ENVIRONMENTAL JUSTICE FOR STATES:

A Guide for Developing Environmental Justice Programs for State Environmental Agencies

A Report to the U.S. Environmental Protection Agency

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EXECUTIVE SUMMARY

This report on environmental justice programs for state environmental agencies grew out of a lawsuit filed by Rhode Island Legal Services in 1999 against the Rhode Island Department of Environmental Management (RIDEM") and the City of Providence ("City") challenging the siting of two public schools on the former city dump and the clean up plan for the school site. As a result of that litigation, RIDEM is establishing a stakeholder group to assist the agency develop legislation, regulation and policies on a variety of environmental justice issues. This report is intended to help inform the work of the stakeholder group, as well as advance the development of environmental justice programs by state agencies across the United States.

Initially, this report was conceived as a "best practices" report on environmental justice initiatives undertaken by state environmental agencies. As research unfolded, it became clear that compiling a "best practices" report was an unrealistic proposition. First, there were too few examples of successful state environmental justice programs about which to write. Second, even in states in which environmental justice programs have been implemented, those programs are relatively new and are still works in progress. Consequently, this report contains recommendations regarding what features a model state environmental agency's environmental justice program should include.

The report is broken into three parts. The first part provides an introduction to environmental justice, including a brief history of the environmental justice movement in the United States and Rhode Island. While definitions of the term "environmental justice" vary, this report examines "environmental justice" as the term is defined by the United States Environmental Protection Agency ("EPA"). EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."

The second part explains the reasons state environmental agencies should adopt environmental justice programs. First, the federal law requires recipients of federal financial assistance such state environmental agencies not to discriminate on the basis of race, color and national origin in their activities. That law, Title VI of the Civil Rights Act of 1964, authorized federal agencies to issue anti-discrimination regulations. EPA's Title VI regulations require recipients to refrain from taking actions that have the effect of discriminating on the basis of race, color or national origin. Those regulations also require state environmental agencies to adopt grievance procedures to investigate and resolve complaints alleging discrimination on the basis of race, color or national origin.

State agencies should adopt environmental justice programs for non-legal reasons as well. Those programs produce environmental benefits beyond those achieved by environmental laws that regulate pollution and land-use, because "traditional" environmental laws fail to address or take into account disparities in public health, pollution and vulnerabilities to the effects of exposures to pollutants experienced by low-

income and minority communities. Also, states should establish environmental justice to promote the development of social capital in communities where such capital is lacking. Social capital reflects the capacity of a community to collectively respond to issues or problems faced by the community. Low income and non-white communities have reduced levels of social capital as measured by civic engagement, voting in municipal or off-year elections and membership in social, service or religious organizations. Communities with fewer indicators of social capital were found to be more likely to suffer from environmental injustice, such as reduced levels of pollution reduction and lower expenditures on clean ups of contaminated sites.

The third part of the report contains recommendations on initiatives state environmental agencies could take to establish environmental justice programs. Many of the initiatives could be undertaken by agencies under existing legal authority, while others require agencies to obtain new authority from their respective state legislatures. Legislative approval of state environmental justice initiatives will further institutionalize agency efforts in this area, but in many states environmental justice legislation has languished for years. Thus, agencies would be wise to initiate as many of these recommendations using their existing authority and seek legislative approval thereafter.

The first group of recommended initiatives helps agencies implement their obligation to establish formal complaint procedures to resolve discrimination complaints brought under Title VI of the Civil Rights Act. Using EPA's Title VI complaint process as a guide, the report proposes a complaint processing process that includes the agency's: (1) written acknowledgment of the complaint, (2) acceptance of the complaint for investigation or rejection or referral of the complaint, (3) investigation of the complaint, (4) issuance of a preliminary finding of noncompliance, (5) issuance of a formal finding of noncompliance, (6) provision of a ten-day period in which a respondent may come into voluntary compliance through a written agreement with OCR and (7) provision of a hearing/appeal process to respondents who fail to voluntarily comply or who wish to challenge the agency's formal finding of non-compliance.

A critical component of any Title VI investigation involves the way the agency determines whether a violation of Title VI has occurred. Since EPA's regulations ban recipients of federal funds from taking actions (or refraining from taking actions) that have a disparate impact on the basis of race or color, state agencies should develop a standard framework to determine whether a complaint of action or inaction has a disparate impact. Moreover, given that state agencies could be the subject of Title VI complaints, agencies should utilize that same framework in its own decision-making. The framework proposed consists of seven basic tasks: (1) identifying the activity or facility at issue; (2) identifying the hazards associated with the proposed activity or facility (adverse impact); (3) identifying the population affected by the hazards associated with the proposed activity or facility; (4) identifying other hazardous activities or facilities, particularly activities or facilities previously permitted by the agency, that already impact the affected population (cumulative impact); (5) determining the demographics of the affected population; (6) comparing impacts (both adverse and

cumulative) on the affected population to a larger population (disparate impact); and (7) determining the significance of the disparity.

Given that Title VI's obligations extend to all activities of the agency, reform measures should ensure that environmental justice considerations are integrated into all agency activities. In other words, states should take a *comprehensive approach* to incorporating environmental justice into agency work, "rather than focusing on a specific facet (*e.g.*, permitting, siting, brownfields, enforcement) that may raise issues associated with environmental justice. This task can be challenging given that state environmental agencies have many divisions and environmental justice efforts must affect all of those divisions. To accomplish this task, the report makes a number of recommendations, including developing an agency-wide environmental justice policy or plan; creating an interagency task force on environmental justice to coordinate efforts with related state agencies; creating an environmental justice advisory committee where stakeholders from outside the agency can provide input and on-going feedback on the agency's environmental justice initiatives; appointing an environmental justice ombudsperson or creating an office of environmental justice within the agency; and providing staff training on environmental justice and public participation techniques.

An integral element of a good state agency's environmental justice program is thorough and meaningful public participation. Members of communities affected by agency decisions should be actively involved in the many stages of planning and implementation, starting at the earliest practical moment after a project is proposed or a concern arises and continuing even after permits are issued and/or facilities are built. The theoretical framework underlying this section comes from the public participation spectrum developed by the International Association for Public Participation ("IAP2"). The IAP2 spectrum consists of 5-stages of increasing levels of public participation, however, for reasons relating to the nature of decision-making by state environmental agencies, the fifth stage is not discussed herein. The first stage, informing the public, constitutes the bare minimum of public participation measures and involves providing community members with facts and materials intended to help them understand the problems or proposals at issue. The second stage, consulting the public, requires that practitioners not only provide information but also solicit feedback regarding that information. Practitioners should also provide feedback to the community on how input from the public ultimately influenced the decision(s) made. Involving the public, the third stage in the spectrum, builds upon consultation by including repeated opportunities for feedback and a greater level of give-and-take between practitioners and members of the public. The fourth stage, collaborating with the public, involves consistent partnering with community members in all stages of decision-making. Not every environmental decision made by the state agency need involve every stage of the spectrum, but measures designed to promote all four stages are necessary for effective participation.

Finally, the report recommends certain legislative actions to be taken to support environmental justice programs initiated by state agencies. As previously noted, the adoption and implementation of environmental justice programs by state environmental agencies does not require agencies to obtain new legislative authority. That being said,

the success of environmental justice initiatives at the state level would be greatly enhanced by legislative enactments that provide additional financial support and legal authority for state environmental agencies to decisively act to promote environmental justice.

First, environmental justice programs need to be properly funded. Initially, such appropriations should fund staff positions such as an environmental justice ombudsperson position or several positions to staff an office on environmental justice. Funds should also be appropriated to support staff training, particularly on conducting disparate impact analysis and public participation techniques. Funds should also be made available to non-profit community groups and universities to support capacity building and research efforts related to environmental justice.

An area ripe for legislative activity is developing legal standards to guide agency decision-makers to avoid or mitigate disparate impacts. The most common legislative approach to mitigating disparate impacts of siting and permitting decisions involves the dispersion of environmentally hazardous activities within a given area. Generally, these laws restrict the siting of environmentally hazardous activities within a certain distance of another similar facility or limit the number of facilities within a defined area. Alternatives to dispersion laws are laws requiring a "fair share" distribution of environmentally hazardous facilities in a given jurisdiction. A third approach attempts to restrict certain land uses that entail environmental risks. For example, some states enacted laws that restrict the siting of schools on sites contaminated by hazardous substances. An emerging approach not widely adopted in the United States directs environmental decision-makers to follow a precautionary approach in their decision-making. This approach, known as the "Precautionary Principle," requires that "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. California has taken the lead in advancing the precautionary principle in its environmental justice programs.

PREFACE

This report on environmental justice programs for state environmental agencies grew out of a lawsuit filed by Rhode Island Legal Services in 1999 against the Rhode Island Department of Environmental Management ("RIDEM") and the City of Providence ("City"). The lawsuit challenged the City's siting of two public schools on top of the former Providence City Dump and RIDEM's approval of a clean-up plan for the site. When initially conceived, research for this report was to be used to develop a policy guide of "best practices" for use by a stakeholder group assembled by RIDEM as part of a settlement of the aforementioned lawsuit. The stakeholder group was to make recommendations to RIDEM on how the agency should consider environmental equity issues in proposed clean-up of sites contaminated by hazardous substances.

The stakeholder group was to be established in 2003; however, the Court rejected the settlement agreement with RIDEM due to objections raised by the City. Thus, the stakeholder group was not established, and the lawsuit went to trial. In 2005, a Rhode Island Superior Court judge ruled in favor of the plaintiffs, finding that both RIDEM and the City broke the law when the schools were sited, and the clean-up plan was approved. In 2006, RIDEM agreed, again, to establish the stakeholder group on environmental equity, and the results of this report will be provided to the stakeholder group at the group's initial meeting.

Despite the breakdown of the settlement, research on this report began in 2004. As research unfolded, it became clear that compiling a "best practices" policy guide on state environmental justice programs was an unrealistic proposition. First, there were too few examples of successful state environmental justice programs about which to write.

Second, even in states in which environmental justice programs have been implemented, those programs are relatively new and are still works in progress. Consequently, this report contains recommendations regarding what features a model state environmental agency's environmental justice program should include. Thus, these recommendations are applicable not only to Rhode Island but also to the environmental agencies of all fifty states. However, since the report was written primarily for a Rhode Island audience, the recommendations herein fail to address several environmental justice concerns, such as environmental justice issues of Native American tribes, that are not as prevalent in Rhode Island as they may be in other locations.

I. AN INTRODUCTION TO ENVIRONMENTAL JUSTICE

A. DEFINING "ENVIRONMENTAL JUSTICE"

The terms "environmental justice," "environmental equity" and "environmental racism," though often used interchangeably, have distinct meanings. "Environmental justice" is the broadest of the three terms and is the term used most widely to describe efforts to improve the living environment of low-income communities and communities of color. Due to both the term's breadth and widespread use, this study examines "environmental justice" programs of state environmental agencies.

The term "environmental justice" has both narrow and broad meanings. When used in the regulatory context, "environmental justice" generally concerns incorporating principles of fairness and public participation when making environmental decisions that

affect communities of color and low-income communities. When used to describe advocacy efforts, the term extends beyond those two principles.

The United States Environmental Protection Agency ("EPA") defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[1] Similarly, the Massachusetts Executive Office of Environmental Affairs defined environmental justice as "the equal protection and meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies and the equitable distribution of environmental benefits."[2]

The EPA's definition is less expansive than the definitions of "environmental justice" developed by environmental justice advocacy groups. At the First National People of Color Environmental Leadership Summit held in Washington, D.C. in 1991, activists from communities of color around the world adopted a seventeen-point "Principles of Environmental Justice"[3] akin to the Magna Carta of the environmental justice movement. The "Principles of Environmental Justice" document declares environmental justice as a series of "rights," such as the rights to:

- freedom from ecological destruction;
- ethical, balanced and responsible uses of land and renewable resources;

[1] U.S. Environmental Protection Agency (EPA), *Environmental Justice*, available at http://www.epa.gov/Compliance/environmentaljustice/index.html (last accessed Sept. 13, 2006).
[2] Julian Agyeman & Tom Evans, *Rethinking Sustainable Development: Toward Just Sustainability in Urban Communities: Building Equity Rights with Sustainable Solutions*, 590 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 35 (2003).
[3] Copy available at http://saepej.igc.org/Principles.html (last accessed Sept. 13, 2006).

- political, economic, cultural and environmental self-determination for all peoples;
- participation as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation;
- a safe and healthy work environment (for all workers); and
- full compensation and reparations for (environmental) damages, as well as quality health care.[4]

Moreover, the Principles of Environmental Justice declare "governmental acts of environmental injustice [as] a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide."[5]

More recently, environmental justice advocates have put forth a rights-based "environmental justice framework" that expands on the principles adopted at the First National People of Color Environmental Leadership Summit. Included in the framework are the notions that prevention should be the preferred public health strategy and that the burden of proof of harm should be reallocated towards polluters and away from affected communities.[6] These notions stem from an emerging approach to environmental regulation known as the Precautionary Principle, adopted at the 1998 Wingspread Conference on the Precautionary Principle. The Precautionary Principle requires that:

> "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic

[4] *Id.*
[5] *Id.*
[6] Manuel Pastor, et al., *In the Wake of the Storm: Environment, Disaster, and Race After Katrina*, Russell Sage Foundation, New York (2006), at 7-8.

> and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action."[7]

The term, "environmental equity" is often used synonymously with the term "environmental justice," but the terms have distinct meanings. Professor Bunyan Bryant distinguished "environmental justice" from "environmental equity" in the following manner:

> "*Environmental Equity:* Environmental equity refers to the equal protection of environmental laws. . . . [Those] laws should be enforced equally to ensure the proper siting, clean up of hazardous wastes, and the effective regulation of industrial pollution regardless of the racial and economic composition of the community.
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> *Environmental Justice:* Environmental justice (EJ) is broader in scope than environmental equity. [EJ] refers to those cultural norms and values, rules, regulations, behaviors, policies and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing and productive." [8]

Professor Bryant notes that "both scholars and activists have in most instances replaced the concept 'equity' with the concept 'justice' [because] [t]he former concept was too limiting for the job that needed to be done."[9]

"Environmental racism" is also distinguishable from "environmental justice." Civil rights activist Dr. Benjamin F. Chavis, Jr. is credited with coining the former term, and he defined "environmental racism" as "the deliberate targeting of people-of-color communities for toxic waste facilities and the official sanctioning of a life-threatening presence of poisons and pollutants in people-of-color communities."[10] "Environmental racism" is a narrower term than "environmental justice" because the former only

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[7] A copy of the Wingspread Consensus Statement on the Precautionary Principle adopted on January 26, 1998 is available at http://www.sehn.org/wing.html (last accessed Sept. 13, 2006).
[8] Bunyan Bryant, ed., *Environmental Justice: Issues, Policies, and Solutions* (1995), at 5-6.
[9] *Id.*, at 6.
[10] Avi Brisman, *EPA's Disproportionate Impact Methodologies – RBA and COATCEM – and the Draft Recipient Guidance and Draft Revised Investigation Guidance in Light of* Alexander v. Sandoval, 34 CONN. L. REV. 1107 (2002).

addresses environmental issues that disproportionately impact identifiable racial groups (black, white, Asian, Native American), whereas the latter encompasses both a race-based and class-based analysis of environmental impacts.

B. A BRIEF HISTORY OF THE ENVIRONMENTAL JUSTICE MOVEMENT

To better understand issues of environmental justice, it is important to review the historical development of what has become known as the environmental justice movement. The environmental justice movement is a product of both the civil rights movement of the 1950s and 1960s and the environmental movement of the 1960s and 1970s. The legal basis for much environmental justice advocacy, Title VI of the Civil Rights Act of 1964 ("Title VI"),[11] was one of the landmark civil rights bills passed at the height of the civil rights movement's influence. Title VI forbids the recipients of federal funds from discriminating on the basis of race, color or national origin.[12] The environmental movement achieved similar legislative success with the passage of the National Environmental Protection Act ("NEPA") in 1969.[13] NEPA requires all federal agencies to prepare detailed environmental impact statements for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ."[14] NEPA also established the Council on Environmental Quality ("CEQ"), which is required to submit to Congress annually an Environmental Quality Report. CEQ's 1971 Report contained probably the

[11] 42 U.S.C. §2000d.
[12] Environmental Justice Resource Center, *Environmental Justice Timeline – Milestones*, Clark Atlanta University (2006), available at http://www.ejrc.cau.edu/summit2/%20EJTimeline.pdf (last accessed Sept. 13, 2006).
[13] 42 U.S.C. §§4321-4347
[14] 42 U.S.C. §4332

first official acknowledgement that racial discrimination had a negative impact on the environment of urban poor Americans.[15] This report also provided the first documented correlation between toxic risk and income, finding that income disparities adversely affected the ability of the urban poor to elevate the quality of their environment.[16]

The environmental justice movement began in 1982 when residents of Warren County, North Carolina organized themselves to oppose the State of North Carolina's decision to site a PCB (poly-chlorinated biphenyl) landfill in Warren County.[17] Many Warren County residents believed the site was chosen because African-Americans composed sixty-five percent (65%) of the county's population. An activist opposing the proposed landfill, Dr. Benjamin Chavis, coined the term "environmental racism"; hence, the Warren County controversy is widely viewed as the controversy that gave birth to the environmental justice movement.

Following the protests in Warren County, several studies were undertaken to determine whether the location of hazardous waste sites was related to the race of the population surrounding such sites. In 1983, the General Accounting Office (GAO) found a relationship between the location of hazardous waste sites and the race of people living in the surrounding neighborhood.[18] In a 1987 study, the United Church of Christ found that predominantly African-American neighborhoods were more likely to be located near hazardous waste sites than neighborhoods where other racial groups were predominant.[19] That same year, Robert Bullard published *Invisible Houston*, a book about the

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[15] Environmental Justice Resource Center, *supra,* note 12.
[16] Virginia Natural Resources Leadership Institute, *Environmental Injustice: Factors and Influences,* available at http://www.virginia.edu/ien/vnrli/docs/EJInD2005.pdf (last accessed Sept. 13, 2006).
[17] Manuel Pastor, et al., *supra*, note 6.
[18] Joseph Ursic, *Finding A Remedy for Environmental Justice: Using 42 U.S.C. § 1983 To Fill In A Title VI Gap,* 53 CASE W. RES. L. REV. 497 (2002).
[19] Lily N. Chinn, *Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading,* 26 ECOLOGY LAW QUARTERLY 80 (1999).

environmental conditions of African-Americans living in Houston, Texas.[20] Bullard discovered that eighty-two percent (82%) of Houston's waste facilities were in black communities even though Houston's population was only twenty-five percent (25%) black.

By the late 1980s, in response to these initial studies, communities of color began organizing themselves into environmental justice advocacy groups. For instance, the Gulf Coast Tenants Organization was formed to advocate closing petrochemical industries in "Cancer Alley" (located between Baton Rouge and New Orleans, Louisiana).[21] Similarly, community activists in New York City's West Harlem neighborhood formed West Harlem Environmental Action ("WEACT") to fight "the harmful impacts of the North River Sewage Treatment Plant on the people of the West Harlem community."[22]

In the 1990s, the environmental justice movement continued growing. In 1991, the first People of Color Environmental Summit was held in Washington, DC.[23] During the summit, key principles of the environmental justice movement were adopted. Some of those principles included: 1) demanding that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias; 2) affirming the fundamental right to political, economic, cultural and environmental self-determination of all peoples; and 3) protecting the rights of victims of environmental injustice to receive full compensation and reparations for damages, as well as quality health care.[24]

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[20] Environmental Justice Resource Center, *supra*, note 12.
[21] Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 72 (1997).
[22] Environmental Justice Resource Center, *supra*, note 12.
[23] *Id.*
[24] Lincoln L. Davies, *If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence*, 207 FORDHAM ENVTL. L. J. 295 (1999).

The first attempt to pass legislation on the federal level to address environmental justice concerns, the Environmental Justice Act, was introduced in 1992 by former Senator Al Gore and Georgia Congressman John Lewis.[25] The Act would have required the EPA to publish a list ranking from 1 to 100 the geographic units with the highest amounts of toxic chemicals. Also, the Act would have also placed a moratorium on the siting or permitting of new toxic chemical facilities that release toxic chemicals that significantly impact human health and well-being.[26]

In 1992, the *National Law Journal* published a report on the United States Environmental Agency's ("EPA") implementation of the Superfund program that found that environmental law fines and penalties assessed by the EPA were higher in white neighborhoods than in minority neighborhoods.[27] The report also noted that hazardous wastes were removed from white neighborhoods faster than were hazardous wastes located in minority neighborhoods.

The following year, EPA established the National Environmental Justice Advisory Council ("NEJAC") to provide advice and recommendations to the agency on environmental justice matters. NEJAC consists of representatives of community, academia, industry, environmental, indigenous and state/local/tribal government groups and has conducted more than two-dozen meetings, roundtable discussions and public dialogues since the Council's first meeting in May 1994.[28]

One of the most important accomplishments of the environmental justice movement occurred in 1994, when President Clinton issued Executive Order 12898,

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[25] Knorr, *supra*, note 21.
[26] *See*, S. 2806 (102d Cong. 2d Sess. June 3, 1992) *and* H.R. 5326 (102d Cong. 2d Sess. June 4, 1992.)
[27] Ursic, *supra*, note 18.
[28] More information on NEJAC is available *infra*, at 47, and on EPA's website at http://www.epa.gov/compliance/environmentaljustice/nejac/index.html (last accessed Sept. 13, 2006).

"Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." Building on both Title VI and NEPA, this Order directed each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations in the United States . . . ."[29] More specifically, every federal agency was required to develop an agency-wide environmental justice strategy that "identifies and addresses disproportionately high and adverse human health effects" on minority and low income populations and to conduct the agency's operations "that substantially affect human health or the environment in a manner that ensures that [the agency's operations] . . . do not have the effect of excluding persons (including populations) from participation in, denying persons . . . the benefits of, or subjecting persons . . . to discrimination . . . because of their race, color or national origin."[30]

The environmental justice movement achieved further successes in the first decade of the 21st century. In 2000, the Macon County Citizens for a Clean Environment stopped the siting of a landfill near the historic Tuskegee University (located in Tuskegee, Alabama). In 2001, detoxification work on the Warren County Landfill began, and it was completed in late December 2003.[31]

However, in 2001, the environmental justice movement suffered a significant setback to its efforts with a ruling by the United States Supreme Court that greatly limited the effectiveness of Title VI in environmental justice cases. The Court's ruling in

[29] Executive Order 12898, Section 1-101 (Feb. 11. 1994).
[30] *Id.*, at Sections 1-103, 2-2.
[31] Robert Bullard, ed., *The Quest for Environmental Justice* (2005).

Sandoval v. Alexander[32] ended the ability of private parties to sue recipients of federal funds for violating so-called "disparate impact" regulations issued under Title VI. Before the *Sandoval* ruling, environmental justice groups frequently used these "disparate impact" regulations as the legal basis for challenging decisions of state environmental agencies such as permitting decisions. To establish a violation of the "disparate impact" regulations, it was necessary only to prove that the recipient took action that had the effect of discriminating on the basis of race, color or national origin. After *Sandoval*, persons suing recipients of federal funds for violating Title VI must establish that the recipient intentionally discriminated on the basis of race, color or national origin, which is much more difficult to prove.[33]

The relationship between race and/or color and prevalence of environmental hazards in areas populated by non-whites became clear as a result of damage caused by Hurricane Katrina and studies issued in the storm's aftermath. Television images of mostly poor and Black hurricane victims dying on the street and being rescued from rooftops laid bare the environmental inequities that have plagued New Orleans and nearby Cancer Alley for generations. A 2006 study by the Russell Sage Foundation, "In the Wake of the Storm: Environment, Disaster, and Race After Katrina," documented how pre-Katrina racial disparities in transportation, health care, housing and employment resulted in disproportionately large numbers of Black residents of the affected area not

[32] 532 U.S. 275 (2001).

[33] The *Sandoval* decision affected the ability of a community group in Camden, New Jersey, to successfully challenge the state environmental agency's decision to permit construction of a cement crushing plant. Before *Sandoval* the group obtained an injunction against the permit, since the agency was found to have violated the applicable Title VI disparate impact regulations. *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, 145 F.Supp. 446 (D.N.J. 2001). The injunction was dissolved after the *Sandoval* ruling since the injunction was based on a showing of disparate impact as opposed to intentional discrimination. *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001).

being evacuated before the storm hit. Moreover, those same disparities made Blacks less able to recover from the storm's damage, as Blacks were more likely to be underinsured for flood damage, more reliant on publicly funded health clinics for health care (now closed) and public transportation and more likely than whites to have lived in areas flooded when the levees broke.

Also in 2006, a study by Professors Paul Mohai and Robin Saha further documented the disproportionately high number of poor people and minorities living near toxic waste facilities.[34] Mohai and Saha used a new "distance-based" model, in which the numbers of poor people and minorities within a fixed distance of a particular facility were counted. Prior studies counted persons living in the same zip code or census tract as a particular facility; thus, a person who lived across the street from a waste site would not be counted if that person's zip code or census tract was different than the one in which the facility was located. Using their "distance-based" model, Mohai and Saha found that a larger percentage of low-income and minority individuals live near hazardous waste cites than was previously thought. Further, the "distance-based" model confirmed earlier research suggesting that the percentage of minorities and the poor living within a defined area is a strong predictor of the location of toxic waste sites.

C. ENVIRONMENTAL JUSTICE IN RHODE ISLAND

While the national environmental justice movement can trace its history back to the 1980s, environmental justice advocacy efforts started in Rhode Island much later. The first successful effort to establish environmental justice as official policy in Rhode

[34] Paul Mohai & Robin Saha, *Reassessing Racial and Socioeconomic Disparities in Environmental Justice Research*, 43 DEMOGRAPHY 383 (2006).

Island occurred in 1995, when the Rhode Island General Assembly enacted the Industrial Property Remediation and Reuse Act ("IPRARA"), found in Chapter 19.14 of Title 23 of the General Laws of Rhode Island. IPRARA is the Rhode Island law that regulates the redevelopment of sites contaminated with hazardous materials other than petroleum. For the first time, IPRARA directed RIDEM to examine "environmental equity issues" when approving clean-up plans for contaminated sites. The particular provision of IPRARA that contains this requirement is found at Rhode Island General Laws Section 23-19.14-5(a), which states:

> "The department of environmental management shall consider the effects that clean-ups would have on the populations surrounding each site and shall consider the issues of environmental equity for low income and racial minority populations."

The 1995 version of section 5(a) of IPRARA also required RIDEM to "develop and implement a process to ensure community involvement throughout the investigation and remediation of contaminated sites." The General Assembly required that the process include, at a minimum, written notification to abutting property owners and tenants at certain stages of the clean-up process and "[a]dequate availability of all public records concerning the investigation and clean-up of the site, including, where necessary, the establishment of informational repositories in the impacted community."[35]

The environmental equity provisions of IPRARA went largely unnoticed until 1999, when a lawsuit challenging the siting of two public schools on top of the former Providence City Dump was filed. The former dump was located on Springfield Street, and during the lawsuit the schools were called the "Springfield Street Schools."[36] The lawsuit alleged that RIDEM failed to consider issues of environmental equity as required

[35] R.I.GEN. LAWS §23-19.14-5(a)(2) (2006).
[36] These schools are now called the Carnevale Elementary School and the DelSesto Middle School.

by IPRARA when the agency approved the clean-up plan, thereby permitting the schools to be built, and that RIDEM failed to have any community involvement process in place as IPRARA required. The City of Providence ("City"), the Providence School Board and the City's Director of Public Property were also sued for failing to give proper notice to abutting property owners and tenants about the environmental investigation of the site.

The persons bringing suit claimed that RIDEM should have considered issues of environmental equity for two reasons. First, the students who would attend the Springfield Street Schools were mostly low-income and non-white; and second, those populations were less healthy and, thus, more vulnerable to the harmful effects of exposure to toxic substances known to exist at the site at unsafe levels, such as lead, arsenic, petroleum by-products and volatile organic compounds. In 1998, the Providence School Department projected that 83% of the students who would attend the Springfield Street Schools would be non-white.[37] Similarly, in 1998, 75% of students attending Providence public schools city-wide were eligible for government-subsidized lunch programs.[38] Children in the city had higher rates of environmentally induced illnesses such as lead poisoning and asthma than children statewide, and population health indicators, such as low birth-weight babies and malnutrition rates, suggested that the population of Providence school-age children was less healthy overall than the population of school-age children statewide.[39] Children who are lead-poisoned and malnourished

[37] *Hartford Park Tenants Association et al. v. R.I. Department of Environmental Management et al.,* C.A. 99-3048, slip. op. at 13 (Prov. Super. Ct. Oct. 5, 2005).
[38] *Id.,* at 13-14.
[39] *Id.,* at 14-15.

are at greater risk of being harmed by exposure to toxic substances than children who are not lead-poisoned or properly nourished.[40]

While the Springfield Street Schools case was pending, RIDEM, in August of 2001, published on its website a draft environmental equity policy statement in both English and Spanish and asked the public to submit comments on the policy. Three groups submitted comments on the policy, but no further efforts were made to adopt the draft policy as official agency policy.[41] The draft policy read as follows:

> By law, all Rhode Islanders have a right to enjoy a clean and healthy environment. The Department must, therefore, be affirmative in guarding against environmental discrimination and working towards environmental equity. For purposes of this policy, environmental equity means that no person or particular group of persons suffers disproportionately from environmental degradation or intentional discrimination, or is denied enjoyment of a fair share of environmental improvements.
>
> Equity does not mean that it is possible to guarantee all people and communities an identical environmental experience or identical shares of environmental benefits and burdens. Rather, equity requires that benefits and burdens in general be distributed fairly. As the Department develops, implements and evaluates its policies, programs and actions, it must strive to achieve, restore or maintain a fair distribution. In pursuing this goal, the Department must be particularly sensitive to the interests of groups of people who are afforded special protection under federal and state anti-discrimination laws.
>
> An effective environmental equity policy requires meaningful opportunities for affected or potentially affected parties to have input into policy development, programmatic planning and decision-making by the Department. The Department's objective is to provide for proactive consideration of environmental equity concerns, in early stages, before case-specific decisions such as regulatory approvals are made. This policy presumes that after-the-fact challenges to specific decisions are not an effective way to promote environmental equity.[42]

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[40] *Id.*, at 34.
[41] Rhode Island Department of Environmental Management, *Environmental Equity In Rhode Island, Progress Report* (July, 2002), at 7, available at http://www.dem.ri.gov/pubs/eeqprog.pdf (last accessed Sept. 13, 2006).
[42] RIDEM's Draft Environmental Equity Policy is available at http://www.dem.ri.gov/pubs/eequity.htm (last accessed Sept. 13, 2006).

The Springfield Street Schools case went to trial in April and May of 2003 and lasted twenty-five days. In October of 2005, Superior Court Judge Edward C. Clifton ruled that RIDEM violated IPRARA by failing to consider environmental equity issues and failing to implement the required community involvement process when the agency approved the clean-up plan for the Springfield Street Schools.[43] Judge Clifton also ruled that the City violated RIDEM's Site Remediation Regulations and the due process clauses of the Rhode Island and United States Constitution by failing to notify abutting property owners, tenants and other interested parties about activities relating to the environmental investigation of the school site.[44] To remedy RIDEM's violations of law, the Court ordered the agency to establish a stakeholder group to develop legislation, regulations or policies on a number of issues, including ways in which the agency should consider environmental equity issues and better involve affected communities when reviewing and developing clean-up plans for contaminated sites.[45]

One result of the Springfield Street Schools case was changing IPRARA in a way that increased public participation requirements when contaminated sites are proposed for reuse as schools, childcare facilities or public recreational facilities. In 2006, the Rhode Island General Assembly amended IPRARA to require sponsors of school, child care or public recreational facilities to take certain steps if the proposed site "is known to be contaminated or is suspected of being contaminated based upon its past use."[46]

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[43] *Id.*, at 110.
[44] *Id.*, at 109-111.
[45] The Court is considering competing remedy proposals submitted by the plaintiffs and the City and will issue a ruling in the coming months.
[46] 2006 R.I. Pub. Laws Ch. 250 §1 (amending R.I.GEN. LAWS §23-19.14-5(a)), available at http://www.rilin.state.ri.us/PublicLaws/law06/law06250.htm (last accessed Sept. 13, 2006).

First, the sponsor must conduct an "all appropriate inquiries" study of the site. This study reports the results of an environmental due diligence process for assessing a property for presence or potential presence of contamination. That process includes researching the history of the site using property records, aerial photographs and other sources to determine prior use of the property; interviewing current and former owners about past uses of the property; searching government records for environmental clean-up liens or other evidence of environmental pollution; and visually inspecting the site and adjoining properties for evidence of contamination.[47]

After completing the "all appropriate inquiries" study, the sponsor must hold a public meeting for the purpose of obtaining information about conditions at the site and the environmental history at the site. The public meeting is to be held in the city or town where the site is located, and the sponsor must give ten days public notice of the meeting. Information obtained at the public meeting should be used by the sponsor to help establish the scope of the investigation of the site and/or establish the objectives for the environmental clean-up of the site. The sponsor must also accept written public comment about the site for a period of ten to twenty days following the public meeting. After the public comment period ends, the sponsor must prepare and submit to RIDEM a written report that includes the results of all appropriate inquiries analysis and information obtained at the public meeting and through the public comment period. No work (remediation or construction) shall be permitted at the property until the

[47] Requirements for "all appropriate inquiries" studies were established by Congress in the 2002 Brownfields Amendments to what is commonly called the Superfund Act or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Additional information about "all appropriate inquiries" is available at http://www.epa.gov/swerosps/bf/regneg.htm (last accessed Sept. 13, 2006).

public meeting and comment period regarding the site's proposed reuse has closed, except under very limited circumstances approved by the Director of RIDEM.

While controversies surrounding the siting of public schools on contaminated sites have been at the forefront of environmental justice activism in Rhode Island, there are other environmental and public health issues, such as lead poisoning and asthma, that raise environmental justice concerns. Lead poisoning rates in the state, while dropping, still are significantly higher in the six Core Cities where the child poverty level is greater than 15% (Central Falls, Newport, Providence, Pawtucket, West Warwick and Woonsocket)[48] and where 78% of Rhode Island's non-white children reside.[49] According to the Rhode Island Department of Health, in 1996 the incidence of lead poisoning was 18.9% in the Core Cities and 6.9% in the Non-Core Cities; and by 2005 lead poisoning rates were 3.4% in the Core Cities and 0.7% in the Non-Core Cities. The disparity in lead poisoning rates between the Core Cities and Non-Core Cities has, thus, actually grown between 1996 and 2005 even while lead poisoning rates have dropped. Similarly, there is a significant disparity in the incidence of asthma in Rhode Island's low-income and minority populations, as reflected by asthma hospitalization rate statistics for children under 18 years of age. Asthma is a disease that is exacerbated by air pollution and exposures to polluted indoor air. Between 2000 and 2004, the asthma hospitalization rate in the Core Cities was nearly double that experienced in Non-Core Cities (5.2 per 1,000 children compared to 2.7 per 1,000 children).[50] Moreover, the hospitalization rate in the

[48] Rhode Island Department of Health, *Childhood Lead Poisoning in Rhode Island: The Numbers 2006 Edition* (2006), at 17.
[49] This figure was calculated from 2000 census data statistics reported in Table 5 of the *2006 Kids Count Fact Book* by subtracting the number of White children from the total population of the six Core Cities and dividing that figure (52,874) by the difference of the total child population of the state minus the number of white children in the state (67,807).
[50] Rhode Island Kids Count, 2006 *Rhode Island Kids Count Factbook* (2006), at Table 19.

same period for Black children under age 18 was 7.0 per 1,000 and 4.6 per 1,000 for Latino children, compared with 3.0 for white children.[51]

The higher rates of lead poisoning and asthma among low-income and non-white children in Rhode Island have environmental justice policy implications. Laws aimed at reducing lead poisoning in children not only protect public health but also advance environmental justice. The siting of new industrial or diesel vehicle depots that emit large quantities of air pollution in the Core Cities could lead to higher rates of asthma and are, therefore, an environmental justice issue of concern. Similarly, efforts in the Core Cities to reduce indoor air pollutants that exacerbate asthma, such as cigarette smoke and fumes from pesticides, cleaning fluids and building materials, advance environmental justice. As the relationship between environmental conditions in the Core Cities and the health of those populations becomes better known, environmental justice advocacy efforts in Rhode Island are likely to grow.

D. RESEARCH METHODOLOGY

The starting point for research for this report was "Environmental Justice for All: A Fifty-State Survey of Legislation, Policies and Initiatives," a survey of environmental justice laws, policies and initiatives of all fifty states prepared by Public Law Research Institute of Hastings College of the Law in cooperation with the Section of Individual Rights and Responsibilities of the American Bar Association.:[52] The various laws, policies and initiatives were broken into various categories to better understand the

[51] *Id.*, at 68.
[52] Steven Bonnorris, ed., *Environmental Justice for All: A Fifty State Survey of Legislation, Policies, and Initiatives* (January 2004), available at http://www.abanet.org/irr/committees/environmental/statestudy.pdf (last accessed Sept. 13, 2006) (hereafter "50 STATE SURVEY").

breadth of environmental justice initiatives and the states which had the greatest number of initiatives. States having a larger number of initiatives were identified (California, Illinois, New York, Massachusetts), and efforts were made to interview government officials and environmental justice advocacy groups in those states.[53]

Initial contact with environmental justice advocates revealed that many of the initiatives described in the Fifty-State Survey either existed only on paper or were at very early stages of implementation. Thus, the focus of this report changed from a review of best practices of state environmental justice programs to a report on what the essential elements should be contained in a strong state environmental justice program. An outline listing the essential elements of a state agency environmental justice program was circulated for comment, and feedback was incorporated into the outline. Some of the practices discovered during our research were incorporated into our findings.

This report will be given to members of the stakeholder group assembled by RIDEM and established as a result of the Springfield Street Schools case. It is our hope that the findings of this report will help guide the deliberations of the stakeholder group and result in the adoption and implementation of an effective environmental justice program in Rhode Island.

II. WHY STATES SHOULD DEVELOP ENVIRONMENTAL JUSTICE PROGRAMS

A. ENVIRONMENTAL JUSTICE IS MANDATED BY LAW

[53] A list of persons interviewed for this report is found in Appendix A.

The obligation for state environmental agencies to create environmental justice programs comes from federal law, specifically Title VI of the Civil Rights Act of 1964 ("Title VI"), and regulations issued by the United States Environmental Protection Agency ("EPA") to implement Title VI. Additionally, some state legislatures have enacted laws directing state environmental agencies to incorporate environmental justice into various aspects of agency operations.

1. Title VI

Title VI has two operative provisions found in sections 601 and 602 of the Act.[54] Section 601 prohibits acts of intentional discrimination in the administration of federally funded programs that would also violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.[55] Section 601 provides:

> "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."

Section 602 of Title VI authorizes federal agencies that distribute federal funds to issue regulations to implement Section 601 of the Act. EPA distributes federal funds to a variety of recipients, including state environmental agencies, and issued regulations to implement Title VI in 1973. Like most federal agencies, EPA's Title VI regulations not only bar recipients of federal funds from engaging in acts of intentional discrimination but also bar recipients from using criteria or methods that have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin. The key provisions of EPA's regulations implementing Title VI are found at 40 C.F.R. §§ 7.30

[54] These provisions have been codified at 42 U.S.C. 2000d and 2000d-1, respectively.
[55] *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

and 7.35, with the latter regulation containing the ban on actions that have a discriminatory effect. The applicable portion of the latter regulation reads as follows:

> **§7.35 Specific Prohibitions.**
>
> (b) A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin or sex.
>
> (c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

Title VI applies to **all** activities of state environmental agencies, not just the programs that are federally funded. In the Civil Rights Restoration Act of 1987, Congress amended Title VI to include a definition of "program or activity." The definition of "program or activity" means "all the operations of . . . a department, agency, special district or other instrumentality of a State or local government . . . any part of which is extended Federal financial assistance."[56] In other words, "[when] Congress passed the Civil Rights Restoration Act of 1987 . . . [it] thereby modified Title VI so that it encompasses programs or activities of a recipient of Federal financial assistance on an institution-wide basis."[57]

EPA's anti-discrimination regulations require recipients to develop grievance procedures for persons alleging unlawful discrimination, including discrimination on the

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[56] 42 U.S.C.A. § 2000d-4a (2006).

[57] *Cureton v. Nat'l Collegiate Athletic Ass'n.*, 198 F.3 107, 115 (3d. Cir. 1999).

basis of race, color or national origin.[58] The requirement to adopt a grievance procedure is found at 40 C.F.R. §7.90:

> **§7.90 Grievance procedures.**
>
> (a) *Requirements.* Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violations of this part.
>
> (b) *Exception.* Recipients with fewer than fifteen (15) full-time employees need not comply with this section unless the OCR [Office of Civil Rights] finds a violation of this part or determines that creating a grievance procedure will not significantly impair the recipients ability to provide benefits or services

Additionally, EPA regulations bar recipients from retaliating against any person who files a discrimination complaint or who opposed any practice made unlawful under EPA's non-discrimination regulations.[59]

To comply with the various requirements imposed by Title VI and EPA's non-discrimination regulations, state environmental agencies must ensure their actions do not intentionally discriminate or have the effect of discriminating on the basis of race, color or national origin; and they must adopt some kind of process to receive, investigate and resolve discrimination complaints. A state's compliance with environmental laws does not constitute per se compliance with Title VI—"[a] recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing [a state agency's] permitting program."[60] The most effective way to for state environmental agencies to ensure compliance with

[58] EPA's non-discrimination regulations also ban discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended (codified at 29 U.S.C. §794); and discrimination on the basis of sex under programs or activities receiving financial assistance under the Clean Water Act (see Section 13 of the Federal Water Pollution Control Act Amendments of 1972, codified at 33 U.S.C. §1251).
[59] 40 C.F.R. §7.100 (2006).
[60] *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Complaints Challenging Permits*, 65 Fed. Reg. 39650, 39680 (June 27, 2000).

Title VI's mandates is to establish an agency-wide compliance program that promotes environmental justice. The elements of such a program are discussed below in Part III of this report.

2. State Law

Several states have passed legislation that requires the state environmental agency to take certain actions to promote environmental justice.[61] In Rhode Island, the state's Department of Environmental Management must consider the effects that contaminated site clean-ups would have on the populations surrounding each site and the issues of environmental equity for low-income and racial minority populations.[62] Similarly, in Kentucky, the state environmental agency must consider both the social and economic effects of issuing a certificate of environmental safety and public necessity for the siting of a facility.[63] The state of Arkansas enacted a law that prohibits the siting of landfills within twelve miles of each other. More specifically, it states that there is a "rebuttable presumption against permitting the construction or operation of any high impact solid waste management facility within twelve miles of any existing high impact solid waste management facility."[64] Even though there are exceptions to this presumption, the purpose underlying the statute is to avoid the concentration of solid waste disposal facilities in low-income and minority communities.

Many states' constitutions contain language on environmental protection that provides legal authority for adopting environmental justice programs. The state constitutions of Alabama, California, Colorado, Florida, Hawaii, Illinois, Louisiana,

[61] *See* 50 STATE SURVEY, *supra*, note 52.
[62] R.I. GEN. LAWS §23-19.14-5 (2006).
[63] KAN. STAT. ANN. §224.46-830 (2006).
[64] ARK. STAT. ANN. § 8-6-1504 (2006).

Massachusetts, Montana, New Mexico, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas and Virginia contain environmental laws or public policy statements favoring the development of environmental programs.[65] In Rhode Island, Article I, Section 17 of the state's constitution directs the state legislature to "provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state."[66] Some states' constitutions, such as those of Hawaii and Montana, provide a constitutional right to live in a clean and healthful environment.[67] The constitutions of Massachusetts and Pennsylvania provide the right to both clean air and clean water. [68]

B. ENVIRONMENTAL JUSTICE IS GOOD ENVIRONMENTAL POLICY

States should develop environmental justice programs because these programs produce environmental benefits beyond those achieved by environmental laws that regulate pollution and land-use. These "traditional" environmental laws fail to address or take into account disparities in public health, pollution and vulnerabilities to the effects of exposures to pollutants experienced by low-income and minority communities. To understand the shortcoming of traditional environmental laws, it is important to recognize the existence of environmental health disparities and the underlying causes of those

[65] Knorr, *supra*, note 21.
[66] R.I. Const. art. I, §17 (2006).
[67] Mont. Const. art. II, §3 (2005); Haw. Const. art. XI, §9 (2006).
[68] Mass. Const. art. XLIX (2005); Pa. Const. art. I, §27 (2005).

disparities. Below is a short analysis of environmental health disparities prepared by the Oakland, California-based Environmental Justice and Health Union:

> "Better health is a benefit often tied to more income, more education, and better jobs, as well as living in communities where more people have higher incomes and more education. However, race, class, and gender discrimination in the U.S. makes better health difficult to attain for people in poor minority communities. Limits on housing choice, education, income and political power create environments for low-income communities of color that trigger disease. The end result is that people in low-income communities of color have less healthy surroundings, less education, and less income to support their personal health, and to fight for better healthcare, than people in other communities. People residing in low-income communities of color also die sooner.
>
> The environmental health consequences of such limitations are substantial. Exposure to toxins are greater in low-income communities of color because they are often located in or near polluting industrial areas and consist of cheap older housing where lead paint and pests are a threat. Employment in low-income communities of color is often limited to jobs with low pay, no health benefits, and, sometimes, severe workplace dangers. Low-income communities of color receive less treatment for environmental disease because healthcare resources are limited and environmental health expertise is rare. Finally, when environmental health threats are not eliminated, the harm jumps from generation to generation."[69]

The Environmental Justice and Health Network documented the disparities in exposures to toxic chemicals among various communities of color in a report, "Environmental Exposures and Racial Disparities,"[70] using exposure data compiled by the national Center for Disease Control ("CDC").[71] The CDC data include information

[69] Environmental Justice and Health Union, *Disparities in Disease*, available at http://www.ejhu.org/disparities.html (last accessed Sept. 13, 2006).
[70] Environmental Justice and Health Union, *Environmental Exposures and Racial Disparities* (August 2003), available at http://www.ejhu.org/disparities.html (last accessed Sept. 13, 2006).
[71] The data were compiled by the Center for Disease Control ("CDC") in its "Second National Report on Human Exposure to Environmental Chemicals." The most recent data (as well as the data from the Second Report) are contained in the CDC's "Third National Report on Human Exposure to Environmental Chemicals" (July 2005), available at http://www.cdc.gov/exposurereport/3rd/pdf/thirdreport.pdf (last accessed Sept. 13, 2006).

on the concentration of 116 chemicals found in low-income and minority communities. Key findings of the report include the following:

- Non-Hispanic Blacks are much more likely to be exposed to dioxins and polychlorinated biphenyls (PCBs) and are more likely to be exposed at higher levels;
- Mexican-Americans are much more likely to be exposed to pesticides, herbicides and pest repellants and are more likely to be exposed at higher levels;
- Non-Hispanic Whites are much more likely to be exposed to polycyclic aromatic hydrocarbons (PAHs) and phytoestrogens and are more likely to be exposed to phthalates at higher levels;
- Non-Hispanic Blacks and Mexican-Americans are much more likely to have higher levels of less common chemicals; and
- Non-Hispanic Blacks are exposed to the greatest number of chemicals.[72]

The failure of "traditional" environmental laws to protect more vulnerable human populations in low-income and minority communities is reflected in a recent ruling of the Connecticut Department of Environmental Protection ("DEP") denying permits to reactivate two oil-fired boilers to generate electricity on peak demand days. The closed power plant, English Station, was located in a low-income and minority neighborhood in the city of New Haven. The proposed project met current applicable standards for permit issuance, and the DEP Hearing Officer recommended granting permits to allow the power plant to reopen. That decision was appealed to the DEP Commissioner, who

[72] Environmental Justice and Health Union, *Environmental Exposures and Racial Disparities, Executive Summary* (August 2003), available at http://www.ejhu.org/eerdexecsum.htm (last accessed Sept. 13, 2006).

reversed the Hearing Officer's recommendation. The Commissioner found that neighbors of the power plant, who were minority and low-income, were ill-equipped to avoid or lessen the impacts of the incremental pollution from the power plant due to their economic status and the condition of the housing stock:

> "Since the power plant is a peaking plant, it will be operating only during peak periods of electrical demands. These periods most commonly occur during the summer and when the temperature is hot which is also when peak air pollution occur [*sic*]. . . . [L]ow income households living near the power plant are ill equipped to avoid such hazards as they can afford little air conditioning and must resort, instead to opening their windows regardless of air quality conditions."[73]

The Commissioner's decision also noted that New Haven had one of the highest asthma hospitalization rates in the state of Connecticut and that the adverse health effects from any incremental increase in emissions from the proposed power plant outweighed the benefits from the relatively small amount of electric power that would have supplied the New England power grid.[74] Had DEP only considered emission levels that the power plant was to produce and not also the health impacts on residents who already suffered from high rates of asthma, the power plant would have received the permit to operate.

The environmental benefits reaped from environmental justice programs are attained not only by changing laws and policies but also through education and outreach to residents of low-income and minority communities about environmental health hazards unique to those communities. Through such efforts, residents are informed about actions they can take to protect themselves from environmental hazards. For example, in Milwaukee, Wisconsin, environmental justice advocates and government agencies

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[73] *In the Matter of Quinnipiac Energy, LLC,* Application Nos. 200001616 and 200001617, Final Decision at 7, (June 23, 2003), available at http://www.dep.state.ct.us/adjud/decisions/062603quinnipiacenergyfinaldecision.pdf (last accessed Sept. 13, 2006).

[74] *Id.*,at 8.

worked to educate Hmong refugee families about health hazards associated with subsistence fishing in polluted waters. The diets of Hmong families are largely based on the consumption of fish living in the Great Lake Basin, where the fish are contaminated by high levels of methylmercury and polychlorinated biphenyls (PCBs). However, the Hmong had a limited understanding of the health risks and health consequences of eating contaminated fish. To better inform Hmong residents about the health problems from eating contaminated fish, EPA published and distributed a pamphlet both in English and the Hmong's native language that explains the health effects to humans caused by eating fish and shellfish contaminated with mercury.[75] Also, a professionally produced video targeted for adult members of the Hmong community was prepared by a university sponsored program that teaches ways of preparing fish that can reduce the amounts methylmercury and polychlorinated biphenyls consumed.[76]

C. ENVIRONMENTAL JUSTICE PROMOTES SOCIAL CAPITAL FORMATION

States should establish environmental justice programs because these programs promote the development of social capital. The term "social capital" means "the ability of communities to shape and bring into existence community aspirational goals, and to address collective community issues."[77] In other words, social capital reflects the capacity of a community to collectively respond to issues or problems faced by the

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[75] U.S. Environmental Protection Agency (EPA), *What You Need to Know About Mercury in Fish and Shellfish*, available at http://www.epa.gov/waterscience/fish/MethylmercuryBrochure.pdf (last accessed Sept. 13, 2006).

[76] National Institute of Environmental Health Sciences, United States Department of Health and Human Services, *Fish Consumption Risk Communication in Ethnic Milwaukee: An Initiative of The U.W.-Milwaukee NIEHS Marine and Freshwater Biomedical Sciences Center and Institute of Environmental Health in Partnership with the Hmong American Friendship Community and the Sixteenth Street Community Health Center* (2006), available at http://www.niehs.nih.gov/translat/envjust/projects/petering.htm (last accessed Sept. 13, 2006).

[77] Nicholas Targ, *A Third Policy Avenue to Address Environmental Justice: Civil Rights and Environmental Quality and the Relevance of Social Capital Policy*, 16 TULANE ENVTL. L.J. 167 (2002), at 169.

community. Indicators for social capital include civic engagement, voting in municipal or off-year elections and membership in social, service or religious organizations.[78]

The relationship between social capital formation and environmental justice was the subject of a law review article by Nicholas Targ, counsel to EPA's Office of Environmental Justice. Targ found that communities with fewer indicators of social capital were more likely to suffer from environmental injustice. For example, communities with high rates of voter participation in general elections (normalized for race, income and education factors) had higher Toxic Release Inventory (TRI) chemical reductions than communities with low rates of voter participation.[79] Similarly, expenditures for contaminated site clean-ups were greater on a cancer-risk basis in communities with higher rates of voter turn-out.[80] Most telling were the reported results of a survey of 200 corporate counsels, which found that "the overwhelming majority of attorneys said they were more likely to recommend reducing their facilities' emissions if a community group could make a credible threat to take political or legal action against the facility."[81] This finding demonstrates the need for environmental justice programs to increase the capacity of low-income and minority communities to collectively act to reduce existing pollution and prevent the development of new sources of pollution.

Environmental justice programs can be tailored to promote social capital by: (1) helping communities identify and address local issues and goals and (2) providing communities more access to the government decision-making process.[82] Through education about and increased access to information regarding environmental policies

[78] *Id.*, at 168 n.6.
[79] *Id.*, at 169.
[80] *Id.*
[81] *Id.*, at 170.
[82] *Id.*, at 169.

and decision-making procedures, such communities will experience an increased capacity to identify and address local concerns and goals with regard to both present and future issues. As communities become active participants in the environmental decision-making process, individual community members will gain valuable skills such as the ability to interpret results of environmental sampling and pollution monitoring and knowledge of various bureaucratic processes. Such expertise will not only benefit individuals; when individuals with specific expertise work together within a community setting, the community as a whole will reap the benefits of that expertise. One person can educate another, and the knowledge and skills will gradually spread throughout the community, fostering an increased community capacity for meaningful participation in the many activities of state environmental agencies.

III. RECOMMENDED ELEMENTS OF STATE AGENCY ENVIRONMENTAL JUSTICE PROGRAMS

This section proposes a series of initiatives that could be adopted by any state environmental agency interested in establishing an environmental justice program or improving an existing program. The initiatives proposed are comprehensive in nature and can be adopted in stages. Many of the initiatives discussed below can be implemented without the need for legislative action while others require the adoption of new legislation or agency regulations. Discussed first are those initiatives which require little formal action by agencies; followed by those which might or do require the promulgation of formal agency rules or policies; and ending with initiatives that require approval by state legislatures and governors. Particular emphasis is given to improving public participation in agency decision-making, as environmental injustice flows directly

from a lack of ongoing involvement in agency decision-making processes by members of low-income communities and communities of color.

A. DEVELOPING COMPLAINT PROCESSING PROCEDURES AND METHODS FOR ANALYZING DISPARATE IMPACTS

The first component of a state agency's environmental justice program should be providing a formal process for investigating and resolving environmental justice related complaints. Under federal law, every state environmental agency must establish a grievance procedure to resolve complaints alleging discrimination on the basis of race, color or national origin under Title VI of the Civil Rights Act of 1964.[83] However, as of 2004, only four states had adopted formal discrimination complaint procedures (Alabama, Connecticut, Illinois and Louisiana).[84] Necessarily, the investigation of a discrimination complaint includes an analysis of whether the actions or inactions causing the complaint have an adverse and disparate impact on populations with distinct racial or ethnic characteristics. Since the actions or inactions of a state agency could be challenged under Title VI, state agencies would be wise to incorporate some form of disparate impact analysis into their regular process of decision-making, particularly when making decisions regarding the permitting and siting of environmentally hazardous facilities. Each state agency should determine the need for promulgating formal regulations to adopt the complaint-processing procedures and methods for analyzing disparate impact recommended below.

1. *Complaint Processing Procedures*

Given that few states have adopted a formal Title VI grievance process, state agencies should look to the complaint process of the United States Environmental

[83] 40 C.F.R. § 7.90 (2006).
[84] 50 STATE SURVEY, *supra*, note 52.

Protection Agency's Office of Civil Rights ("OCR") for guidance. OCR developed a detailed, seven-step complaint process, outlined in EPA's Title VI complaint regulations, published in the Code of Federal Regulations at 40 CFR §120. EPA further explained those regulations in a draft guidance published in the Federal Register on June 27, 2000.[85] The draft guidance also contains a flow chart illustrating EPA's Title VI complaint process.[86] The seven steps in EPA's Title VI process include the agency's: (1) written acknowledgment of the complaint, (2) acceptance of the complaint for investigation or rejection or referral of the complaint, (3) investigation of the complaint, (4) issuance of a preliminary finding of noncompliance, (5) issuance of a formal finding of noncompliance, (6) provision of a ten-day period in which a respondent may come into voluntary compliance through a written agreement with OCR and (7) provision of a hearing/appeal process to respondents who fail to voluntarily comply or who wish to challenge the agency's formal finding of non-compliance.[87] Using EPA's process as a guide, set forth below are the basic steps a state agency should incorporate into its Title VI grievance procedures.

First, a discrimination complaint should be presented to the state environmental agency within a specified time period following the alleged discriminatory act, typically 180 days.[88] The agency should waive this time period where good cause exists. Once an initial complaint is received, agency staff should assist the complainant in drafting a formal written complaint that should meet certain threshold requirements. For example,

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[85] *See*, *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39650, 39667-86 (June 27, 2000), available at http://www.epa.gov/ocr/docs/frn_t6_pub06272000.pdf (last accessed Sept. 13, 2006).
[86] *Id.*, at 39687.
[87] *Id.*, at 39670-71.
[88] *See*, 40 C.F.R. § 7.120(b)(2) (2006).

the complaint should include the complainant's contact information to enable the agency to contact the complainant about the complaint; identify the alleged discriminatory acts that violate Title VI and/or the Environmental Protection Agency's Title VI regulations; identify the recipient(s) of federal funding that committed the alleged discriminatory acts; and describe the discrimination that has or will occur and identify how the complainant is affected by the alleged discriminatory acts. Once drafted, the complainant should sign and date the complaint.

Next, the agency should determine whether to accept, reject, or refer the complaint. When the complaint meets the threshold requirements described above, the agency should accept the complaint. Complaints that are so incoherent that they cannot be considered to be grounded in fact, fail to provide a way to for the agency to contact the complainant or for some reason are premature should be rejected.[89] When the agency decides to accept the complaint for investigation, the agency should give written notice of the complaint to the respondent and provide the respondent with a written explanation of his or her procedural rights, including a deadline for making a written reply to the complaint (EPA provides 30 days).[90] At the same time, the agency should encourage the respondent to attempt to resolve the complaint with the complainant, with or without the agency's involvement. Also, the agency could suggest that the parties to the complaint obtain the services of a professional mediator to resolve the complaint (often called "alternative dispute resolution").[91]

Assuming the complaint is not resolved informally, the agency should subsequently conduct a formal merit-based investigation of the complaint. Unlike a court

[89] *See*, 65 Fed. Reg. 39672-73 (June 27, 2000).
[90] *See*, 65 Fed. Reg. 39687 (June 27, 2000).
[91] *See*, 65 Fed. Reg. 39673 (June 27, 2000).

proceeding in which each side presents evidence and arguments in support of their respective position, an agency investigation is conducted by the agency itself. The agency could ask each party to present information by answering specific questions or could invite each party to provide information of the party's choosing to supplement the information obtained by agency staff. Efforts to resolve the complaint informally may continue during the investigation process.

Should the complaint not be resolved before the investigation is completed, the agency should issue preliminary findings regarding compliance or non-compliance with Title VI within a defined period (EPA issues preliminary findings within 180 days from the start of the investigation).[92] Where preliminary findings are made in the complainant's favor, the agency could simultaneously recommend actions the respondent could take to come into compliance with Title VI.

Should the respondent fail to comply with the agency's recommendations or if the respondent disagrees with the preliminary findings, the agency should conduct a formal hearing on the complaint. A hearing at this stage resembles a trial-like proceeding presided over by an agency hearing officer in a manner similar to that of a legal judge. After the hearing, the hearing officer issues a written decision in favor of either the complainant or respondent. Where a hearing officer rules that the respondent failed to comply with Title VI, the hearing officer could order the respondent to take actions to resolve the complaint.[93] Also, the hearing officer should notify EPA of the decision in order to allow EPA to initiate its own enforcement action.

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[92] 40 C.F.R. §7.115(c)(1) (2006).

[93] The grievance procedure required by EPA's Title VI regulations must provide for "prompt and fair resolution of [Title VI] complaints . . . ." 40 C.F.R. §7.90 (2006). Complaints may not be resolved

2. Methods for Determining Disparate Impact

The investigation of a Title VI complaint requires an analysis of whether or not the action or inaction leading to a complaint has an adverse and disparate impact on a discrete racial or ethnic group. Disparate impact analysis can be conducted in a number of ways, and no single technique for analyzing and evaluating adverse disparate impact can be applied in all situations.[94] While there are various ways to measure and determine disparate impact, the framework for conducting an analysis of disparate impact consists of seven basic tasks: (1) identifying the activity or facility at issue; (2) identifying the hazards associated with the proposed activity or facility (adverse impact); (3) identifying the population affected by the hazards associated with the proposed activity or facility; (4) identifying other hazardous activities or facilities, particularly activities or facilities previously permitted by the agency, that already impact the affected population (cumulative impact); (5) determining the demographics of the affected population; (6) comparing impacts (both adverse and cumulative) on the affected population to a larger population (disparate impact); and (7) determining the significance of the disparity.

The first task, identifying the activity or facility at issue, is fairly straightforward. Here, the agency determines the source of the potential disparate impact. The source could include a specific facility for which a permit is sought, such as a new or expanded power plant or solid waste landfill, or it could include an activity, such as the clean-up of a site contaminated by hazardous substances.

The second task requires agency decision-makers to identify the adverse impacts of hazards to human health associated with the proposed activity or facility. Initially, the

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voluntarily; thus, the state agency must have the power to order a non-complaint respondent to comply with Title VI for the complaint to be resolved.

[94] 65 Fed. Reg. 39650, 39676 (June 27, 2000).

agency should determine the type of hazards that the agency has authority to regulate or is otherwise required to consider as part of its decision-making (e.g., air pollution, release of chemicals, noise, odors, etc.). Next, the agency should inventory the specific hazards associated with the proposed activity or facility and determine the impact those hazards might have on humans. An essential component of analyzing adverse impact is identifying the ways in which humans could come into contact with the hazards associated with the proposed activity or facility (this process is called identifying exposure pathways) and determining the possible consequences to humans of coming into contact with those hazards.[95]

Once adverse impacts are identified, the next task involves identifying the population likely to be affected by those adverse impacts. To do this, the agency must identify the geographic area that could be impacted by exposure pathways associated with the facility or activity. For facilities where pollutants are released into the air, the affected population can be identified by computer models that predict where pollutants are likely to travel and how they become dispersed.[96] Similarly, computer models of groundwater flow can predict where hazardous substances buried in the ground may travel away from the location where the substances were buried.[97]

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[95] Determining the human health consequences of particular hazards is probably the most complicated part of disparate impact analysis. The reliability, degree of scientific acceptance and uncertainties inherent in determining health consequences varies greatly among particular kinds of facilities and activities. Moreover, many types of health impacts require years of exposure to a large number of people in order to be observed in health outcome data. 65 Fed. Reg. 39650, 39679 (June 27, 2000). These factors suggest that agencies should exercise precaution where possible, to avoid bringing humans into contact with activities or facilities that pose hazards to human health.

[96] A description of this technique is available on EPA's website. *See*, Walts, *Approaching Disparity Analysis* (June 15, 2003) available at http://www.epa.gov/reg5oair/toxics/1e-Walts.pdf#search=%22alan%20walts%20disparity%20analysis%22 (last accessed Sept. 14, 2006).

[97] Juliana Maantay, *Mapping Environmental Injustices: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 ENVTL. HEALTH PERSPECTIVES 161, 168 (Apr. 2002).

The agency's inquiry into the affected population does not end with the particular facility or activity. The agency must also identify areas in which the health hazards from other existing facilities or activities may, when added to the hazards of the proposed facility or activity, cause adverse cumulative impacts on human health. For example, a proposed power plant may emit a plume of pollutants that disperses emissions at levels considered safe. The dispersed plume may travel to a neighborhood where a diesel bus terminal is located, and the combined emissions from both the bus terminal and the new power plant may cause air pollution levels to rise to unacceptable levels. Thus, the agency must identify those existing facilities and activities that pose health hazards similar to the hazards posed by the proposed facility or activity and identify geographic areas where cumulative impacts may occur.

After the affected population is determined, the next task involves analyzing demographic data to determine the characteristics of the affected population by race, color and national origin. Typically, this involves an analysis of statistical data compiled by the United States Census Bureau or other entities that may have compiled more current data. EPA suggests using the smallest geographic resolution feasible for the demographic data, such as census blocks.[98]

Next, the statistical data on the affected population (those who live in areas where adverse and cumulative impacts may occur) must be compared to data on the race, color or national origin of a larger population to determine whether any disparity exists. Two distinct types of disparities should be examined: demographic disparities (is the affected population composed of persons of particular races or ethnicities that are significantly different from those of the larger population?) and impact disparities (are there greater

[98] 65 Fed. Reg. 39650, 39681 (June 27, 2000).

hazards to human health found in the area where the affected population lives as compared to the area where the larger population lives?). Comparison populations might include the general population for the reference area, such as that of a city, county or state (including the affected population) or the non-affected population for the reference area (e.g., those in the reference area who are not part of the affected population).[99]

Geographic Information Systems (GIS) mapping can be a useful tool for identifying disparities. GIS mapping utilizes a computer program to plot pieces of information (here the location of hazardous facilities or activities, areas where adverse and cumulative impacts may occur and demographic information within those areas) on a map. In some instances it might not be possible to precisely identify the impacted area, or there may be instances in which demographic data is not available for the precise geographic area likely to be impacted. In these instances, the geographic area will have to be determined in a less precise way, such as by selecting a geographic unit for which demographic data is readily available or by using data within a set distance from the facility or activity (such as a one-mile radius). When these less precise methods are utilized, the reliability of the maps decreases for the purposes of determining disproportionate burdens in the affected population.[100]

The final task of disparate impact analysis is to determine whether or not any disparities identified are significant. This task does not lend itself to applying a specific formula to determine the significance of an observed disparity. According to EPA's Draft Revised Guidance for Investigating Title VI Complaints Challenging Permits:

> [F]or both demographic disparity and disparity of impact there is no fixed formula or analysis to be applied. . . . Given the wide variability in many

[99] *Id.*
[100] Mantaay, *supra*, note 97, at 165.

> of the underlying factors such as the proportion of racial subgroups in the general population, it is impossible to determine a single factor that could be applicable in all cases.[101]

EPA suggests that a number of factors should be considered when assessing the significance of demographic and impact disparities. As to the former, EPA suggests comparing the demographic disparities in the context of such factors as:

- Affected population size;
- Overall demographic composition of the general population; and
- The overall proportion of the jurisdiction's total population within an affected population.[102]

For evaluating the significance of disparities in adverse impact EPA recommends consideration of such factors as:

- The level of adverse impact (e.g., a little or a lot above a threshold of significance);
- The severity of the impact; and
- Its frequency of occurrence.[103]

Once the agency determines that a facility or activity poses significant adverse disparate impacts on the basis of race, color or national origin, the respondent to the discrimination complaint must demonstrate some non-discriminatory justification for the activity. EPA's legal standard for establishing "justification" requires the respondent "to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important and integral to the recipient's institutional mission."[104] The determination of

[101] 65 Fed. Reg. 39650, 39682 (June 27, 2000).
[102] *Id.*
[103] *Id.*
[104] *Id.*, at 39683.

"justification" must not only be measured from the respondent's standpoint; the benefits from the facility and activity must also be delivered to the affected population, and views of the affected community regarding the level of community benefit must be considered as part of the agency's determination.[105] Moreover, a purported "justification" may be rebutted if less-discriminatory alternatives to the proposed activity or facility exist that are "practicable and comparably effective in meeting the needs addressed by the challenged practice."[106] Such alternatives could include mitigation measures that lessen or eliminate demonstrated adverse impacts.

This discussion of disparate impact analysis reveals that to comply with Title VI, state environmental agencies must gather a significant amount of scientific and demographic data and submit that data to a fairly rigorous analysis to determine both the existence and significance of disparities among different racial and ethnic groups in the area affected by a proposed activity or facility. Undoubtedly, this may require either a reallocation of resources within the agency or the hiring of specialized staff to undertake disparate impact analysis. Those issues are addressed further in the following section.

B. INTEGRATING ENVIRONMENTAL JUSTICE INTO ALL AGENCY ACTIVITIES

The implementation of a comprehensive environmental justice program requires some degree of structural reform of the agency, which may or may not require adopting new laws or regulations. Regardless, such reform measures should ensure that environmental justice considerations are integrated into all agency activities. In other words, states should take a *comprehensive approach* to incorporating environmental justice into agency work, "rather than focusing on a specific facet (*e.g.*, permitting, siting,

[105] *Id.*
[106] *Id.*

brownfields, enforcement) that may raise issues associated with environmental justice."[107] While the structure of state environmental agencies varies from state to state, they have many common features. Typically, a state environmental agency is composed of several departments or divisions organized around the following: specific parts of the natural world (such as air, water, land, wetlands or coastal areas, etc.), particular kinds of pollutants (such as hazardous and solid waste, pesticides and radiation); and particular agency tasks (such as law enforcement, policy development, research and media/public relations). A comprehensive approach ensures that environmental justice principles are followed by all divisions of the agency and invites coordination between the state environmental agency and other state agencies, such as state health departments, having jurisdiction over environmental issues.

A comprehensive approach to addressing environmental justice generally consists of the following elements: a statement of policy; a strategic plan for integrating environmental justice into agency policies; a plan for coordination between and among state and federal agencies; capacity building measures; and a method for evaluation and accountability.[108] Typically, the contents of policy statements, strategic plans and plans for integration and coordination are developed by advisory committees with members from both inside and outside the agency and interagency task forces. Evaluation and accountability can occur using those committees and task forces and/or by designating someone within the agency with responsibility over those elements, such as an environmental justice ombudsperson, or creating a specialized office on environmental

[107] Nicholas Targ, *State Comprehensive Approaches to Environmental Justice*, unpublished draft on file with author, at 2. A subsequent version of this draft was published as "State Comprehensive Approaches to Environmental Justice" in *Power, Justice and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press 2005).
[108] *Id*., at 18.

justice. Capacity building within the agency can occur through the activities of an environmental justice ombudsperson or environmental justice office and by training agency staff on environmental justice. Examples of how comprehensive approaches to environmental justice have been adopted at the state and federal levels are discussed below.

1. Environmental Justice Policies or Plans

As of 2004, nine state environmental agencies had formally adopted environmental justice policies or plans (Arizona, California, Connecticut, Illinois (interim), Indiana, Massachusetts, New Hampshire, New York, North Carolina and Texas).[109] Some of these policies and plans, such as the Environmental Justice Policy of the Massachusetts Executive Office of Environmental Affairs, incorporate a comprehensive approach to environmental justice. The comprehensive approach is set forth in the first sentence of the Massachusetts policy's statement of purpose:

> It is the policy of the Executive Office of Environmental Affairs that environmental justice shall be an integral consideration to the extent applicable and allowable by law in the implementation of all EOEA programs, including but not limited to, the grant of financial resources, the promulgation and implementation and enforcement of laws, regulations and policies, and the provision of access to both active and passive open space.[110]

The Massachusetts policy was adopted by the Executive Office of Environmental Affairs without any legislative mandate to adopt such a policy. In California, legislation passed by the state's legislature and signed into law by then-Governor Gray Davis

[109] Analysis of 50 STATE SURVEY, *supra*, note 52.
[110] Executive Office of Environmental Affairs, *Environmental Justice Policy of the Executive Office of Environmental Affairs* (2002), at 4, available at http://www.mass.gov/envir/ej/pdf/EJ_Policy_English_Full_Version.pdf (last accessed Sept. 14, 2006).

required the state's Environmental Protection Agency to adopt an environmental justice mission statement that followed a comprehensive approach, such that the agency must:

(a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state [and]

(b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.[111]

The examples from these states show that the comprehensive approach to environmental justice can be adopted with or without specific legislation. Absent specific legislation, an agency could ignore or abandon policy statements that incorporate the comprehensive approach. However, attempts to pass environmental justice legislation can take years, as was the case in California,[112] or may not succeed, as has been the case in Massachusetts.[113] Thus, non-legislative approaches to developing comprehensive environmental justice policies must be considered as a viable alternative.

2. *Appointing an Interagency or Intra-agency Task Force*

One way in which states can foster coordination between environmental agencies and related agencies (*e.g.*, state health departments), or even within a large environmental agency itself, is through the appointment of an Interagency or Intra-agency Task Force on environmental justice. In California, the state legislature created an Environmental Justice Working Group, comprised of the heads of Cal/EPA's Boards, Departments and Office and the Director of the Governor's Office of Planning and Research. California's

[111] CAL. PUB. RES. CODE §71110(a)-(b) (2006).
[112] Targ, *supra*, note 107, at 8.
[113] Interview with Quita Sullivan, Staff Attorney, Alternatives for Community and Environment (April 30, 2004).

Environmental Justice Working Group serves to "[identify] any gaps in existing programs, policies, or activities that may impede the achievement of environmental justice."[114] Another precedent for establishing Interagency or Intra-agency Task Forces on environmental justice is the federal Interagency Working Group, established by President Clinton's Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The Federal Interagency Working Group was established to:

> "(1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;
>
> (2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by…this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;
>
> (3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities […];
>
> (4) assist in coordinating data collection, required by this order;
>
> (5) examine existing data and studies on environmental justice;
>
> (6) hold public meetings […]; and
>
> (7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies."[115]

The primary benefit of establishing interagency and intra-agency task forces is bringing representatives of the various departments within an agency and/or representatives of agencies outside the state environmental agency to a common table

[114] CAL. PUB. RES. CODE §§ 71113(a) (2006).
[115] Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994), available at http://www.epa.gov/fedrgstr/eo/eo12898.pdf (last accessed Sept. 14, 2006).

where coordination of effort can be discussed, planned and evaluated. Missing from the conversation are stakeholders outside of the agency, who may provide valuable insight on how coordination of effort could occur. Thus, state environmental agencies should consider establishing advisory committees to supplement the work of task forces composed only of government employees.

3. Appointing An Environmental Justice Advisory Committee

States may choose to establish environmental justice advisory committees to obtain ongoing input from environmental justice stakeholders such as community groups, industry representatives, etc. Such advisory groups differ from state Interagency or Intra-agency Task Forces by including members of the public who work outside the state government. Advisory committees make recommendations on ways in which state governments can develop and implement environmental justice programs; provide ongoing feedback on and evaluations of programs that have been put into operation; and allow for increased public participation in policy development and decision-making.[116]

As of 2004, eleven states (Alabama, California, Delaware, Georgia, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon and Pennsylvania) had created environmental justice advisory committees that included members external to state government to make recommendations on environmental justice policies to state officials.[117] Often, these advisory committees are modeled upon the National Environmental Justice Advisory Council (NEJAC), which was created by the EPA in 1993 under the Federal Advisory Committee Act. The 26 members of NEJAC are selected from the following groups: Academia, Community Groups, Industry/Business,

[116] For further discussion, see section on Public Participation Measures, *infra*, at 50.
[117] Analysis of 50 STATE SURVEY, *supra*, note 52*;* Executive Office of Environmental Affairs, *supra*, note 110, at 2.

Non-Government Organizations/Environmental Organizations, State/Local Governments and Tribal Governments/Indigenous Groups.[118] In some states, such as California, the advisory committee was established through legislative enactment,[119] while in other states agencies established advisory committees in response to litigation[120] or on their own initiative.[121]

4. Appointing an Environmental Justice Ombudsperson

To ensure that environmental justice concerns are addressed across all agency divisions, state environmental agencies should dedicate staff positions to work exclusively on environmental justice issues. At a minimum, states should dedicate at least one staff position exclusively to environmental justice work. As of 2004, this had been done in eleven states (Arizona, California, Connecticut, District of Columbia, Louisiana, New York, Pennsylvania, South Carolina, Texas and Washington).[122]

Should a state agency only have the resources to create only a single staff position devoted to environmental justice, the agency should consider creating an Environmental Justice Ombudsperson position. The Ombudsperson would be responsible for coordinating environmental justice-related policy and training in all branches of the agency's work and would serve as a liaison between members of the public and the environmental agency. As a liaison, the ombudsperson can also serve as the point-person within the agency for promoting community participation in the decision-making process.

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[118] Additional information on NEJAC can be found in this report, *supra*, at 9, and on EPA's web site at http://www.epa.gov/environmentaljustice/nejac/index.html (last accessed Sept. 14, 2006).
[119] CAL. PUB. RES. CODE § 71114 (2006).
[120] In Rhode Island, the state's Department of Environmental Management was ordered to establish a stakeholder group to advise the agency on policies related to environmental equity. See discussion of Springfield Street schools litigation, *supra*, at 14.
[121] For example New Jersey's Department of Environmental Protection established an Environmental Equity Task Force/Advisory Council to develop a policy and process for incorporating environmental justice concerns into the agency's permitting process. 50 STATE SURVEY, *supra*, note 52, at 39.
[122] Analysis of 50 STATE SURVEY, *supra*, note 52..

The Delaware Department of Natural Resources and Environmental Control (DNREC), for instance, has a Community Ombudsperson whose primary responsibilities include working "to enhance the flow of information between communities and the Department [DNREC], enhance community participation, and facilitate dialogue among all stakeholders during the decision making process…to ensure that no community in the State is disparately affected by environmental impacts."[123]

A better approach involves creating a specialized office or division on environmental justice. The Connecticut Department of Environmental Protection established an Environmental Equity Program staffed by three staff members. One person is responsible for investigating complaints, one for outreach to the community and a third person serves as the program administrator.[124] The Environmental Equity Program conducts a variety of activities such as: environmental equity, diversity and risk communication training; conferences and public and neighborhood meetings; responding to environmental problems in low-income and minority communities and analysis of pollution source trends; targeting areas and populations at risk for environmental investigations, enforcement and clean-up activities; etc.[125]

5. *Training Staff on Environmental Justice and Communicating with the Public*

To increase the agency's capacity to address and respond to environmental justice issues, a state agency's environmental justice program should provide agency staff

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[123] *James A. Brunswick, Jr. Becomes DNREC Community Ombudsman*, 35 NEWS FROM THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL 139 (May 31, 2005), available at http://www.dnrec.state.de.us/ciac/documents/PressReleaseJamesBrunswick-CommunityOmbusdman.pdf (last accessed Sept. 14, 2006).

[124] Conn. Dep't. Envtl. Prot., *Overview—Environmental Justice Program* (2004), available at http://dep.state.ct.us/envjustice/program.htm (last accessed Sept. 13, 2006).

[125] A complete description of the Environmental Equity Program can be found on the website of the Connecticut Department of Environmental Protection, available at http://dep.state.ct.us/aboutdep/progacti.htm#Urban (last accessed Sept. 13, 2006).

members with training on both environmental justice issues and effective ways to communicate with members of the public, particularly with individuals who are low-income and non-white. Five states have formal training programs for state environmental agency employees on environmental justice (California, Illinois, Maine, New York and Tennessee).[126]

The National Environmental Justice Training Collaborative undertook a national effort to establish a uniform training for environmental agency staff. The Collaborative developed both a three-day and a condensed one-day training for EPA staff that has also been used to train employees of state environmental agencies.[127] Topics addressed by the training include differing definitions of Environmental Justice; the historical context of environmental justice; Acts, authorities and Executive Order 12898 on environmental justice; case studies; and tools, such as GIS mapping, used to assist environmental justice analysis. Staff members should also receive training on group facilitation, public speaking and public participation techniques to maximize the ability of agency staff to collaborate with members of the public.

One way to introduce agency staff to environmental justice concerns is to include staff in meetings with state advisory groups, where staff can learn about community concerns and, in turn, familiarize stakeholders with the agency's structure and operations. In New Jersey, quarterly meetings of the state's Department of Environmental

[126] Analysis of 50 STATE SURVEY,*supra*, note 52; The New York State Department of Environmental Conservation conducted a staff training in 2003 that was not mentioned in the 50 State Survey. A brief description of the training is available at http://www.dec.state.ny.us/website/environmentdec/2003b/ejtrainingedec.html (last accessed Sept. 14, 2006).

[127] Interview with Running-Grass, Region 10, US EPA (Sept. 5, 2006).

Protection's ("NJ DEP") EJ Advisory Council "better NJ DEP staff's understanding of the environmental justice population and the issues that affect them."[128]

Agency staff members should also learn to build relationships with members of various vulnerable or affected communities. It is preferable to develop these relationships before "problems" arise, although often it is difficult to identify specific affected communities before a particular decision-making process begins. An effective method for fostering relationship building is to participate in walk-throughs of environmental justice communities and to solicit community input at that time. At the Connecticut Department of Environmental Protection ("CT DEP"), bureau chiefs went on toxic tours of environmental justice communities that made agency officials better able to act on the desires of community leaders.[129] Follow-up visits and attempts to show that community concerns are being addressed absent a specific project should further the relationship development. Community outreach and education programs also provide additional opportunities for relationship building.

C. PROMOTING PUBLIC PARTICIPATION IN AGENCY DECISION-MAKING

An integral element of a good state agency's environmental justice program is thorough and meaningful public participation. Members of communities affected by agency decisions should be actively involved in the many stages of planning and implementation, starting at the earliest practical moment after a project is proposed or a concern arises and continuing even after permits are issued and/or facilities are built. State environmental agencies should also initiate and encourage ongoing contact with community groups and individual community members in order to build relationships

[128] 50 STATE SURVEY, *supra*, note 52, at 40.
[129] Interview with Edith Pestana, Director of CT DEP Environmental Justice Program (May 14, 2004).

with the community even before specific issues arise. Community members may offer valuable insights and information not readily available to agency members. Such contact and participation enables those affected by environmental decisions to have a voice at the decision-making table, and enhanced public participation measures will ultimately improve the ability of state environmental agencies to make decisions that are sensitive and responsive to the vulnerabilities, needs and concerns of the citizens of the state.

The theoretical framework underlying this section comes from the public participation spectrum developed by the International Association for Public Participation ("IAP2").[130] IAP2 has developed a range of tools for practitioners seeking to increase public participation in various fields and interest areas. All of IAP2's suggestions for promoting public participation are based on the beliefs that individuals should have a say in decisions that impact them and that public participation in its ideal form is an ongoing, two-way process that benefits both members of the public and practitioners (in the case of environmental justice, term "practitioners" refers to state environmental agency administrators and staff).

The IAP2 spectrum consists of 5-stages of increasing levels of public participation; however, for reasons relating to the nature of decision-making by state environmental agencies, the fifth stage is not discussed herein.[131] The first stage, informing the public, constitutes the bare minimum of public participation measures and involves providing community members with facts and materials intended to help them

[130] International Association for Public Participation, *IAP2 Spectrum for Public Participation*, available at http://www.iap2.org/associations/4748/files/spectrum.pdf (last accessed Sept. 14, 2006).
[131] The IAP2 spectrum's fifth stage, empowering the public, entails turning decision-making entirely over to the public. Decision-making by state agency officials inherently excludes this possibility. However, some public participation projects that agencies may become involved with, such as community-based participatory research, may enable practitioners to apply empowerment techniques in their work.

understand the problems or proposals at issue. The second stage, consulting the public, requires that practitioners not only provide information but also solicit feedback regarding that information. Practitioners should also provide feedback to the community on how input from the public ultimately influenced the decision(s) made. Involving the public, the third stage in the spectrum, builds upon consultation by including repeated opportunities for feedback and a greater level of give-and-take between practitioners and members of the public. The fourth stage, collaborating with the public, involves consistent partnering with community members in all stages of decision-making. Not every environmental decision made by the state agency need involve every stage of the spectrum, but measures designed to promote all four stages are necessary for effective participation.

1. Informing the Public

Without adequate information about the procedures involved in environmental decision-making and access to information about particular environmental exposures, members of the public stand on unequal footing with agency policymakers, industry representatives and outside researchers. One of the major obstacles to public participation is the perception by state agency personnel that members of affected communities do not have the education or expertise necessary help the agency make relevant decisions.[132] That perception undervalues the expertise that community members possess a vast amount of local knowledge that may enhance the ability of all parties to make decisions, until the public has access to the specialized information – chemical release information, procedural information, etc. – to which agency and

[132] Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond,* 17 J. ENVTL. L. & LITIG. 207 (2002).

industry members and other specialists are privy. Set forth below is a series of practices state environmental agencies can adopt to ensure that the public receives adequate information on a timely basis.

State agencies should make effective use of the Internet to disseminate information by maintaining a website that is readily understandable (in "plain language")[133] and user-friendly. For instance, the New Jersey Department of Environmental Protection set up an interactive GIS mapping tool on the agency's web site that enables users to obtain environmental information, such as the location of contaminated sites that have been identified by the agency, about their neighborhood or town.[134] Agency staff can also publish online notices about agency actions and decisions, such as plans for brownfields cleanup and development, and can regularly post updates on project progression. In Pennsylvania, the Department of Environmental Protection's ("PA DEP") Environmental Justice Advisory Board ("EJAB") even hosts an online discussion area in which members of the public can post comments.[135]

The agency should also create fact sheets about issues such as permitting procedures and contaminant cleanup measures to be available both on the website and for distribution at public meetings. Fact sheets, notices and the like provided on the website and in hard copy should be written in languages other than English in those states with large numbers of non-native speakers of English. Hiring bi- or multi-lingual agency staff

[133] Cal/EPA, *Draft Proposed Recommendations for a Public Participation Policy* (2005), available at http://www.calepa. ca.gov/EnvJustice/ActionPlan/PhaseI/June2005/PPGuidelines.pdf (last accessed Sept. 14, 2006).
[134] The mapping tool i-MapNJ DEP can be accessed at http://www.nj.gov/dep/gis/depsplash.htm (last accessed Sept. 13, 2006).
[135] 50 STATE SURVEY, *supra*, note 52, at 47.

members or community members will enable the agency to prepare accurate and coherent translations of these documents.

Hard-copy information not available through the website should be maintained in accessible repositories with low-cost copying facilities available. When members of the public request agency documents under state freedom of information laws, agencies should develop a special fee schedule or waiver system since copying fees can be a substantial barrier to access for many affected community groups and individuals.

In addition to increasing access to information, state agencies should publish guides to educate members of the public about how to become involved in environmental decision-making processes with funded assistance from the EPA. The Indiana Department of Environmental Management ("IDEM"), published a *Guide to Citizen Participation*, available in both English and Spanish, to explain the state's environmental regulations, procedures and opportunities for involvement.[136] Such a guide could serve as an invaluable resource to communities and individuals looking to educate themselves about how to become involved in environmental decision-making in their state of residence.

Furthermore, state environmental agencies should maintain regularly-updated contact lists to be utilized to inform members of the public of permit applications, public hearings and decisions. These contact lists may be email- and/or mail-based. In Illinois, for example, the Community Relations group of the Illinois Environmental Protection Agency ("IEPA") compiles a mailing list of "Interested and Potentially Affected

[136] National Academy of Public Administration, *Models for Change: Efforts by Four States to Address Environmental Justice* 41 (2002), available at http://71.4.192.38/napa/napapubs.nsf/17bc036fe939efd685256951004e37f4/95fffb0b62b4e26d85256be3004ff436/$FILE/Final+State+EJ+2002.pdf#search=%22Models%20for%20Change%3A%20Efforts%20by%20Four%20States%20to%20Address%20Environmental%20Justice%22 (last accessed Sept. 13, 2006).

Citizens" who "receive notices of hearings on regulations, permit applications, or any other significant Agency action likely to impact the community in which the individual lives, or in which the group has expressed an interest."[137]

Agencies should also include on their contact lists locally-based communications channels, such as newspapers, community newsletters, public access broadcast media, etc., so as to reach the greatest number of state residents and widest demographic possible. The Massachusetts Executive Office of Environmental Affairs ("EOEA"), for example, had plans in 2003 to develop a list of "Alternative Media Outlets" for use in alerting communities about projects affecting their area.[138] Additionally, agencies should develop methods through which community members can request that their names are added to the contact lists, such as an agency website, toll-free hotline or sign-up sheet at public meetings. Members of affected communities should also be encouraged to suggest to agency members other individuals who or entities that might want to be included on such contact lists.

2. Consulting the Public

Merely informing the public, however, is not sufficient to foster truly meaningful public participation in environmental decision-making. An informed public can serve as a valuable and significant source of input regarding potential decisions, and members of affected communities may be able to offer feedback, analysis and alternatives that agency and industry representatives or outside researchers cannot. The public should be consulted early and often about any possible or proposed action. Agency staff should

[137] Illinois Environmental Protection Agency, *Interim Environmental Justice Policy* (undated), available at http://www.epa.state.il.us/environmental-justice/policy.html (last accessed Sept. 13, 2006).
[138] 50 STATE SURVEY, *supra*, note 52, at 33.

make the opportunity for comment – be it through public meetings, surveys, or focus groups – available at numerous points in the decision-making process.

A proactive state environmental justice program will develop knowledge of the concerns, needs and wants of specific communities even before issues related to land use, siting and permitting arise in those communities. A useful tool for documenting a community's environmental concerns is a Community Impact Statement (CIS). A CIS enables community members and agency staff to analyze the baseline environmental condition of that community before a specific project is proposed. In creating a CIS, the community members serve as experts; they, not project proponents or agency members, are the ones who prioritize concerns, evaluate risks and decide what conditions constitute "environmental" conditions. For instance, some communities see crime, traffic and socioeconomic problems as issues of "environmental" concern in the same way that groundwater contamination or habitat destruction are traditionally seen as environmental concerns.[139]

The documentation of community concerns before a specific project is proposed benefits the community by putting their concerns "out front." When the community's concerns are "out front," industry proponents, planners and regulators will be able to predict the community's response to a future proposal and attempt to address those concerns during the proposal's design stage and at the beginning of the proposal process. Moreover, when agency members consult communities about their environmental worries and interests before potentially controversial decisions need to be made, agency members

[139] Lenny Siegal, *The Community Impact Statement* and *The Community Impact Statement: An Exercise in Community Empowerment* (July 1999), available at http://www.cpeo.org/pubs/cisexe.html (last accessed Sept. 14, 2006).

can attempt to remedy any problems or alleviate community members' concerns very early in the decision-making process.

Putting together a comprehensive CIS, however, can be expensive and time-consuming and requires periodic updating. Likewise, specific projects can lead to particular community concerns in addition to or that may differ from those already documented in an existing CIS. Sometimes, too, vulnerable communities are not identified until specific projects are proposed that may affect those communities. In these situations, Public Involvement Plans (PIPs) or Public Participation Plans (PPPs), such as those in required in Massachusetts[140] and California,[141] can serve as important components of public consultation. A PIP/PPP differs from a CIS in that a CIS documents all of a community's concerns, divorcing these general concerns from those regarding a specific project, whereas a PIP/PPP focuses solely on a community's concerns regarding a particular site or facility.

PIPs/PPPs not only formally document the concerns of affected communities with regard to specific sites or facilities but also set forth specific public participation measures that will ensure that the communities' concerns about a specific project are recognized and addressed by the agency. In Massachusetts, PIPs created as part of a waste site cleanup must include a "site description and history, an environmental assessment history, and a history of public involvement at the site."[142] Each PIP should then include information about current community concerns gained from community

[140] Massachusetts Department of Environmental Protection, *Public Involvement Plan Interim Guidance for Waiver Sites* (1991), available at http://www.mass.gov/dep/cleanup/pubinv.pdf (last accessed Sept. 14, 2006).
[141] California Environmental Protection Agency, *Department of Toxic Substances Control Public Participation Manual* (Rev. Oct. 2001), available at http://165.235.111.242/LawsRegsPolicies/Policies/PPP/PublicParticipationManual.cfm (last accessed Sept. 13, 2006).
[142] Massachusetts Department of Environmental Protection, *supra*, note 140, at 8-9.

interviews conducted by Potentially Responsible Parties (PRPs), "language describing how public involvement activities will be conducted during the remedial action," and a catalog of specific activities that will be conducted to involve the public.[143] These specific activities must be listed in the PIP with a proposed schedule for completing them and can include the following:

- establishing a local repository to house site information; establishing a site-specific mailing list to be maintained by the PRP(s);
- developing a notification list including the state agency of individuals who have selected to be notified in advance of "major milestones and events during response actions;"[144]
- soliciting public input during public comment periods (see below); providing a "formal record of all comments received during the public comment period and…PRP responses to each comment;"[145]
- and any other measures deemed necessary.

While the "PRP is responsible for carrying out public involvement activities at the site," the state agency must address "situations in which the agency receives complaints about the manner is which the public involvement process is being developed or implemented by the PRP," and oversee any changes to the PIP if community concerns change or if new issues arise.[146]

California PPPs are strikingly similar to Massachusetts PIPs, although California agency staff and contractors, not PRPs (with the possibility for exceptions), are the ones

[143] *Id, at* 14.
[144] *Id, at* 15.
[145] *Id.,* at 16.
[146] *Id.,* at 17.

primarily responsible for the work involved in developing a PPP.[147] Primary responsibility for developing participation plans should lie with agency staff, as opposed to PRPs and their contractors, for several reasons. First, the legal responsibility for ensuring public participation lies with the state agency, not PRPs or their contractors. Second, agency staff will develop expertise in development of public participation plans over time, both in how public participation best occurs and how various concerns raised by members of the public are best addressed. Finally, unlike PRPs and their contractors, state agencies (at least in theory) serve a public interest in environmental protection, whereas contractors and PRPs themselves serve private interests that may desire a lesser role of the public in agency decision-making.

A public comment period is a required component of a PIP/PPP. Public meetings, however, may be utilized outside of the requirements of a PIP/PPP as well, and agency members should invite public commentary and feedback throughout the decision-making process, not just from affected communities but also from the public at large. Although communities in which proposed projects would be located may be the most directly affected by a decision and are most likely to have been consulted in the development of a PIP/PPP, that decision may also impact residents of the broader local geographic area and, perhaps, the remainder of the state. The agency should consult the broader public by convening public meetings held in several locations.

A state agency can use public meetings to consult members of the public to gauge concerns and interests when developing or reviewing the agency's environmental justice

[147] California Environmental Protection Agency, *Department of Toxic Substances Control Public Participation Manual* (Rev. Oct. 2001), available at http://165.235.111.242/LawsRegsPolicies/Policies/PPP/upload/OEA_Pol_PublicParticipationManual_Chapter2.pdf (last accessed Sept. 13, 2006).

program. When holding public meetings or hearings, agency members should conduct them in a way that promotes as much public participation as possible. An open-microphone format may invite wider participation by members of the public than panel presentations or rigidly structured "trial-like" sessions or some other formats. However, individuals may also be hesitant to come up to a microphone and ask a question or voice an opinion.

At later stages in the decision-making process, after various concerns have been identified and constituent groups have formed, roundtable discussions may provide the means for more in-depth interactions or question-and-answer sessions. Agencies may also find it necessary to provide translation services in order to encourage effective and comprehensive participation by non-English-speaking members of the public. Those determining the timing and location of such hearings should also be conscious of community members' resources and work, family, or other community commitments.

In Maryland, as part of efforts to develop a state environmental justice program, the Commission on Environmental Justice and Sustainable Communities, in collaboration with the Maryland Department of Environment and the US EPA, obtained funding to hold a series of Environmental Equity Hearings (EE Hearings).[148] "The purpose of these EE Hearings [was] to create a forum for community organizations, neighborhood groups and local leaders to provide advice and direction to State agencies…on environmental policies that impact minority and low-income families and other affected communities throughout Maryland."[149] These and related hearings resulted in the compilation of a list

[148] 50 STATE SURVEY, *supra*, note 52, at 31.
[149] Maryland Commission on Environmental Justice and Sustainable Communities, *Annual Report* (2002), at 10, available at

of environmental justice themes and concerns and a series of recommendations on how to address the concerns that were identified.[150]

In situations in which is it easier to identify specific groups or neighborhoods impacted by a proposed project, agencies may also utilize community surveys to obtain public feedback and opinions. In order to maximize access to various constituencies and public involvement, members of affected communities should be involved in the development and implementation of such surveys in collaboration with agency representatives and, perhaps, outside researchers. Such surveys would result not only in valuable information about community members' concerns and opinions but also in the development of valuable community and agency experience and expertise in developing and conducting surveys that could benefit the community later, as well.

3. Involving the Public

Beyond consulting the public once or twice to garner information about community concerns and feedback, an agency with a meaningful public participation program will strive to involve the public on an ongoing basis. This involvement may be achieved by an agency soliciting input on a consistent, repeated basis and offering reciprocal feedback to the community regarding how the public's feedback is being incorporated into the agency's decision-making process. Public involvement – beyond the information and consultation stages – will ensure that agencies regularly consider and address community concerns.

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http://www.mde.state.md.us/assets/document/environmental_justice/ej_2002_Annual_Report.pdf (last accessed Sept. 14, 2006).

[150] Maryland Department of Public Works, *Public Dialogues Executive Summary* (2003), available at http://www.Mde.state.md.us/assets/document/environmental_justice/Public%20Dialogues%20Exec%20Summary.pdf (last accessed Sept. 14, 2006).

Members of the public may be involved in ongoing workshops to develop alternatives or to educate individuals and community groups about the scientific, technical, or procedural issues involved. Agency staff members may also provide and/or offer technical expertise and information to which members of the public might not otherwise have access at this stage, too, as could outside experts in conjunction with agency representatives.

In Maryland, the state's Commission on Environmental Justice and Sustainable Communities ("EJ Commission") initiated a series of "Public Dialog Sessions" at which the public could make suggestions about environmental policies and processes that could impact the state's low-income and minority residents to various levels of government. The EJ Commission was first established by an Executive Order and then re-established by the state's legislature two years later.[151] Four "Public Dialog Sessions" were held across the state over a two-month period. Prior to conducting the public sessions, a consultant was hired to help identify possible issues for discussion, to identify potential participants in the sessions, to conduct outreach and prepare materials for the sessions and to facilitate the public sessions.[152] The EJ Commission continues to meet on a regular basis and makes recommendations to state policy makers in annual reports.

4. Collaborating with the Public

Good, comprehensive environmental justice programs will involve collaboration with the public in which community input, concerns and advice are not merely solicited

[151] Maryland Dept. of Envir., *Environmental Justice in Maryland* (2006), available at http://www.mde.state.md.us/Programs/MultimediaPrograms/Environmental_Justice/implementation/details.asp (last accessed Sept. 13, 2006).
[152] Public Works, *Public Dialogues Executive Summary* (undated), available at http://www.mde.state.md.us/assets/document/environmental_justice/Public%20Dialogues%20Exec%20Summary.pdf (last accessed Sept. 13, 2006).

but are substantially incorporated into the actual decisions made. Formal bodies appointed by the agency, such as Community Advisory Boards/Committees (CABs or CACs) and Community Working Groups (CWGs), create conditions in which community concerns are effectively communicated to agency decision-makers, well-conceived alternatives to proposed actions may be developed and recommendations regarding preferred actions may be made. Decisions concerning long-term projects and oversight of those projects, especially those concerning pollution reduction or cleanup, may more readily lend themselves to standing community advisory group involvement than might decisions regarding the siting or permitting of specific facilities. However, no particular issue precludes community advisory involvement. Community advisory groups may also be more helpful to agency decision-making when community members are relatively well-informed and educated about the environmental decision-making process and in which relationships have already been built between community groups and agency decision-makers.

Agencies may shy away from community advisory groups due to a lack of experience with selecting group members from the community. In order to best meet the needs and satisfy the concerns of all affected community stakeholders, community advisory groups should consist of a membership that accurately reflects the demographic composition of the community. Furthermore, a standing group's members and agency staff should encourage representatives of as many interests groups as possible to participate in the group's work.

In recent years, several state environmental agencies have established, most often through legislative mandate, standing advisory groups that make recommendations on

ways in which states can improve their overall environmental justice programs. These state advisory groups are modeled after the National Environmental Justice Advisory Council ("NEJAC"), which was created by the EPA in 1993 under the Federal Advisory Committee Act.[153]

In California, a leader in state-level environmental justice efforts, Senate Bill 89 (Escutia) led to the formation of the California Environmental Protection Agency's ("Cal/EPA") Advisory Committee on Environmental Justice in December 2001. The Committee assists the Cal/EPA Interagency Working Group, which includes the heads of Cal/EPA's Boards, Departments and Office and the Director of the Governor's Office of Planning and Research, by contributing to the development of a strategy for identifying and addressing environmental justice shortcomings in Cal/EPA's programs. The Committee is comprised of external stakeholders, originally including the following thirteen members: "two representatives of local or regional land-use planning agencies; two representatives from air districts; two representatives from certified unified program agencies (CUPAs); two representatives from environmental organizations; three business representatives (two from large and one from small business); and two representatives from community organizations."[154] After recognizing that the committee membership did not include representatives of African-American groups or Native American tribes and that the community/environmental group membership did not "reflect a good geographic representation of the state,"[155] the committee pushed for legislation enacted in

[153] Kathy Bunting, *Risk Assessment and Environmental Justice: A Critique of the Current Legal Framework and Suggestions for the Future*, 3 BUFF. ENVT'L. L. J. 129 (1995).
[154] Cal/EPA Interagency Working Group on Environmental Justice, *Recommendations of the California Environmental Protection Agency (Cal/EPA) Advisory Committee on Environmental Justice to the Cal/EPA Interagency Working Group on Environmental Justice* (October 7, 2003), at 7, available at http://www.calepa.ca.gov/EnvJustice/Documents/2003/FinalReport.pdf (last accessed Sept. 13, 2006).
[155] *Id*.

September 2002, that expanded the membership to include two additional community group representatives, one representative of Native American tribes and one additional small business representative. The committee also sought input from additional community groups, environmental justice organizations, business and labor representatives, local governments, federal government agencies, Native American tribal representatives and academic scholars in compiling their recommendations to the Cal/EPA Interagency Working Group. These recommendations focused on promoting public participation through relationship building, increasing the availability of information, improving staff training and capacity building.[156]

Following recent legislation, the state environmental agency in Delaware, the Department of Natural Resources and Environmental Control ("DNREC"), chartered an advisory group designed to identify both environmental justice communities and communication and public involvement issues and then to recommend ways to address those issues. That group, the Community Involvement Advisory Committee ("CIAC"), was comprised of a wide cross-section of stakeholders, including not only community representatives but also representatives of "community-based and indigenous peoples' organizations, faith-based, civil rights and women's groups, local planning councils, academia, health agencies, environmentalists, city government, business and industry."[157] Together, the members of the CIAC met at locations throughout the state to identify additional stakeholders, solicit input and then summarize and report the primary concerns

[156] *Id.*, at 17.
[157] *Report of the Community Involvement Advisory Committee to the Delaware Department of Natural Resources and Environmental Control* (March 22, 2001), at 6, available at http://www.dnrec.state.de.us/dnrec2000/Admin/BusServ/CIACReport.pdf (last accessed Sept. 14, 2006).

of community members and make recommendations regarding specific measures for increasing public involvement to DNREC.

Although the previous examples concern advisory groups intended to make broad recommendations for state environmental justice programs as a whole, some states have created community advisory boards (CABs) that focus on particular issues. In Arizona, for instance, CABs of five to twenty members meet quarterly with the Arizona Department of Environmental Quality ("DEQ") as part of DEQ's state Superfund program. The CABs' duties "include providing comments to DEQ on cleanup goals, methods and other issues; representing the community located around the site; participat[ing] in community outreach with respect to the project; and mak[ing] visits to the cleanup site."[158] CABs, therefore, not only provide feedback to DEQ but also foster an ongoing two-way dialogue between the agency and the community.

Public participation measures comprise a vitally important aspect of any good state environmental justice program. The various stages in increasing public participation outlined above build upon one another; as community members become informed about environmental issues and decision-making procedures and are consulted about their wishes and concerns, their involvement with agency representatives can ultimately become truly collaborative. Such a progression can ultimately lead to a level of public participation that will allow state environmental agencies to make decisions that address the concerns of each state's citizens and that take the suggestions and recommendation of those citizens into account.

The success and value of a good state environmental agency's public participation program is neither measured nor revealed solely by the outcome of the specific

[158] 50 STATE SURVEY, *supra*, note 52, at 3-4.

participation measures implemented. A state with a good public participation program may not always be able to make "perfect" decisions or to hold totally productive public meetings. Instead, success "can be defined by the participatory processes used in the programs."[159] In other words, regardless of the tools utilized, a state environmental agency that approaches public participation and the development of a good public participation program as an ongoing process may be more successful than an agency that takes a more superficial "check off the box" approach to document completion of specific public participation activities.

Likewise, no single public participation measure will work in every situation, and a particular measure that worked well once may not be so successful again, even in a similar situation. However, an enduring emphasis on the principles underlying public participation combined with continual assessment and evaluation of the success of different public participation measures in different contexts may lead to the development of a public participation program that can address and meet the needs and desires of both the agency and the public.

D. LEGISLATIVE ACTIONS TO SUPPORT STATE ENVIRONMENTAL JUSTICE INITIATIVES

The adoption and implementation of environmental justice programs by state environmental agencies does not require agencies to obtain new legislative authority. That being said, the success of environmental justice initiatives at the state level would be greatly enhanced by legislative enactments that provide additional financial support and legal authority for state environmental agencies to decisively act to promote environmental justice. Many of the environmental justice initiatives described above

[159] Caron Chess & Kristen Purcell, *Public Participation and the Environment: Do We Know What Works?* 33 ENVIRONMENTAL SCIENCE AND TECHNOLOGY 2685 (1999).

were either initially established or subsequently re-established by legislative enactments and will not be mentioned again here. This section focuses on legislative appropriations in support of environmental justice and legislatively prescribed standards to guide agency decision-making.

1. *Fiscal Support*

The initiatives proposed in this report do not come without a price tag. While it was beyond the scope of this report to estimate the costs of the recommendations made herein, the financial resources necessary to carry out those recommendations must come either from existing state agency budgets or from additional appropriations to the agency. Initially, such appropriations should fund staff positions such as an environmental justice ombudsperson position or several positions to staff an office on environmental justice. Funds should also be appropriated to support staff training, particularly on conducting disparate impact analysis and public participation techniques.

In addition to increased funding for state agencies, funds should be made available to support environmental justice efforts undertaken by local non-profit agencies or state-funded universities. In California, the state legislature established an environmental justice small grant program through which grants up to $20,000 are made to non-profit entities and federally recognized tribes for a number of environmental justice related activities, such as expanding the understanding of a community about environmental issues in their community and promoting community involvement in agency decision-making.[160] In Florida, the State Legislature created a Center for Environmental Equity and Justice at the Florida Agricultural and Mechanical University's Environmental Sciences Institute. The Center is funded under the

[160] CAL. PUB. RESOURCES CODE §71116 (2006).

university's base budget to conduct research, develop policies and implement education, training and community outreach initiatives.[161]

2. *Standards to Guide Agency Decision-Making*

While Title VI requires agencies to refrain from actions that have the effect of discriminating on the basis of race and/or color, agency decision-makers must be better empowered to reject projects that have significant disparate impacts on non-white and low-income communities.[162] Title VI itself does not provide standards to guide agency decision-makers in avoiding or mitigating disparate impacts that may be caused by agency decision-making. To fill this void, some states have enacted legislation establishing standards designed to mitigate discriminatory environmental impacts.

The most common legislative approach to mitigating disparate impacts of siting and permitting decisions involves the dispersion of environmentally hazardous activities within a given area. Generally, these laws restrict the siting of environmentally hazardous activities within a certain distance of another similar facility or limit the number of facilities within a defined area. For example, in Alabama, no more than one hazardous waste treatment facility or disposal site may be located within a county.[163] In Arkansas, state law establishes "a rebuttable presumption against permitting the construction or operation of any high impact solid waste management facility . . . within 12 miles of any existing high impact solid waste management facility."[164]

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[161] Ann E. Goode, *State Approaches to Environmental Justice* (undated), available at http://www.abanet.org/irr/committees/environmental/newsletter/dec03/Goode.html (last accessed Sept. 13, 2006).
[162] Interview with Luke Cole, Executive Director, Center for Race, Poverty and the Environment (Dec. 2, 2004).
[163] ALA. CODE §22-30-5.1(c) (2006).
[164] ARK. CODE ANN. §8-6-1504(a)(1) (2006).

Alternatives to dispersion laws are laws requiring a "fair share" distribution of environmentally hazardous facilities in a given jurisdiction. This approach was followed in New York City with regards to the siting of new city facilities, those facilities "used . . . to meet city needs that [are] located on real property owned or leased by the city . . . ."[165] Under the City Charter, the City's Planning Commission is charged with adopting criteria for the siting of new city facilities that are "designed to further the fair distribution among communities of the burdens and benefits associated with city facilities . . . and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites."[166] The City Planning Commission developed separate siting criteria for local facilities (those facilities serving just the planning district in which the majority of users live and work), such as libraries, fire stations and senior citizen centers, and for regional or city-wide facilities (those serving several districts or the entire city), such as sewage treatment plants, landfills and jails. [167] Criteria for siting new regional and city-wide facilities include: the facility's compatibility with existing facilities and programs in the neighborhood, the extent to which the neighborhood's character will be adversely affected by a concentration of such facilities, the distribution of similar facilities throughout the city, the size of the proposed facility and the adequacy of streets and transit facilities to handle traffic generated by the facility.[168] While the New York City Charter does not squarely apply to siting decisions of environmentally hazardous facilities, the approach could be applied to the siting of the kinds of facilities regulated using the dispersion approach.

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[165] N.Y. City Charter, §203(c) (2004).
[166] *Id.*, at §203(a) (2004).
[167] Vicki Bean, *What's Fairness Got to do With it? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993), at 1078, n.425.
[168] *Id.*, at 1078 and n.426.

A third approach attempts to restrict certain land uses that entail environmental risks. For example, some states enacted laws that restrict the siting of schools on sites contaminated by hazardous substances. In California, a solid waste disposal site may be used for a school only if all of the disposed solid waste has been removed from the site.[169] In Florida, a site contaminated by hazardous substances may be used if "steps have been taken to ensure that children attending the school or playing on school property will not be exposed to contaminants in the air, water or soil at levels that present a threat to human health or the environment." [170]

An emerging approach not widely adopted in the United States directs environmental decision-makers to follow a precautionary approach in their decision-making. This approach, known as the "Precautionary Principle,"[171] has been adopted by a handful of municipalities in California such as San Francisco. San Francisco's Precautionary Principle Ordinance directs "all officers, boards, commissions, and departments of the City and County [to] implement the Precautionary Principle in conducting the City and County's affairs . . . ."[172] The Ordinance continues:

> "Where there are reasonable grounds for concern, the precautionary approach to decision-making is meant to help reduce harm by triggering a process to select the least potential threat. The essential elements of the Precautionary Principle approach to decision-making include:
>
> 1. Anticipatory Action: There is a duty to take anticipatory action to prevent harm. Government, business, and community groups, as well as the general public, share this responsibility.

[169] CAL. EDUC. CODE §17213(a) (2006).
[170] FLA. STAT. §1013.36-1013.365 (2006).
[171] See Discussion, *supra*, at 4.
[172] San Francisco Precautionary Principle Ordinance, §101 (2006), available at http://www.sfenvironment.com/aboutus/innovative/pp/sfpp.htm (last accessed Sept. 13, 2006)

2. Right to Know: The community has a right to know complete and accurate information on potential human health and environmental impacts associated with the selection of products, services, operations or plans. The burden to supply this information lies with the proponent, not with the general public.

3. Alternatives Assessment: An obligation exists to examine a full range of alternatives and select the alternative with the least potential impact on human health and the environment including the alternative of doing nothing.

4. Full Cost Accounting: When evaluating potential alternatives, there is a duty to consider all the reasonably foreseeable costs, including raw materials, manufacturing, transportation, use, cleanup, eventual disposal, and health costs even if such costs are not reflected in the initial price. Short-and long-term benefits and time thresholds should be considered when making decisions.

5. Participatory Decision Process: Decisions applying the Precautionary Principle must be transparent, participatory, and informed by the best available information."

The Precautionary Principle has worked its way into the California Environmental Protection Agency's Environmental Justice Action Plan. As part of that Plan, the agency plans to develop guidance on precautionary approaches to environmental decision-making and evaluate whether additional precaution may be warranted in the agency's environmental programs to address or prevent environmental justice problems.[173]

[173] California Environmental Protection Agency, *October 2004 Environmental Justice Action Plan* (Oct. 2004), at 4, available at http://www.calepa.ca.gov/EnvJustice/ActionPlan/Documents/October2004/ActionPlan.pdf (last accessed Sept. 13, 2006).

APPENDIX A

PERSONS INTERVIEWED FOR THIS REPORT

Name		Title	Organization
Bradley	Angel	Executive Director	Greenaction
Luke	Cole	Executive Director	Center for Race, Poverty & the Environment (CA)
Veronica	Eady	Attorney	New York Lawyers for the Public Interest
Running	Grass		U.S. Environmental Protection Agency, Region 10
Anjuli	Gupta		Center for Environmental Health (CA)
Keith	Harley	Attorney	Chicago Legal Clinic
Gavin	Kearney	Attorney	New York Lawyers for the Public Interest
Yuki	Kidokoro	Acting Executive Director	Communities for a Better Environment (CA)
Kwabena	Kyei-Aboagye	Regional Planner	Mass. Executive Office of Environmental Affairs
Dr. Mark	Mitchell	Executive Director	Connecticut Coalition for Environmental Justice
Paul	Mohai	Professor	University of Michigan
Maria	Moya	Organizer	Environmental Health Coalition (CA)
Omar	Osiris	Coordinator	Northeast Environmental Justice Network (NY)
Edith	Pestana	Administrator, Enviromental Equity	CT. Department of Environmental Protection
Bhavna	Shamasunder	Program Associate	Urban Habitat (CA)
Lenny	Siegel	Director	Center for Public Environmental Oversight (CA)
Katie	Silberman	General Counsel	Center for Environmental Health (CA)
Quita	Sullivan	Staff Attorney	Alternatives for Community and Environment (MA)
Nicholas	Targ	Attorney	Office of Environmental Justice, USEPA HQ
Alan	Walts	Attorney	U.S. Environmental Protection Agency, Region 5
Joy	Williams	Director of Research	Environmental Health Coalition (CA)