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Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?

Thalia González* and Giovanni Saarman†

Given the failure of federal, state, and common-law environmental regulation to deal with the external social costs of pollution on human health and the environment, local communities have turned to legal and nonlegal strategies to address their concerns. This Article seeks to address the increased need for the study of community environmental policing and monitoring of air quality. The case study presented of the Portland Good Neighbor Agreement considers whether the community benefits gained by a Good Neighbor Agreement are equitably balanced against the costs to the community of negotiation and implementation. While such agreements have the potential for a wide range of positive benefits for a community, there are significant transaction costs associated with negotiating, signing, implementing, and enforcing the terms and conditions. As such, reliance on Good Neighbor Agreements to remediate the negative human health impacts of pollution is misguided and detracts from the critical need for an environmental regulatory regime to take the responsibility off of communities and to adequately address the impacts of industrial pollution.

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INTRODUCTION

With the complex nature of environmental problems in the 21st century, it is easy to forget that the distribution of environmental harm is fundamentally based in how society is organized. As such, the exploitation of the environment and attempts to control and remediate the associated harms have been linked inextricably since the creation of political economies. 1 While the type and the magnitude of these responses have evolved with the progression of law and society, there has been a consistent theme of balancing the interests of political elites with developing effective, efficient, and, in theory, equitable environmental policies.

The fundamental and recurring issue is how to establish an environmental regulatory authority that protects communities from the inequitable distribution of environmental risks. As studies of environmental policy in the United States have shown, there has not been a steady improvement in addressing the human health impacts of pollution despite a continued focus at the federal and state levels. 2 Given the inadequacy of common law, state, and federal environmental remedies to address pollution, local communities have attempted to respond to escalating environmental concerns through both legal 3 and nonlegal strategies. 4

These strategies seek to increase environmental accountability and address insufficiencies in regulation given that the external social costs of pollution have not been adequately internalized into the decision-making processes of industrial polluters. This structure allows market mechanisms to impose the burden on communities to mitigate the negative externalities of pollution by engaging in environmental policing. This raises significant concerns, as communities that have traditionally experienced pollution disproportionately are often the same communities that have been excluded from environmental decision-making processes.

In the face of profound health effects caused by pollution and a lack of remediation by government, some communities have decided to bear the high transaction costs of attempting to regulate polluters themselves. In the context of air pollution, for example, Dara O’Rourke and Gregg Macey have documented the efforts of “bucket brigades” to monitor and enforce air quality as a means of placing external pressure on regulatory officials to monitor polluting industries more effectively. Other communities have sought redress in the courts, while still others have sought to directly impact the behavior of industrial polluters by negotiating voluntary self-compliance agreements.


7. See Butler & Macey, supra note 6, at 29 (explaining externalities).

8. See id.

9. Pirk, supra note 4, at 209–11 (noting that communities are not able to effectively engage in environmental decision-making processes due to the unequal power relationship between community members, government officials, and corporations); Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L.Q. 619, 641 (1992) (arguing that the use of environmental litigation may actually further disempower low-income communities as mainstream environmental laws fail to adequately address the needs of those most affected by pollution); Robert Bullard, Environmental Justice for All, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 11 (Robert Bullard ed., 1994) (arguing an environmental justice framework “brings to the surface the ethical and political questions of ‘who gets what, why and in what amount?’ Who pays for, and who benefits from, technological expansion?”).

10. Dara O’Rourke & Gregg P. Macey, Community Environmental Policing: Assessing New Strategies of Public Participation in Environmental Regulation, 22 J. POL’Y ANALYSIS & MGMT. 3, 383, 386–91 (2003); see also Pirk, supra note 4, at 219–21 (discussing other bucket brigades); Kuhn, supra note 4, at 657–58 (discussing a good neighborhood ordinance and Communities for a Better Environment’s bucket brigade).

11. See infra Part 2.1.

The good neighbor agreement (GNA) is one such corporate-community agreement and the primary focus of this Article. Since the 1980s, community activists have used GNAs as a tool to bargain with industrial polluters for positive reform and financial investment to protect community health and welfare outside of both state and federal environmental regulatory structures. GNAs are “legally binding agreement[s] negotiated by stakeholders and industry in which the violating industry agrees to reduce or eliminate pollution risks to the surrounding community.” If enforced effectively, GNAs can produce improved outcomes compared to litigation since GNAs allow greater flexibility in the bargaining of terms and conditions not available through traditional citizen suits.

Similarly, Sanford Lewis and Diane Henkels, who documented the GNAs of the early 1990s in Minnesota, Texas, New Jersey, and California, outlined conditions included in the agreements that would have been outside the scope of citizen suits, such as increased access to information, community facility inspection and access, accident preparedness plans, emission reductions, local hiring agreements, and investment in community services. While noting the potential positive outcomes, Lewis cautioned that the benefits of these agreements might not be realized without significant costs to the community. This is particularly true in environmental justice communities, given the larger socio-political context and the disproportionate siting of industrial polluters.

This Article studies a 2011 agreement in Portland, Oregon between ESCO and activists from three different community organizations. As discussed in Part III, the GNA was executed as a formal written document and established specific terms and conditions for ESCO and the community organizations. We chose to study this GNA for several reasons. First, as environmental policy continues to change in an attempt to address the impacts of pollution, there is an increased need for the study of community environmental policing and monitoring. Second, there has been a lack of contemporary case studies that consider whether the community benefits gained by a GNA are equitably balanced against the costs to the community of negotiation and implementation. Third, much of the prior literature on these
agreements has failed to consider the economic context of negative externalities. Fourth, the Portland experience provided the unique opportunity to investigate an agreement negotiated by an affluent community with a long history of public participation and engagement around local environmental decision making. Further, such inquiry was significant to evaluate whether sustained community solutions to pollution regulation could be achieved in a community with such conducive characteristics.

Based on our findings in Portland, we agree with prior analyses considering the possible benefits achieved by local community action in reaching a GNA with an industrial polluter. However, we diverge from this earlier literature and argue that reliance on GNAs to remediate the negative human health impacts of pollution is misguided. Moreover, we reject the proposition that community activism, through the GNA negotiation process, compensates for a lack of resources and capacity by the Environmental Protection Agency (EPA) and other regulatory bodies to effectively address local issues of industrial pollution. As environmental scholar Alice Kaswan noted in the late 1990s, questions of local activism to address environmental harm to a community’s well-being implicate not only questions of distributive justice, but also political justice. For Kaswan, political justice concerned the fairness of the decision-making process within the broader context of environmental law. As the experience in Portland highlights, we cannot shift the burden to communities, whether politically powerful or not, to hold industrial polluters accountable for the costs they impose on society. Rather, there must be a radical restructuring of the environmental regulatory scheme. This is particularly true when we contextualize negative externalities within the larger dynamic of the social production of inequality and environmental degradation.

Part I of this Article broadly considers the health impacts of pollution on communities. Part II presents a brief historical perspective on the regulation of pollution and discusses the progression from legal remedies at common law to state and federal regulation. Part II also discusses the shortcomings of such remedies in the context of protecting community health and the environment.

21. See Kenney et al., supra note 20, at 9.
23. Cf. Adriatico, supra note 4, at 288 (characterizing GNAs as “viable and promising”).
25. Id. at 233–35.
Part III introduces the use of GNAs as an approach to mitigate pollution and focuses specifically on the 2011 ESCO agreement as a primary case study. Part IV presents findings from our research and positions this case study within the broader need for regulatory reform in order to balance community health, economic demands, policy goals, and environmental protection.

I. COMMUNITY HEALTH IMPACTS OF POLLUTION

Human activity invariably impacts the environment, yet it has been and continues to be an arduous path to fully recognize and characterize these effects, mitigate harms, and change behaviors. Pollution poses one of the most intractable issues. It has accompanied human existence and negatively impacted human health for millennia.26 Toward the end of the 19th century, progressive state health boards posited a “natural rights philosophy to argue for pollution controls that would protect all people.”27 This principle has yet to be realized. The 20th century was marked by state and federal action to address the tangible impact of pollution caused by “a post-World War II surge in the industrial uses of man-made substances.”28

In the early 1970s, environmental issues soared to a place of prominence in the federal political agenda of the United States. This visibility was accompanied by abundant evidence both domestically and internationally regarding environmental degradation and sustainability.29 During this time, public concerns shifted to focus increased attention on the human health impact of pollution as opposed to conservation. In particular, the emergence of the environmental justice movement highlighted the critical need for the redesign of environmental policy to address the disproportionate impact of pollution and toxins on low-income communities and communities of color.30

27. CHAD MONTRIE, A PEOPLE’S HISTORY OF ENVIRONMENTALISM IN THE UNITED STATES 29 (2011).
30. See Cole, supra note 9, at 636–38; Philip J. Landrigan et al., Environmental Justice and the Health of Children, 77 MOUNT SINAI J. MED. 178, 178–79 (2010); see also Robert D. Bullard, Building Just, Safe, and Healthy Communities, 12 TUL. ENVTL. L.J. 373 (1999) (discussing the emerging trend of environmental injustice). As stated in the “Principles of Environmental Justice,” one of the founding documents of the environmental justice movement, “[e]nvironmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.” ENVTL. JUSTICE RES. CTR., PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), available at http://www.ejrc.caau.edu/princej.html; see also EPA, MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898 (2011), available at http://epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf (declaring the “continued importance of identifying and addressing environmental justice considerations”).
A. How Communities Experience Pollution

Today there are diverse arrays of pollutants and toxic substances, activities responsible for their release, and resulting adverse effects on human health from acute and chronic exposure. Further, the types and levels of pollutants have changed over time and dramatically worsened in the past two centuries. Sustained physical exposure to a significant number of hazardous pollutants is one way communities experience pollution. A lack of both adequate monitoring and documentation of ambient concentration levels and comprehensive scientific studies of the health and environmental implications of pollution exacerbate this exposure. As a case study in Houston, Texas found, for example, “[f]rom the start of the first comprehensive federal program to regulate air pollution, hazardous air pollutants (HAPs)—those that can cause immediate or chronic harm from localized exposure—have been difficult to manage and control.”

The array of pollutants present in our environment has changed dramatically over the course of the past century, particularly during the latter half. For example, children today risk exposure to over 80,000 synthetically derived chemicals in consumer goods, plastics, building materials, pesticides, and synthetic hormones; many of these were newly synthesized and had never been released previously. Further, as reported by the EPA’s Toxics Release Inventory, which tracks over 650 chemicals, more than 213 million pounds of toxic chemicals and substances were discharged into surface waters in 2011, and more than 800 million pounds were released into the air from


32. See MARKHAM, supra note 26, at xi; Flatt, supra note 2, at 120–22; O’Rourke & Macey, supra note 10, at 384. There are numerous sources that discuss the adverse environmental and human health impacts of urban growth. For a good overview, see William W. Buzbee, Sprawl’s Political-Economy and the Case for a Metropolitan Green Space Initiative, 32 URB. LAW. 367, 368–69, 372–73 (2000) (“[S]prawling growth often leaves behind increasingly impoverished central urban areas, destroys green space, converts agricultural land to residential or business use, and contributes to deteriorating air pollution as residents must drive increased distances to jobs and to obtain basic amenities.”); Howard Frumkin, The Health of Places, the Wealth of Evidence, in URBAN PLACE: RECONNECTING WITH THE NATURAL WORLD 253, 262–64 (Peggy F. Barlett ed., 2005) (describing the features of sprawling communities and subsequent health implications).


34. See id.

35. Flatt, supra note 2, at 111.


37. See MORAG-LEVINE, supra note 28, at 9 (discussing the rise in pollution during the latter half of the century).

38. See Landrigan et al., supra note 30, at 180.

39. See id.
point and fugitive sources.\textsuperscript{40} Overall, total on- and off-site disposal and other releases into the environment amounted to over 4 billion pounds.\textsuperscript{41}

One need only consider the diminishing air quality in Portland, Oregon over the last twenty years to comprehend what this level of toxic release means locally.\textsuperscript{42} During this time, manufacturing flourished and the population grew significantly. The state’s largest city experienced increased ambient levels of HAPs.\textsuperscript{43} The EPA found that more than 9 million pounds of HAPs were released into Portland’s airshed in 1996.\textsuperscript{44}

Furthermore, a multi-year study by Bonnie Tam and Catherine Neumann gathered data from five monitoring sites throughout the city and determined that all five had seventeen or more HAPS that exceeded carcinogenic benchmark concentrations.\textsuperscript{45} Data from the EPA’s National Air Toxics Assessment, which models ambient concentration levels, also indicated that in 2002, eleven HAPs exceeded “health benchmark concentrations.”\textsuperscript{46} This type of data is instrumental for community organizations and individuals to conceptualize and better understand the relationship between their health experience and environmental pollution. In the context of the ESCO GNA, a \textit{USA Today} report provided the catalyst for community action by synthesizing the Toxic Release Inventory data with toxicity information to estimate exposure levels at schools.\textsuperscript{47}

According to the American Lung Association, the current capacity for completing community-based studies of air pollution exposure continues to be


\textsuperscript{41} See id.


\textsuperscript{43} See id.

\textsuperscript{44} See id. at 138.

\textsuperscript{45} See id. at 138 tbl.4.

\textsuperscript{46} Id. at 132.

\textsuperscript{47} See The Smokestack Effect: Toxic Air and America’s Schools, \textit{USA TODAY}, http://content.usatoday.com/news/nation/environment/smokestack/index (last visited Feb. 15, 2014); Methodology, \textit{USA TODAY}, http://content.usatoday.com/news/nation/environment/smokestack/methodology (last visited Feb. 1, 2014). The experience in Portland is not isolated. The \textit{USA Today} database provides information and statistics of more than 127,800 public and private schools from the National Center for Education Statistics and more than two dozen state education agencies. Since 2005 there has been a growing body of scientific literature considering the susceptibility of children to the adverse effects of environmental pollution. See Manuel Pastor, Jr. et al., Breathless: Schools, Air Toxics, and Environmental Justice in California, 34 POL’Y STUD. J., 337–38 (2006) (finding that students of color attended schools with higher respiratory hazards from air toxins); Paul Mohai et al., Air Pollution Around Schools Is Linked to Poor Student Health and Academic Performance, 30 HEALTH AFF. 852, 852–53 (finding clear links between school locations and air pollution leading to poor student health and academic performance).
“quite limited.” Few communities have the resources and technical expertise to complete comprehensive monitoring and assessment of toxic exposure. Moreover, even in Portland, a city with some resources and expertise, community monitoring efforts failed to successfully force Oregon’s Department of Environmental Quality (DEQ) to take substantive action regarding ESCO’s emission levels. In the absence of comprehensive monitoring by communities and governments, there has been little progress in developing an understanding of current levels of exposure and the related human health impacts. Even with a significant investment in monitoring efforts, the ability to effectively address pollution is further hindered by a lack of comprehensive scientific studies on human health impacts and the concurrent recent rise in the use of synthetic toxic substances. This is especially true in the context of “toxic hotspots” in which exposure to combinations of pollutants interact with one another to have additive and synergistic effects on human health beyond the scope of their isolated harms.

Despite a lack of toxicity data, scientific studies have begun to demonstrate and quantify the adverse health impacts associated with or directly caused by different forms of pollution. For instance, the health impacts caused by exposure to air pollution “are diverse in scope, severity, duration, and clinical significance.” They include increased respiratory illness, decreased lung function, altered host defense, bone marrow diseases, and low birth weight, prematurity and birth defects in children living near the hazardous waste site, love canal, 2 hazardous waste & hazardous materials 209 (1985).
excess cardiorespiratory mortality, neurological damage, exacerbated asthma, increased infant mortality, low birth weight, increased prevalence of birth defects, cancer, reduced life expectancy, and increased daily mortality. These physical health effects can have subsequent harms such as impaired academic performance, lower IQ scores, lifestyle disruptions, nuisance effects, and other psychosocial effects. These psychosocial effects can include perceptions of powerlessness and neighborhood disorder, increased concern about future health, and other individual mental health issues. They also have broader implications at the community and society levels.

B. Environmental Justice and the Disproportionate Exposure to Pollution

It is impossible to consider environmental pollution in modern society without an acknowledgement of the disproportionate health impact that falls on low-income communities and communities of color. These communities are

59. Shelton, supra note 22, at 3.
60. The Am. Lung Ass’n, supra note 48, at 358.
61. Shelton, supra note 22 at 3.
63. Pastor et al., supra note 47, at 337; see also O’Neill et al., supra note 62, at 1861 (discussing impacts from air pollution on mortality in general).
64. See Goldman et al., supra note 54, at 210; O’Neill et al., supra note 62, at 1861.
65. See Goldman et al., supra note 54, at 210; O’Neill et al., supra note 62, at 1861; Shelton, supra note 22, at 3.
66. Shelton, supra note 22, at 3.
68. Id.
69. Pastor et al., supra note 47, at 338; Mohai et al., supra note 47, at 852.
70. Mohai et al., supra note 47, at 852.
71. Susan J. Elliott et al., The Power of Perception: Health Risk Attributed to Air Pollution in an Urban Industrial Neighbourhood, 19 RISK ANALYSIS 621, 628 (1999) (lifestyle disruption includes actions such as keeping the windows of a house shut or remaining indoors).
72. Id.
73. Id.
often the least equipped to mitigate and avoid the devastating impact of pollution, since they have been excluded from environmental decision- and policy-making processes.77

Documentation of environmental inequality began in the early 1970s.78 In 1982, African-American communities in North Carolina protested the disposal of PCB-laden soil at a local toxic-waste landfill.79 These protests, are often characterized as the beginning of the environmental justice movement,80 instigated the initial 1983 study by the General Accounting Office that documented racial disparities in the communities surrounding hazardous waste facilities in the Southeast.81 This movement responded to a specific form of environmental inequality, characterized as environmental racism.82 The emergence of the environmental justice movement had a significant impact on local politics, litigation strategies, community policing and environmental regulation. In 1987, the United Church of Christ published its seminal report on the racial and socioeconomic characteristics of communities with hazardous waste sites.83 It was within this complex social and political context that GNAs emerged as a strategy for community empowerment84 given significant social justice and civil rights concerns that environmental laws were being applied in a potentially discriminatory manner85 and simply furthering injustice.86

Since the early 1990s, there has been increasing attention and research

excellent history of the environmental justice movement and the disproportionate impact of environmental regulation on low-income communities and communities of color.


79. Agyeman, supra note 76, at 14.

80. Id.; Cole & Foster, supra note 76, at 19.


82. Brulle & Pellow, supra note 78, at 104–05 (quoting definition by Chavis: “Environmental racism is racial discrimination in environmental policymaking, the enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from leadership in the ecology movements.”).

83. Miranda et al., supra note 75, at 1757.

84. See Lewis & Henkels, supra note 5, at 134.

85. An early investigation by the National Law Journal illuminated the wide disparities in the penalties exacted for violations of environmental laws in predominately white versus minority communities. See Agyeman, supra note 76, at 15.

documenting and addressing environmental inequity. Studies have been conducted on a variety of pollutants and pollution sources including air pollution, Superfund sites, and manufacturing facilities. A robust literature has developed to document and study environmental inequities based on race and class, yet these disparities persist even as documentation has become more sophisticated and health impacts better understood. The United Church of Christ report was updated in 2007 using more advanced spatial analytical techniques to find that disparities in the location of hazardous waste sites persist. It found, for example, that over 9 million people live within three kilometers of commercial hazardous waste facilities in the United States and people of color make up a majority of the residents in these impacted communities.

Racial disparities are even more extreme when considering communities and neighborhoods with multiple facilities. In certain states such as California and Nevada, people of color represent more than 75 percent of the population in these severely impacted communities. In Michigan, disproportionate representation is higher than a factor of three. Such contemporary documentation of inequality linked to social hierarchies and disproportionate exposure to environmental risks illustrates the failures of the current environmental regulatory structure.

II. LEGAL REMEDIES FOR ADDRESSING ENVIRONMENTAL POLLUTION

Pollution is the primary target of environmental law. Consider that during the past forty years, hundreds of federal and state statutes, administrative regulations, and international treaties have established diverse approaches to addressing pollution of the air, water, and land. Yet the law continues to struggle with identifying precisely what constitutes pollution, how much of it is...
tolerable, and what we should do about it.

The United States has a relatively long history of pollution control legislation, partially due to its early industrialization. 96 From these efforts, environmentalists learned several lessons that remain true today. First, effective environmental regulation needs to be sufficiently specific to be capable of enforcement. Second, enforcement requires an independent regulatory authority with sufficient resources and expertise to exercise its regulatory functions effectively. Third, society has recognized that environmental harm and human health impacts are increasingly evident, tangible, and inescapable byproducts of modern economic activity.

Striking this balance between specific and effective regulation to address social and environmental harms and the corresponding economic benefits of polluting activity is precisely the goal of successful environmental regulation. 97 This socially desirable level of pollution, stemming from an efficient allocation of resources, is achieved when polluters are held liable for the associated costs of their activity, costs that are often imposed on third parties as negative externalities. “A negative externality is a cost imposed on society by the production or marketing of a good or service that the price charged for that good or service does not reflect.” 98 In this way, such external costs fall outside the market mechanism since the responsible party is able to avoid liability and therefore has little incentive for behavior change that undermines profitability. 99 As a result, firms “focus on short-term profits at the expense of worker, community, and environmental health.” 100

Given this economic reality, the burden of pollution falls disproportionately on communities that lack economic and political power. 101 In the face of such market failure 102 and social inequity, it is the inherent responsibility of government to change economic structures and force the internalization of externalities associated with pollution. Over time, several legal mechanisms have emerged for achieving this, including both citizen suits and municipal ordinances stemming from common law as well as state and federal environmental regulation, with a historical progression from the former to the latter. However, significant inadequacies remain apparent within each of

96. See Markham, supra note 26, at 12–23.
97. See Butler & Macey, supra note 6, at 29–30. The first economic theorist to consider solutions to dealing with pollution as an externality was Arthur Pigou, who proposed what is now commonly referred to as the “Pigouvian tax.” The goal of this tax is to align the economic self-interest of polluters with the interests of society. See Gideon Parchomovsky & Peter Siegelman, Cities, Property, and Positive Externalities, 54 WM. & MARY L. REV. 211, 221 (2012).
99. See id. at 218; Kenney et al., supra note 20, at 9.
101. See Cole, supra note 9, at 642.
102. See id.
these mechanisms as many of the costs associated with pollution continue to be externalized and placed on individuals and communities.

A. Common Law Remedies

Historically, pollution regulation has been dealt with at the local level, either by individuals using common law claims such as nuisance and trespass or by state and municipal governments enacting regulatory statutes. For example, a Massachusetts law in 1878 prohibited industrial and municipal discharge of refuse into waterways and a local ordinance in 1881 prohibited dense smoke in Chicago. Common law interpretations further codified the role of community policing in enforcement. For example, courts enforcing the common law permitted impacted individuals to break dams. Adopting a common law approach attempted to deal with the localized nature of pollution, allowing for judges to reflect on the customs and traditions of their communities.

Nuisance was the one of the earliest common law instruments for enforcing environmental rights. At common law, landowners enjoyed the right to the benefits of their land free from unwanted and unreasonable invasions by people or pollution. Nuisance claims could either be for public or private harm. Then, as now, a public nuisance claim could be brought against an action interfering with public health and rights. To raise a public nuisance claim, a plaintiff alleged “a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience.” By contrast, a private nuisance was “an unreasonable interference with the use or enjoyment of land owned or leased by a private plaintiff.” In order to make a determination regarding a private nuisance courts balanced the equities, namely weighing the severity of the interference with a plaintiff’s use of property against the possible adverse effects of

103. See MORAG-LEVINE, supra note 28, at 1.
104. Arnold W. Reitze, Jr., The Legislative History of U.S. Air Pollution Control, 36 Hous. L. Rev. 679, 680–81 (1999); Lewis, supra note 22, at 1560–64; Jason J. Czarnecki & Mark L. Thomsen, Advancing the Rebirth of Environmental Common Law, 34 B.C. Envtl. Aff. L. Rev. 1, 3 (2007). It should be noted that while common law remedies such as nuisance and trespass are still available contemporaneously, modern litigation tends to operate within the framework of environmental statutes.
105. MONTRIE, supra note 27, at 16.
106. Reitze, supra note 104, at 684.
107. MONTRIE, supra note 27, at 18.
109. Id. at 926–38.
110. Czarnecki & Thomsen, supra note 104, at 4.
111. Id.
113. Lewis, supra note 22, at 1562.
enjoining or limiting the defendant’s economic activity.\textsuperscript{114} Trespass was also used to provide equitable relief for pollution and to serve as a source of environmental regulation at common law. Trespass is “an intrusion or invasion of tangible property, either real or personal, which interferes with the possessor’s interest in the right of exclusive possession of the property.”\textsuperscript{115} As Frona Powell notes, a single intrusion can “constitute both trespass and nuisance because it interferes with both the right of possession and the use and enjoyment of the possessor’s property.”\textsuperscript{116}

An action alleging negligence “requires the plaintiff to prove that the defendant was required to meet a certain standard of care in conducting his affairs, that the defendant breached that duty, and that the conduct was the actual and proximate cause of the plaintiff’s injury.”\textsuperscript{117} In industrial pollution cases, “if a plaintiff can prove that an industrial defendant knew that the pollution was “substantially certain to follow” under an intentional trespass or nuisance theory, he can also often argue that the pollution was a “foreseeable” result of the defendant’s activities and that the defendant failed to use reasonable care to protect landowners near the pollution source.\textsuperscript{118} Strict liability for ultrahazardous activities is derived from \textit{Rylands v. Fletcher}\textsuperscript{119} and has also been utilized as a common law remedy for pollution control.

As society gained a more sophisticated understanding of pollution, it became clear that an exclusive reliance on private remedies was ill suited.\textsuperscript{120} Individual and community action was hindered by a number of different factors, including insufficient information regarding the actual harms inflicted\textsuperscript{121} and the significant costs associated with undertaking an avoidance or mitigation strategy.\textsuperscript{122} Today, for example, externalities are often concealed due to an inability to discern the exact source or responsible party to prove causation.\textsuperscript{123} Additionally, the precise nature of harms inflicted is often

\begin{footnotes}
\footnote{114}{Daniel A. Farber, \textit{The Story of Boomer: Pollution and the Common Law}, 32 \textit{ECOLOGY L.Q.} 113, 118 (2005).}
\footnote{115}{Frona M. Powell, \textit{Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases}, 21 \textit{REAL EST. L.J.} 182, 185 (1992); see Lewis, \textit{supra} note 22, at 1564.}
\footnote{117}{Powell, \textit{supra} note 115, at 192.}
\footnote{118}{\textit{Id.} at 192–93 (citing the \textit{RESTATEMENT (SECOND) OF TORTS} §8A (1965)).}
\footnote{120}{Reitz, \textit{supra} note 104, at 681.}
\footnote{121}{See supra Part IA.}
\footnote{122}{Gregg P. Macey, \textit{Coasean Blind Spots: Charting the Incomplete Institutionalism}, 98 \textit{GEO. L.J.} 863, 865 (2010).}
\footnote{123}{See The Am. Lung Ass’n, \textit{supra} note 48, at 364–66; Catherine M. Sharkey, \textit{Punitive Damages as Societal Damages}, 113 \textit{YALE L.J.} 347, 367 (2003); see also supra Part IA (discussing the inadequate data on toxicity).}
\end{footnotes}
unknown or uncorroborated scientifically. Common law failed to alleviate the burden on communities of policing and monitoring to produce complete inventories of toxic pollutants or comprehensive studies. Moreover, the absence of such information today severely curtails the efficacy of remediation and exacerbates the problems associated with a reliance on courts to remediate the complex health and environmental problems arising from pollution.

Internalizing the externalities associated with pollution is also hindered by the significant transaction costs associated with mitigation, such as filing common law suits, discovery and litigation, negotiations, contract specification, inspection, and enforcement. Affected parties necessarily incur the costs of time, effort, and resources. These costs counterbalance the benefit of seeking remediation of any kind. Additionally, avoiding the impacts of pollution entails inconvenience and substantial cost of relocating out of the impacted region.

These barriers gain importance in the context of addressing the disproportionate impact that environmental pollution has on the health and well being of low-income communities and communities of color. Scholars have repeatedly documented the limitations of common law litigation to address environmental justice claims. As Paul Maynard Hendrick argues, “environmental justice advocates acknowledge that the doctrine has not overcome the remedial limitations of . . . environmental law, civil rights law, administrative law, [and] tort law.” Alice Kaswan attributes the “consistent” failure of environmental justice equal protection cases in part “to the courts’ findings, under the facts of those cases, that substantive and procedural requirements and norms were followed.” Tessa Meyer Santiago argues that very few plaintiffs “meet the burden of proof under current judicial

124. Sharkey, supra note 123, at 367; see also supra Part I.A.
125. Czarnecki & Thomsen, supra note 104, at 7.
127. Coase, supra note 126, at 32; Paben, supra note 3, at 251. Paben notes that another concern with settlements in environmental tort cases is the administration of settlements. Paben, supra note 3, at 251. Tort lawyers are typically not environmental justice experts. While many may take cases because they want to see justice served for the community, justice is frequently defined by monetary compensation. Challenges come not just from differing goals or personal experiences, but also from the system itself, which, through monetary remedies and contingency-fee arrangements, creates a monetary incentive for lawyers to take these cases.
128. See Monsma, supra note 86, at 451–54, 458, 466–68; Paben, supra note 3, at 250–52 (arguing that the use of common law tort claims to address environmental harms requires reliance on extensive scientific information and expert testimony which frequently makes these cases economically impractical for low-income communities or environmental justice clients).
remedies."131

As was the experience for activists in Portland, bringing common law claims for pollution can be overwhelming for communities due to the significant transaction costs, magnitude of the environmental problem, and perceived lack of remedies. Such barriers exemplify why communities have increasingly sought remedies that more effectively internalize the associated external costs either through federal and state regulatory schemes or direct engagement with polluters attempting to reach corporate-community agreements.132

B. State Responses to Pollution

Mounting public concern and a progression in scientific understanding of pollution prompted a shift in the regulation of environmental hazards from municipalities133 to state governments.134 Having recognized that common law remedies inadequately protected community health and environmental interests,135 states began developing regulatory structures to address the impact of pollution.136 For example, Massachusetts became the first state in 1910 to regulate air pollution.137 In 1947, California followed by regulating air pollution in the Los Angeles area—much of which originated outside city limits, making local ordinances ineffective.138 In 1951, Oregon lead the way in creating an agency to regulate air pollution, and by 1960 a total of seventeen states had such agencies.139 The transition from a reliance on the common law to a more formalized statutory and administrative approach for pollution control attempted to alleviate the burden on impacted communities for

132. See Monsma, supra note 86, at 472–77 for an argument for voluntary, stakeholder-based agreements based on the principle of corporate social responsibility to deal with pollution, given the failure of environmental law to protect communities.
133. In 1869, Pittsburgh passed the first local air pollution ordinance in the United States, followed by Cincinnati in 1881 and St. Louis in 1893. Jacobson, supra note 36, at 85. In fact, 175 municipalities had air pollution ordinances by 1920, which grew to 200 by 1940. Id.
136. See Jacobson, supra note 36, at 85.
137. Id. at 85.
138. See Morag-Levine, supra note 28, at 125.
remediation and enforcement.140

During this time, state efforts benefited significantly from early federal technical assistance in studying and regulating air pollution.141 Beginning in the mid-1960s, political pressure, increased scientific understanding, state failures to protect public health and the environment, and community outcry prompted the federal government to reevaluate its role in environmental regulation.142 One such concern that supported a stronger federal role was a fear that states would compete for economic growth by limiting environmental regulation in a “race to the bottom.”143

Since federal preemption grew soon after states had begun to address environmental pollution, some proactive state regulatory regimes had little time to test efficacy. In the context of water pollution, for example, each state passed individual legislation by 1966, but the federal Clean Water Act followed six years later with a national statutory regime. Indeed, initial studies of water quality under the new federal legislation documented significant improvements during the preceding decade, precisely as states had begun to take action.144 Since the expansion of federal law, advocates have suggested that

140.  Czarnezki & Thomsen, supra note 104, at 7.
141.  Jacobson, supra note 36, at 210–11 (discussing the Air Pollution Control Act of 1955, which provided $3 million per year for five years to the Department of Health, Education, and Welfare to both study air pollution and to aide states in their efforts to control it).
144.  A. Myrick Freeman III, Water Pollution Policy, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 97, 114 (Paul R. Portney ed., 1990) (“The results of the EPA’s first National Water Quality Inventory, conducted in 1973, indicated there had been significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacteria.”).
environmental issues are inherently local and have come to the conclusion that state-based tort law may be more protective than the federal regime.145

As the federal role expanded, local ordinances lost significance and states became beholden to ensuring minimum federal requirements while simultaneously implementing new regulatory schemes.146 Even with increased federal preemption beginning in the 1960s, however, states have not lost all authority to regulate pollution.147 Consider the example of air pollution regulation in Oregon, a state that has passed more stringent requirements than the federal Clean Air Act148 (CAA) to reduce the health impacts of pollution and improve environmental quality.149 The Oregon state air toxics program was first implemented in 2003 and established a number of different regulatory components, including an Air Toxics Science Advisory Committee (ATSAC) and ambient pollution benchmark levels protective of human health.150 The program required the ATSAC to identify and categorize air toxics and set recommendations regarding ambient benchmark levels.151 The Oregon Environmental Quality Commission (EQC) would establish benchmarks for ambient air pollution in different geographic regions and the DEQ oversees implementation, monitoring, and enforcement.152 In setting ambient

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145.  William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 N.Y.U. L. Rev. 1547, 1556 (2007) (“The common law system’s independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation.”); Czarnezki & Thomsen, supra note 104, at 35 (“State common law doctrines can effectively determine what is an unreasonable act using state promulgated environmental standards, and provide for alternative or additional remedies. Meanwhile, judicially crafted remedies like the common law fund—allowing portions of state court damages to be paid to a restoration fund—can effectively promote both restoration and deterrence where federal action has proven less than effective.”); Tom Kuhnle, Note, The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination, 15 STAN. ENVTL. L.J. 187, 229 (1986) (concluding “common law actions currently stand as an alternative to the arbitrary rules, delays, and poor drafting accompanying CERCLA”).


149.  See Flatt, supra note 2, at 123.

150.  Id. at 152.

151.  Id. at 153 (noting that the Air Toxics Science Advisory Committee uses five criteria in prioritizing recommendations: (1) toxicity and potency; (2) exposure and number of people at risk; (3) impact on sensitive human populations; (4) number and degree of ambient benchmark exceedances; and (5) potential to cause harm through persistence of bioaccumulation).

152.  Id.
benchmarks, the EQC would weigh competing criteria\(^\text{153}\) and attempt to ensure an excess lifetime cancer risk level no greater than one in 1 million.\(^\text{154}\)

Oregon also requires monitoring and testing of ambient concentrations, but leaves flexibility regarding how this is achieved.\(^\text{155}\) Such flexibility means that the DEQ relies heavily on self-reported emissions data,\(^\text{156}\) which is part of the Title V\(^\text{157}\) permitting process under the federal CAA. With this data the department models ambient concentration levels.\(^\text{158}\) Thus, there is significant room for error in the model by relying on data exclusively from Title V permitted facilities and excluding other sources of pollution.\(^\text{159}\) Indeed, ambient monitoring studies in the Portland area have documented concentrations of air toxics that far exceed federal standards.\(^\text{160}\) The DEQ’s reliance on models as opposed to direct monitoring stems from the enormous expense of on-the-ground ambient monitoring\(^\text{161}\) combined with severe cutbacks in the agency’s budget in recent years.\(^\text{162}\) While Oregon has adopted stricter pollution control mechanisms, our findings suggest these inadequately protect communities and incorrectly place the onus on communities to police industrial polluters.

C. Federal Responses to Pollution

The federal government was not far behind states as they began to enact legislation, create new regulatory agencies and coordinate with municipalities and communities. While involvement first concerned federal assistance for state efforts to regulate air pollution,\(^\text{163}\) the federal purview of environmental law quickly expanded. The CAA of 1963\(^\text{164}\) was the federal government’s first attempt to regulate emissions from smokestacks.\(^\text{165}\) These efforts expanded


\(^{154}\) Flatt, supra note 2, at 153.

\(^{155}\) OR. REV. STAT. § 468A.070(1) (“[T]he Department of Environmental Quality shall establish a program for measurement and testing of contamination sources and may perform such sampling or testing or may require any person in control of an air contamination source to perform the sampling or testing, subject to the provisions of subsections (2) to (4) of this section.”).

\(^{156}\) See Flatt, supra note 2, at 154. Under section 468A.070(1), the Oregon Department of Environmental Quality can perform monitoring itself or rely on self-reporting.


\(^{158}\) See Flatt, supra note 2, at 154. As Ross and Brown also note, the EPA relies on engineering estimates of ambient concentrations based on emissions data from regulated emitters. See Ross & Brown, supra note 53, at 57. In this way, Oregon has followed the federal example.

\(^{159}\) See Flatt, supra note 2, at 155.

\(^{160}\) Tam & Neumann, supra note 42, at 137–42; see also Part I.A.

\(^{161}\) Interview with Andy Ginsburg, Air Quality Div. Adm’r, Or. Dep’t of Envtl. Quality, & George Davis, Envtl. Eng’r., Or. Dep’t of Envtl. Quality, in Portland, Or. (July 19, 2012).


\(^{163}\) See supra note 140.

\(^{164}\) See supra note 147.

\(^{165}\) JACOBSON, supra note 36, at 211.
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with the Motor Vehicle Air Pollution Control Act of 1965\textsuperscript{166} and the Air Quality Act of 1967.\textsuperscript{167} With dominant air pollution regulations in place, the federal government delegated the development and implementation of controls for stationary sources of pollution to the states.

During the 1970s, federal involvement in environmental law grew tremendously. New federal environmental regulations included the National Environmental Policy Act of 1970,\textsuperscript{168} the Clean Water Act of 1972,\textsuperscript{169} and the Endangered Species Act of 1973.\textsuperscript{170} Further, the EPA consolidated regulatory authority of five major environmental statutes previously administered by different agencies following its inception in 1970 by executive order.\textsuperscript{171} This executive order declared that “[d]espite its complexity, for pollution control purposes the environment should be perceived as a single, interrelated system.”\textsuperscript{172} This early federal regulation began with a command-and-control approach that set standards regarding emission levels and abatement technology.\textsuperscript{173} Over time, however, a technology-based regime has been superseded by a stronger focus on human health.

Although federal action brought the promise of increased efficacy and uniformity, federal regulation has also proven inadequate in many ways.\textsuperscript{174} After nearly half a century under a complex and extensive set of environmental regulations,\textsuperscript{175} it is increasingly evident that while advances have been made, the current structure is insufficient and fails to meet contemporary and future environmental challenges.\textsuperscript{176} The federal role began with crucial funding to

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  \item \textsuperscript{166} See 42 U.S.C. § 7521 (2006).
  \item \textsuperscript{167} Id. § 1857.
  \item \textsuperscript{168} See id. § 4321.
  \item \textsuperscript{169} See 33 U.S.C. § 1318 (2012).
  \item \textsuperscript{170} See 16 U.S.C. § 1531 (2012).
  \item \textsuperscript{171} Uwe M. Erling, Approaches to Integrated Pollution Control in the United States and the European Union, 15 TUL. ENVTL. L.J. 1, 15 (2001).
  \item \textsuperscript{172} Message of the President Relative to Reorganization Plan Nos. 3 and 4 of 1970, July 9, 1970, in U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 295 (1970).
  \item \textsuperscript{174} Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 IOWA L. REV. 545, 579–80 (2007).
  \item \textsuperscript{175} Mary Christina Wood, Advancing The Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift, 39 ENVTL. L. 43, 78 (2009).
  \item \textsuperscript{176} Karl Hausker, Reinventing Environmental Regulation: The Only Path to a Sustainable Future, [1999] 29 Envtl. L. Rep. (Envtl. Law Inst.) 10,148, 10,148 (“The current system is inadequate for the challenges ahead.”); Debra S. Knopman & Marc K. Landy, A New Model of Governance, BLUEPRINT MAG., Sept. 1, 2000, at 34, 34 (arguing that environmental regulations “are increasingly inefficient in a fast-paced economy and too rigid” to address current ecological concerns); Case, supra
\end{itemize}
support and research air pollution regulation efforts, but this has not been adequately expanded. As noted above, significant information gaps persist regarding both source-level emissions data and the human and environmental impacts of pollution. The quality of most water, air, and land in the United States remains unknown, impeding federal, state, and local action. Despite extensive federal environmental law, statutes have not seen timely and effective implementation in order to successfully protect communities. Some scholars have noted that the primary function of the agencies charged with environmental protection is to process and grant permits that “affirmatively sanction destruction of resources by private interests.”

Other scholars have argued that the failure of the EPA in the 1970s and 1980s can be attributed to the government’s risk assessment approach to pollution control. This approach focused on management through treatment and disposal of pollutants rather than a pollution prevention model that would have required a fundamental rethinking of industrial processes, production methods, and technological innovation. Even after major toxic waste disasters in the 1980s, the pollution control model continued to be the dominant regulatory strategy. While it appeared that in the 1990s the federal regulatory structure would shift to a pollution-prevention paradigm in response to widespread criticism and grassroots activism, such a shift failed to effectively occur. As Robert Gottlieb noted, pollution prevention remained external to the EPA’s decision making and did not become the nexus for federal environmental regulatory reform.

note 173, at 16–26 (describing the American environmental regulatory landscape as a battleground wrought with distrust and conflict).


178. See Wagner, supra note 33, at 1624.


180. Wood, supra note 175, at 55.


182. Robert Gottlieb et al., By Air, Water, and Land: The Media-Specific Approach to Toxics Policies, in REDUCING TOXICS: A NEW APPROACH TO POLICY AND INDUSTRIAL DECISION-MAKING, supra note 181, at 25, 50; Mayer et al., supra note 177, at 578.

183. Gottlieb et al., supra note 181, at 129.


185. Robert Gottlieb, Conclusion: Barriers and Opportunities for Pollution Prevention, in REDUCING TOXICS: A NEW APPROACH TO POLICY AND INDUSTRIAL DECISION-MAKING, supra note 181, at 421, 421–22. Gottlieb argues that the failure to transition from pollution control to pollution
In the case of air pollution, the focus of the GNA advocacy in Portland, the CAA Amendments of 1970 pioneered a comprehensive and standardized approach to regulation, replacing divergent localized efforts and concentrating the policy focus on public health. Nonetheless, air pollutants continue to pose a serious threat to human health. The basic structure of the CAA established three separate regulatory frameworks to deal with different classes of pollutants: “criteria,” “hazardous,” and “designated.” The first two categories are regulated under the National Ambient Air Quality Standards (NAAQS) and National Emission Standards for Hazardous Air Pollutants (NESHAP), respectively. These standards are based solely on public health risk, thereby relying heavily on scientific data. However, New Source Performance Standards (NSPS) for “criteria” pollutants mandate the use of available control technologies and account for compliance costs in this determination. The NAAQS program was delegated to individual states for implementation while the federal government retained much more control in implementing NESHAP and NSPS.

While the focus on health risk in developing standards under NAAQS and NESHAP was positive, its required reliance on scientific risk assessment severely curtailed implementation. For example, NESHAP implemented technology standards for regulated facilities, but only subsequently and with significant time delay did it address health impacts as “residual risks.” Such an approach fails to adequately monitor ambient concentration levels or to consider the synergistic health effects of exposure to multiple pollutants. Moreover, operating permits under the CAA can reference emissions formulas for monthly or annual averages, leaving the potential for acute exposure from short-term spikes in emissions.

In the case of Oregon, the use of annual emissions formulas allowed continued operation of the ESCO foundry despite a major failure of the prevention increased attention by grassroots activists on corporate-community agreements to more effectively address the seemingly voluntary nature of pollution prevention.

188. See Flatt, supra note 2, at 111; see generally Ross & Brown, supra note 53 (criticizing the EPA’s methodology for evaluating health risks from hazardous air pollutants).
189. MORAG-LEVINE, supra note 28, at 15.
190. See id. at 15–16.
191. Id. at 16.
192. See id. at 15–20.
193. See Flatt, supra note 2, at 111; MORAG-LEVINE, supra note 28, at 19.
195. Id. at 57, 65.
196. Id. at 63.
baghouse (the emissions filtering system) without a violation of the operating permit. During this period, the neighboring communities experienced acute exposure to a variety of pollutants legally emitted without any filtration. In this regard, despite the promise of a “federal, uniform, and proactive” regulatory structure to protect the public from air pollution, failures and shortcomings of the CAA have returned the onus to states, local governments and communities to mitigate these harms. It is in this regulatory context, which concentrates on the symptoms of pollution rather than its fundamental causes, that individuals and communities have turned to other means of improving their immediate conditions, whether by engaging in monitoring efforts, initiating citizen suits, or negotiating agreements.

III. GOOD NEIGHBOR AGREEMENTS

A. Background

While individuals and impacted communities have used many avenues to mitigate the harms of exposure to pollution and toxins, GNAs are unique in that they are corporate-community agreements designed to cooperatively address the negative impacts of industrial pollution or other nuisances. Influenced by contract law, GNAs have been characterized as “second-order regulatory agreements” since they are public-private in nature and can focus not only on environmental pollution but also on larger issues of community health or worker safety.

198. There are conflicting reports regarding the exact duration, but the incident began on July 9, 2010 and ended on July 15, according to the Northwest Examiner, or on August 19, 2010, according to Neighbors for Clean Air and the Northwest District Association. See Allan Classen, Esco Admits Air Pollution Leak, NW. EXAM'R, Aug. 2010, at 1; Short Term Air Toxics Benchmarks, NEIGHBORS FOR CLEAN AIR (Apr. 4, 2011, 8:44 PM), http://www.whatsinourair.org/2011/04/04/short-term-air-toxics-benchmarks/; Sharon Genasci, NWD HA & E Minutes, NW. DIST. ASS’N (Aug. 12, 2010), http://www.northwestdistrictassociation.org/?p=1084.

199. See sources cited supra note 198.

200. MORAG-LEVINE, supra note 28, at 1.

201. See supra note 10.

202. See Adler, supra note 3, at 41–51.

203. See supra note 22.

204. See Lewis & Henkels, supra note 5, at 134.

205. See id.; Vandenbergh, supra note 22, at 2064; KENNEY ET AL., supra note 20, at 1.


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GNAs emerged from two parallel movements, the civil rights movement of the 1960s and the environmental movement of the 1970s, as advocates struggled with community marginalization and environmental inequity.208 Early scholarship documenting GNAs focused on the use of such agreements in the context of the environmental justice movement and how they could present a “viable and promising”209 tool to positively redefine the roles of industries, regulators, and citizens.210 Redefining the role of the community through the principle of community empowerment was a central component of Sanford Lewis’ extensive practice in developing, negotiating, and implementing GNAs for more than a decade.211

The first GNA was negotiated in Worcester, Massachusetts in 1978 as a community strategy to remediate issues of environmental pollution.212 Since then GNAs have developed as a nonlitigious method of dispute resolution among corporations, workers, environmentalists, activists, and community organizations.213 Whether exclusively addressing environmental issues or including nonenvironmental concerns such as collective bargaining or labor relations, one goal of GNAs is to increase public participation.214 GNAs have been defined as “instruments that provide a vehicle for community organizations and a corporation to recognize and formalize their roles within a locality . . . [in order to] foster sustainable development in a community by

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208. See Lewis & Henkels, supra note 5, at 134 (discussing the emergence of GNAs); LAZARUS, supra note 84, at 788–89 (discussing the development of the environmental movement); Kaswan, supra note 24, at 259–65 (discussing the historical background from which the environmental justice movement arose); Monsma, supra note 84, at 445–47 (discussing the context of the environmental justice movement); Siegel, supra note 5, at 149–50 (discussing GNAs in the context of the limited options for redress for environmental justice claims because of both substantive and procedural limits, resources, and opportunities).

209. See, e.g., Adriatico, supra note 4, at 285, 288–89 (arguing that GNAs could force increased self-policing of industry without compromising environmental standards).

210. See Pirk, supra note 4, at 238–40 (exploring how citizens in communities of color and low-income communities can have an equal voice in decision making to solve local environmental problems); Siegel, supra note 5, at 171 (framing GNAs as a practical approach for communities to bargain with industry for positive reforms); see generally KENNEY ET AL., supra note 20, at iii (reviewing 11 GNA case studies).


212. Lewis & Henkels, supra note 5, at 138; Lewis, supra note 22, at 1580–88 (using GNAs as an alternative to common law and statutory law approaches to environmental regulation, as it merges public participation and self-compliance).

213. See Pellow, supra note 1, at 54–55; KENNEY ET AL., supra note 20, at 13–16. See generally Biglan, supra note 98 (discussing the inadequacy of environmental protections, especially given the increase in corporate power over government and the tailoring of environmental laws to the interests of business).

214. Campbell-Mohn, supra note 206, at 239
reconciling economic development with the community’s welfare.”

GNAs emerge from a lengthy negotiation process that seeks to balance economic, environmental, and health considerations. Community members’ interests, rather than regulatory officials, policy experts, lawyers, or other professionals, should drive the negotiation process. As evidenced by this case study, divergent community interests can present challenges to the negotiation process. Further, just arriving at the negotiating table with corporate management can present a tremendous hurdle for community activists given that corporate interests are often influenced by local, regional, and global economic conditions. This is particularly true in politically disenfranchised and historically marginalized communities. Moreover, lengthy negotiations offer ample opportunities for failure and by no means guarantee that an agreement will be reached. This negotiation process exemplifies Coasian bargaining, which seeks to ameliorate negative externalities, yet it also requires significant transaction costs for the community in the form of time, effort, resources, and legal representation. Given these significant transaction costs and limited community resources, the very presence of a GNA reveals the severity of environmental harm and the critical need for a restructuring of environmental regulation.

One significant challenge of the negotiation process is that both sides must compromise in order to find a suitable solution. As Janet Siegel notes, polluting facilities often concede emission controls, audits, citizen oversight, or

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215. Lewis & Henkels, supra note 5, at 138; see also Campbell-Mohn, supra note 206, at 239; Adriatico, supra note 4, at 288 (describing GNAs as “empowering” locals); AGYEMAN, supra note 76, at 20.
216. See Pirk, supra note 4, at 239. While the focus of this Article is on GNAs, they are by no means the only corporate-community agreements that have been developed to address systematic disenfranchisement of low-income communities and communities of color. For example, community benefit agreements are private contracts between a developer and a coalition of community interest groups. Community benefit agreements have been used in the planning process to create legally enforceable contract terms and hold developers accountable for their impact on neighborhoods. See Salkin & Lavine, supra note 22, at 177–81.
217. Cf. Pirk, supra note 4, at 212–13 (noting that experts “may have a narrow view on the issue and may not take into consideration the values of the surrounding community”).
218. Corporate management has little incentive to give credence to community concerns or entertain negotiations in the absence of a serious threat. This can take the form of a citizen suit pursuant to environmental statutes or a toxic tort action, community obstruction of a vital permit approval or renewal process, direct actions, and other methods that raise public awareness, thereby increasing the perceived costs of inaction. See Siegel, supra note 5, at 172–73; see also Shelton, supra note 22, at 16 (noting that “many developers treat direct negotiations with the community as a last, rather than first, option”).
219. See supra note 9 and accompanying text.
220. See Lewis & Henkels, supra note 5, at 148.
221. COASE, supra note 126.
222. See Pellow, supra note 1, at 55.
223. See Siegel, supra note 5, at 172; KENNEY ET AL., supra note 20, at 15–20; Adriatico, supra note 4, at 290–91.
other economic investments. Given the localized context of GNAs, signatories to an individual agreement may agree to lend their support and to settle, discontinue, or forgo any legal suits. As discussed below, the community groups in Portland agreed to limit their ability to bring any type of suit against ESCO except in the case of noncompliance or breach of the agreement by ESCO. GNAs have “include[d] clauses on community access to information, negotiated improvement in pollution prevention, local job guarantees, and other local economic benefits.” Further provisions may grant the community the right to inspect the facility, establish a stakeholder audit, and ensure accident preparedness.

Different models of GNAs have evolved over time. Some agreements are legally enforceable, with specific contractual stipulations for the community signatories and the corporation. Other agreements are based “on a relationship-building model in which the agreements contain no legally binding language.” Implementation and accountability are based on a continued relationship between the parties and integration of the GNA terms and conditions into the formal regulatory structure, such as an operating permit or a settlement for damages caused by industrial accidents. The signing of a formal agreement does not ensure self-execution or implementation success and, as other case studies have demonstrated, implementation success is ultimately linked to continued community mobilization and public pressure. Even when formal GNAs are reached and included in a permit process, as was the case in Portland, the potential positive human health impacts of the agreement are minimized by existing shortcomings of the state regulatory structure.

224. See Siegel, supra note 5, at 172.
225. See Vandenberghe, supra note 22, at 2065–66; Shelton, supra note 22, at 16; Kenney et al., supra note 20, at 1.
226. AGYEMAN, supra note 76, at 20.
227. See Lewis & Henkels, supra note 5, at 139–40; Pirk, supra note 4, at 238; Kenney et al., supra note 20, at 1.
228. See Kenney et al., supra note 20, at 15.
229. See Lewis & Henkels, supra note 5, at 141; Kenney et al., supra note 20, at 15.
230. See Lewis & Henkels, supra note 5, at 142.
231. See Interview with Ginsburg & Davis, supra note 161; Gregg P. Macey & Lawrence Susskind, The Consensus Building Institute, Using Dispute Resolution Techniques to Address Environmental Justice Concerns: Case Studies 47 (2003) (noting that a GNA became part of the permit modification proposal for the Rhone-Poulenc facility in Manchester, Texas); Kenney et al., supra note 20, at 34 (describing a community challenging permit modification for mine expansion and a lawsuit before the regulatory agency led to the negotiation of the Stillwater Mine GNA); Lewis, supra note 22, at 1586 (noting that the GNA between Chevron and Communities for a Better Environment was included in the permitting process for plant expansion); Kenney et al., supra note 20, at 49 (noting that the Idaho Dairies GNA arose out of community challenge to water permit); Lewis, supra note 18, at 2.
232. See Lewis & Henkels, supra note 5, at 142.
233. See Kenney et al., supra note 20, at 9–11.
234. Kenney et al., supra note 20, at 15 (distinguishing formal, i.e. written and legally binding agreements, from “handshake” agreements between community groups and companies).
Consistent with Douglas Kenney’s findings in 2004, the Portland case study reaffirms that while GNAs provide the possibility for improving community health, they should not be conceptualized as a replacement for strong environmental regulation requiring industrial polluters to internalize the costs of their activity. For example, the activists’ choice between emission reduction and sustained “fenceline” monitoring of ESCO’s operations exemplifies the critical need for strong regulation coupled with DEQ monitoring and enforcement.

B. The ESCO Good Neighbor Agreement

Portland has a long history of public participation in local politics and environmental activism, especially in the Northwest District. Demographically, residents of the Northwest District tend to be considerably more white with higher levels of education than those living in the rest of the city. While there is considerable variation between neighborhoods, the district includes one of the city’s wealthiest areas near Chapman Elementary School, the site that helped launch the community campaign against ESCO. It also represents one of Portland’s most densely populated areas. Though the neighborhood has seen increased growth and income through gentrification, the changing demographics have not changed the neighborhood’s close proximity to significant industrial activity that releases toxins and pollutants into the environment on a daily basis.

The Northwest District Association (NWDA) began its air quality monitoring efforts in the early 1990s. These efforts were instrumental in providing the framework for the involvement of other stakeholders and the collective negotiations that ultimately culminated in the execution of a formal agreement with ESCO and community organizations as signatories. The ESCO community campaign, collaboratively spearheaded by the NWDA and Neighbors for Clean Air (NCA), began in 2009. Throughout the campaign, community stakeholders adopted a wide range of advocacy strategies to bring ESCO to the negotiating table. The goal of reaching a formal GNA became a

235. See Pellow, supra note 1, at 55; Lewis, supra note 18, at 7.
primary focus of the campaign in 2010, and in November of 2011 such an agreement was reached.

This Part initially presents background information on the community signatories and ESCO. It then places the ESCO agreement in the larger context of the community campaign, primarily undertaken by the NWDA and NCA, and ESCO’s Title V permitting process. This Part outlines the terms and conditions of the agreement, considering the equitable balance of community benefits gained by the agreement and the costs incurred by the community signatories of negotiation and implementation.

1. ESCO

As a company, ESCO has a long history in Portland; it established its first steel foundry in Northwest Portland in 1913 and its operations have continued in the area ever since. The company began as the Electric Steel Foundry Company and manufactured steel alloy products primarily for the timber industry in the Pacific Northwest. The ESCO brand was launched in 1926. The company’s operations expanded internationally in the 1950s as the company grew its manufacturing base for the construction and mining industries. Today, ESCO specializes in producing wear parts and replacement products, such as giant steel teeth for shovel machines used in mining and a variety of other industries. The company operates more than twenty factories in eighteen countries, employing over 5500 people, including about 1050 in the Northwest Portland Industrial Area.

ESCO is responsible for the release of a wide range of odors, particulates, air toxins, and pollutants into the Portland airshed, though the exact volume and composition of these emissions is unknown. Reporting data and other evaluations demonstrate the impediments to effective monitoring and regulation. According to the DEQ, ESCO’s emissions include thirty-seven different HAPs totaling 46,993 pounds of emissions annually. Conversely, the EPA’s Toxic Release Inventory reports data for sixteen different chemicals from ESCO’s two Portland facilities with an annual on-site release into the

243. ESCO History, supra note 242.
244. Read, supra note 241.
245. Learn, supra note 238.
environment of 19,637 pounds. Additionally, a feasibility study for near-real-time fenceline monitoring completed by Cooper Environmental Services, LLC collected ambient concentration levels for twenty-four different elements but failed to include aggregated emission data over the course of study.

Given these competing data, it is difficult to identify the exact level and precise composition of ESCO’s emissions, which include harmful metallic compounds such as lead and manganese. In addition to the potential harm to human health, foul odors inundating the surrounding neighborhood constitute the most palpable and readily apparent impact of ESCO’s operations, as odors are a typical concern with foundries. Neighborhood activists have long documented the impacts of ESCO’s operations through odor complaints and other monitoring efforts.

2. The Northwest District Association

Portland has a long history of citizen participation in local government. In Portland, for example, there are numerous neighborhood councils and associations that address issues of land use, economic development, air quality, public health, and quality of life. Given the importance of community-specific information for environmental decision making, the structure of neighborhood associations promotes bottom-up participation and enhances the political capacity of represented communities. In contrast to previously studied GNAs, the neighborhood association structure in Portland suggests individuals and community organizations have a heightened ability and institutionalized mechanisms to more effectively leverage their political power in the context of negotiations. As discussed below, sustained community policing efforts by the NWDA with respect to air quality coupled with the existing political structures preliminarily indicate that an agreement with ESCO effectively represents the diverse and critical needs expressed by each of the

249. EMISSION DETAIL SHEETS, supra note 246; Facility Profile Report: ESCO Corp, 2211 NW Brewer St, supra note 247; Facility Profile Report: ESCO Corp, 2141 NW 25th Ave, supra note 247.
250. See generally MORAG-LEVINE, supra note 28, at 143–78 (discussing regulation of odors).
251. Learn, supra note 238.
253. Id. at 38.
254. Id. at 37.
The NWDA is one of the oldest neighborhood associations located in Portland. Since its creation it has worked on a variety of local issues, such as air quality, transportation, safety, housing, and planning through various committees and working groups. NWDA’s Air Quality Committee (AQC), formerly known as the Health and Environment Committee, has focused considerable time and energy on community policing and monitoring the air quality in the Northwest region since 1992. The mission of the AQC is “to focus its energies and resources on the reduction of toxic air pollutants, including volatile organic compounds (VOCs) and particulate matter (dust), primarily from fixed industrial sources.”

The work of the AQC first began with community surveys about industrial odors. Four years later, the AQC drafted the *Northwest Portland Air Pollution Action Guide* in an effort to spur increased community policing and monitoring of air toxins present in the district. Shortly after the guide’s publication, the AQC received funding from the EPA to use bucket monitors in the neighborhood. Based on the results of this monitoring, in 1999 the AQC released a report recommending the DEQ establish an ongoing ambient HAP monitoring program. In 1998, the AQC began direct action against industrial polluters by testifying at Title V operating permit hearings for ESCO. The NWDA subsequently began a campaign for an independent consultant to audit the ESCO foundry in order to address HAP emissions. At the same time, Sharon Genasci filmed a short documentary film about neighborhood air quality activism in Oregon, Washington, and California to bring greater attention to the issue and to create additional pressure on the DEQ to increase

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256. Interview with Genasci, supra note 50.
260. AIR QUALITY COMMITTEE WORK PLAN, supra note 259.
261. See sources cited supra note 258.
262. Id. The 1997 bucket monitoring program was designed by Dr. Amundson and developed into a collaboration with the AQC and the DEQ. The AQC and DEQ monitors established that residents in Northwest Portland were subjected to higher concentrations of air toxins than other sites in Portland. See ROBERT AMUNDSON & GREGG LAUDE, 1997–1998 NORTHWEST PORTLAND AIR TOXICS MONITORING PROJECT (1999), available at http://yosemite.epa.gov/oar/communityassessment.nsf/6ce396ab3fa98ee485256b08000ac9d4/$FILE/NW_Portland.pdf.
263. AMUNDSON & LAUDE, supra note 262; AIR QUALITY COMMITTEE WORK PLAN, supra note 259.
264. Interview with Genasci, supra note 50; AIR QUALITY COMMITTEE ACHIEVEMENTS, supra note 258.
accountability for the release of air pollutants into the Northwest District.265
Throughout the late 1990s and early 2000s the AQC took an active role on issues related to air quality in Portland. The AQC filed lawsuits, conducted community monitoring, held community forums, met with the DEQ, and developed reports documenting high levels of air toxins.266 In 2002, the AQC released its fourth report to the DEQ on air monitoring data collected in the neighborhood. This report found benzene and acrolein concentrations significantly higher than the EPA’s benchmarks levels.267 The release of this report catalyzed community action. Members of the NWDA began organizing to testify against ESCO at its 2005 Title V permit renewal hearing. The efforts of the NWDA, including long-term air pollution documentation, laid the foundation for the organization and the NCA to collaborate on future campaigns.268 In 2009, the NWDA began a multi-year campaign with NCA to respond to increasing health risks associated with air pollution in the Northwest region and the failure of the DEQ to protect the community from industrial pollution.269 This three-year campaign culminated in the signing of the ESCO GNA and, as discussed below, the agreement was conditioned upon the community signatories not intervening in the renewal of ESCO’s Title V permit by the DEQ.

3. Neighbors for Clean Air and Earthrise Law Center

In 2009, NCA was founded by local Northwest neighborhood resident Mary Peveto in response to increased documentation of high pollution levels at Chapman Elementary.270 NCA became a citywide coalition of residents seeking “to make public health, with special consideration for children’s health, a priority in Oregon’s air quality standards and programs for toxic emissions.”271 The focus of NCA is collaborative action with elected officials.

266. AIR QUALITY COMMITTEE WORK PLAN, supra note 259.
268. Interview with Genasci, supra note 50; AIR QUALITY COMMITTEE WORK PLAN, supra note 259. In 2005, the AQC also created a new odor survey form and electronic tool for community members to register complaints and received 1050 complaints. AIR QUALITY COMMITTEE ACHIEVEMENTS, supra note 258.
269. Interview with Peveto, supra note 50; Interview with Genasci, supra note 50.
270. Interview with Peveto, supra note 50 (stating that her interest in the issue of air pollution in Portland was spurred by a 2008 series published by USA Today that reported on the ambient concentrations of air toxics at schools sites across the United States); see also The Smokestack Effect: Toxic Air and America’s Schools, supra note 47 (documenting toxicity assessments for various schools); Learn, supra note 238; Scott Learn, Northwest Portland Activists, Esco Sign ‘Good Neighbor’ Agreement to Reduce Pollution, THE OREGONIAN (Nov. 29, 2011, 11:08 AM), http://www.oregonlive.com/environment/index.ssf/2011/11/northwest_portland_activists_e.html.
and industrial polluters to promote regulations and policies that best protect public health. In this capacity, NCA was able to enter into the socio-political environment of Northwest Portland and add a new dimension to the activism around air quality. NCA’s focus on collaboration with ESCO should be recognized as a distinct strategy from that of the AQC. This strategic focus led NCA to work closely with the Northwest Environmental Defense Center (NEDC) and the Earthrise Law Center (Earthrise), formerly the Pacific Environmental Advocacy Center of Lewis and Clark Law School. The NEDC is a nonprofit organization that engages Lewis and Clark law students in clinical practice to protect the environment and natural resources of the Pacific Northwest. Since 1996, Earthrise has provided low- or no-cost legal services to citizen-activists and nonprofit organizations.

For Mary Peveto, the founder of NCA, the issue of air pollution around schools was critical. In April 2009, she organized a series of meetings on air toxins that led to the founding of NCA. One month later, the NCA held its first community action at Chapman Elementary. Chapman Elementary remained a focal point for NCA throughout the multi-year community campaign against ESCO. In preparation for this action, Peveto engaged in outreach to Chapman Elementary parents and to NWDA in order to hold a townhall style meeting with the DEQ focused on the human health impacts of air pollution. Parents and children delivered 600 signed petitions to the DEQ demanding greater protections for children from short-term spikes in air quality.

*that Esco, Their Local Polluter, Is Fouling Their Air with Carcinogens, CASCADIA TIMES* (Apr. 2, 2011, 11:03 AM), http://times.org/2011/04/02/air-pollution-inc-northwest-portland-gets-a-daily-reminder-that-esco-their-local-polluter-is-fouling-their-air-with-carcinogens-odor-complaints-have-been-going-on-for-years (quoting Dr. Matthew Brodsky, a neurologist at Oregon Health Sciences University, who said that ESCO’s manganese emissions have given him “grave concern about the air quality in my neighborhood”).


273. *About Us,* EARTHRISE LAW CENTER, LEWIS & CLARK LAW SCH., http://law.lclark.edu/centers/earthrise/about_us/. (last visited Feb. 15, 2014). In 2009, a team of law students from the Northwest Environmental Defense Center began reviewing the ESCO Title V operating permit in anticipation of its renewal later that year. As John Krallman noted, “I think this is the most general permit I have ever seen.” See Allan Classen, *Clearing the Air: Local Schools Try to Straddle Air Issues,* NW. EXAMINER, May 2009, at 1. These legal efforts were supervised by Aubrey Baldwin, who was later retained as counsel for NCA. See Learn, supra note 238.


275. *Earthrise Law Center’s Mission,* EARTHRISE LAW CENTER, LEWIS & CLARK LAW SCH., http://law.lclark.edu/centers/earthrise/about_us/mission/ (last visited Feb. 15, 2014). During the ESCO community campaign and negotiation process NCA was represented by Aubrey Baldwin, a clinical professor of law and staff attorney at the Earthrise Law Center.


277. Mirk, supra note 276.

278. Learn, supra note 238.

279. *Id.*
pollution. At the townhall meeting, an independent environmental air quality auditor presented results of a 2008–2009 ESCO “fenceline” monitoring project showing spikes in lead and manganese. Underscoring the heightened level of political engagement of activists in the Northwest District, NCA invited State Representative Mitch Greenlick to a rally in front of the DEQ headquarters in 2010, drawing even greater public attention to the issues the AQC had been documenting since the early 1990s. In late 2009, NCA and the AQC developed a formal partnership that became the foundation of the ESCO community campaign and GNA negotiations.

4. Community Action and Negotiation of the ESCO GNA

Like many local organizations seeking environmental and political justice in their communities, the NCA and the NWDA employed traditional organizing tactics to increase awareness of health impacts associated with the ESCO foundry and to put pressure on the DEQ to take more aggressive actions to monitor ESCO. After receiving positive press coverage of the May 2009 townhall with the DEQ, for example, Peveto and Genasci provided testimony at a statewide hearing on environmental quality and health in Oregon convened by Representative Greenlick, a long-time resident of the area. Throughout 2009, activists from NCA and the NWDA increased pressure on the DEQ to conduct independent monitoring of ESCO and to require it to decrease toxic emissions. They conducted such actions as coordinating a letter writing campaign, collecting over 1200 petitions demanding that the ESCO operating permit stipulate to the company’s use of Best Available Technology to minimize air emissions, submitting testimony, engaging in outreach to the media, holding community forums and townhalls, and meeting with DEQ representatives. This sustained community activism in the context of its expiring Title V permit might have incentivized ESCO to begin community negotiations. However, it is impossible to determine precisely what motivated ESCO to engage with the community activists.

In late 2009 ESCO invited members of the AQC and NCA to tour its

280. Id.
281. Interview with Genasci, supra note 50; interview with Peveto, supra note 50; Learn, supra note 238; AIR QUALITY COMMITTEE ACHIEVEMENTS, supra note 258. The Cooper Environmental Services, LLC report was funded by the EPA and includes the Northwest industrial area of Portland as a field site for data collection on ambient concentrations of air toxics. See FRY ET AL., supra note 248.
283. Interview with Genasci, supra note 50; interview with Peveto, supra note 50.
284. Interview with Peveto, supra note 50; interview with Genasci, supra note 50; interview with Mitch Greenlick, Rep., Or. State Leg., in Portland, Or. (July 20, 2012).
285. Interview with Peveto, supra note 50; interview with Genasci, supra note 50.
286. AIR QUALITY COMMITTEE ACHIEVEMENTS, supra note 258.
287. Interview with Peveto, supra note 50; interview with Genasci, supra note 50.
288. Interview with Peveto, supra note 50; see also Koberstein, supra note 271.
289. Interview with Peveto, supra note 50.
foundry and subsequently began an extensive negotiation process aimed at addressing community public health concerns. In 2010, the possibility of a GNA emerged in the conversations between ESCO and the community, and later became the primary intent of formal negotiations. Throughout the process, activists continued policing and monitoring efforts by gathering emissions data and odor complaints. In addition to community activism, several pivotal events occurred, influencing the outcome of the agreement.

In early July 2010, ESCO continued foundry operations despite a major failure of the baghouse filtration system. While this continued operation and release of unfiltered toxic emissions was considered legal under its Title V operating permit, the DEQ fined ESCO $5200 for its failure to properly notify the department of the incident. As a result of the baghouse failure and increased public scrutiny, the DEQ funded an independent audit of ESCO’s operations. This audit was completed in early 2011 and affirmed the community’s long-held concerns regarding emission levels and the human health impacts of ESCO’s operations.

Throughout 2010 and 2011, representatives of ESCO, the NWDA, NCA, the NEDC, and Earthrise engaged in extensive negotiations regarding the potential terms and conditions of a final agreement. In addition to the signatories to the GNA, both the DEQ and Representative Greenlick were significantly involved throughout the process, underscoring the socio-political context of the Northwest District, and representing an intersection of socio-economic status, a history of environmental activism, and institutional mechanisms for increased community access to political decision making. In November 2011 the parties reached and signed a final agreement providing for a reduction in ESCO’s emissions. The stated goals of the agreement are to reduce emissions from the ESCO foundries, monitor emissions, facilitate renewal of the Title V permit, improve neighborhood livability, and encourage

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290. Id.
291. Interview with Ginsburg & Davis, supra note 161. The public hearings associated with previous ESCO permit renewals had been very contentious between ESCO, the DEQ, and the community. The public pressure of activism by the AQC and NCA required a proactive response and negotiation process for this particular renewal.
292. See supra note 196.
295. Interview with Peveto, supra note 50; interview with Genasci, supra note 50; interview with Aubrey Baldwin, Assoc. Clinical Professor, Earthrise Law Ctr., Lewis & Clark Law Sch., in Portland, Or. (July 20, 2012).
296. During this time, Aubrey Baldwin of Earthrise represented the interests of NEDC and NCA. NWDA was not represented by counsel. ESCO was represented by Mark Morford of Stoel Rives.
297. This type of engagement by a regulatory agency and a government official has not been documented in prior studies of GNAs but proved instrumental in the context of the ESCO negotiations. See interview with Ginsburg & Davis, supra note 161; interview with DeConcini, supra note 50.
communication between ESCO and the community.\textsuperscript{298}

Community activists sought ambient air quality monitoring at multiple sites in Northwest Portland, “fenceline” monitoring of ESCO’s operations, emission reductions, creation of a community oversight panel, increased oversight by the DEQ, regular independent audits of ESCO’s operations, and greater accountability to internalize the external costs.\textsuperscript{299} However, it remained evident that several key concerns expressed by community signatories were left unaddressed. In order to reach a final agreement, ESCO forced the community signatories to choose between emission reductions and ambient concentration monitoring at one location, Chapman Elementary School, and “fenceline” monitoring of ESCO’s operations. This decision created substantial tension among the community signatories.

The GNA resulted in several structural changes in the relationship between ESCO, DEQ, and the community signatories. In November 2011, a neighborhood advisory committee was established to “promote continuous improvement in neighborhood safety and livability as impacted by ESCO’s operations, and to facilitate communications between ESCO and its neighbors.”\textsuperscript{300} The committee is comprised of members from NEDC, NWDA, NCA, and ESCO.\textsuperscript{301} In March 2012, the terms and conditions of the GNA were integrated into a Best Work Practices Agreement\textsuperscript{302} between ESCO and the DEQ as part of its Title V operating permit renewal.\textsuperscript{303} As DEQ officials noted, this action formalized oversight by the department to the stipulations of the final agreement.\textsuperscript{304}

5. \textit{ESCO Good Neighbor Agreement Terms and Conditions}

The ESCO GNA was executed as a formal written document establishing specific terms and conditions for ESCO and the community signatories.\textsuperscript{305} Specifically, the agreement identifies seventeen improvement projects that ESCO is required to complete over a five-year term.\textsuperscript{306} These projects include

\begin{itemize}
\item \textsuperscript{298} \textit{Good Neighbor Agreement}, supra note 19, at 1.
\item \textsuperscript{299} Interview with Peveto, supra note 50; interview with Genasci, supra note 50; interview with DeConcini, supra note 50; interview with Baldwin, supra note 296; interview with Ginsburg & Davis, supra note 161; see also Bill Lascher, \textit{Foundry Neighbors Make Good, Agree on Air Toxics Reductions}, LUND REP., Dec. 8, 2011, http://www.thelundreport.org/resource/foundry_neighbors_make_good_agree_on_air_toxics_reductions.
\item \textsuperscript{300} \textit{Good Neighbor Agreement}, supra note 19, at 4.
\item \textsuperscript{302} OR. ADMIN. R. §340-208-0320 (2013).
\item \textsuperscript{303} Interview with Ginsburg & Davis, supra note 161; OR. DEPT. OF ENVTL. QUALITY, AIR QUALITY DIV., OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY OREGON TITLE-V OPERATING PERMIT 17 (2011), available at http://www.deq.state.or.us/aq/permit/tv/262068esco_p.pdf.
\item \textsuperscript{304} Interview with Ginsburg & Davis, supra note 161.
\item \textsuperscript{305} \textit{See Good Neighbor Agreement}, supra note 19, at 1–3, 8.
\item \textsuperscript{306} \textit{Id. at Attachment A}, 1–2.
\end{itemize}
installing a leak detection system for the baghouses,\textsuperscript{307} establishing operational changes to reduce emissions at dump back and transfer points,\textsuperscript{308} developing and implementing an Incident (Atypical) Investigation Plan,\textsuperscript{309} and completing an engineering study of capture and control methods for emissions from pour points in Slinger Bay, one of ESCO’s facilities in Portland.\textsuperscript{310} Of the projects identified in the agreement, six were completed prior to its signing.\textsuperscript{311} All the projects specify a confirmation method and upon full completion ESCO’s emissions should decrease by an estimated 20 percent overall.\textsuperscript{312} Confirmation of completion involves inspection by community signatories, documentation review by the neighborhood advisory committee, or emissions testing by a third party chosen by ESCO and approved by the committee.\textsuperscript{313}

In exchange for completion of these projects, community organizations were required to participate in the neighborhood advisory committee.\textsuperscript{314} Further, community organizations agreed not to submit comments to the DEQ “objecting to, or encouraging modifications to, the Proposed Permit Terms” for the Title V permit.\textsuperscript{315} Community organizations also agreed not to “contest in any legal proceeding, or encourage any other person to contest, the Renewed Permit.”\textsuperscript{316} These covenants did not prohibit community organizations from participating in the public process for issuance, renewal, or modification of the permit, but limited this participation to only issues not addressed in the GNA or the permit terms.\textsuperscript{317}

Except in the case of noncompliance by ESCO or breach of the agreement, the GNA also required community organizations not to sue or bring any other form of action against ESCO alleging that ESCO is liable for creating a public or private nuisance, trespass, or other damages arising out of emissions from the foundries.\textsuperscript{318} The community organizations agreed that during the five-year term they would not apply to a court to enforce the renewed Title V permit or the federal Clean Air Act or Oregon air quality laws if Oregon or the United States had commenced and was diligently prosecuting a civil or criminal action in a federal or state court, or had issued an administrative order requiring immediate compliance with the permit.\textsuperscript{319}

Lastly, the community organizations agreed not to materially aid or assist
IV. CONTEXTUALIZING THE ESCO GNA

The experience in Portland in many ways demonstrated ideal conditions for a successful and effective GNA: a community with a long history of activism around the issue, scientific documentation by experts, involvement of multiple community organizations with significant resources including pro bono legal representation during the negotiation process, and a corporation firmly rooted in the area with existing social commitments. Furthermore, the organizations and activists in Portland had not experienced traditional economic, social, and racial barriers to political engagement. However, despite a dynamic process marked by community policing and coalition building and organizing, the GNA deliberations failed to address substantive community concerns. This underscores the limitation of GNAs. Without significant leverage, codified in the regulatory scheme, communities may be forced to bargain away their rights in order to achieve incremental positive change. Further, while GNAs are one strategy to address environmental and community health concerns, they must be coupled with other mechanisms of enforcement and accountability to ensure sustained pollution prevention and remediation.

As noted above, limited bargaining power forced community signatories to choose between “fenceline” monitoring and a reduction in emissions in order to reach a final agreement. This choice created division among coalition members, and undermined a fundamental goal of GNAs: to create community power. Moreover, the ESCO GNA limited meaningful public participation in the environmental decision-making process by restricting the ability of the community signatories to object to or encourage modification of ESCO’s Title V permit renewal. While the community signatories experienced increased direct access to ESCO and the DEQ during the GNA deliberation process, this stipulation severely curtailed their ability to fully engage in the larger political process. It should be noted that this limitation represents a significant shift in community power given the long history of engagement with the DEQ during prior operating permit renewal hearings.

The terms and conditions of the GNA also limited the overall scope of

320. The agreement specifically provides that, “[a]s a critical part of the consideration ESCO has received in support of this Agreement, PEAC has represented to ESCO that it has no present intent to represent any person other than NCA and NEDC with respect to ESCO air quality matters or to participate in the administrative process for issuing the Renewed Permit, to challenge the renewed permit or to bring any form of legal action against ESCO on behalf of any other client.” Id.

321. Bob Lubben, a member of the AQC, noted that “the agreement placed ‘onerous’ restrictions on the community, and it would be better not to sign it.” See Allan Classen, Esco, Neighbors Agree to Emission-Reduction Plan, NW. EXAM’R, Dec. 2011, at 20.

322. See id. at 8–9.
community advocacy, as the agreement formalized ESCO’s relationship with the stakeholders by establishing a neighborhood advisory committee as the primary means of engagement and communication with ESCO. The agreement also required the community signatories to serve on the committee. It is unclear how such a formalized structure will impact the long history of community monitoring and policing by activists in the Northwest District, but it raises concerns as to the different strategies each community signatory will be able to engage in outside the formal committee.

The GNA also limited monitoring of air quality to a single site, Chapman Elementary, and failed to provide the necessary resources and support for additional monitoring efforts in the Northwest District. This restricted funding undermines another fundamental principle of GNAs, to increase access to information in order to promote facility compliance with environmental law and regulations. By restricting the ability of the community signatories to file suit against ESCO in many instances, the GNA established a dangerous precedent of limiting individual and community access to common law remedies. Taken in its totality, the ESCO GNA raises many questions as to its overall efficacy and enforceability, and the role for corporate-community agreements within state and federal environmental regulatory regimes.

While we question the ultimate applicability, suitability and effectiveness of GNAs, we recognize the positive outcomes of the ESCO community campaign. Specifically, activists negotiated provisions providing for community oversight and an overall 20 percent reduction in emissions by ESCO. These stipulations seek to tangibly improve the quality of life in the Northwest District. As has been the case in other communities utilizing GNAs, activists involved with the ESCO community campaign have now turned their efforts toward state level advocacy and reform.

While it is too early to determine the long-term impact of the ESCO GNA, other scholars have noted that reaching an agreement can shift community attention away from the polluting corporation and result in implementation failures, a loss of community power, and a false sense that all concerns have been resolved. We believe such issues are critical and bring us back to the

325. *See id.* at 4.
326. *Learn*, supra note 238.
327. Interview with Peveto, supra note 50.
328. In the case of the Richmond GNA, community attention shifted toward other areas and terms agreed to in the GNA that failed to be implemented. Further, in the case of the Unocal GNA, after the signing of the GNA, the community organizations involved were characterized as “no longer strong and vibrant.” Given this, researchers found that it was unlikely that all provisions of the GNA would be implemented. *See Kenney et al.*, supra note 20, at 10. In Manchester, Texas, some residents believed that signing the GNA was an opportunity squandered and the agreement gave the community a false
question Lewis proposed in 1996 as to whether GNAs advance or hinder effective government regulation.\textsuperscript{329} In 2013, we would tailor this inquiry as to whether GNAs advance or hinder effective reform of the environmental regulatory paradigm to protect communities.

As discussed, we diverge from prior literature conceptualizing GNAs as a substitute to effective environmental regulation\textsuperscript{330} and argue that in many ways the presence of GNAs in fact limits the possibility of much-needed structural reform. Indeed, GNAs offer improvements from the status quo when compared to failed environmental regulation, but true analysis of the GNA model must not be predicated on such failure.\textsuperscript{331} As a brief survey of environmental law literature reveals, scholars continue to press for systemic change and critique the contemporary structure of government regulation.\textsuperscript{332} In large part, our environmental regulations have failed to successfully monitor, quantify, and mitigate the hazards of air pollution.\textsuperscript{333} These failures are often attributed to a lack of funding for state and federal regulatory agencies.\textsuperscript{334} For instance, with monitoring stations sited away from localized “toxic hotspots” and a reliance on computer modeling of ambient concentration levels, as seen in Oregon, there are significant gaps in our understanding of local pollution levels.\textsuperscript{335} These gaps are compounded by a limited scientific understanding of the health impacts of pollution, especially concerning additive and synergistic effects.\textsuperscript{336} In conceptualizing regulatory reform, economic theories of externalities and potential solutions for increased internalization provide a theoretical frame for sense of assurance that the community concerns and issues underlying the GNA had been resolved. See Macey & Susskind, supra note 231, at 47.

\textsuperscript{329} Lewis, supra note 18, at 9.

\textsuperscript{330} Cf. Adriatico, supra note 4, at 288 (describing GNAs as “viable and promising”).

\textsuperscript{331} Scholarship continues to document the failures of current environmental regulatory regimes. However, evaluation and analysis of GNAs should not be relative to this failure. Instead, it is crucial to look at the potential for GNAs, analyzing both costs and benefits, in relation to other means of structural regulatory reform.


\textsuperscript{333} See The Am. Lung Ass’n, supra note 48, at 363–64 (discussing gaps in knowledge about ambient air pollution).

\textsuperscript{334} See Vig & Kraft, supra note 142, at 17–19 (The authors found that federal spending on pollution control and abatement actually decreased in real terms from 1980 to 2004 and that the EPA’s operating budget only grew incrementally from 1980 to 2000 despite significantly expanded duties and responsibilities. Most agencies have faced insufficient resources to fully implement new environmental regulations and achieve environmental policy goals.); Adriatico, supra note 4, at 296; Michael Milstein, DEQ Cuts May Leave Us Wheezing, THE OREGONIAN, Sept. 28, 2005, at A1; interview with Ginsburg & Davis, supra note 161; interview with DeConcini, supra note 50.

\textsuperscript{335} See The Am. Lung Ass’n, supra note 48, at 369.

\textsuperscript{336} See, e.g., Ross & Brown, supra note 53, at 65 (discussing EPA’s lack of knowledge about ambient and synergistic effects of hazardous air pollutants).
government action and intervention. However, the difficulty of bridging the gap between theory and practice remains. For instance, efficient and appropriate government intervention as well as the success of contractual or other private solutions require a complete understanding of the impacts and externalities of pollution. Without this, it is impossible to determine efficient and effective policy solutions, regulatory or otherwise.

The very same information costs related to incomplete toxic release inventories and scientific studies, which undermines both common law remedies and enforcement of a statutory regime, also prove problematic in the context of GNAs. For example, the true impacts of pollution on communities and the actual source can be hidden, indirect, and difficult to ascertain. The absence of this basic information severely impedes individual and community action. First, it is impossible for an individual community to take any action if the impacts are not evident. Second, even when the harm is known, the absence of an accurate understanding and quantification of the impacts, or external costs, thwarts informed and efficient decision making. Individuals and communities cannot effectively decide what action to take or even whether to take action without a basic understanding of the costs and benefits associated with that choice. For these reasons, the success of GNAs is reliant on a political and legal structure that at a minimum supplies this necessary information.

Since GNAs are inherently local, corporation-specific, and issue-specific, they cannot provide the means to improve nationwide air pollution monitoring efforts or establish a comprehensive scientific understanding of the human health impacts of pollution. Despite the potential for tangible improvements in local communities, the Portland case study emphasizes that GNAs should not be viewed as a substitute for a more stringent environmental regulatory structure. Consider the example of monitoring. GNAs can promote community policing and private monitoring efforts, but they fail to incentivize comprehensive regulatory monitoring. In the case of the ESCO GNA, for years the onus of monitoring fell principally on the community, and more recently on ESCO per the terms of the agreement providing for a local monitoring station at Chapman Elementary. The larger issue of inadequate DEQ funding for air monitoring remained unresolved. Even in the instance where a GNA includes “fenceline” monitoring, implementation is extremely difficult. For instance, the Unocal GNA in Crocket and Rodeo, California provided that a single resident of Crocket received the software to view continuously updated levels of chemicals and to keep track of toxic air pollutants as they crossed refinery property. Six years after the GNA was signed, there was still no means of recording and documenting this stream of real-time data, rendering it next to useless.

337. Parchomovskey & Siegelman, supra note 97, at 222.
338. MACEY & SUSSKIND, supra note 231, at 61.
339. Id.
CONCLUSION

On their face, GNAs are designed to codify corporate behavior changes and concessions in order to disclose, mitigate, and reduce the negative impacts of local industry on surrounding communities. They have been viewed as a mechanism to hold corporations accountable when the state and federal regulatory bodies fail to. While recognized early on as no panacea, the hope has been that GNAs can empower and include historically disenfranchised communities; address the shortcomings of traditional environmental regulation identified by the environmental justice movement; reduce the negative community health impacts of local industry; provide a means of community oversight, accountability, monitoring and external review; internalize the negative externalities imposed on society; and foster a collaborative relationship between corporations and communities. Under certain conditions, GNAs may in fact achieve each of these goals, but the practical reality of negotiating, signing and implementing a GNA is in stark divergence.

As the Portland case study suggests, corporate-community agreements of this nature are not a reliable means of internalizing negative externalities and protecting communities from the inequitable distribution of environmental harms. In the case of Portland, despite extensive documentation of ambient pollution levels in excess of health benchmarks and significant community policing efforts, an underfunded DEQ was unable to adequately monitor emission levels, address long-standing community concerns, and mitigate the impacts of ESCO’s pollution. Given these circumstances, the community assumed the burden of attempting to hold ESCO accountable. In the absence of stricter environmental laws or changes to DEQ policy and practice, the community faced limited options to influence corporate behavior. While the GNA may successfully achieve emission reductions, the community incurred significant costs during the negotiation, signing, and implementation processes. The decision by community organizations to negotiate an agreement with a profit-driven corporation as opposed to using traditional political channels for seeking regulatory reform ultimately calls into question the role of government in protecting its citizens from environmental harms. This case study highlights

340. See KENNEY ET AL., supra note 20, at 1.
341. See Lewis & Henkels, supra note 5, at 147.
342. See Adriatico, supra note 4, at 288–90, 302; Pirk, supra note 4, at 238–40.
343. See supra notes 30, 76, & 84.
344. See Lewis & Henkels, supra note 5, at 139–40; Lewis, supra note 22, at 1584–86; Adriatico, supra note 4, at 288–90; Pirk, supra note 4, at 238–40.
345. See Lewis & Henkels, supra note 5, at 139–40; Lewis, supra note 22, at 1584–86; Adriatico, supra note 4, at 288–90; Pirk, supra note 4, at 238–40.
346. See KENNEY ET AL., supra note 20, at 9.
347. See Lewis & Henkels, supra note 5, at 138; Adriatico, supra note 4, at 288–89; Pirk, supra note 4, at 239.
348. See supra note 45.
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the critical need for an environmental regulatory regime to take this responsibility off of communities and to adequately address the impacts of industrial pollution. To do so, society must successfully strike a balance between the economic benefits of polluting industrial activity and its social and environmental harms with efficient, effective, and equitable environmental regulation.

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