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**WASHINGTON PARK  
LEAD COMMITTEE, INC. V. UNITED  
STATES ENVIRONMENTAL PROTECTION  
AGENCY: HELEN PERSON AND THE  
LANDMARK STRUGGLE AGAINST  
ENVIRONMENTAL INJUSTICE**

ARMEN H. MERJIAN\*

*When it comes to enforcing the rights of poor people and people of color in the United States, government officials often look the other way. Too often they must be prodded to enforce environmental and civil rights laws and regulations without regard to race, color, national origin, and socioeconomic background. Laws, regulations, and executive orders are only as good as their enforcement. In many communities populated by poor people and people of color, unequal enforcement has left a gaping hole in environmental protection. Waiting for government to act is a recipe for disaster.*

- Robert D. Bullard, *The Quest for Environmental Justice*<sup>1</sup>

*We are somebody, too. Just because we are poor and live in a housing project does not mean that we shouldn't be treated equally and fairly.*

- Helen Person, President of the Washington Park Lead Committee, February 24, 1994<sup>2</sup>

The tests have confirmed what parents have long suspected: they are living in a toxic environment, adjacent to the old bronze foundry, and their children have suffered lead poisoning. Years pass, but the local, state, and federal governments fail to address the emergency, despite official confirmation of pervasive lead contamination in the neighborhood. A superficial cleanup is eventually conducted, but subsequent tests reveal even more

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1. THE QUEST FOR ENVIRONMENTAL JUSTICE 41 (Robert D. Bullard ed., 2005).

2. Transcript of Proceedings at 9, In re: Public Hearing on a Proposal to Change the Cleanup Plan for the Abex Superfund Site (Feb. 24, 1994), [http://logger-head.epa.gov/arweb/public/advanced\\_search.jsp](http://logger-head.epa.gov/arweb/public/advanced_search.jsp) (search "State: VA" and "Site Name: Abex Corporation") [hereinafter Transcript].

widespread contamination. Ultimately, the government agrees to buy out local homeowners so that they can relocate. For the nearly 500 residents of a segregated "Negro housing" project on the grounds of this toxic site, however, the government offers neither compensation nor relocation. In fact, when those same residents sue, demanding relocation, the government vigorously opposes them, seeking to circumscribe the rights of such citizens to challenge and overcome environmental injustice.

This would appear to be an echo from a distant and shameful past, but sadly it is not: It is the story of the Washington Park Public Housing Project in Portsmouth, Virginia, a story that culminated *this* decade with the case of *Washington Park Lead Committee, Inc. v. United States Environmental Protection Agency*.<sup>3</sup> It is as if Robert Bullard, one of the founders of the environmental justice movement, had Washington Park in mind when he penned the words that open this article. Unfortunately, Mr. Bullard's words were not so selective: Washington Park is just one of myriad struggles for environmental justice that poor communities throughout the country have been forced to wage, particularly communities of color, against unreceptive, if not hostile, government officials. Part I of this article provides a brief overview of the environmental justice movement in the United States. Part II examines the history of the Washington Park Public Housing Project, its designation as a Superfund site, and the struggles of Helen Person and other residents to secure relief from the Environmental Protection Agency ("EPA") and state and local authorities. Part III examines the landmark *Washington Park* litigation. A brief conclusion follows in Part IV.

## I. THE BIRTH OF A MOVEMENT

Environmental injustice in the United States dates from the earliest period in the nation's history, with the destruction of Native American habitats and the removal of Native Americans to increasingly inhospitable lands to the West. The environmental justice movement, however, is of relatively recent vintage. While local communities have battled throughout the years against such injustice, in 1982, the African American community of Afton, North Carolina gained national attention for their rally against the disposal of dangerous PCBs in their neighborhood.<sup>4</sup> A subsequent study by the U.S. General Accounting Office revealed a strong correlation between the placement of hazardous waste

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3. No. 2:98CV421, 1998 WL 1053712 (E.D. Va. Dec. 11, 1998).

4. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 29-31 (3d ed. 2000).

landfills in the region and the “race”<sup>5</sup> and socio-economic status of the local residents.<sup>6</sup>

In 1987, the Reverend Benjamin Chavis, then head of the United Church of Christ, commissioned a national study that similarly demonstrated a strong correlation between the location of hazardous waste sites and “race” and socio-economic status. The study advised that “race was consistently more prominent a factor in the location of commercial hazardous waste facilities than any other factor examined.”<sup>7</sup> Then, in September of 1991, 650 leaders from around the world gathered in Washington, D.C. for the First National People of Color Environmental Leadership Summit, where they adopted 17 “Principles of Environmental Justice.” Bullard calls this gathering “probably the single most important event in the environmental justice movement’s history.”<sup>8</sup>

One year later, in July of 1992, an Environmental Equity Workgroup (“Workgroup”) authorized by the United States Environmental Protection Agency released a report entitled “Environmental Equity: Reducing Risks for All Communities,” in which the Workgroup found that, “[r]acial minority and low-income populations are disproportionately exposed to lead, selected air pollutants, hazardous waste facilities, contaminated fish tissue and agricultural pesticides in the workplace.”<sup>9</sup> In 1994, increasing public awareness and agitation combined with increasing confirmation of the injustice led President Clinton to issue Executive Order 12898, entitled, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”<sup>10</sup> The order provided that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, pol-

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5. I have utilized quotation marks here and elsewhere to reflect the fact that “race” is of course a social and thus artificial construct.

6. See U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (June 1, 1983), <http://archive.gao.gov/d48t13/121648.pdf>.

7. COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiii (1987) (on file with author).

8. THE QUEST FOR ENVIRONMENTAL JUSTICE, *supra* note 1, at 20.

9. Letter to EPA Administrator William K. Reilly (May 29, 1992), in EPA, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES (1992), [http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing\\_risk\\_com\\_vol1.pdf](http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf).

10. Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994).

icies, and activities on minority populations and low-income populations in the United States and its territories . . .”<sup>11</sup>

Unfortunately, this order has been largely observed in the breach. Indeed, the EPA’s own Office of the Inspector General, in a 2004 report, strongly criticized the agency for failing to comply with the order:

EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations. EPA has not identified minority and low-income [populations], nor identified populations addressed in the Executive Order, and has neither defined nor developed criteria for determining disproportionately impacted [minority or low-income populations]. Moreover, in 2001, the Agency restated its commitment to environmental justice in a manner that does not emphasize minority and low-income populations, the intent of the Executive Order.<sup>12</sup>

The EPA dismissed the Inspector General’s findings and recommendations, rejecting the notion that it has any obligation to specifically address the needs of minority and low-income populations. A June 2002 memorandum by the Office of Environmental Justice summarizes the agency’s position:

‘Senior management should recognize that the environmental justice program is not an affirmative action program or a set-aside program designed specifically to address the concerns of minority communities and/or low-income communities. To the contrary, environmental justice belongs to all Americans and it is the responsibility of Agency officials, as public servants, to serve all members of the public.’<sup>13</sup>

Thus, despite decades of well-documented affirmative action *against* “minority” and low-income communities across the United States, leaving them disproportionately affected by environmental hazards every day,<sup>14</sup> the EPA rejected the notion that it had any duty to “specifically . . . address the concerns” of these communities, for that would constitute “affirmative action” or “a

11. *Id.*

12. OFFICE OF INSPECTOR GEN., EPA, EVALUATION REPORT NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE i (Mar. 1, 2004), <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>.

13. *Id.* at 10 (quoting Memorandum from the Office of Env’tl. Justice to the EPA (June 2002)).

14. In December 2005, for example, the Associated Press released its analysis of an EPA research project demonstrating that African Americans are 79 percent more likely than White Americans to live in neighborhoods where industrial pollution is believed to pose the greatest health danger. Among other things, the analysis also showed that, in 19 states, African Americans are more than twice as likely to live in neighborhoods where air pollution appears to pose the greatest health dangers. See David Pace, Assoc. Press, *Study Finds Black Communities in Areas of Worst Air Pollution*, THE STAR-LEDGER (NEWARK, N.J.), Dec. 14, 2005, at 14.

set-aside program.”<sup>15</sup> The application of equal principles to unequal circumstances would only ensure the perpetuation of existing patterns of injustice.

Indeed, in 2007, on the twenty-year anniversary of its groundbreaking report on environmental racism, the United Church of Christ released a new report, *Toxic Wastes and Race at Twenty*, finding that environmental racism and injustice not only persist in this country, but are in fact *worsening*:

It is ironic that twenty years after the original *Toxic Wastes and Race* report, many of our communities not only face the same problems they did back then, but now they face new ones because of government cutbacks in enforcement, weakening health protection, and dismantling the environmental justice regulatory apparatus.<sup>16</sup>

The report noted that 40 of 44 states with hazardous waste facilities in this country have a disproportionately high percentage of people of color within three kilometers of those facilities.<sup>17</sup>

People of color and persons of low socioeconomic status are still disproportionately impacted and are particularly concentrated in neighborhoods and communities with the greatest number of facilities. Race continues to be an independent predictor of where hazardous wastes are located, and it is a stronger predictor than income, education and other socioeconomic indicators. . . . African Americans, Hispanics/Latinos and Asian Americans/Pacific Islanders alike are disproportionately burdened by hazardous wastes in the U.S.<sup>18</sup>

Apropos of this article, finally, the report concluded:

Government officials have knowingly allowed people of color families near Superfund sites, other contaminated waste sites and polluting industrial facilities to be poisoned with lead, arsenic, dioxin, TCE, DDT, PCBs and a host of other deadly chemicals. Having the facts and failing to respond is explicitly discriminatory and tantamount to an immoral human experiment.<sup>19</sup>

Sadly, this is precisely what happened to hundreds of African American plaintiffs in the case of *Washington Park*.

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15. See OFFICE OF INSPECTOR GEN., *supra* note 12, at 10 (quoting Memorandum from the Office of Env'tl. Justice to the EPA (June 2002)).

16. ROBERT D. BULLARD, ET AL., *TOXIC WASTES AND RACE AT TWENTY* vii (2007), <http://www.ejrc.cau.edu/TWART-light.pdf>.

17. *Id.* at xi.

18. *Id.* at xii.

19. *Id.*

## II. WASHINGTON PARK: "NEGRO" PUBLIC HOUSING

Portsmouth, Virginia, with a population of 99,321,<sup>20</sup> is located in the southeast region of the state, directly across from the city of Norfolk. Home of the Norfolk Naval Shipyard, Portsmouth enjoyed an employment boom during and immediately after World War II, which ended in the 1950s and 60s. This economic deterioration does not, however, explain the massive "White flight" to the suburbs that followed. Rather, the segregationist policies of both the federal and Portsmouth governments, together with the segregationist proclivities of the "fleeers," were the keys to creating the exodus.

Following the Supreme Court's 1954 decision in *Brown v. Board of Education*,<sup>21</sup> mandating the desegregation of public schools, Virginia politicians launched a campaign of "massive resistance" to stymie the Court's order. The campaign was spearheaded by powerful Virginia Senator Harry Flood Byrd, Sr., who announced, "If we can organize the Southern States for massive resistance to this order I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South."<sup>22</sup> In 1958, rather than permit integration, Virginia Governor J. Lindsay Almond ordered Norfolk, Charlottesville, and Warren Counties to close their public schools.<sup>23</sup> In the years that followed, White families throughout Virginia moved their families from the inner-cities to the overwhelmingly White suburbs to avoid integration.

The formation of suburban White enclaves was fostered by the overtly segregationist policies of the federal government during this period:

Middle-income Caucasians, both veteran and non-veteran, were encouraged to buy new housing in the growing suburbs by the enticement of no- and low-interest loans from the Veterans Administration and the Federal Housing Administration, respectively. Both federal governmental agencies practiced overt acts of discrimination that enabled Caucasians to buy houses in the suburbs and prevented African-Americans from moving out of the central cities. Government dollars built the infrastructure to provide utility, water and sewer service to the suburbs. As the interstate highway system was built with federal dollars, industry moved out to the suburbs. De-

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20. U.S. Census Bureau, State and County QuickFacts (Population, 2009 estimate), <http://quickfacts.census.gov/qfd/states/51/51740.html>.

21. 347 U.S. 483, 495 (1954).

22. The Library of Virginia, *Brown v. Board of Education: Virginia Responds*, [www.lva.lib.va.us/whoweaare/exhibits/brown/resistance.htm](http://www.lva.lib.va.us/whoweaare/exhibits/brown/resistance.htm) (last visited Apr. 20, 2011) (on file with author).

23. See, e.g., ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954-89* 9-10 (1992).

cent housing, good jobs and quality education moved from the cities to the suburbs in a determined, rapid and enduring fashion leaving behind substandard housing, unemployment and an underfinanced educational system.<sup>24</sup>

Meanwhile, the creation of African-American enclaves in the inner-cities was accelerated by a combination of so-called “urban renewal” initiatives and the construction of segregated, federally-subsidized public housing. Black (and integrated) neighborhoods were cleared out, and Black families with no other option were forced into segregated public housing – often constructed in isolated, industrial settings – with the sanction and financial assistance of the federal government. As the Department of Housing and Urban Development (“HUD”) admitted in 1997, “[during the period 1937 to 1962], the Federal government permitted, if not encouraged, segregation by race in public housing developments.”<sup>25</sup>

In sponsoring the Fair Housing Act of 1968 to address this deliberate segregation, Senator Edward Brooke of Massachusetts pointed out that “an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government – is racially segregated.”<sup>26</sup> Senator Brooke added:

Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph – even as he ok’s public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it.<sup>27</sup>

“In other words,” Senator Brooks concluded, “our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation.”<sup>28</sup>

The City of Portsmouth was no exception. Together with the Portsmouth Redevelopment Housing Authority (“PRHA”), a state-chartered non-profit agency, the city “established and perpetuated segregation by eliminating racially-mixed neighborhoods and by acquisition and the clearance of African American

24. Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice For All*, 5 B.U. PUB. INT. L.J. 69, 85-86 (1995).

25. U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE ON SITE-BASED WAITING LISTS, 62 FR 1026-01, 1027 (Jan. 7, 1997).

26. Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1014 (E.D. Pa. 1976) (quoting 114 Cong. Rec. 2528 (1968)).

27. *Id.* (quoting 114 Cong. Rec. 2281 (1968)).

28. *Id.* (quoting 114 Cong. Rec. 2281 (1968)).



neighborhoods and relocation of African Americans to isolated concentrations of segregated housing, including public housing.”<sup>29</sup> Portsmouth and the PRHA razed existing neighborhoods and moved the displaced Black residents into housing constructed in industrial areas and rezoned for residential use.

One such housing project was located adjacent to the Abex foundry<sup>30</sup> in the eastern section of Portsmouth, less than a mile from the shipyard. In furtherance of its segregationist policies, in 1960, the PRHA purchased several blocks of industrial land adjacent to the foundry and constructed a 160-unit, low-income “Negro housing” project<sup>31</sup> known as Washington Park. Bounded by highways to the North and West, and by warehouses and vacant lots to the East, the site was wholly inappropriate for residential use. Indeed, some of the housing units were constructed not 50 feet from the active foundry. The site was also too small for the intended construction, and federal authorities initially refused to fund the project.<sup>32</sup> They eventually relented, however, and construction began in 1962. In February 1964, the first of 160 African-American families moved in to the newly completed project.

Just as the authorities intended, throughout its existence, Washington Park’s population of approximately 490 remained overwhelmingly – if not exclusively – African-American.<sup>33</sup> Meanwhile, in 1974, the City of Portsmouth sold 17 lots of land at the site to individual homeowners; houses on these lots would be known as the Effingham residences. The Effingham homeowners, like the residents of Washington Park, were predominantly African-American.<sup>34</sup>

At the height of Portsmouth’s economic boom, during and immediately after World War II, almost 31,000 people lived within a one-mile radius of the Abex site. By 1970, this figure had declined to 19,940, and by 1980, the figure stood at 15,100.<sup>35</sup> “This decline was not the result of normal demographic cycles,”

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29. Second Amended Complaint at 11, *Washington Park Lead Comm., Inc. v. EPA*, 1998 WL 1053712 (E.D. Va. Aug. 9, 1999) (No. 2:98CV421) [hereinafter *Second Amended Complaint*] (on file with author).

30. Although the foundry has been owned and operated by a number of corporations since it began operation in 1928, for the sake of convenience, the site shall be referred to as the “Abex” site. Abex Corporation purchased the facility in 1966 and operated it until it closed in 1978.

31. See *Washington Park Lead Comm., Inc. v. EPA*, No. 2:98CV421, 1998 WL 1053712, at \*2 (E.D. Va. Dec. 11, 1998).

32. Second Amended Complaint, *supra* note 29, at ¶ 49.

33. Telephone Interview with Helen Person, Founder, Washington Park Lead Comm. and Former Resident, Washington Park (May 30, 2006).

34. Jan Mazurek & Robert Hersh, *Land Use and Remedy Selection: Experience from the Field – The Abex Site 4* (Resources for the Future, Discussion Paper 97-26, 1997), available at <http://www.rff.org/documents/RFF-DP-97-26.pdf>.

35. *Id.* at 6.

explains Julie Nepveu, a civil rights attorney who served as co-counsel on *Washington Park*, “but of the intentional segregationist and isolationist policies of the City of Portsmouth.”<sup>36</sup>

#### A. *A Toxic Dumping Ground*

As they surely must have known, PRHA and the City of Portsmouth could hardly have chosen a worse location for human habitation. From 1928 until 1978, Abex and its predecessors operated a brass and bronze foundry at the site to recycle railroad journal bearings (the bearings upon which the railroad car axle turns). The foundry melted the bearings – which were over 80 percent bronze, with traces of lead, iron, and other metals – and poured the molten metal into sand molds in order to cast new bearings.<sup>37</sup> The foundry then dumped the excess sand from this process in a one-acre parcel of land adjoining the foundry.

In fifty years of operation, the foundry recycled approximately seven million pounds of used bearings, and produced 6.6 million pounds of new bearings a year.<sup>38</sup> The foundry also dumped about 4,000 cubic feet of waste sand in the adjoining landfill.<sup>39</sup> Over the years, this sand was used as fill material for residential and commercial development projects around the foundry.<sup>40</sup> Unfortunately, the sand was toxic. Through the smelting process, the sand utilized in the journal casts became laden with materials such as lead, copper, zinc, and antimony. This, together with emissions from the smelting furnaces, resulted in lead and other mineral contamination at the site and in surrounding residential and non-residential areas.

For fourteen years, Washington Park residents lived at the site of this fully functional foundry, unaware that each day, the foundry was spewing toxic emissions and dumping toxic landfill in their midst. Each summer, Washington Park and Effingham residents would unknowingly plant flowers and vegetables in soil laden with lead and other dangerous materials. And each day, the children of Washington Park and Effingham would visit the only playground in the area, a playground located directly across

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36. Telephone Interview with Julie Nepveu, Legal Director, Nat'l Coalition for Disability Rights (June 4, 2006).

37. EPA, Abex Corporation, Community Relations Plan (May 1996) [hereinafter EPA Community Relations Plan], <http://www.epa.gov/reg3hwmd/super/sites/VAD980551683/crp/1996-05.htm>.

38. *Id.*

39. NUS CORP., SUPERFUND DIVISION, A PRELIMINARY ASSESSMENT OF ABEX CORPORATION 2-3 (May 31, 1983) [hereinafter PRELIMINARY ASSESSMENT], [http://loggerhead.epa.gov/arweb/public/advanced\\_search.jsp](http://loggerhead.epa.gov/arweb/public/advanced_search.jsp) (search “State: VA” and “Site Name: Abex Corporation”).

40. Mazurek & Hersh, *supra* note 34, at 4.

the street from the landfill. When the foundry closed in 1978, no remedial measures were taken. Not only was there no assessment or cleaning of the foundry and surrounding areas, but the landfill was never capped; Abex simply erected a fence around the lot.<sup>41</sup> This would remain the situation for many years to come.

### B. *"The Canaries in the Coal Mine"*

Although the foundry produced several toxic materials, the chief contaminant at the Abex site was lead. This became apparent in the early 1980s, when tests by the Portsmouth Health Department revealed that children from Washington Park had suffered lead poisoning.<sup>42</sup> Lead is an extremely dangerous pollutant, particularly for children under the age of six and for pregnant women, because, at the early stages of development, the brain and central nervous systems of infants and young children are still forming. Lead also interferes with kidney development and the formation of red blood cells.<sup>43</sup>

Exposure to lead during pregnancy can cause premature birth, low birth weight, and even miscarriage.<sup>44</sup> Exposure by children to even low levels of lead can lead to lower IQ scores, learning disabilities, behavioral problems, impaired hearing, and stunted growth. At higher levels, it can lead to permanent brain and kidney damage, mental retardation, increased blood pressure, male reproductive problems, and even death.<sup>45</sup> "Lead poisoning has been associated with a significantly increased high-school dropout rate, as well as increases in juvenile delinquency

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41. See NUS CORP., SUPERFUND DIVISION, SITE INSPECTION OF ABEX CORPORATION 2-2 (1986) [hereinafter NUS SITE INSPECTION] ("In 1978, Abex Corporation graded the site and fenced the area with a 7-foot cyclone fence. No other remedial action is known to have occurred at this site."), [http://loggerhead.epa.gov/arweb/public/advanced\\_search.jsp](http://loggerhead.epa.gov/arweb/public/advanced_search.jsp) (search "State: VA" and "Site Name: Abex Corporation").

42. Lead exposure can occur in several ways, including: (1) by breathing lead particles in the air; (2) by drinking lead-contaminated water; and (3) by eating food or soil that contains lead. Children in poor, urban areas are already at risk for lead exposure due to three additional sources of contamination found in higher concentrations in their environments, including: (1) vehicle exhaust particularly in areas of heavy traffic; (2) lead paint; and (3) drinking water delivered in lead plumbing. In Richmond, Virginia, for example, housing units with lead-based paint located in low-income and extremely low-income neighborhoods account for 78 percent of lead poisoning cases in the city. See Office of Cmty. Planning & Dev., U.S. Dep't of Hous. & Urban Dev., *Richmond, VA: Consolidated Plan*, <http://archives.hud.gov/reports/plan/va/richmova.html> (last visited Apr. 20, 2011).

43. National Safety Council, *Health Effects on Children* (May 25, 2006) [hereinafter NSC] (on file with author).

44. EPA, *Abex Corporation: Questions and Answers About Lead* (May 1997), [www.epa.gov/reg3hwmd/super/sites/VAD980551683/fs/1997-05\\_2.htm](http://www.epa.gov/reg3hwmd/super/sites/VAD980551683/fs/1997-05_2.htm) [hereinafter *EPA Q&A*].

45. See NSC, *supra* note 43. See also *EPA Q&A*, *supra* note 44.

and criminal behavior,” the National Safety Council cautions.<sup>46</sup> And because lead poisoning produces no obvious symptoms, it can go undetected for years.

Contrary to longstanding belief, there are no safe levels of lead exposure. In fact, in a 2003 article published in the *New England Journal of Medicine*, researchers concluded that the CDC’s “safe” lead level of 10 micrograms of lead per deciliter is not safe at all, and significant damage is caused to children with blood levels *below* 10 micrograms.<sup>47</sup> The study found that for blood lead levels up to 10 micrograms per deciliter, there was a 7.4-point decline in IQ, and each additional 10 micrograms was associated with a 4.6-point decrease in IQ. “In addition, all lead exposed children showed some degree of behavioral dysfunction in memory, planning and problem solving and attentional flexibility.”<sup>48</sup>

The Washington Park children registered blood levels over *five* times the CDC’s “safe” level, with some registering at 53 and 58 micrograms per deciliter, for example.<sup>49</sup> With the help of a Portsmouth law firm, the families of these children sued Abex seeking compensation for their injuries. Unfortunately, the practice of suing for lead poisoning was still in its nascent stages, and neither the families nor their attorneys fully appreciated that the damage caused by lead poisoning does not manifest itself immediately, but in succeeding years, when the cognitive skills of the poisoned infants can be fully assessed. In addition, because no comprehensive testing had been carried out at that time, proving that the foundry caused the lead poisoning would have been difficult. As a result, in 1983, the families quickly settled with Abex for paltry sums ranging from \$1,000 to \$12,000 per child, with Abex denying any liability.<sup>50</sup>

Richard Serpe, a Norfolk attorney who represented several Washington Park families in lawsuits against Abex, observed that these early cases of severe lead poisoning should have sounded the alarm that residents at the Abex site were in grave danger. “These were the canaries in the coal mine,” Serpe explained.<sup>51</sup> But as we shall see, city, state, and federal authorities ignored the alarm bells. Their lethargic response in the face of this emergency ensured that Washington Park residents would continue to be ex-

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46. NSC, *supra* note 43.

47. Newsroom, Univ. of Rochester Med. Ctr., *Research Study Rejects CDC and WHO ‘Safe’ Lead Exposure Levels* (Apr. 17, 2003), [www.urmc.rochester.edu/pr/news/story.cfm?id=230](http://www.urmc.rochester.edu/pr/news/story.cfm?id=230).

48. *Id.*

49. Mazurek & Hersh, *supra* note 34, at 7.

50. Telephone Interview with Richard Serpe, Law Offices of Richard J. Serpe, P.C. (July 20, 2006).

51. *Id.*

posed to the Abex contaminants year after year and, astoundingly, decade after decade. A testament to the longevity of this injustice, in the 1990s, Serpe actually filed new lawsuits against Abex on behalf of some of the same families who settled with Abex in 1983, arguing that, "from the moment those children signed the settlement documents and went home to Washington Park," they were once again subject to and damaged by pervasive lead contamination.<sup>52</sup>

### C. *Early Tests and Plans for Remediation*

In January 1983, after the Washington Park children tested positive for lead poisoning, the EPA sent a team to investigate the Abex site. The team did not take any samples. In a May 1983 report, however, the team noted that: (1) a brass and bronze foundry had operated at the site for 50 years; (2) brass and bronze contain tin, zinc, copper, and traces of lead and iron; (3) approximately 4,000 cubic feet of leftover sand from the furnaces was dumped in the Abex landfill; and (4) "no cap was installed on the landfill."<sup>53</sup> Despite this discovery – and despite the cases of lead-poisoned Washington Park children – the EPA did not return to the site to actually take samples until one and one-half years later in July 1984. The samples showed extremely high concentrations of lead in soil at the Abex lot and east of the Abex lot. The results suggested that "lead contaminated soil could have potentially contributed to the elevated blood levels found in local children."<sup>54</sup>

Despite these results, the EPA took no further action for nearly two more years. The EPA did not alert local residents to the potential danger of lead poisoning and failed to order any form of cleanup, including merely capping the dump site. The EPA did not even return to the site for further and more expansive tests until 1986. When it did, the EPA again confirmed the presence of dangerous contaminants, including lead. "A toxicological evaluation of the data indicates the presence of high levels of lead, zinc, copper, and antimony in sediment samples," a March 1986 report explained.<sup>55</sup> "Possible human exposure via the inhalation route should be investigated."<sup>56</sup> The report continued:

Limited sampling of this former brass/bronze foundry site revealed notably elevated concentrations of lead (up to 10,400 mg/kg), copper (up to 23,000 mg/kg), zinc (up to 5,700 mg/kg),

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52. *Id.*

53. PRELIMINARY ASSESSMENT, *supra* note 39, at 3-1.

54. Mazurek & Hersh, *supra* note 34, at 8.

55. NUS SITE INSPECTION, *supra* note 41, at 1-2.

56. *Id.*

and atypical levels of other metals. From a toxicological consideration, lead represents the most significant potential for human health hazards. The site is adjacent to housing projects and located in a densely populated urban area where lead exposure is generally inherently excessive.<sup>57</sup>

Noting that the Washington Park housing was an “area of concern,” the report warned that “it is possible that past release may be posing a current and persistent health hazard,” and called for further testing.<sup>58</sup>

Here was all the evidence the EPA and Virginia authorities needed to conclude that there was a potential or actual emergency at the site.<sup>59</sup> The early reports of lead poisoning were now buttressed with toxicology reports confirming “notably elevated concentrations of lead,” quite possibly “posing a current and persistent health hazard.” No emergency measures were taken, however, and the authorities still provided no warning or notice to area residents.

Instead, in August 1986, the EPA entered into a consent decree with Abex in which Abex agreed to remove contaminated soil to a depth of six to twelve inches from part of Washington Park, the Effingham Playground, and the Effingham Residences.<sup>60</sup> Abex also agreed to perform a cleanup of the landfill.<sup>61</sup> Once again, residents were not informed of these developments, much less removed from this toxic site during the cleanup. Helen Person, a Washington Park resident and tireless advocate whom we will soon meet, explained, “They never told us what they were doing. They paid off the families who sued them in the early 1980s, and insisted that they keep their mouths shut. So no one ever told us a thing.”<sup>62</sup>

This initial, limited “cleanup” would prove wholly inadequate, as subsequent events demonstrated. Ironically, by dredging up and discharging lead particles into the air, the cleanup process temporarily rendered the site even more dangerous. For this reason, the EPA temporarily (and ultimately permanently) re-housed residents during later cleanups. By then, of course, residents were aware of the danger and thus able to advocate for their rights. In 1986, they had no way of knowing about the contamination all around them.

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57. *Id.* at 7-1.

58. *Id.* at 3-4, 7-1.

59. At the time, the Virginia Department of Waste Management, rather than the EPA, was technically the lead agency at the site.

60. Mazurek & Hersh, *supra* note 34, at 8.

61. *Id.*

62. Telephone Interview with Helen Person, *supra* note 33.

Samples taken during the cleanup revealed levels of contamination so high that the site qualified for inclusion on the Superfund's National Priorities List ("NPL"). The NPL is a list of hazardous sites that the EPA considers "the most serious," qualifying for possible cleanup using Superfund money.<sup>63</sup> Under the EPA's ranking system, if a site registers a score above 28.5, it is eligible for the NPL. The Abex site registered a score of 36.53.<sup>64</sup> In June of 1988, the EPA proposed that the site be included on the NPL, and so it was in August of 1990. Nonetheless, the EPA and the Virginia authorities apparently felt no obligation to inform neighborhood residents that they were living on one of the most hazardous sites in the United States, much less to move them. They also felt no obligation to implement any emergency cleanup and containment measures.

In October of 1989, nearly a year and one-half after the EPA's proposal for NPL listing, the Virginia Department of Waste Management entered into a consent order with Abex, under which Abex agreed to perform a remedial investigation and feasibility study to determine the extent of the contamination at the site and to propose "remedial alternatives to cleanup the site."<sup>65</sup> To carry out this investigation, workers appeared at the site wearing sealed "space suits" and rubber boots as they took soil samples for study. It is an indelible image in the minds of many Washington Park residents: that of Abex contractors in white space suits digging up soil samples as unwitting and unprotected African American children stood by and stared in curiosity and wonderment. "People were running from door to door saying, 'What in the world is going on? What do we have?' No one told us, and at that time, we didn't know which way to turn, or who to call," Ms. Person explained.<sup>66</sup>

Beginning in 1990, Abex contractors tested over 1,000 soil samples from the site. The results demonstrated that despite the 1986 cleanup, "lead contamination was pervasive throughout the 700-foot radius surrounding the foundry."<sup>67</sup> While the maximum level of lead permitted by the EPA in residential areas was 500 mg/kg, lead levels of up to 46,500 mg/kg were discovered in Washington Park soil to a depth of four feet.<sup>68</sup> Dirt from the foundry contained levels of up to 100,000 mg/kg, while levels in the landfill area registered up to 58,000 mg/kg in the top two feet

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63. EPA Community Relations Plan, *supra* note 37.

64. *Id.*

65. Mazurek & Hersh, *supra* note 34, at 9.

66. Telephone Interview with Helen Person, *supra* note 33.

67. Mazurek & Hersh, *supra* note 34, at 11.

68. *Id.* at 12.

of soil.<sup>69</sup> Washington Park children continued to frolic in the only playground in the neighborhood – an area abutting the landfill – in ignorant bliss.

Two more years would pass before the final investigatory report was issued. In the final report dated February 1992, the EPA determined that the lead-contaminated soil “presented a short-term threat to human health.”<sup>70</sup> On March 30, 1992, the EPA ordered Abex to remove surface soils from the site. Despite the “short-term threat to human health,” the residents were not moved. They watched as Abex removed surface soil from Washington Park, the Effingham Playground, and the Effingham residences.<sup>71</sup>

#### D. *The Indomitable Helen Person*

The silence of the federal, state, and local governments throughout this period ensured that residents would remain in the dark for nearly a decade after the first Washington Park children had tested positive for significant lead poisoning. For Helen Person – like many other Washington Park residents – news of the contamination came not from the authorities but from her neighbors. In the early 1990s, Ms. Person had decided to grow a garden outside of her Washington Park residence, so she signed up for a gardening class in the neighborhood’s Community Center. In class, she learned of the contamination all around her. “I was living, sitting out on one of the hot spots,” Ms. Person explained, “but I had no idea. We had no idea what they were testing for. They didn’t tell us.” The news was nothing short of an outrage, but then Ms. Person was sadly no stranger to outrage.<sup>72</sup>

Born in East Hampton, New York on March 24, 1931, Ms. Person grew up in an integrated Long Island community. In 1950, she moved to Portsmouth with her husband, a native Virginian, and their two small children. There, Ms. Person and her family daily suffered the outrageous misfortune of living in a segregated, racist society. “My family and I rode the back of the bus every day,” Ms. Person explained.<sup>73</sup> “Everywhere we went, we were forced to use the ‘colored’ facilities.”<sup>74</sup> Segregation – that destructive, crushing tool of White supremacy – pervaded every activity of life. “Of course, my children attended segregated schools. If we wanted a bite to eat, we were not allowed inside of the restaurants. We had to buy our food from outdoor windows,

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69. *Id.*

70. EPA Community Relations Plan, *supra* note 37.

71. Telephone Interview with Helen Person, *supra* note 33.

72. *Id.*

73. *Id.*

74. *Id.*



no matter what the weather. If we had to use the bathroom, we weren't allowed inside. We were forced to use horrible out-houses, which were never cleaned."<sup>75</sup>

On the ferry from Portsmouth to Norfolk, "the White folks could walk right on, but we had to walk a long distance to a separate area."<sup>76</sup> The local hospital, King's Daughters, maintained a separate ward for Black patients, and even the doctors' offices maintained separate waiting areas. "At one doctor's office," Ms. Person recalled, "we didn't have a waiting area at all. We had to sit on the stairs to the second floor, while the White folks rested comfortably in the waiting area below."<sup>77</sup>

In 1964, working as a home health aide, Ms. Person heard about the new, federally-subsidized housing at Washington Park. Now a single mother of four children, Ms. Person was looking for a clean, healthy, affordable environment in which to raise her family, and the newly-constructed Washington Park seemed to fit the bill. "Most of the projects were scary places," Ms. Person explained, "but Washington Park had running water, lights . . . included in the rent, and enough room for your family. It was lovely."<sup>78</sup> Ms. Person and her children joined approximately 160 other families as the first residents of Washington Park.

Decades would pass before Ms. Person learned the truth about Washington Park. But once she did, she would not rest until she had secured justice for herself and all of the residents of Washington Park. She formed the Washington Park Lead Committee, a neighborhood organization that advocated for the rights of all Washington Park residents. For the next decade, as president of the Committee, Ms. Person tirelessly threw herself into the cause of securing relocation to safe and habitable housing for all. As a former home health aide, she knew that lead posed a tremendous risk, particularly for children. "Any lead in your body is harmful," Ms. Person explained, "and you can go look that up. I don't care what color a child is, they should not have to live like that."<sup>79</sup>

Beginning in the early 1990s, Ms. Person attended nearly every meeting of the Portsmouth City Council, tirelessly pleading for relocation twice a month, year after year. "They thought I was a crazy Black woman for getting up there, time after time."<sup>80</sup> She was not deterred by what others might think. Inspiring her neighbors to speak truth to power, Ms. Person attended every

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

public hearing held on the cleanup of the Abex site and spoke passionately about the urgent need for relocation for all Washington Park residents.

Ms. Person sought out the assistance of anyone, and any organization, she could find. Ultimately, she secured the support of Virginia Senator Charles Robb and, most notably, Congressman Norman Sisisky, who urged the EPA to relocate the Washington Park tenants. It would take a lawsuit, however, with Ms. Person and her Committee serving as lead plaintiffs, before relief would be secured. But that was still many years away.

#### E. *No Child Left Behind, Except for Washington Park Children*

In 1992, the EPA assumed responsibility for the Abex site and proposed a remediation plan calling for removal of contaminated soil down to two feet, at an estimated cost of \$16 million.<sup>81</sup> This plan was amended later in 1992 to provide for excavation in residential areas down to the water table, at an estimated cost of \$28.9 million.<sup>82</sup> It was at this time that the EPA finally invited the public to comment on the proposed remediation plan, meeting with Effingham and Washington Park residents and finally explaining the proposed plans and health effects associated with lead contamination.

Following these early meetings, and in the face of public demand, the Portsmouth Department of Public Health began offering free blood-lead testing to all residents. In July and August of 1992, 546 individuals were tested.<sup>83</sup> The results revealed that 21 children, or four percent of those tested, had blood levels equal to or higher than 10 micrograms per deciliter.<sup>84</sup> The EPA and the Portsmouth Department of Health determined that this was not exceptional enough to warrant the removal and relocation of residents.<sup>85</sup>

In their comments to the EPA, Washington Park and Effingham residents expressed fierce skepticism of the EPA's plan. Led

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81. Mazurek & Hersh, *supra* note 34, at 17.

82. *Id.*

83. EPA Community Relations Plan, *supra* note 37.

84. EPA, Memorandum of Review on EPA's Management of the Abex Superfund Site: Report No. 2000-S-00006 7 (Aug. 31, 2000), <http://epa.gov/oig/reports/2000/abex.pdf>.

85. In a 2000 report, released during the Washington Park residents' pending lawsuit against the EPA and the City of Portsmouth, the EPA's Divisional Inspector General for Audit concluded: "According to EPA officials, the blood lead level results for all of the testings did not detect exceptionally high lead levels. As a result, the blood screenings for the Abex site did not support soil excavation through an emergency removal or the permanent relocation of residents. . . . [W]e believe EPA took reasonable measures to determine the effect of the Abex lead contamination on the WPH residents." *Id.* at 8.

by Helen Person, they argued that no amount of remediation would render the site safe for habitation; they had good reason to be skeptical. In testing the Washington Park apartments, for example, the EPA took wipe samples from the areas around the heating vents, which did not show high concentrations of lead, but they did not sample the inside of the vents, causing many Washington Park residents grave concern. Unswayed by the EPA's "expertise," residents threatened not to return to their apartments until proper tests were conducted. Sure enough, when the EPA finally sampled the inside of the ducts, the tests revealed high levels of lead contamination in the large amounts of dust found in the ducts. "In the winter months, some residents were heating their homes with their stoves, because they were afraid that if they turned on their heating system, it would dislodge the lead particles and injure their children," explained Damon Whitehead, co-counsel for the plaintiffs in *Washington Park*.<sup>86</sup>

Similarly, the EPA plan did not provide for remediation of the soil in the crawl spaces beneath the homes because the EPA mistakenly assumed that the homes were constructed on concrete slabs.<sup>87</sup> After residents protested this oversight, the EPA was again forced to return for more sampling and then to alter their remediation plan to include the crawl spaces.

Perhaps most egregious of all, the EPA plan did not provide for relocation of the residents during the cleanup. The inhumanity of this oversight was (quite literally) made apparent when the short-term contractor arrived to remove the remaining contaminated surface soil and advised the residents to take their pets to a kennel during the soil removal.<sup>88</sup> He had no advice for the residents themselves.<sup>89</sup>

In 1993, in the face of growing outrage, Abex, the City of Portsmouth, and the PRHA proposed a new plan advocating less extensive remediation combined with permanent relocation of the Effingham residents, with compensation for their homes. All residential properties at the Abex site would be converted to industrial or commercial use – except for Washington Park.<sup>90</sup> Not only would the remaining Washington Park children have no one else to play with, but they would no longer even have a play-

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86. Telephone Interview with Damon Whitehead, Lawyers' Comm. for Civil Rights Under the Law (May 26, 2006).

87. Mazurek & Hersh, *supra* note 34, at 18.

88. *Id.* at 19.

89. *Id.*

90. A lower standard of remediation is required for property dedicated to industrial or commercial rather than residential use.

ground: even the Effingham Playground would be converted to commercial or light industrial use.

In 1994, the EPA adopted this proposal in its amended remedy, merely requiring the City of Portsmouth to rezone the area according to plan. The EPA assured the Washington Park residents that the area was safe. Nonetheless, the EPA warned residents not to permit their children to dig in the ground, or to put their fingers in their mouths. "If you know children, you know that it's impossible to keep them from digging in the dirt or putting their fingers in their mouths," commented Nepveu.<sup>91</sup> "They were telling us it was safe," Ms. Person recounted, "but they were telling us to keep all of our windows closed. One July, we were forced to keep our windows shut for more than two weeks, without any air conditioning."<sup>92</sup>

In public hearings on the new plan, Washington Park residents registered their outrage at being left behind and, again, demanded the right to safe, permanent relocation. A February 1994 hearing with the EPA is illustrative. At this hearing, Ms. Person took the floor and challenged the EPA's contention that Washington Park was safe for habitation. She exclaimed, "[H]ow can you say that our children at Washington Park is safe when our children are continuously becoming contaminated? Where can they play? Where can they dig?"<sup>93</sup> "We are somebody, too,"<sup>94</sup> she told the EPA representatives. "Just because we are poor and live in a housing project does not mean that we shouldn't be treated equally and fairly."<sup>95</sup> She added, "We do intend to get out of that Superfund area, and we will not settle for anything, not nothing but permanent relocation."<sup>96</sup>

Other Washington Park residents followed. Henrietta Harrell denounced the EPA's hypocrisy and lack of compassion. "[D]on't none of you-all live out there," Ms. Harrell admonished them.<sup>97</sup> "It's not safe for those kids. I bet neither one of you-all would bring your own kids out there to stay one day. So you-all really don't know."<sup>98</sup> Naomi Levitt echoed this sentiment: "That's one of the things I don't feel from this – from the group or from the city, that they really don't understand what it means to be trapped in that proverbial bus waiting for something to happen to you, either die of toxics or move. I don't know if any

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91. Telephone Interview with Julie Nepveu, *supra* note 36.

92. Telephone Interview with Helen Person, *supra* note 33.

93. Transcript, *supra* note 2, at 8.

94. *Id.* at 9.

95. *Id.*

96. *Id.* at 9-10.

97. *Id.* at 33.

98. *Id.*

of you have ever been in that situation before.”<sup>99</sup> Finally, Cheryl Artis pointed out the injustice of leaving the Washington Park residents behind:

Do you think, in all fairness, that we, the residents of Washington Park, have been treated right? Don't you feel that we have been discriminated against by leaving - - you're cleaning up, buying the homeowners out. I know it's a difference because they own, but there's no difference where the child is concerned, where his health is concerned.<sup>100</sup>

The EPA responded with the same disquieting tune:

It's the position of the agency that at this time there's no immediate threat. Now, we do understand that you cannot fully enjoy the use of your property . . . until this is permanently cleaned up. But we're not telling you right now that it is completely pristine. What we're telling you is that it's safe to live there as long as children are not allowed to dig.<sup>101</sup>

For seven more years, Ms. Person and her Washington Park neighbors indefatigably demanded the right to permanent relocation and the closing of Washington Park, in every venue and to anyone who would listen. As the EPA's 1996 *Community Relations Plan* noted, the residents consistently expressed their anger that, a decade after the contamination had been discovered, there was still no remediation. Residents protested that lead contamination had turned their children into “slow learners,”<sup>102</sup> and they explained that they were “stressed out” by fears of contamination at the site. Finally, the residents argued that, “because most of the affected residents are African-American, officials did not address Site contamination as effectively as they could have. Some Washington Park tenants allege that they also have been discriminated against because they are poor.”<sup>103</sup>

It is important to note that for poor tenants of subsidized housing, relocating is an illusive dream. For one thing, it is often impossible to find comparable, affordable housing, particularly in or near the same area. Washington Park residents also feared the typically dangerous and squalid conditions in other subsidized housing projects in the region.<sup>104</sup> Poor folks establish care net-

99. *Id.* at 41.

100. *Id.* at 34.

101. *Id.* at 39.

102. EPA Community Relations Plan, *supra* note 37. At the February 1994 public hearing, Cecilia Hawk expressed this much more powerfully: “And I feel like, no, it's not safe for our children to be at Washington Park when over half of the children in Washington Park are in special education in school, and most of them have to be put on SSI.” Transcript, *supra* note 2, at 15.

103. EPA Community Relations Plan, *supra* note 37.

104. At one point in 1993, the PRHA offered individual residents the choice of moving into another notoriously dangerous and segregated public housing project. All of the residents refused this meaningless offer. The authorities not only refused

works, including childcare; they establish ties with neighborhood health providers willing to accept government health coverage, and they take jobs in their neighborhood. With extremely limited means, leaving those established networks is often not an option. As Washington Park resident Cheryl Artis explained in a 1996 letter to the editor of the *Virginian-Pilot*:

People say move. Easier said than done. Where can one get a deposit for another [apartment] when rent here undoubtedly is too high – not to mention the numerous doctors and medical bills we are faced with due to our lead contamination. Not everyone out here has medical insurance and indeed this entire lead situation has financially burdened us as a result.<sup>105</sup>

The EPA, HUD, the City of Portsmouth, and the PRHA refused every request and protestation to move the residents into viable, integrated housing, and to close Washington Park, including requests by Senator Robb and Congressman Sisisky. In September 1995, Abex, the PRHA, and the City of Portsmouth agreed to the amended EPA plan, and in April 1996, the plan was adopted in a final consent decree in federal court. Commenting on the plan, Ms. Person told the *Virginian-Pilot*: “This place is not fit for a dog to live in,” (and indeed residents had been told to remove their pets to a kennel).<sup>106</sup> “They’re keeping us here because we’re poor, and they’re still moving young people with kids in here. Now you tell me if that’s right.”<sup>107</sup>

By July of 1996, the buyout of private homeowners was largely complete. Washington Park residents looked on as their neighbors packed up and abandoned the Superfund site. In the Spring of 1997, “final” remediation on the Abex site began. This time, many Washington Park residents were relocated to motel rooms and other apartments for a period of about one to two months. Contractors demolished the Effingham Properties and then the former Abex foundry building. Following the demolition, workers excavated the contaminated soil, at an estimated cost of \$31.5 million.<sup>108</sup>

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to move the residents into safe, integrated housing, but they insisted upon continuing to move other (inevitably Black) families into Washington Park. See Telephone Interview with David Bailey, Staff Attorney, Lawyers’ Comm. for Civil Rights Under Law (June 13, 2006).

105. Letters to the Editor - Portsmouth, *Get Rid of the Lead*, VIRGINIAN-PILOT, Feb. 11, 1996, at 6.

106. Scott Harper, *Agreement Clears Way to Begin Cleaning Toxic Portsmouth Site*, VIRGINIAN-PILOT, Jan. 19, 1996, at B1.

107. *Id.*

108. EPA, PRELIMINARY COST ESTIMATE FOR REMEDIAL ACTIVITIES (COST FOR TEMPORARY RELOCATION; ESTIMATE OF STRUCTURE DEMOLITION AND SOIL EXCAVATION AND DISPOSAL; TOTAL COST SUMMARY AND FIGURES ATTACHED) 27 (Dec. 29, 1993), [http://loggerhead.epa.gov/arweb/public/advanced\\_search.jsp](http://loggerhead.epa.gov/arweb/public/advanced_search.jsp) (search “State: VA” and “Site Name: Abex Corporation”).

### III. WASHINGTON PARK LEAD COMMITTEE, INC. v. EPA

#### A. "A Badge of Slavery"

After the final remediation work was ostensibly completed, the residents were forced to return to Washington Park. But they had not given up on their goal of winning the right to permanent, safe relocation for all. In 1997, Ms. Person contacted David Bailey, head of the Environmental Justice Project at the Washington, D.C.-based Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"). Bailey traveled to Portsmouth to investigate, meeting with Ms. Person and other residents, gathering facts, and touring the entire Superfund site. "What I saw was appalling," Bailey recalls.<sup>109</sup> "There were signs all over the grounds of the project saying, 'This is a hazardous area, stay away.' There were signs all along the boundaries of the property, and in the tennis courts, which were just a spit away from the Washington Park housing."<sup>110</sup> "My only thought," Bailey explained, "was, 'How quickly can I move these people out of here?'"<sup>111</sup> Bailey returned to Washington and convinced his colleagues to take the case. Bailey began the massive task of assembling the facts and preparing the legal case alone, eventually enlisting a team that included the aforementioned, attorney Jannette Wipper, and lead attorney Thomas Henderson. The prestigious firm of Davis, Polk & Wardwell later agreed to join the team as co-counsel, on a pro bono basis.

Despite the blatant injustice, bringing the lawsuit would not be easy. A series of Supreme Court cases had severely circumscribed the rights of litigants to bring environmental justice claims. Early litigants had filed suit under the Equal Protection Clause of the Fourteenth Amendment to the Constitution.<sup>112</sup> In *Washington v. Davis*<sup>113</sup> and *Village of Arlington Heights v. Metropolitan Development Corp.*,<sup>114</sup> however, the Supreme Court had ruled that to prevail on an equal protection claim, plaintiffs must prove that the defendants *intentionally* discriminated against them on the basis of race.<sup>115</sup> This is an extremely difficult or impossible burden in environmental justice cases: defendants rarely

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109. Telephone Interview with David Bailey, *supra* note 104.

110. *Id.*

111. *Id.*

112. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

113. 426 U.S. 229 (1976).

114. 429 U.S. 252 (1977).

115. See 426 U.S. at 240 ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the *Equal Protection Clause*.").

leave behind smoking guns, and they can almost always point to a non-discriminatory justification for their decision, such as that the landfill was sited on the cheapest land available. Despite strong evidence that their communities face disproportionate harm from the siting of hazardous facilities, plaintiffs suing under the Equal Protection Clause routinely lose.

For example, in *R.I.S.E., Inc. v. Kay*,<sup>116</sup> a Virginia federal court ruled in 1991 that the “placement of landfills in King and Queen County [Virginia] from 1969 to the present has had a disproportionate impact on black residents.”<sup>117</sup> The court found, however, that “official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Such action violates the *Fourteenth Amendment’s Equal Protection Clause* only if it is *intentionally* discriminatory.”<sup>118</sup> Without the elusive smoking gun of racist intent, the plaintiffs lost, despite 22 years of “disproportionate” suffering.

Plaintiffs have also relied upon the regulations drafted by various federal agencies to implement Title VI of the Civil Rights Act of 1964. These regulations provide that a litigant can prevail on a claim of discrimination by proving that the act or conduct in question has had the effect of subjecting individuals to discrimination based upon race, regardless of motive.<sup>119</sup> This appeared to be a promising tool against environmental injustice, since the regulations permit proof of discrimination through a showing of “disparate impact” upon a community of color, even absent proof of intent. In *Alexander v. Sandoval*,<sup>120</sup> however, a divided Supreme Court ruled that there is no “private right of action” under these regulations.<sup>121</sup> Thus, Washington Park residents would not be able to sue under these regulations.

Meanwhile, complaints lodged with the government have brought little or no relief. From 1993 through the summer of 2005, for example, the EPA received 164 complaints alleging civil

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116. 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992).

117. *Id.* at 1149.

118. *Id.*

119. *See, e.g.*, 28 C.F.R. § 42.104(b)(2) (1999) (providing that recipients of federal funding “may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.”) (emphasis added).

120. 532 U.S. 275 (2001).

121. *Id.* at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”) (footnote omitted).



rights violations in environmental decisions.<sup>122</sup> The EPA accepted merely 47 of those for investigation; 28 of the 47 were later dismissed, and 19 were pending as of December 2005.<sup>123</sup> As for President Clinton's 1994 Executive Order on Environmental Justice, Section 6-609 of that very order specifically states that it does not "create any right . . . enforceable at law . . . ."<sup>124</sup>

There was a critical difference in the *Washington Park* case, however: Washington Park was unequivocally created with an intent to discriminate – specifically, to create "Negro housing" – and the actions of the federal and local governments in forcing the residents to remain at the Superfund site served to perpetuate that segregation. The Lawyers' Committee knew they had a strong legal claim. After preparing their case, they approached the Justice Department, laying their claims on the table and asking the government to do the right thing and settle the case without forcing the residents to fight it out in court. Insisting that the EPA cleanup was sufficient and arguing that the plaintiffs did not have a viable legal claim, the government refused to settle the case.<sup>125</sup>

In April of 1998, the Lawyers' Committee filed suit in the federal district court for Eastern Virginia, located in Norfolk. With the Lead Committee, Ms. Person, and three other residents serving as lead plaintiffs, the lawsuit named the EPA, the City of Portsmouth, the PRHA, and Abex as Defendants; the plaintiffs later named HUD as an additional defendant. The plaintiffs laid out the shameful history of discrimination and the unbroken chain of injustice. "At least since the depression," the complaint asserted, "the federal government, the City and the Authority [PRHA] have deliberately established and maintained a dual housing system."<sup>126</sup> Under this system, African-Americans, including those in Washington Park, "have been and continue to be relegated to public housing in racially segregated, impoverished, deteriorating neighborhoods which are subject to lead contamination, isolation, incompatible and undesirable land uses, and have been denied the opportunity to live in integrated, residential neighborhoods with appropriate community resources, without concentrations of poverty, and with ample social and economic opportunities."<sup>127</sup>

"Washington Park was developed pursuant to policies of *de jure* segregation on a site that was recognized as inappropriate,"

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122. Pace, *supra* note 14.

123. *Id.*

124. Exec. Order No. 12989, § 6-609, 61 Fed. Reg. 6091 (Feb. 11, 1994).

125. Telephone Interview with Damon Whitehead, *supra* note 86.

126. Second Amended Complaint, *supra* note 29, at ¶ 20.

127. *Id.* at ¶ 21.

the plaintiffs explained.<sup>128</sup> “During the entire period of its existence, beginning in 1962 with the planning of Washington Park, HUD, the City, and the Authority knew that Washington Park was physically located next to an industrial foundry and subject to environmental contamination.”<sup>129</sup> Plaintiffs’ claims were not, however, based in history. “The area remains heavily contaminated with lead,”<sup>130</sup> the plaintiffs asserted. “[A]s late as March 1998, the Authority distributed a flyer to all Washington Park tenants informing them that the attics in each housing unit were not part of the authorized occupancy, and that all attic doors were to be secured and the attics not used.”<sup>131</sup>

In violation of the Fifth,<sup>132</sup> Thirteenth,<sup>133</sup> and Fourteenth Amendments to the U.S. Constitution<sup>134</sup> and in violation of Title VI of the Civil Rights Act of 1964,<sup>135</sup> the plaintiffs asserted that the defendants:

have acted to establish, maintain, and perpetuate a racially segregated system of low income housing, have failed to dismantle a de jure system of public housing, and have agreed to and acted in concert and combination to maintain, perpetuate and reestablish such de jure segregation . . . through various acts, decisions and agreements, including the adoption and implementation of a remedy plan to cleanup toxic contamination at the Abex site, but which maintains plaintiffs’ housing as ra-

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128. *Id.* at ¶ 49.

129. *Id.* at ¶ 56.

130. *Id.* at ¶ 73.

131. *Id.* at ¶ 75.

132. U.S. CONST. amend. V (“nor be deprived of life, liberty, or property, without due process of law”).

133. U.S. CONST. amend. XIII, § 1 (abolishing slavery). In *Washington Park*, the plaintiffs argued: “Washington Park, which was established in 1960 as a housing project exclusively for ‘Negroes’ and which has always been populated almost entirely by African Americans, stands alone in the middle of what has become a ‘brown-field,’ isolated from the remainder of the Portsmouth community with its very surroundings a constant reminder to the residents of their subordinated and inferior status. A more glaring example of a badge of slavery than the Defendants’ stubborn and deliberate preservation of the contaminated, segregated housing projects at Washington Park would be difficult to imagine.” Consolidated Response in Opposition to Defendants’ U.S. EPA, City of Portsmouth, Portsmouth Redevelopment & Housing Authority, Danny Cruce and Pnuemo Abex Motions to Dismiss at 52-53, *Washington Park Lead Comm., Inc. v. EPA*, 1998 WL 1053712 (E.D. Va. Dec. 11, 1998) (No. 2:98CV421) [hereinafter Consolidated Response] (on file with author). The Supreme Court has ruled that the Thirteenth Amendment also prohibits “badges” or relics of slavery. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *See generally* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307 (2004).

134. U.S. CONST. amend. XIV.

135. Title VI of the Civil Rights Act of 1964 provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1964).

cially segregated, exposed to contamination and toxics now and continuing into the future, and isolated in an area of inappropriate and harmful industrial and other land uses.<sup>136</sup>

### B. *The Defendants Respond*

The defendants' reaction was as predictable as it was outrageous: each party moved to dismiss the case entirely. "This is a very irresponsible complaint to file," a lawyer for the PRHA told the *Virginian-Pilot*, suggesting that the case lacked scientific, environmental, or legal grounds.<sup>137</sup> None of the defendants contested that Washington Park was established pursuant to an ugly policy of *de jure* segregation. And none of the defendants disputed that the proposed cleanup would "exacerbate the conditions, attributes, features, and consequences of *de jure* segregation by further isolating and identifying the housing project as a facility improperly located, undesirable, and inappropriate for residential living."<sup>138</sup> Yet each sought to abolish the rights of the Washington Park residents to challenge their circumstances, and each, including most egregiously the federal and local governments, sought to abolish the rights of all future residents living on a Superfund site to challenge a proposed remediation or to obtain relocation until *after* the remediation was completed.

Among the many grounds upon which the defendants moved to dismiss, the City of Portsmouth argued that the residents were barred by a two-year statute of limitations.<sup>139</sup> The residents had suffered continuing discrimination and continuing harm up until the time they filed suit, however, and the Fourth Circuit had expressly recognized a "continuing violation" doctrine.<sup>140</sup> Under this just doctrine, the statute of limitations accrues, or begins anew, each day that there is a violation, no matter how many years a plaintiff has suffered.<sup>141</sup>

The City also argued that the plaintiffs' claims were barred by the doctrine of "issue preclusion," since they were already litigated in the proceedings between the EPA, the City, the PRHA and Abex, which led to the 1996 consent decree and final

136. Second Amended Complaint, *supra* note 29, at ¶ 1.

137. Scott Harper, *Neighbors File Suit over Toxic Site*, VIRGINIAN-PILOT, Apr. 24, 1998, at B1.

138. Consolidated Response, *supra* note 133, at 7.

139. Washington Park Lead Comm., Inc. v. EPA, No. 2:98CV421, 1998 WL 1053712, at \*5 (E.D. Va. Dec. 11, 1998).

140. See, e.g., Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1166 (4th Cir. 1991); Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 663 (4th Cir. 1989); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 346-47 (4th Cir. 1994).

141. See *Nat'l Adver. Co.*, 947 F.2d at 1166; *Baliles*, 868 F.2d at 663; *Brinkley-Obu*, 36 F.3d at 346-47.

remediation plan.<sup>142</sup> Under the doctrine of issue preclusion, plaintiffs cannot re-litigate an issue if, among other things, they were a party to the earlier action or in privity with a party to the earlier action.<sup>143</sup> The City of Portsmouth actually argued that the EPA “adequately represented” the interests of the Washington Park residents,<sup>144</sup> even as it completely ignored all of their requests when entering into the remediation plan to which the residents were not even a party. As the Lawyers’ Committee pointed out, in fact, “the Plaintiffs’ interests and those of the EPA are diametrically opposed in many respects.”<sup>145</sup> In addition, the issue of discrimination, central to the plaintiffs’ claims, was never broached in the prior proceedings.

Most troubling of all, however, was the assertion by all of the defendants that the federal Superfund law prohibits “all claims of any kind”<sup>146</sup> challenging a remedial action until it is completed.<sup>147</sup> The “timing-of-review” provision, Section 9613(h) of the governing CERCLA statute,<sup>148</sup> provides:

No Federal Court shall have jurisdiction under Federal law other than under [a section relating to diversity of citizenship jurisdiction] or under State law which is applicable or relevant and appropriate under [a section relating to cleanup standards] to review any challenges to removal or remedial action . . . except [upon five limited grounds] . . .<sup>149</sup>

Defendants argued that by enacting this provision, “Congress intended to preclude all citizens’ suits against EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause.”<sup>150</sup>

Defendants’ argument, if adopted by the court, would have profoundly deleterious consequences for the Washington Park residents: they would have to continue to reside at the site throughout all further remediation, possibly for years to come.<sup>151</sup>

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142. *Washington Park*, 1998 WL 1053712, at \*6.

143. See, e.g., 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 132.01[1] (3d ed. 1997) (“Under the doctrine of issue preclusion . . . once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party (or privity) to the prior litigation.”).

144. Consolidated Response, *supra* note 133, at 22.

145. *Id.* at 27.

146. *Id.* at 28.

147. *Washington Park*, 1998 WL 1053712, at \*8.

148. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675 (1994).

149. 42 U.S.C. § 9613(h) (1994).

150. *Washington Park*, 1998 WL 1053712, at \*8 (citations and internal quotations omitted).

151. As one commentator observes, “[T]he timing-of-review provision generally serves environmental and public health interests by promoting rapid remediation of contaminated waste sites. However, in some cases it may frustrate those interests by

The patent unfairness of such an outcome was once again made apparent by the EPA announcement in the summer of 1999 that, yet again, more cleanup than anticipated was required. "The city of Portsmouth has revealed that there are more lead-contaminated areas in a public housing complex undergoing Superfund remediation than the [EPA] previously told the city's housing authority or complex residents," the headlines read.<sup>152</sup> As Whitehead explains, "[W]e always hoped the government would stand up and do the right thing . . . say 'this looks bad' and 'children are being hurt.' Let's make the right decision and reverse course." Instead, Whitehead explains, they fought the Washington Park residents "tooth and nail." "It makes you concerned about what the government is about," Whitehead said. "Is it about defending their position at all costs, or is it of the people and for the people?"<sup>153</sup>

### C. *The Decision*

In December 1998, Judge Jerome B. Friedman issued a decision denying the defendants' motions to dismiss. Judge Friedman ruled that the plaintiffs' lawsuit was filed within the statute of limitations, since the plaintiffs filed within two years of the final consent decree setting forth the remedial plan.<sup>154</sup> The judge also found that the plaintiffs were not precluded from bringing their claims based upon the consent decree proceedings because the plaintiffs were not a party to those proceedings, or in privity with those who were, "and indeed it seems that plaintiffs' interests are opposed to the interests of the parties to the consent decree."<sup>155</sup> As a result, the plaintiffs could not have been "adequately represented."

Most significantly, the court ruled that CERCLA did not prohibit plaintiffs' claims. CERCLA indeed bars claims to ongoing remediation under state and federal statutes, the court explained, but the *Washington Park* plaintiffs had advanced claims

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blocking judicial review even when the administrative cure is worse than the disease." Megan A. Jennings, *Frey v. Environmental Protection Agency: A Small Step Toward Preventing Irreparable Harm in CERCLA Actions*, 33 *ECOLOGY L.Q.* 675, 681 (2006).

152. Solid Waste Digest, *EPA Error Means More Portsmouth Land Must Be Cleaned*, Chartwell Solid Waste Group (July 1999) (on file with author).

153. Telephone Interview with Damon Whitehead, *supra* note 86.

154. *Washington Park*, 1998 WL 1053712, at \*6. As the Third Circuit had found just a year before this decision, a cause of action challenging a CERCLA consent decree accrues as of the date the final judgment is entered. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119; 1125 (3d Cir. 1997) (finding that plaintiffs filed within the statutory period, the court apparently saw no need to apply the "continuing violation" doctrine to plaintiffs' claims).

155. *Washington Park*, 1998 WL 1053712, at \*7.

under the U.S. Constitution, which is not a statute.<sup>156</sup> In addition, the court noted the illogic of forcing the residents to wait until after the cleanup was complete to challenge the remediation plan. If the Superfund bar applied, the court noted, the plaintiffs “could not raise their constitutional claims until the cleanup was concluded. However, at that point the case would be moot.”<sup>157</sup>

Finally, the court refused to dismiss plaintiffs’ Thirteenth Amendment claim. The court explained that plaintiffs’ faced a heavy burden: “‘Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage . . . adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group.’”<sup>158</sup> Plaintiffs might prevail, however, if they could prove “a severe stigma on blacks.”<sup>159</sup>

#### D. *The Consent Decree*

After the court’s decision upholding the plaintiffs’ right to pursue their legal claims, the only remaining question was whether the plaintiffs could proffer sufficient evidence to prove those claims. For the next year, the government defendants fought vigorously to prevent the plaintiffs from obtaining that evidence, repeatedly seeking protective orders and resisting the disclosure of documents. “Everything we asked for they resisted, including documents demonstrating the establishment of Washington Park as a segregated housing facility, documents central to our constitutional claim,” Wipper explained.<sup>160</sup>

The facts were clearly in the plaintiffs’ favor, however, and the defendants were likely to suffer an embarrassing loss if the case went to trial. After the EPA’s announcement that yet more

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156. *Id.* at \*9.

157. *Id.* There is a split of authority on the question of whether CERCLA precludes judicial review of constitutional challenges to remedial plans and actions. “While a majority of courts agree that all claims should be barred, a minority of courts maintain that review should be available to claims when a delayed review would be inadequate or contrary to the ultimate objectives of CERCLA.” Robert G. Ruggieri, *Broward v. Environmental Protection Agency: CERCLA’s Bar on Pre-enforcement Review of EPA Cleanups Under Section 113(h)*, 13 VILL. ENVTL. L.J. 375, 375-76 (2002). See Jennings, *supra* note 151; *Broward Garden Tenants Ass’n v. EPA*, 157 F. Supp. 2d 1329 (S.D. Fla. 2001).

158. *Washington Park*, 1998 WL 1053712, at \*11 (quoting *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981)). Of course, this analysis presupposes a completely random or coincidental siting in a predominantly African American neighborhood, and is thus inapposite to *Washington Park*: The government actively placed the African American plaintiffs into “Negro Housing” abutting an active, toxic foundry, and then refused to relocate them year after year, perpetuating the discriminatory and pernicious segregation.

159. *Id.*

160. Telephone Interview with Janette Wipper, Partner, Sanford Wittels & Heisler, LLP (June 5, 2006).

contamination had been discovered at the site, the City of Portsmouth for the first time expressed concerns over the health of the residents. "It was getting so obscene," Bailey explained, "that the City of Portsmouth – but not the EPA – began to realize that their position was untenable."<sup>161</sup> The defendants finally acceded to the plaintiffs' – and Congressman Sisisky's – requests for settlement negotiations and, in April 2000, the parties entered into a consent decree granting the Washington Park residents the relief they had desperately sought for so long. All of the residents would be permanently relocated, commencing immediately.<sup>162</sup> The PRHA would assist them in finding suitable, affordable housing units in non-segregated areas of the city, paid for with federally subsidized "Section 8" housing vouchers.<sup>163</sup> The PRHA agreed to demolish the Washington Park complex and, along with the City, agreed to enact restrictions prohibiting reuse of the property for residential purposes.<sup>164</sup> This was the first time in history that a Superfund remediation plan had been altered to address racial discrimination in public housing. "I have prayed and worked for years for the safe relocation of all the people in Washington Park, especially the children," Ms. Person told the press, "and now my prayers have been answered."<sup>165</sup> "We got a divorce today," Henrietta Harrell told the *Virginian-Pilot*. "We got a divorce today from the lead. And it's a good feeling."<sup>166</sup>

Nearly two decades after the first Washington Park children had tested positive for serious lead poisoning, and a decade after the site had been added to the Superfund's NPL, the 490 residents of Washington Park would finally taste fresh air and touch safe ground. For Helen Person, it would be the first non-segregated housing she had lived in since moving to Portsmouth in 1950, a half-century earlier. Neither she nor any of the other residents would receive a penny for the pain and suffering that the various governments had forced them to endure.

In June of 2000, the Lawyers' Committee submitted an appendix to the consent decree entitled, "An Examination of the Racial Characteristics of Populations Permanently Relocated

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161. Telephone Interview with David Bailey, *supra* note 104.

162. See *Washington Park*, 1998 WL 1053712.

163. *Id.* at \*4-13.

164. *Id.* at \*21-26.

165. PR Newswire, *Public Housing Residents at Superfund Site Relocated to Integrated Housing Opportunities; Agreement is a Landmark Victory in Environmental Justice Movement* (Apr. 12, 2000), <http://www.prnewswire.com/news-releases/public-housing-residents-at-superfund-site-relocated-to-integrated-housing-opportunities-agreement-is-a-landmark-victory-in-environmental-justice-movement-72579957.html>.

166. Stephanie A. Crockett, *Washington Park Pact Approved*, *VIRGINIAN-PILOT*, Feb. 18, 2000, at A1.

from Superfund Sites.”<sup>167</sup> This study examined data from the EPA’s list of Superfund Permanent Relocations and other sources to determine the “racial” makeup of each of the 19 populations that the EPA had permanently relocated from a Superfund site to date. The results were startling. Of the 19 permanent relocations, 16 involved a predominantly White population.<sup>168</sup> “Of the sixteen White populations, nine had a White population that was 97% or higher and fourteen had a White population that was at least 81%.”<sup>169</sup> Of the three relocations of predominantly African-American populations, one was based upon an act of Congress, one was the result of litigation (Washington Park), and one was based upon “intense lobbying on the state and federal level during an election year.”<sup>170</sup> As the Lawyers’ Committee concluded, “the results demonstrate that white populations have overwhelmingly been permanently relocated as compared to communities of color.”<sup>171</sup>

#### IV. CONCLUSION: ANIMALS SLEEP THERE NOW

In 2003, as agreed, Washington Park was demolished, and the site was rezoned exclusively for commercial or industrial use. Washington Park, the Effingham residences, and the playground have now been replaced with a fire station and a stable for city horses, in addition to tracts of land capped with a blue sealant. While some residents left the state, and some ended up in public housing projects, Ms. Person and many other residents found decent housing units in integrated buildings throughout the City of Portsmouth. They no longer have the community of friends and neighbors they had come to know and love over the years, but they are at last free from harm. And if you happen to attend a City Council meeting in Portsmouth this month, you might well see Ms. Person at podium, “still speaking out about issues that are important to my community.”<sup>172</sup>

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167. Lawyers’ Committee for Civil Rights Under Law, *An Examination of the Racial Characteristics of Populations Permanently Relocated from Superfund Sites* (June 21, 2000) (on file with author).

168. *Id.* at 6.

169. *Id.*

170. *Id.*

171. *Id.* at 7.

172. In February 2002, the Virginia General Assembly passed a resolution honoring Ms. Person as “a courageous advocate, community leader, and steadfast crusader for the rights of the residents of Portsmouth’s Washington Park Housing Complex,” and commending her for her “diligent, resolute, and courageous pursuit of justice.” It is a remarkable achievement, and one of many honors that Ms. Person would receive. See H.J. Res. 369 (Va. 2002), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+HJ369ER>.



