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Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice

Eileen Gauna

University of New Mexico - School of Law

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Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice

*Eileen Gauna**

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ED. NOTE: The *Ecology Law Quarterly* would like to apologize to the author for the tardiness of this article. The article was originally scheduled to be published in February 1995. *ELQ* accepts full responsibility for the late publication of this article and has ensured that the research and propositions remain current.

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INTRODUCTION

The late 1980's witnessed the birth of a chilling phrase: environmental racism.¹ Surprisingly, the phrase was directed at the practices of the guardians of the environment,² in particular the Environmental Protection Agency (EPA)³ and mainstream national environmental organizations.⁴ More important, the phrase connected two complicated social problems previously unconnected in the minds of many:

1. The coining of the phrase "environmental racism" is attributed to Dr. Benjamin Chavis, former Executive Director of the United Church of Christ Commission for Racial Justice, which released its landmark study documenting exposures to hazardous waste sites in 1987.

[Dr. Chavis defines racism as] racial prejudice plus power. Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

Benjamin F. Chavis, *Preface to COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES ix-x* (1987) [hereinafter *TOXIC WASTES AND RACE*].

2. In this article, the term "environmental protection" encompasses both the regulation of exposure to environmental hazards and enforcement of environmental laws.

3. See William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 18; see also *infra* note 38 and accompanying text.

4. See John H. Adams, *The Mainstream Environmental Movement*, EPA J., Mar.-Apr. 1992, at 25, 25-26; see also *infra* note 39 and accompanying text.

environmental hazards and racial injustice.⁵ Although the phrase was new, the political movement that gave birth to it was not. Activists in communities of color have been fighting the effects of environmental racism in organized campaigns at the local level for many years.⁶ Despite their efforts and decades of environmental regulation, communities of color are left with greater environmental hazards and less rigorous environmental enforcement than exist in predominantly White communities.⁷ A similar pattern of unequal environmental protection exists in low income communities.⁸ Something has gone wrong.

Apparently, neither Congress nor EPA officials contemplated that the creation and administration of federal environmental laws would allow a disproportionate burden⁹ to fall on minor-

5. See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 1-20 (1990) [hereinafter *DUMPING IN DIXIE*]. Environmental "time bombs" in communities of color are not high on the agenda of mainstream environmentalists and have not received much attention from mainstream civil rights advocates, but in the 1980's a small cadre of African-American activists began to view environmental discrimination as a civil rights issue. *Id.* at 14-17. EPA did not examine racial equity issues until the early 1990's. Even then, managers in EPA's Office of Solid Waste and Emergency Response were not aware of EPA's efforts and believed environmental equity awareness workshops were necessary within EPA. See ENVTL. PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, VOL. 2 SUPPORTING DOCUMENT 17* (1992) [hereinafter *SUPPORTING DOCUMENT*]; ENVTL. PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, VOL. 1 WORKGROUP REPORT TO THE ADMINISTRATOR* (1992) [hereinafter *WORKGROUP REPORT*]. The Workgroup Report and the Supporting Document are collectively referred to as the "1992 EPA Report."

6. See *DUMPING IN DIXIE*, *supra* note 5, at 37-73 (describing five organized campaigns in low income and middle income African-American communities in the southern states that date to the early 1980's); see also *SUPPORTING DOCUMENT*, *supra* note 5, at 90 (commenting on the long history of local efforts in communities of color).

7. See generally *TOXIC WASTES AND RACE*, *supra* note 1; *SUPPORTING DOCUMENT*, *supra* note 5; *WORKGROUP REPORT*, *supra* note 5; *DUMPING IN DIXIE*, *supra* note 5; *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* (Bunyan Bryant & Paul Mohai eds., 1992) [hereinafter *RACE AND ENVIRONMENTAL HAZARDS*] (discussing disparate exposure to environmental hazards on the basis of race); *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1, S1-S12 [hereinafter *Unequal Protection*] (discussing disparate enforcement of environmental laws); *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (Robert D. Bullard ed., 1993) [hereinafter *VOICES FROM THE GRASSROOTS*]; *TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE* (Richard Hofrichter ed., 1993) [hereinafter *TOXIC STRUGGLES*]; *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* (Robert D. Bullard ed., 1994).

8. See *supra* note 7.

9. Burdens caused by environmental laws include price increases passed on to consumers, product limitation or unavailability, fewer employment opportunities, more governmental expenditures, and redistribution of environmental risks that results from some forms of environmental control. Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 792-96 (1993). The scope of this article is limited to disparate environmental risk in low income and minority communities and unequal enforcement of environmental laws.

ity¹⁰ and low income communities, or that these communities would continue to suffer a disproportionate share of environmental hazards.¹¹ Congress did anticipate, however, a risk of underenforcement of environmental laws due to lack of regulatory capacity.¹² Consequently, federal legislation envisioned that private participation in the enforcement of environmental laws would be an important aspect of environmental regulation as an adjunct to public enforcement.¹³ Most major federal environmental laws contain special citizen suit provisions, granting private citizens authority to prosecute civil actions against polluters for violations of environmental laws and authority to sue government officials for failure to perform nondiscretionary duties.¹⁴ Citizen suit provisions allow a private citizen more than a challenge to arbitrary agency action; citizen suit provisions essentially confer "private attorney general" status, allowing a citizen to proceed on behalf of the general public.¹⁵

Private enforcement has played and continues to play a key role in environmental protection. Yet, individuals using citizen suit provisions are under no obligation to prosecute violators in any particular manner, nor are they subject to governmental oversight, nor are they held accountable to the general public. In theory at least, it is possible for private enforcers to skew enforcement and exacerbate the effects of environmental racism by prosecuting violations or challenging agency inaction that affect only affluent, predominantly White communities. Private enforcement can mean that some communities have the benefit of public and private enforcement resources while other communities must rely solely upon public enforcement of environmental laws.

Given increasing evidence that minority and low income communities suffer disproportionately greater environmental hazards, it is important to ask first, whether the scheme of private enforcement contributes indirectly to unequal environmental protection, and second, whether citizen suit provisions could provide one means to address environmental inequities. The frequency of use of environmental citizen suits by low income and minority communities relative

10. For ease of reference, and to avoid awkward sentences, sometimes I use the phrase "minority communities" instead of "communities of color." It is an unsatisfactory, but widely understood term.

11. Major environmental laws lack legislative provisions specifically addressing distributional inequity to low income and minority communities, which suggests that the problem was not anticipated, or that there was insufficient political pressure brought to bear upon the issue. See *infra* note 78 and accompanying text.

12. See *infra* note 136 and accompanying text.

13. See *infra* note 140 and accompanying text.

14. See *infra* note 139 and accompanying text.

15. *Id.*

to White, affluent communities is difficult, if not impossible, to measure empirically.¹⁶ However, characteristics of the scheme of private enforcement,¹⁷ as well as the nature of the environmental justice movement,¹⁸ suggest that citizen suits are underutilized in the environmental justice context.¹⁹ This article attempts to examine the special problems that community-based groups in low income and minority communities might encounter in prosecuting citizen suits under highly technical environmental statutes.

To set the context for this inquiry, part II of this article describes the environmental justice movement and investigates the charge that communities of color are disproportionately and unjustly burdened with environmental hazards. Part II also explores the differences in perspective that underlie much of the conflict among environmental justice activists, mainstream environmental organizations, and EPA.²⁰ Part II concludes with a look at social forces that have contributed to environmental inequities and that might influence environmental enforcement efforts.

Part III examines the current scheme of private enforcement of selected, major federal environmental laws through citizen lawsuit

16. Notice-to-sue provisions generally do not require the prospective plaintiff to provide information concerning the demographics of the location where the alleged violation occurs. Interview with Robin Lancaster, EPA Office of Regulatory Enforcement, Toxics and Pesticides, in Albuquerque, N.M. (Aug. 4, 1994); see also 40 C.F.R. § 135.3 (1994) (contents of notice under Clean Water Act); *id.* § 254.3 (1994) (contents of notice under the Resource Conservation and Recovery Act (RCRA)). A major study of citizen's suits noted that often notices were incomplete and duplicative. See BUREAU OF NAT'L AFFAIRS, ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION 19 (1988) [hereinafter BNA REPORT].

17. For example, compare enforcement suits under the Clean Water Act with enforcement suits under the Clean Air Act and RCRA. See *infra* part II.B.1.

18. For example, only recently have environmental hazards in minority communities been characterized as environmental issues rather than farmworker, labor, or civil rights issues. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 11 FORDHAM URB. L.J. 523, 526-27 (1994) [hereinafter *Environmental Justice Litigation*].

19. Telephone Interview with Deohn Ferris, Alliance for Washington Office for Environmental Justice (Aug. 17, 1994). Ms. Ferris concurs with a general assessment that communities of color and low income communities are not using environmental citizen suits as a concerted strategy. *Id.* In contrast, Ms. Ferris noted that there has been a recent surge in complaints under Title VI of the Civil Rights Act and is personally aware of approximately 18 such lawsuits brought within the last few years. *Id.* Also, Scott Fulton, Deputy Assistant Administrator for Enforcement and Compliance Assurance of the EPA, reported that although verification is difficult, it is his general sense that Clean Air Act and RCRA citizen suits are underutilized, especially in the environmental justice context. Interview with Scott Fulton, EPA Deputy Assistant Adm'r for Enforcement and Compliance Assurance, in Albuquerque, N.M. (Aug. 5, 1994).

20. Part II of this article is an attempt to remedy unfamiliarity with the environmental justice movement as well as to provide the context for the following discussion of citizen suits as a remedy for environmental inequity. Those readers who have studied or worked with environmental justice issues might wish to proceed directly to parts III and IV.

provisions.²¹ Existing citizen suit provisions contain limitations that create incentives for private citizens to prosecute certain types of actions and disincentives to prosecute other actions. Part III addresses the possibility that these incentives and disincentives result in an unequal playing field for enforcement by low income communities and communities of color, which in turn exacerbates the disparity in environmental protection of these communities. Common types of environmental citizen suits are examined to determine whether they have the potential to address environmental problems prevalent in low income and minority communities, and, if so, whether community-based groups might be at a disadvantage in prosecuting such lawsuits because of underfunding.

In conclusion, part IV suggests amendments to environmental laws that might more directly address disparity in environmental protection. It also suggests alternative interpretations of federal citizen suit provisions that might facilitate the use of private enforcement to promote environmental justice.²²

21. See *infra* note 137.

22. Ultimately, environmental justice will be attained when communities of color and low income communities are on an equal footing economically and politically with the rest of society. Meanwhile, enhancing private enforcement under citizen suit provisions is one of several ways to use the legal system to promote environmental justice. Recently, legal commentators have focused on siting procedures and civil rights claims. Federal constitutional and civil rights challenges to siting toxic facilities have been unsuccessful because of the difficulty of proving discriminatory intent. Commentators suggest legal reformation in the civil rights area, challenges to discriminatory siting through alternative state claims, and reformation of facility siting procedures for toxic waste facilities. See generally Rachel D. Godsil, Comment, *Remediating Environmental Racism*, 90 MICH. L. REV. 394 (1991) (examining reform of siting procedures); Kelly M. Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153, 205-06 (1991) (suggesting reform of siting procedures); Naikang Tsao, Comment, *Ameliorating Environmental Racism: A Citizens' Guide To Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 379-405 (1992) (suggesting challenges under state constitutional, statutory, and common law doctrines); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 300-12 (1992) (examining the potential of state law doctrines); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495 (1992) (discussing inadequacies of litigation and suggesting community-level environmental planning); Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77 (1992); Edward P. Boyle, Comment, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993) (advocating intermediate scrutiny for state actions with significant disparate impact); Lazarus, *supra* note 9 (examining reform of civil rights laws, possible alternative civil rights claims, and distributional effects in environmental laws); Carolyn M. Mitchell, *Environmental Racism: Race As a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176 (1993) (describing specific instances of environmental hazards in minority communities and discussing civil rights and constitutional claims); Vicki Been, *What's Fairness Got To Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) (exploring different conceptions of fairness in the context of siting locally undesirable land uses and examining the limitations of existing proposals for

I

THE ENVIRONMENTAL JUSTICE MOVEMENT

To many, the term "environmentalism" evokes images of a movement engineered and mobilized by a constituency of White, highly educated, middle and upper class citizens who strive to preserve pristine natural areas and save endangered species.²³ To others, the term evokes an image of national and international nongovernmental organizations with scientific expertise and political influence that are largely responsible for seeding the crop of federal environmental laws that have flowered in recent years.²⁴ These images are incomplete. Parallel to mainstream environmentalism is a different environmental movement, a movement whose constituents reside primarily in low income communities and communities of color.²⁵ The self-termed

reform of siting procedures); Leslie A. Coleman, Comment, *It's the Thought That Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447 (1993) (suggesting an "effect" rather than an "intent" approach, statutory mandates, and community participation); James H. Colopy, Comment, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

One commentator thoughtfully reexamined the lawyer's role in representing poor communities. Luke W. Cole, *Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) [hereinafter *Empowerment As the Key*]; Luke W. Cole, *Correspondence, Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992) (responding to comment by Rachel D. Godsil).

There have been several symposia on environmental justice issues. See Symposium, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992); *Third Annual Stein Center Symposium on Contemporary Urban Challenges*, 21 FORDHAM URB. L.J. 425 (1994).

See also Regina Austin & Michael Schill, *Black, Brown, Poor and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991) (describing the environmental justice movement); Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335 (1993) (suggesting additional data, legislative and administrative remedies, education, and activism); Xavier C. Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357 (1993); Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267 (1994).

23. John H. Adams, Executive Director of the Natural Resources Defense Council, notes: "The history is well documented: the mainstream environmental movement grew out of a white, middle-class effort to preserve the world's natural wonders. It is still true that the staffs of the major national organizations are disproportionately white and middle class, and it is not defensible." Adams, *supra* note 4, at 26; see Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support of Minorities?*, in RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7, at 28-54.

24. *Empowerment As the Key*, *supra* note 22, at 635-36 (discussing the scientific and legal focus of this "second wave" of the environmental movement, which helped to create complex administrative proceedings that elevate the "expert" while excluding people without legal or scientific training).

25. See generally VOICES FROM THE GRASSROOTS, *supra* note 7; ROBERT D. BULLARD, PEOPLE OF COLOR ENVIRONMENTAL GROUPS DIRECTORY 1992 (1992) (profiling 205 groups in 35 states, the District of Columbia, Puerto Rico, and Canada).

movement for environmental and economic justice, often called the environmental justice movement,²⁶ has a historical development different from the mainstream environmental movement. Because many of the grassroots campaigns originated in communities that were *both* poor and predominantly minority²⁷ and because, statistically, race is more significantly associated with the prevalence of environmental hazards,²⁸ disparate environmental protection in this context is often described as environmental racism.²⁹ All low income communities (regardless of race)³⁰ and all communities of color (regardless of income) should be free from environmental inequities; however, it is in the context of numerous race-charged conflicts that the social justice model of environmentalism developed.

26. I use the phrases "environmental justice movement" and "environmental justice organization" for ease of reference, but the phrases are misnomers to some degree. Community-based organizations identified with the environmental justice movement are multi-issue, multicultural organizations that address a wide range of social justice issues and use the term "environment" only in its broadest terms. Interview with Jeanne Gauna, SouthWest Organizing Project, in Albuquerque, N.M. (Aug. 19, 1994); see Richard Hofrichter, *Introduction to TOXIC STRUGGLES*, *supra* note 7, at 4-6; see also *infra* note 40.

27. African-Americans and Hispanic-Americans are on average poorer and less educated, and have higher rates of unemployment than whites: about 32% of African-Americans and 27% of Hispanic-Americans have incomes below the poverty line, compared with about 10% of White Americans. SUPPORTING DOCUMENT, *supra* note 5, at 6.

28. Most studies reveal that race is a bigger indicator of the prevalence of environmental hazards than income. See *Toxic Wastes and Race*, *supra* note 1, at 13, 23 (concluding that the possibility of racial patterns occurring by chance is virtually impossible); see also Benjamin A. Goldman & Laura J. Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites 2* (1994) (concluding that the disproportionate environmental impacts that were first identified and documented in the 1987 United Church of Christ study have grown more severe). But see Douglas L. Anderton et al., *Hazardous Waste Facilities: 'Environmental Equity' Issues in Metropolitan Areas*, 18 EVALUATION REV. 123 (1994); Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 11 FORDHAM L.J. 689, 695-700 (1994). For a critique of the Anderton study, see Robert D. Bullard, *A New 'Chicken-or-Egg' Debate: Which Came First—The Neighborhood, or the Toxic Dump?*, 19 THE WORKBOOK 60 (1994).

29. Although racial disparity is the focus of environmental justice activism, organizations in communities of color voice strong sentiments of racial and cultural inclusion and view economic empowerment as key to combatting environmental inequity. See, e.g., *SouthWest Organizing Project*, VOCES UNIDAS, First Quarter 1991, at 16, 16 (stating that the mission of empowerment of the disenfranchised in the Southwest is to realize racial and gender equality, and social and economic justice). On October 25, 1991, the First National People of Color Environmental Leadership Summit held a plenary session on "Building a Multiracial and Multicultural Environmental Justice Movement." COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, PROCEEDINGS OF THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (Charles Lee ed., 1991) [hereinafter ENVIRONMENTAL LEADERSHIP SUMMIT].

30. For a discussion of grassroots activism from a socioeconomic perspective, followed by a discussion of a new model of practicing environmental poverty law, see *Empowerment As the Key*, *supra* note 22.

A. *The Historical Context*

Despite decades of local activism,³¹ environmental justice has only been conspicuous on the national agenda since 1982. In that year the siting of a polychlorinated biphenyl (PCB) landfill in predominantly African-American Warren County, North Carolina sparked nonviolent demonstrations resulting in over 500 arrests.³² Against a well-publicized charge that the community was targeted for siting because the residents were predominantly African-American, the United States General Accounting Office (GAO) undertook an investigation in the southern region (EPA Region IV) and found that three of the four major offsite hazardous waste facilities were in fact located in predominantly African-American communities, even though African-Americans comprised only about one-fifth of the region's population.³³ The hazardous waste facility was ultimately sited in Warren County anyway, but the protest provided an impetus for subsequent empirical study of racially disparate exposure to environmental hazards.

In 1987, the United Church of Christ Commission for Racial Justice published its national study, which documented a significant relationship between the location of commercial hazardous waste facilities and race, and documented the prevalence of uncontrolled toxic waste sites in and near communities of color.³⁴ The highly publicized report caught the attention of academicians who began to study the relation-

31. VOICES FROM THE GRASSROOTS, *supra* note 7, at 9. Dr. Bullard has observed that:

The struggle for environmental justice was not invented in the 1990s. People of color, individually and collectively, have waged a frontal assault against environmental injustices that predate the first Earth Day in 1970. Many of these struggles, however, were not framed as "environmental" problems—rather they were seen as addressing "social" problems. For example, the U.S. National Advisory Commission on Civil Disorders (1968) discovered that systematic neglect of garbage collection and sanitation services in African-American neighborhoods contributed to the urban disturbances in the 1960s. Inadequate services, unpaved streets, lack of sewers and indoor plumbing were environmental problems in the 1960s and are environmental problems in the 1990s.

Id. at 9; see also *Environmental Justice Litigation*, *supra* note 18, at 526-28.

32. TOXIC WASTES AND RACE, *supra* note 1, at xi.

33. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1 (1983) [hereinafter SITING OF HAZARDOUS WASTE LANDFILLS]; see also Paul Mohai & Bunyan Bryant, *Race, Poverty and the Environment: The Disadvantaged Face Greater Risks*, EPA J., Mar.-Apr. 1992, at 6, 6; Robert D. Bullard, *The Threat of Environmental Racism*, NAT. RESOURCES & ENV'T, Winter 1993, at 23, 23.

34. TOXIC WASTES AND RACE, *supra* note 1. A "commercial hazardous waste facility" is a public or private facility that accepts hazardous waste from a third party for a fee or other remuneration, and undertakes to treat, store, or dispose of the hazardous waste. *Id.* at xii. "Uncontrolled toxic waste sites" are closed and abandoned sites on EPA's list of sites posing a present and potential threat to human health and the environment. *Id.* In 1985, the EPA Risk Commission for Racial Justice Report summarized the following major findings:

ship between race and the environment and participate in the environmental justice movement.³⁵

Demographic Characteristics of Communities with Commercial Hazardous Waste Facilities.

*Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities. This represented a consistent national pattern.

*Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents. In communities with two or more facilities or one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities (38% vs. 12%).

*In communities with one commercial hazardous waste facility, the average minority percentage of the population was twice the average minority percentage of the population in communities without such facilities (24% vs. 12%).

*Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant. This remained true after the study controlled for urbanization and regional differences. Incomes and home values were substantially lower when communities with commercial facilities were compared to communities in the surrounding counties without facilities.

*Three out of the five largest commercial hazardous waste landfills in the United States were located in predominantly Black or Hispanic communities. These three landfills accounted for 40% of the total estimated commercial landfill capacity in the nation.

Demographic Characteristics of Communities with Uncontrolled Toxic Waste Sites.

*Three out of every five Black and Hispanic-Americans lived in communities with uncontrolled toxic waste sites.

*More than 15 million Blacks lived in communities with one or more uncontrolled toxic waste sites.

*More than 8 million Hispanics lived in communities with one or more uncontrolled toxic waste sites.

*Blacks were heavily over-represented in the populations of metropolitan areas with the largest number of uncontrolled toxic waste sites. These areas include: Memphis, TN (173 sites), St. Louis, MO (160 sites), Houston, TX (152 sites), Cleveland, OH (106 sites), Chicago, IL (103 sites), Atlanta, GA (94 sites).

*Los Angeles, California had more Hispanics living in communities with uncontrolled toxic waste sites than any other metropolitan area in the United States.

*Approximately half of all Asian/Pacific Islanders and American Indians lived in communities with uncontrolled toxic waste sites.

*Overall, the presence of uncontrolled toxic waste sites was highly pervasive. More than half of the total population in the United States resided in communities with uncontrolled toxic waste sites.

Id. at xiii-xiv (footnotes omitted).

Dr. Bullard notes:

The facility siting controversy cannot be reduced solely to a class phenomenon because there is no shortage of poor white communities in the region. One only has to point to southern Appalachia to see widespread white poverty in America. Nevertheless, poor whites along with their more affluent counterparts have more options and leveraging mechanisms (formal and informal) at their disposal than blacks of equal status.

DUMPING IN DIXIE, *supra* note 5, at 32-33.

35. For example, the University of Michigan School of Natural Resources in January 1990 sponsored the "Michigan Conference on Race and the Incidence of Environmental Hazards," which conducted a review of environmental risk from a socioeconomic perspective. Bunyan Bryant & Paul Mohai, *The Michigan Conference, A Turning Point*, EPA J., Mar.-Apr. 1992, at 9 [hereinafter *The Michigan Conference*]. "Nine of the twelve scholar-

Meanwhile, community-based organizations—in addition to local activism—established regional and national networks³⁶ to prevent the shifting of environmentally harmful activities from one poor and/or minority community to another.³⁷ In addition to building networks, environmental justice activists began to challenge the practices of EPA³⁸ and mainstream environmental organizations.³⁹ These chal-

activists who presented papers at the Michigan Conference were people of color." RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7, at 3. Participants in the Michigan Conference, referring to themselves as the "Michigan Coalition," remained active in the environmental justice movement and commented on the 1992 EPA Report. See SUPPORTING DOCUMENT, *supra* note 5, at 80-87.

A notable scholar of environmental racism is Dr. Robert D. Bullard, a Professor of Sociology at the University of California, Riverside. Dr. Bullard began investigating the relationship between race and the siting of noxious facilities as early as 1979, and has published, along with numerous articles, several influential books, including *Dumping in Dixie* and *Voices from the Grassroots*. See DUMPING IN DIXIE, *supra* note 5; VOICES FROM THE GRASSROOTS, *supra* note 7.

36. See generally Environmental Leadership Summit, *supra* note 29; Marcia Coyle, *When Movements Coalesce, in Unequal Protection*, *supra* note 7, at S22 [hereinafter *When Movements Coalesce*]. Networks of community-based environmental and economic justice organizations include the Southwest Network for Environmental and Economic Justice, the Southern Organizing Conference, and the Indigenous Environmental Network.

37. "A Call to Action," adopted at the 1991 First National People of Color Environmental Leadership Summit, expressed a strong sentiment for a united effort to resist forms of environmental racism. ENVIRONMENTAL LEADERSHIP SUMMIT, *supra* note 29, at xvii-xviii. The steadfast insistence on social justice principles marks a fundamental difference from environmental activism that is characterized solely by the not-in-my-back-yard (NIMBY) attitude. Dorceta E. Taylor, *Environmentalism and the Politics of Inclusion, in VOICES FROM THE GRASSROOTS*, *supra* note 7, at 54 [hereinafter *Environmentalism and Politics*].

38. For example, the Southwest Network for Environmental and Economic Justice sent a letter to then EPA Administrator William K. Reilly giving specific examples of "the poisoning of our communities" and listing "examples of the lack of accountability on the part of EPA towards communities of color." Letter from the Southwest Network for Environmental and Economic Justice, to William K. Reilly, Administrator, Environmental Protection Agency (July 31, 1991) (on file with author) [hereinafter SNEEJ Letter to EPA]. The groups represented requested a meeting within 60 days, a description of the process of addressing problems in communities of color, actions being taken to address specific cases of environmental degradation, a list of specific cases where EPA chose not to take action and a list of cases in which EPA used its own funds to clean up industrial, military, or agricultural contamination. *Id.* at 7. The groups also requested the implementation of policies that "will guarantee the full, ongoing and meaningful participation of those directly affected by environmental degradation in any and all workgroups designed to address discriminatory EPA policies in the field and that these participants be chosen by those directly affected, their organizations and communities." *Id.* at 8.

39. For example, the SouthWest Organizing Project sent a letter to the "Group of Ten" national environmental organizations, expressing concern about the role of the organizations in communities of color and citing examples of lack of accountability by the Group of Ten. Letter from SouthWest Organizing Project, to National Wildlife Federation, Sierra Club, Sierra Club Legal Defense Fund, National Audubon Society, National Wildlife Federation, Environmental Defense Fund, Environmental Policy Institute/Friends of the Earth, Izaak Walton League, The Wilderness Society, National Parks and Conservation Association, and Natural Resources Defense Council 1-3 (Mar. 16, 1990) (on file with author); see also *The Letter That Shook a Movement*, SIERRA MAG., May-June 1993, at 54.

lenges well illuminated their different perspectives on environmentalism.⁴⁰

Environmental justice activists, many of whom were veterans of the civil rights movement, saw environmental problems as only one part of the larger social issues of racism and cultural and economic injustice, while the conventional perspective of environmentalism was more narrowly focused on the preservation of pristine ecosystems or on the science and technology of environmental pollution regulation.⁴¹ Environmental justice activists charged that national mainstream organizations, at best, contributed to environmental inequities

40. There are many significant differences between mainstream environmental movements and environmental justice activists. For example, the environmental justice movement grew with strong support of religious institutions. Largely due to the influence of Native American participation, the movement holds spirituality as a key element. *A Place at the Table, A Sierra Roundtable on Race, Justice and the Environment*, SIERRA MAG., May-June 1993, at 50, 55 [hereinafter *A Place at the Table*]. While mainstream environmental organizations developed complex relationships with administrative bureaucracies and focused on national, bureaucratic resolutions, grassroots organizations tended to address local urban and industrial issues. Robert Gottlieb & Helen Ingram, *The New Environmentalists*, THE PROGRESSIVE, Aug. 1988, at 14, 14-15. In addition to toxic substances, air pollution, and residential groundwater contamination, grassroots organizations view environmental issues as including issues of housing, transportation, and economic development. *Id.* Viewing conventional environmentalism's focus on regulation and cleanup as rationalizing urban industrial issues, grassroots organizations promote the concept that the need of the community and workplace take precedence and that risk decisions—being political as well as technological—should be subjected to public scrutiny, debate, and participation. *Id.*

The existing nationally oriented environmental groups, though influenced to some extent by the new grass-roots organizations, still adhere to an organizational network that depends primarily on lobbying, litigation, and technical expertise. Furthermore, during the Reagan years these conventional environmental organizations have become more dependent on funding from foundations and other private and governmental sources than on their membership bases. And many have come to embrace an operational style that stresses management skills rather than organizing efforts, dictating opinion rather than soliciting it. . . . What is most striking about the grass-roots efforts, however, is their democratic thrust Instead of embracing expertise, they have developed self-taught experts. Instead of concentrating on lobbying and legislation, they have resorted to popular action and citizens' lawsuits. They have become organizations of active members rather than rosters of dues-payers on mailing lists.

Id. at 15.

41. DUMPING IN DIXIE, *supra* note 5, at 11-12. Dr. Bullard notes that mainstream environmental organizations emphasize preservation and outdoor recreation and are heavily involved with the technical aspects of environmental regulation and national environmental policy. *Id.* These organizations have not had a great deal of success in attracting working class persons and Black community residents, who are generally more attracted to issues couched in a civil rights or equity framework. *Id.* Moreover, poor and minority residents have tended to see mainstream environmentalism "as a disguise for oppression and as another 'elitist' movement." *Id.* at 9.

Blacks did not launch a frontal assault on environmental problems affecting their communities until these issues were couched in a civil rights context beginning in the early 1980s. They began to treat their struggle for environmental equity as a struggle against institutionalized racism and an extension of the quest for social justice.

Id. at 29.

by neglect, and at worst, disrupted local initiatives in poor and minority communities by failing to consider the social, economic, and cultural complexities involved.⁴²

In July 1990, then EPA Administrator William K. Reilly formed the EPA Environmental Equity Workgroup (EPA Workgroup), composed of EPA staff persons,⁴³ to assess evidence that racial minority and low income communities bear a higher environmental risk burden than the general population.⁴⁴ After two years of study, the EPA

42. On March 16, 1990, the SouthWest Organizing Project, a grassroots environmental organization, sent a letter to the "Group of Ten" national environmental organizations, charging:

In the name of eliminating environmental hazards at any cost, across the country industrial and other economic activities which employ us are being shut down, curtailed, or prevented while our survival needs and cultures are ignored. We suffer the end results of these actions, but are never full participants in the decision-making which leads to them.

See *The Letter That Shook a Movement*, *supra* note 39, at 54. The letter cited specific instances where environmental organizations ignored survival and cultural needs of people of color, such as Sierra Club's and The Wilderness Society's support of legislation that annexed 13,000 acres considered to be the ancestral holdings of the Pueblo of Acoma to form El Malpais National Monument of New Mexico and the Nature Conservancy's and the National Audubon Society's opposition to sheep grazing on Humphries and Sargent Wildlife areas by local economic development projects in northern New Mexico. *Id.* Richard Moore, Co-Chair of the Southwest Network for Environmental and Economic Justice (SNEEJ), remarked: "We've had to close down plants. . . . [I]t's killed people inside, and has also poisoned our groundwater and our air and our children outside. But we went through a process first, attempting to bring workers into the decision." *A Place at the Table*, *supra* note 40, at 58.

Carl Anthony, President of Earth Island Institute, recently noted:

A good example of the attitudes of the more established groups toward communities of color is *Blueprint for the Environment*, which was submitted to George Bush when he took office. It contained 750 detailed recommendations. . . . The Groups could have made recommendations about lead poisoning, energy conservation in public housing, siting of affordable housing near transportation corridors, and occupational health-and-safety issues in the workplace. But they didn't.

Id. at 53.

Winona LaDuke, Director of the White Earth Recovery Project, remarked:

In our [Native American] case, unfortunately, the trouble is that environmental groups have, historically, come from a Eurocentric perspective. That is not an inclusive perspective, and it's not something we can relate to. Many times, in fact, environmental groups make decisions that affect other communities without the input of those communities. One of them even purchased land on our reservation without ever talking to us about it, and restricted our use of an area that had medicinal plants.

Id. at 57.

Scott Douglas, Director of the Greater Birmingham Ministries, remarked:

As I went to those communities [of color], I noticed that they didn't separate the hazardous-waste incinerator from the fact that lead poisoning is not being dealt with in their schools, from the fact that their schools have been underfunded, that they have no day care, no jobs, no access to jobs. . . . Oppressed people do not have compartmentalized problems.

Id. at 58.

43. WORKGROUP REPORT, *supra* note 5, at ii-iii.

44. The EPA Workgroup's mission was to review and evaluate (with respect to income and race) evidence of disproportionate risk burden, current EPA programs, risk assessment guidelines, risk communication guidelines, and institutional relationships. *Id.* at

Workgroup reported insufficient data on environmental *health effects* by race and income, but concluded that racial minority and low income populations experience higher than average *exposures* to certain air pollutants, hazardous waste facilities (and by implication, hazardous waste), contaminated fish, and agricultural pesticides.⁴⁵ The

7-8. Although the 1992 EPA Report focuses on income as well as race, the charge of racial disparity and the attendant political pressure was the prime motivating force. An internal EPA memorandum asserts that: "[L]ong-simmering resentment in the people of color and Native American communities about environmental fairness could soon be one of the most politically explosive environmental issues yet to emerge." *The Real Story Behind EPA's "Environmental Equity" Report*, RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Fall 1991-Winter 1992, at 5, 18 [hereinafter *The Real Story*].

45. The EPA Workgroup noted evidence of disproportionate exposure in five areas: exposures to hazardous materials due to residence located near waste sites, lead exposures, pesticide exposures, air pollution exposures, and dietary exposures to polychlorinated biphenyls (PCB's), dioxins, and furans through fish consumption. SUPPORTING DOCUMENT, *supra* note 5, at 7-14.

Residences Near Waste Sites: Ethnic minorities are more likely to live near a commercial or uncontrolled hazardous waste site. *Id.* at 7-8 (citing SITING OF HAZARDOUS WASTE LANDFILLS, *supra* note 33, at 1). The proportion of minorities in communities with the largest commercial landfills or the highest number of commercial waste facilities is three times greater than in communities without such facilities. *Id.* (citing TOXIC WASTES AND RACE, *supra* note 1, at 15-21). Race is more strongly associated with residence near a waste site than socioeconomic status. *Id.* at 8. Three out of every five African-Americans and Hispanic-Americans live in a community with an uncontrolled hazardous waste site. *Id.*

Lead Exposures: A significantly higher percentage of Black children compared to White children have unacceptably high blood lead levels. *Id.* at 9-10. Notably, these are studies of actual exposure measured by blood levels, not indicators of potential exposure determined by measuring ambient concentrations.

Pesticide Exposures: Racial minorities are at increased risk of pesticide exposure because farmwork not done by farm families is done primarily by ethnic minorities. "[A]gricultural workers are exposed to many toxic substances in the workplace. Such exposures can cause cancer and a wide range of noncancer health effects." *Id.* at 10. Of approximately two million workers, 80% to 90% are Latino, followed in order by African-Americans, Black Caribbeans, Puerto Ricans, Filipinos, Vietnamese, Laotians, Koreans, and Jamaicans. *Id.* As many as 313,000 farmworkers experience pesticide-related illnesses each year. *Id.*

Air Pollution: "[H]igher percentages of Blacks and Hispanics live in EPA-designated non-attainment areas, relative to Whites, for particulate matter, carbon monoxide, ozone, sulfur dioxide and lead." *Id.* at 11. Indicators of unhealthy outdoor air quality positively correlate with low income areas. *Id.* African-Americans were shown to have higher levels of carbon monoxide than Whites in a national study. *Id.*

Fish Consumption: Nearly 20 local and national surveys and reports note fish consumption differences based on race and ethnicity, but find different rates for the populations studied. *Id.* at 12. Native Americans consumed 36% more fish and Blacks 13% more fish than Caucasians. *Id.* (citing Patrick West et al., *Minority Anglers and Toxic Fish Consumption: Evidence from a Statewide Survey of Michigan*, in RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7, at 100) [hereinafter West Survey]. Asians/Samoans eat the most fish, followed in order by Caucasians, Hispanics, and African-Americans. SUPPORTING DOCUMENT, *supra* note 5, at 12. "The National Purchase Diary (NPD) Survey, a national survey of 25,000 individuals, found Asians to have the highest fish consumption rate." *Id.* The EPA Workgroup noted that the studies, focused on licensed fishers, "may not be accounting for lower-income anglers who do not purchase licenses but continue to catch and

higher than average exposures to air pollutants and hazardous substances were due largely to residential patterns (i.e., living in areas with unhealthy outdoor air quality and near hazardous waste facilities). Occupational exposures accounted for higher than average pesticide exposure. Above average fish consumption generally, the kinds of fish consumed, and the manner of preparation accounted for higher than average exposure to contaminated fish. The 1992 EPA Report was cautious in tone. The EPA Workgroup stressed that exposure does not always result in immediate or acute health effects and that an individual's activity pattern is the most important determinant of exposure.⁴⁶ Thus, exposure indicated by environmental measurements in air, water, soil, or food merely represents potential rather than actual exposure.⁴⁷ The exception to the potential, but not necessarily actual, exposure distinction was lead. The existing studies of unacceptably high blood lead levels documented actual rather than potential exposure and, consequently, directly established disparate adverse health effects.⁴⁸ The EPA Workgroup then concluded that high exposures and the possibility of chronic effects presented cause for concern, and suggested that EPA procedures might be improved to take into account equity considerations.⁴⁹ The EPA Workgroup also emphasized the Agency's earlier responses to environmental justice issues at regional levels.⁵⁰

consume fish." *Id.* Other studies suggest that "ethnic minorities are more likely to eat fish with the skin, may be less likely to trim the fat, and are more likely to eat the whole fish." *Id.* Bottom-dwelling fish are consumed more by non-White, low income populations, and clams and hepatopancreas of crabs are disproportionately consumed by Asians. *Id.* at 12-13.

46. WORKGROUP REPORT, *supra* note 5, at 3, 7.

47. SUPPORTING DOCUMENT, *supra* note 5, at 7. The EPA Workgroup noted that the level of pollution is a measure of potential exposure, and, "although the potential for exposure may be the same, not all potentially exposed persons will experience the same actual exposure. . . . [A] person's activity pattern is the single most important determinant of environmental exposures for most pollutants." *Id.*

48. *Id.* at 9-10.

49. Among the Workgroup's recommendations are that EPA should: (1) increase the priority that it gives to issues of environmental equity; (2) establish and maintain information that provides an objective basis for assessment of risks by income and race; (3) incorporate considerations of environmental equity into the risk assessment process; (4) target opportunities to reduce concentrations of risk to specific population groups; (5) where appropriate, assess and consider the distribution of projected risk reduction in major rulemakings and Agency initiatives; (6) selectively review and revise permit, grant, monitoring, and enforcement procedures to address high concentrations of risk in racial minority and low income areas and emphasize environmental equity concerns to state and local governments; (7) improve communication with racial minority and low income communities and increase efforts to involve them in environmental policymaking; and (8) establish mechanisms to incorporate environmental equity concerns in long-term planning operations. See Workgroup Report, *supra* note 5, at 25-31.

50. Many of the equity projects listed in the 1992 EPA Report were not specifically designed to target racial or socioeconomic disparity, but had the potential to indirectly affect poor and minority communities. Equity projects included: (1) a project in Boston,

The 1992 EPA Report was reviewed by environmental justice activists. They were particularly critical of the EPA Workgroup's decision to narrow the environmental justice issue to exclude consideration of relevant social dynamics as causes of environmental inequities, such as housing discrimination, land use planning, and redlining.⁵¹ In addition, the EPA Workgroup made no attempt to provide an analysis of how exclusion, power imbalances, and other institutionalized forms of racial and class discrimination affect environmental policies and decisionmaking. For example, one organization questioned the Workgroup's failure to consider how delegation of programs to states, agreements with regulated industries, and market

Massachusetts (Region I), which consisted of nine meetings between community leaders, Black college student government presidents, local urban media outlets, and EPA officials and was intended to culminate in a conference in 1993; (2) a study in New York (Region II) to assess whether more affluent communities were receiving more favorable cleanup through the Superfund program; (3) a multimedia environmental risk profile to be developed in Region III to see if risks were distributed disproportionately by socioeconomic class; (4) a program in Region III for communication of radon and asbestos health risks to communities in the Philadelphia area; (5) a program to increase multicultural participation in the restoration of the Chesapeake Bay in Region III; (6) a risk-based, multimedia effort in southeast Chicago (Region V) to reduce toxics in inner-city locations; (7) a comparative risk analysis project in Region VI to analyze factors such as age, pregnancy, genetics, personal income, preexisting disease, and lifestyle as susceptibility measures; (8) a major 1992 enforcement effort in the Gulf Coast ecoregion (Region VI); (9) a study to monitor and analyze toxic chemicals along the Rio Grande from El Paso to the Gulf of Mexico; (10) a strategy to develop the capability within tribes to manage their own tribal environments in Kansas City (Region VII); (11) a pilot teacher-training program focused on educating K-6 teachers at a July 1991, two-week summer institute in Region VII; (12) an investigation of polluting facilities and enforcement actions in the Denver-Boulder metropolitan area (Region VIII); (13) an outreach program piloted in a low income community in Region VIII; (14) a public water supply enforcement effort in San Francisco (Region IX); (15) an environmental risk-ranking project in Hawaii; (16) the development of a pesticide applicator training course in Spanish, held at six locations in Washington State; (17) a Seattle study (Region X) to develop a methodology to estimate populations that may be at greater risk from fish consumption; (18) a study to see whether a state revolving fund loan program was providing equitable funding to economically disadvantaged small communities; (19) a project to develop and test new financing arrangements and to encourage private participation in environmental services; (20) a strategy to reduce lead, including publishing a final rule reducing lead in drinking water and planning to propose lowering the national ambient air quality standard for lead; (21) training sessions for Mexican inspectors of maquiladora industries; and (22) the development of a project to evaluate the relationship between pollutant emissions and exposure for racial minorities and low income persons to be done by state, county, and targeted geographic areas. SUPPORTING DOCUMENT, *supra* note 5, at 54-67.

51. Responding to the 1992 EPA Report, the Michigan Coalition noted a failure to mention housing discrimination, poverty, or imbalances in political access and power. *Id.* at 73. Dr. Bullard observed that the EPA Workgroup and the resulting 1992 EPA Report: (1) failed to grasp the interrelationship between race, class, and environmental decisionmaking; (2) omitted literature on environmental politics challenging the notion of "value-free" science and application of technology; (3) identified class factors as the reason for elevated risks instead of racial barriers, inequitable distribution of wealth, housing and real estate practices, land use planning, redlining, and differential enforcement of environmental laws; and (4) failed to address the issue of institutional racial discrimination. *Id.* at 78.

incentives impact low income and minority communities.⁵² The 1992 EPA Report was also criticized for overemphasizing the lack of data and for the absence of specific recommendations to address disparity in environmental protection.⁵³ Environmental justice activists were clearly frustrated by EPA's failure to take specific and aggressive action.⁵⁴ Activists also questioned the motives of high level EPA officials and their commitment to environmental justice.⁵⁵

52. SNEEJ noted: "There is no analysis of causes of environmental inequities. EPA policies, including delegation of programs to state/local governments, voluntary agreements with industry, and market incentives, disproportionately impact racial minority and low-income communities." *Id.* at 75.

53. *See id.* at 72-121. For example, the Michigan Coalition noted that the 1992 EPA Report overstated the lack of data on environmental risks, and that there was more information on the impacts of environmental hazards to racial minority and low income communities than the Workgroup had considered. *Id.* at 73. SNEEJ noted that, while the 1992 EPA Report identified lack of data as a major finding, EPA was not planning any major effort to remedy the data gap. *Id.* at 75-77. Dr. Robert Bullard noted that the EPA Report contained "a selective, biased and superficial review of the literature on the nature and severity of environmental problems." *Id.* at 78.

54. Richard Moore, Co-Chair of SNEEJ, commented: "We want protection, not another study . . . We've studied this issue to death. When you see poor communities that have six times more miscarriages than they should have or clusters of babies born without brains, you don't need another study to tell you that something is wrong." *Environment, Community Leaders Angered by EPA Report on Pollution Impact on Poor, Minorities*, Daily Rep. for Executives (BNA) No. 143, at D6 (July 24, 1992), available in LEXIS, Nexis Library, NWLTRS File. He also questioned whether the formation of an EPA "environmental equity cluster" (as the EPA Workgroup suggested) would be a powerless buffer between grassroots environmental organizations and the more powerful branches of EPA. *Id.* Also noted was the Workgroup's failure to address inequitable siting concerns and failure to explain inaction in pesticide regulation. SUPPORTING DOCUMENT, *supra* note 5, at 72, 75-76; *see also supra* note 45 (findings on pesticide exposure).

55. Response to the 1992 EPA Report also evidences a basic mistrust of high level EPA officials, who allegedly view equity solely as a public relations issue. SUPPORTING DOCUMENT, *supra* note 5, at 72. The criticism is not without basis. A confidential internal EPA memorandum (from the Associate Administrator for Communications to the Administrator's Chief of Staff) warned that environmental fairness could become "one of the most politically explosive environmental issues yet to emerge." *The Real Story, supra* note 44, at 5 (quoting the memorandum). The memorandum further warned that: "[EPA's] goal is to make the agency's substantial investment in environmental equity and cultural diversity an unmistakable matter of record with mainstream groups before activists enlist them in a campaign that could add the agency . . . as a potential target." *Id.* at 18 (quoting the memorandum). According to the memorandum, EPA should "win recognition" before "the people of color fairness issue reach[es] the 'flashpoint'—that state in an emotionally charged public controversy when activist groups finally succeed in persuading the more influential mainstream groups (civil rights organizations, unions, churches) to take ill-advised actions." *Id.* (quoting the memorandum). The adversarial tenor of the memorandum indicates more of a concern for political maneuvering than a respect for the concerns of environmental justice activists. Some members of the EPA Workgroup specifically dissented from the 1992 EPA Report on the basis that the Report "does not include any input from outside organizations which have been active in identifying the issue of environmental equity." *EPA Report: A Dissent, RACE, POVERTY & ENV'T* (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Fall 1991-Winter 1992, at 19; *see also* SNEEJ Letter to EPA, *supra* note 38 (requesting participation in EPA Workgroup proceedings).

On September 21, 1992, the *National Law Journal* presented the results of an eight-month investigation of EPA's enforcement patterns.⁵⁶ Among the most alarming findings were that penalties for violations of federal environmental laws were substantially higher (46% to 500% higher) in predominantly White communities;⁵⁷ the Superfund cleanup of contaminated sites in or near non-White communities generally took longer than efforts in predominantly White areas; and the cleanup remedies chosen in non-White areas were less thorough than cleanup initiatives in predominantly White areas.⁵⁸

EPA's oblique response to the investigation was an assertion that environmental laws are enforced in a neutral manner according to neutral criteria.⁵⁹ EPA's race-oblivious approach to environmental protection appeared to be justified on a familiar logic: (a) more scientific studies must be completed before it is determined if, and to what extent, disparate exposure to environmental hazards, disparate adverse health effects, and disparate environmental protection actually exist; and (b) if there is disparity in environmental protection, it is the result of the legacy of inherited poverty and discrimination.⁶⁰ Accord-

56. *Unequal Protection*, *supra* note 7, at S5.

57. In the *National Law Journal's* investigation, enforcement data and Superfund data were divided into four equal groups or "quartiles"; the results compare the quartile with the highest White population to the quartile with the lowest White population. *Methodology: Computing the Patterns, in Unequal Protection*, *supra* note 7, at S2, S4. For ease of reference to this particular study, I use the term "predominantly White communities" to signify the quartile with the highest White population and the terms "non-White areas" or "non-White communities" to signify the quartile with the lowest White populations.

58. *Unequal Protection*, *supra* note 7, at S2. Key findings, based on computer-assisted analysis of census data, revealed that:

*Penalties under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population. Hazardous waste, meanwhile, is the type of pollution experts say is most concentrated in minority communities.

*For all the federal environmental laws aimed at protecting citizens from air, water, and waste pollution, penalties in white communities were 46 percent higher than in minority communities.

*Under the giant Superfund cleanup program, abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority action list than those in white areas.

*In more than half of the 10 autonomous regions that administer EPA programs around the country, action on cleanup at Superfund sites begins from 12 percent to 42 percent later at minority sites than at white sites.

*At the minority sites, the EPA chooses "containment," the capping or walling off of a hazardous dump site, 7 percent more frequently than the cleanup method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment.

Id. at S4, S7.

59. EPA lawyers declined to respond directly to the *National Law Journal's* analysis, but said decisions are based on the science of particular sites, not on race. *Id.* at S8.

60. In an article published before the *National Law Journal* published a report on its investigation, then EPA Administrator William K. Reilly stated that the failure to achieve equity in environmental matters is a symptom of larger patterns of industrial growth and

ing to this logic, EPA is neither culpable nor legally *required* to undertake specific or targeted action to alleviate the effects of past injustices.⁶¹

Partly in response to the *National Law Journal* investigation and report, the United States Commission on Civil Rights launched a broad investigation of federal agencies' compliance with Title VI of the Civil Rights Act, which prohibits discrimination in programs receiving federal financial assistance. In particular, the Commission on Civil Rights sought to examine EPA's environmental justice policy.⁶² Perhaps in response to the investigation, some EPA officials under a new administration appeared to take a more introspective look at how Agency procedures might affect environmental justice issues.⁶³

neglect, and the legacy of inherited poverty and discrimination. Reilly, *supra* note 3, at 22. Mr. Reilly also protested that talk of environmental racism at EPA infuriated him and that impartiality should guide the application of laws designed to protect the health of human beings and the productivity of ecological systems. *Id.* According to Reilly, EPA's approach to environmental equity is to strengthen relationships with minority academic institutions, hire more racial minorities, and address the distribution and management of environmental risk. *Id.* at 19.

61. Mr. Reilly took the position that a governmental agency is limited in its capacity to affect larger cultural and social trends, but he acknowledged that EPA could make efforts to redress obvious wrongs. *Id.* Although he felt that informed decisions about environmental equity require a better database, Mr. Reilly suggested that EPA could integrate equity considerations in risk assessment, target high risk populations, incorporate equity into long-term planning, and improve relationships with minority and low income communities. *Id.* at 22. He stated that regional offices were investigating problems of environmental equity and undertaking steps to remedy them, but he alleged that minorities are usually the chief beneficiaries of more general efforts to protect the environment. *Id.* Mr. Reilly's comments, as well as the 1992 EPA Report, exhibit a notable lack of introspection concerning EPA's internal processes or the social context in which environmental laws are enforced. SUPPORTING DOCUMENT, *supra* note 5, at 2-3 (EPA Workgroup noting that the existence of injustices and socioeconomic factors was beyond the scope of the 1992 EPA Report and that EPA can act on inequities based on scientific data).

EPA did not appear to question whether there could exist institutional racism or even unconscious individual racism within the Agency. See Reilly, *supra* note 3. Similar institutional attitudes have been examined in other governmental contexts. See generally JAMES A. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES (1980) (supporting the theory that judicial treatment of racial segregation is based on the assumption that segregation is a result of unknown and unknowable causes, which leads to a failure to identify the nature and extent of government culpability and abdication of moral or legal responsibility).

62. Marcia Coyle et al., *Civil Rights Commission To Look at Agencies*, NAT'L L.J., Oct. 18, 1993, at 5, 5. The Commission also asked EPA to review Mississippi's hazardous waste facility permitting program to determine whether it exposes poor and predominantly Black communities to disproportionately high environmental risks. *Id.* at 5, 9.

63. Scott Fulton, then EPA's acting head of enforcement, during a March 25, 1993, forum of civil rights and environmental justice activists, commented that: "[O]ver the past several months in particular, [EPA has] been doing a lot of soul-searching, to make sure we're doing the right thing in this area. We need to look at how we target the enforcement machine and see how we can focus it better on the communities that are suffering disproportionate risk." Marianne Lavelle, *EPA Enforcement To Be Probed by Rights Commission*, NAT'L L.J., Apr. 5, 1993, at 3, 34. He also noted that: "[I]t's certainly true that

Although many EPA officials under President Clinton's Administration have abandoned the race-oblivious approach to environmental protection, the primary administrative responses⁶⁴ remain investigation and study, rather than specific remedies targeted toward alleviating specific environmental inequities.⁶⁵

On a legislative level, environmental justice measures have been proposed as well, but the measures largely provide for further study in one form or another. For example, in response to the United Church of Christ study and the *National Law Journal* investigation, Congress amended legislation establishing an Office of Environmental Justice to gather and analyze data and to develop a plan to achieve environmental equity.⁶⁶ There were additional legislative proposals attempt-

without documentation [of assessed penalties], we're left unable to police ourselves in the way we would like to assure that things like bias don't creep into our penalty assessments. We're working on that." *Id.*

64. The Clinton Administration recently agreed to: (1) investigate civil rights claims of two communities charging racially motivated facility sitings; (2) review regulations designed to prevent exposure to contaminants from fish consumption; (3) open the process for community participation in the identification and cleanup of contaminated sites; (4) institute a lead abatement program in Washington, D.C.; and (5) draft proposed regulations pressing state agencies to consider, in permit proceedings, the environmental impact of high concentrations of industries in the area. Melissa Healy, *Administration Joins Fight for 'Environmental Justice'*, L.A. TIMES, Dec. 7, 1993, at A1. On February 11, 1994, President Clinton signed an Executive order requiring federal agencies to make fair treatment of minority communities a factor in decisions ranging from the regulation of pesticides to the prosecution of polluters. Melissa Healy, *'Environmental Justice' for U.S. Minorities Is Ordered*, L.A. TIMES, Feb. 12, 1994, at A15. But at a meeting of environmental justice activists, the Administration was called upon to take specific action, such as the promulgation of a ban on lead and benzene. *Id.*

65. For example, at a meeting of the National Environmental Justice Advisory Council (NEJAC)—comprised of members of environmental justice groups, academics, and industry—representatives of the EPA Office of Enforcement and Compliance Assurance discussed potential projects to enhance enforcement in poor and minority communities. Proceedings of the National Environmental Justice Advisory Council Meeting (Aug. 3-5, 1994) (meeting summary on file with author).

Another concern raised at the NEJAC enforcement subcommittee meeting by environmental justice advocate Pat Bryant of the Gulf Coast Tenants Organization, is that, despite efforts at the federal level, it is difficult to get concrete beneficial results at the regional and local enforcement level. Acknowledging the difficulty, Scott Fulton, EPA Deputy Assistant Administrator for Enforcement and Compliance Assurance, noted that the states conduct approximately 95% of regulatory inspections and bring about 10,000 enforcement compliance actions, compared to the approximately 4000 enforcement actions (including criminal enforcement) brought annually by EPA. He explained the difficulty in the federal-state relationships involved: where EPA challenges the states for nonenforcement, courts tend to look at EPA as being "too picky" and the states respond by declining to administer some programs. His comments underscore the need for enhanced private enforcement at the local level in poor and minority communities. *Id.*

66. 139 CONG. REC. S5166-67 (daily ed. Apr. 29, 1993) (recording a Senate discussion of both the 1987 United Church of Christ study and the 1992 *National Law Journal* investigation to support an amendment establishing an office of environmental justice that would be responsible for collection of data on environmental justice issues).

ing to identify high impact areas and adverse health effects as a prelude to further legislative or administrative action.⁶⁷

In addition to recent agency and legislative responses, some of the national mainstream environmental organizations,⁶⁸ such as Sierra Club,⁶⁹ have responded to environmental justice issues by attempting candid communication with community activists, such as Richard Moore of the Southwest Network for Environmental and Economic Justice (SNEEJ) and Winona LaDuke of White Earth Recovery Project.⁷⁰ These national organizations have also undertaken collabora-

67. On June 24, 1993, the proposed Environmental Justice Act of 1993 was submitted to Congress for consideration. 139 CONG. REC. S8107-10 (daily ed. June 24, 1993). Under the proposed legislation, the EPA Administrator is to inventory toxic chemicals released and, within one year of enactment, determine the 100 geographical areas of the United States with the highest total load of toxic chemicals. *Id.* at S8108. Within two years of enactment, EPA, in consultation with other agencies, is to conduct compliance inspections of facilities in the areas and publish a report identifying the nature and extent of the health impacts of such facilities on the communities involved. *Id.* If significant adverse health effects on humans are found, the President would have one year to propose administrative and legislative changes to Congress in order to remedy and prevent adverse impacts. *Id.* Additionally, if significant adverse health effects are found, the Administrator is to promulgate regulations for federal permits for construction or modifications of toxic chemical facilities requiring net reductions of chemicals causing adverse health effects (i.e., an offset program for new sources). *Id.* An earlier version submitted by former Senator Gore was more aggressive in providing for a *moratorium* on new permits in high impact areas. 138 CONG. REC. S7489 (daily ed. June 3, 1992).

The proposed legislation would undoubtedly be beneficial in that EPA would undertake to inventory multiple and diverse contaminants and study resulting adverse health effects. But the bill in its currently proposed form has obvious problem areas. The phrase "significant adverse impacts" from exposure to toxic chemicals on human health, which triggers a duty to propose legislation and promulgate offset requirements, is not statutorily defined. There is no statutory deadline to promulgate offset regulations. The bill is silent as to its effect on inconsistent provisions in other federal environmental laws. For example, the Clean Air Act authorizes a *waiver* of offset requirements for certain facilities emitting criteria pollutants (which should be considered toxic pollutants under the proposed Environmental Justice Act) if located in nonattainment areas designated as zones targeted for economic development. See *infra* note 277 and accompanying text. Lastly, the proposed legislation does not contain a citizen suit provision authorizing an action-forcing suit should the Administrator fail to perform a nondiscretionary duty under the bill.

The proposed legislation was not enacted during the 103d congressional session. More specifically targeted amendments were proposed (but not enacted during the 103d congressional session) under the Solid Waste Disposal Act (SWDA), which includes RCRA, to require federal rejection of proposals to site hazardous or solid waste facilities in environmentally disadvantaged communities and to require community information statements. See *infra* note 259 and accompanying text.

68. In using the term "mainstream environmental organizations," I exclude some initiatives by local chapters. Professor Jarman correctly points out that, in the past, some local chapters undertook environmental initiatives in low income and minority communities, but were often understaffed, underfunded, and unsupported at the national level. Telephone interview with Casey M. Jarman, Associate Professor, University of Hawaii, William S. Richardson School of Law (July 20, 1994) (on file with author).

69. See generally *A Place at the Table*, *supra* note 40.

70. *Id.* at 53-58.

tive efforts with environmental justice groups⁷¹ and have diversified staff boards and staff members.⁷² However, initiatives in poor and minority communities brought by national environmental organizations have been counterproductive to the environmental justice movement when representation is undertaken without meaningful direction from the community.⁷³ Additionally, national environmental organizations compete with community organizations for limited funding that is available for environmental justice activities.⁷⁴

In sum, despite national publicity surrounding environmental justice issues and some agency and environmental interest group response, many local communities are in substantially the same position as they were before the 1982 Warren County demonstrations.

B. *From the Data Gap to the Quantification Trap*

In the 1970's and 1980's, environmental justice advocates—those who were engaged in addressing environmental problems on the local level with limited budgets—did not participate in the formulation of national environmental policy, the legislation of federal environmental laws, or the implementation of regulatory enforcement.⁷⁵ The in-

71. *Environmentalism and Politics*, *supra* note 37, at 58-59. However, not all mainstream environmental groups have been willing to collaborate.

Some white environmentalists dismiss this new sector of the environmental movement as radical social justice extremists and stubbornly ignore the potential insights to be gained by exploring their experience. For them, it is still business as usual. Others have sought to make just enough changes within their organizations to avoid charges of racism and negative press coverage. Still others have responded to this new sector of the movement by beginning to imagine more powerful and inclusive ways of furthering the environmental cause.

Id. at 58; see Steven Keeva, *A Breath of Justice*, 80 A.B.A. J. 88, 90 (1994) (noting that Sierra Club Legal Defense Fund opened an office in Louisiana's "Cancer Corridor" area); see also Richard Moore & Louis Head, *Acknowledging the Past, Confronting the Present*, in TOXIC STRUGGLES, *supra* note 7, at 122-23 (discussing successful alliances with National Toxics Campaign and Campaign for Responsible Technology).

72. See generally Adams, *supra* note 4.

73. Environmental justice advocate Dana Alston of the Public Welfare Foundation discussed the difficulty with alliances between community groups and large environmental organizations. She noted that there have been instances where litigation-oriented national environmental groups prosecuted lawsuits concerning activities in poor and minority neighborhoods without meaningful participation from the community residents. Community residents and community organizations were not consulted to determine if the litigation would be beneficial to the community, given the political and economic complexities involved. Interview with Dana Alston, Public Welfare Foundation, in Albuquerque, N.M. (Aug. 4, 1994).

74. *Id.* Ms. Alston noted that some large national environmental organizations use their "environmental justice" activities to bolster their fundraising campaigns. See Richard Moore & Louis Head, *Acknowledging the Past, Confronting the Present*, in TOXIC STRUGGLES, *supra* note 7, at 124-25.

75. Major environmental laws were first enacted or underwent substantial revision from the late 1960's to the early 1980's. See FRANK P. GRAD, ENVIRONMENTAL LAW § 1.01 (3d ed. 1985) [hereinafter GRAD, ENVIRONMENTAL LAW]. For example, although the Clean Air Act was the product of 10 separate congressional acts beginning with the Air

fluent players in the national environmental community have been the regulated entities, governmental agencies administering environmental laws,⁷⁶ and national environmental organizations, particularly those with litigation missions.⁷⁷ It has become apparent that the interests of low income and minority persons were not specifically addressed during the drafting of critical environmental laws.⁷⁸

Pollution Control Act of 1955, it was substantially amended by the Clean Air Amendments of 1970 and 1977. See Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); see also 3 MARK SQUILLACE, ENVIRONMENTAL LAW: AIR POLLUTION 47 (2d ed. 1992). The Clean Water Act was amended in 1972 and again in 1977. Clean Water Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); Clean Water Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). RCRA was first enacted in 1976. Pub. L. No. 94-580, 90 Stat. 2795 (1976). The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was first enacted in 1980. Pub. L. No. 96-510, 94 Stat. 2767 (1980). Yet, grassroots organizations did not begin to coalesce nationally until the 1980's. DUMPING IN DIXIE, *supra* note 5, at 29. But see *When Movements Coalesce*, *supra* note 36, at S22 (stating that grassroots movements truly coalesced in 1991 during the First National People of Color Environmental Leadership Summit); but cf. Gottlieb & Ingram, *supra* note 40, at 15 (finding that nationally oriented environmental groups focus on lobbying and legislation while grassroots organizations generally resort to popular action and citizen's lawsuits).

76. EPA administers the majority of the pollution control environmental laws; however, the Army Corps of Engineers administers § 404 of the Clean Water Act. 33 U.S.C. § 1344(d) (1988 & Supp. V 1993) (giving the Secretary of the Army authority to issue permits to discharge dredged or fill materials into navigable waters). Other agencies administer environmental laws that pertain to resource management rather than pollution control, such as the Department of Fish and Wildlife, which administers the Endangered Species Act. See 16 U.S.C. §§ 1531-1644 (1988 & Supp. IV 1992).

77. National environmental organizations that have litigation missions and typically seek review of environmental standards in the courts of appeals include Sierra Club, the Environmental Defense Fund, and the Natural Resources Defense Council. GRAD, ENVIRONMENTAL LAW, *supra* note 75, § 1.04.

78. For example, the Clean Air Act was amended in 1977. Pub. L. No. 95-95, 91 Stat. 777 (1977). By 1977, there were at least three urban area studies that had analyzed the distribution of air pollutants by race; two of the studies indicated the distribution was inequitable by race. See Paul Mohai & Bunyan Bryant, *Environmental Racism, Reviewing the Evidence*, in RACE and ENVIRONMENTAL HAZARDS, *supra* note 7, at 166 [hereinafter *Reviewing the Evidence*] (table summarizing various environmental studies and noting the following studies: (1) A. Myrick Freeman III, *The Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS: THEORY AND METHOD IN THE SOCIAL SCIENCES 243, 264 (Allen V. Kneese & Blair T. Bower eds., 1972) [hereinafter 1972 Freeman Study] (study of Kansas City, St. Louis, and Washington, D.C.); and (2) W. J. Kruvant, *People, Energy and Pollution*, in THE AMERICAN ENERGY CONSUMER (K.K. Newman & D. Day eds., 1975) [hereinafter 1975 Kruvant Study]).

By 1977, there were at least six urban area studies that had analyzed the distribution of air pollution by income, and all had found distribution inequitable by income. *Reviewing the Evidence*, *supra*, at 166 (table summarizing various environmental studies and noting the following studies: (1) COUNCIL ON ENVTL. QUALITY, THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1971) [hereinafter 1971 CEQ STUDY]; (2) 1972 Freeman Study, *supra*; (3) D. HARRISON JR., WHO PAYS FOR CLEAN AIR: THE COST AND BENEFIT DISTRIBUTION OF AUTOMOBILE EMISSION STANDARDS (1975) [hereinafter 1975 HARRISON STUDY]; (4) 1975 Kruvant Study, *supra*; (5) J. M. ZUPAN, THE DISTRIBUTION OF AIR QUALITY IN THE NEW YORK REGION (1973) [hereinafter 1973 ZUPAN STUDY]; and (6) W. R. Burch, *The Peregrine Falcon and the Urban Poor: Some*

One result of the isolation of environmental justice advocates from the national legislative process was that environmental regulatory agencies seldom, if ever, considered race or income to be an important factor in the first critical years of data compilation and analysis. Environmental regulatory agencies, like EPA, did not routinely collect and analyze environmental and health data by income

Sociological Interrelations, in HUMAN ECOLOGY, AN ENVIRONMENTAL APPROACH (P. Richerson & J. McEvoy eds., 1976) [hereinafter 1976 Burch Study].

Three studies compared race and income: two found income to be a more important determinant in inequitable distribution, and one found race to be a more important determinant. *Reviewing the Evidence*, *supra*, at 166 (table summarizing various environmental studies and noting that the 1975 Kruvant study and the 1976 Burch study found income to be a more important determinant, and the 1972 Freeman study found race to be more important). The 1975 Harrison study also examined the national distribution of air pollution by income (not limited to urban areas) and found that distribution by income was not inequitable. 1975 HARRISON STUDY, *supra*. The 1976 Burch study analyzed but did not find inequitable distribution by race. 1976 Burch Study, *supra*. A computer search did not reveal that any of these studies were discussed during the debates on the 1977 amendments to the Clean Air Act.

By the time of the 1990 amendments to the Clean Air Act, there were at least four more studies indicating racially inequitable distribution of air pollution. *Reviewing the Evidence*, *supra*, at 166 (table summarizing the following environmental studies: (1) B. J. BERRY ET AL., THE SOCIAL BURDENS OF ENVIRONMENTAL POLLUTION: A COMPARATIVE METROPOLITAN DATA SOURCE (1977) [hereinafter 1977 BERRY STUDY] (urban area study); (2) P. Asch & J.J. Seneca, *Some Evidence on the Distribution of Air Quality*, in LAND ECONOMICS 54(3), 278-97 (1978) [hereinafter 1978 Asch Study] (urban area study); (3) L. Gianessi et al., *The Distributional Effects of Uniform Air Pollution Policy in the U.S.*, Q.J. ECON., May 1979, at 281 [hereinafter 1979 Gianessi Study] (national study); and (4) Michel Gelobter, *The Distribution of Outdoor Air Pollution by Income and Race: 1970-1984* (1987) [hereinafter 1987 Gelobter Study] (unpublished M. thesis, University of California at Berkeley)). There were two more studies finding inequitable distribution of air pollution by income in U.S. urban areas. *Reviewing the Evidence*, *supra*, at 166 (table summarizing studies including the 1979 Gianessi Study and the 1987 Gelobter Study). On a national basis, the 1979 Gianessi study did not find inequitable distribution of air pollution by income. *Id.* The 1987 Asch study found income to be a more important determinant, while the national 1979 Gianessi study and the 1987 Gelobter study found race to be a more important determinant. *Id.* There are no provisions in the voluminous amendments that directly address racial or socioeconomic disparity in exposure to air contaminants. In fact, the EPA Workgroup identified provisions of the Clean Air Act amendments of 1990 that have the potential to affect poor and minority communities more adversely. SUPPORTING DOCUMENT, *supra* note 5, at 23-24; see also *infra* part II.B.1.

RCRA, first enacted in 1976, was substantially amended in 1980 and again by the Hazardous and Solid Waste Amendments of 1984. RCRA of 1976, Pub. L. No. 94-550, 90 Stat. 2796 (1976); SWDA Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984). CERCLA, first enacted in 1980, was substantially amended by the Superfund Amendments and Reauthorization Act (SARA). CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980); SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1615, 1652, 1692, 1703, 1704, 1774 (1986). At the time of the 1986 amendments, there was at least one regional study by the U.S. government indicating inequitable location of hazardous waste facilities by race and income. *Reviewing the Evidence*, *supra*, at 166 (table summarizing studies including SITING OF HAZARDOUS WASTE LANDFILLS, *supra* note 33).

and race.⁷⁹ Environmental regulators did not specifically consider race or income in risk assessment and risk management procedures.⁸⁰ Data was not routinely collected on health risks posed by multiple industrial facilities, cumulative effects, synergistic effects, or multiple pathways of exposure, all of which tend to affect people of color disproportionately.⁸¹ To date, no one has published a comprehensive national study of exposures and risks to environmental contaminants by race and income.⁸² Presently, there exist national studies on blood

79. WORKGROUP REPORT, *supra* note 5, at 17-18. As early as 1971, William Ruckelshaus, then Administrator of the newly formed EPA, testified in a hearing before the Civil Rights Commission that EPA was a technical and scientific agency not equipped to judge disparate impacts on minority communities due to pollution. Marianne Lavelle, *Residents Want 'Justice,' The EPA Offers 'Equity,' in Unequal Protection*, *supra* note 7, at S26.

80. SUPPORTING DOCUMENT, *supra* note 5, at 30-37.

The four components of EPA's risk assessment process as defined in risk and exposure assessment guidelines do not exclude the consideration of age, gender, racial/ethnic groups. Age and gender and some racial/ethnic elements are traditional health topics and so are explicitly discussed in risk assessments conducted by the Agency as appropriate. Age and gender are familiar topics in exposure guidance; information concerning exposure traits of racial/ethnic groups are [sic] more limited. While the guidelines discuss some of these issues, the availability of data for use in risk assessment is problematic. . . . [O]ne way in which risk assessments can be improved in terms of environmental equity is to determine the proportionality and distribution of environmental exposures and risk. . . . [T]he U.S. Census could be applied to that particular geographical area to identify the age, gender, levels of income, race and ethnicity of the potentially exposed population according to the estimated cumulative frequency distribution of environmental exposures. This could permit quantitative analysis of the proportionality of exposures and risk according to demographic classifications of race, ethnicity, gender, age and income. . . . [I]n addition, the exposure analysis can be improved through the further research and incorporation of human activity patterns that may be influenced by custom, social class, and ethnic and racial culture.

Id. at 31-32.

Exposure assessment does not incorporate ethno-cultural and economic considerations. *Id.* at 34. "[Yet c]ultural specific behaviors, activity patterns, and food preferences vary significantly by ethnic and racial groups, and these patterns may define pathways of exposure to an environmental pollutant." *Id.* Furthermore, "[t]he available studies on human activity patterns (percent time spent in various activities while at work, home, and recreation) are skewed toward middle income individuals, but are generally not delineated by race/ethnicity." *Id.* at 35 (citation omitted).

81. WORKGROUP REPORT, *supra* note 5, at 17-18. Inner cities and industrial environments sustain exposure to pollutants from diverse and numerous sources. *Id.* at 18. The percentages of minorities living in urban areas are much higher than Whites (91.2% Latino, 86.1% African-American, and 86.5% other minorities, compared to 70.3% Caucasian). SUPPORTING DOCUMENT, *supra* note 5, at 7.

82. The EPA Workgroup explains: "No national baseline currently exists of population exposures and risk to environmental contaminants that is evaluated by age, gender, ethnicity, and race for all environmental media. Therefore it is not possible to statistically evaluate the proportionate risk burden by age, gender, ethnicity and race on a national scale." SUPPORTING DOCUMENT, *supra* note 5, at 33. However, three national studies that analyzed exposures to selected environmental hazards by race and income found race to be more importantly related to exposure to environmental hazards. *Reviewing the Evidence*, *supra* note 78, at 166 (table summarizing studies including the following: (1) 1979 Gianessi Study, *supra* note 78 (air pollution); (2) TOXIC WASTES AND RACE, *supra* note 1 (hazardous wastes); and (3) Michel Gelobter, *Toward a Model of Environmental Discrimination*, in

levels of lead, exposure to air pollution, and location of communities near hazardous waste facilities.⁸³ But comprehensive nationwide studies on other major environmental hazards, such as water pollution, pesticide exposure, and asbestos exposure are still needed.⁸⁴

EPA's traditionally race-oblivious perspective on environmental problems has unfortunate circularity. Historical inattention to race and social context in environmental regulation has resulted in a data gap: a lack of comprehensive statistical information on environmental exposures to major pollutants and adverse health effects by race and income. This lack of data (caused in part by the Agency's own failure to consider social context) then has become the focus of the response and the primary reason for EPA not to address environmental inequities aggressively.⁸⁵

Even when some EPA officials have shifted from a race (and socioeconomic) neutral approach to environmental protection to a more direct consideration of environmental justice issues, the Agency as an institution falls short of the mark. Agency response is oriented toward the science and technology of pollution control. EPA responds to the issue of disparate environmental protection as a technical issue to be addressed within the narrow framework of data collection and risk assessment.⁸⁶ Instead of considering the social context in which envi-

RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7, at 64-81 (air pollution)). EPA regional offices are undertaking investigations and studies of disparate environmental exposures on regional levels. See WORKGROUP REPORT, *supra* note 5, at 33-40.

83. See *Reviewing the Evidence*, *supra* note 78; see also *supra* note 45 (EPA Workgroup findings).

84. Paul Mohai & Bunyan Bryant, *Race, Poverty & the Distribution of Environmental Hazards: Reviewing the Evidence*, RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Fall 1991-Winter 1992, at 3, 24.

85. Lack of data was the first finding of the EPA Workgroup, which recommended the establishment and maintenance of information to provide an objective basis for assessment of risks by income and race. See Workgroup Report, *supra* note 5, at 3-4. There was a lack of specificity to the recommendations in general. See *id.* See generally Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1662 (1991) (discussing the eight "laws" of administrative behavior and asserting that, "administrators frequently chose to 'study' uncertain issues as a way to avoid resolving them").

86. The difference in perspective is illuminated in the debate over the choice of terms used to define and address the problem of disparate environmental protection. The EPA Workgroup explained:

EPA chose the term environmental equity because it most readily lends itself to scientific risk analysis. The distribution of environmental risks is often measurable and quantifiable. The Agency can act on inequities based on scientific data. Evaluating the existence of injustices and racism is more difficult because they take into account socioeconomic factors in addition to the distribution of environmental benefits that are beyond the scope of this report [the 1992 EPA Report]. Furthermore, environmental equity, in contrast to environmental racism, includes the disproportionate risk burden placed on any population group, as defined by gender, age, income, as well as race.

ronmental laws are created and enforced—and responding directly to adverse social forces—major environmental justice concerns remain unaddressed pending a study and quantification. As a result, environmental justice might ultimately be lost in the institutional machinery of risk analysis.⁸⁷

C. *A Difference in Perspective: Environmental Justice v. Environmental Equity*

The environmental justice movement adheres to a social justice perspective on environmentalism, while EPA and many national environmental organizations adhere to a science and technology-oriented perspective on environmentalism. A scientific framework of risk analysis,⁸⁸ with a focus on the proportionality and distribution of environmental exposures and risk,⁸⁹ is ill suited to address social justice issues. It is not difficult to imagine that once environmental problems in low income communities and communities of color are sufficiently studied, quantified, compared, and ranked, disparity in risk is likely to be addressed by the experts as a risk redistribution enterprise.⁹⁰ The

SUPPORTING DOCUMENT, *supra* note 5, at 2-3.

87. For a critique of the overemphasis on scientific risk assessments and the need to consider normative questions, including equity among risk-bearers, see Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562 (1992). Professor Hornstein demonstrates how, in evaluating risks according to expected losses across populations, distributional aspects are deemphasized.

For example, if the widespread use of chlorine in public drinking water systems causes each year an estimated 400 excess cancers nationwide, an evaluation based on population effects would rank it as a worse cancer risk than that posed by active hazardous waste sites . . . if air and water pollution from such sites cause no more than 100 excess cancers annually For the "hard" comparative risk analyst, the evaluation of these risks is simple arithmetic: 400 cancers are worse than 100 The full evaluation of these two risks is not so simple.

Id. at 593. For example, suppose the hazardous waste sites were exclusively near low income communities of color. One might imagine that these residents would "misperceive" the risks of hazardous waste as much greater than the risks associated with the use of chlorinated drinking water. In addition, assume that centers of industrial activity emitting large amounts of air and water pollutants were similarly located exclusively in low income minority communities, and that the risks were similarly ranked lower than the chlorine risk. If risks were compared and ranked separately, chlorinated water would be ranked first. In this hypothetical society, if comparative ranking was the only analytical tool employed and resources were given to higher ranked risks, the diffuse risks associated with chlorinated drinking water would be addressed first and most aggressively. In such a situation, one wonders who is misperceiving risks.

88. *Id.* at 569-70 (stating that the discipline of formal risk analysis has developed a sufficiently rigorous internal structure to qualify as a "science" on its own right).

89. SUPPORTING DOCUMENT, *supra* note 5, at 30-37.

90. As long as EPA rejects a social justice orientation and exclusively relies on a "scientific" comparison of one quantified risk to another, the focus is on distribution. "Environmental equity refers to the distribution of environmental risks across population groups and to policy responses to these distributions." WORKGROUP REPORT, *supra* note 5, at 2. The response to an inequitable distribution may likely involve an effort at redistribution (e.g., siting a noxious facility in another area but not outright denial of a permit), rather

risk assessment model—and its ultimate goal of *risk distribution* determined and executed by EPA experts—does not give communities an equal voice in determining which risks can be *prevented* and which risks are *acceptable* (or unacceptable) within the community that ultimately bears the environmental burden.⁹¹

Alternatively—from an environmental justice perspective—when viewed in its social context, empirical evidence that low income and minority communities are disproportionately subjected to environmental hazards,⁹² that people of color disproportionately suffer adverse health effects from toxic substances,⁹³ and that enforcement of environmental laws in communities of color is not as rigorous as in predominantly White communities⁹⁴ is evidence of racism and exclusion. Thus, environmental injustice cannot be adequately addressed solely within the confines of scientific study, technical risk assessment,⁹⁵ and risk redistribution.

than risk elimination or risk reduction. Risk reduction or risk elimination would necessarily entail tighter controls on regulated industries, a strategy that would meet with severe—and probably effective—opposition from those industries. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-88 (1975) (explaining reasons why agencies favor organized interests, especially the interests of the regulated); Latin, *supra* note 85, at 1659 (discussing the dynamics of agency behavior in the implementation of environmental legislation and concluding that, “[s]ocial dislocation and competitive disadvantages from environmental regulation will invariably provoke intense opposition that from an agency’s perspective may lead to many undesirable consequences”). Administrators will therefore avoid these kinds of politically controversial choices if Congress fails to provide unambiguous and unqualified directions. If professor Latin’s theories of agency behavior are correct, any efforts at redistribution of environmental risk are as likely to fail as his predicted failure of the implementation of the 1990 amendments to the Clean Air Act.

91. Pollution prevention rather than risk redistribution is a central theme in the environmental justice movement, along with principles of public participation and self-determination. ENVIRONMENTAL LEADERSHIP SUMMIT, *supra* note 29, at 31. For a critique of EPA’s quantitative risk assessment model for ranking environmental hazards from an environmental justice perspective, see ENVIRONMENTAL JUSTICE COMM. OF THE CAL. COMPARATIVE RISK PROJECT, ENVIRONMENTAL JUSTICE AND COMPARATIVE RISK (1994). The Environmental Justice Committee argues that the present model of comparative risk as risk ranking fails to incorporate the concerns and experiences of impacted communities, tends to compare and choose between risks rather than consider toxic reduction strategies, does not distinguish between existing and future (preventable) risks and that quantitative risk assessment does not account for multiple hazards, differences in individual susceptibilities to toxics, and potentially synergistic health effects. *Id.* at 10-16. Using population risk measures rather than individual risk measures downplays impacts affecting smaller groups of people who are affected disproportionately. *Id.* at 17-19.

92. See *supra* notes 34, 45 and accompanying text.

93. See *supra* note 45 and accompanying text (concerning findings of adverse health effects from exposure to lead).

94. See *supra* note 58 (summarizing *National Law Journal* findings).

95. In the 1992 EPA Report, the EPA Workgroup appeared intentionally to exclude an evaluation of the existence of injustices and racism in its use of the term “environmental equity.” SUPPORTING DOCUMENT, *supra* note 5, at 1. The recommendations of the EPA Workgroup appear further to confine the consideration of environmental equity to the risk assessment process. See WORKGROUP REPORT, *supra* note 5; see also *supra* note 80

Environmental justice activists steadily and forcefully insist that disparate environmental protection should be addressed through a participatory, democratic process that considers and responds to the larger social context.⁹⁶ Risk elimination rather than risk redistribution is a key component of the environmental justice perspective.⁹⁷ In short, argue environmental justice activists, "environmental equity" misses the point.

D. Considering the Social Context

Regardless of the relative merits of the contradictory positions, there is common ground. More study is undoubtedly necessary, but irrefutable evidence of disparate adverse health effects need not be a prerequisite to Agency response. EPA often regulates—sometimes aggressively—in the face of scientific uncertainty about the existence of adverse health effects.⁹⁸ Confronted with credible evidence sug-

(describing the risk assessment process); see also *supra* note 49. Risk assessment is more limiting than risk management. Risk assessment generally means the characterization of potential adverse health effects of human exposures to environmental hazards, while risk management describes the process of evaluating and selecting among alternative regulatory actions. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 502 (2d ed. 1990) [hereinafter ENVIRONMENTAL PROTECTION] (citing COMMISSION ON LIFE SCIENCES, NATIONAL RESEARCH COUNCIL COMM. ON INSTITUTIONAL MEANS FOR ASSESSMENT OF RISKS TO PUBLIC HEALTH, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 18-347 (1983)). It appears from the 1992 EPA Report that EPA is attempting to confine its role in the issue of environmental racism to determining whether any particular segment of society suffers actual disparate health effects due to exposure to environmental pollutants (i.e., risk assessment) rather than targeted agency action (i.e., risk management).

96. For the environmental justice advocates' responses to the 1992 EPA Report, see *supra* note 51.

97. Explaining the environmental justice movement, Dr. Chavis emphasizes: [T]he environmental justice movement is not an anti-white movement. [Contributors to Voices from the Grassroots] document the stories of grassroots leaders who are struggling against unjust, unfair, unethical, and sometimes illegal practices of industry and government. Environmental justice advocates are not saying, "Take the poisons out of our community and put them in a white community." They are saying that *no* community should have to live with these poisons.

Rev. Benjamin F. Chavis, Jr., *Foreword to VOICES FROM THE GRASSROOTS*, *supra* note 7, at 5.

98. Although the role of cost in relation to scientific uncertainty has resulted in substantial litigation, it remains clear that EPA has authority under many statutes to regulate substances for which there is no clear causal link between the substance and adverse effects on health, like cancer or birth defects. For example, the Clean Air Act allows EPA to regulate emissions that "may reasonably be anticipated" to endanger public health or welfare. 42 U.S.C. § 7408(a)(1)(A) (1988); see also *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1153-57 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980) (rejecting the position that primary air quality standards were too stringent because they protected against subclinical effects that were not proven to be clearly harmful). Prior to the 1990 amendments to the Clean Air Act, EPA was authorized to establish ambient standards for hazardous air pollutants at a level that provided an "ample margin of safety." 42 U.S.C. § 7412 (Supp. V 1993); cf. *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir.

gesting that select classes of communities (poor and minority) suffer disparate exposure to major pollutants, EPA would be acting within its mandate in taking *targeted* and aggressive action to protect these communities.

Agency response, however, should include consideration of the larger social context.⁹⁹ The reasons that communities of color and low income communities receive too little environmental protection are varied and complex. To respond adequately to environmental disparities, EPA must make a good faith attempt to understand the social dynamics in which environmental laws are enforced. There is helpful information available, albeit not written within the comfortable confines of scientific and technological jargon.¹⁰⁰ Even if sociological studies are not available that precisely address adverse social forces in the context of environmental regulation, EPA must still consider the forces of racism and class privilege. This approach is neither a new nor radical idea. For example, EPA's common sense determination that violators of environmental laws are motivated by profit informs

1987) (en banc decision upholding EPA's discretion to regulate vinyl chloride emissions in the face of scientific uncertainty but allowing consideration of technological feasibility of alternatives within a range of "safe," albeit not "risk free"). A more recent example of EPA's aggressive regulation is the prohibition on the manufacture, importation, processing, and distribution of asbestos in most products, promulgated under the authority of § 6 of the Toxic Substances Control Act. The final rule was vacated by the Fifth Circuit on the rationale that EPA did not adequately consider costs, benefits, and alternatives. *Corrosion Proof Fittings, Inc. v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

99. A cross-disciplinary approach to environmental regulation is not new. EPA routinely uses economic analysis in fashioning regulations when considerations of technological and economic feasibility are specifically allowed under the statutes. A good illustration of the use of economic cost-benefit analysis is found in a recent case involving EPA's promulgation of a rule for the regulation of asbestos under the Toxic Substances Control Act. A ban on asbestos in products was predicated upon a cost-benefit analysis indicating that a ban on asbestos pipe would save three lives over 13 years at a cost of \$128-227 million per life, a ban on asbestos shingles would save .32 statistical lives at a cost of \$21-34 million, a ban on asbestos coating would save 3.33 lives at a cost of \$46-181 million, and a ban on asbestos paper products would save .60 lives at a cost of \$4-5 million. See *Corrosion Proof Fittings, Inc.*, 947 F.2d at 1222.

100. The sociological basis of the problem is not difficult to see and not unknown to EPA officials.

OSWER [Office of Solid Waste and Emergency Response] managers recognize that the siting and permitting of hazardous and solid waste management facilities raise socioeconomic factors that are distinct from technical concerns (geo-hydrology, depth to groundwater, etc.). They also believe that one result of the "not in my backyard" (NIMBY) syndrome is that such facilities will tend to be located in communities with the least ability to mount a protest. They pointed out that this problem is compounded when wastes from Superfund sites are brought to commercial hazardous waste management facilities as a result of community opposition to incineration of the hazardous waste at the Superfund site.

SUPPORTING DOCUMENT, *supra* note 5, at 18. For bibliographies of cross disciplinary writings, surveys, and studies, see VOICES FROM THE GRASSROOTS, *supra* note 7, and RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7.

EPA's penalty policy.¹⁰¹ In assessing risk¹⁰² as well as managing risk, EPA encounters data gaps and rests its ultimate decisions on considerations other than hard scientific data.¹⁰³

Often there is little reason for EPA not to consider the dynamics of racism, along with economic and political disadvantage in the course of environmental regulation.¹⁰⁴ In the case of disparate environmental hazards, an inquiry into the cause of the problem must include consideration of the social context.

Social dynamics can explain why minority and low income communities are exposed to more environmental hazards and, once exposed, why these communities appear to receive less protection from enforcement agencies than do other communities. Although the social dimension of the problem is complicated, a few explanations have become apparent to those studying environmental inequities.

1. Keeping the Noxious Facility Away: NIMBY-ism and Siting

One cause of environmental inequities is the not-in-my-backyard, or NIMBY attitude. In classic NIMBY-ism, the community's goal is to keep noxious facilities out of the area without thought to

101. Penalty policy requires that, ideally, penalties under environmental laws should be in an amount sufficient to make the violator disgorge the economic benefit of noncompliance. See *infra* note 115. To my knowledge, the assumption that making a profit is a prime motivating factor in the violation of environmental laws was not empirically verified before the penalty guidelines were established. Rather, profit motivation appears to be assumed based upon common experience.

This is not to say that stated penalty policy prevails. According to a recent study, penalties showed little relationship to the economic benefits of the violations. See generally U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS (1991).

102. In assessing risk, the Agency often encounters gaps in available data and, in order to proceed, must choose from a range of inferences; the choice of inference (e.g., a conservative inference) is ultimately a policy choice, not a scientific decision. See Hornstein, *supra* note 87, at 572 n.41.

103. ENVIRONMENTAL PROTECTION, *supra* note 95, at 493-519. Risk management also entails consideration of political, social, economic, and engineering information (along with risk-related information), and selection of regulatory options necessarily requires the use of value judgments on issues such as the acceptability of risk and the reasonableness of costs of control. *Id.* at 502 (quoting COMMISSION ON LIFE SCIENCES, NATIONAL RESEARCH COUNCIL COMM. ON INSTITUTIONAL MEANS FOR ASSESSMENT OF RISKS TO PUB. HEALTH, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 18-347 (1983)).

104. The authority for the Agency to consider these matters might be found in Executive Order No. 12,898, signed by President Clinton on February 11, 1994, under which: "[E]ach Federal agency shall 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 and its territories and possessions, the District of Columbia, Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands." Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

where the facilities will be ultimately sited.¹⁰⁵ Wealthier and more politically powerful neighborhoods often keep noxious facilities out of their communities by restrictive zoning or targeted political pressure.¹⁰⁶ At best, an unintended but unfortunate effect of NIMBY-ism is that unwanted land uses "take the path of least resistance" and are shifted to communities that do not have the political resources to prevent the siting of facilities in the area.¹⁰⁷

A more skeptical view (though one not without basis) is that low income and minority communities are intentionally targeted for siting polluting facilities because they lack the political power to prevent the siting.¹⁰⁸ Once a polluting facility is located in or near a minority or

105. See Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. REV. 198, 198-200 (1990).

106. DUMPING IN DIXIE, *supra* note 5, at 81-84. Developers understand that well-funded community resistance can result in costly delays in siting; thus, communities that cannot afford to litigate will be more vulnerable to site selection. Collin, *supra* note 22, at 512. But see Michael B. Gerrard, *The Victims of NIMBY?*, 11 FORDHAM URB. L.J. 495, 514-16 (1994) (noting no nationwide pattern of siting new hazardous waste or radioactive materials facilities in minority communities since the passage of RCRA because there has been only one facility successfully sited).

107. DUMPING IN DIXIE, *supra* note 5, at 37-38 ("The cumulative effect of not-in-my-backyard (NIMBY) victories by environmentalists appears to have driven the unwanted facilities toward the more vulnerable groups. Black neighborhoods are especially vulnerable to the penetration of unwanted land uses."); Robert D. Bullard, *In Our Backyards*, EPA J., Mar.-Apr. 1992, at 11, 11-12. An example of racially inequitable results is the siting of large commercial hazardous waste facilities. Chemical Waste Management owns the Nation's largest commercial hazardous waste site, located in Emelle, Alabama, an economically impoverished rural area where over 90% of the residents are African-American. Robert D. Bullard & Beverly H. Wright, *The Quest for Environmental Equity: Mobilizing the African-American Community for Social Change*, 3 SOC'Y & NAT. RESOURCES 301, 307 (1990). Chemical Waste Management also owns another hazardous waste facility in Kettleman City, California, which is predominantly Latino (more than 95% of the residents). VOICES FROM THE GRASSROOTS, *supra* note 7, at 29. Chemical Waste Management also owns three toxic waste incinerators, one located on the south-side of Chicago, where the population is 55% African-American and 24% Latino; one in downstate Illinois, near neighborhoods that are 95% or more African-American; and one in Port Arthur, Texas, which is 80% African-American and Latino. Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67, 70-71 (1993-94).

108. As one might expect, no one will admit to targeting a community because of its racial characteristics. However, some have been more candid about targeting low income communities. A 1984 report prepared for the California Waste Management Board by J. Stephen Powell of Cerrell Associates observed that all socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle- and upper-socioeconomic strata possess better resources to effectuate their opposition. Accordingly, the report advised that middle- and higher-socioeconomic strata neighborhoods should not fall at least within the one-mile and five-mile radii of the proposed site. J. STEPHEN POWELL, CERRELL ASSOCS., POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING: REPORT TO THE CALIFORNIA WASTE MANAGEMENT BOARD 42-43 (1984) [hereinafter CERRELL REPORT]. The report noted: "Ideally . . . officials and companies should look for 'lower socioeconomic neighborhoods.'" Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, AMICUS J., Spring 1989, at 22, 26 (quoting the CERRELL REPORT); see also SUPPORTING DOCUMENT, *supra* note 5, at 78 (comments from external reviewers of the 1992 EPA Report criticizing the EPA Workgroup's failure

low income community, the residents can seldom "vote with their feet" and relocate to safer areas.¹⁰⁹ A polluting facility, once sited, often provides justification for siting similar facilities nearby, resulting in de facto sacrifice areas.¹¹⁰

NIMBY-ism presents a paradox that EPA and mainstream environmentalists have yet to address in the context of environmental justice. If politically powerful communities (in this case, predominantly White and/or affluent communities) are able through environmental activism to push noxious facilities into communities with fewer political resources (in this case, minority and/or poor communities), then responsible agency action would be to enforce environmental laws in a manner that will eliminate the inequity. Ideally, this will mean that some environmental hazards will be eliminated by tightening controls on the regulated entities (polluting industry). But some environmental risks will not be eliminated due to economic or technological infeasibility. The risk-generating activity that the Agency decides cannot be eliminated must be redistributed geographically, potentially affecting White affluent communities. Consequently, to the extent that EPA is successful in alleviating disparate environmental burdens, it will receive intense political pressure from the regulated community because of tighter controls, along with intense political pressure from more politically powerful communities because of redistributed risk. In this light, one must question whether EPA can adequately respond to environmental inequity, given that Agency response is primarily

to acknowledge the existence of the Cerrell Report). The same sentiments have been expressed in the international arena. In a memorandum from World Bank Vice President and Chief Economist Lawrence Summers to colleagues, Summers wrote: "Shouldn't the World Bank be encouraging more migration of the dirty industries to the LDCs (less developed countries)?" *World Bank Dumps on Third World Again, RACE, POVERTY & ENV'T* (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Fall 1991-Winter 1992, at 12 (quoting the memorandum). Summers further proposed that the World Bank encourage the dumping of toxic waste in Africa. *Id.* Summers also stated: "[T]he economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that." *Id.* (quoting the memorandum). When the memorandum was publicized, Summers claimed his remarks were intended as a "sardonic counter-point, an effort to sharpen the analysis." *Id.* (quoting the memorandum); see also *Pollution and the Poor: Why 'Clean Development' at Any Price Is a Curse on the Third World*, *THE ECONOMIST*, Feb. 15, 1992, at 18 (quoting the memorandum as an illustration of classic welfare economic theory and of how in both domestic and global environmental policy, equitable distribution is generally subordinated to short-term economic efficiency).

109. VOICES FROM THE GRASSROOTS, *supra* note 7, at 21; see also Collin, *supra* note 22, at 507-10 (discussing land use practices that systematically exclude people on the basis of race).

110. See Cynthia Hamilton, *Coping With Industrial Exploitation*, in VOICES FROM THE GRASSROOTS, *supra* note 7, at 70 ("As long as land can be acquired cheaply and easily in communities of color, and as long as zoning and other regulations can be minimized, these communities will continue to be prime targets, particularly for waste disposal and waste-to-energy incinerators. This will intensify as landfill space decreases.").

limited to narrowly focused discretionary actions and environmental justice projects. Despite the good intentions of many EPA personnel, the contribution of NIMBY-ism to environmental inequity is profound and is not likely to be remedied solely by discrete projects, more study, and promises of even-handed enforcement.¹¹¹

2. *Once Sited, Keeping the Facility Clean: The Problem of Compliance*

In addition to the NIMBY phenomenon, which causes polluting activity to be located in and near minority and low income communities, the social context in which environmental laws are enforced must be considered. Enforcement of environmental laws typically includes distinct agency actions: inspection of permitted facilities, detection of violations, prosecution of violators, punishment of violators, and agency response to the release of hazardous substances. Assuming even-handed governmental inspection of facilities,¹¹² inequities result if violations are prosecuted less often or less rigorously in low income and minority communities, or if violators operating in such communities are assessed more lenient penalties. Polluting industries will find it advantageous to locate in low income and minority communities if penalties are so low that it makes economic sense to disregard environmental laws and to consider the penalties simply as a cost of business. If, as the National Law Journal's study indicates, fines in predominantly White areas are 149% to 506% higher,¹¹³ then the

111. See generally Latin, *supra* note 85 (describing the dynamics of agency response under political pressure). The same dynamics would apply at the state regulatory level as well.

112. The author is unaware of any studies of inspection patterns within EPA.

113. In the seven years of fines analyzed by the *National Law Journal*, 86.5% of the fines were negotiated and 13.5% were the result of court decisions. Marianne Lavelle, *Negotiations Are Key to Most Fines, in Unequal Protection*, *supra* note 7, at S15 [hereinafter *Negotiations*]. Considering both negotiated and adjudicated fines, the fines in predominantly White areas were 506% higher than in minority areas. *Id.* Considering only negotiated fines, the fines in White areas were 149% higher. *Id.* "Only in Superfund enforcement cases, lodged mainly against polluters who have been recalcitrant about cleaning up abandoned toxic waste sites, did fines in minority areas come out higher than in white areas, by 9 percent. Minority communities saw lower average penalties in federal enforcement of the Clean Water Act, by 28 percent, the Clean Air Act, by 8 percent, and the Safe Drinking Water Act, by 15 percent." *Unequal Protection*, *supra* note 7, at S4. Under RCRA, the average fine in areas with the greatest White population was \$335,556, compared to \$55,318 in the areas with the greatest minority population. *Id.*

Although penalties against polluters in poor neighborhoods are on average 54% lower than those in wealthy communities, the pattern varies depending on the particular law involved such that income is not a reliable predictor. Marianne Lavelle, *The Minorities Equation, in Unequal Protection*, *supra* note 7, at S2. But minority communities consistently draw lower average fines under every type of environmental law except CERCLA. *Id.* In the Clean Air Act, Superfund, and Safe Drinking Water Act cases, low income communities see higher fines than high income communities. *Id.* However, in the Clean Water Act and "multimedia" cases (i.e., charges made under different laws), the fines are

comparatively low fines in non-White areas are likely to be more cost-effective than compliance. Although statutory provisions and administrative penalty guidelines recommend that penalties should be in an amount sufficient to remove the economic benefit of noncompliance,¹¹⁴ there are other factors considered in assessing penalties against a violator, such as the gravity of the violation, degree of culpability, violator's ability to pay, and other circumstances as justice may require.¹¹⁵ As a result, "EPA reserves for itself virtually unlimited flexibility to reduce the computer-generated penalty."¹¹⁶ The flexibility of penalty assessment at the regional level, undoubtedly beneficial in some respects, creates the potential for racially and socioeconomically inequitable enforcement. For example, flexible criteria can be manipulated to justify less rigorous penalties that are really based on unstated or even unconscious attitudes that violations in rundown

so much higher in high income areas that low income communities fare worse on average.
Id.

114. See *supra* note 101.

115. See, e.g., 33 U.S.C. § 1319(d) (1988) (requiring that the court, in determining Clean Water Act civil penalties for violations of standards, consider the seriousness of the violation, the economic benefit resulting from the violation, history of violations, good faith efforts to comply with applicable requirements, the economic impact of the penalty on the violation, and such other matters as justice may require); 42 U.S.C. § 7413(e)(1) (Supp. V 1993) (setting forth Clean Air Act penalty assessment criteria: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation); 40 C.F.R. § 66.21 (1994) (explaining EPA's calculation of noncompliance penalties under the Clean Air Act); 42 U.S.C. § 6928(g) (1988) (providing for civil penalties under RCRA of up to \$25,000 per day for each violation); *id.* § 9609(a)(3) (1988) ("[For CERCLA class I violations, the] President shall take into account the nature, circumstances, extent and gravity of the violation or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."). See generally *Enforcement: GAO Says EPA Failing To Collect Money Gained by Polluters Evading Requirements*, 22 ENV'T REP. (BNA) No. 8, at 483 (June 21, 1991). The General Accounting Office (GAO) found that two out of three penalty cases in fiscal year 1990 did not include recovery of economic benefits gained by the polluters. *Id.*

116. *Negotiations*, *supra* note 113, at S15. Although ability to pay is a factor affecting the size of the penalty, the *National Law Journal* investigation found that some relatively minor fines in minority areas have been lodged against large industries, for example, a \$22,000 air pollution penalty against Procter & Gamble Co. in Staten Island, New York, and \$32,000 against General Motors Corp. in Dayton, Ohio. *Id.*

In a review of state enforcement actions under the Clean Air Act, the GAO found that over half of the more than 1,100 significant violators that states and localities identified in 1988 and 1989 had paid no cash penalties at all. In one case, a company that failed to install pollution control equipment—and thus had emitted excess pollution—for six years was assessed a penalty of \$15,000, although EPA's Enforcement Office later found that the economic benefit of the violation was more than \$231,000, or about 15 times the penalty.

Another Reason Not To Let Polluters Open Shop in Your Community, RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Fall 1991-Winter 1992, at 9.

(low income or minority) neighborhoods are not as serious as violations in "better" neighborhoods.¹¹⁷

Other factors might influence enforcement of environmental laws in a manner that results in disparity. One factor identified by the *National Law Journal* investigation is that the degree of citizen involvement affects the size of the penalty; the top penalties were levied against violators when citizens joined the litigation.¹¹⁸ If citizens in low income and minority communities rely solely on governmental enforcement because they have fewer resources (money, time, and expertise) than White, wealthier communities to prosecute violators through citizen suits, then disparity results in part from private enforcement, or at least from the leverage that the ability to "take the matter to court" provides.¹¹⁹

3. *Once Contaminated: The Problem of Cleanup*

In addition to disparity in facility siting and disparity in enforcement of regulatory requirements, the cleanup of contaminated sites is an area where there is racial and socioeconomic disparity. According to the *National Law Journal* investigation, it takes 20% longer to place a site in a minority community on the Superfund list once a release of

117. See generally Boyle, *supra* note 22 (discussing the dynamics of institutional forms of racism, both on a conscious invidious level and on an unconscious insidious level, which the author terms "aversive institutional racism"); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

118. *Negotiations*, *supra* note 113, at S15. Disparity in litigation resources affects environmental enforcement. GRAD, ENVIRONMENTAL LAW, *supra* note 75, § 1.04[2]. Government litigators and environmental groups utilizing citizen suit provisions find it hard to match the economic means of regulated industries, which may make a difference where technical issues are complex and expert witnesses expensive. *Id.*

119. In a recent survey of corporate counsel: "[O]nly 2 percent surveyed said they were taking steps to assure that minority communities were not disproportionately affected by their operations. About 4 percent said they had concerns but had not taken action on it. More than 70 percent said they did not anticipate any serious challenge of 'environmental racism.'" Marianne Lavelle, *Community Activists Can Push Companies To Take Extra Steps*, NAT'L L.J., Aug. 30, 1993, at S1, S5. More than 50% said community activism had some impact, but the corporate response noted was an effort to build a relationship with the neighborhood rather than reduce polluting activity. *Id.* About 15% reported the corporation responded to community activism by additional compliance evaluation or pollution-reducing features, while 11.8% said the presence of community activists had no impact whatsoever. *Id.* The survey results support the observation that corporations are responding to community concerns in general, but are more likely to undertake pollution-reducing measures or step up compliance measures when they perceive that the community has the resources to mount a serious legal challenge. In the same survey, two-thirds of the counsel surveyed said their businesses have operated at least some time in the past year in violation of state or federal environmental laws. Marianne Lavelle, *Environment Vise: Law, Compliance*, NAT'L L.J., Aug. 30, 1993, at S1. In contrast, only one-third said they were in compliance. *Id.*

a hazardous substance is discovered.¹²⁰ Further, at the minority sites, EPA chooses "containment," the capping or walling off of a hazardous dump site, 7% more frequently than the cleanup method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. At the White sites, EPA orders treatment 22% more often than containment.¹²¹ Some environmental justice activists believe that political clout substantially influences decisions concerning how thoroughly to clean a contaminated site.¹²² It is difficult to confirm the charge with anything other than anecdotal evidence. However, at least one commentator has demonstrated how EPA in the course of Superfund cleanups may yield to pressure to keep cleanup costs to a minimum, and in the process disregard clear statutory mandates.¹²³ Policy considerations and value judgments may lie hidden in the scientific conclusions that support selection of a cleanup remedy.¹²⁴ When EPA is under substantial pressure to keep cleanup costs to a minimum, the degree of citizen involvement may be critical to the ultimate outcome, but significant citizen involvement is less likely in

120. It takes an average of 4.7 years in communities with the highest White populations, compared to 5.6 years in communities with the most minorities. *Unequal Protection*, *supra* note 7, at S7.

121. *Id.*

122. Environmental activists compare the results obtained in a predominantly White, blue collar mobile home park in Globe, Arizona, with the results obtained in Carver Terrace, an African-American middle class neighborhood in Texarkana, Texas. Marcia Coyle & Marianne Lavelle, *Same Ills, Different Solutions, in Unequal Protection*, *supra* note 7, at S23. After 1979, residents of the trailer park, which had been built on asbestos-contaminated soil, lobbied then Governor Bruce Babbitt, who referred the community leaders to an attorney who served on the committee that worked on the creation of EPA under former President Nixon. *Id.* The attorney filed suit and worked with EPA officials to get the community relocated, eventually recovering approximately \$80,000 per resident. *Id.* Throughout the 1970's, middle class African-American residents in Carver Terrace tried to get their community placed on the Superfund list. *Id.* The community, built on a former wood-preserving plant site, was contaminated with toxic chemicals. *Id.* The site was listed in 1986. *Id.* The federal government offered residents an average of \$30,000 to \$40,000 for their homes. *Id.*

123. Donald A. Brown, *EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241 (1990) (demonstrating through a case study how EPA disregarded congressional preferences for treatment, prohibitions on considerations of cost in initial phases of remedy selection, and applicability of RCRA standards and federal water quality criteria).

124. For a discussion of how political, nonscientific, and ideological positions on cost are hidden behind purportedly objective scientific conclusions, see generally *id.* In this way, inequality of political power is masked, leading in many instances to inadequate cleanup of Superfund sites. Donald Brown examines the weakness of EPA's approach to cleanup standards under Superfund and the extent to which public policy questions are determined by technical experts and hidden in technical language. "If the analyst does not identify how he or she resolved all [scientific] uncertainties, then trans-scientific policy or ethical discourse about the nature of the danger posed by the site may be distorted by what appears to be neutral scientific descriptions of the site's contamination." *Id.* at 282.

highly technical and complicated matters.¹²⁵ Poor and minority communities are again at a substantial disadvantage because of a relative lack of political power, lack of information on technical matters,¹²⁶ and limited litigation resources.¹²⁷

4. *Environmental Jobmail*

The phenomenon of environmental jobmail, sometimes termed "environmental blackmail," is yet another factor that results in disparate exposure to environmental hazards. It presents itself in various contexts and in various forms. Environmental jobmail may involve the use of superior economic power to persuade communities to accept noxious facilities for the promise of jobs to local citizens, or a local employer's overt or implied threat to leave the area if its environmental practices are questioned by the community.¹²⁸ Until recently, the issue of environmental protection in poor and minority communities had been framed as an issue of jobs versus the environment.¹²⁹ Communities with extreme poverty, high unemployment, a shrinking tax base, and decaying business infrastructure, are more vulnerable to the argument that proposals for environmental reforms will result in plant closures, layoffs, and economic dislocation.¹³⁰ Accepting the jobs-for-environment tradeoff presents a tragic predicament for those living in low income and minority communities: risk

125. *Id.* Brown demonstrates how statutory preferences and mandates can be circumvented—resulting in an inadequate cleanup remedy—through a case study of the Douglasville Disposal Site, Union Township, Berks County, Pennsylvania. *Id.* at 287-301.

The more technical [Superfund controversies] become, the more removed they become from public view and less capable of being understood by local citizens whose interests may be affected. Perhaps as a consequence of the complexity of the issues in the Douglasville ROD, for example, the only group that submitted any comments on the sufficiency of the remedy was . . . a group comprised of some of the potentially responsible parties.

Id. at 303; see also Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 *ECOLOGY L.Q.* 173 (1991) (discussing impediments to public participation in the Superfund cleanup process).

126. Persons affected by contamination from a site listed on the National Priorities List (NPL) may qualify for a technical assistance grant to help interpret information regarding the site. 42 U.S.C. § 6917(e) (1988). However, there may be substantial limitations to receiving a grant. See *supra* note 284 (discussing the availability of technical assistance grants).

127. See *infra* note 152 and accompanying text.

128. See generally Robert D. Bullard, *Environmental Blackmail in Minority Communities*, in *RACE AND ENVIRONMENTAL HAZARDS*, *supra* note 7, at 82-95. Dr. Bullard remarks that a combination of compensation and monetary inducements is a strategy proposed to minimize opposition to hazardous waste facilities siting; but the troubling moral question is not adequately addressed: "[S]hould one part of society (the affluent) pay another part of society (the disadvantaged) to accept risks that others can afford to escape?" *Id.* at 84.

129. *Id.* at 83.

130. *Id.* (citing R. KAZIS & R. GROSSMAN, *FEAR AT WORK: JOB BLACKMAIL, LABOR, AND THE ENVIRONMENT* 37 (1982)).

one's job (and the economic viability of the community) if environmentally harmful activities are challenged; or risk one's health (and the community's health) if environmentally harmful activities are not challenged. Environmental justice activists have disputed the framing of the issue as a "jobs or clean environment" choice, but continue to address the very real concerns of economically vulnerable communities.¹³¹ They take the position that health is not an acceptable tradeoff for a job, and that a contrary view is not only morally wrong but makes little economic sense in the long run.¹³²

The goal of environmental justice in poor and minority communities illustrates well the interconnectedness of the physical environment, market economic behavior, bureaucratic behavior, political forces, the dynamics of institutional racism, differing cultural world views, the ability to obtain information, and limited access to political and economic resources. It becomes clear that there is no one solution to environmental injustice. In light of the relative disparity in economic and political resources, unchecked market forces drive environmental hazards to low income and minority communities. Existing regulatory structures and pollution control strategies have not provided sufficient environmental protection. A partial solution may lie in enhancing legal tools available to the strongest advocates of environmental justice: the community residents. Access to the courts under the authority of environmental citizen suit provisions has served mainstream environmentalists and now should be explored for a more targeted mission—environmental justice.

The use of environmental citizen suits, however, must be viewed with an important caveat. Environmental justice activist and attorney Luke Cole makes a convincing argument that traditional forms of litigation often disempower community-based groups when lawyers—the experts—step in and take over.¹³³ He points out that environmental justice struggles are primarily political and economic, not legal, and as a general proposition recommends against lawsuits.¹³⁴ His general observation has even greater force for those environmental citizen suits that are technically complex. Here the potential for the

131. See *supra* note 42 (discussing the need for a participatory process in addressing environmental concerns and the need to address economic impact on communities).

132. See, e.g., Principles of Environmental Justice Adopted at the First National People of Color Environmental Leadership Summit, in ENVIRONMENTAL LEADERSHIP SUMMIT, *supra* note 29, at xiii-xvi.

133. See generally *Empowerment As the Key*, *supra* note 22; Open Letter from Bay Area Environmental Justice Activists, to Environmental Law Clinic Proponents at Boalt Hall Law School, Golden Gate Law School, and Stanford Law School (Dec. 20, 1993) (on file with author) (letter from 12 community groups discussing the potential for well-intentioned legal clinics to foster a "dependency mentality" in their clients).

134. *Environmental Justice Litigation*, *supra* note 18, at 541.

scientific and technical issues to overshadow political objectives is greatest. However, when attorneys undertake to represent low income and minority communities in a manner that is sensitive to the political-organizing aspects of a case, environmental citizen suits can serve to educate and strengthen morale.¹³⁵ The approach taken in this article is to examine environmental citizen suits as a genre, then to investigate the practical limitations given the particular environmental statute at issue, and finally to contemplate the use of citizen suits within the context of an ongoing political struggle that will outlive any particular lawsuit.

II

PRIVATE ENFORCEMENT: CITIZEN SUIT PROVISIONS

EPA, charged with enforcement of most federal environmental laws, lacks the ability to enforce all environmental laws to the maximum extent possible.¹³⁶ Understanding that there would be undesirable underenforcement of environmental laws because of limited regulatory resources, Congress equipped many federal environmental laws with citizen suit provisions, which essentially confer "private attorney general status" on the citizenry.¹³⁷ Under citizen suit provi-

135. See *id.* at 526-30. Luke Cole places traditional environmental litigation at the top of the litigation hierarchy. *Id.*

136. From an economic perspective, broad categorical—and hence, overinclusive—rules are economically efficient when considering the costs associated with evaluating and developing regulatory actions (rulemaking costs) as well as the costs associated with compliance. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 20.3 (3d ed. 1986). Although full enforcement is not economically efficient, EPA, burdened with statutory mandates far in excess of its resources as well as political restraints, falls far short of achieving optimal enforcement. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 880-95 (1985) (discussing causes of inadequate agency enforcement and contemporary views of regulatory enforcement, including an economic view, an activist view, and a behavioral view).

137. A plaintiff suing under environmental citizen lawsuit provisions has been referred to as a "private attorney general." *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972). Citizen suit provisions in major environmental laws include: Act To Prevent Pollution of Ships, 33 U.S.C. § 1910 (1988); Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993); Clean Water Act, 33 U.S.C. § 1365 (1988); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (1988); Emergency Planning and Community Right-to-Know Act of 1986, *id.* § 11046 (1988); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1988); Noise Control Act of 1972, 42 U.S.C. § 4911 (1988); Public Lands Act, 43 U.S.C. § 1349(a) (1988); Resources Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); Safe Drinking Water Act, *id.* § 300j-8 (1988); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1988); and Toxic Substances Control Act, 15 U.S.C. § 2619 (1988 & Supp. V 1993). See generally MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* app. 1 (1991) [hereinafter AXLINE, *ENVIRONMENTAL CITIZEN SUITS*] (listing citizen suit provisions under all federal environmental statutes). Some environmental statutes do not contain citizen suit provisions, notably the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1988 & Supp. V 1993).

sions, private individuals have statutory authority to prosecute members of the regulated community for certain violations of requirements of some environmental laws.¹³⁸ In addition to "enforcement" suits against violators, citizens also have the authority to undertake "action-forcing" suits against public officials—such as the Administrator of EPA—for alleged failure to perform nondiscretionary duties under the environmental law in question.¹³⁹ Although private attorney general status is not without controversy, private enforcement remains an important part of environmental regulation.¹⁴⁰

Early legislative history reveals the practical and philosophical controversy behind the private attorney general concept of environmental citizen suit provisions.¹⁴¹ Some legislators viewed the private citizen action as a welcome supplement to regulatory agencies' inevitable underenforcement due to lack of resources.¹⁴² Other lawmakers saw the provisions as imposing yet another burden on judicial resources.¹⁴³ Commentators, as well, differ in their views on the value of the citizen as enforcer. Some view private enforcement as a dan-

138. See *infra* note 148.

139. Environmental citizen suit provisions allowing suit against the Administrator for failure to perform a nondiscretionary duty are similar to the jurisdictional basis of the Mandamus and Venue Act, allowing federal district courts to hear suits "in the nature of [common law] mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1988). In addition to allowing suits against an agency official for failure to perform nondiscretionary duties, some environmental laws explicitly provide for judicial review of an Administrator's action in promulgating standards and limitations. See, e.g., 42 U.S.C. § 7607(b) (Supp. V 1993); 33 U.S.C. § 1369 (1988) (including review of denial or issuance of permits). *But see* 42 U.S.C. § 6972(b)(2)(D) (1988) (prohibiting action-forcing suits under RCRA to challenge the siting of a hazardous waste facility or to restrain or enjoin the issuance of a permit for such a facility). A private party also may obtain review under general jurisdictional statutes that allow district court review of actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). However, citizen suit provisions under environmental legislation are preferable because they allow fee shifting from one party to another under certain circumstances. See *infra* part III.C (discussing attorney's fees).

140. See generally JEFFREY G. MILLER & ENVIRONMENTAL LAW INST., *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1987); Boyer & Meidinger, *supra* note 136; AXLINE, *ENVIRONMENTAL CITIZEN SUITS*, *supra* note 137; BNA REPORT, *supra* note 16; Symposium, *Citizen Suits: The Privatization of Environmental Law Enforcement*, 8 J. ENVTL. L. & LITIG. 253 (1993). For a criticism of environmental citizen suits, see Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

141. See generally MILLER & ENVIRONMENTAL LAW INST., *supra* note 140, § 2.1, at 3-6.

142. ENVIRONMENTAL POLICY DIV., CONGRESSIONAL RESEARCH SERV., *A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970*, at 226 (1974) [hereinafter *LEGISLATIVE HISTORY OF 1970 CLEAN AIR ACT*]. In the September 21, 1970 Senate debates, Senator Muskie noted the inadequate enforcement on the state and local levels and stressed the need for more enforcement tools, a federal presence, and backup authority. *Id.*

143. *Id.* at 273-79. In the September 21, 1970 Senate debates, Senator Hruska submitted statistics on court congestion in opposition to citizen suit provisions. *Id.*

gerous intrusion into spheres of sovereign authority; others see private enforcement as a device that enhances public participation and ultimately legitimizes the regulatory state.¹⁴⁴ Citizen suit enforcement was recently criticized as ill designed and part of an uncoordinated enforcement scheme that distorts environmental regulation by over-enforcement of some environmental laws and that results in an "off-budget entitlement program for a particular constituency."¹⁴⁵

The final forms of citizen suit provisions in many statutes reflect the inevitable compromise in the debate about the wisdom of private enforcement in the environmental context.¹⁴⁶ Before 1970,¹⁴⁷ citizen suit provisions were common to some nonenvironmental laws, but generally only allowed actions by individuals injured by a violation of

144. Professors Boyer and Meidinger summarize the debate nicely:

Private delegations of enforcement power may be as suspect as private delegations of rulemaking authority because they bypass the existing structure of limited authority and political accountability that confines the powers of the regulatory state. . . . [On the other hand, t]o the extent that regulation serves "the people" rather than "the industry" or "the bureaucrats," it gains legitimacy. Conversely, it forfeits that legitimacy when it becomes captive to the will of the industries or bureaucrats. From this perspective, private enforcement may be viewed as the ultimate legitimating device, since it gives the effective power to initiate regulation back to the people themselves.

Boyer & Meidinger, *supra* note 136, at 842-43.

145. Greve, *supra* note 140, at 385. The author argues that laws are usually overinclusive, thus full enforcement is not socially useful and results in more costs than benefits. Moreover, private enforcers are not generally accountable as are their public counterparts. *Id.* at 344. To the extent that a scheme of private enforcement is badly designed (i.e., providing incentives for pursuing one type of enforcement suit but not providing incentives for pursuing other beneficial types of enforcement suits), private enforcement generates overenforcement. *Id.* at 344-45. An example of overenforcement is prosecution of permit violations under the Clean Water Act National Pollutant Discharge Elimination System (NPDES) program. Because NPDES permit violations are relatively easy to prove, it is often in the defendant's economic interest to settle for less than the penalties a court could impose. See *infra* part II.A.1 (discussing Clean Water Act enforcement suits). Pursuant to the settlement, the funds are then donated to programs that fund environmental improvement projects instead of the U.S. Treasury. The result, argues Greve, is that enforcement actions under Clean Water Act citizen suit provisions have led to overenforcement of the NPDES permit program while subsidizing national environmental groups. Greve, *supra* note 140, at 356, 380-81. Other types of suits may be neglected by national environmental advocacy groups because they do not yield the same benefits. *Id.* at 342, 371.

146. The focus of this article is on citizen suit provisions contained in four major environmental statutes: Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993); Clean Water Act, 33 U.S.C. § 1365 (1988); CERCLA, 42 U.S.C. § 9659 (1988); and RCRA, *id.* § 6972 (1988). These statutes were chosen because they are the major environmental laws most pertinent to environmental hazards that affect low income communities and communities of color, namely, residences near waste sites, lead exposure, air pollution, and consumption of fish from contaminated waters. SUPPORTING DOCUMENT, *supra* note 5, at 7-14; see also *supra* note 45 (EPA Workgroup's findings). Although pesticide exposure was identified as an area of grave concern, FIFRA does not contain a citizen suit provision. See 7 U.S.C. § 136 (1988 & Supp. V 1993).

147. The prototype of the environmental citizen suit provision is § 304 of the Clean Air Act, first enacted by the 1970 Clean Air Act amendments. Similar provisions were subsequently drafted into other environmental statutes with varying degrees of modification.

a federal law.¹⁴⁸ Environmental citizen suit provisions are different in an important respect. They grant citizens the ability to act as real private attorneys general to sue *on behalf of the community at large*, rather than to vindicate individual rights resulting in economic loss.¹⁴⁹ Thus, environmental citizen suit provisions typically provide a means to obtain injunctive relief and do not afford the citizen an avenue to recover damages resulting from violations of environmental laws.¹⁵⁰ Logically, then, citizen suits are fueled by the altruism of the citizen enforcer. Although desirable as a philosophical matter, this might work systematically against the citizen enforcer who is hampered by lack of resources and has to decide whether litigation is worthwhile.¹⁵¹

In addition to limitations as to damages, environmental citizen suit provisions do not give private individuals *carte blanche* authority to sue polluters or government enforcers for any reason. From the perspective of the regulated and the regulators, substantive limitations and strict procedures on citizen suits are desirable and control private enforcement in a manner that complements rather than supplants public enforcement. Procedural and substantive limitations vary depending upon the statute at issue and whether the citizen suit is against a polluter (to force compliance requirements) or against a regulatory official (to perform a nondiscretionary duty). Many such limitations raise environmental justice concerns. As is discussed in detail below, the limitations on private enforcement, when considered from

148. A common example of citizen suits allowing damage actions is suits under the civil rights laws. See, e.g., 42 U.S.C. § 1983 (1988) (mandating that the party violating the statute "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"); see also *Carey v. Phipps*, 435 U.S. 247 (1978) (holding that compensation for actual damages constitutes the basic purpose of § 1983). However, a successful party's failure to prove actual damages will only entitle him or her to nominal damages. *Carey*, 435 U.S. at 247. In addition, prevailing parties may be awarded reasonable attorney's fees at the court's discretion. 42 U.S.C. § 1988(b) (Supp. V 1993). In 1991, Congress enacted the Civil Rights Act of 1991, which allows a claimant who has suffered intentional employment discrimination to recover compensatory and punitive damages. *Id.* § 1981a (Supp. V 1993).

149. See MILLER & ENVIRONMENTAL LAW INST., *supra* note 140, § 1, at 1.

150. Generally, environmental citizen suit provisions give courts authority to consider an injunction against the defendant, and under some statutes, penalties to be paid to the U.S. Treasury. See, e.g., Clean Water Act, 33 U.S.C. § 1365(a) (1988) (allowing for injunctive relief and penalties); Clean Air Act, 42 U.S.C. § 7604(a) (1988 & Supp. V 1993) (allowing for injunctive relief and penalties); RCRA, *id.* § 6972(a) (1988) (allowing for injunctive relief and penalties). However, CERCLA does not allow for penalties. 42 U.S.C. § 9659(c) (1988). Courts have refused to fashion common law damage remedies from violations of federal environmental laws. See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding that no private action for damages exists under the Clean Water Act); *Commerce Holding Co., Inc. v. Buckstone*, 749 F. Supp. 441 (E.D.N.Y. 1990) (holding that there is no private action for damages under RCRA).

151. See generally Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990). Professors Gillette and Krier discuss how public risk litigation, generally, is biased against victim access to courts. *Id.* at 1044-54.

the perspective of low income communities and communities of color, inhibit private enforcement action that might otherwise lessen distributional inequities in environmental protection.¹⁵²

A. Enforcement Actions Against the Polluter

After sufficient notice,¹⁵³ and if a government agency is not already diligently prosecuting an action against the violator,¹⁵⁴ any per-

152. The assertions of this article rest on the fact that community groups in low income communities and communities of color (as a class) tend to have less education and thus less access to technical knowledge of environmental matters and agency processes, and tend to have less financial resources than community groups in wealthier, predominantly White communities. See generally VOICES FROM THE GRASSROOTS, *supra* note 7. Thus, the more complicated, technical, and time-consuming a case, the more an underfinanced community group will be at a disadvantage. Prosecuting complicated actions requires the use of expensive expert witnesses and involves substantial discovery of technological and scientific matters. GRAD, ENVIRONMENTAL LAW, *supra* note 75, § 104[2]. Complicated environmental cases are typically prosecuted by large, national environmental organizations who have the economic resources to finance the suits and the legal expertise in a highly specialized area of law. Greve, *supra* note 140, at 369-70.

153. Generally, a citizen must first provide at least 60 days notice to the alleged violator, the state (where appropriate), and EPA. See, e.g., 33 U.S.C. § 1365(b) (1988) (requiring 60-day notice for Clean Water Act enforcement suits unless the suit concerns new source standards or toxic and pretreatment standards); 42 U.S.C. § 7604(b) (1988 & Supp. V 1993) (requiring 60-day notice for Clean Air Act enforcement suits unless the suit concerns hazardous air pollutant standards violations and violations of SIP compliance orders); *id.* § 6972(b) (1988) (requiring 60-day notice for RCRA enforcement suits unless the suit concerns hazardous waste management); *id.* § 9659(d)(1) (1988) (requiring 60-day notice for CERCLA enforcement suits). Failure to comply with notice provisions may be jurisdictional. In *Hallstrom v. Tillamook County*, 110 S. Ct. 304 (1989), the Supreme Court held that notice provisions of environmental statutes should be strictly interpreted. See Karen P. Ryan, Note, *Hallstrom v. Tillamook County: Interpreting the Notice Provisions of Environmental Statutes*, 8 PACE ENVTL. L. REV. 255, 255-56 (1990).

154. Clean Air Act, Clean Water Act, and RCRA enforcement suits are precluded if the Administrator or state has commenced and is diligently prosecuting a civil action in a federal or state court. 42 U.S.C. § 7604(b)(1)(B) (1988); 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B). The Clean Water Act and RCRA include criminal actions in the limitation. 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B). Court proceedings under the Clean Air Act and the Clean Water Act must seek compliance with standards, limitations, or orders; and court proceedings under RCRA must seek compliance with permits, standards, regulations, conditions, requirements, prohibitions, or orders. 42 U.S.C. § 7604(b)(1)(B); 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(a)(1)(A)-(B).

Some courts have expanded the meaning of "court" to include agency proceedings. See, e.g., *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979); *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980); *North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1991) (holding that a compliance action bars a citizen suit). In some cases, courts have declined to extend "diligent prosecution" defenses to administrative proceedings when the agency's authority to provide relief was more limited. See *Student Pub. Interest Research Group of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131 (3d Cir. 1985) (holding that EPA lacked power under the Clean Water Act to issue penalties and enforce consent decrees, and citizens are not provided the same participation rights); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985) (holding that an administrative consent agreement does not preclude suit); *Washington Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) (holding that a compliance order does not bar a

son may bring a private citizen enforcement action against a member of the regulated community to enforce requirements of the applicable law.¹⁵⁵ Requirements are often, but not always, found in the permits required under the act in question. Some permit violations are easily proven, but other enforcement actions involve matters outside the ambit of clear violations of unambiguous permit requirements and

citizen suit, but active pursuit of administrative penalties does). Some court decisions appear to be grounded in a suspicion of lack of impartiality at the agency level. *Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685 (W.D. La. 1985).

The diligent prosecution limitation to citizen suits appears logical under a theory that private enforcement is only appropriate as a supplement to public enforcement, but some have questioned the effect of a diligent prosecution limitation, considering the dynamics between the regulator and regulated over time. Professor Rodgers argues:

[W]hen the game is played over time under the constraints of reciprocity, short-run pound-of-flesh policies are abandoned in favor of more "cooperative" strategies featuring compliance most of the time and enforcement only occasionally. Those outcomes that evolve to the advantage of the principals may coincide only approximately or not at all with formal legal obligation. A wayward citizens group introduced into this game would be likely to identify a "best" strategy that would depart from the position taken by the other players. Citizen organizations, too, may become cooperative game players rather than isolated iconoclasts, and both kinds of groups may appear in the same lawsuit. The national environmental organizations may put in a tub-thumping, short-term appearance in the long-standing regional environmental lawsuit advocating a quick-kill policy that is an anathema to the citizen advocates who would have to live with it. Turned around, the national environmental groups such as the Natural Resources Defense Council, the Environmental Defense Fund, or the Sierra Club may be in pursuit of a comprehensive bargain that requires a strategy greatly different from the peripheral sniping that is the best course for an outsider who has no hope of cracking the inner circles.

1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 3.4, at 211 (1986 & Supp. 1992) [hereinafter RODGERS, AIR AND WATER] (footnotes omitted).

However, CERCLA precludes citizen suits upon diligent prosecution of "actions" (not just court actions) by the President to require compliance with CERCLA or the Solid Waste Disposal Act. 42 U.S.C. § 9659(d)(2) (1988). There is no requirement that EPA file a court action. RCRA imminent hazard suits are similarly barred by an unusually broad range of court and administrative actions.

155. The Clean Water Act, 33 U.S.C. § 1365(a) (1988), employs the phrase "any citizen," while the Clean Air Act, 42 U.S.C. § 7604(a) (1988 & Supp. V 1993), RCRA, *id.* § 6972(a) (1988), and CERCLA, *id.* § 9659(a) (1988), all use the phrase "any person." Enforcement actions under the Clean Air Act are for violations of "emission[s] standard[s] or limitation[s]," or orders respecting such standards or limitations. 42 U.S.C. § 7604(a)(1). Enforcement actions under the Clean Water Act are for violations of an effluent standard or limitation, or orders respecting same. 33 U.S.C. § 1365(a)(1). Enforcement actions under RCRA are for violations of any effective "permit, standard, regulation, condition, requirement, prohibition or order." 42 U.S.C. § 6972(a)(1)(A). In addition, enforcement suits under RCRA also may be brought against persons who are "contributing to" the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment (known as RCRA imminent hazard suits). *Id.* § 6972(a)(1)(B). Enforcement actions under CERCLA involve violations of any "standard, regulation, condition, requirement or order" under the Act. *Id.* § 9659(a)(1).

standards.¹⁵⁶ Sometimes requirements are found in administrative or court orders issued under the act in question.¹⁵⁷

Regardless of whether the enforceable requirement is easy to isolate or more difficult, the community must *first* become aware of a risk to the public and associate the risk with a suspected violation. A community group with limited resources will find it difficult to obtain information about public risks that may not be readily apparent, and secondly, will find it difficult to mobilize to influence agency response or initiate court proceedings.¹⁵⁸ Thus, the first crucial step in enforcement of environmental laws in poor and minority communities is that the citizens must have the knowledge and resources to detect noncomplying industrial activity within their community.¹⁵⁹ Detecting non-compliance ranges from relatively easy to nearly impossible depending upon the type of polluting activity involved.

1. Clean Water Act Enforcement Suits

Under the Clean Water Act,¹⁶⁰ the detection and prosecution of permit violations are easy relative to other enforcement actions. As such, they constitute a disproportionately large percentage of citizen

156. Compare Clean Water Act NPDES violation enforcement actions, *see infra* part II.A.1, with RCRA endangerment suits, *see infra* part II.A.4.

157. For example, administrative or court cleanup orders issued pursuant to CERCLA may have enforceable requirements. *See infra* part II.A.3.

158. In discussing the inherent bias against citizen access to courts or agencies, professors Gillette and Krier note:

[T]he typical characteristics of public risk—impacts that are latent, diffuse, widely dispersed, of low probability, and nonexclusive—limit the ability of potential and actual public risk victims to gain access to the courts. Our point here is that they can also frustrate the efforts of victims to mobilize for the purpose of influencing agency decisions about risk. Whatever the objective of the mobilization effort . . . considerable amounts of time, effort, and money will be required.

Gillette & Krier, *supra* note 151, at 1067-68 (citations omitted).

159. At a meeting of the subcommittee on enforcement of the National Environmental Justice Advisory Committee, the author suggested that, in addition to federal enforcement efforts targeted at low income and minority communities (termed "EJ communities" by EPA), community groups could be trained in compliance monitoring. Environmental justice activists Richard Moore of SNEEJ and Pat Bryant of the Gulf Coast Tenants Organization responded that they had in the past repeatedly requested such training. Scott Fulton, EPA Deputy Assistant Administrator for Enforcement and Compliance Assurance, then announced that the Agency was developing a pilot project, termed "Partners in Protection," which is an educational program that involves demonstration of sampling and monitoring techniques to minority institutions and local environmental groups. Minority academic institutions will be funded to train local communities and will be given compliance data. The project was scheduled to begin in two EPA regions in the fall of 1994. The project description did not indicate the types of compliance monitoring training that would be provided. National Environmental Justice Advisory Committee Meeting (Aug. 4-5, 1994) (project description on file with author).

160. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat 1566 (1977) (codified at 33 U.S.C. § 1251 (1988 & Supp. V)).

enforcement actions.¹⁶¹ Any facility discharging regulated pollutants into a body of water from a discrete conveyance must first obtain a Clean Water Act permit under the National Pollutant Discharge Elimination System (NPDES) program.¹⁶² In addition to limiting the amount of pollutant discharged with a facility's effluent, an NPDES permit requires its holder to test regularly its effluent and to submit reports with the recorded actual pollutant concentration. The reports are generally available to the public.¹⁶³ It is relatively easy, with minimum training, for a citizen to check and compare the facility permits with the discharge reports if the citizen (or community group) suspects that violations may be causing undue pollution.¹⁶⁴ If there is a violation, the citizen should be able to establish liability at the summary judgment phase of a case simply by submitting the permit and the discharge monitoring reports indicating a discharge beyond permit limitations.¹⁶⁵ It would be relatively easy to train citizens in poor and minority communities to detect and prosecute Clean Water Act violations.

A citizen or community group may also seek penalties to be deposited in the U.S. Treasury. This gives private enforcers some leverage in prosecuting Clean Water Act violations.¹⁶⁶ Often, the defendant (i.e., the discharging facility) and the plaintiff will settle the citizen's suit for a sum generally less than the anticipated penalty amount. Because of the prohibition on recovery of damages, the plaintiff is unable to receive funds from settlements directly. The settlement amount, therefore, upon court approval, is submitted to a special fund for environmental mitigation projects (sometimes called credit projects) instead of the U.S. Treasury.¹⁶⁷ National environmental organizations have been successful in establishing and funding en-

161. BNA REPORT, *supra* note 16, at 10-11; Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 35-53 (1985).

162. 33 U.S.C. §§ 1311(a), 1342(a) (1988).

163. *Id.* § 1318 (1988).

164. Fadil, *supra* note 161, at 37-38 (describing ease of proof of NPDES permit violations).

165. See BNA REPORT, *supra* note 16, at 10-11; Student Pub. Interest Research Group of N.J. v. Monsanto Co., 600 F. Supp. 1479, 1485 (D.N.J. 1985); Sierra Club v. Raytheon Co., 22 Env't Rep. Cas. (BNA) 1050 (D. Mass. 1984).

166. *But see* Beverly M. Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1, 58 (1989-90) (discussing the inability of citizens to collect civil penalties for purely past violations of the Clean Water Act as inhibiting leverage accorded to citizen enforcement efforts).

167. Boyer & Meidinger, *supra* note 136, at 932-33; Greve, *supra* note 140, at 356-59. *But see* Friends of the Earth v. Archer Daniel Midland Co., 780 F. Supp. 95, 101-02 (N.D.N.Y. 1992) (declining to approve a Clean Water Act citizen suit settlement providing for payment of money to three private environmental groups where there was no provision for payment of penalties to the U.S. Treasury).

vironmental mitigation projects with Clean Water Act citizen suit settlements. However, poor and minority communities generally do not have the same capacity to conceive, design, and administer environmental mitigation projects within their communities.¹⁶⁸ Therefore, such communities might not have the same incentives to prosecute Clean Water Act enforcement actions.

In addition, Clean Water Act enforcement suits might be inadequate to address problems in low income and minority neighborhoods because the *standards* promulgated under the Clean Water Act are not sufficiently protective for classes of persons who consume more than the "average" daily amount of fish. Water quality criteria are based primarily upon scientifically determined "safe" concentrations of regulated pollutants discharged into a water body.¹⁶⁹ The determined safe concentration levels are based on assumptions about how frequently the general population consumes fish caught from a given water body.¹⁷⁰ However, many low income and minority communities near waterways are likely to depend upon subsistence fish consump-

168. It takes considerable time and effort to conceive, design, and set up the administrative mechanisms for an environmental mitigation project. National environmental organizations or well-funded community groups may undertake the task, but this is one potential goal that, despite the overall agenda to attain political and economic parity with wealthier communities, may not be feasible for a community group on a tight budget to achieve.

169. 33 U.S.C. § 1313 (1988); 40 C.F.R. § 131.6 (1994). Generally, permit conditions are based on technology-based effluent limitations as long as the applicable standards do not cause the water body to exceed designated water quality standards. 33 U.S.C. §§ 1316, 1342 (1988 & Supp. V 1993). The water quality standards are set with reference to federally promulgated water quality criteria. *Id.* § 1312 (1988). If the water quality criteria are underprotective, then the discharge by multiple sources, all in compliance with technology-based effluent limitations, may not exceed water criteria but still present a threat to area residents with a higher than average intake of fish caught from local waters.

170. SUPPORTING DOCUMENT, *supra* note 5, at 13.

EPA develops its water quality criteria and encourages the states to set water quality standards assuming consumption over a 70-year period of two liters per day of ambient, untreated water and 6.5 grams per day of fish caught in the same body of water In order to determine the amount of fish consumed, EPA examined available studies and decided to use the 1977-78 survey conducted by the United States Department of Agriculture (USDA). All the studies examined had shortcomings. . . . That survey indicated that the average individual consumed 6.5 grams of estuarine fish per day and 14.3 grams of all types of fish per day.

Id. Fish consumption surveys indicate an association between average daily rates of freshwater fish consumption and race/ethnicity. *Id.* at 12-13. For example, if fish caught in a certain area are contaminated with a bioaccumulative pollutant, then consumption of the fish will lead to exposure to the pollutant. The more that the fish are included in the diet, the higher the exposure to the pollutant. EPA found that, on average, Asians are the highest consumers of fish, followed in order by Native Americans, African-Americans, and Whites. *Id.* In addition, certain ethnic populations tend to consume fish with a higher fat content. Fish with a high fat content bioaccumulate lipophilic (fat-loving) pollutants to a higher degree, thus causing a higher exposure to the pollutants in populations that prefer fish with a high fat content. *Id.* There are no adequate studies of urban or rural poor that could elucidate the relationship between fish consumption and poverty. However, it is likely that there are significant numbers of rural and urban poor people who are supple-

tion well above the consumption of the "average person" used by EPA in setting acceptable levels of pollution.¹⁷¹ Consequently, even if all permitted facilities are compelled by citizen enforcers to discharge in strict compliance with their NPDES permits, the populations near waterways may not be adequately protected because of greater than average fish consumption.¹⁷² In such a case, local citizens could not effectively address the threat to their health by prosecuting owners of local discharging facilities under citizen suit provisions because the facilities would be operating lawfully within the requirements of the Clean Water Act.

Ironically, a potential problem raised by the ease of Clean Water Act enforcement suits is that national environmental organizations might be encouraged to target resources (at least those resources budgeted for enforcement suits) to NPDES Clean Water Act violations that are easily proven and have the potential to generate funds for environmental projects.¹⁷³ Thus, underfunded community groups that must rely on pro bono assistance might face a disinclination on the part of environmental organizations to undertake more complicated lawsuits, such as those that involve exposures from multiple and diverse sources of pollutants.¹⁷⁴

2. Clean Air Act Enforcement Suits

Under the Clean Air Act, a private citizen can sue a person alleged to be in violation of an emission standard or limitation.¹⁷⁵ But until the Title V permit program enacted by the 1990 amendments to the Clean Air Act is fully implemented, an enforceable federal "emis-

menting their daily consumption of animal protein by catching and consuming local fish.
Id.

171. *Id.*; see also Patrick C. West et al., *Minority Anglers and Toxic Fish Consumption: Evidence from a Statewide Survey of Michigan*, in RACE AND ENVIRONMENTAL HAZARDS, *supra* note 7, at 100-13 (discussing the statistical interaction effect between race, place of residence, and length of residence in the state).

172. In such a case, the citizens group might have challenged the promulgation of the underprotective water quality standard. As noted earlier, most local citizens groups were not involved in the formulation of laws and regulations; they lacked the resources to challenge promulgations of standards at the national level. Even if the community group had knowledge of the proceedings and the technical and scientific expertise to challenge the underprotective standard, the group might still have other practical obstacles, like the logistics of prosecuting a suit in the District of Columbia, where venue lies for nationally applicable regulations for water quality criteria under the Clean Water Act. See 42 U.S.C. § 7607(b)(1) (Supp. V 1993).

173. See Fadil, *supra* note 161, at 35-53 (discussing the rise of citizen suits against polluters under the Clean Water Act).

174. See *supra* note 81 and accompanying text (discussing the exposure of urban residents to pollutants from multiple sources).

175. 42 U.S.C. § 7604(a)(1) (1988 & Supp. V 1993). In addition, undertaking construction of new or modified major emitting facilities without required Clean Air Act permits is actionable. *Id.* § 7604(a)(3) (1988 & Supp. V 1993).

sion standard or limitation"¹⁷⁶ is not easily identified or prosecuted. Title V of the 1990 amendments establishes a comprehensive permit program for air emissions. Because the permit program is not expected to be fully implemented for several years,¹⁷⁷ this article evaluates private enforcement as it presently exists, then discusses the possible effects of the Title V Clean Air Act permit program on private enforcement.¹⁷⁸ It is important to bear in mind, however, that successful enforcement suits, both presently and when the permit program is in place, depend upon the ability of the community to detect the presence of harmful air pollutants, to find the source of the pollutants (the facility), to identify a federally enforceable requirement, and ultimately, to prove a violation of that requirement.

a. Citizen Suits Under the Existing Clean Air Act Programs

Presently, not all facilities emitting air pollutants¹⁷⁹ are subject to uniform national standards or require a permit under the Clean Air Act.¹⁸⁰ Moreover, although one might think that an "emission standard or limitation" refers to a quantifiable, permitted concentration of a regulated pollutant emitted into the air at a particular rate, this is not always the case. The general definition of "emission standard or limitation" under the Clean Air Act also includes requirements that are not easily subject to measurement, such as requirements relating to operation or maintenance, design and equipment, work practices, and operational standards.¹⁸¹ As a result, identifying the enforceable requirements for a particular business operation is often difficult.

176. *Id.* § 7661 (Supp. V 1993).

177. *See infra* note 208.

178. Such a permit program is likely to substantially affect private enforcement under the citizen suit provisions.

179. Under the Clean Air Act, air pollutant means:

[A]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g) (Supp. V 1993). Despite the inclusive definition, under pre-1990 law EPA chose to actively regulate only about 20 air pollutants: 6 criteria pollutants, *see infra* note 186, 8 hazardous air pollutants for which the Administrator promulgated national standards (asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, mercury, radionuclides, and vinyl chloride), 4 nonhazardous noncriteria pollutants from designated facilities (sulfuric acid mist from sulfuric acid plants, fluoride emissions from phosphate fertilizer plants, total reduced sulfur emissions from Kraft pulp mills, and fluoride emissions from primary aluminum reduction plants), and hydrocarbons from automobiles. JOHN-MARK STENVAAG & CRAIG N. OREN, CLEAN AIR ACT 1990 AMENDMENTS: LAW AND PRACTICE § 2.2 (1991).

180. *See infra* note 183 and accompanying text.

181. In the general definition section:

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180. *See infra* note 183 and accompanying text.

181. In the general definition section:

The first task is to classify each source of air emissions within the plant in question under a complicated scheme.¹⁸² Generally, new

The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7602(k) (Supp. V 1993). In addition, the Clean Air Act citizen suit provision is more broadly defined, allowing citizen suits for a wide range of violations of requirements:

For purposes of this section, the term "emission standard or limitation under this chapter" means—

- (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
- (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or
- (3) any condition or requirement of a permit under [a PSD program] or [a nonattainment program], section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545 (e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or
- (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations[.]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title [relating to federal facilities]) or under an applicable implementation plan.

Id. § 7604(f) (Supp. V 1993).

182. "Stationary sources" mean buildings, structures, facilities, and installations emitting any air pollutant, as opposed to mobile sources, like automobiles and aircraft. *See id.* § 7602(z) (Supp. V 1993). *Compare id.* § 7411(a)(3) (1988 & Supp. V 1993) with *id.* § 7521(b) (1988). A citizen suit by a local citizens group is more likely to be against stationary sources regulated under subchapter I than against the types of industries regulated under other subchapters (e.g., the automobile industry under subchapter II or utility plants under subchapter IV); enforcement suits under other subchapters are more likely to be brought by national environmental groups and are not discussed in this article.

"New stationary sources" are sources in which construction or modification is commenced after publication of regulations prescribing standards of performance for the particular industry category. *Id.* § 7411(a)(2) (1988 & Supp. V 1993). For example, "a primary lead smelter is considered a new source under the law if the construction or modification of that smelter began after October 16, 1974, the date the EPA first promulgated standards of performance for primary lead smelters." SQUILLACE, *supra* note 75, at 53 (citation omitted). Modification means physical changes or changes in operation methods that increase or add emissions of air pollutants. 42 U.S.C. § 7411(a)(2), (4) (1988 & Supp. V 1993).

"Existing source" means any source other than a new stationary source. *Id.* § 7411(a)(6) (1988).

A "major stationary source" is generally a facility that has the potential to emit 100 tons per year or more of any air pollutant. *Id.* § 7602(j) (1988). However, specific statutory provisions of the 1990 amendments modify the definition of a major stationary source. For example, in serious ozone nonattainment areas, a major stationary source is one that has the potential to emit 50 tons or more per year of volatile organic compounds (an ozone

sources of air emissions within a plant must be built according to federal technology-based standards. In addition, the owner of a plant containing sources of air emissions that are both newly constructed (or modified) *and* have the potential to emit large amounts of certain air pollutants, must obtain a permit under the Clean Air Act before commencing construction.¹⁸³ But the majority of stationary sources of

precursor); in severe areas, 25 tons or more per year; and in extreme areas, 10 tons or more per year. *Id.* § 7511a(a)-(c) (Supp. V 1993); *see also id.* § 7512a(c) (Supp. V 1993) (50 tons or more per year of carbon monoxide in serious areas in which stationary sources contribute significantly to carbon monoxide levels); *id.* § 7513a(b)(3) (Supp. III 1991) (70 tons or more per year of particulate matter from sources or groups of sources in a contiguous area).

A "major emitting facility" is generically described in the same manner as a major stationary source. *Id.* § 7602(j). However, major emitting facilities in attainment areas (subject to part C PSD program) include 28 types of sources (e.g., coal-fired utility plants and municipal incinerators) that have the potential to emit 100 tons or more per year of any air pollutant and other (nonenumerated) sources that can emit 250 tons or more of any air pollutant. *Id.* § 7479(l) (Supp. V 1993).

A "major source," subject to exceptions, usually refers to one or more stationary sources in a contiguous area under common control that have the potential to emit 10 or more tons of a hazardous air pollutant or 25 or more tons of a combination of hazardous air pollutants. *Id.* § 7412(a)(1) (1988 & Supp. V 1993). An "area source" is a source emitting hazardous air pollutants that is not a major source. *Id.* § 7412(a)(2) (1988 & Supp. V 1993).

183. New stationary sources must meet new source performance standards (NSPS). Major stationary sources, having located in an area that exceeded a designated national ambient air quality standard (NAAQS) at the time of construction, must use the lowest achievable emissions reduction available (LAER). Major emitting facilities having located in areas not exceeding NAAQS at the time of construction must use the best available control technology (BACT). Facilities emitting certain hazardous air pollutants must not emit in a manner that will violate a national emission standard for an Administrator-listed hazardous air pollutant (NESHAP).

New or modified stationary sources emitting pollutants must comply with technology-based new source performance standards, generally determined by industry category. 42 U.S.C. § 7411(a)(1) (1988 & Supp. V 1993); 40 C.F.R. §§ 60.1-748 (1994). NSPS's are preferably expressed as emissions standards (by regulations that numerically limit concentrations of pollutants in air emissions), but, if infeasible, may be expressed as "a design, equipment, work practice or operational standard, or combination thereof." 42 U.S.C. § 7411(a)(1); *id.* § 7411(h)(1) (1988). However, particular technological systems may not be required as a NSPS. *Id.* § 7411(b)(5) (1988). Instead of requiring a federal permit, each state develops a procedure for implementing and enforcing NSPS's. *Id.* § 7411(c)(1) (1988). Waivers from designated NSPS's may be granted for technological innovation. *Id.* § 7411(j) (1988). To determine the applicable requirement, a citizens group must first determine if the facility was constructed after promulgation of NSPS's for its industry category, then whether a waiver was granted.

Major stationary sources desiring to locate in nonattainment areas are first required to meet certain offset requirements and operate with the lowest achievable emissions rate in order to obtain a construction permit under the Clean Air Act. *Id.* § 7503 (1988 & Supp. V 1993). The permit should reflect the applicable emissions standard.

Major emitting facilities desiring to locate in an attainment area must undergo a review process and demonstrate that potential emissions will not exceed a specified increment, must employ the best available control technology, and must obtain a Clean Air Act construction permit. *Id.* §§ 7470-7491 (1988 & Supp. V 1993). Under the PSD permit program, an emission standard or limitation for each facility is determined to be the maximum

air pollution (which includes small existing sources) has no uniform federal standards, does not require federal permits and, if regulated, is regulated primarily through state implementation plans.¹⁸⁴

The regulation of small existing stationary sources emitting certain air pollutants will depend primarily upon how each state decides to achieve or maintain compliance with national ambient air quality standards (NAAQS).¹⁸⁵ NAAQS pertain to common air pollutants that enter the air from diverse sources (termed "criteria pollutants").¹⁸⁶ Under the Clean Air Act, each state must submit to EPA a state implementation plan (SIP), which contains a variety of strategies and controls designed to reduce emissions of criteria pollutants to achieve or maintain compliance with NAAQS.¹⁸⁷ Control strategies

degree of reduction of pollutants that the administrator determines is achievable for the facility on a case-by-case basis, not to exceed emissions allowed by any new source emission standard or hazardous air emission standard. The permit should reflect the applicable emissions standard and any monitoring requirements. *Id.* § 7479(3) (1988 & Supp. V 1993).

Facilities emitting a hazardous air pollutant for which a health-based national emission standard for hazardous air pollutants was promulgated under pre-1990 law must not emit in a manner that will violate the NESHAP (subject to some exceptions and waivers). *Id.* § 7412(c) (1988 & Supp. V 1993). Under the prior Act, the Administrator was required to publish a list of hazardous air pollutants for which he intended to establish an emission standard. 42 U.S.C. § 7412(b)(1) (1988). The 1990 amendments specifically list 189 hazardous air pollutants, direct EPA to categorize sources into major sources and area sources, 42 U.S.C. § 7412(a)(1)-(2), and require the promulgation of emission standards for all major sources and area sources by the year 2000, *id.* § 7412(c)(1), (e)(1)(E) (1988 & Supp. V 1993). Major sources must use the maximum achievable control technology (MACT) and standards for area sources will be based on generally available control technology (GACT). Pre-1990 hazardous air emissions standards are preserved but may be made more stringent. *Id.* § 7412(g) (Supp. V 1993). For modified major sources, either EPA or the state will define MACT on a case-by-case basis if no emission standard has been promulgated at the time of modification. *Id.* § 7412(g)(2)(A). However, by voluntarily participating in an early reduction program, some sources will have the opportunity to have a six-year extension for complying with new standards. *Id.* § 7412(i)(5) (Supp. V 1993).

184. See generally STENSVAAG & OREN, *supra* note 179, § 2.5. As early as 1981, one commentator noted that approximately 2000 new sources per year fell under Clean Air Act permit requirements, while at least 10 times that many sources were created annually. William F. Pedersen, Jr., *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1089 n.95 (1981).

185. NAAQS are described as the maximum concentration of criteria pollutants applicable for various time periods that is not to be exceeded more than a specified number of times annually. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 676 (1992) [hereinafter PLATER, ENVIRONMENTAL LAW].

186. To date, NAAQS have been promulgated for six criteria air pollutants: sulfur dioxide, nitrogen dioxide, suspended particulates, carbon monoxide, ozone, and lead. *Id.* at 773. By statute, the Administrator must promulgate NAAQS for emissions that may reasonably be anticipated to endanger public health or welfare and come from numerous and diverse sources. 42 U.S.C. § 7408 (1988 & Supp. V 1993).

187. Each state first submits to EPA a list of geographic areas in which criteria pollutants in the ambient air exceed NAAQS. These areas are designated nonattainment areas. 42 U.S.C. § 7507 (1988 & Supp. V 1993). Under the 1990 amendments to the Clean Air

are diverse and depend in large part upon whether the air quality in the geographical area exceeds the NAAQS for a pollutant (a nonattainment area subject to stringent SIP requirements) or not (subject to prevention of significant deterioration (PSD) requirements).¹⁸⁸ Each state may have an assortment of strategies designed to control pollutants, which may range from permit programs requiring certain emitting facilities to limit emissions of criteria air pollutants, to automobile inspection and maintenance programs, to public transportation and traffic control plans, to programs requiring particular equipment for certain industrial activities.¹⁸⁹ Herein lies the dilemma for the citizen enforcer.

A community group wishing to remedy localized harmful air quality would first have to determine the nature of the offending pollution and where the pollution originates. The determination might be easy where there is one plant emitting air pollutants in the area, but would be much more difficult where there are multiple emitting facilities in a small area. Alternatively, a citizen group might decide to investigate selected industrial operations in the area to determine if any are in violation of the Clean Air Act. If a local plant is large and relatively new, or has recently undergone modification or expansion, the owner might have been required to obtain Clean Air Act permits prior to commencing construction of emission sources within the plant. In such a case, the citizen group could check the permits to ascertain the pollutants emitted, along with any applicable technol-

Act, some nonattainment areas are further classified by the degree of nonattainment; for example, nonattainment areas for ozone may be classified as marginal, moderate, serious, severe, or extreme. *Id.* § 7511(a) (Supp. V 1993). Nonattainment areas for carbon monoxide and particulate matter may be designated as either moderate or serious. *Id.* § 7512(a) (Supp. V 1993). Depending upon the severity of nonattainment, a state has a certain amount of time to bring its air quality in nonattainment areas into compliance with applicable NAAQS. *See, e.g., id.* (mandating that moderate nonattainment areas for carbon monoxide must attain NAAQS by December 31, 1995 and serious areas must achieve attainment by December 31, 2000). *See generally id.* §§ 7501-7515 (1988 & Supp. V 1993).

For geographical areas in which the ambient air has concentrations of criteria air pollutants at or below NAAQS, these areas are deemed to be in attainment, but each state must act to prevent significant deterioration of air quality in these areas. *See generally id.* §§ 7470-7479 (1988 & Supp. V 1993).

188. *See generally id.* §§ 7501-7515 (nonattainment); *id.* §§ 7470-7492 (1988 & Supp. V 1993) (prevention of significant deterioration).

189. *See, e.g., Friends of the Earth v. Carey*, 535 F.2d 165, 178 (2d Cir. 1976), *on remand*, 422 F. Supp. 638 (S.D.N.Y. 1976), *vacated*, 552 F.2d 25 (2d Cir. 1977), *on remand*, 76 F.R.D. 33 (S.D.N.Y. 1977), *cert. denied*, 434 U.S. 1310 (1977) (holding that where state and city officials in New York made it sufficiently clear that they would carry out the strategies of a SIP, a metropolitan transportation control plan contained therein was subject to citizen enforcement). *See generally* 42 U.S.C. § 7511a (Supp. V 1993) (plan submissions and requirements for ozone nonattainment areas); *id.* § 7512a (Supp. V 1993) (plan submissions and requirements for carbon monoxide nonattainment areas); *id.* § 7513a (Supp. III 1991) (plan provisions and schedules for plan submissions for particulate matter nonattainment areas).

ogy-based standards and monitoring requirements.¹⁹⁰ Alternatively, the state might have its own permit system in place. But reliance on requirements in state-issued permits is risky because presently there is no mechanism to coordinate permit terms with applicable SIP provisions; SIP requirements may change, while permits do not.¹⁹¹

If a plant owner is not required to obtain a permit under the Clean Air Act or the SIP, the process of isolating federally enforceable requirements is more complicated. The citizen group must first find out if the plant is emitting regulated pollutants and, if so, the sources and concentrations of the pollutants, and the processes resulting in the emissions. Next, the community group must review the SIP to determine if the particular plant's emissions are limited, or if the industry category to which the business belongs is regulated in any manner.¹⁹² The citizen group must then attempt to determine if the requirements contained in the SIP constitute enforceable standards or limitations under the Clean Air Act.¹⁹³ In this respect, state implementation plans have been characterized as "notoriously vague, not to mention fickle and misleading."¹⁹⁴ Even where standards and limitations in the SIP are clearly defined as federal Clean Air Act requirements, standards are often expressed in general terms, and emission monitoring requirements may be equally general or nonexistent.¹⁹⁵

190. The ease of discovering a permit violation will depend upon the permit conditions. It will be relatively easy to discern a violation if the permit contains quantifiable air emission limitations with clear monitoring and reporting requirements. It will be harder to discern a permit violation where the requirements relate to operation and maintenance, design and equipment, or work practices, *see supra* note 181 and accompanying text, or where monitoring or reporting requirements are not clearly stated or are ambiguous, *see infra* note 195.

191. Pedersen, *supra* note 184, at 1093; RODGERS, AIR AND WATER, *supra* note 154, § 310, at 261-62 (describing backlog of SIP revisions).

192. Although states differ, when designing a mix of control strategies to attain NAAQS or prevent significant deterioration of NAAQS, requirements may be stated by reference to industry category rather than by specific facilities. Alternatively, however, a SIP may allocate emissions limitations for stationary sources within the same industry and region on an ad hoc basis. Stephen Fotis, *Private Enforcement of the Clean Air Act and Clean Water Act*, 35 AM. U. L. REV. 127, 169 (1985).

193. *See, e.g.,* City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976) (holding that an underground garage venting pollutants into the air is not a violation of an emission standard or limitation); Wilder v. Thomas, 659 F. Supp. 1500 (S.D.N.Y. 1987), *aff'd*, 854 F.2d 605 (2d Cir. 1988) (holding that an allegation that a development project would aggravate carbon monoxide hotspots within New York City did not constitute an enforceable SIP provision); Citizens for a Better Env't v. Deukmejian, 731 F. Supp. 1448, 1459 (N.D. Cal. 1990) (holding that, although the plan clearly required stationary sources to take contingency measures if the state did not make reasonable further progress to attain compliance with NAAQS, citizen plaintiffs could not "point to any language that expressly links the number of such measures to the attainment of NAAQS or expressly commits to sufficient contingency measures to attain NAAQS").

194. RODGERS, AIR AND WATER, *supra* note 154, § 3.4, at 222.

195. *See* 42 U.S.C. § 7414(a)(1) (Supp. V 1993). Under pre-1990 Clean Air Act provisions, EPA monitoring and emissions reporting were not mandatory for all sources. Moni-

Finally, even where SIP standards are specific and monitoring is required, the problem of obtaining reliable data to detect and prove the violation remains.¹⁹⁶ Sometimes, requirements normally pertaining to the type of air emissions unit involved might be excused if there are decreases in emissions from other units within the plant.¹⁹⁷ Thus, the fact that the facility owner does not have the type of pollution control equipment *required* by law for a particular source category might not constitute a violation. Even monitoring data indicating an excess of emissions *allowed under* the SIP for a particular source category might not establish a violation of a requirement. As a result, one commentator has observed that even where monitoring and reporting is required, "[i]dentifying noncompliance often require[s] assembling, correlating and interpreting monitoring data in light of the applicable standards. Developing a basis for alleging noncompliance [can] be a cumbersome and sometimes uncertain process."¹⁹⁸ A report by the Environmental Law Institute found that few Clean Air Act regulations "require periodic reports on emission levels and there is no uniform system of record keeping of hard, reliable compliance data. Tests are relatively expensive and obviously cannot be performed by prospective plaintiffs."¹⁹⁹

As a result of the difficulty in determining the nature and source of air pollution, isolating a federal requirement, and further proving the violation of an enforceable "standard or limitation," an attorney representing a citizens group in prosecuting a Clean Air Act enforcement action takes a substantial risk that after an expensive investigation, consultation with experts, and perhaps protracted litigation, a

toring emissions directly from the smoke stack is extremely expensive; thus, emissions might be estimated instead by visual observation and theoretical calculations. Fotis, *supra* note 192, at 165.

196. See generally COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, IMPROVEMENTS NEEDED IN CONTROLLING MAJOR AIR POLLUTION SOURCES (1979) (describing inaccuracies in determining compliance by major stationary sources and demonstrating that many sources' compliance was based upon unverified and unreliable data and that these sources were actually in violation).

197. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

198. Scott M. DuBoff, *The 1990 Amendments and Section 304: The Specter of Increased Citizen Suit Enforcement*, NAT. RESOURCES & ENV'T, Fall 1992, at 34.

199. ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES IV-4 (1984) [hereinafter ELI REPORT].

Although air emissions and compliance data is collected by the government under the Clean Air Act's National Emissions Data System (NEDS), and Compliance Data System (CDS) this information is considered highly unreliable and "stale." Often, said an interviewee, CDS data is based simply on subjective, visual observation, because to conduct a proper "stack test" would be too expensive at the estimated cost of \$12,000-\$15,000.

Id. at V-14; see also RODGERS, AIR AND WATER, *supra* note 154, § 3.4, at 209; Fotis, *supra* note 192, at 165.

court would conclude that there was no enforceable standard or limitation, or that the defendant did not violate the permit or SIP requirement.²⁰⁰ In such cases, the citizens group cannot obtain relief or recover costs.²⁰¹ Consequently, poorly funded community groups (and their attorneys) presently have a substantial disincentive to prosecute Clean Air Act violations.²⁰²

An additional disincentive to identifying and prosecuting violations, not applicable to national environmental groups prosecuting like cases, is that the facility in question might employ community residents. If this is the case, compliance monitoring might place some community residents in fear of losing their jobs and a citizens group might be reluctant to challenge the practices of local emitters.²⁰³

b. *Possible Improvements Under the 1990 Clean Air Act Permit Program*

Although national environmental organizations might have the expertise and economic resources to assume the risk inherent in Clean Air Act enforcement suits, resources of national environmental groups are more likely to be used for lawsuits other than Clean Air Act enforcement actions.²⁰⁴ National environmental groups often sue under general judicial review provisions challenging the promulgation of national standards, apparently because such suits have a potentially

200. For example, in 1981 the Sierra Club Legal Defense Fund initiated a number of citizen suits against utilities for violations of the Clean Air Act. ELI REPORT, *supra* note 199, at I-6. The Sierra Club lost the four cases that went to trial in large part because of the procedural issues involving the underlying validity of SIP provisions. *Id.* ("The first decade of experience had given environmental organization enforcers little confidence in [Clean Air Act] citizen suits as a tool.")

201. Technically, costs under the Clean Air Act citizen suit provisions may be awarded to any party "whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d) (1988). One may argue that the citizens group need not be a "prevailing party" or "substantially prevailing party" as is required under other environmental law citizen suit provisions, like RCRA or CERCLA. *Id.* §§ 6972(e), 9659(f) (1988). However, in *Ruckelshaus v. Sierra Club* the Supreme Court held that: "[A]bsent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under § 307(f)." 463 U.S. 680, 694 (1983). Although the Court was construing judicial review provisions, the same rationale would arguably extend to citizen suit provisions.

202. Representative Waxman (D-Cal.) summed up the situation this way:

In theory, even prior to the 1990 Amendments, the [Clean Air Act] provided an opportunity for citizen suits against private sources. However, this authority was rarely used. One reason is that it has proven difficult for citizens to ascertain the control requirements applicable to a source because these requirements were often buried in complex state implementation plans. Also, even where the requirements were known, it was generally not possible—short of hiring engineers and conducting monitoring—for citizens to determine compliance status.

The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1747 (1991).

203. See *supra* part II.A.2.a; see *infra* part II.B.1.

204. ELI REPORT, *supra* note 199, at II-10 (fig. D), III-29 (tbl. 5); Fadil, *supra* note 161, at 32.

broader impact.²⁰⁵ Furthermore, when national environmental groups do prosecute enforcement suits under citizen suit provisions, the suits are often those involving violations of the Clean Water Act NPDES program.²⁰⁶

The permit program mandated by the 1990 amendments to the Clean Air Act might remove some of the present obstacles to Clean Air Act enforcement suits. States were to submit permit programs to EPA for approval by November 15, 1993.²⁰⁷ Once a state's permit program is adopted (or a federal permit program instituted),²⁰⁸ facilities subject to permit requirements have one year to submit a complete permit application.²⁰⁹ Ideally, the permits ultimately issued will clearly define Clean Air Act standards and limitations; clearly define federal requirements pertaining to testing methods, monitoring, record keeping, and reporting; and separate and distinguish "state only" requirements not subject to federal citizen enforcement suits.²¹⁰ Like the Clean Water Act NPDES permit program, reference to the applicable permit and emission reports should provide citizen enforcers adequate information to detect and prosecute violations. In addition to the permit program, the 1990 amendments also grant citizens authority to seek penalties and specifically authorize part of the penalties to be diverted to fund beneficial mitigation projects.²¹¹ In these respects, the amended Clean Air Act citizen suit provision might provide similar structural incentives as the popular Clean Water Act enforcement authority. Unfortunately, however, even after the permit program is in place, other provisions and regulations might undermine citizen enforcement efforts.

For example, states may exempt nonmajor sources from the Title V permit program until EPA completes rulemaking on how to fold the

205. GRAD, ENVIRONMENTAL LAW, *supra* note 75, § 702[3].

206. Greve, *supra* note 140, at 352-54 (tbl. I).

207. 42 U.S.C. § 7661a(d) (Supp. V 1993).

208. EPA has one year to review the state program for approval. *Id.* § 7661a(d)(1).

209. *Id.* § 7661b(a)(2) (Supp. V 1993). The first permit applications are likely to be due in winter 1994, but because states may require permit applications to be submitted at different times, many companies remain uncertain as to the deadline. Russell S. Frye & Leslie S. Ritts, *State Clean Air Act Programs Undefined*, NAT'L L.J., June 28, 1993, at 21, 21. Whether a permit is complete will be determined within 60 days of submission of the permit application. 40 C.F.R. § 70.7(a)(4) (1994). Permit applications must identify all pollutants emitted by the facility regulated under the Clean Air Act, applicable pollution control requirements, test methods for determining compliance, control equipment and emissions-related information, and anticipated alternative operating scenarios. *Id.* § 70.5(c) (1994). The facility may operate under a limited permit application shield pending issuance of the permit. *Id.* § 70.7(b) (1994). Although all terms of a "part 70" permit are enforceable by the Administrator and citizens under the Clean Air Act, the permitting authority is to designate terms and conditions *not required* under the Clean Air Act and not federally enforceable. *Id.* § 70.6(b) (1994).

210. See generally 40 C.F.R. pt. 70 (1994).

211. 42 U.S.C. § 7604(g) (Supp. V 1993).

nonmajor sources into the permit program.²¹² In an area where air quality is adversely affected by numerous small sources, and where new small sources are presently subject to Clean Air Act new source performance standards (NSPS), citizen enforcers might not have the benefit of Title V-mandated, clearly defined, permit conditions to aid in enforcement efforts.²¹³

Another potentially problematic provision of Title V is the "permit shield." This provision provides the permitting authority to state in a permit that compliance with the permit is deemed compliance both with the enforceable requirements of the permit and with requirements explicitly excluded by the permit.²¹⁴ The permit shield has been criticized to the extent that it may be interpreted to exempt a source from specifically applicable provisions if the permit makes reference to a more general but applicable statutory provision.²¹⁵ A liberal interpretation of the permit shield gives a permit applicant the benefit of agency omission in the permitting process.²¹⁶

It is fair to conclude that the highly technical nature of air pollution regulation, coupled with the decentralized nature of SIP's and permit decisions, systematically discourages citizen enforcement. Moreover, implementation of the Title V permit program will do little

212. 40 C.F.R. § 70.3(b) (1994). Further, when EPA promulgates new source performance standards and hazardous air pollutant standards for sources that are nonmajor, the Administrator has the authority to exempt such sources from the permit provisions of title V. *Id.*; see also 56 Fed. Reg. 21,715-16 (1991) (stating that nonmajor sources in nonattainment areas will receive deferral from the title V permit requirements if the state can effectively enforce SIP obligations without using federally enforceable operating permits); see also *supra* note 182. Exempting small sources from title V deadlines and mandates is especially troubling when one considers that: "Because many major stationary sources have adopted reasonably good pollution controls, future progress will depend to a significant extent on improved regulation of smaller source[s]." Latin, *supra* note 85, at 1698.

213. States may subject nonmajor sources to the permit program, but the requirements could be more stringent than federal requirements and likely not federally enforceable. 40 C.F.R. § 70.1(c) (1994).

214. 42 U.S.C. § 7661c(f) (Supp. V 1993); 40 C.F.R. § 70.6(f) (1994). The permit shield will not preclude prosecution of Clean Air Act violations occurring before permit issuance, of requirements of the acid rain program, and of requirements relating to information gathering. 40 C.F.R. § 70.6(f)(3). Emergency order requirements are exempt by statute. 42 U.S.C. § 7661c(f).

215. James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 300 (1992). However, the permit shield will apply provided the applicable requirements are included in the permit and are "specifically identified in the permit." 40 C.F.R. § 70.6(f)(1)(i). Thus, an argument can be made that the permit shield should be narrowly construed and that applicable requirements must be clearly identified. Otherwise, if new requirements become applicable to the facility and the permit term has more than three years remaining, the permitting authority must reopen permit proceedings. 42 U.S.C. § 7661a(b)(5)(D) (Supp. V 1993).

216. A permit may be reopened upon a determination that the permit contains a material mistake or where it must be revised to assure compliance with applicable provisions of the Clean Air Act. 42 U.S.C. §§ 7661a(b)(9), 7661c(a) (Supp. V 1993). However, reopening a permit is a cumbersome process. Miskiewicz & Rudd, *supra* note 215, at 301.

to change the regulatory dynamics that impeded implementation of the pre-1990 Clean Air Act.²¹⁷ Citizens in poor and minority communities are likely to remain at a disadvantage as they generally have fewer resources and access to the expertise needed to determine compliance and prosecute enforcement actions.²¹⁸

3. *Comprehensive Environmental Response, Compensation and Liability Act Enforcement Suits*

The primary focus of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as Superfund, is to clean up contaminated sites.²¹⁹ Enforce-

217. Latin, *supra* note 85. In a discussion of the conflicts between SIP and title V permit programs, professor Latin observes:

The decentralized nature of SIPs and permit decisions will often lead EPA to refuse to substitute its own policy preferences for state or local judgments, and I believe the burden of proof will rest with EPA to demonstrate state choices on permit terms are legally inadequate. Administrative "laws" concerning an agency's need for a credible scientific basis for controversial decisions and need to minimize erosion of political support will militate against EPA reversal of questionable state judgments. Moreover, the low visibility of most permit terms will not induce either state or federal agencies to withstand industry criticism and political leverage in many cases. Thus [control technique guidelines] and Agency oversight procedures may create a higher level of consistency than would otherwise occur, but I predict that many inconsistent treatments in permit terms will be the regulatory norm for the foreseeable future.

Notwithstanding the "loose cannon" quality of many pollution permits, I expect permit terms increasingly to displace SIP plans as the central implementation mechanisms and points of controversy in the nonattainment program. Unlike more general SIP requirements, permits will impose specific controls on specific dischargers. I anticipate that polluters will take an active part in the permit development process in an attempt to negotiate the least onerous terms possible, while environmental groups will only be able to challenge agency determinations or "deals" on a selective basis. This asymmetry of participation will induce many dischargers and regulators to devote the most attention to the permit process. Given the administrative "laws" pertaining to manipulative behavior by private parties, bureaucratic aversion to criticism, regulatory unwillingness to cause social dislocation, and agency desires to demonstrate progress in order to strengthen political support, some states are likely to impose relatively permissive terms in a permit process that may be more flexible, less visible, and less vulnerable to meaningful EPA oversight than the SIP program. I found no indication that Congress recognized that the permit-issuance process provides a new opportunity for dischargers to persuade state regulators to reconsider and weaken present air pollution control requirements.

Id. at 1703-04 (emphasis omitted).

218. Telephone Interview with Deohn Ferris, Alliance for Washington Office for Environmental Justice (Aug. 17, 1994). Ms. Ferris pointed out that the technical nature of a citizen suit puts the posture of the suit squarely into a battle of the experts, with the corporate defendants having more money to hire experts. Additionally, the more technical the lawsuit, the greater the inclination of citizen plaintiffs to turn the matter over to lawyers or the regulatory agencies; and community organization suffers as a result. Another problem Ms. Ferris identified is that EPA and the defendant companies are often left to figure out if air emission levels have been exceeded, and again the community residents are left out of the process.

219. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 7, 35 (1982). Once there has been a release of a hazardous substance on a site, EPA may

ment actions under CERCLA do not involve violations of permit requirements as is common under environmental laws regulating the release of pollutants, like the Clean Air Act and Clean Water Act.²²⁰ Until EPA initiates an action to clean up a contaminated site, there are no "requirements" for the persons responsible for the contamination (potentially responsible parties) to violate. Because CERCLA does not actually *prohibit* the release of hazardous substances, citizens cannot initiate an enforcement action against potentially responsible parties to compel the cleanup of a contaminated site.²²¹ Citizen suit provisions under CERCLA, termed "one of the crueler farces of contemporary environmental lawmaking,"²²² limit enforcement actions to circumstances where the regulatory agency (EPA) first obtains an order against a potentially responsible party to abate an imminent and substantial endangerment, and the potentially responsible party subsequently violates the requirements stated in the order.²²³ As a practi-

clean up the site with funds from the Superfund and then sue potentially responsible parties to recover cleanup costs and replenish the fund. 42 U.S.C. §§ 9604, 9607 (1988). Potentially responsible parties include the current owner or operator of the facility (contaminated site), past owners or operators of the facility, transporters who brought waste to the site, and generators who arranged for disposal of waste at the site. *Id.* § 9607. Alternatively, EPA has the authority to compel a party to clean up a site by an administrative or court order. *Id.* § 9606 (1988).

If EPA elects to clean up the site, it may undertake short-term "removal" actions or long-term "remedial" actions or a combination of both. Removal actions (like temporary evacuation or limiting site access) are actions allowed in limited circumstances where it is necessary to prevent, minimize, or mitigate damage to public health. *Id.* §§ 9604(a), 9601(23) (1988). Remedial actions, which may involve containment or treatment of the contaminated site, are subject to statutory cleanup standards. *Id.* § 9621 (1988). In order for EPA to recover costs from potentially responsible parties, the cleanup must be done in accordance with requirements of the National Contingency Plan (NCP). *Id.* § 9607(a)(4)(B). Under the NCP, long-term remedial actions may be taken only at sites listed on the National Priorities List. 40 C.F.R. § 300.425(b)(1) (1994).

The CERCLA citizen suit provision was first adopted by the Superfund Amendments and Reauthorization Act of 1986. Superfund Amendments and Reauthorization Act § 206, Pub. L. No. 99-499, 100 Stat. 1613, 1703 (codified as amended at 42 U.S.C. § 9659 (1988)).

220. Typically, no federal, state, or local permits are required for removal or remedial actions conducted entirely onsite. 42 U.S.C. § 9621(e).

221. CERCLA does not prohibit the release of hazardous substances. H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 83 (1986), reprinted in 1986 U.S.C.A.N. 3124, 3206. Because CERCLA does not allow citizens to sue to abate imminent and substantial endangerments, citizens cannot directly sue potentially responsible parties to compel a cleanup. *Cf.* 42 U.S.C. § 6973 (1988) (RCRA imminent hazard provisions).

222. 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTE § 8.14(C), at 708 (1992) [hereinafter RODGERS, HAZARDOUS WASTE]. See generally Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 Sw. L.J. 929 (1990).

223. If EPA (or another federal agency) or a state agency elects to clean up a site and seek recovery of costs against a potentially responsible party, see 42 U.S.C. § 9607, a citizens group challenging the cleanup would sue the *government agency* under an action-forcing suit if the cleanup was not in compliance with CERCLA requirements. See *infra* part II.B.2. Thus, the only "requirements" directly imposed upon a potentially responsible

cal result, citizens on or near contaminated areas can obtain relief under CERCLA citizen suit provisions only after EPA elects to take action.²²⁴ This is especially troubling in view of the findings that Superfund cleanups in minority areas take significantly longer than in nonminority areas, and that less comprehensive remedies (like containment rather than treatment) are more often required.²²⁵ Moreover, since minority and low income communities are disproportionately located near commercial hazardous waste facilities and uncontrolled toxic waste sites, these communities are more likely to be adversely affected by the inadequacies of CERCLA enforcement actions.²²⁶

4. *Resource Conservation and Recovery Act Enforcement Suits and Imminent Hazard Suits*

For communities located near solid waste and hazardous waste facilities, a citizen suit under the authority of the Resource Conservation and Recovery Act (RCRA) could provide a remedy in the event of regulatory inaction under CERCLA. RCRA is the federal statute that regulates the disposal, storage, and treatment of solid and hazardous wastes.²²⁷ Under RCRA citizen suit provisions, the citizen group may enforce any RCRA "permit, standard, regulation, condition, re-

party would be pursuant to an abatement order under CERCLA § 106. 42 U.S.C. § 9606. Noncompliance with abatement orders is rare, as the potentially responsible party risks a substantial fine for failure to comply with an order. *Id.* § 9606(b).

224. There are two situations where a citizen may have a direct action against a party without government intervention, but neither situation is likely. The first case occurs where a citizens group undertakes to clean up a site and sue a potentially responsible party for recovery of costs. 42 U.S.C. § 9607(a)(4)(B). It is unlikely that a citizens group in a low income or minority area would have the resources to undertake expensive cleanup of contaminated properties, especially in view of the requirement that cost recovery is conditioned upon compliance with the National Contingency Plan. *Id.* However, for an interesting discussion of the use of CERCLA for medical monitoring cost recovery, see Crawford, *supra* note 22.

The other situation involving a direct action is where a person in charge of a facility has knowledge of a reportable release of a hazardous substance and fails to notify the National Response Center as is required under CERCLA. 42 U.S.C. § 9603(a) (1988); 40 C.F.R. § 302.6 (1994). A citizens group would likely report the release directly instead of prosecuting an enforcement suit where they would have to prove the person in charge had knowledge of the release. Even if a citizens group decided to sue for failure to report, a court might apply precedent under the Clean Water Act that precludes enforcement actions for "wholly past violations." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987); *see, e.g., Lutz v. Chromatex*, 718 F. Supp. 413 (M.D. Pa. 1989) (holding that only current violations are authorized by the CERCLA citizen suit provision); Gaba & Kelly, *supra* note 222, at 942-43 (analyzing the *Lutz* decision).

225. *See supra* note 58 and accompanying text.

226. *See supra* note 34 (summarizing findings in TOXIC WASTES AND RACE).

227. 42 U.S.C. §§ 6901-6992 (1988 & Supp. V 1993).

quirement, prohibition or order."²²⁸ In addition to enforcement suits, RCRA citizen suit provisions authorize private citizens to prosecute an action against any person who is contributing (or has contributed) to the handling of a solid or hazardous waste in a manner that presents an imminent and substantial endangerment to health or to the environment.²²⁹

Each existing hazardous waste facility must have a RCRA permit to operate.²³⁰ A citizen group in a community located near a hazardous waste facility might choose to investigate the facility's compliance with RCRA and prosecute an enforcement action if the facility is violating its permit conditions. However, RCRA enforcement suits have not been aggressively pursued.²³¹ Commentators have suggested that practical proof problems may hinder RCRA enforcement suits, as vio-

228. *Id.* § 6972 (1988) provides that any person may commence a civil action on his own behalf:

[A]gainst any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter[.]

Generally, RCRA, part of the Solid Waste Disposal Act, prohibits the treatment, storage, or disposal of hazardous wastes without a permit or interim status. *Id.* § 6925 (1988). RCRA also regulates generators and transporters of hazardous wastes. *Id.* §§ 6922-6923 (1988). Hazardous waste that is regulated under RCRA is defined by a complicated mix of statutory provisions and regulations. *See, e.g., id.* §§ 6903(27), 6921 (1988); 40 C.F.R. § 261 (1994). The universe of substances defined as hazardous wastes and regulated under RCRA is less inclusive than the universe of hazardous substances defined under CERCLA. *Cf.* 42 U.S.C. § 9601(14) (1988) (CERCLA definition of hazardous substances).

229. 42 U.S.C. § 6972(a)(1)(B) provides that any person may commence a civil action on his own behalf:

[A]gainst any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment[.]

230. *Id.* § 6925.

231. In a 1987 report on citizen actions, 1209 notices of intent to sue under the Clean Water Act, CERCLA, and RCRA (submitted to EPA) were reviewed. *BNA REPORT, supra* note 16. Of the 1209 notices, 265 were brought under RCRA, which could have been RCRA enforcement suits, RCRA imminent hazard suits, or RCRA action-forcing suits. *Id.* at 19. The majority of claims, 882, were brought under the Clean Water Act. *Id.* Although RCRA citizen suit provisions are of more recent vintage than Clean Water Act citizen suits (RCRA citizen suit provisions were first enacted in 1976 and Clean Water Act citizen suit provisions were first enacted in 1972), Clean Water Act citizen enforcement suits were not prosecuted in large numbers until 1983. *ELI REPORT, supra* note 199, at III-10 (indicating that Clean Water Act known notices and suits prior to 1983 were less than 20 per year, yet 108 filings occurred in 1983 and 87 filings occurred in the first quarter of 1984). As of April 30, 1984, there were 27 known RCRA notices of suit. *Id.*

lations are not easily discernable from the documentation required of RCRA permitted facilities.²³²

Further, RCRA enforcement actions contain procedural limitations. In addition to a standard sixty-day notice provision,²³³ civil or criminal court proceedings prosecuted by EPA or the state will preclude a citizen enforcement suit,²³⁴ and "wholly past" violations of RCRA permits are not actionable under citizen suit provisions.²³⁵

A more promising avenue lies in the RCRA citizen suit imminent hazard authority. The standards to be applied under RCRA citizen suit imminent hazard provisions should be the same as the standards under the EPA Administrator's authority to address imminent hazards.²³⁶ EPA has taken the position that its authority under RCRA's imminent hazard provision may remedy hazards brought on by releases to land, water, or air.²³⁷ In this respect, RCRA's imminent hazard authority is "essentially a codification of common law public

232. RODGERS, HAZARDOUS WASTE, *supra* note 222, § 7.6, at 17 (citing D.W. STEVER, LAW OF CHEMICAL REGULATION & HAZARDOUS WASTE 5-133 (1986)).

233. Citizens must provide notice to EPA, the state and the alleged violator of intent to sue and wait 60 days before filing an enforcement suit. 42 U.S.C. § 6972(b)(1)(A). However, the 60-day notice provision is explicitly waived for violations of hazardous waste facility violations. *Id.*

234. *Id.* § 6972(b)(1)(B); *Lykins v. Westinghouse Elec. Corp.*, 715 F. Supp. 1357, 1359 (E.D. Ky. 1989); *Student Pub. Interest Research Group of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1137 (3d Cir. 1985) (looking to the coercive powers of the administrative agency and to procedural similarities to characterize an agency proceeding as a court action under the citizen suit provision). However, the citizen is given a right to intervene in such suits. 42 U.S.C. § 6972(b)(1)(B).

235. *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989) (RCRA violations); *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (Clean Water Act violation). Conversely, the imminent hazard provisions pertains to any person who "has contributed or is contributing to the past or present handling" of a solid waste or hazardous waste. 42 U.S.C. § 6972(a)(1)(B).

236. H.R. REP. NO. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

The authority of the Administrator to address imminent hazards provides in relevant part:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6973(a) (1988); *cf. id.* § 6972(a)(1)(B); *see supra* note 229.

237. Any solid or hazardous waste released into land, water, or air that poses an imminent hazard may support an imminent hazard suit. 56 Fed. Reg. 24,393-95 (1991) (enforcement authority guidance); 40 C.F.R. § 261.1(b)(2)(ii) (1994) (EPA Administrator's imminent hazard authority); *see Orchard Lane Road Ass'n v. Pete Lien & Sons, Inc.*, 16 F.3d 416 (10th Cir. 1994).

nuisance remedies."²³⁸ Unlike common law nuisance doctrine, however, RCRA's imminent hazard provisions may reach a broader range of defendants, specifically government agencies waiving sovereign immunity, and *past or present* generators, transporters, owners, or operators of waste facilities.²³⁹ Therefore, the advantage of RCRA citizen suit imminent hazard actions is that citizen groups may reach a wide range of defendants for dangerous conditions emanating from both operating and *abandoned* waste facilities.²⁴⁰ Since minority and low income communities are located near uncontrolled toxic waste sites in greater numbers,²⁴¹ and EPA has been slow to respond under its CERCLA authority,²⁴² RCRA imminent hazard citizen authority has the potential—at least theoretically—to fill the enforcement gap.

The potentially far-reaching range of the RCRA citizen suit imminent hazard provision is curbed, however, by more stringent notice provisions²⁴³ and by an unusually broad "diligent prosecution" defense. The diligent prosecution defense is typically a way of stating that environmental citizen enforcement actions are precluded when enforcement agencies are diligently prosecuting actions *in court*.²⁴⁴ In addition, however, RCRA imminent hazard suits are precluded when there is an *administrative* response under RCRA or CERCLA.²⁴⁵

238. S. REP. NO. 172, 96th Cong., 2d Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5023. For discussion of the relevance of common law and the *Restatement (Second) of Torts* standards, see Joel A. Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazard Provision: Some Suggestions for a Sound Judicial Construction*, 11 HARV. L. REV. 247 (1987).

239. 42 U.S.C. § 6972(a)(1)(B); see *supra* note 229.

240. H.R. REP. NO. 198, *supra* note 236, at 48.

241. See *supra* note 34.

242. See *supra* note 58.

243. Citizens must provide notice to EPA, the state, and persons allegedly contributing to an imminent hazard, and must wait 90 days before filing suit unless the hazard involves the violation of hazardous waste provisions, in which case suit may be filed immediately after notice. 42 U.S.C. § 6972(b)(2)(A).

244. For a discussion of preclusion of citizen enforcement actions upon an agency's diligent prosecution, see *supra* note 154.

245. Citizen authority enacted in 1984 to prosecute imminent hazard suits under RCRA cannot be invoked while the EPA Administrator or state is prosecuting a RCRA imminent hazard suit (pursuant to 42 U.S.C. § 6973 (1988)) or a CERCLA imminent hazard suit (pursuant to *id.* § 9606 (1988)); is engaging in a CERCLA removal action (pursuant to *id.* § 9604 (1988 & Supp. IV 1992)); or has incurred costs to initiate a CERCLA remedial investigation and feasibility study (pursuant to *id.*) in the course of a remedial action (pursuant to *id.* § 9601 (1988)). *Id.* § 6972(b)(2)(B)-(C). But these statutory limitations have been construed narrowly by the courts. See, e.g., *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988) (holding that mere initiation of a remedial investigation/feasibility study without further action on the part of EPA does not adequately amount to "diligence" to prohibit plaintiff's claim); *Utah State Dep't of Health v. Ng*, 649 F. Supp. 1102, 1108 (D. Utah 1986) ("The prohibition is not intended to bar an action alleging an imminent and substantial endangerment which may exist following the termination of any removal action at the site, where no future remedial action is planned." (citation omitted)); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568,

Where there is such a response, the citizen group may prosecute an imminent hazard action only to the extent that the hazard presented is not adequately addressed by the scope and duration of the administrative order,²⁴⁶ or may intervene only if their interest is not adequately protected.²⁴⁷ In addition, an imminent hazard suit may be precluded as long as the facility is operating within the scope of its permit.²⁴⁸

Once procedural requirements are met, the citizen group would have to establish: (1) "that the conditions at the site present an imminent and substantial endangerment to health or the environment;"²⁴⁹ (2) "that the endangerment stems from the handling, storage, treatment, transportation, or disposal of a solid or hazardous waste;"²⁵⁰ and (3) that "the defendant has contributed or is contributing to such handling, storage, treatment, transportation or disposal."²⁵¹ The imminent and substantial endangerment standard is subject to varying judicial interpretation,²⁵² but courts generally hold that a plaintiff

1574 (5th Cir. 1988) (denying defendant's motion to dismiss despite completion of an EPA study because diligence is a fact issue).

246. 42 U.S.C. § 6972(b)(2)(B); *see, e.g.*, *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1539 (M.D. Pa. 1985) (holding that a citizen suit is not precluded despite a CERCLA order where citizens sought additional remediation of subsurface water contamination, "because they are not challenging the scope of the already existing actions ordered by the EPA, and seek only to add to those actions").

247. The citizen may intervene upon showing an interest in the subject action and establishing that disposition would impair an ability to protect that interest, unless the state or the Administrator can show that the applicant's interest is adequately represented by existing parties. 42 U.S.C. § 6972(b)(2)(E). *But see* *United States v. Hooker Chems. & Plastics Corp.*, 101 F.R.D. 451, 455 (W.D.N.Y. 1985), *aff'd*, 749 F.2d 968 (2d Cir. 1984) (holding, seven days after the RCRA intervention provision was adopted, that citizens have no right to intervene in a government-prosecuted imminent hazard suit). The RCRA imminent hazard intervention provision is more restrictive than intervention provisions under RCRA citizen enforcement authority. *Cf.* 42 U.S.C. § 6972(b)(1).

248. *Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1178 (6th Cir. 1993).

249. *Cf. United States v. Bliss*, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987) (discussing the requirements for maintaining a suit under the Administrator's imminent hazard authority, RCRA § 7003).

250. *Id.* The definition of hazardous waste presenting an imminent and substantial endangerment and subject to EPA and citizen enforcement authority is not limited to hazardous waste defined for purposes of *regulation* under RCRA. 45 Fed. Reg. 33,084, 33,090 (1980) (preamble to hazardous waste regulations). Solid and hazardous wastes giving rise to a cause of action under RCRA imminent hazard provisions may be more broad than hazardous substances giving rise to an action under CERCLA. *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378 (8th Cir. 1989) (noting that the three pesticides in question were considered solid or hazardous wastes under RCRA, but were not hazardous substances under CERCLA).

251. *Cf. Bliss*, 667 F. Supp. at 1313.

252. *See, e.g.*, *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) (holding that, even though the substantial endangerment standard is broadly stated, the Administrator's authority to address an imminent hazard under § 7003 establishes substantive liability); *United States v. Diamond Shamrock Corp.*, 12 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,819, 20,821 (N.D. Ohio May 29, 1981). *Contra* *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1133-34 (D.C. Conn. 1980) ("[S]ection 7003 does not itself estab-

need not prove an emergency or irreparable injury.²⁵³ Even where the plaintiff sustains no actual harm, a release of a hazardous waste that presents a risk of exposure and eventual harm may suffice.²⁵⁴

Where a defendant is not the owner of the site, but is someone who sent hazardous waste to be disposed of (a generator), the plaintiff must establish a causal connection between each defendant generator and the endangerment. This is established upon proof that the *generator's* hazardous substances are at the site and might have contributed to a situation presenting an endangerment.²⁵⁵

Another practical concern to underfunded plaintiffs is that imminent hazard suits, especially those involving complicated pathways of exposure, multiple contaminants, and multiple defendants, may be factually and technically complex. For example, it is often difficult to detect the existence of a dangerous situation posed by minute

lish standards for determining the lawfulness of the conduct of those sued by the United States.").

253. *Waste Indus., Inc.*, 734 F.2d at 165.

254. EPA has taken the position that under its own grant of authority to address imminent hazards, see 42 U.S.C. § 6973, the *risk* of harm must be imminent but the harm itself does not have to be imminent and could occur after a period of latency. 56 Fed. Reg. 24,395-96 (1991); see, e.g., *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (holding that a plume of contaminants in the vicinity of a pond used for recreation and where many residents relied on wells or a groundwater system for drinking water presented an imminent hazard despite a lack of evidence that any resident was in immediate danger of drinking contaminated water); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (holding that an escape of dioxin from the premises presented an imminent hazard despite a lack of proof of actual harm sustained, where the plaintiff established that the escape was in quantities that, under an acceptable but unproved theory, might be carcinogenic, teratogenic, mutagenic, and fetotoxic); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 193-94 (D.C. Mo. 1985), *on remand*, 628 F. Supp. 391 (W.D. Mo. 1985), *later proceeding*, 653 F. Supp. 152 (W.D. Mo. 1986) (holding that an endangerment is substantial when the environment, including birds and wildlife, or the public may be exposed to a risk of harm by virtue of a release or threatened release). In determining whether a release presents a substantial endangerment, the court will consider the amount of waste released, the nature and degree of the hazards, and the routes or potential routes of exposure. *Conservation Chem. Co.*, 619 F. Supp. at 194. *But cf.* *Price v. United States Navy*, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992) (holding that effective barriers to contaminated soil underneath a house prevented the contamination from presenting an imminent and substantial endangerment).

255. See *United States v. Hardage*, 116 F.R.D. 460, 466 (W.D. Okla. 1987) (holding that the proximate cause defense is available to a defendant in an EPA-prosecuted RCRA imminent hazard suit). *But cf.* *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 992 (D.S.C. 1984) (applying a relaxed proof of causation standard in CERCLA cost recovery actions). However, causation is inferred from a wide range of circumstances. See, e.g., *Zands v. Nelson*, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991) (inferring that past owners of a gas station had contributed to soil contamination because the contamination was a direct result of activities relating to operation of the gas station); *Vermont Poultney v. Staco*, 684 F. Supp. 822, 831 (D. Vt. 1988) (holding that the presence of mercury in domestic septic tanks and homes of former employees was sufficient to demonstrate the liability of the manufacturer).

amounts of highly toxic substances in the air, soil, and groundwater.²⁵⁶ Low income and minority communities, disproportionately located in high density industrial areas burdened by pollution from a multitude of sources, would face more difficulty establishing causation.

In addition, RCRA citizen suit provisions have a significant limitation. The citizen enforcer is specifically prohibited from challenging a hazardous waste facility siting decision or issuance of a permit.²⁵⁷ The limitation, an obvious attempt to curb NIMBY-ism,²⁵⁸ was drafted into RCRA citizen suit provisions due to the increasing difficulty in siting hazardous waste facilities. The limitation, however, has had the effect of closing an avenue of redress to communities who may be targeted for siting because of the socioeconomic or racial characteristics of their residents. Although two proposed amendments to the Solid Waste Disposal Act (SWDA) attempted to remedy this situation,²⁵⁹ at present where the socioeconomic and/or racial characteris-

256. However, the EPA Administrator, when receiving information of an endangerment, must promptly post notice at the hazardous waste site. 42 U.S.C. § 6973(c).

257. RCRA specifically provides:

No action may be commenced under [the RCRA citizen suit provisions] by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

Id. § 6972(b)(2)(D) (1988).

258. Although difficult to verify empirically, it is the *success* of NIMBY-ism in affluent White communities that many activists believe is a significant cause of environmental inequity. Telephone Interview with Deohn Ferris, Alliance for Washington Office for Environmental Justice (Aug. 17, 1994). Ms. Ferris points out that there are no studies that attempt to determine (for a particular area and within a particular time frame) the total number of proposed sitings and successful sitings in relation to the racial and economic composition of the surrounding neighborhoods. However, reports such as the Cerrell report, *see supra* note 108, indicate that the decisionmakers in corporations and local governments are acutely aware of the success of NIMBY challenges in affluent neighborhoods and the advantages of shifting siting proposals to poor neighborhoods.

259. Two proposed amendments to SWDA sought to remedy the situation. One version would have amended SWDA subtitle G by adding a provision allowing a citizen residing in a state where a solid waste facility (including hazardous waste facilities) is proposed to be constructed in an "environmentally disadvantaged community" to petition for denial of the permit. *See* H.R. 1924, 103d Cong., 1st Sess. (1993). An environmental law judge would conduct a hearing and approve the petition upon finding that the proposed facility may adversely affect human health or the air, soil, or water in the community. *Id.* at 4-5. However, even upon a finding of adverse effect, the judge could deny the petition if there is no alternative location in the state that poses fewer risks and if the facility will not release contaminants or engage in activity likely to increase the cumulative impact of contaminants. *Id.* at 5. "Environmentally disadvantaged community" is defined as an area within two miles of the borders of the proposed site and where the percentage of ethnic minorities in the population exceeds the percentage in the state or United States, or if 20% or more of the residents are living at or below the poverty line, or if the per capita income of 80% of the residents is below the national average. *Id.* at 6-7. Also included in this definition are communities that already have an operating hazardous waste facility, an abandoned hazardous waste facility, a site where a release (under CERCLA standards) has occurred, a municipal solid waste facility, or a facility whose owner is required to submit a toxic chemical release form under the Emergency Planning and Community Right-

tics of a community are a significant but undisclosed factor in a siting decision, citizens will have little recourse once the siting decision is made.

Briefly, RCRA violations may require detection expertise beyond the capability of community residents. Challenges to facility sitings are precluded under RCRA citizen suit provisions. But if the community is aware of a dangerous situation and the appropriate authorities take no action, the RCRA imminent hazard provision might provide an important avenue of redress. Although a balancing of the equities does not always result in the citizens' favor,²⁶⁰ the wide range of injunctive relief available might make the economic expenditures worthwhile.²⁶¹

B. Action-Forcing Suits Against Regulatory Officials

In addition to enforcement actions against regulated entities, citizen suit provisions allow action-forcing suits against regulatory officials for failure to perform nondiscretionary duties.²⁶² Whether any particular provision involves a discretionary duty is sometimes diffi-

to-know Act for releases likely to adversely affect human health. *Id.* at 7-8. In short, low income communities, communities of color, or communities that have existing sites that pose a hazard could petition for denial of a permit. Effectively, the provision would not give a citizen authority to prosecute a citizen suit (or override the RCRA citizen suit provision limitation), but would allow for stay of the permit proceedings pending a determination on the petition. Presumably, the petition would have to be submitted before the permit is issued. There are no provisions in the proposed legislation precluding review of a denial.

The other proposed amendment to SWDA would have amended subtitle C to provide for the preparation of a community information statement as part of the permitting process for offsite hazardous waste facilities. See H.R. 495, 103d Cong., 1st Sess. (1993). Among other things, the community information statement would describe: effects of the facility on the community; human health impacts associated with wastes; options and mitigation of impacts; demographic characteristics of the community according to race, ethnicity, and income; presence of solid waste facilities or sites where hazardous substance releases (defined by CERCLA) have occurred; and the permittee's compliance record. *Id.* at 3-4.

260. *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993) (finding that injunctive relief may be denied where the plaintiff does not establish irreparable harm).

261. In one suit brought by EPA against former and current owners of a former landfill, the court suggested that a balance of the equities may weigh in favor of court-ordered funding of a diagnostic study of public health threats. *United States v. Price*, 688 F.2d 204, 212-13 (3d Cir. 1982). One court held that the Administrator need not show inadequate remedies at law because an express statute, not common law equity doctrine, provided for an injunctive remedy. *United States v. Waste Indus., Inc.*, 734 F.2d 159, 168 (4th Cir. 1984). *But see United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 143-44 (N.D. Ind. 1980) (holding that the imminent hazard provision is jurisdictional, not substantive).

262. See *supra* note 139. Conceptually, action-forcing suits are not suits in the nature of private attorney general enforcement actions. They are more in the nature of a mandamus action. Since mandamus actions are common for nondiscretionary duties, the action-forcing authority of citizen suit provisions is not as controversial as enforcement authority.

cult to determine, and ultimately the courts are left with the task.²⁶³ In recent years, courts have been increasingly deferential to agency determinations under federal environmental statutes.²⁶⁴ Accordingly, citizens dissatisfied with the level of environmental protection have had little recourse against regulatory officials when an official's action lies within the realm of her discretion.²⁶⁵

1. *The Regulatory Statutes: Clean Air Act, Clean Water Act, and RCRA Action-Forcing Suits*

Action-forcing suits under regulatory statutes usually involve nondiscretionary duties, duties such as meeting statutory deadlines,²⁶⁶ and the duty to take *some* action.²⁶⁷ For example, environmental organizations have been successful in forcing the EPA Administrator to promulgate standards and regulations.²⁶⁸ But the findings supporting

263. See *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976) (rejecting EPA's argument that it has discretion in listing lead as a pollutant to be regulated under Clean Air Act § 108).

264. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROBS. 249 (1991) (discussing the judicial shift from respect for policy decisions of Congress and elevation of environmental values to skepticism of legislative choices, neutrality toward environmental values, and concomitant deference toward EPA decisions).

265. Citizens may challenge agency action under the Administrative Procedure Act, 5 U.S.C. § 702 (1988). However, such challenged actions are subject to intensely deferential standards of review, such as the substantial evidence standard and the arbitrary and capricious standard. *Id.* § 706 (1988). Even if such actions are successful, the citizens group typically must finance the lawsuit, which presents an obstacle to underfunded community groups.

266. See, e.g., *RODGERS, HAZARDOUS WASTE*, *supra* note 222, § 7.6(D)(2), at 17-20 (noting that the prominent examples of RCRA nondiscretionary suits are the deadline suits).

267. *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 896-900 (2d Cir. 1989), *cert. denied*, 493 U.S. 991 (1989) (commenting on the nondiscretionary duty to make some decision concerning revision of sulfur dioxide NAAQS); see also *RODGERS, AIR AND WATER*, *supra* note 154, § 4.5, at 72 (describing clearly defined Clean Water Act mandatory deadlines, and duties to adopt definitions and decide whether certain materials are pollutants); *id.* § 3.4, at 223 (describing Clean Air Act mandatory deadlines, duties to implement policies and promulgate plans, and the duty to initiate rulemaking proceedings); *RODGERS, HAZARDOUS WASTE*, *supra* note 222, § 7.6, at 18 n.81. Professor Rodgers counts 170 nondiscretionary duties under RCRA, but, due to the fine line between discretion and nondiscretion, estimates the number, conservatively, between 150 and 200. *RODGERS, HAZARDOUS WASTE*, *supra* note 222, § 7.6, at 18 n.81.

268. *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (requiring EPA to issue final standards for radionuclide emissions under the Clean Air Act); *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264 (N.D. Ill. 1981) (requiring EPA to promulgate regulations under the Clean Air Act); *Motor Vehicle Mfrs. Ass'n v. Costle*, 647 F.2d 675 (6th Cir. 1981), *cert. denied*, 451 U.S. 907 (1981) (requiring EPA to issue regulations under the Clean Air Act for spare parts and emissions control maintenance); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (holding that EPA has a duty to adopt a definition of "navigable waters" under the Clean Water Act); *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 11-25 (1976) (holding that EPA has a duty to decide if nuclear waste materials are "pollutants" under the Clean Water Act).

the standards and the substantive content of the standards and regulations generally involve agency expertise and discretion.²⁶⁹ Similarly, sometimes there is a nondiscretionary duty to *determine compliance* with the statute²⁷⁰ or to *make a finding* concerning a violation, but the Administrator's decision itself involves discretionary judgment.²⁷¹ Many of the action-forcing suits under regulatory environmental statutes are intended to goad the agencies to take some action in the first instance (otherwise, there is no action to review under more general review provisions). Not surprisingly, many action-forcing suits are brought by national environmental organizations concerned with the potentially broad impact of regulatory agency action and standard-setting rather than by community-based groups engaged in addressing local problems.²⁷²

Action-forcing suits are often luxuries that underfunded citizen groups cannot afford to undertake. Although the timely issuance of standards and requirements is desirable, community-based environmental justice organizations are often preoccupied attempting to remedy exigent local conditions, usually on shoestring budgets. Even if a community group has sufficient resources to launch an action-forcing suit against the Administrator for failure to perform a nondiscretion-

269. However, a challenge to the standard or regulation may be made under judicial review provisions of the Clean Air Act and Clean Water Act. See *supra* note 139.

270. *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 271 (N.D. Ill. 1981) (finding that EPA has a duty to determine whether state SIP's comply with the Clean Air Act).

271. *Wisconsin's Env'tl. Decade v. Wisconsin Power & Light Co.*, 395 F. Supp. 313, 323 (W.D. Wis. 1975) (holding that EPA has a discretionary duty to decide whether a violation occurs, but a mandatory duty to make a finding of violation and, if a violation occurs, to notify); *Atlantic Terminal Urban Renewal Coalition v. New York City Dep't of Env'tl. Protection*, 705 F. Supp. 988, 990-93 (S.D.N.Y. 1989) (finding that EPA's duty to find a violation of a Clean Air Act order to comply with a SIP is discretionary).

272. Ironically, recent court decisions restricting standing to environmental plaintiffs may change this situation. In *Lujan v. Defenders of Wildlife*, the Supreme Court held that Congress cannot confer standing under environmental citizen suit provisions. 112 S. Ct. 2130, 2143-46 (1992). Environmental plaintiffs must now establish a "case or controversy" under Article III. To do so, a citizen must allege and prove an imminent and substantial injury in fact. *Id.* at 2143-44. Since a generalized interest in environmental protection is insufficient, national environmental organizations may have difficulty establishing a concrete injury in fact. See generally Cass Sustein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163 (1992). Citizens groups in poor and minority neighborhoods are more likely to have members concretely affected by underprotective national standards or agency inaction. This situation, in turn, may encourage more coalitions between national advocacy groups and environmental justice activists, thereby bringing environmental justice concerns into the policy debate of suits that have a national effect. Cf. *Conservation Law Found. v. EPA*, 950 F.2d 38, 40-43 (1st Cir. 1991) (holding that environmental groups do not have standing to force EPA to assess CERCLA risks at all federal facilities and that only members living near specific facilities have standing to seek relief); *United States v. AVX Corp.*, 962 F.2d 108, 118 (2d Cir. 1992) (holding that the National Wildlife Federation did not present sufficient specific allegations of environmental injury to have standing to challenge an appeal of a CERCLA consent decree).

ary duty, such nondiscretionary duties may not be the highest priority for environmental justice advocates.

Ironically, and perhaps not coincidentally, it is squarely in the realm of the Administrator's discretion that environmental justice issues arise for consideration and debate. For example, the 1990 Clean Air Act amendments provide opportunities for EPA to consider environmental equity issues, but implementation of equity considerations is entirely discretionary.²⁷³ There are two areas of particular concern that have a potential to disproportionately affect low income and minority communities and that involve agency discretion. First is the ability of a local or state authority (with the Administrator's approval) to establish an air emissions trading program that allows polluting sources to sell their pollution credits to other sources. Emissions trading programs open the possibility of increasing concentrations of emissions in one part of an air basin through trading pollution credits from another part of the basin, thereby potentially creating "hot spots"²⁷⁴ in poor and minority communities.

Second, the EPA Administrator has discretion to approve alternative permitting approaches for new and modified major sources in nonattainment areas that have been classified as zones identified for targeted economic development, which are, by definition, impoverished areas. Generally, if a major emitting facility desires to locate in a nonattainment (dirty) area, it must first establish that its air emissions *will be more than offset by emission reductions* from existing

273. The EPA Workgroup made suggestions in implementing the 1990 amendments: (1) "SIPs could contain simple tracking mechanisms for evaluating their effect on racial minority and low-income populations relative to white and higher-income populations"; (2) EPA may consider equity issues in establishing requirements for state permit programs; (3) EPA may establish clear standards for evaluating the equity impacts of permits for construction of new major sources in nonattainment areas; (4) EPA may provide states with information on the socioeconomic impacts of different control options for use in formulating SIP's; and (5) EPA may consider equity where EPA has input into the structure of emissions trading programs initiated by state and local governments. SUPPORTING DOCUMENT, *supra* note 5, at 22-23. Under provisions that direct EPA to set air quality standards, conduct research programs, and investigate and prepare reports on toxic air pollutants, EPA may incorporate equity considerations. *Id.* at 22-25. As in many provisions, a citizens group may sue under the action-forcing provisions should EPA fail to undertake a particular directive, for example, the failure to conduct a research program on the problem of toxic air pollutants in urban areas pursuant to the Clean Air Act. *See* 42 U.S.C. § 7412 (1988 & Supp. V 1993). But once undertaken, the Administrator's discretion in design and implementation of the directive is broad and is likely to be upheld unless it is deemed to be arbitrary and capricious.

274. SUPPORTING DOCUMENT, *supra* note 5, at 23. *See generally* Nancy J. Cohen, *Emissions Trading and Air Toxics Emissions: Reclaim and Toxics Regulation in the South Coast Air Basin*, 11 J. ENVTL. L. 255, 264-67 (1993) (explaining how a proposed trading program for reactive organic compounds in southern California could lead, overall, to higher levels of hazardous air pollutants and concentrated hot spots in some areas of the air basin).

sources in the area (i.e., an "offset" ratio of more than 1:1).²⁷⁵ This offset requirement ensures that nonattainment areas make reasonable progress in attaining compliance with NAAQS.²⁷⁶ Under special statutory provisions, however, a zone targeted for economic development in a nonattainment area might become host to new or modified major sources without the owners having to obtain a greater than one to one offset ratio.²⁷⁷ The result is that citizens groups in these poorer areas might not be able to force the EPA Administrator (through an action-forcing suit) to require offsets, a suit that could be prosecuted if pertaining to a nonattainment area not targeted for economic development. As the availability of offsets decreases in nonattainment areas, states might utilize growth allowances in poor nonattainment areas, resulting in more sources than would normally occur. There is no indication that environmental justice issues were considered or that environmental justice organizations were directly involved in the legislation of this Clean Air Act provision.²⁷⁸ As a result, community groups are left largely to depend upon the Administrator's initiative in considering environmental equity and implementing protective measures under the Clean Air Act.

In a more general vein, communities of color and poor communities are left to rely on agency discretion in considering environmental justice issues in the promulgation of standards and the enforcement of environmental laws. Thus, the authority that citizen suit provisions confer to institute action-forcing suits under regulatory statutes has little potential to address environmental justice issues in a direct manner. A community-based organization may institute an action-forcing suit if the Administrator fails to promulgate standards mandated by a federal environmental statute. In such a case, the citizen group could prosecute an action-forcing suit, followed by review of agency action if the standard promulgated is underprotective. Such an effort would severely strain the resources of the community group. Perhaps the

275. 42 U.S.C. § 7503(a)(1)(A) (Supp. V 1993).

276. *Id.* § 7502(c)(2) (Supp. V 1993).

277. SUPPORTING DOCUMENT, *supra* note 5, at 24. New and modified major sources locating in zones targeted for economic development might be subject to subsection (a)(1)(B) and not to subsection (a)(1)(A), which requires greater than one to one offsets. 42 U.S.C. § 7503(a)(1)(B). EPA has taken the position that in a nonattainment area, which has an inadequate SIP, a major source may not take emissions credit for existing growth allowances unless the area is in a zone targeted for economic development. 57 Fed. Reg. 13,554 (Apr. 16, 1992). In addition, new growth allowances are generally restricted unless the area is a zone targeted for economic development. *Id.*

278. There is no specific legislative history on this particular provision. The provision might be in response to an expressed concern that it will be exceedingly difficult for an active air emissions market to develop in economically stagnant areas. *See, e.g.*, RICHARD A. LIROFF, AIR POLLUTION OFFSETS: TRADING, SELLING, AND BANKING 27 (1980). Regardless of the reasons for, or merits of, the provision, the decision was made at the level of national policy without participation of the affected communities.

best solution in such a case is for the community residents to join forces with a national environmental organization that has the expertise and financial resources to undertake such an expensive and daunting task.²⁷⁹

2. *A Remedial Statute: CERCLA Action-Forcing Suits*

The cleanup of contaminated sites under CERCLA may be accomplished in several ways: (1) by a cleanup funded by EPA (using Superfund money) accompanied by a cost recovery action against the potentially responsible parties; (2) by a cleanup pursuant to an agreement among the potentially responsible parties; or (3) by an order compelling a potentially responsible party to undertake a cleanup of the site under EPA supervision.²⁸⁰ One might contemplate that a community faced with exposure from a contaminated site could institute an action-forcing suit to compel EPA to take action to clean up the site. However, CERCLA *authorizes* EPA to take action but does not expressly *mandate* the cleanup of contaminated sites.²⁸¹ Once EPA elects to clean up a site (either through the Superfund process or by supervising the cleanup assumed by the potentially responsible parties), CERCLA and the National Contingency Plan (NCP) requirements govern the adequacy of the cleanup.²⁸²

Until EPA initiates action, a citizen's action-forcing suit is premature.²⁸³ Even then, there are barriers to an action-forcing suit to challenge the legal adequacy of the anticipated cleanup.²⁸⁴ The first two

279. See *infra* part III.A.

280. See *supra* note 219 and accompanying text.

281. Generally, the EPA Administrator is authorized but not required to: (1) take responsive action upon discovery of a release or threatened release of hazardous substances, (2) use Superfund monies to clean up a site, and (3) proceed against potentially responsible parties in a cost recovery action. 42 U.S.C. § 9604 (1988). Alternatively, EPA may seek a court or administrative abatement order compelling a party to undertake necessary action. *Id.* § 9606(a) (1988).

282. The 1986 Superfund Amendments and Reauthorization Act added a section that does not contain specific numerical cleanup standards, but is a descriptive approach, requiring that cleanup standards must attain "legally applicable or relevant and appropriate state or federal standard[s], requirement[s], criteria, or limitation[s]." *Id.* § 9621(d)(2)(A)(ii) (1988).

283. An exception to this is that EPA must take steps to assure that federal agencies assess contamination of facilities that the agencies own or operate, and the Administrator is to evaluate the facilities for possible listing on the National Priorities List. *Id.* § 9620(d) (1988).

284. EPA must publish notice and an explanation of the proposed cleanup plan and afford a reasonable opportunity for public comment. *Id.* § 9617(a) (1988). Persons affected by a release from a contaminated site listed on the NPL may apply for a technical assistance grant to interpret information regarding the nature of the hazard, remedial investigation and feasibility study, record of decision (ROD), remedial design, selection and construction of the remedial action, operation and maintenance, or removal action at such facility. *Id.* § 9617(e) (1988). The grants may be up to \$50,000, but are subject to a 20% contribution requirement by the applicant, which may be waived. *Id.* § 9617(e)(2). How-

obstacles are procedural. First, a citizens group cannot sue prior to a cleanup, but must wait until the government has completed a distinct phase in the cleanup process.²⁸⁵ This puts the citizens group in the position of asking the court to have EPA undo what has already been done, usually at considerable expense.²⁸⁶ Second, the community group will face practical difficulties unless the community is near or in the Washington, D.C. area, where venue lies for action-forcing suits under CERCLA.²⁸⁷

The third impediment is substantive. Although CERCLA and the NCP requirements have strong language concerning the nature and degree of remediation, upon closer examination EPA has much more discretion than it would appear from reading the statute.²⁸⁸ For

ever, applicants for technical assistance grants must meet recordkeeping and financial accountability requirements, and must be incorporated as nonprofit organizations for the purpose of addressing the Superfund site for which the grant is provided. 40 C.F.R. § 35.4020 (1994). See generally *id.* § 35, subpt. M (1994). These and other requirements may preclude community-based organizations from receiving grants. Deoohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in Superfund Cleanups*, 21 *FORDHAM URB. L.J.* 671, 678-79 (1994) (stating that deficiencies in the grant process include a lengthy and labor intensive application process, procurement procedures that make it difficult to hire a technical advisor, and reimbursement procedures that delay grant payments to communities). After the notice and comment period, EPA may issue a record of decision that summarizes the final cleanup plan.

285. 42 U.S.C. § 9613(h)(4) (1988). For comments on applying the limitation, see H.R. REP. NO. 962, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3276. For example, "a challenge could lie to a completed excavation or incineration response in one area, as defined in a Record of Decision, while a pumping and treating response activity was being implemented at another area of the facility." *Id.*, reprinted in 1986 U.S.C.C.A.N. at 3276.

Professor Jarman points out that this unfortunate provision has a silver lining. Sometimes, the threat of a suit after the completion of an expensive phase of a cleanup remedy brings the community group into negotiations involving remedy selection at an earlier stage than would normally occur.

286. For example, if the government chooses a particular method of treatment—incineration to treat contaminated soil—a citizen group must wait until the expensive incineration process is completed to challenge the adequacy of the method.

287. Action-forcing suits under CERCLA may be brought only in the District Court for the District of Columbia. 42 U.S.C. § 9659(b) (1988). This venue provision is more restrictive than the jurisdiction and venue provisions under other major environmental statutes. Under the Clean Air Act, district courts have jurisdiction to hear action-forcing suits for agency actions unreasonably withheld, unless the delay pertains to promulgation of ambient air standards. In the latter case, the Court of Appeals for the District of Columbia has exclusive jurisdiction. *Id.* §§ 7604(a), 7607(b) (1988 & Supp. V 1993). Under the Clean Water Act, jurisdiction for action-forcing suits lies in the district courts unless the suit challenges the promulgation of standards, which must be brought in a court of appeals. 33 U.S.C. §§ 1365(a), 1369(b)(1) (1988). Action-forcing suits under RCRA may be brought either in the district court for the district in which the alleged violation occurred or in the District Court for the District of Columbia. 42 U.S.C. § 6972(a) (1988).

288. Under CERCLA: "Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment." 42 U.S.C. § 9621(b)(1) (1988) (emphasis added). "If the Presi-

example, there is a clear statutory *preference* for treatment over containment of contamination, but the choice of remedy is ultimately discretionary.²⁸⁹ Similarly, there is a requirement that remedial actions selected "shall" attain a degree of cleanup "which assures protection of human health and the environment,"²⁹⁰ but the judgment as to what constitutes a sufficiently protective cleanup involves discretion. This discretion has troubling significance considering the National Law Journal's findings suggesting that containment is the preferred remedy in minority areas while treatment is the preferred remedy in nonminority areas.²⁹¹

C. Attorney's Fees and Costs Under Citizen Suit Provisions

The citizen suit provisions of the Clean Air Act allow an award of attorney's fees and costs where appropriate.²⁹² Citizen suit provisions of the Clean Water Act, RCRA, and CERCLA provide for an award of attorney's fees and costs to prevailing parties or substantially prevailing parties.²⁹³ Environmental "fee shifting" provisions are a nec-

dent selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected." *Id.* Thus, there is a clear statutory preference for treatment of contamination rather than containment, but the only apparent nondiscretionary duty under CERCLA § 121(b) is that the President "shall" conduct an assessment of permanent solutions, treatment, and recovery technologies that will result in permanent reduction of toxicity, mobility, or volume of hazardous substances. *Id.* There are statutory requirements for the content of the assessment, but the selection of the alternative appears to be discretionary. *Id.*

289. *Id.*

290. *Id.*

291. See *supra* notes 7, 58 and accompanying text.

292. 42 U.S.C. § 7604(d) (1988). The "where appropriate" standard may have been inserted into the citizen suit provisions of the Clean Air Act to allow a court to award attorney's fees against plaintiffs who bring frivolous claims or to favor a plaintiff who prosecutes a claim in the public interest, regardless of the outcome of the case. MILLER & ENVIRONMENTAL LAW INST., *supra* note 140, § 9.2, at 98. When interpreting the "where appropriate" standard for plaintiff recovery, however, courts similarly decline recovery for purely procedural or "trivial" victories, but may award recovery where the plaintiff, although not completely prevailing, obtains some success on the merits. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983). Thus, citizen plaintiffs may be denied recovery and risk having to pay defendant's fees if they settle a case without establishing a fairly clear causal connection between the claim and the outcome.

293. Clean Water Act, 33 U.S.C. § 1365(d) (1988); RCRA, 42 U.S.C. § 6972(e) (1988); CERCLA, *id.* § 9659(f) (1988). The prevailing party standard parallels the civil rights standard and has been interpreted in the same manner. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986). This is problematic because in traditional civil rights cases the plaintiffs prevail by vindicating personal rights and obtaining financial compensation. See *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988). Thus, absent a final judgment, plaintiffs must typically establish a causal relationship between the litigation they bring and the outcome finally realized. *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 497 (9th Cir. 1987); *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981) (commenting on the plaintiff's actions as a contributing factor in bringing about desired changes or as a material factor in bringing

essary incentive to environmental enforcement because few private plaintiffs can afford to finance expensive environmental litigation that typically results in nonmonetary benefits to the public at large (rather than damage awards to the individual plaintiffs).²⁹⁴ Once a plaintiff demonstrates to the court that an award is appropriate (when the plaintiff prevails in some respect or the lawsuit is a contributing factor to the defendant's ultimate actions), then the court may award reasonable attorney's fees. The appropriate amount of fees is calculated as the product of reasonable hours times a reasonable rate, the "lodestar" amount.²⁹⁵ The hourly rate is based on the attorney rates of the area where the action is brought, not where the plaintiff's attorney practices.²⁹⁶

Recently, the U.S. Supreme Court held that the lodestar amount cannot be adjusted to account for the contingency nature of many environmental citizen suits.²⁹⁷ A blanket prohibition on contingency adjustments has obvious disadvantages for underfunded citizens groups who are unable to guarantee their attorney compensation other than court-awarded fees.

about defendants' actions); *Lampher v. Zagel*, 755 F.2d 99, 104 (7th Cir. 1985) (finding that the plaintiffs' efforts contributed to a favorable outcome in a significant way). Plaintiffs must also demonstrate a recovery on at least one substantial claim, not only on relatively minor claims. *Reel v. Arkansas Dep't of Correction*, 697 F.2d 693 (8th Cir. 1982) (civil rights suit).

294. See generally AXLINE, ENVIRONMENTAL CITIZEN SUITS, *supra* note 137, § 8.01; Boyer & Meidinger, *supra* note 136.

295. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2640-41 (1992).

296. See *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 392 (2d Cir. 1985).

297. In *Dague*, the Supreme Court reversed a lower court's upward adjustment of a lodestar amount to reflect the fact that plaintiff's attorneys were retained on a contingent fee basis and assumed the risk of receiving no payment for their services. 112 S. Ct. at 2643-44 (1992). The district court had found that the risk of not prevailing (in a Clean Water Act and Solid Waste Disposal Act enforcement case) was substantial and, without an opportunity for enhancement, plaintiff would have faced substantial difficulty in obtaining counsel. *Id.* at 2640. The Supreme Court announced that a contingency adjustment is not appropriate because an attorney's "contingent risk" is the product of two factors: (1) legal and factual merits, and (2) difficulty of establishing those merits. See *id.* at 2641. The second factor is already reflected in the lodestar amount, and an adjustment to compensate for the first factor would encourage nonmeritorious claims. *Id.* Justice Scalia's reasoning in *Dague* does not consider that only successful plaintiffs receive fee awards. Michael D. Axline, *Decreasing Incentives To Enforce Environmental Laws: City of Burlington v. Dague*, 43 J. URB. & CONTEMP. L. 257, 265 (1993) [hereinafter *Decreasing Incentives*]. In a dissent to the majority opinion in *Dague*, Justice Blackmun observed:

Even the *least* meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be economically preferable to the *most* meritorious fee-bearing claim in which the attorney will be paid only if he prevails, so long as the cases require the same amount of time. Yet as noted above, this latter kind of case—in which potential plaintiffs can neither afford to hire attorneys on a straight hourly basis nor offer a percentage of a substantial damage recovery—is exactly the kind of case for which the fee-shifting statutes were designed.

Dague, 112 S. Ct. at 2647 (Blackmun, J., dissenting).

Even when one considers the altruistic and environmental motivation of attorneys in accepting cases for representation, underfunded community groups are still at a disadvantage. An attorney motivated by the environmental cause would likely choose to prosecute those cases in which he or she is able to obtain an hourly rate (or at least a negotiated flat rate) from the client in the absence of court-awarded fees.²⁹⁸ Consequently, community groups from wealthier communities are more likely to be in a better position to obtain representation by supporting the contingent nature of court-awarded fees with an alternative fee arrangement. Very wealthy citizen plaintiffs can pay the lawyer's normal hourly rates; middle income citizen plaintiffs may be able to offer a lower hourly rate or a flat rate (partial pro bono); and low income citizen plaintiffs are unlikely to be in a position to offer any payment for attorney fees, as any available funds are likely to be marked for litigation expenses. It is in the attorney's best economic interest to take the case of the wealthy client or the middle income client.

The citizens group must find an environmental lawyer who is willing to take the case without any guarantee that the plaintiffs will prevail. Few private attorneys are willing to undertake expensive lawsuits on behalf of underfinanced citizens groups, especially without the incentive of a contingent fee arrangement or an hourly rate agreement backed by a retainer.²⁹⁹ Public interest legal services organizations, which normally serve low income clients, often lack the resources and sometimes the expertise to undertake complex environmental litigation.³⁰⁰ This leaves citizens groups with little recourse but to seek pro bono assistance from environmental organizations with substantial resources and litigation missions.³⁰¹ Although recently national environmental organizations have provided assistance to citizens groups,

298. This assumes that the attorney or law firm is motivated by the environmental cause, but not necessarily by the environmental justice cause. In addition, some environmental law public interest law firms have made it a policy to pay costs associated with environmental suits across the board, in which case underfunded community groups may not be at a disadvantage.

299. This may differ from attorneys who will undertake civil rights suits on behalf of individuals who do not have economic resources. Civil rights lawsuits are not as likely to involve complicated scientific and technical issues, and may come to a resolution more quickly. Moreover, civil rights attorneys may be better able to handle many civil rights cases at one time, whereas large environmental suits will take up more time, resulting in lost opportunities for the lawyer.

300. See *Empowerment As the Key*, *supra* note 22, at 659-60.

301. The national environmental organizations most prominent in litigating environmental cases are the Natural Resources Defense Council, the Environmental Defense Fund, and Sierra Club. GRAD, *ENVIRONMENTAL LAW*, *supra* note 75, § 1.04.

the environmental organizations have no obligation to do so and may have different litigation priorities.³⁰²

Underfinanced citizens groups face other practical problems. Recovery of legal costs occurs, if at all, at the end of the lawsuit. Meanwhile, the citizens group must be able to finance the lawsuit, which may require significant discovery costs, expert witness fees, and transportation costs (if the suit is not local). Although compensation for the delay factor may be subsumed in the lodestar amount if attorney's fees are awarded, the problem of up-front financing is still a significant obstacle for underfunded community groups.³⁰³

Clearly, fee shifting is an incentive to private enforcement generally, although arguably not enough of an incentive considering the expense involved in undertaking complex environmental litigation. The Supreme Court has further limited the incentive structure by prohibiting contingency adjustments. The practical difficulty of financing complex environmental citizen suits, combined with substantive and procedural limitations of enforcement suits generally, presents substantial impediments to court access for community-based environmental justice groups in low income and minority communities. Considering that enforcement suits or imminent hazard suits under RCRA are direct and efficient ways to address the localized effects of environmental inequities, the incentive structure of citizen suits could be adjusted to provide better court access at the local level, thus serving to lessen the disparity in environmental protection.

III

POSSIBLE SOLUTIONS

EPA could begin a serious environmental justice initiative by creating a comprehensive educational program wherein community residents would be trained to detect noncompliance of common federal regulatory environmental laws, like the Clean Air Act. Courts and administrative bodies could use discretion under environmental citizen suit provisions to consider environmental justice issues in award-

302. MILLER & ENVIRONMENTAL LAW INST., *supra* note 140, § 2.3, at 10 (discussing use and evaluation of citizen suits). "NRDC initially focused its attention on major industrial discharges with repeated violations of national pollutant discharge elimination system (NPDES) permits in New York and New Jersey." *Id.* § 2.3, at 11.

303. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, the Court noted that: "[C]ourts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." 483 U.S. 711, 716 (1987). Nevertheless, without a contingency factor, amicus briefs filed in the *Dague* case note that even public interest attorneys need to pay their bills and that as an economic reality, attorneys will decline meritorious contingency cases in favor of hourly-fee-paying clients. *Decreasing Incentives*, *supra* note 297, at 270-71.

ing attorney's fees and determining penalties. In addition, Congress may amend environmental legislation to address environmental justice concerns and may do so without leaving environmental statutes vulnerable to NIMBY challenges. Admittedly, these proposed solutions are "band-aids" for a pervasive and complicated phenomenon. However, the solutions are consistent with the environmental justice perspective, which calls for a direct response to the social context in which environmental laws are enforced.³⁰⁴

A. *Training Communities To Detect Noncompliance*

The first step in a successful private enforcement program is to make citizens knowledgeable about environmental laws and capable of monitoring facilities in their areas to determine compliance with environmental laws. EPA, along with state agencies that administer federal environmental laws, could greatly enhance enforcement in poor and minority neighborhoods by training community residents in sampling and monitoring techniques.³⁰⁵ The training should ideally focus on the more complicated regulatory regimes, like the Clean Air Act and RCRA, which are presently underutilized by citizen enforcers. Training programs could be targeted to those communities suffering pollution from multiple and diverse sources, areas with large poor and minority populations, and/or areas where there is a history of excessive noncompliance. It is crucial that training be comprehensive and sufficiently detailed so participants can achieve a high level of certainty in detecting violations. Although training programs will not address all obstacles, such as environmental jobmail and siting inequities, they have the potential to aid in the empowerment of communities, which is critical to a lasting environmental justice initiative.

B. *Equity Lodestar Adjustment*

At least one commentator has persuasively argued that, to encourage private enforcement, it is imperative that Congress enact legislation authorizing contingency enhancements to attorney's fee awards.³⁰⁶ Removing the disincentive caused by the Supreme Court's

304. See *supra* part II.C.

305. See *supra* note 159. The strategy of the pilot training program proposed by EPA attempts to develop community capacity by funding local minority academic institutions to train local communities in sampling and monitoring, and by supporting local environmental law clinics to work with communities seeking to redress problems not addressed by regulators. However, if EPA or state officials were to work directly with community groups, instead of through intermediary academic or legal institutions, vital communication links could be enhanced and accountability would not be shifted to nonregulatory institutions.

306. *Decreasing Incentives*, *supra* note 297, at 273. Professor Axline argues that an unmodified hourly rate lodestar system is not a sufficient incentive because it does not

prohibition on contingency enhancements will undoubtedly benefit low income and minority communities by providing greater access to courts. More specifically, however, an attorney's fee lodestar adjustment may be targeted to remedy environmental inequity. In the absence of congressional amendment of citizen suit provisions, judges could allow an upward lodestar adjustment, not as a contingency adjustment, but specifically to encourage and reward private attorneys who undertake enforcement actions in low income and minority neighborhoods (i.e., an "equity adjustment").

The Supreme Court noted that the fact that a case involves an issue of public importance has no bearing upon the issue of the risk of loss or whether that risk should be compensated.³⁰⁷ In contrast, however, public policy would be central to an equity adjustment and therefore a reason to adjust the lodestar. If one accepts distributional equity in environmental protection as a legitimate and important public goal, then an upward lodestar adjustment is appropriate.

Fee shifting in the private attorney general context serves several important purposes, not the least of which is the incentive for citizens to bring suits that provide a recognized social benefit. In the case of environmental citizens suits, the recognized social benefit is the enforcement of environmental laws. One can assume that Congress (and the courts) had this general purpose in mind in developing the present fee shifting system based on a market rate lodestar calculation.³⁰⁸ However, in allowing attorney's fees based on the lodestar for environmental citizen suits across the board, Congress did not specifically address environmental justice concerns: that minority and low income communities suffer disparate environmental hazards due in part to a relative lack of resources as a class. Therefore, an upward adjustment is necessary to further another important policy objective *that is not already subsumed in the lodestar calculation*.³⁰⁹ An adjustment should be sufficient to provide an incentive to encourage attor-

account for the contingency nature of citizen suits. He argues that standard enhancement of 10% or 15% would provide sufficient incentive for lawyers to take citizen suit cases while avoiding protracted litigation over the myriad variables impacting the risk of loss in individual cases. *Id.* at 268.

307. *Delaware Valley II*, 483 U.S. at 716.

308. Congress endorsed lodestar market rate calculations of attorney's fees. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908. The lodestar may be adjusted by factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

In *Dague*, Justice Scalia noted that there was a strong presumption that the lodestar represented the appropriate fee, but conceded that there may be instances where a lodestar adjustment may be warranted. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2641 (1992). He went on to hold, however, that "an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.*

309. In *Blum, Commissioner, New York State Department of Social Services v. Stenson*, Justice Powell suggested that, in view of precedent allowing enhancements in cases of ex-

neys to represent low income and minority neighborhoods, thereby reducing environmental risk in such communities and tending to equalize disparate environmental risk. Such an incentive will serve Congress' intended purpose of equitable environmental protection, which was not accomplished under present law. Stated another way, if incentive creation is a legitimate fee shifting rationale, then it is appropriate to "fine tune" the incentives to achieve distributional equity in environmental protection.³¹⁰

Moreover, increasing the incentive by an equity adjustment will not offend other rationales underlying fee shifting, which include discouraging unnecessary litigation, making a wronged party whole after injury, punishing unjustified or undesirable behavior, and generally deterring undesirable conduct.³¹¹ Encouraging citizen suits by community-based groups in poor and minority neighborhoods may further deter the practice of targeting such communities for polluting activity because of lax compliance and less costly cleanups. In addition to providing litigation incentives and deterrence, an equity adjustment can be justified because in such cases defendants, as a class, have the advantage of superior resources.³¹²

In determining whether an equity adjustment is appropriate, judges could consider such factors as the socioeconomic makeup of the community affected by the violation or agency action (or inaction) and whether the community bears a disparate environmental risk burden. Upon such a finding, courts could award a standardized lodestar equity adjustment, which would be sufficient to provide an incentive and still be in the range of a reasonable attorney's fee.

ceptional success, the Court could not agree with petitioner's position that an upward adjustment from the lodestar is never permissible. 465 U.S. 886, 897 (1984).

310. Implicit in environmental laws is the principle that unavoidable environmental risk should be distributed equitably. Citizen suit provisions were designed to ensure enforcement of environmental laws in all segments of society. Fee shifting provisions were included as an incentive to spur private enforcement of meritorious claims. Because of a complicated variety of factors, there are less rigorous environmental enforcement and more environmental hazards in low income and minority neighborhoods. Some environmental hazards could be removed by stricter enforcement of environmental laws in poor and minority communities. An upward lodestar adjustment would act as an incentive and spur private enforcement in low income and minority communities, helping to equalize the disparity in environmental risk.

311. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 652.

312. Dean Rowe observes that: "[W]hen a legislature perceives a regular imbalance, it can seek to match adversaries more evenly by adopting some form of fee shifting to prevent disproportionate advantage in access to and use of the legal process." Rowe, *supra* note 311, at 664 (citing, as an example, the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980)). The same rationale can be applied in the context of environmental justice, especially when one considers that: "[T]he defendants are members of the class of violators and of those whose conduct deserves deterrence; economic sense dictates placing the cost of enforcement at least on the sector whence came the violations." *Id.* at 673.

Viewed in this light, an equity adjustment is essentially a cost-internalizing measure. The class of defendants who would pay greater attorney's fees as a result of the upward lodestar adjustment is the class of defendants who historically benefitted from locating activities in poor and minority neighborhoods where residents were less successful in opposing the activity and enforcement was less rigorous. The plaintiffs' attorney would not get a windfall because the adjustment would still be in the range of "reasonableness." Attorney's fees slightly above market rate are not unreasonable, as the presence of an upward adjustment suggests. Moreover, an adjustment would offset possible disincentives of representing communities with complicated legal problems compounded by economic, social, cultural, and political barriers.³¹³

In summary, the possibility of an equity adjustment could serve to remove the present disincentives for private attorneys to represent underfunded groups in low income and minority communities seeking redress for severe and complex environmental problems. Perhaps more importantly, the purposes underlying environmental laws, civil rights laws, and constitutional principles of equality all would be served.

C. *Penalty Enhancement for Targeting*

Another judicial or administrative response possible under environmental statutes is to consider environmental inequities in the assessment of penalties.³¹⁴ The judge (or authorized official) might consider, for example, evidence that the polluter has a history of permit noncompliance in poor and minority communities. The racial and socioeconomic characteristics of the surrounding community could be included in the criteria for assessing penalties. The possibility of higher penalties in poor communities and communities of color could have a deterrent effect that might offset the corresponding incentive to locate in low income and minority communities because of actual or perceived underenforcement. Thus, the use of judicial and administrative discretion in imposing penalties may help redress environmental inequity by signaling that noncompliance in vulnerable communities will not be tolerated.

313. See generally *Empowerment As the Key*, *supra* note 22.

314. In determining penalties under environmental statutes, those statutes and regulations often provide for consideration of matters such as justice may require including the nature and circumstances of the violation. See *supra* note 115.

D. Nondiscretionary Duties

Similarly, inequities resulting from otherwise legal practices—such as decisions to site polluting facilities in low income and minority communities and discretionary (but arguably inadequate) agency response—must be addressed. Possible solutions lie in carefully crafted amendments to major environmental statutes, which could create nondiscretionary duties with statutory deadlines. The duties should include compiling evidence concerning exposure to the pollutants regulated under the particular environmental statute and adverse health effects caused by such exposure, by race and income, on a national level.³¹⁵

Other nondiscretionary duties under major environmental statutes might require the preparation of equity assessments before approving permits for air or water emissions or hazardous waste management.³¹⁶ The equity assessments should contain: (1) an assessment of the racial and socioeconomic characteristics of the community; (2) the existing sources of pollution in the community; and (3) a discussion of alternative available sites, including racial and sociological characteristics, and existing pollution sources in the alternative sites. The equity assessment process should strive to determine whether the community bears a disproportionate risk burden considering principles of risk assessment, risk management, and statutory goals. The equity assessment process should allow challengers to the permit to formulate and propose alternatives. Optimistically, a procedural duty of this type increases the chances that equity considerations will be brought to the fore, while at the same time retaining administrative flexibility by not specifically mandating a particular substantive decision on the merits of the permit approval. But a real possibility exists that an equity assessment would become an administrative “hoop to jump through” on the way to a predetermined decision.

A substantive nondiscretionary duty would be to mandate specific action upon a dual finding of a disproportionate risk burden and a community disadvantaged due to lack of political or economic resources. Specifically mandated action might include disapproval of the permit, more stringent permit conditions, or specific remedial action.³¹⁷ Nondiscretionary duties could take many forms, depending

315. EPA is currently undertaking discretionary projects of this nature on a regional level. See *supra* note 50 (summarizing EPA equity projects).

316. A prior proposed amendment to SWDA (which includes RCRA) would have provided for a “community information statement” during the course of RCRA permit proceedings for offsite facilities for the storage, treatment, or disposal of hazardous waste. See *supra* note 259.

317. For a prior similar proposed amendment to SWDA that would have allowed a petitioner to challenge the siting of a RCRA hazardous waste facility, see *supra* note 259. The proposal would not have created a nondiscretionary, substantive duty to deny the

on the particular distributional consequences identified under the various federal environmental laws, and depending on whether the disparity is tied to race, income, or a combination of the two.

Thus, a mandate of this type would more directly respond to social forces and address disparity in exposure to environmental hazards, a legitimate environmental regulatory mission.³¹⁸ A finding that a community is disadvantaged necessarily entails a look at sociological factors, like the mean income of the affected neighborhood, the predominant racial characteristics of the neighborhood, the presence of residents on local zoning boards, and other indicia of the relative political strength of the community.

In theory, such a provision would work like a limited waiver of immunity in the realm of conventional agency discretion. As a practical matter, the provision would not unduly usurp agency discretion; it would simply make agency action exacerbating environmental risk disparity subject to judicial review, while otherwise retaining normal agency prerogatives. Examples of targeted nondiscretionary duties might include the following: a low income or minority community suffering from exposure to multiple environmental hazards could be given citizen suit authority: (1) to initiate an action-forcing suit to compel EPA to deny a pending National Pollutant Discharge Elimination System permit application (or to impose strict conditions on the permit); or (2) to compel the veto of a permit to site a RCRA facility. Action-forcing suits of this nature could also remove the prohibition on preenforcement review of containment (instead of treatment) of a contaminated site or a removal action under CERCLA in certain cases.

The positive aspects of a nondiscretionary duty of this nature are that the duty can be carefully tailored under specific statutes to prevent a wholesale NIMBY abuse of the provision. The findings necessary to trigger the nondiscretionary duty could be specific, and the agency response could be equally specific. For example, in response to studies that indicate that the siting of hazardous waste facilities is

permit upon certain findings, but would have allowed the administrative law judge a range of options. *Id.* Moreover, "environmentally disadvantaged community" under the proposal is defined in reference to numerical criteria, such as the relative percentages of minority residents and income, and does not consider other indicia of lack of political strength. *Id.*

318. EPA has expressed a commitment to the principle that low income and minority communities should not bear a disproportionate risk of exposure to environmental hazards. WORKGROUP REPORT, *supra* note 5, at 2 ("Environmental equity is an important goal in a democratic society."). If the commitment is genuine, EPA should have no objection to such a nondiscretionary duty. Administrator Carol M. Browner identified the elimination of "environmental racism" as one of her top priorities [and] vowed to "weave environmental justice concerns throughout all aspects of EPA policy and decision-making." Stephen C. Jones & Jeffrey Hsu, *EPA Targets 'Environmental Racism'*, NAT'L L.J., Aug. 9, 1993, at 28, 28.

disproportionate by race, a nondiscretionary duty under RCRA might be to veto a permit for a hazardous waste facility if the equity risk assessment demonstrates that the siting will result in a disparate risk burden in a community that is low income and/or predominantly minority (when there is a geologically adequate alternative site). A nondiscretionary duty under the Clean Air Act, in response to urban area studies indicating disparate exposures to air pollutants by race, could be a permit veto, offsets, particularly stringent emissions reduction technology, or a denial of a pollution credits program where contrary action would exacerbate the disparate risk burden in a particular geographical area (which may be a smaller geographical area than designated in the applicable state implementation plan). This could reduce or prevent concentrations of air pollutants from multiple sources in inner-city areas. A nondiscretionary duty under the Clean Water Act might entail a requirement that the authorized agency take more stringent action where an equity assessment discloses that a local population's consumption of fish is greater than average; the nondiscretionary duty in such a case might be a moratorium on NPDES permits, more stringent effluent limitations, or the imposition of additional limits on daily effluent discharges even where the water quality standards are otherwise met.

The nondiscretionary duties, coupled with an equity lodestar adjustment, could give community groups in low income and minority communities crucial leverage—a concrete and durable leverage—rather than the present vulnerable position of community-based groups that depend upon the discretion of EPA in studying environmental inequities and the good will of national environmental groups in undertaking representation.

CONCLUSION

The issue of environmental racism or environmental injustice has gained momentum due to years of sustained efforts at the local level. The momentum is also due in part to some media coverage in recent years and challenges to the environmental community by environmental justice organizations. In response, EPA and national environmental groups have taken initiatives by instituting discretionary projects, diversifying boards and staff, and in some cases, hiring attorneys to work on equity issues. There is, however, no assurance that the efforts will continue should the issue of environmental justice retreat from the public eye. It is the sustained vigilance of community-based activism that will ultimately lead to environmental justice. The timing is critical for reform of environmental laws to provide low income communities and communities of color durable leverage in their attempts to remedy environmental disparities.

One method of reform is to create mechanisms that will give community groups greater access to courts. It is the leverage accorded by enhanced access to courts, rather than actual litigation, that will serve to correct environmental inequities by removing the economic and political incentives that drive environmental hazards to these communities. Enhanced court access can be accomplished in a controlled and targeted way by a standardized lodestar adjustment to the attorney's fee calculation to give attorneys a sustained incentive to represent low income communities and communities of color. Citizen suit provisions may aid in realizing environmental justice by providing authority to challenge carefully crafted nondiscretionary statutory duties to: (1) compile information concerning disparities in environmental exposures and adverse health effects; (2) create a process of gathering and using information about environmental equity during routine decisions; and (3) create substantive nondiscretionary duties to respond to disparate risk burdens by taking specific regulatory action.

Ultimately, environmental protection depends upon enforcement. Thus, communities of color and low income communities must have the opportunity and the resources to control private enforcement initiatives in their own communities in order to attain lasting environmental justice.