

Record Proves Private Policing Is Good for Environment

By David A. Rosen
and Gideon Kracov

Gregory P. O'Hara got it right in "Private Policing" (Focus, Feb. 12) when he wrote that "private enforcement keeps environmental officials and polluters honest while allowing citizen participation in policy development." Despite critics' protests, citizen access to civil courts is a necessary element of California's environmental protection framework.

The state's environmental policies endorse both the carrot and the stick. The carrot takes the form of incentives such as pollution-trading programs, tax breaks and beneficial publicity for environment-friendly corporate behavior. Civil suits, whether arising from common law or statutes and regulations, are the stick that punishes past violations and deters future ones. Private policing comports with economic logic: Decision-makers think twice when they must pay for breaking the law. Law-breaking businesses should not gain a competitive advantage over law-abiding ones.

Access to the civil courts gives citizens a voice. Citizen empowerment is particularly necessary when it comes to environmental protection. Possessing enormous wealth, lobbying influence and legal resources, savvy corporate polluters can thwart effective enforcement. The problem worsens when the executive branch permits uneven and underfunded enforcement of existing environmental laws and consistently vetoes new ones.

Environmental disputes generally involve complex and cost-intensive issues of science and human-health risks. Regulators can be overwhelmed and community voices easily silenced. Most vulnerable are low-income communities that typically bear the heaviest burden of pollution and

other environmental harms.

Faced with these challenges, advocates resort to whatever means available. Mr. O'Hara rightly suggests that the successful advocate must have a quiver full of arrows (or sticks). The quiver must include statutory citizens' suits, common-law tort claims, unfair business practices allegations, civil rights challenges, scientific study, legislative advocacy, fund-raising, community organizing and media outreach. That is why federal and state legislatures have recognized that on many environmental matters it is inappropriate to allow regulatory agencies the final word. Only private citizens can guard the guardians.

The benefits of private policing speak for themselves. Can anyone dispute that Heal the Bay's fine legal advocacy, including several federal Clean Water Act citizens' suits, has contributed to water-quality improvements in the Santa Monica Bay? We all breathe cleaner air thanks to hard-fought federal Clean Air Act citizens' suits first filed in the late-1980s by the Coalition for Clean Air and others against the U.S. Environmental Protection Agency and the California Air Resources Board. In 1998, the Center for Environmental Health's Proposition 65 lawsuit forced manufacturers to eliminate dangerous levels of lead from household water faucet systems. These efforts illustrate that environmentalism cannot be labeled as an adversarial or oppositional movement.

Civil suits also encourage transparent regulatory practices. San Francisco-based Communities for a Better Environment's 1997 federal Civil Rights Act challenge to the South Coast Air Quality Management District's car-scrapping plan led that agency to adopt its landmark

"Environmental Justice Initiative."

Currently, pressure from tort, Proposition 65 and unfair business practice suits alleging childhood cancer clusters resulting from chrome-plating factory emissions adjacent to the Suva Street schools in Los Angeles County has spurred pending legislation in Sacramento to ensure heightened scrutiny of environmental safety at inner-city schools. To the parents of deceased Suva Street student Alex Perales, there is no doubt that the benefits of private policing exceed the price paid by the responsible parties. For the Peraleses and other Suva Street families, the stakes are high — the health and safety of their children.

Citizen redress also helps spotlight questionable corporate practices. High-profile toxic tort personal injury lawsuits, like those filed in the early 1990s by workers at Lockheed-Burbank, exposed unsafe working conditions in the aerospace industry. After hearing the evidence, duly sworn juries awarded punitive damages to punish chemical manufacturers for failing to adequately warn of the toxic hazards of their products. Utility giant Pacific Gas and Electric Co. also paid the price on its bottom line when it settled multimillion-dollar personal injury cases in 1994 that alleged it knowingly contaminated drinking water wells with cancer-causing chemicals.

Even in defeat, citizens' legal challenges play an important role. The National Lawyers Guild's recent quo warranto petition to the California attorney general seeking revocation of the corporate charter of Unocal Corp. was denied in less than a week. Nonetheless, it publicly highlighted allegations of consistent and serious environmental and human rights violations. San Diego-based Environmental Health Coalition's 1998 challenge under Article 14 of the NAFTA Side Agreements

to environmental conditions at an abandoned lead smelter in Tijuana, Mexico, also faces long odds. Nonetheless, it is an innovative attempt to remedy health hazards just south of the border.

California is better off because of these (and many other) private policing efforts. Critics overstate the case when they protest that suits are too often filed by "bounty hunters" with "suspect motives" that want "fast and lucrative" results "merely to reap the benefits." Environmental lawsuits are difficult to win and risky to prosecute. The procedural challenges are formidable. Strong cases can wither before esoteric issues such as federal pre-emption, primary jurisdiction, statutes of limitations or challenges to admissibility of scientific testimony. Moreover, the cases require expensive scientific investigation and demand many attorney hours. Sophisticated corporations retain accomplished counsel that defend lawsuits with ingenuity and gusto. The unscrupulous plaintiff is quickly tossed out of court with thousands of dollars in costs and fees.

Both moral sense and economic theory dictate that those responsible must be held accountable for environmental contamination. California's environmental policy must continue to incorporate both the carrot and the stick. One cannot succeed without the other. Accordingly, private policing will remain an essential means to ensure a healthful and sustainable environment in our state.

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