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Public Engagement "Reach In, Reach Out": Pursuing Environmental Justice by Empowering Communities to Meaningfully Participate in the Decision-Making Processes of Brownfields Redevelopment and Superfund Cleanups

Josephine M. Balzac

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PUBLIC ENGAGEMENT “REACH IN, REACH OUT”: PURSUING ENVIRONMENTAL JUSTICE BY EMPOWERING COMMUNITIES TO MEANINGFULLY PARTICIPATE IN THE DECISION-MAKING PROCESSES OF BROWNFIELDS REDEVELOPMENT AND SUPERFUND CLEANUPS

Josephine M. Balzac^A

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INTRODUCTION

“[C]itizen participation is ‘deliberation on issues affecting one’s own life, is the normative core of democracy.’”¹ The U.S. Constitution begins with “We the People,” which establishes the citizens as the basis for democratic government. Citizen participation is a fundamental part of environmental justice especially for those who lack political power and social capital.² Unfortunately, the communities most impacted by environmental threats are often excluded from important decision-making proceedings.³ This can either cause their voices to be muted or to fall on deaf ears.

The principle of environmental justice is that all persons and communities are entitled to equal treatment concerning the distribution of environmental benefits and burdens, without regard to race or

1. Lora L. Karaoglu, *Brownfields Redevelopment: The Criteria for Environmental Justice*, ENVIRONMENTAL JUSTICE RESEARCH COLLABORATIVE AT NORTHEASTERN UNIVERSITY (May 2004), 25, available at <http://www.northeastern.edu/nejrc/wp-content/uploads/Brownfields-Environmental-Justice-Public-Participation-1.pdf> (citing FRANK S. FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE 1 (Duke Univ. Press 2000)).

2. See *id.* at 24 (citing GARY C. BRYNER, GAIA’S WAGER: ENVIRONMENTAL MOVEMENTS AND THE CHALLENGE OF SUSTAINABILITY 44 (Rowman & Littlefield Publishers 2000)); see also MARK S. DENNISON, *Brownfields Redevelopment: Programs and Strategies for Rehabilitating Contaminated Real Estate* (Gov’t Inst. 1998).

3. CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 3, (N.C. Academic Press, 2d ed. 2009).

socio-economic status.⁴ Environmental justice is founded on the belief that affected communities should be empowered to speak for themselves.⁵ The unequal treatment of communities interferes with environmental equity, which has been described as the right “of all people to benefit from the environment and to be equally protected from the effects of human use and abuse of it.”⁶ Environmental injustices impact communities not only with facility siting, but also with cleanup of Superfund sites⁷ and brownfields⁸ redevelopment.

Brownfield and Superfund sites exist in many areas but are concentrated mostly in predominantly minority and lower-income neighborhoods.⁹ Environmental justice seeks to prevent the disproportionate impact of environmental risks, in the backyards of minority and low-income communities. Brownfields and Superfund sites present areas of environmental degradation and toxic contamination, which could potentially threaten the public health. Immediate assessment and cleanup should be undertaken at these sites. However, for the sustainable process of brownfields redevelopment and cleanup of Superfund sites to occur, addressing the needs and involving the communities are essential.

The principle of sustainable development involves the perfect balance between three pillars: economic development, environmental protection, and social development.¹⁰ Each pillar of sustainable development is mutually dependent on the other. The goal is to strike a balance between these interests, which are often competing. With an even balance, a higher quality of life is achieved.¹¹

Environmental protection and human rights are inextricably linked. Humans need nature to survive; “[h]ealthy ecosystems are the

4. *Id.* at 299-300.

5. *Id.* at 433.

6. David Monsma, *Equal Rights, Governance, and the Environment: Intergrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGY L.Q.* 443, 453 (2006) (quoting Dr. Beverly Wright of the Deep South Center for Environmental Equity).

7. Throughout this article, Superfund sites will refer to those hazardous waste sites listed on the National Priorities List (NPL) or designed a Superfund Alternative. *See infra* Part II.

8. Throughout this article, “brownfield” will refer to contaminated properties that are being redeveloped. *See infra* Part II.

9. RECHTSCHAFFEN ET AL., *supra* note 3, at 295; *see also* Karaoglu, *supra* note 1.

10. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 200 (Found. Press, 3d ed. 2007).

11. CTR. FOR INT’L ENVTL. LAW, *ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT* 3 (2002), *available at* www.ciel.org/Publications/OneSpecies_OnePlanet.pdf.

foundation for human life and for the fulfillment of the rights that are inherent to human life.”¹² When people do not have access to the basics of clean water, air, land, and food, then it affects the realization of their human rights. The universality of human rights and the relationship between human rights and the environment further reinforces the nexus between sustainable development and environmental justice.¹³ “On the most fundamental level, environmental justice can be seen as a term that encompasses the twin aims of environmental protection and international human rights.”¹⁴ Integrating human rights and environmental protection is necessary for the success of sustainable development.¹⁵

The principles of environmental justice, sustainable development, and our human rights require public engagement in the decisions making process by the communities most impacted by environmental threats. This includes encouraging members of the affected communities to provide input and meaningfully participate in the decision-making process of brownfields redevelopment and Superfund cleanups. The rights of public participation and access to information need to be a priority in the remediation of brownfields and Superfund sites in order to achieve a higher quality of life for present and future generations.

The article will first discuss the history of the environmental justice movement, including activism, national policy, agency action, and statistics. Part Two will explain CERCLA, the federal statute governing Superfund sites and brownfields redevelopment. Part Three introduces the potential adverse consequences on public health associated with the contaminated environment encountered at brownfields and Superfund sites. This section will emphasize the additional adverse effects of displacement, gentrification, and lack of economic benefits surrounding brownfields redevelopment. Part Four links environmental justice and sustainable development and shows how public participation is necessary to achieve these goals. This section also discusses the human rights associated with public engagement. Part Five discusses the requirements of public engagement within the Superfund

12. *Environmental Governance*, UNITED NATIONS ENV'T PROGRAMME, <http://www.unep.org/environmentalgovernance/UNEPsWork/HumanRightsandtheEnvironment/tabid/130265/Default.aspx> (last visited Jul. 20, 2014).

13. CTR. FOR INT'L ENVTL. LAW, *supra* note 11, at 6.

14. RECHTSCHAFFEN ET AL., *supra* note 3, at 148.

15. U.N. Conference on Sustainable Development, Human Rights and the Environment—Rio+20: Joint Report OHCHR and UNEP, 4 (2012), <http://www.unep.org/environmentalgovernance/Portals/8/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf> [hereinafter *Rio+20*].

and Brownfields law. This section also provides examples of available community involvement resources and grants within these programs. Part Six shows why community involvement is necessary for reducing the potential adverse consequences of brownfields redevelopment and Superfund cleanups, concluding that empowering communities to meaningfully participate in the decision-making process is necessary for environmental justice and sustainable development.

I. ENVIRONMENTAL JUSTICE MOVEMENT

Historical research studies demonstrate that minority and low-income communities are disproportionately exposed to environmental hazards.¹⁶ As early as 1971, the President's Council on Environmental Equity (CEEQ) annual report acknowledged racial discrimination adversely affects urban poor and the quality of their environment.¹⁷ Environmental justice "has precipitated a great deal of research on the racial and socioeconomic disparities in exposure to environmental health risks."¹⁸

Dr. Martin Luther King Jr. "plant[ed] the seeds of the environmental justice movement."¹⁹ Environmental justice began as a grassroots movement combining the principles of civil rights and environmental protection.²⁰ In 1979, the first civil rights lawsuit challenging the siting of a waste facility was filed.²¹ In 1987, the first national study to correlate waste facility siting and race was issued by the United Church of Christ Commission for Racial Justice.²² In 1990, Dr. Bullard published *Dumping in Dixie*, the first textbook on environmental justice.²³ The movement continued as environmental justice activists joined together at the First National People of Color Environ-

16. See generally Second National People of Color Environmental Leadership Summit, *Environmental Justice Timeline –Milestones* (2002), available at <http://www.ejrc.cau.edu/summit2/%20EJTimeline.pdf> [hereinafter *Milestones*].

17. *Id.* at 3.

18. See *Environmental Justice Analysis*, EPA.GOV, <http://www.epa.gov/sustainability/analytics/environmental-justice.htm> (last updated June 24, 2014).

19. Bill Chameides, *A Look at Environmental Justice in the United States Today*, HUFFINGTON POST (Jan. 20, 2014, 3:52 PM), http://www.huffingtonpost.com/bill-chameides/a-look-at-environmental-j_b_4633223.html (quoting U.S. Attorney General Eric Holder in a speech at the Environmental Protection Agency in 2011).

20. Monsma, *supra* note 6, at 451.

21. See *Milestones*, *supra* note 16, at 3.

22. *Id.* at 4; RECHTSCHAFFEN ET AL., *supra* note 3, at 3-4.

23. See *Milestones*, *supra* note 16, at 5; Monsma, *supra* note 6, at 444.

mental Leadership Summit, where the Principles of Environmental Justice were adopted.²⁴

A. *Environmental Justice and the Environmental Protection Agency*

The environmental justice movement gained momentum, and the following year the Environmental Protection Agency (EPA) began implementing environmental justice into its offices, policies, and initiatives. In 1992, the Government Accountability Campaign persuaded EPA and the Agency for Toxic Substances and Disease Registry (ATSDR) to clean up waste sites and support sustainable development.²⁵ That same year EPA released one of the first comprehensive reports to examine environmental justice²⁶ and established the Office of Environmental Justice.²⁷

In response to the overwhelming publicity and demonstrative data, in 1994, President Bill Clinton signed Executive Order 12898 on environmental justice, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”²⁸ The Order directed federal agencies to develop environmental justice strategies to help federal agencies address “disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations.”²⁹ EPA defines environmental justice as the “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.”³⁰

B. *National Environmental Justice Advisory Council*

To continue promoting environmental justice throughout the agency, EPA convened a federal advisory council called National Environmental Justice Advisory Council (NEJAC) to provide advice and

24. See *Milestones*, *supra* note 16, at 5; RECHTSCHAFFEN, *supra* note 3, at 4 (citing the Principles of Environmental Justice, available at <http://www.ejnet.org/ej/principles.html>).

25. See *Milestones*, *supra* note 16, at 6.

26. *Id.* at 6. (The report is titled *Environmental Equity: Reducing Risk for All Communities*, available at http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf).

27. RECHTSCHAFFEN ET AL., *supra* note 3, at 4.

28. Exec. Order No. 12898, 59 FR 7629 (Feb. 11, 1994).

29. *Id.*

30. *Environmental Justice: Basic Information*, EPA.GOV, <http://www.epa.gov/compliance/ej/basics/ejbackground.html> (last updated July 20, 2014).

recommendations on broad issues related to environmental justice.³¹ The goal of NEJAC is to provide recommendations and advice to the EPA Administrator on incorporating environmental justice into agency programs, policies, and day-to-day activities.³² In 1995, shortly after NEJAC came into being, EPA and NEJAC conducted a series of discussions to obtain input from advocates and residents of impacted communities on revitalization of abandoned properties across the nation called “Brownfields.”³³ With the contribution from advocates and residents, NEJAC made recommendations for brownfields redevelopment which exhibited a “consistent theme of the importance of seeking and including communities in decisions and planning.”³⁴ EPA took these recommendations into consideration and implemented a number of actions to improve its Brownfields initiative, which it created under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).³⁵

II. CERCLA: SUPERFUNDS AND BROWNFIELDS

Brownfields and Superfund sites by their very nature are environmental hazards that pose a public health risk. These sites require cleanup, remediation, or removal of environmental hazards. CERCLA, also known as the Superfund, is the primary federal statute governing the remediation of spills or releases of hazardous substances.³⁶ Brownfields and Superfund properties usually involve heavy industrial, extractive, chemical, and hazardous waste activities at the sites. CERCLA authorizes EPA to investigate and cleanup releases of hazardous substances (or to permit private parties to do so) in accordance with the National Contingency Plan (NCP).³⁷ The NCP sets forth guidelines and procedures for responses to releases and threatened releases of hazardous substances, pollutants, or contaminants.³⁸

31. RECHTSCHAFFEN ET AL., *supra* note 3, at 4; see generally *National Environmental Justice Advisory Council*, EPA.GOV, <http://www.epa.gov/Compliance/ej/nejac/index.html> (last updated Sept. 11, 2013).

32. *NEJAC Fact Sheet*, EPA (July 2012), available at <http://www.epa.gov/Compliance/ej/resources/publications/factsheets/fact-sheet-nejac.pdf>.

33. *Id.*

34. *Id.*

35. *Id.*

36. RECHTSCHAFFEN ET AL., *supra* note 3, at 285.

37. *Id.*

38. *CERCLA Overview*, EPA.GOV, <http://www.epa.gov/superfund/policy/cercla.htm> (last updated Dec. 12, 2011).

A. Superfund

Superfund is “the federal government’s program to clean up the nation’s uncontrolled hazardous waste sites.”³⁹ Once a hazardous waste site has been identified, EPA commences a preliminary assessment by placing the data in an information system called CERCLIS, which is a database of all hazardous substance release sites.⁴⁰ The risks are then evaluated considering factors such as toxicity, quantity, and concentrations of wastes present at the site.⁴¹ The agency assigns a numerical score to the site utilizing a Hazard Ranking System (HRS).⁴² A HRS score higher than 28.5 places the site on the National Priority List (NPL).⁴³

The NPL lists the national priorities “among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories.”⁴⁴ However, not all high scoring sites are placed on the NPL. The Superfund alternative (SA) approach is an alternative to listing the site on the NPL.⁴⁵ Eligibility for SA approach is based on three criteria: “1) site contamination is significant enough that the site would be eligible for listing on the NPL; 2) a remedial action is anticipated at the site; 3) at least one willing Potentially Responsible Party (PRP) who will sign agreement with EPA to perform the investigation and cleanup.”⁴⁶ The SA uses the same process and standards for investigation and cleanup as sites on the NPL; however, sites are not eligible for federal remedial cleanup funds.⁴⁷ The cleanup funding is provided by the PRPs.⁴⁸

CERCLA created a tax on the chemical and petroleum industries and provided “broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.”⁴⁹ Cleaning up

39. *Superfund*, EPA.GOV, <http://www.epa.gov/superfund/> (last updated July 14, 2014).

40. RECHTSCHAFFEN ET AL., *supra* note 3, at 286.

41. *Id.*

42. *Id.*

43. *Superfund Alternative Approach*, EPA.GOV, <http://www2.epa.gov/enforcement/superfund-alternative-approach#threshold> (last updated Mar. 16, 2014).

44. *National Priorities List*, EPA.GOV, <http://www.epa.gov/superfund/sites/npl/index.htm> (last updated Oct. 17, 2013).

45. *Superfund Alternative Approach*, *supra* note 43.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Superfund Overview*, EPA.GOV, <http://www.epa.gov/superfund/policy/cercla.htm> (last updated Dec. 12, 2011).

contamination involves long-term “remedial” actions designed to permanently eliminate the risk to public health.⁵⁰ Remedial actions usually consist of excavating contaminated soils, treating contaminated groundwater, and properly disposing of contaminated materials offsite.⁵¹ Under CERCLA, the remedial action preferred is one that “permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances” at a site.⁵²

CERCLA also provides for liability of persons responsible for releases of hazardous waste at these sites and, with the tax collected, established a trust fund to provide for cleanup when no responsible party could be identified.⁵³ Under CERCLA, potentially responsible parties (PRPs) are obligated to contribute financially to site cleanups, either directly or by reimbursing the trust fund for monies expended by government agencies.⁵⁴

B. Brownfields

The liability associated with redeveloping contaminated or potentially contaminated sites left states and localities with several obstacles in the cleanup process.⁵⁵ Brownfield redevelopment programs seek to revitalize properties with real or potential contamination, which were previously abandoned or underutilized industrial and commercial properties.⁵⁶ “Brownfields” are defined by EPA as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”⁵⁷

In 1995, EPA launched the Brownfields Economic Redevelopment Initiative and Agenda, after the Administrative Reforms were announced under the Superfund program.⁵⁸ The goal of the Administrative Reforms was to improve the Superfund without requiring

50. RECHTSCHAFFEN ET. AL., *supra* note 3, at 286.

51. *Id.*

52. *Id.* citing Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA or Superfund), 42 U.S.C. § 9621.

53. *Superfund Overview*, *supra* note 49.

54. RECHTSCHAFFEN ET. AL., *supra* note 3, at 285-286.

55. EPA, THE BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE: PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT DEMONSTRATION PILOTS 1, available at <http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyPDF.cgi?Dockey=P1000E09.pdf>.

56. Karaoglu, *supra* note 1, at 3.

57. *Brownfields Fact Sheet: Brownfields Public Health and Health Monitoring*, EPA July 2006, available at <http://www.epa.gov/brownfields/tools/finalphandbfbfact.pdf>.

58. Karaoglu, *supra* note 1, at 7.

regulatory amendments.⁵⁹ EPA utilized their statutory authority under CERCLA and implemented the Brownfields Initiative.⁶⁰ The authority comes from CERCLA §104,⁶¹ which provides EPA with “broad authority to take response actions whenever there is a release or substantial threat of a release of a hazardous substance.”⁶²

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (“the Brownfields Law”).⁶³ The Brownfields Law amended CERCLA (or Superfund) in several ways, one of which was by providing funds to assess and clean up brownfields.⁶⁴ The Superfund provides funding for brownfield projects.⁶⁵ This new law created a “bona fide prospective purchaser” (BFPP) exemption for those whose potential liability under CERCLA derived only from the fact that it owns or operates a property or facility.⁶⁶ The BFPP shall not be liable if the “BFPP does not impede the performance of a response action.”⁶⁷ This exemption was Congress’ response to the hesitancy in redeveloping brownfields due to the potential liabilities surrounding cleanup.

The Brownfields Law provided new tools for the public and private sectors to promote sustainable brownfields cleanup and reuse.⁶⁸ The Brownfields program was built on four pillars: 1) protecting the environment; 2) promoting partnerships; 3) strengthening the marketplace; and 4) sustaining reuse.⁶⁹ The ultimate goal of brownfields redevelopment should be sustainable development, assuring that each of the four pillars is achieved.

59. *Id.*

60. EPA, RCRA, SUPERFUND, EPCRA HOTLINE TRAINING MANUAL 3, available at <http://www.epa.gov/superfund/contacts/sfhotline/brwnfld.pdf> [hereinafter HOTLINE TRAINING MANUAL].

61. CERCLA § 104(d)(1), 42 U.S.C. § 9604(d)(1) (2006).

62. See HOTLINE TRAINING MANUAL, *supra* note 60, at 3.

63. Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified at 42 U.S.C. §§ 9601-9675).

64. See *id.* (Additional amendments included clarifying CERCLA liability protections and providing funds to enhance state and tribal response programs).

65. Karaoglu, *supra* note 1, at 7.

66. RECHTSCHAFFEN ET. AL., *supra* note 3, at 298.

67. RECHTSCHAFFEN ET. AL., *supra* note 3, at 298 (citing 42 U.S.C. § 9607 (r) (1)).

68. *Brownfields Land and Revitalization: Basic Information*, EPA.gov, http://www.epa.gov/brownfields/basic_info.htm (last updated July 16, 2012).

69. *Id.*

III. POTENTIAL ADVERSE CONSEQUENCES IN SUPERFUND CLEANUPS AND BROWNFIELDS REDEVELOPMENT

Emerging evidence suggests brownfield sites are located disproportionately in low economic and minority communities.⁷⁰ Similarly, studies have documented the presence of the same inequalities in the geographic location of Superfund sites.⁷¹ If these hazardous sites are not remediated permanently, contamination from these sites can affect neighboring properties, including both the soil and the groundwater.⁷² The contaminated sites also threaten to contaminate drinking water and lead to adverse health effects on the community and the environment.⁷³ Environmental justice and sustainable development issues immediately arise under these circumstances because minorities and lower income residents are seen as lacking political resources and clout⁷⁴ and are, therefore, often excluded in governmental environmental decision-making processes.⁷⁵ Excluding communities from the decision-making process of brownfields redevelopment and Superfund cleanups exposes residents to an array of potential adverse consequences, including to their health, safety, and welfare.

A. *Brownfields Redevelopment: Additional Adverse Consequences*

The redevelopment of brownfields has additional adverse consequences that may not be experienced solely with the remediation of Superfund sites. Therefore, as brownfields become identified and before assessments and clean-up begin, the potential threats to the properties of the community surrounding the sites need to be considered.

Although the Brownfields grants are meant to revitalize the community, research shows that brownfields redevelopment can cause unintended adverse consequences.⁷⁶ These consequences include dis-

70. Sangyun Lee & Paul Mohai, *Environmental Justice Implications of Brownfield Redevelopment in the United States* SOC'Y & NAT. RESOURCES, Aug. 2011, at 2.

71. Karaoglu, *supra* note 1.

72. Karaoglu, *supra* note 1 (citing William A. Shutkin *THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY* (Cambridge: MIT Press 2000)).

73. RECHTSCHAFFEN ET. AL., *supra* note 3, at 295.

74. Lee & Mohai, *supra* note 70.

75. *Id.* at 5.

76. See generally NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, UNINTENDED IMPACTS OF REDEVELOPMENT AND REVITALIZATION EFFORTS IN FIVE ENVIRONMENTAL JUSTICE COMMUNITIES, available at <http://www.epa.gov/environmentaljustice/resources/publications/>

placement of residents, gentrification, and lack of economic benefits for the community residents.⁷⁷ The local impact of these issues is of critical concern to environmental justice communities and their advocates.⁷⁸ In 2006, NEJAC produced a report called “*Unintended Impacts of Redevelopment and Revitalization Efforts in Five Environmental Justice Communities*” and made recommendations to EPA.⁷⁹ The report identified that environmental cleanup of formerly industrialized, now residential, communities can be a powerful displacing force.⁸⁰ Local governments are stimulating this revitalization by taking advantage of federal policies and programs to reclaim underutilized and derelict properties for productive uses.⁸¹

1. Displacement and Gentrification

Displacement of residents can occur either through acquiring properties through eminent domain or through gentrification. Gentrification involves the arrival of relatively affluent newcomers who often purchase property at well below market value and renovate it at a considerable expense.⁸² This tends to increase the overall property values in the area, and the low income residents subsequently cannot afford the increased property taxes or rents.⁸³ This then displaces local residents because they are unable to obtain affordable new housing within the same community.⁸⁴ Displacement poses serious problems; displaced residents “often end up in neighborhoods of even lower environmental, economic, and social quality than the ones in which they previously resided.”⁸⁵

Developers must understand as NEJAC explains, “the commodity of land being sold in the real estate market is more than a physical structure or piece of acreage. It is also a neighborhood, a political and cultural entity necessary for the sustainability of a community in that

nejac/redev-revital-recomm-9-27-06.pdf [hereinafter NEJAC]; see generally Lee & Mohai, *supra* note 70.

77. *Id.*

78. NEJAC, *supra* note 76.

79. *Id.*

80. *Id.* at 2.

81. *Id.* at 1-2.

82. Lee & Mohai, *supra* note 70, at 5.

83. *Id.*

84. *Id.*

85. *Id.*

place.”⁸⁶ Displaced residents suffer the loss of important community culture,⁸⁷ which cannot be regained in other communities.

2. Lack of Benefits and Services for the Affected Communities

Brownfield redevelopment seeks to promote sustainable neighborhood revitalization, which should mean that the surrounding affected communities are acquiring the benefits of these development efforts.⁸⁸ However, we have to understand the difference between actual and anticipated benefits.⁸⁹ Often, plans for redevelopment of minority and lower income communities where brownfields are found fail to create benefits for local residents.⁹⁰ Some of the redevelopment, while not harmful to the community, does not fully incorporate community members in the benefits of redevelopment.⁹¹ Does the development create new jobs, services, and sustainable opportunities?

In cases where community groups have become involved, their participation has been welcomed, and the results have been positive.⁹² When local community groups are involved, the needs of the community are likely to be addressed.⁹³ The opposite effect occurs in cases where community groups are less active.⁹⁴ When the community is not involved, it is difficult to find any efforts of services provided to a community.⁹⁵

IV. ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT REQUIRE PUBLIC PARTICIPATION

Environmental justice demands public policy to be based on “mutual respect and justice for all people . . . and insists on the right to

86. NEJAC, *supra* note 76, at 2.

87. Lee & Mohai, *supra* note 70, at 5.

88. Karaoglu, *supra* note 1, at 26.

89. Lee & Mohai, *supra* note 70, at 5.

90. *Id.*

91. RECHTSCHAFFEN ET. AL., *supra* note 3, at 311 (citing Jessica Higgins, *Evaluating the Chicago Brownfields Initiative: The Effects of City-Initiated Brownfields Redevelopment on Surrounding Communities*, 3 NW. J. L. & SOC. POL’Y 240 (2008)).

92. *Id.* at 41 (“Columbia Pointe, the Lawndale site, and the Bronzeville site provide prime examples of how brownfield redevelopment, prompted by community groups and facilitated by the active efforts of the City, can reflect and fulfill the needs of the community.”).

93. *Id.* at 312.

94. *Id.*

95. *Id.*

participate as equal partners at every level of decision-making.”⁹⁶ Similarly, one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.⁹⁷ Commentators agree that the “concept of sustainable development and environmental justice share many critical and defining characteristics” and that “[e]ach requires taking into account and integrating policies relating to social justices, environmental protection, and economic development.”⁹⁸

A. *Sustainable Development and Public Engagement*

Sustainable development came to the forefront of environmental matters at the United Nations Conference on Environment and Development meeting at Rio de Janeiro in 1992 (“Rio Declaration”).⁹⁹ The nations participating in the Rio Declaration formally accepted “sustainable development as the goal of a modern economy.”¹⁰⁰ The Rio Declaration recognized that the protection of human rights is critical for sustainable development through public participation, access to information, and access to judicial remedies.¹⁰¹ Rio highlighted the model of public participation; Principle 10 of the Rio Declaration specifically states that, “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”¹⁰² Environmental scholars and activists began to link environmental protection and human rights, focusing on the procedural human rights.¹⁰³

96. RECHTSCHAFFEN ET. AL., *supra* note 3; see also *The Principles of Environmental Justice*, EJNET.ORG, <http://www.ejnet.org/ej/principles.html> (last updated Apr. 6, 1996).

97. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21, Preamble*, U.N. Doc. A/CONF.151/26/ (Vol. I), at ch. 1 (Aug. 12, 1992). <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> [hereinafter *Agenda 21*].

98. Monsma, *supra* note 6, at 483-484.

99. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex 1, at princ. 10 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

100. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 199 (Foundation Press, 3rd ed. 2007).

101. *Rio+20*, *supra* note 15, at 11.

102. *Rio Declaration*, *supra* note 99.

103. DONALD K. ANTON & DINAH L. SHELTON, *ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS* 356 (Cambridge University Press 2011).

B. Human Rights and Public Engagement

Procedural human rights include access to information, public participation, and access to justice and remedies in the event of environmental harm.¹⁰⁴ In 1998, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“Aarhus Convention”) was adopted in Aarhus, Denmark.¹⁰⁵ The Aarhus Convention “links environmental protection and human rights, acknowledges that we owe an obligation to future generations, and establishes that sustainable development can be achieved only through the involvement of all stakeholders.”¹⁰⁶ Furthermore, “[h]uman rights depend on environmental protection,” and “environmental protection depends on the exercise of certain human rights, such as the rights to information, public participation in decision-making and access to justice.”¹⁰⁷

The Aarhus Convention, linking international human rights and environmental protections, established minimum standards for national level decision-making, which are described as the three pillars of “environmental democracy”¹⁰⁸ and include the following: 1) public participation in environmental decision-making; 2) right to access information;¹⁰⁹ and 3) equal access to justice.¹¹⁰ These procedural human rights linked to environmental protection “have received the greatest attention in legal instruments and jurisprudence, as well as in doc-

104. *Id.*

105. *Introduction*, U.N. ECON. COMM’N FOR EUR., <http://www.unece.org/env/pp/introduction.html> (last visited Jul. 20, 2014); see also *The Aarhus Convention*, EUROPEAN COMM’N, <http://ec.europa.eu/environment/aarhus/> (last updated Mar. 6, 2014) (entered into force on Oct. 30, 2001).

106. *Id.*

107. *Rio+20*, *supra* note 15, at 6.

108. U.N. ECON. COMM’N FOR EUR., *THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 2000*, at 5-6, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000), available at <http://www.unece.org/fileadmin/DAM/env/pp/implementation%20guide/english/part1.pdf> [hereinafter *AARHUS CONVENTION GUIDE*].

109. *Id.* at 17; see also *Access to Information*, U.N. ECON. COMM’N FOR EUR., <http://www.unece.org/env/pp/contentai.html> (last visited Jul. 20, 2014) (“The information pillar covers both the ‘passive’ or reactive aspect of access to information, i.e. the obligation on public authorities to respond to public requests for information, and the ‘active’ aspect dealing with other obligations relating to providing environmental information, such as collection, updating, public dissemination and so on.”).

110. *AARHUS CONVENTION GUIDE*, *supra* note 108, at 17; see also *Access to Justice*, U.N. ECON. COMM’N FOR EUR., <http://www.unece.org/env/pp/contentaj.html> (last visited July 20, 2014) (“aims to provide access to justice in three contexts: review procedures with respect to information requests review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and challenges to breaches of environmental law in general.”).

trine.”¹¹¹ Strengthening these procedural rights of engaging the public’s participation will encourage sustainable development.¹¹²

V. PUBLIC ENGAGEMENT: BROWNFIELDS REDEVELOPMENT AND SUPERFUND REMEDIATION

Brownfields and Superfund sites intersect environmental remediation and environmental justice.¹¹³ Environmental “cleanup” justice “requires that minorities and the poor be treated the same as other socioeconomic groups . . . and encouraged to participate in the cleanup of environmental hazards in their communities.”¹¹⁴ The Executive Order 12898 on environmental justice defines meaningful involvement when:

- (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health;
- (2) the public’s contribution can influence the regulatory agency’s decision;
- (3) their concerns will be considered in the decision making process;
- and (4) the decision makers seek out and facilitate the involvement of those potentially affected.¹¹⁵

In establishing the Superfund program, Congress intended to provide opportunities for residents of affected communities to actively participate in the process and to have a voice in the decisions that affect their community.¹¹⁶ Similarly, the mission of EPA’s Brownfields Program is to “empower states, communities, and other stakeholders in economic redevelopment to *work together* in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields.”¹¹⁷

Therefore, during the brownfields redevelopment process and Superfund cleanups, communities have a right to participate as equal stakeholders in the decisions. It is commonly observed that the environmental decision-making process “favors those with resources and political power over minority and low-income communities.”¹¹⁸ There-

111. *Rio+20*, *supra* note 15, at 24.

112. *Id.*

113. Sandra George O’Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, 115 ENVTL. HEALTH PERSP. 1087 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1913562/>.

114. *Id.*

115. *Environmental Justice: Basic Information*, EPA.GOV, <http://www.epa.gov/compliance/ej/basics/ejbackground.html> (last updated May 24, 2012).

116. EPA, SUPERFUND COMMUNITY INVOLVEMENT HANDBOOK 1 (2005), available at http://www.epa.gov/superfund/community/cag/pdfs/ci_handbook.pdf.

117. *Brownfields Land and Revitalization*, *supra* note 68.

118. RECHTSCHAFFEN ET AL., *supra* note 3, at 10.

fore, communities with Superfund sites and/or brownfields need to have greater access to information and legal and technical resources to ensure equal access to decision-makers and the decision-making process.¹¹⁹ The residents whose backyards are contaminated are the very people affected and, therefore, should be key stakeholders in the cleanup or redevelopment process.

A. *Community Involvement Resources within Superfund*

Both the Superfund and Brownfields Law provide opportunities and resources for community participation.¹²⁰ The goal of Superfund community involvement “is to advocate and strengthen early and meaningful community participation during Superfund cleanups.”¹²¹ EPA provides technical assistance and training resources to help communities participate in Superfund decisions at sites in their community.¹²² Each Superfund site involves a Community Involvement Coordinator (CIC) to act as a liaison between EPA and the community and to provide information.¹²³ Additionally, Technical Assistance Grants (TAGs) are available for eligible Superfund sites placed on the NPL for up to \$50,000.¹²⁴ These grants provide money for activities that help communities participate in decision-making by contracting with independent technical advisors to help the community understand technical information about their site.¹²⁵

When Superfund sites are not eligible for TAGs because they are not listed on the NPL, Technical Assistance Plans (TAPs) are available.¹²⁶ TAPs are funded by PRPs, unlike TAGs, which are funded by

119. *Id.*

120. See generally EPA, OSWER FACT SHEET ON ENVIRONMENTAL JUSTICE ACTION AGENDA, available at [http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyNET.exe/9100O2XS.pdf?ZyActionP=PDF&Client=EPA&Index=1995Thru1999&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C95THRU99%5CTXT%5C0000028%5C9100O2XS.txt&Query=&SearchMethod=1&FuzzyDegree=0&User=ANONYMOUS&Password=anonymous&QField=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&Docs=.](http://nepis.epa.gov/EPA/html/DLwait.htm?url=/Exe/ZyNET.exe/9100O2XS.pdf?ZyActionP=PDF&Client=EPA&Index=1995Thru1999&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C95THRU99%5CTXT%5C0000028%5C9100O2XS.txt&Query=&SearchMethod=1&FuzzyDegree=0&User=ANONYMOUS&Password=anonymous&QField=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&Docs=)

121. *Superfund Community Involvement*, EPA.GOV, <http://www.epa.gov/superfund/community/index.htm> (last updated June 27, 2012).

122. *Superfund Community Resources*, EPA.GOV, <http://www.epa.gov/superfund/community/resources.htm> (last updated Jan. 12, 2012).

123. See, e.g., *Region 4: Superfund*, EPA.GOV, <http://www.epa.gov/region4/superfund/programs/comminvolve/comminvolve.html> (last updated Jan. 3, 2012).

124. *Technical Assistance Grants*, EPA.GOV, <http://www.epa.gov/superfund/community/tag/> (last updated Feb. 1, 2012).

125. *Id.*

126. EPA, EPA/PRPs TECHNICAL ASSISTANCE PLANS, <http://www.epa.gov/superfund/community/pdfs/toolkit/techassist-tap.pdf>.

EPA or other government entities.¹²⁷ TAPs are only required in Superfund Alternative Approaches and become available when a settlement agreement has been reached.¹²⁸ The initial financial arrangement is an obligation of \$50,000 from the PRPs.¹²⁹ Additional technical assistance benefits are provided by EPA through their Technical Assistance Services for Communities (TASC).¹³⁰ These services include community training, educational presentations, understanding technical information, and helping form Community Advisory Groups (CAGs).¹³¹

Superfund allows for the creation of CAGs, which is a task force, committee, or board made up of community residents.¹³² The purpose of CAGs is to exchange information among the local community and EPA, the State regulatory agency, and other pertinent Federal agencies involved in cleanup of the Superfund site.¹³³ CAGs function independently of EPA, but can serve as important community outreach and participation tools.¹³⁴ EPA encourages CAGs, and EPA regions support CAGs at many Superfund sites.¹³⁵

B. Community Involvement Resources in Brownfields Redevelopment

Brownfields grants support revitalization efforts by funding environmental assessment, cleanup, and job training activities.¹³⁶ Brownfields redevelopment, if done properly with community participation, can provide a number of improvements to the surrounding community, such as to “improve public health by adding accessible and affordable grocery stores, recreational or green space, community gardens, healthcare facilities, pharmacies and other important amenities important to meet community needs as part of healthier redevelopment and reuse as well as job opportunities for community residents.”¹³⁷

The Brownfields assessment grant provides funding for a grant recipient to “inventory, characterize, assess and conduct planning for

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Brownfields Land and Revitalization*, *supra* note 68.

133. *See* SUPERFUND COMMUNITY INVOLVEMENT HANDBOOK, *supra* note 116, at 33.

134. *Brownfields Land and Revitalization*, *supra* note 68.

135. *Id.*

136. *Id.*

137. *Id.*

cleanup and redevelopment and community involvement (outreach).¹³⁸ The grant specifically provides for community involvement, which suggests EPA's intent for the community to participate in assisting with the assessment of brownfields. This allows grant recipients to allocate funds to disseminate information, conduct community outreach, and hold public meetings and workshops.¹³⁹ Grantees can receive up to \$400,000 to assess hazardous substances and petroleum products over a three-year period.¹⁴⁰

The Brownfields law focuses on the impacts of brownfields, especially in disadvantaged communities.¹⁴¹ The assessment grant allows a local government to spend up to 10% of a Brownfields grant for health monitoring.¹⁴² The health monitoring provision under EPA's Brownfields grant is defined as "the collection of health-related qualitative and quantitative data of relevance to brownfield communities and hazardous substance exposures."¹⁴³ It allows for "(1) monitoring the health of populations exposed to one or more hazardous substances from a brownfield site; and (2) monitoring and enforcement of any institutional control used to prevent human exposure to any hazardous substance from a brownfield site."¹⁴⁴

The Brownfields Program also provides for job training grants to nonprofits and other organizations to "recruit, train, and place predominantly low-income and minority, unemployed and under-employed people living in areas affected by solid and hazardous waste."¹⁴⁵ The goal is to give residents the opportunity to work in green jobs, which reduce environmental contamination and build more sustainable futures for communities.¹⁴⁶

138. *Id.*

139. *Id.*

140. EPA, EPA BROWNFIELDS ASSESSMENT GRANTS: INTERESTED IN APPLYING FOR FUNDING? (2009), available at http://www.epa.gov/brownfields/grant_info/assess/assessment_factsheet.pdf.

141. *Brownfields Land and Revitalization*, *supra* note 64.

142. EPA, BROWNFIELDS PUBLIC HEALTH AND HEALTH MONITORING 2 (2006), available at <http://www.epa.gov/brownfields/tools/finalphandbfbfact.pdf>.

143. *Id.*

144. *Id.*

145. *Environmental Workforce Development and Job Training*, EPA.GOV, <http://www.epa.gov/brownfields/job.htm> (last updated May 12, 2014).

146. *Id.*

VI. PUBLIC ENGAGEMENT REDUCES THE POTENTIAL FOR ADVERSE
CONSEQUENCES IN SUPERFUND CLEANUPS
AND BROWNFIELDS REDEVELOPMENT

The potential negative health impacts and environmental degradation associated with cleanup of Superfund sites and brownfields requires community involvement through public participation and access to information. The contamination of soil, groundwater, and air may lead to adverse effects on the health of people, animals, and plants at or near the sites.¹⁴⁷ The environmental damage is irreversible, the health impacts are critical, and the loss of property is permanent; these consequences demonstrate the importance of acquiring information prior to decision-making to ensure informed choices are made.¹⁴⁸ The people that are going to be affected need all of the information surrounding the cleanup and redevelopment in their neighborhoods. Reaching out to communities, disseminating information, and identifying interest is necessary to achieve effective and meaningful participation and reduce the potential adverse consequences.¹⁴⁹ Public participation produces faster and more resident-oriented outcomes.¹⁵⁰

Information gives communities the tools they need to use their voices and make informed decisions while publicly participating in creating a sustainable community to live in. However, if there is no knowledge of the environmental concern, then the community will not be involved because they are unaware. The adverse consequences are less likely to occur when the community is involved because their rights and interests are considered and therefore better protected. The concerns of the residents are not usually the top priority, but when they become involved, they quickly move up the ladder. EPA and municipalities for the most part have open door policies and are willing to listen and help. However, if there is no community interest, then business will continue as usual.

There are many resources available for community involvement within the Brownfields and Superfund programs. The programs and grants discussed above provide avenues and funding to address the needs of the community to prevent adverse consequences in the cleanup process. TAGs, TAPs, CAGs, assessment grants, job training grants, and health monitoring are all crucial for the success of

147. *Superfund: Contaminated Media, Human Health, and Environmental Effects*, EPA .gov, <http://www.epa.gov/superfund/health/index.htm> (last updated Mar. 21, 2014).

148. ANTON & SHELTON, *supra* note 103, at 357.

149. Karaoglu, *supra* note 1, at 26.

150. Lee and Mohai, *supra* note 70, at 5.

Superfund cleanups and brownfields redevelopment. The issue is, however, that communities usually are unaware of the available resources. Agencies and municipalities need to do better jobs at community outreach in order to get the information across. Outreach efforts should include not only notice in the newspaper, but door-to-door, various forms of media (specialty newspaper, radio broadcasts, local news), emails, mail outs, workshops, and public meetings. The content of the information is very important, remembering the audience is the key to success. Additionally, the information on sites needs to be easily accessible, such as by creating a repository, uploading the information online, and quickly providing it upon request.

The programs and benefits are an excellent step in the right direction to achieve environmental justice and sustainable development, but what good are they if they are not actually utilized? There is a difference between saying and doing; as the saying goes, "actions speak louder than words." The agency, municipalities, and PRPs need to consider reaching into communities before communities will reach out. After all, they are the ones with the information regarding potential contamination, not the communities.

Environmental justice, sustainable development, and human rights all recognize the importance of public participation and access to information. The risks of adverse consequences in brownfields redevelopment and cleanup are too high to not involve the community. The goal is one of meaningful involvement in the decision-making processes associated with assessments and cleanup of Superfunds and brownfields. Participatory practices empower citizens to identify resources and risks and correlate directly with democratic theory and environmental democracy.¹⁵¹

CONCLUSION

Environmental justice demands equal treatment of communities for environmental benefits and protection from its harm. It is important not only for our human health, but the health of our democracy to actively engage citizens in decisions affecting their health, environment, and communities. The voices of communities should not fall on deaf ears. In order to achieve sustainable development in environmental justice communities, public participation and access to information is critical. Communities need to organize together and take a stand for justice in their backyards. Community residents

151. Karaoglu, *supra* note 1.

should be encouraged to participate and feel empowered that their voice is being heard and equally important. When working together in joint partnership, people who lack an equal share of resources gain greater access to and control over those resources. When the community is empowered they are better able to bring about change in their communities. The residents of the community are better equipped to know what benefits will bring them a higher quality of life. If both sides at the table participate in a joint effort of reaching in and reaching out, environmental justice and sustainable development will be achieved.