods, Community Participation and Implementation of a Unique Statute*, 8 INT'L J. OF ENVT'L RES. & PUB. HEALTH 4140 (2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3228563/.
[59] Mcardle, *supra* note 4.
[60] *Id*.
[61] *Id*.
[62] *Id.*
[63] H.R. 0308 (Mich. 2010), *available at* http://www.legislature.mi.gov/documents/2009-2010/resolutionintroduced/House/pdf/2010-HIR-0308.pdf.
[64] *Id.*

have sued various industries under private nuisance theory, mostly seeking damages.[65] Under Michigan law, private nuisance may exist where pollution or odors "contaminate the atmosphere to such an extent as to substantially impair the comfort or enjoyment" of an adjacent property owner.[66] When residents sue several industrial polluters under a nuisance theory, as they have in southwest Detroit, the burden is on the defendant-industries to apportion liability among one another.[67] This relieves citizens from identifying one source or one polluter as the cause of the emissions impairing their property rights. According to Michigan courts, allocating the burden in this way is only fair since the companies are far more familiar with the nature of the emissions from their respective facilities than are neighboring residents.[68] Furthermore, if apportionment is simply not practical, the defendant-industries will be held jointly and severally liable for any resulting damage.[69] Although these components of Michigan nuisance law seem to favor plaintiffs, cases brought by southwest Detroit residents have had only limited success.

In 1977, an association of neighbors in Oakwood Heights sued Ford Motor, Marathon Oil, Edward C. Levy Company, and Detroit Salt, as a class for private nuisance created by air pollution.[70] The complaint alleged that the defendant companies released a

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[65] *E.g.,* Danyo v. Great Lakes Steel Corp, 286 N.W.2d 50 (Mich. App. 1979). A few of these cases, including *Danyo*, have also relied on the Michigan Environmental Protection Act (MEPA), MICH. COMP. LAWS. § 324.1701-324.1706 (2010). MEPA provides Michigan citizens with a cause of action against any party for conduct likely "to pollute, impair, or destroy" the environment. § 324.1701(1).
[66] De Longpre v. Carroll, 50 N.W.2d 132, 133 (Mich. 1951).
[67] Oakwood Homeowners Ass'n, Inc. v. Ford Motor Co., 258 N.W.2d 475, 484 (Mich. App. 1977).
[68] *Id*.
[69] *Id*. at 483.
[70] *Id*. at 477.

substantial amount of gases and particulate matter into the air on a regular basis, causing property damage and illness among class members.[71] This Michigan Court of Appeals decision is significant only in that it allowed the residents, members of forty-six different households, to proceed as a class.[72] Class certification is especially useful in this context because it allows individual plaintiffs access to the court system when doing so alone would have been economically infeasible. Certification also helps to ensure that any damage award will be of a sufficient dollar amount to deter future transgressions on the part of the defendant. Before a trial on the merits, however, the neighbors settled with Ford, Detroit Salt, and Edward C. Levy.[73] In the trial against Marathon alone, the jury found for the plaintiff-residents and awarded damages.[74]

The 1977 Oakwood Heights case demonstrates an increasingly common pattern among nuisance suits brought by southwest Detroit residents. Typically, a group of neighbors will file suit against one or more industrial polluters in their immediate area. The initial court struggle will be over class certification. If homeowners can get beyond this procedural hurdle, the companies will generally settle with them before a trial on the merits can proceed. In 1999, forty-two homeowners in Delray, a city bordering 48217, filed a class action lawsuit against Peerless Metals, alleging nuisance caused by odors emitted from the plant. The suit was settled before trial with each homeowner receiving between $1000 and $2,000 each.[75] Similarly, residents of Melvindale filed suit against

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[71] *Id.*
[72] *Id*.
[73] Oakwood Homeowners Ass'n, Inc. v. Marathon Oil Co., 305 N.W.2d 567, 569 (Mich. App. 1981).
[74] *Id*.
[75] Curt Guyette, *Peerless Pays Up*, METRO TIMES (Jan. 24, 2001), http://www2.metrotimes.com/news/story.asp?id=1240.

Severstal Steel in 2008 claiming that the dust, odors, smoke, and vapors coming from the steel manufacturer substantially impaired air quality in their neighborhood.[76] Melvindale neighbors 48217 on the northeast side. After the residents successfully fought challenge against their class certification, they settled with Severstal Steel for a collective total of $850,000.[77]

Although discrete neighborhoods in and immediately surrounding southwest Detroit have obtained some monetary concessions from industrial polluters in the past, the area still remains the most polluted in the state.[78] It is noteworthy that these settlements – whether they occurred in 1977 or just a few years ago – were obtained from the very same industrial polluters that southwest Detroiters continue to complain about today: Marathon Oil, Severstal Steel, Detroit Salt, etc. The fact that concentrated air pollution persists in southwest Detroit, to such a dangerous degree and from the exact same industries, is a testament to the failure of nuisance law to bring about a long-range solution to environmental injustice.

2. Constitutional Guarantees and the Civil Rights Act

Robert Bullard, a sociologist and scholar in the study of environmental justice, claims that the siting process for industry, toxic dumping, and other unwanted land uses, generally follows the "path of least resistance."[79] Consequently, politically powerless minority and low-income communities are "disproportionately burdened with [the

[76] Brindley v. Severstal North Am., 775 N.W.2d 742 (Mich. 2009).
[77] *Verdicts & Settlements*, MICH. LAWYERS WEEKLY (July 30, 2010), *available at* http://www.dolanmedia.com/view.cfm?recID=617037.
[78] Lam, *supra* note 7.
[79] Monsma, *supra* note 14, at 444.

resulting] externalities" of industry and hazardous waste.[80] Since these siting decisions are deliberate, and since minorities shoulder an unequal share of the burden, environmental justice plaintiffs have attempted to use constitutional guarantees and civil rights laws to enjoin industrial development or hazardous waste siting in their neighborhoods. However, to succeed using these laws, courts require proof of an intent to discriminate on the basis of race. Under current law, the "path of least resistance" does not equal intentional discrimination. This is the case even though, by its very nature, the "path of least resistance" involves capitalizing on past discrimination, takes advantage of institutional discrimination, and undeniably results in disparate impact.

a. The Equal Protection Clause

The Fourteenth Amendment to the United States Constitution promises that "no state shall…deny to any person within its jurisdiction the equal protection of the laws."[81] Using the Equal Protection Clause to challenge siting decisions presents at least two problems for environmental justice plaintiffs. First, because poverty is not a suspect classification under the constitution,[82] any siting process that selects a host neighborhood that is disproportionately composed of low-income families -- but not disproportionately composed of minorities -- will generally be upheld.[83] Of course, this would not be an obstacle for any potential southwest Detroit plaintiff, as the racial composition of the area is overwhelmingly minority. Second, even when a legal challenge alleges racial discrimination (a suspect classification), and even when the effect of a legislative or

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[80] *Id*.
[81] U.S. CONST. amend. XIV, § 1.
[82] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
[83] Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1390-91 (1994).

administrative decision results in a racial disparity, courts will uphold those decisions if they are facially neutral and if there is no proof that race was the primary "motivating factor" in the decision.[84] According to the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Co*., disparate impact is only one factor in determining whether race was a primary consideration in an agency or legislative body's decision.[85] A court will also look to the historical background of the decision, departures from normal decision-making procedure, and contemporary statements of members of the decision-making body.[86]

Given the multitude of factors involved in a siting decision, proving that racial discrimination was the "primary" one is exceptionally difficult. In *R.I.S.E., Inc. v. Kay*, the plaintiffs, a citizen group organized solely for the purpose of challenging the development of a regional landfill in their community, claimed the city government's siting decision denied them equal protection under the law in violation of their Fourteenth Amendment rights.[87] The racial composition of the host neighborhood was sixty-four percent African American.[88] Nevertheless, citing *Village of Arlington Heights*, the district court held that the siting decision was not unconstitutional "solely because it result[ed] in a racially disproportionate impact."[89] Moreover, there was nothing "unusual or suspicious" about the government's decision: no departure from normal procedures, no contemporary statements implicating racial discrimination, etc.[90] Upholding the siting

[84] Vill. of Arlington Heights v. Metro. Housing Dev. Co., 429 U.S. 252, 264-66 (1977).
[85] *Id*. at 266.
[86] *Id*. at 267.
[87] R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1145 (E.D. Va. 1991).
[88] *Id*. at 1148.
[89] *Id*. at 1149.
[90] *Id*. at 1149-50.

decision, the court further opined that the Equal Protection Clause imposes "no affirmative duty to equalize the impact of official decisions on different racial groups."[91] Since disparate impact is completely legal, the Equal Protection Clause is entirely inadequate in the environmental justice context.

b. The Civil Rights Act

In the past, some environmental justice plaintiffs have looked to Title VI of the Civil Rights Act of 1964 ("the Act") for a legal remedy. Title VI of the Civil Rights Act of 1964 ("the Act") prohibits using federal funds in a way that discriminates on the basis of race or national origin.[92] Specifically, section 601 of the Act declares that "no person…shall, on the grounds of race, color, or national origin, …be subjected to discrimination under any program or activity receiving Federal financial assistance.[93] In addition, section 602 of the Act authorizes each "Federal department and agency" empowered to extend federal funds, to effectuate the provisions of section 601 by "issuing rules, regulations, or orders" that are consistent with the achievement of the Act's objectives.[94] Thus, to make a Title VI claim, a litigant need only demonstrate a federal funding nexus. Since the EPA gives federal funds to most state environmental agencies, including MDEQ, the permits those state departments issue are under Title IV jurisdiction and cannot be issued if doing so would be racially discriminatory.

Section 601 of the Act has proven a dead end for environmental justice plaintiffs. Just as in the Equal Protection Clause context, proof of intentional discrimination is

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[91] *Id*. at 1150.
[92] 42 U.S.C. §§ 2000d - 2000d-1 (2000).
[93] *Id*. § 2000d.
[94] Id. § 2000d-1.

required to maintain a cause of action under section 601.[95] These legal challenges fail for the same reasons that other environmental justice cases brought under the Equal Protection Clause fail. Without some evidence of the additional factors noted by the Supreme Court in *Village of Arlington Heights*, the presence of disparate impact alone is insufficient to prove discriminatory "motive."

Unfortunately, section 602 of the Act is also ineffective at providing a remedy for environmental justice communities, but for different reasons. The EPA implemented section 602 in 1973 by issuing regulations requiring that "in determining the site or location of facilities," recipients of EPA funds "may not make selections with the purpose or *effect of*…subjecting [individuals] to discrimination…on the ground of race, color, or national origin."[96] Likewise, those same recipients are prohibited from "utilize[ing] criteria or methods of administration which have the *effect of* subjecting individuals to discrimination because of their race, color, or national origin."[97] EPA's chosen language clearly envisions a discriminatory effect standard. This relieves environmental justice plaintiffs from the burden of proving intentional discrimination. Nevertheless, despite the liberal language of EPA's regulations, the Supreme Court has effectively cut off section 602 for private plaintiffs. In *Alexander v. Sandoval*, the Court held that Congress did not intend to create a "freestanding private right of action to enforce regulations promulgated under section 602."[98] Instead, section 602 was meant to be a "directive to federal

[95] Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602*, 27 B.C. ENVTL. AFF. L. REV. 631, 644-45 (2000).
[96] 28 C.F.R. § 42.104(b)(3) (emphasis added).
[97] *Id*. § 42.104(b)(2) (emphasis added).
[98] 532 U.S. 275, 293 (2001).

agencies engaged in the distribution of public funds."[99] Therefore, private plaintiffs cannot use section 602 to challenge agency decisions that violate the EPA's own regulations and that clearly have a disparate impact.

c. 42 U.S.C. § 1983

Although *Alexander v. Sandoval* effectively closed the door on section 602 as a way for private litigants to enforce EPA's disparate impact regulations, the case did leave one remaining possibility: 42 U.S.C. § 1983 ("section 1983").[100] Section 1983 provides citizens with a cause of action against state actors who have violated their constitutional rights or their rights under certain federal statutes. The Supreme Court limited its *Sandoval* decision to a discussion of section 602 but, in his dissent, Justice Stevens suggested that "litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference section 1983 to obtain relief."[101]

While the Supreme Court was deciding the *Sandoval* case, environmental justice plaintiffs were already testing the viability of section 1983 in the lower courts as a means

[99] Monsma, *supra* note 14, at 463.
[100] Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000). The statute in full reads: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."
[101] Joseph Ursic, *Finding A Remedy for Environmental Justice: Using 42 U.S.C. § 1983 To Fill in a Title VI Gap*, 53 CASE W. RES. 497, 508 (2002).

of enforcing EPA's disparate impact regulations. Before *Sandoval* was decided, residents of South Camden, New Jersey, a community whose population was ninety-one percent African American, had already filed suit against the state department of environmental protection, challenging the siting of an industrial facility in their neighborhood.[102] Instead of alleging intentional discrimination in the siting process, however, the plaintiffs claimed that the siting would result in a racially disparate impact. [103] They filed their action under section 1983, attempting to use their private cause of action under that statute to enforce the EPA's discriminatory effect regulations promulgated under section 602.[104] The district court held that the plaintiffs did in fact have an "implied" private right of action under Title VI to enforce the EPA regulations.[105]

This victory for environmental plaintiffs would be very short-lived. Not long after the New Jersey district court's finding of an "implied" private right of action under Title VI in the *South Camden* case, the Third Circuit reversed the decision. In *South Camden III*,[106] the Third Circuit noted two well-recognized exceptions to enforcing federal statutory rights under section 1983. According to Supreme Court precedent, section 1983 is not available as a remedy where (1) Congress foreclosed enforcement of the statute in the enactment itself, or (2) the statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983.[107] The Third Circuit held that prong (2) was applicable in *South Camden III*. Using the *Sandoval* decision, the circuit court of

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[102] South Camden Citizens in Action v. New Jersey Dept. of Envtl. Protection, 145 F. Supp. 2d 446, 450 (D.N.J. 2001).
[103] *Id*.
[104] Monsma, *supra* note 14, at 464.
[105] *South Camden Citizens in Action*, 145 F. Supp. 2d at 474.
[106] South Camden Citizens in Action v. New Jersey Dept. of Envtl. Protection (*South Camden III*), 274 F.3d 771 (3d 2001).
[107] *Id*. at 780.

appeals held that, while Congress created an explicit right to be free of intentional discrimination under section 601, it did not explicitly create a federal right to be free from disparate impact discrimination under section 602.[108] Rather, that right was created only through the EPA's implementing regulations and "are not based on any federal right present in the statute."[109] While EPA's regulations may be valid, they gave a scope to Title VI "beyond that which Congress contemplated" and, therefore, "are too far removed from congressional intent to constitute a 'federal right' enforceable under section 1983."[110] A year later, the US Supreme Court upheld the Third Circuit's line of reasoning in *Gonzaga University v. Doe*, holding that section 1983 could not be used to enforce Title VI disparate impact regulations.[111]

IV. Corporate Social Responsibility as an Alternative Solution

A. Support for Corporate Social Responsibility

The most widely accepted paradigm for corporate structure is shareholder wealth maximization.[112] According to this business model, a "corporation is organized and carried on primarily for the benefit of the stockholders," and "the power of directors is to employed for that end" only.[113] In short, the only corporate actions that should be taken are those that will increase the bottom line of the business and, consequently, that of the shareholders. Nevertheless, the modern corporation is an enormous entity, multi-national in scale and touching almost every aspect of daily life. Corporate activity affects far more

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[108] *Id*. at 788-90.
[109] *Id*. at 790.
[110] *Id*.
[111] Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002).
[112] Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 Del. J. Corp. L. 649, 688 (2004).
[113] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

people than just its shareholders. Consumers, communities, employees, and the environment are all within a corporation's sphere of influence. These third parties are often referred to as corporate "stakeholders."[114]

Corporate Social Responsibility (CSR) is a different corporate model allowing corporate decision-makers to take the interests of these stakeholders into account in addition to the interests of traditional shareholders.[115] In many cases, the interests of stakeholders will be inconsistent with the interests of shareholders and profit maximization. Despite this conflict with shareholder wealth maximization, corporations engage in CSR with very little interference from the court. At least thirty states have adopted "corporate constituency statutes," explicitly authorizing corporate managers to consider stakeholder interests.[116] Moreover, judges will generally uphold CSR inspired decisions in the face of legal challenge by deferring to the business judgment of the corporation's directors.[117] Although corporations are given the discretion to make CSR a part of their decision-making process, it is important to note that no court or state law requires corporations to consider the interests of stakeholders. CSR is entirely voluntary in nature.

Corporations have incorporated CSR into their decision-making processes to varying degrees. Some will not engage in CSR at all aside from taking action that has a direct correlation to future shareholder profits. This is activity such as legal compliance

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[114] Licht, *supra* note 112, at 651.
[115] *Id*.
[116] Einer Elhuage, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005). Michigan does not have a corporate constituency statute, but corporations are permitted to make donations for "the public welfare; community fund or hospital; or a charitable, educational, scientific, civic, or similar purpose." MICH. COMP. LAWS § 450.1261(k) (2006).
[117] MODEL BUSINESS CORP. ACT § 8.31. *See also* Elhuage, *supra* note 116, at 770.

and safety standards, or avoidance of mass tort situations that could lead to fines or lawsuits.[118] Although compliance and prevention measures cost money up front, they can ultimately save shareholders millions of dollars. At the other end of the extreme, a corporation may choose to donate a percentage of its proceeds or a certain product to a charitable organization, or make a public pledge to engage in sustainable building methods or to use environmentally friendly packaging. Corporate managers attempt to justify these CSR expenditures to their shareholders by connecting them to a "long run" benefit for the company.[119]

B. Corporate Social Responsibility in the Environmental Justice Context

As residents of the same community, southwest Detroiters are "stakeholders" of their corporate neighbors. Similarly, as the University of Michigan study highlights, mere permit compliance is insufficient to adequately protect these stakeholders' interests in breathable air. In order for CSR to provide a solution for environmental justice communities, in southwest Detroit or elsewhere, resident corporations must participate in CSR style decision-making beyond simple fulfillment of legal obligations.

1. The Community Benefits Agreement

A Community Benefits Agreement ("CBA") is a private, enforceable contract between a community coalition and a prospective developer. It provides a mechanism for communities to negotiate for public benefits from the developer in exchange for

[118] Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 814 (2005).
[119] There is little empirical proof for this justification. *See* Joshua D. Margolis & James P. Walsh, *Misery Loves Companies: Rethinking Social Initiatives by Business*, 48 ADMIN. SCI. QUARTERLY, 268, 278 (2003).

community support of a project.[120] The community may want the developer to agree to local hiring, job training, urban revitalization efforts and the like. Likewise, the developer desires the community's support to avoid time-consuming delays associated with public opposition to a project, and to prevent community initiated legal challenges regarding the project that could halt development altogether.[121] Importantly, although a corporation's initial decision to enter into a CBA is voluntary, the resulting contract is enforceable against both parties.[122] In environmental justice communities such as southwest Detroit, CBAs can meaningfully safeguard the interests of minority neighborhoods in a way that government regulation has not.

The expansion of Los Angeles International Airport ("LAX") in 2004 is an example of how successful CBAs can be in protecting the interests of environmental justice communities. For years, the African-American and Latino residential areas located directly under LAX's flight path suffered from increasing noise and air pollution.[123] Once the expansion effort was announced, a community coalition of religious groups, labor unions, and school districts, initiated negotiations with developers in order to ensure the expansion plans "went forward only if the community's environmental concerns… were addressed."[124] Ultimately, the coalition successfully negotiated for soundproofing of local

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[120] Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVT'L L. & POL'Y 291, 293-94 (2008).
[121] *Id*. *See also* Sariyah S. Buchanan, *Why Marginalized Communities Should Use Community Benefit Agreements as a Tool For Environmental Justice*, 29 TEMP. J. SCI. TECH. & ENVT'L L. 31, 48 (2010).
[122] The contract is *theoretically* enforceable by either party. However, no CBA has been the subject of judicial review as of yet. *See* Salkin & Lavine, *supra* note 120, at 295.
[123] Buchanan, *supra* note 121, at 49.
[124] *Id*.

schools, homes, and churches; "the electrification of passenger gates and cargo areas (to reduce the need for engine idling), emissions reductions, and the conversion of airport vehicles to alternative fuels."[125]

Although southwest Detroit has formed a coalition to enter into negotiations with developers and industry in southwest Detroit,[126] the organization's current focus is not on the Marathon expansion effort or abating emissions from any of the multitude of factories in the area. Rather, the focus of the coalition appears to be achieving a CBA between the Delray neighborhood and the State of Michigan in exchange for Delray (potentially) hosting the new international bridge crossing. The coalition is concerned that if built, the new bridge will bring increased traffic and pollution to an already contaminated environment. Nevertheless, the coalition has pledged to support its construction if certain concessions are made via a CBA; including air filtration at nearby schools, local hiring guarantees, adequate compensation for the nearly 700 residents the project will displace, the creation of parks in Delray, etc.[127] No CBA has been signed yet and it is unclear just how important, from the State's perspective, the incorporation of one into any development agreement for the new crossing would be. Thus far, the battle over construction of the bridge has focused on a plethora of lawsuits filed by the owner of the Ambassador Bridge. Should the project overcome these legal hurdles and eventually get the green light to proceed, whether a CBA in some limited form is adopted or not, it

[125] Salkin & Lavine, *supra* note 120, at 305.
[126] *About Us*, Southwest Detroit Community Benefits Coalition, http://www.delraycbc.org/about-us.php (last visited Mar. 25, 2012).
[127] *Our Vision*, Southwest Detroit Community Benefits Coalition, http://www.delraycbc.org/our-vision.php (last visited Mar. 25, 2012).

seems doubtful that the State would consider entering into one *necessary* for the bridge's ultimate construction.

2. The Marathon Buyout

In 2008, Marathon Petroleum began a $2.2 billion expansion of its oil refinery in Oakwood Heights.[128] In November 2011, after months of protest by individual residents, Marathon announced its Oakwood Heights Property Purchase Program.[129] The program "will provide offers on all residential property in the [Oakwood Heights] neighborhood and will assist neighbors who wish to relocate."[130] Like the CBA, Marathon's program is a private contract solution for environmental justice communities, but this time between the corporation and the individual stakeholder.

Through its buyout program, Marathon will be making purchase offers to residents of about 350 homes in Oakwood Heights.[131] Homes purchased will be demolished in order to create a "buffer zone of green space between the expanded refinery and outlying neighborhoods.[132] The minimum offer on each home will be the average of two appraised values or $50,000, whichever is greater, plus a fifty percent premium of the averaged appraised price.[133] Just like there is no obligation for target homes to enroll in the program, there is no obligation to accept a purchase offer when it is

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[128] Mcardle, *supra* note 4.
[129] Press Release, *Marathon Petroleum Offers to Buy Residential Properties in Detroit*, Marathon Petroleum Co. (Nov. 2, 2011), http://www.marathonpetroleum.com/content/documents/investor_center/OHP3NEwsRelease.pdf.
[130] *Id*.
[131] Gallagher, *supra* note 8.
[132] *Id*.
[133] *Id*.

received.[134] Nevertheless, over eighty percent of homeowners in Oakwood Heights were participating in the program at the time of the enrollment deadline.[135] With no legal or political alternative to halt the expansion project, most homeowners are happy to receive the buyout offer and have the opportunity and means to leave southwest Detroit for good.[136]

V. Problems with Corporate Social Responsibility as a Remedy

The voluntary nature of CSR renders it problematic as a long-term solution for environmental injustice. Neither market pressures nor government regulation compels CSR. Rather, it is a purely "private alternative to conventional government regulation of externalities."[137] These realities make CSR especially unreliable for southwest Detroiters for two principal reasons: (1) in Detroit, the incentive to participate in CSR is entirely one-sided; and (2) as with any private contract, the details of Marathon's buyout program demonstrate problems of asymmetrical information, unequal bargaining power, and the exclusion of other interested parties.

A. Lack of Incentive

Whether or not there is in fact an identifiable "long run" benefit for shareholders, corporations are for-profit enterprises and corporate managers must at least perceive

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[134] *Property Owners – Offer, Acceptance and Release*, Oakwood Heights Property Purchase Program, Marathon Petroleum Co., http://ohppp.com/terms.html (last visited Apr. 5, 2012).
[135] Kate Abbey-Lambertz, *Marathon Petroleum Buyout Finds Support in Oakwood Heights*, Huffington Post (Jan. 31, 2012), http://www.huffingtonpost.com/2012/01/31/marathon-petroleum-buyout-oakwood-heights-detroit_n_1244351.html.
[136] *Id*.
[137] Leonid Polishchuk, *Corporate Social Responsibility vs. Government Regulation: Institutional Analysis with an Application To Russia* 4, Int'l Soc'y for New Inst. Econ., 2009 Conference, *available at* http://papers.isnie.org/berkeley.html.

some benefit for entering into CBAs or private contracts like that of Marathon's. More often than not, corporations realize that benefit in a positive public relations campaign associated with CSR-driven concessions or commitments. This, in turn, can lead to an expeditious approval for their project. While this may be a powerful incentive for companies in some instances, it disappears in economically depraved areas like Detroit.

Just like the State of Michigan does not need to enter into a CBA with Delray in order to build the new international crossing, Marathon did not need to create goodwill within Detroit in order to obtain approval for its expansion. In fact, Detroit encouraged Marathon to expand by offering the company $178 million in tax breaks over the next twenty years.[138] The buyout program, announced three years after the expansion began, was never a condition of those tax breaks or of the city's approval of the project.[139] For Marathon, there could not have been a smoother approval process.

While the cost of Marathon's buyout program will hardly touch its profitability, at $40 million, it is still a significant expense.[140] Since the buyout represents the only realistic opportunity to escape life in the most toxic ZIP code in Michigan, residents are eager to enter into these purchase agreements. Nevertheless, Marathon could have easily continued the expansion without ever having to expend resources administering a buyout

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[138] Yung, *supra* note 23.

[139] Marathon did promise the city council that it would hire Detroit residents to fill the jobs created by the expansion. *See* Yung, *supra* note 19. So far, Marathon has not followed through on this pledge. Of the forty-five people hired for the sixty permanent jobs, only thirteen of them live in Detroit. *Id*. This promise was not made as part of a CBA or development agreement with the city of Detroit. As a result, it is completely unenforceable.

[140] Stephen Henderson, *City Needs to Watch and Learn from Marathon Expansion Plan*, DET. FREE PRESS (Nov. 2, 2011), http://www.freep.com/article/20111102/COL33/111102040/Stephen-Henderson-City-needs-watch-learn-from-Marathon-expansion-plan.

program or spend $40 million creating a green space. No outside pressures have incentivized Marathon to buyout Oakwood Heights. Its decision to do so, therefore, should be the subject of careful scrutiny.

Marathon may have manufactured its own incentive with the terms of the buyout contract itself. Although the agreements are supposed to be confidential, State Representative Rashida Tlaib reports that some of the purchase agreements her Oakwood Heights constituents have been presented with contain clauses preventing residents from suing Marathon in the future over any health problems caused by pollution from the refinery.[141] In this way, Marathon has created a "long run" benefit for itself by eliminating the threat of future liability. While minimal CSR behaviors such as compliance and safety measures are also performed in order to limit liability, those activities limit liability by preventing harm before it occurs. Marathon's program, on the other hand, takes advantage of the vulnerable position of these southwest Detroiters by taking away a potentially viable cause of action. In this way, the terms of the buyout exemplify an inherent danger in private agreements when the incentives to participate in CSR are so one-sided.

B. Problems with Private Contract

1. Negotiation Inequities

The limitation of liability clause in Marathon's purchase agreements demonstrate the problem with using individual private contracts to provide a remedy in environmental justice communities, particularly southwest Detroit. To rely on contract to allocate risk fairly, several assumptions must be made. First, it must be presumed that the parties to

[141] Yung, *supra* note 23.

the contract have all the information they need to make an informed decision. Second, it is assumed that people are rational actors meaning that when the parties have the requisite information, they will make a rational decision. Finally, we assume that the parties have genuine freedom of contract; that bargaining power between the parties is equal and they are both free to negotiate terms. These are assumptions that operate in only the most ideal situations. They have very little practical application where, as here, one party is far more sophisticated than the other.

Marathon has created a website devoted to the buyout program and to informing program participants.[142] On the "Terms" page it warns participants that, by agreeing to the purchase offer, they will waive certain claims against Marathon in the future.[143] It also recommends that participants review the purchase agreements with their attorneys.[144] Nevertheless, according to Representative Tlaib, most of her constituents had no idea the limitation of liability clause appeared in their purchase agreements.[145] Perhaps these residents failed to read the website or the contract thoroughly. However, it is equally likely is that they read the clause but did not understand its meaning and could not afford to hire an attorney to explain it to them. Even if they read and understood this clause with the help of an attorney, participants would still not have all the requisite knowledge to make a "fully informed" decision. That would require information regarding the likelihood of contracting a pollution-related illness the future and how much that illness would cost their family in lost wages and medical bills.

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[142] *Oakwood Heights Property Purchase Program*, MARATHON PETROLEUM CO., http://ohppp.com/ (last visited Apr. 5, 2012).
[143] *Property Owners – Offer, Acceptance and Release, supra* note 134.
[144] *Id*.
[145] Yung, *supra* note 23.

Even if Oakwood Heights residents had all of this information and completely understood their purchase agreements, assuming they would then conduct an intricate cost benefit analysis to arrive at a rational decision ignores the realities of their situation. These people live in the most toxic ZIP code in Michigan by far. No legal challenge or political pressure will stop Marathon from expanding.[146] Marathon admits that the expansion will release even more pollutants into the air.[147] Southwest Detroit one of the poorest areas of the state.[148] In a depressed housing market and economy, this purchase offer may provide the only opportunity for residents to relocate. Such a situation can prevent rational decision-making.

Similarly, the desperate nature of these circumstances reveals inherent bargaining inequities between the parties. Marathon has the upper hand in every possible way. As a multi-billion dollar corporation, it has world-class legal advice and statistical data at its disposal. Every decision it makes can be the result of meticulous and careful study. With no legal or political resistance to its expansion efforts, it can afford to have a "take it or leave it" approach to this buyout program and these individual contracts. Residents have absolutely no bargaining power. Nevertheless, just for good measure, Marathon has declared all contract terms to be non-negotiable.[149]

2. Exclusion of Parties

Assuming these private contract issues do not exist and Marathon's program fairly allocates risk, there is at least one more problem with using CSR to resolve environmental inequities. Naturally, contracts will exclude interested parties and the

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[146] *See* Parts II and III, *supra*.
[147] Yung, *supra* note 23.
[148] *See supra* text accompanying note 21.
[149] *Property Owners – Offer, Acceptance and Release, supra* note 134.

buyout in this case is no exception. Marathon has limited its buyout to Oakwood Heights, presumably because the expansion will bring the refinery borders closer to homes in that neighborhood. This exclusion, however, calls into question the effectiveness of the buyout and the resulting "buffer of green space" at providing a comprehensive solution for the community as a whole.

Just a few blocks from Oakwood Heights, across from Interstate 75, is a collection of thirteen homes surrounded on all sides by facilities of Marathon, Detroit Salt, and one of Detroit's main wastewater treatment plants.[150] The bleak location of this neighborhood has earned it a nickname: "The Hole." The Hole is also part of 48217 and, since it is in the middle of the refinery's expansion instead of on the edge of it, many consider its plight to be far more acute than that of Oakwood Heights.[151] Although they are undoubtedly "stakeholders" in Marathon's expansion just as much as residents of Oakwood Heights are, the Hole is not included in Marathon's buyout program. Despite the creation of green space, its residents will still breathe in air polluted by the expansion and everything else that surrounds them. Of course, if Marathon expands its program to the Hole, by the same logic it would have to extend it to the next neighborhood and so on. Marathon cannot be expected to buy out all of southwest Detroit and, as a result, some arbitrary line drawing must be done.

VI. CONCLUSION

[150] Patrick Geans-Ali, *Marathon Should Do Right By All the Communities Affected by Their Expansion*, THE MICH. CITIZEN (Nov. 27, 2011), http://michigancitizen.com/marathon-should-do-right-by-all-the-communities-affected-by-their-expansion-p10535-77.htm.
[151] *Id*.

Notably, the problems with private contract mentioned in Part V exist to a lesser degree if a community coalition negotiates a CBA with industry. Since a coalition necessarily involves more parties, it will represent more neighborhoods and may have more negotiating power with industry. Nevertheless, a significant problem remains: bringing the corporation to the bargaining table in the first instance.

In an economy like Detroit's, where economically depressed local governments are welcoming industry with open arms, there is simply no incentive for corporations to make CSR related commitments. Should some companies perceive a benefit and engage in CSR, any concessions made will be too sporadic and isolated to constitute any kind of comprehensive solution for southwest Detroit. When CSR does lead to private agreements, the lack of any state law, political, or judicial remedy leaves residents with no alternatives; they are forced to accept the terms of a contract that may not be in their best interest. Those agreements also necessarily involve some line drawing, making it arguable whether programs like Marathon's will ultimately serve the needs of the communities most harmed by industrial pollution. Corporations cannot be relied upon to solve all societal ills and perhaps they should not be. Whether the result is a CBA or an individual contract, relying on CSR avoids the core problem with which environmental justice is concerned: the fact that communities like 48217 are allowed to exist in the first instance. Especially in southwest Detroit, the private alternative that CSR presents is not an adequate substitute for state regulation.