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Nancy Perkins Spyke

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PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING AT THE NEW MILLENNIUM: STRUCTURING NEW SPHERES OF PUBLIC INFLUENCE

*Nancy Perkins Spyke**

In recent years, commentators and government officials have realized the importance of effective solicitation and integration of public participation in environmental decisionmaking. A plethora of theories and strategies designed to encourage decisionmakers to consider public input an integral part of policy development and implementation have been introduced. A similar number of methods to increase the public's feeling of connection to the decisionmaking of their government have been suggested. This article suggests a framework in which the various forms of public participation may be organized, so that participants can become cognizant of the role they play in the overall process of environmental control. Such a framework will enable presentation of the many diverse forms of public participation as a cohesive system, as opposed to a jumble of unrelated efforts. As such, the framework can be used as a guide for decisionmakers and the public alike, to coordinate efforts and foster an understanding of how individual forms of participation combine to animate public involvement as a whole.

INTRODUCTION

Nearly thirty years ago, the United States Court of Appeals for the Second Circuit resolved a protracted power plant licensing dispute in the case of *Scenic Hudson Preservation Conference v. F.P.C.*¹ La-

* B.A., Mount Holyoke College; J.D., Nova Southeastern University Shepard Broad Law Center; Assistant Professor, Duquesne University Law School. The author wishes to thank Dean Nicholas P. Cafardi for encouraging this project and Duquesne Law School for a summer research grant. She also wishes to thank Professor Bruce Ledewitz for his valuable comments on an earlier draft of this article.

¹ 453 F.2d 463 (2d Cir. 1971) (upholding F.C.C. license).

menting the inadequacies of public participation in the plant's siting decision, Judge Irving R. Kaufman remarked:

[I]f I were an environmental activist, I would not have any great feeling of satisfaction that the procedures leading to the final decision permitted or, perhaps more importantly, encouraged maximum input and participation by interested and affected groups I fear that public participation was far from full or effective in any sense that looks beyond the boundaries of technical openness. The basic defect in the process, as I see it, was the inevitably narrow scope of the decision the agency had to make²

The decisionmaking process has evolved in ensuing years, and numerous attempts have been made to address the deficiencies noted by Judge Kaufman.

Today's environmental decisionmaking invites extensive public participation, guided by ecosystem-wide factors³ and neorepublican theory.⁴ These developments target the narrowness that troubled Judge Kaufman, but they do not represent a panacea. The fact remains that public participation occasionally triumphs where narrow interests predominate. Some localized problems, for example, can be adequately resolved by focusing on isolated issues.⁵ Other environmental problems can be addressed by putting values aside and yielding to technical expertise.⁶ A successful approach to public participation in environmental decisionmaking must accommodate these realities as well as the newer, more comprehensive and value-based insights.

In the relatively brief history of modern federal environmental law, public participation in the decisionmaking process has played an important role. Numerous authors have analyzed its promises and shortcomings: some point to public participation weaknesses in general, others offer suggestions for improvement, some focus on public participation in discrete environmental areas, while other commentators consider public participation in the context of larger issues. Not surprisingly, the diverse scholarship fails to reveal a comprehensive solution that would erase existing problems; neither does it disclose a unifying theme to help shape the next generation of public participation in environmental decisionmaking.

² Irving R. Kaufman, *Power for the People—And by the People: Utilities, the Environment and the Public Interest*, 46 N.Y.U. L. REV. 867, 871-72 (1971).

³ See *infra* notes 124-26 and accompanying text.

⁴ See *infra* note 31 and accompanying text.

⁵ See *infra* note 148 and accompanying text.

⁶ See *infra* note 188 and accompanying text.

A handful of separate trends emerges, however. First, there is no question that federal agencies are becoming increasingly committed to improving the quality and quantity of public input in the decision-making process. An ecosystem or regional approach to environmental decisionmaking is also taking hold, as are efforts to assure widespread consideration of environmental justice issues. Additionally, agencies are making conscious efforts to compile data to measure the success or failure of public participation programs. Finally, the utilitarian or pluralistic approach to environmental regulation is beginning to give way to one that is more fully informed by public values.⁷

These trends inevitably suggest that a one-size-fits-all approach to public participation in environmental decisionmaking is no longer acceptable. In its place is a system that promotes inclusiveness and flexibility, but runs the risk of being unwieldy, incoherent and ad hoc. The ideal form of public input no doubt depends on the environmental decision at hand, but some type of overall framework is needed to assure that those involved in individual decisions are cognizant of the relationship between their decisions and the entire process of environmental control. Any such framework must be adaptable enough to allow localized participation programs to operate primarily under a limited universe of considerations, must allow common values to inform policy formation as well as implementation, and must make use of an ecosystem approach to environmental planning.

This article suggests a way of looking at public participation that will accomplish these ends. The proposed vision is of a comprehensive framework comprised of three concentric spheres—self-contained yet related capsules—representing separate spheres of public influence in three distinct stages of environmental decisionmaking. The structure presents public participation as a coordinated system rather than a jumble of unrelated efforts, and strives to take into account current trends and suggestions in a way that will allow them to function effectively.

The first section of this article presents a general discussion of public participation. It is followed by a section describing the legal mandates for public participation in selected federal environmental programs, along with critiques of those programs. The third section of the article synthesizes existing criticisms, suggestions, and trends. The final section proposes strategies for agencies and the public alike

⁷ See Eileen Guana, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 20–21, 29 (1998).

to improve the quality of public participation. It also presents the spherical model, suggesting it as a first step in bringing coherence to the new order of public participation in environmental decisionmaking. Without a coordinated vision, new and commendable initiatives in public participation may ultimately yield little more than wasted effort and frustration.

I. THE WORLD OF PUBLIC PARTICIPATION

Public participation operates in the vast universe of government, and although it carries positive connotations, it has no singular meaning. This discussion does not attempt to provide a concise definition. In fact, the following section hints at many absorbing issues not addressed by this article. Its goal is to provide a brief background of the subject matter as a prelude to an analysis of specific environmental issues.

A. *Definition and Theoretical Foundations*

Although the meaning of public participation is difficult to articulate,⁸ it has been defined as "purposeful activities in which citizens take part in relation to government."⁹ It has also been described as being comprised of four elements: the purposes for which the participation is undertaken, the type of action that is undertaken, the individuals who are involved in the action, and the governmental entities that are targeted.¹⁰ More generally, it has been pointed out that public participation is an approach or philosophy that supplements the political process and that is manifested in various ways.¹¹ It has also been characterized as a change in process rather than an answer to all problems,¹² as something that carries emotive power and that im-

⁸ See MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 31 (1981); Stuart Langton, *What is Citizen Participation?*, in CITIZEN PARTICIPATION IN AMERICA 13, 13 (Stuart Langton ed., 1978).

⁹ Langton, *supra* note 8, at 17. Langton uses this definition to define "citizen participation" rather than "public participation" to differentiate between situations when the public becomes involved with social, rather than governmental, institutions. See *id.* This article will consistently use the phrase "public participation."

¹⁰ See *id.*

¹¹ See Jerry Delli Priscoli, *Implementing Public Involvement Programs in Federal Agencies*, in CITIZEN PARTICIPATION IN AMERICA 97, 105 (Stuart Langton ed., 1978).

¹² See *id.*

proves democracy,¹³ and as a force that can result in a redistribution of power.¹⁴

Public participation is difficult to define because it takes so many forms. In its broadest form, participation can include education and information, review and reaction, and interaction and dialogue.¹⁵ Alternatively, public participation can be compartmentalized based on what force generates the participation. It can, for example, be brought about by the public, the government, the electoral process, or by legal mandates.¹⁶ It can take the form of lobbying, public advocacy and protest, public hearings, solicitation of public comments, political party involvement, voting, payment of taxes, and jury service.¹⁷ Participation also exists in information-gathering activities, interest group involvement, service on advisory and review boards, campaigns for political office, and simple contacts with elected officials.¹⁸ Even litigation has been mentioned as an example of public participation.¹⁹

The definitions and examples of public participation unveil a large and nebulous concept, one with an almost amoeba-like shape. Participation theory is more sharply defined, however. It is anchored by the democratic values of political equality and popular sovereignty²⁰ which are thrust upon the republican form of government.²¹ Because government is derived from the people, all citizens have the right to influence governmental decisions, and the government should respond to them.²² Widespread participation exposes decisionmakers to a healthy mix of perspectives,²³ which is believed to improve the

¹³ See Langton, *supra* note 8, at 13, 27.

¹⁴ See KWEIT & KWEIT, *supra* note 8, at 162.

¹⁵ See Paul Wilkinson, *Public Participation in Environmental Management: A Case Study*, 16 NAT. RESOURCES J. 117, 119 (1976).

¹⁶ See Langton, *supra* note 8, at 21.

¹⁷ See *id.*

¹⁸ JAMES BURKHART ET AL., STRATEGIES FOR POLITICAL PARTICIPATION 41 (1972); KWEIT & KWEIT, *supra* note 8, at 56.

¹⁹ See Adam N. Bram, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 153 (1996). Despite Congress' desire to offer broad-based public participation in the environmental area by way of these provisions, this type of participation is becoming increasingly difficult to accomplish and some feel its benefit to the public is questionable. See *id.* at 154-55.

²⁰ See Nelson M. Rosenbaum, *Citizen Participation and Democratic Theory*, in CITIZEN PARTICIPATION IN AMERICA 43, 43 (Stuart Langton ed., 1978).

²¹ See KWEIT & KWEIT, *supra* note 8, at 161.

²² See Nelson M. Rosenbaum, *supra* note 20, at 46.

²³ See Mark Sagoff, *Can Environmentalists Be Liberals? Jurisprudential Foundations of Environmentalism*, 16 ENVTL. L. 775, 786 (1986).

decisionmaking process.²⁴ Even though one viewpoint must ultimately prevail over all others,²⁵ the democratic process fosters inclusiveness, and may even result in a redistribution of power if those in control yield to the public's desires.²⁶

In recent years the participatory process has followed a pluralistic or utilitarian format, one that encourages all competing views to be brought to the table.²⁷ Pluralist theory is well established in administrative practice,²⁸ and was initially thought to be more democratic than republicanism²⁹ because it tolerated public participation at all stages of the decisionmaking process, from policy formation through implementation.³⁰ Some scholars, however, perceive that a neorepublican approach, one that emphasizes common goals and values rather than individual preferences, is poised to overtake participation efforts.³¹ This new collectivist approach encourages public input in particular at the policy-formation stage, where common values can inform the lawmaking process. Earlier views of collectivism would go so far as to bar public input beyond the electoral process, believing that participation after norms have been determined is anti-democratic.³² The new collectivism is more extensive, however, as it endorses pervasive public participation.

Although the proper limits of public participation are no doubt worthy of further exploration, this discussion recognizes that today's laws generally embrace an expansive form of public participation. Participation is encouraged, if not mandated, at all stages of the decisionmaking process, from voting to lawmaking to implementation. With this reality in mind, the most pertinent challenge facing present-day public participation theory centers on the lingering tension between utilitarian and neorepublican viewpoints.

²⁴ See *id.* at 795-96.

²⁵ See *id.* at 792.

²⁶ See KWEIT & KWEIT, *supra* note 8, at 132.

²⁷ See Guana, *supra* note 7, at 20-21, 25.

²⁸ See *id.* at 19-28.

²⁹ See *id.* at 20-21.

³⁰ See *id.* at 20, 24.

³¹ See *id.* at 28-29; see also KWEIT & KWEIT, *supra* note 8, at 44; Sagoff, *supra* note 23, at 779-82. Sagoff's terminology differs, however. He labels general welfare proponents "utilitarian liberals," and individual rights adherents "deontological liberals." Sagoff, *supra* note 23, at 779-82.

³² Earlier arguments were based on a belief that allowing participation after norms were determined was anti-democratic. See KWEIT & KWEIT, *supra* note 8, at 46, 52.

B. History

Political party membership represented the earliest method of public participation in America. By the end of the nineteenth century, however, domineering political machines led to popular disillusionment with political parties.³³ During the first half of the twentieth century, the population became politically inactive and uninformed, and there was a strong desire to maintain the status quo of government; the few groups that tried to gain attention were hindered from having much impact.³⁴ Public frustration eventually grew, as did the size of government and its bureaucracies.³⁵

By mid-century, things began to change. In 1946, the Administrative Procedure Act formalized public participation at the federal level.³⁶ This initial codification of public involvement in agency decisionmaking was conservative in that it forced the public to take steps to become involved in the decisionmaking process.³⁷ Later, sunshine laws helped to enhance public participation by guaranteeing attendance at government meetings. Again, however, the burden was on the public to take the initiative.³⁸ The 1960s brought calls for "power to the people" and demands for a redistribution of power.³⁹ Congress responded during the 1970s, and enacted a flurry of public participation measures.⁴⁰ Soon, major federal legislation routinely included participation mandates. In response, agencies offered educational programs to the public, published news releases about their activities, and hired experts to develop participation programs.⁴¹ Participation became increasingly diverse and pervasive, and hundreds of public interest groups took form.⁴²

³³ See *id.* at 17.

³⁴ See *id.* at 22.

³⁵ See *id.* at 22-24.

³⁶ 5 U.S.C. §§ 551-559 (1994).

³⁷ See Walter A. Rosenbaum, *Public Involvement as Reform and Ritual: The Development of Federal Participation Programs*, in *CITIZEN PARTICIPATION IN AMERICA* 81, 82 (Stuart Langton ed., 1978).

³⁸ See *id.* at 82, 85.

³⁹ See KWEIT & KWEIT, *supra* note 8, at 25.

⁴⁰ The Earth Day experience demonstrated how public outcry could be deafening and effective. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66-67 (1992) (referring to such points in time as "republican moments").

⁴¹ See KWEIT & KWEIT, *supra* note 8, at 5-6.

⁴² See Stuart Langton, *Citizen Participation in America: Current Reflections on the State of the Art*, in *CITIZEN PARTICIPATION IN AMERICA* 1, 1-3 (Stuart Langton ed., 1978). Many of these groups were devoted to environmental issues. See *id.* at 2.

Yet as soon as public participation became institutionalized, it seemed to stagnate. Statutory mandates for public input were predictable, taking the form of citizen suit provisions and notice, hearing and comment procedures.⁴³ The standardization of participation measures was accompanied by a decline in political party influence, an increase in public apathy, and the emergence of special interest groups.⁴⁴ The Reagan Administration further estranged the public from the decisionmaking process by placing greater reliance on highly technical approaches to decisionmaking, typified by the cost-benefit analysis.⁴⁵

Public participation in the latter half of this century has reflected the dominance of utilitarian theory. As public involvement in political parties has declined, special interest groups have become more influential in the decisionmaking process.⁴⁶ Recent suggestions of an imminent return to republicanism and the infusion of common values into the decisionmaking process reflect an awareness that the present participatory structure is in need of change. As the millennium approaches, public participation advocates should be optimistic that improvement is on the horizon, yet wary that well-intentioned changes could result in poorly coordinated, unsuccessful initiatives.

C. *Goals and Participant Traits*

Given its definitional difficulties and divergent theoretical foundations, it should not be surprising that public participation has many goals which sometimes conflict with one another. Goal conflicts often result from the contrasting expectations of participants and decisionmakers.⁴⁷ Citizens, for example, may choose to participate because they believe they are experts in their own right.⁴⁸ Agencies, on the other hand, may approach public participation seeking nothing more than a quick-and-easy public stamp of approval to a decision they feel is within their own expertise.⁴⁹

⁴³ See Bram, *supra* note 19, at 150, 153.

⁴⁴ See Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 527 (1989).

⁴⁵ See *id.* at 528-29.

⁴⁶ See KWEIT & KWEIT, *supra* note 8, at 53-54.

⁴⁷ See *id.* at 37.

⁴⁸ See *id.* at 72.

⁴⁹ The success of a public participation effort is often tied to the expectations of the participants. See *id.* at 75.

The goals of public participation, although numerous, generally fall into four somewhat overlapping categories. General goals include the improvement of government,⁵⁰ the redistribution of power, positive change both in government policy and citizen attitudes toward government,⁵¹ and the consideration of diverse viewpoints to assure fully-informed decisions.⁵² There are also community-based goals, including the strengthening of local communities, the fostering of a sense of empowerment,⁵³ and the creation of indigenous leadership.⁵⁴

The two remaining goal categories focus on decisionmakers and participants. Agencies view participation programs as a way to improve their decisionmaking process.⁵⁵ To achieve this end, they strive to exchange information with the public, deal with diverse groups within the community, demonstrate a responsiveness to public concerns, and ultimately gain public acceptance of their decisions.⁵⁶ These aims are to be contrasted with those of the public. Participants are often motivated by immediate goals arising from matters that affect their daily lives.⁵⁷ Although it may be true that the primary goal of some individuals is to convince decisionmakers to accept their solution to a problem,⁵⁸ a secondary goal is to create feelings of self-confidence and shared control of government.⁵⁹ A sense of control over one's life and a feeling of political efficacy can also lead individuals to perceive the decisionmaking process as more democratic.⁶⁰

The expectations of public participants may depend on whether they participate as a one-time occurrence or whether they are frequent, if not professional, public advocates. A recent study suggests

⁵⁰ See *id.* at 36.

⁵¹ See KWEIT & KWEIT, *supra* note 8, at 162.

⁵² See Walter A. Rosenbaum, *supra* note 37, at 86.

⁵³ See Fiorino, *supra* note 44, at 536.

⁵⁴ See KWEIT & KWEIT, *supra* note 8, at 89, 92. The emergence of new leaders from the lower socio-economic classes is particularly beneficial. See *id.* at 92. It has been suggested that lawyers working with local community leaders should always be aware that they are working toward community empowerment rather than breaking legal ground. See William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 459-60 (1994).

⁵⁵ See Bram, *supra* note 19, at 152.

⁵⁶ See DANIEL S. IACOFANO, PUBLIC INVOLVEMENT AS AN ORGANIZATIONAL DEVELOPMENT PROCESS: A PROACTIVE THEORY FOR ENVIRONMENTAL PLANNING PROGRAM MANAGEMENT 13 (1990).

⁵⁷ See BURKHART, *supra* note 18, at 49; KWEIT & KWEIT, *supra* note 8, at 85.

⁵⁸ See KWEIT & KWEIT, *supra* note 8, at 33.

⁵⁹ See Nelson M. Rosenbaum, *supra* note 20, at 45.

⁶⁰ See IACOFANO, *supra* note 56, at 11.

that many individuals who have spent their professional lives promoting the public interest exhibit similar character traits.⁶¹ Those who appear to be well suited for public advocacy are trustful, have strong self-esteem, and believe that they can have an impact on decisionmakers.⁶² The common-denominator traits that emerge include the ability to deal with diversity;⁶³ to feel compassion for all views, including those of the opponent;⁶⁴ to collaborate and cooperate with trust;⁶⁵ and to see life as an interconnected whole.⁶⁶ This final trait is particularly noteworthy, requiring participants to look beyond individual and community interests to learn how their concerns relate to the global commons.⁶⁷

These traits obviously do not exist in most individuals. Yet it is believed that people who have an inclination toward public involvement can develop these traits by learning a number of "habits of mind."⁶⁸ The most obvious habit is to interact freely with others in order to develop a sense for what they feel. More challenging habits include the ability to work with contradictions and avoid being closed-minded. Perhaps the most demanding habit calls for developing an ability to engage in systemic thought, allowing the individual to comprehend the connections between components of the world.⁶⁹ The use of imagery, symbols, and stories has been suggested as a way to help shape the components of the global environment to bring home the interconnectedness between things.⁷⁰

Nurturing these traits is needed not only to assure a continuing supply of valuable public participants, but to further the goals of public participation. People who are open-minded, who are tolerant of diverse views, and who can see connections between things are precisely the type of individuals who can help make a public participa-

⁶¹ See generally LAURENT A. PARKS DALOZ ET AL., *COMMON FIRE: LIVES OF COMMITMENT IN A COMPLEX WORLD* (1996) [hereinafter *COMMON FIRE*]. This interesting text sets out to determine what character traits are shared by publicly committed individuals.

⁶² See *id.* at 26, 34-35. America's pervasive emphasis on the individual and cynicism impede public service, however, since they lead individuals to shun common problems. See *id.* at 11-12.

⁶³ See *id.* at 65.

⁶⁴ See *id.* at 77-79. It is fair to question whether a public advocate can effectively promote a position while empathizing with the opposition.

⁶⁵ See *id.* at 231.

⁶⁶ See *COMMON FIRE*, *supra* note 61, at 108.

⁶⁷ See *id.* at 6.

⁶⁸ See *id.* at 108.

⁶⁹ See *id.* at 108, 114.

⁷⁰ See *id.* at 132-36.

tion experience meaningful. And although these traits have been described as crucial for the next generation of public participants, it would be beneficial to nurture them in decisionmakers as well.

D. *Inherent Problems*

Public participation has not yet arrived at a point where all of those involved possess the traits necessary to achieve its many goals, which partially explains why existing efforts are simply not as effective as desired. Participation also struggles because of the vague and conflicting goals of public participation.⁷¹

To begin with, public participation's emphasis on the individual and direct access to decisionmakers conflicts with collectivist theory and republicanism.⁷² It also undermines the administrative goals of efficiency, expertise, and control,⁷³ which drive agencies to seek quick public approval of predetermined solutions.⁷⁴ On a more practical level, public participation is inefficient in terms of cost and time, and can result in lowest-common-denominator solutions if decisionmakers strive to accommodate as many views as possible.⁷⁵

Agency-specific public participation difficulties are varied. They often begin with vaguely worded language mandating broad public participation.⁷⁶ Ironically, statutory text may provide so much discretion that it allows administrators to do very little to implement participation programs.⁷⁷ Political concerns can also lead agencies to stop short of developing broad-based programs. Agencies may, for example, fear retaliatory funding cuts if they make publicly-informed decisions that oppose Congressional desires.⁷⁸

Agency implementation of participation programs poses still other problems. Some agencies are not consistent in how they approach public participation; others fail to undertake any planning whatso-

⁷¹ See KWEIT & KWEIT, *supra* note 8, at 41.

⁷² See *id.* at 46.

⁷³ See Barry Checkoway & Jon Van Til, *What Do We Know About Citizen Participation? A Selective Review of Research*, in *CITIZEN PARTICIPATION IN AMERICA* 25, 33 (Stuart Langton ed., 1978).

⁷⁴ See *id.* at 32-33.

⁷⁵ See Nelson M. Rosenbaum, *supra* note 20, at 48.

⁷⁶ See Walter A. Rosenbaum, *supra* note 37, at 88-89.

⁷⁷ See Judy B. Rosener, *Matching Method to Purpose: The Challenges of Planning Citizen-Participation Activities*, in *CITIZEN PARTICIPATION IN AMERICA* 109, 113 (Stuart Langton ed., 1978).

⁷⁸ See Walter A. Rosenbaum, *supra* note 37, at 90, 92.

ever.⁷⁹ Implementing regulations may generate conflict from the outset by providing only scant provisions cast in adversarial terms,⁸⁰ and staffing concerns may lead agencies to decentralize their public participation activities by having them performed by outside contractors.⁸¹ Agencies may also experience difficulty coordinating public participation efforts with other agencies that might be involved in the same or similar projects.⁸²

A good many administrative problems arise from public interaction. Agencies have a philosophical objection to loss of control, something that is inherent in public participation programs. They point out that public involvement hinders their own creativity,⁸³ and that the public is incapable of grasping the technical nature of the problems at hand.⁸⁴ Even when efforts are made to involve the public, agencies may be unable to achieve the degree of pluralism envisioned by Congress because of limited funds and difficulties in motivating people to participate.⁸⁵

There are also plenty of problems with participation programs from the public's perspective. A fundamental problem is large-scale public apathy toward these programs. When participation does take place, studies have shown that participants tend to be from the upper socio-economic classes, leading to common charges of elitism.⁸⁶ Whoever does participate is likely to experience a drain in terms of time and personal cost.⁸⁷ Not only does it take time to become comfortable with the technical nature of many issues, but personal costs tend to come up-front and results can be a long time coming.⁸⁸ Further, the expectations of those who choose to become involved will almost certainly conflict with those of the decisionmaker. Despite the adversarial nature of participation, some participants will be convinced that their involvement guarantees the achievement of their goal.⁸⁹ Frustration is likely to set in as citizens, who are accustomed to living in harmony, begin to experience conflict.⁹⁰ They may well feel inadequate, distrust-

⁷⁹ See Rosener, *supra* note 77, at 109.

⁸⁰ See Priscoli, *supra* note 11, at 100.

⁸¹ See *id.* at 102.

⁸² See *id.* at 97.

⁸³ See Nelson M. Rosenbaum, *supra* note 20, at 49.

⁸⁴ See Priscoli, *supra* note 11, at 100; KWEIT & KWEIT, *supra* note 8, at 7.

⁸⁵ See Walter A. Rosenbaum, *supra* note 37, at 91.

⁸⁶ See Checkoway & Van Til, *supra* note 73, at 28.

⁸⁷ See KWEIT & KWEIT, *supra* note 8, at 39-40.

⁸⁸ See *id.* at 40.

⁸⁹ See *id.* at 37.

⁹⁰ See *id.* at 40.

ful, and alienated as they become more deeply immersed in complex problems and are confronted with apparent agency expertise.⁹¹

The decline in political parties and the corresponding growth in public and special interest group influence creates a final obstacle to participation success. Charges are routinely made that the public is excluded from the decisionmaking process because well-funded efforts on the part of powerful, regulated industries capture agencies.⁹² More ironic is the problem caused by public interest groups. These seeming allies of public participation bring attention to otherwise unheard arguments, excel at issue management, and find access points to government.⁹³ Nevertheless, it has been suggested that the benefits of power redistribution that result from public interest group efforts often inure to those groups rather than the public at large.⁹⁴ Free-rider problems also exist, because individuals may be content to pay membership dues and allow interest groups to take on issues at their discretion.⁹⁵ Further, the issues that are in fact pursued by highly organized public interest groups tend to be national, rather than local.⁹⁶ Their extensive use of litigation,⁹⁷ expertise, and ample funding lead public interest groups to intervene in matters that often do not affect the average individual.⁹⁸

Public participation is a large and unwieldy process with a rocky history. It is fraught with goal conflicts and inherent problems. Nevertheless, it continues to be embraced, in particular and with great force, in environmental matters.

II. PUBLIC PARTICIPATION AND THE ENVIRONMENTAL DOMAIN

Public participation mandates are both prevalent and controversial in areas concerning the environment. The public has traditionally played a role in environmental policy formation, statutory implementation, and private enforcement. Recent programs show that the public's role is still strong and in fact is expanding, albeit not without concerns. This section of the article will briefly touch on public par-

⁹¹ See *id.* at 68.

⁹² See Checkoway & Van Til, *supra* note 73, at 33.

⁹³ See David Cohen, *The Public-Interest Movement and Citizen Participation*, in *CITIZEN PARTICIPATION IN AMERICA* 56, 62-63 (Stuart Langton ed., 1978).

⁹⁴ See KWEIT & KWEIT, *supra* note 8, at 55, 60.

⁹⁵ See Farber, *supra* note 40, at 73.

⁹⁶ See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 *TUL. L. REV.* 339, 369-71 (1990).

⁹⁷ See *infra* note 272 and accompanying text.

⁹⁸ See Bram, *supra* note 19, at 154-56.

ticipation in the lawmaking process, detail the participation provisions in a handful of environmental statutes, and examine the United States Environmental Protection Agency (EPA) participation efforts of a more general nature. This section also summarizes existing commentary about these various initiatives.

A. *Participation and Lawmaking*

Public participation in environmental law brings to mind public hearing, notice and comment provisions, but it would be premature to address these mechanisms before considering public input in the lawmaking or policy formation process. It is that form of participation that helps define the public will for lawmakers and guides them as they establish the legislative policies that agencies must in turn implement. It is a form of participation that at times seems overlooked.

Today's environmentalists lobby legislators to adopt eco-friendly views in the hope of further nationalizing a concern for the environment.⁹⁹ Political parties adopt stances on environmental matters that they, too, promote, while special interest groups seek to advance their own, sometimes anti-environmental, agendas. The democratic process allows legislators to make environmental policy decisions based on these competing views.¹⁰⁰ Public pressure in the 1960s and 1970s led Congress to enact a plethora of environmental legislation,¹⁰¹ reflecting the broadly-held environmental values of the American public.¹⁰² Public input—in the form of voting, political party involvement, and membership in environmental or other groups¹⁰³—continues to play a crucial role in environmental policy formation. It helps maintain the substance of environmental laws, introduces innovative environmental solutions to Congress,¹⁰⁴ and otherwise allows lawmakers to keep a finger on the environmental pulse of the American people.

The federal environmental laws clearly reflect a policy that encourages public participation in all aspects of environmental decisionmaking. Environmental statutes typically call for the elimination of pollution, necessitating extensive regulatory response.¹⁰⁵ Public

⁹⁹ See Sagoff, *supra* note 23, at 795–96.

¹⁰⁰ See *id.* at 790.

¹⁰¹ See Farber, *supra* note 40, at 66–67.

¹⁰² See *id.* at 65.

¹⁰³ See *id.* at 66–67, 71.

¹⁰⁴ See *id.*

¹⁰⁵ See, e.g., 33 U.S.C. § 1251 (1994) (Clean Water Act provision calling for the elimination of

involvement in the resulting administrative process is often mandated, as are citizen suits to prevent agency foot-dragging¹⁰⁶ and to enforce the laws' provisions against violators.¹⁰⁷ Congress has recently added to these traditional avenues of participation by authorizing more proactive participatory mechanisms.¹⁰⁸ The agencies authorized to carry out the statutory goals, most often the EPA, promulgate regulations establishing the public participation procedures for their various programs. A look at a representative group of statutory provisions, implementing regulations, and participation programs reveals the many opportunities afforded the public to influence environmental decisionmaking.

B. *Selected Environmental Areas*

The public participation requirements of five federal environmental laws have been selected for review. In addition to detailing their statutory provisions and the regulations promulgated under them, the discussion will review critiques of the various programs in an effort to provide a sense of the current state of public participation in the environmental decisionmaking process.

1. The National Environmental Policy Act (NEPA)¹⁰⁹

NEPA boldly proclaims that "each person has a responsibility to contribute to the preservation and enhancement of the environment."¹¹⁰ It thus expressly contemplates both public and private input to help realize national environmental policies. The public is brought into the NEPA process in many ways. For example, federal agencies planning major projects are required to prepare environmental impact statements (EIS) which must be published in the Federal Register¹¹¹ for public review. The Council on Environmental Quality

polluting discharges into the nation's navigable waters). See also Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 735 (1990).

¹⁰⁶ See, e.g., 33 U.S.C. § 1365 (1994) (Clean Water Act's authorization of citizen suits against the EPA for failure to perform non-discretionary duties). See also Bram, *supra* note 19, at 153.

¹⁰⁷ See, e.g., 33 U.S.C. § 1365(a)(1) (1994) (Clean Water Act's authorization of citizen suits against violators of the Act).

¹⁰⁸ See Bram, *supra* note 19, at 163.

¹⁰⁹ 42 U.S.C. §§ 4321-4370(d) (1994).

¹¹⁰ See *id.* § 4331(c) (1994). The substantive provisions of NEPA generally require federal agencies to consider the environmental effects of their major activities. See *id.* § 4332.

¹¹¹ See *id.* § 4332(c)(i)-(v). Publication in the Federal Register is required under the Administrative Procedure Act. See 5 U.S.C. § 552 (1994).

(CEQ), established under NEPA to carry out the functions of the statute,¹¹² was authorized early on to seek the assistance of a Citizens' Advisory Committee on Environmental Quality.¹¹³ NEPA also provides the EPA with funding to make grants to nonprofit citizen groups to support and encourage participation.¹¹⁴

CEQ regulations stress public involvement in the implementation of NEPA. Notice and comment procedures are mandated in the NEPA process.¹¹⁵ In addition, federal agencies are required to promulgate their own NEPA implementing regulations and to publish guidance documents to supplement those of the CEQ.¹¹⁶ Further, citizens may seek redress for NEPA non-compliance in court.¹¹⁷

Despite NEPA's strong commitment to public involvement, numerous problems persist. Participants feel that NEPA-related documents are too technical, that agency decisions are determined before public involvement is sought, and that agencies do a poor job of locating stakeholders.¹¹⁸ It is believed that early public input could help address these concerns, particularly at the scoping stage of the NEPA process, where the environmental impacts of proposed projects are identified. Because scoping occurs prior to the drafting of an EIS, efforts to involve the public at that time could help prevent premature agency decisions.¹¹⁹

¹¹² 42 U.S.C. §§ 4342, 4344 (1994). CEQ duties include advising the President on the state of the environment, assembling and analyzing environmental information, reviewing federal programs to determine if they are in compliance with the Act, and recommending environmental policies. *See id.* § 4344.

¹¹³ *See id.* § 4345. The Citizens' Advisory Committee was established in 1969 by Executive Order number 11,472. It was later terminated. *See* Exec. Order No. 12,007, 42 Fed. Reg. 42,839 (1977).

¹¹⁴ *See* 42 U.S.C. § 4368 (1994).

¹¹⁵ *See* 40 C.F.R. § 1501.7 (1997) (calling for the input of interested persons in agency scoping decisions); § 1502.19 (requiring draft and final environmental impact statements to be circulated to anyone who requests them); § 1503.1(a)(4) (requiring agencies to affirmatively seek comments from persons who may be interested in their actions); § 1503.4 (requiring agencies to respond to public comments).

¹¹⁶ *See* 40 C.F.R. § 1507.3(a) (1997).

¹¹⁷ *See, e.g.,* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (holding that NEPA creates "judicially enforceable duties").

¹¹⁸ *See* EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS ix, x (1997) [hereinafter CEQ STUDY].

¹¹⁹ *See* Nicholas C. Yost, *The National Environmental Policy Act, in* AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 36, 36 (ABA Public Services Division, Standing Committee on Environmental Law) (1994).

Earlier input would not cure all of NEPA's participation ills, however. There are concerns that public hearings and other public involvement efforts are adversarial. In addition, the public complains that its own efforts to investigate and devise alternatives are wasted because citizens cannot compete with the far superior resources available to agencies.¹²⁰ A further concern targets the increased reliance on environmental assessments (EAs).¹²¹ In certain cases agencies may choose to prepare an EA instead of an EIS and bypass some of the public participation requirements that are mandated in the full-blown EIS process. The EA alternative thus allows agencies to side-step full NEPA compliance and cut the public out of the decisionmaking process.¹²²

The CEQ is attempting to correct these deficiencies in three ways: by improving strategic planning, implementing an ecosystem approach, and by instituting post-hoc monitoring of federal projects. Strategic NEPA planning requires the integration of NEPA into each agency's internal planning procedures¹²³ and strives to coordinate interagency NEPA compliance when a project involves multiple agencies.¹²⁴ The ecosystem approach is the second component of the CEQ's recent efforts, and has been defined as

a method of sustaining or restoring natural systems and their functions and values. It is goal driven, and it is based on a collaboratively developed vision of future desired conditions that integrate ecological, economic and social factors. It is applied within a geographic framework defined primarily by ecological boundaries.¹²⁵

¹²⁰ See CEQ STUDY, *supra* note 118, at 18.

¹²¹ An environmental assessment is a preliminary document prepared to determine whether an EIS is needed. See James W. Spensley, *National Environmental Protection Act*, in ENVIRONMENTAL LAW HANDBOOK 416 (14th ed. 1997). Most agencies require limited public input in the EA process. See *id.*

¹²² See CEQ STUDY, *supra* note 118, at 19-20. As of 1993, approximately 50,000 EAs were prepared each year; over 80% of those were prepared by five agencies: the Bureau of Land Management, the Department of Housing and Urban Development, the U.S. Army Corps of Engineers, the U.S. Forest Service, and the Federal Highway Administration. See *id.* at 19.

¹²³ See *id.* at 7.

¹²⁴ See *id.* at 7, 9. One opportunity for better interagency coordination is the habitat conservation plan process, where requirements under the ESA and NEPA might be coordinated. See *id.* at 23.

¹²⁵ *Id.* at 15. Ecosystem planning has also been embraced by land ethicists who suggest its adoption as part of "sustainable land policy." See LYNTON KEITH CALDWELL & KRISTIN SHRADER-FRECHETTE, *POLICY FOR LAND: LAW AND ETHICS* 195 (1993) (arguing in favor of a national land policy).

The goal of the approach is to achieve a balance between conservation, economic aims, and cultural values.¹²⁶ The CEQ's post-hoc monitoring efforts seek to determine whether environmental projections are accurate, and if not, whether project modification is feasible.¹²⁷ These three initiatives represent nothing less than a reinvention of the NEPA process in the hopes of improving the quality of public input.¹²⁸

2. The Clean Air Act (CAA)¹²⁹

The CAA contains several opportunities for public participation including information sharing, notice and comment mandates, and a citizen suit provision. Specifically, the Act provides for publication of research and development materials dealing with the prevention and control of air pollution;¹³⁰ public notice and comment opportunities related to transportation controls,¹³¹ consent orders, and settlement agreements,¹³² and public notification of exceedances of ambient air quality standards and related health hazards.¹³³ It also authorizes public participation to help improve emissions estimating techniques,¹³⁴ and as a part of the prevention of serious deterioration program¹³⁵ and the interstate transport commission program.¹³⁶ The CAA expressly provides for public participation in the EPA's rulemaking procedures,¹³⁷ and citizens are authorized to bring suit against the EPA for failure to perform nondiscretionary duties under the Act.¹³⁸

The CAA's implementing regulations provide additional opportunities for public participation. Public input is authorized in the state implementation plan (SIP) process,¹³⁹ in procedures related to state programs for the control of hazardous air pollutants,¹⁴⁰ and as part of state and federal permitting programs under Title V.¹⁴¹ Regulations

¹²⁶ See CEQ STUDY, *supra* note 118, at 14.

¹²⁷ See *id.* at 31-32.

¹²⁸ See *id.* at 35.

¹²⁹ 42 U.S.C. §§ 7401-7671(q) (1994).

¹³⁰ See *id.* § 7403(b)(1), (6).

¹³¹ See *id.* § 7408(f)(1)(A).

¹³² See *id.* § 7413(g).

¹³³ See *id.* § 7427(a).

¹³⁴ See 42 U.S.C. § 7430.

¹³⁵ See *id.* § 7470(5).

¹³⁶ See *id.* § 7506a(a), (c).

¹³⁷ See *id.* § 7607(d), (h).

¹³⁸ See *id.* § 7604(a)(2).

¹³⁹ See 40 C.F.R. §§ 51.102, 51.285 (1997).

¹⁴⁰ See *id.* § 63.91.

¹⁴¹ See *id.* §§ 70.7(h), 71.11.

also assure that the public has access to information submitted by owners and operators of new and modified sources of air pollution.¹⁴²

The CAA's requirement for public participation in the SIP process has been described as without guidelines and limited.¹⁴³ Long-range transportation planning, which must be reviewed by the EPA for compliance with SIPs,¹⁴⁴ poses particular problems. The public's lack of knowledge about mobile source air pollution is a major hurdle to meaningful participation, as is its often fierce opposition to proposals that call for modified driving habits and higher gasoline prices.¹⁴⁵ Like the public, transportation planners may be ill-informed about environmental matters, and may fail to take public participation seriously.¹⁴⁶ Not only do agencies have difficulty making the public understand the nature of a transportation project's impact on the air they breathe, but, because of the very nature of air pollution, agencies face challenges in identifying members of the public who will be affected by those projects.¹⁴⁷

The most successful participation initiatives under the CAA at the present time appear to be of a local nature.¹⁴⁸ This accomplishment is commendable but, if true, suggests that the public remains largely removed from regional planning decisions. Steps to correct this problem include measures to involve the public earlier in transportation planning.¹⁴⁹ In addition, agencies have begun to use visioning meetings where transportation planners discuss long-range plans in a way that is more accessible to laypersons.¹⁵⁰ Suggestions have also been made to enhance education by providing the public with credible information about the detrimental effects of mobile source emissions, and by offering technical support to participants to enable them to develop alternative strategies.¹⁵¹ The frequent overlap of air, land, and transportation planning makes the management of participation programs difficult. Improved inter-agency coordination is needed to

¹⁴² See *id.* § 51.161.

¹⁴³ See Janet S. Hathaway, *The Clean Air Act and the Intermodal Surface Transportation and Efficient Act*, in ABA/PUBLIC PARTICIPATION 28, 31-32 (ABA Public Service Division Standing Committee on Environmental Law) (1994).

¹⁴⁴ See *id.* at 31.

¹⁴⁵ See *id.* at 29, 32.

¹⁴⁶ See *id.* at 33, 35.

¹⁴⁷ See *id.* at 29.

¹⁴⁸ See Hathaway, *supra* note 143, at 29.

¹⁴⁹ See *id.* at 28.

¹⁵⁰ See *id.* at 29.

¹⁵¹ See *id.* at 30.

make the process more efficient and to assure that the public can have an impact on long-range decisions.¹⁵²

3. The Clean Water Act (CWA)¹⁵³

Like the CAA, the CWA contemplates broad public participation. It mandates public input in the "development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program" established by the EPA or the states, and also requires the EPA and the states to promulgate regulations setting forth participation guidelines.¹⁵⁴ In addition, the EPA must provide the public with notice of, and the opportunity to comment on, civil penalty orders under the Act.¹⁵⁵ State programs for the management of nonpoint sources of water pollution also require public input,¹⁵⁶ and citizens are authorized to bring action-forcing suits against the EPA.¹⁵⁷

Implementing regulations under the CWA call for participation in EPA rulemaking; in the issuance, modification and enforcement of National Pollution Discharge Elimination System (NPDES) permits;¹⁵⁸ in the production of citizen guides, handbooks, and policy guidance memoranda; and in determinations regarding state assumption of various CWA programs.¹⁵⁹ The regulations, which in many cases also govern public participation programs under the Resource Conservation and Recovery Act (RCRA) and the Safe Drinking Water Act, additionally call for the distribution of information to the public as well as notification and consultation by way of public hearings, meetings, advisory groups, seminars, and informal personal communication.¹⁶⁰

The EPA has established a number of public participation initiatives under the CWA. One example is a new management strategy for nonpoint sources of water pollution which seeks to hasten the implementation of nonpoint source control measures.¹⁶¹ The draft strat-

¹⁵² See *id.* at 33.

¹⁵³ 33 U.S.C. §§ 1251-1387 (1994).

¹⁵⁴ See *id.* § 1251(e).

¹⁵⁵ See *id.* § 1319(g)(4)(A).

¹⁵⁶ See *id.* § 1329(b)(1).

¹⁵⁷ See *id.* § 1365(a)(2).

¹⁵⁸ See 40 C.F.R. §§ 124.51-.66 (1997). NPDES permits regulate the discharge of pollutants into the nation's waters. See Lynn M. Gallagher, *Clean Water Act*, in ENVIRONMENTAL LAW HANDBOOK 109, 114 (14th ed. 1997).

¹⁵⁹ See 40 C.F.R. §§ 25.1-.14, 123.62(b)(2) (1997).

¹⁶⁰ See *id.* § 25.4(d).

¹⁶¹ See Draft Strategy Seeks to Hasten Effort to Control Nonpoint Source Pollution, 28 Env't Rep. (BNA) 1254-55 (Oct. 24, 1997).

egy includes efforts to enhance public awareness of nonpoint source pollution by using the Internet.¹⁶² An example of a localized public participation effort is the *EPA Lakewalk Manual: A Guidebook for Citizen Participation*,¹⁶³ a brief yet informative pamphlet published by the Water Division of EPA's Region 10. The guidebook teaches citizens who visit nearby lakes to compile data which can then be turned over to local environmental groups or the EPA. The pamphlet is written in layperson's language and contains a worksheet for lake-walkers to use to input data.¹⁶⁴ Both of these examples are illustrative of EPA efforts to reach out to citizens to inform them and to enable them to become more involved in monitoring the quality of the nation's waters.

Public participation also plays an important role in state-delegated programs under the CWA. States that have assumed wetlands permit programs, for example, have had a positive experience in public involvement.¹⁶⁵ Even though the tension between administrative efficiency and public participation exists in state programs as much as it does at the federal level,¹⁶⁶ the costs associated with state participation may be less and there may be better opportunities for participation in the state appeals process.¹⁶⁷ Yet state-assumed wetlands issues do not always pique the public interest. If the public does become involved, the technology gap remains an obstacle, as do the resources of well-funded and powerful permit applicants.¹⁶⁸ Despite these hurdles, state programs may be particularly important given what some perceive as a Congressional backlash to "comprehensive environmentalism."¹⁶⁹ The fact that state wetlands programs offer localized and less formal procedures may make them more accessible to the public than their federal counterpart,¹⁷⁰ but those very characteristics tend to hinder coordination with other federal programs.¹⁷¹

¹⁶² See *id.*

¹⁶³ See generally EPA LAKEWALK MANUAL: A GUIDEBOOK FOR CITIZEN PARTICIPATION (United States Environmental Protection Agency, Region 10, Water Division, 1996).

¹⁶⁴ See *id.*

¹⁶⁵ See generally Mary Goodenough, *Public Participation in a State-Assumed Wetlands Permit Program: The Michigan Example*, 10 J. ENVTL. L. & LITIG. 221 (1995).

¹⁶⁶ See *id.* at 277.

¹⁶⁷ See *id.* at 247, 250.

¹⁶⁸ See *id.* at 286-88.

¹⁶⁹ See *id.* at 286; see also *infra* notes 291-96 and accompanying text.

¹⁷⁰ See Goodenough, *supra* note 165, at 288-89.

¹⁷¹ See *id.* at 283-84.

4. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁷²

CERCLA's extensive participation provisions seek to assure the public an active role in the cleanup of Superfund sites. The public has a right to judicial review of any regulation promulgated under the Act¹⁷³ and regulations must be promulgated to assure public participation in the development of administrative records related to removal and remedial actions.¹⁷⁴ Public notice of removal actions must include information about the proposed activities and alternative plans, and the public must have an opportunity to comment on the proposal. Public meetings are also authorized in localities where plans are to be carried out.¹⁷⁵ Further, the EPA must respond to significant comments, criticisms, and new information submitted by the public.¹⁷⁶ To assist the public in dealing with the complex nature of the clean-up process and to enable them to voice their concerns in a meaningful way, technical assistance grants are available.¹⁷⁷ When a final remedial plan is selected, the public must be notified and informed about any deviations from the original proposal.¹⁷⁸ The public may also comment on consent decrees¹⁷⁹ and settlements.¹⁸⁰ Finally, CERCLA's citizen suit provision includes the familiar language authorizing action against the EPA for failure to perform nondiscretionary duties.¹⁸¹

CERCLA's regulations authorize public involvement when sites are proposed to be deleted from the National Priorities List.¹⁸² In addition, the regulations require community relations efforts for removal actions¹⁸³ as well as during the remedial investigation/feasibility study (RI/FS) and the remedy design/remedial action (RD/RA) phases.¹⁸⁴ These requirements are carried out through the appointment of

¹⁷² 42 U.S.C. §§ 9601-9675 (1994).

¹⁷³ See *id.* § 9613(a).

¹⁷⁴ See *id.* § 9613(k). In general, removal actions deal with environmental emergencies, while remedial actions are long-term and permanent in nature. See Robert T. Lee, *Comprehensive Environmental Response, Compensation, and Liability Act*, in ENVIRONMENTAL LAW HANDBOOK 430, 437-38 (14th ed. 1997).

¹⁷⁵ See 42 U.S.C. § 9613(k)(2)(B) (1994).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* § 9617(e).

¹⁷⁸ See *id.* § 9617(b).

¹⁷⁹ See *id.* § 9622(d)(2).

¹⁸⁰ See 42 U.S.C. § 9622(i)(1), (2).

¹⁸¹ See *id.* § 9659(a)(2).

¹⁸² See 40 C.F.R. § 300.425(e)(4) (1997).

¹⁸³ See *id.* § 300.415.

¹⁸⁴ See *id.* §§ 300.430, 300.435. The RI/FS and RD/RA phases are part of the remedial process. See Lee, *supra* note 174, at 439-40.

agency spokespersons, the use of community interviews, and the preparation of community relations plans. Regulations also emphasize the need to allow the public to suggest the manner in which they become involved in the process, to make them aware of the availability of technical assistance grants, and to make information available to them by establishing information repositories.¹⁸⁵

CERCLA's generous participation provisions have not resulted in a high level of public satisfaction. Its citizen suit provision has been strictly interpreted by the courts to delay suits until clean-up actions have been undertaken.¹⁸⁶ In addition, the public often feels powerless once immersed in the Superfund process, and administrators complain that CERCLA's participation requirements only add time and cost to an already lengthy and costly procedure.¹⁸⁷ It has also been pointed out that participants are not good judges of acceptable levels of risk, and in any event should not become so involved that they usurp the EPA's role as regulator.¹⁸⁸ What tends to exist under CERCLA are public participation programs that provide technical information to the public but fail to fully integrate public values into the clean-up process.¹⁸⁹ There is a sense that the public should be involved as early as possible in the clean-up process, should have the ultimate say in land use decisions,¹⁹⁰ and should have the opportunity to introduce values such as intergenerational equity into the clean-up equation.¹⁹¹ These values and unique local concerns, which are likely to be raised by the public, are often ignored by the EPA or are characterized as emotional reactions.¹⁹² Additional suggestions to improve the process include more informal public interaction and easier public access to technical assistance grants.¹⁹³

¹⁸⁵ See 40 C.F.R. §§ 300.415(n), 300.430(c).

¹⁸⁶ See *Clinton County Comm'rs. v. EPA*, 116 F.3d 1018, 1024 (3d Cir. 1997); *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990); see also Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 *ECOLOGY L.Q.* 173, 200 (1991); Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 *S.W. L.J.* 929, 950-53 (1990).

¹⁸⁷ See Gene A. Lucero, *Superfund*, in *ABA/PUBLIC PARTICIPATION* 13, 14 (ABA Public Service Division, Standing Committee on Environmental Law) (1994).

¹⁸⁸ See *id.* at 16-17.

¹⁸⁹ See Folk, *supra* note 186, at 200.

¹⁹⁰ See Lucero, *supra* note 187, at 14, 18.

¹⁹¹ See Folk, *supra* note 186, at 186.

¹⁹² See *id.* at 189-91.

¹⁹³ See *id.* at 216-17.

5. Endangered Species Act (ESA)¹⁹⁴

The ESA authorizes public involvement in the listing of endangered species,¹⁹⁵ the designation of critical habitat,¹⁹⁶ and the development of recovery plans for endangered species.¹⁹⁷ Participation is also called for in permitting decisions, which allow individuals to take protected species under limited and controlled conditions.¹⁹⁸ Regulations require the Fish and Wildlife Service to cooperate with states that have their own endangered species conservation programs. The cooperative agreements may require that state programs provide for public participation in the designation of protected species.¹⁹⁹

The difficulties with public involvement in ESA procedures are predictable. Often the information that is made available to the public is highly technical.²⁰⁰ Not only is biological information difficult to grasp, but the quantity of pertinent data can be enormous because of the Act's comprehensive and cumulative approach to ecosystem planning.²⁰¹ The ecosystem approach, which is both popular²⁰² and cost-effective,²⁰³ poses still other problems. Its necessarily wide scope makes the identification of stakeholders a challenge. Further, members of the public who may be interested in specific ESA procedures are often numerous and geographically scattered.²⁰⁴ A final problem under the ESA is raised by interagency consultation, a process which is frequently required but from which the public is for the most part removed.²⁰⁵ The greatest opportunities for public input under the ESA appear to exist in permitting procedures for private development of habitat, listing decisions, and the formation of recovery plans.²⁰⁶

Suggestions to improve participation efforts under the ESA focus on integration, consensus-building, and early public input. Specifically,

¹⁹⁴ See 16 U.S.C. §§ 1531-1544 (1994).

¹⁹⁵ See *id.* § 1533(b)(5).

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* § 1533(f)(4).

¹⁹⁸ See *id.* § 1533(c).

¹⁹⁹ See 50 C.F.R. § 81.2 (1997).

²⁰⁰ See Craig Potter, *The Endangered Species Act*, in ABA/PUBLIC PARTICIPATION 21, 23 (ABA Public Service Division, Standing Committee on Environmental Law) (1994).

²⁰¹ See Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGY L.Q.* 369, 393 (1996).

²⁰² See *supra* notes 123-25 and accompanying text.

²⁰³ See Lin, *supra* note 201, at 399.

²⁰⁴ See Potter, *supra* note 200, at 22.

²⁰⁵ See *id.* at 23.

²⁰⁶ See *id.* at 25.

better coordination of state and federal efforts is called for,²⁰⁷ as is integration of NEPA into habitat conservation planning.²⁰⁸ The use of a facilitator to help move the participation process along has also been suggested,²⁰⁹ as has reliance on a few agreed-upon organizations to represent numerous diverse environmental interests.²¹⁰ Other suggestions point to a need for consistency in standards²¹¹ and early written understandings detailing the scope of public negotiations.²¹²

The foregoing discussion reveals the common forms of public participation in environmental statutes and regulations, but is surely not meant to be exhaustive. Similar provisions exist under other environmental statutes,²¹³ and leave no doubt that Congress and the EPA are strongly committed to public participation in environmental decision-making. This commitment is shared by the Clinton Administration, which has stressed participation in various contexts.²¹⁴

6. General EPA Initiatives

EPA's recent participation efforts also include initiatives that are not tied to specific statutes. Chief among these is the incorporation of consensus building into various participation programs.²¹⁵ The hallmark of this approach is a requirement that agencies reach out to the public at the earliest possible time to invite participation.²¹⁶ Consensus building requires that all interested parties—including the government—develop proposals for a project, the merits of which are debated under the guidance of a neutral facilitator.²¹⁷ A final solution is accepted only when consensus is reached, meaning that "all involved agree that everyone's concerns have been heard, a good-faith nego-

²⁰⁷ See Lin, *supra* note 201, at 406.

²⁰⁸ See *id.* at 429–30.

²⁰⁹ See *id.* at 413–14.

²¹⁰ See Potter, *supra* note 200, at 22.

²¹¹ See Lin, *supra* note 201, at 420.

²¹² See *id.* at 422.

²¹³ For example, public participation is called for under the Safe Drinking Water Act and the Toxic Substances Control Act. See, e.g., 15 U.S.C. § 2605(c)(2) (1994); 42 U.S.C. § 300h-6(e)(3), (h) (1994).

²¹⁴ The President has called for public participation in relation to NAFTA's environmental side agreement and in connection with environmental justice matters. See Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (1994); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

²¹⁵ See Lawrence E. Susskind, *Overview of Developments in Public Participation, in ABA/PUBLIC PARTICIPATION 2, 2* (ABA Public Service Division, Standing Committee on Environmental Law) (1994).

²¹⁶ See *id.* at 3.

²¹⁷ See *id.*

tiation has taken place, and the actions . . . proposed meet the constraints of the law as well as the constraints of money."²¹⁸ The ultimate decision need not be unanimously agreed upon, but it must be arrived at by consensus. To avoid later disputes, all participants must state on the record what the final result means to them.²¹⁹ The prenegotiation stage, which involves contacting all stakeholders and developing focused and complete agendas for all meetings, is crucial to building consensus.²²⁰ Post hoc evaluation is likewise important, since it allows decisionmakers to determine whether the process was fair, efficient, and stable.²²¹

Another broad-based EPA effort is its Green Communities program. The Green Community concept is committed to sustainability, emphasizes intergenerational equity, and encourages people to work toward a "shared vision."²²² The EPA has prepared a colorful Green Community kit that explains the five steps in the Green Community process. Communities are encouraged to take these steps with the help of the EPA, if needed.²²³ The program seeks to assist local governments with environmental planning on a community-based level. In addition to providing interested communities with techniques to assess their current quality of life, the kit suggests ways to improve the environmental health of the community. EPA's Green Communities website is also available as a tool to make the program more accessible.²²⁴

The Green Community initiative is part of the EPA's Community-Based Environmental Protection program (CBEP), which allows agencies and EPA region offices to share information with communities. The goal is to empower local communities so they can play a role in the nation's environmental protection efforts. It is a broad-based program with three major components: providing direct assistance to communities of a general, technical, or financial character; building capacity by guiding communities to a point where they will take it upon themselves to become involved in environmental planning; and

²¹⁸ *Id.* at 4.

²¹⁹ *See id.* at 10, 12.

²²⁰ *See* Susskind, *supra* note 215, at 10.

²²¹ *See id.*

²²² U.S. ENVIRONMENTAL PROTECTION AGENCY, GREEN COMMUNITIES: BUILDING SUSTAINABLE FUTURES BY LINKING ENVIRONMENT, COMMUNITY, ECONOMY (1997).

²²³ The steps require a community to ask the four questions—Where are we now? (Step 1); Where are we going? (Step 2); Where do we want to be? (Step 3); How do we get there? (Step 4)—and then make a commitment to take action—Let's Go (Step 5). *See id.*

²²⁴ *See id.*

working internally within the EPA's own offices by way of CBEP staff training to enable the offices to develop a more community-based approach to their work.²²⁵

Measures to provide the public with ample information regarding environmental issues are common to all of these programs. This focus on public access to information has become a major thrust of current participation measures,²²⁶ and has also become a component of recent efforts to reinvent the environmental permitting process. In 1996, the EPA's Permit Improvement Team published its *Concept Paper on Environmental Permitting and Task Force Recommendation*,²²⁷ which details suggestions to improve the permitting process in general. Public access to information is seen as the "common denominator" to the new style of permitting,²²⁸ which is termed "public performance-based permitting."²²⁹ Recognizing that environmental performance occurs in the public arena, the report suggests that the public become involved early in all permitting decisions,²³⁰ that participants be provided with information, and that they become involved in setting performance standards and monitoring the subsequent performance of permittees.²³¹

The Concept Paper discloses some of the newest trends in public participation. As mentioned above, there is an overriding emphasis on providing the public with information about environmental matters. This is to be accomplished through the development of well-publicized, user-friendly information that is disseminated early. The publication of EPA guidance documents will also support this goal,²³² as will sensitivity to environmental justice concerns.²³³ The Concept Pa-

²²⁵ Telephone interview with Susan McDowell, Community-Based Environmental Protection Coordinator, EPA Region III (Nov. 14, 1997). More information can be found at the EPA's website: <http://earthl.epa.gov/ecosystems/>.

²²⁶ For example, President Clinton has requested additional environmental funding to enhance the public's knowledge of environmental hazards. Plans include providing members of the public with access to environmental information and informing them about EPA's work. This initiative is known as Environmental Monitoring for Public Access and Community Tracking (EMPACT). See \$159 Million Requested for Right to Know, \$18.7 Million More Than 1998 Appropriation, 28 Env't Rep. (BNA) 2016 (Feb. 6, 1998).

²²⁷ EPA, *Notice of Availability of Permits Improvement Team Concept Paper on Environmental Permitting and Task Force Recommendations; Correction*, 61 Fed. Reg. 41,252 (1996) [hereinafter Permit Concept Paper].

²²⁸ *Id.* at 41,262.

²²⁹ *Id.* at 41,252.

²³⁰ See *id.* at 41,255.

²³¹ See *id.* at 41,252.

²³² See Permit Concept Paper, *supra* note 227, at 41,269-70.

²³³ See *id.* at 41,270.

per also calls for developing a standard permitting model which will be easier for the public to comprehend,²³⁴ and which will coordinate permitting between various media programs whenever possible.²³⁵ The goal is to institute comprehensive multi-media community involvement programs in place of individual permitting programs that have been prone to inconsistency.²³⁶ Importantly, the report states that more is needed than a mere reaching out to the public with environmental information; rather, the public must be actively involved in permit decisions and in monitoring permit compliance.²³⁷ The Concept Paper also recognizes the importance of self-evaluation on the part of EPA to be sure that its performance is adequate.²³⁸ The preparation of case studies that detail successful public participation experiences is one way to accomplish this goal.²³⁹

The inclusion of a strong environmental justice component in the proposed revisions to the permitting process reflects a major development in the evolution of environmental decisionmaking. President Clinton's 1994 executive order on environmental justice mandates that federal agencies make the equitable treatment of minority communities a part of their decisionmaking procedures.²⁴⁰ In compliance with that order, the EPA has devised an Environmental Justice Checklist²⁴¹ that contains thirty-five points which seek to integrate environmental justice considerations into public participation programs.²⁴² The increased influence of the environmental justice movement in environmental law in general is thus having a direct impact on public participation. The EPA now strives to make sure that all individuals who will be impacted by siting and other environmental decisions receive information early, are allowed to provide input in the decisionmaking process,²⁴³ and are involved in enforcement and

²³⁴ See *id.* at 41,262.

²³⁵ See *id.* at 41,269.

²³⁶ See *id.* at 41,270.

²³⁷ See Permit Concept Paper, *supra* note 227, at 41,252-64. This approach is also illustrated in the lakewalk program. See *supra* note 163 and accompanying text.

²³⁸ See Permit Concept Paper, *supra* note 227, at 41,252.

²³⁹ See *id.* at 41,271.

²⁴⁰ See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

²⁴¹ The checklist was recommended by the National Environmental Justice Advisory Council in order to assist EPA in developing its environmental justice strategy. See Guana, *supra* note 7, at 53-54. The checklist is also playing a role in permit reform. See 19 Daily Env't Rep. (BNA) d14 (May 10, 1996); see also National Environmental Justice Advisory Council, Public Participation & Accountability Subcommittee, MODEL PLAN FOR PUBLIC PARTICIPATION (Nov. 1996).

²⁴² See Guana, *supra* note 7, at 54.

²⁴³ See Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *ECOLOGY L.Q.* 705, 724 (1994).

post-decision evaluation as well.²⁴⁴ Full participation and a democratic process will hopefully avoid the disparate environmental impacts that have plagued many siting and planning decisions in the past.²⁴⁵

The foregoing EPA strategies bode well for public participants, but not all new environmental initiatives are as promising. Despite the existence of the Environmental Justice Checklist, there are concerns that the distributional impacts of decisions may be overlooked in the haste to develop creative and efficient approaches to environmental problems. For example, recent brownfields initiatives, which attempt to revitalize old urban areas by reducing cleanup standards and limiting liability,²⁴⁶ can adversely affect nearby disempowered residents.²⁴⁷ In order to reach a fully informed and fair decision as to the tradeoffs involved in making these sites once again productive, all interested parties must participate early and fully in the decisionmaking process.²⁴⁸

The EPA's Project XL, which allows industrial entities to operate under relaxed regulatory standards in exchange for verification of greater pollution reduction, is another source of concern. Because this program represents a major shift in the approach to regulation, full public participation is crucial.²⁴⁹ The EPA is mindful of the need for participation in the Project XL process, yet its guidelines are weak, and regulated targets are often given the power to determine who the stakeholders are.²⁵⁰ Efforts to reinvent regulation, as exemplified by brownfields initiatives and Project XL, serve as reminders that despite the advances that are being made, public participation is not always given the priority it deserves.

III. OBSTACLES, TRENDS AND SUGGESTIONS

Public participation in environmental decisionmaking is experiencing positive change, but it is clear that problems persist. Some difficulties are generic to participation programs while others are peculiar to environmental initiatives. A thorough consideration of these problems reveals the real challenges for public participation at the millen-

²⁴⁴ See *id.* at 765.

²⁴⁵ See Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 29 (1995).

²⁴⁶ See McWilliams, *supra* note 243, at 738.

²⁴⁷ See *id.* at 757.

²⁴⁸ See *id.* at 773-74.

²⁴⁹ See Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 *ENVTL. L. REP. (Envtl. L. Inst.)* 10,527 *passim* (Oct. 1996).

²⁵⁰ See *id.* at 10,533.

nium. This section of the article will focus on those challenges and will also analyze the trends and suggestions that hold promise for the future.

A. *Obstacles to Participation*

Environmental decisionmakers experience many difficulties that are typical of any participation program. To them, the public is emotional and ill-equipped to deal with technical matters.²⁵¹ Participation programs demand large amounts of time,²⁵² are difficult to manage,²⁵³ and conflict with the administrative goal of efficiency.²⁵⁴ In addition, environmental decisionmakers are as reluctant to give up power as are other administrators,²⁵⁵ and are similarly plagued by understaffed offices and limited funds.²⁵⁶

Public participants bring high expectations to environmental participation programs²⁵⁷ and lodge many standard complaints as well. They feel that administrators are paternalistic²⁵⁸ and use participation programs to legitimize previously-made decisions.²⁵⁹ They point out that technical experts fail to understand participation programs and may even refuse to take them seriously.²⁶⁰ At best, environmental agencies react to public suggestions rather than anticipate them,²⁶¹ and ultimately make decisions that are politically expedient.²⁶² The public sees participation as an exercise in confrontation,²⁶³ governed by inflexible agency rules that afford only limited avenues for meaningful input.²⁶⁴

²⁵¹ See Fiorino, *supra* note 44, at 501; Folk, *supra* note 186, at 175; Potter, *supra* note 200, at 23.

²⁵² See Lin, *supra* note 201, at 398-99.

²⁵³ See Lucero, *supra* note 187, at 15.

²⁵⁴ See Goodenough, *supra* note 165, at 276-77.

²⁵⁵ See W.R. Derrick Sewell & Timothy O'Riordan, *The Culture of Participation in Environmental Decisionmaking*, 16 NAT. RESOURCES J. 1, 17 (1976).

²⁵⁶ See Lin, *supra* note 201, at 400, 403-04.

²⁵⁷ See KWEIT & KWEIT, *supra* note 8, at 31-32.

²⁵⁸ See Daniel A. Farber, *Review Essay: Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021, 1034 (1989); Susskind, *supra* note 215, at 2; Wilkinson, *supra* note 15, at 132.

²⁵⁹ See Goodenough, *supra* note 165, at 288; Hathaway, *supra* note 143, at 28.

²⁶⁰ See Hathaway, *supra* note 143, at 34-35.

²⁶¹ See Fiorino, *supra* note 44, at 519.

²⁶² See KWEIT & KWEIT, *supra* note 8, at 67.

²⁶³ See Wilkinson, *supra* note 15, at 132.

²⁶⁴ See KWEIT & KWEIT, *supra* note 8, at 76; Wilkinson, *supra* note 15, at 130.

This predictable litany of shortcomings forms the foundation of a formidable wall of participation problems in the environmental area. There are, however, many other participation problems that are unique to environmental issues. These environmentally-specific problems are of particular interest and present the greatest challenges for today's participation program managers.

The technology challenge is perhaps the most obvious of those problems that become more pronounced in environmental settings. Some decisions, such as those involving risk assessment, demand an understanding of extremely technological information, making them more difficult for the public to grasp than those dealing with other issues.²⁶⁵ The heightened level of technology often necessitates the compilation of enormous amounts of data, resulting in a data deluge that can overwhelm lay participants.²⁶⁶ A more subtle ramification of the technology problem arises from the scientific uncertainty that plagues so many environmental problems. Administrators may be hesitant to present the public with scientific data that is unclear and conflicting, believing that to do so would leave the public even more distrustful of government. Any such reluctance to share scientific information with the public can threaten participation efforts.²⁶⁷

Influential special interests and environmental organizations are two other pronounced factors in environmental decisionmaking. Special interest groups frequently lobby legislators on a variety of policy matters, but because environmental regulations significantly impact industry, special interests are particularly active in the environmental lawmaking process.²⁶⁸ Maintaining a low profile, these groups target sympathetic lawmakers and legislative committees,²⁶⁹ often promoting views that are opposed to public opinion on environmental matters.

As mentioned previously, public interest groups represent an ironic threat to public participation. Because these groups represent the public interest, any increased influence in policy formation or decisionmaking on their part should be welcomed by public participation advocates. This suggests that the existence of strong environmental organizations should be applauded by participation advocates. The

²⁶⁵ See Fiorino, *supra* note 44, at 501.

²⁶⁶ See CEQ STUDY, *supra* note 118, at 27.

²⁶⁷ See Folk, *supra* note 186, at 180.

²⁶⁸ See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 19 (1991).

²⁶⁹ See *id.*

dominance of environmental organizations, however, has had the down-side effect of adding to the free-rider problem. Individuals tend to remain aloof and let organized environmentalists present their own agendas.²⁷⁰ Those agendas are frequently criticized for targeting national rather than local issues and for failing to serve the needs of local communities.²⁷¹ Critics charge that large environmental organizations further their national goals by monopolizing environmental citizen suits and reaping the benefits from mitigation programs that may be included in dispute settlements.²⁷² The preoccupation with national matters is particularly detrimental to would-be participants from poor communities who face environmental degradation, who are likely to be strapped for funding and greatly in need of the expertise that national groups possess.

While technology and interest group concerns may be more exaggerated in environmental decisionmaking, other factors combine to create new varieties of challenges. The conflict between public environmental values and economic approaches to environmental regulation is perhaps the most significant example.²⁷³ As environmental regulators increasingly rely on economic equations to establish optimal levels of pollution,²⁷⁴ public values become less influential, if not ignored.²⁷⁵ Yet commonly-held values can forcefully be articulated by the public. To ignore them and to rely exclusively on market forces limits the choice of options in the decisionmaking process.²⁷⁶ Ethicists would go so far as to argue that economic approaches are completely out of place in all land use decisions, which are fundamentally ethical in nature.²⁷⁷ Pure cost-benefit approaches foreclose public input, making it more difficult to determine social consensus on environmental policy.²⁷⁸

²⁷⁰ See Farber, *supra* note 40, at 72.

²⁷¹ See Bram, *supra* note 19, at 153-56; Greve, *supra* note 96, at 351, 371; Guana, *supra* note 245, at 42-44.

²⁷² See Greve, *supra* note 96, at 356-59.

²⁷³ See Farber, *supra* note 258, at 1021-22.

²⁷⁴ See Carol M. Rose, *Environmental Lessons*, 27 LOY. L.A. L. REV. 1023, 1034-35 (1994).

²⁷⁵ See Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 308 (1982).

²⁷⁶ See COMMON FIRE, *supra* note 61, at 233-34.

²⁷⁷ See THOMAS BEATLEY, *ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLANNING* 261 (1994).

²⁷⁸ See Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 19 (1986); see also Rose, *supra* note 274, at 1032-35; Sagoff, *supra* note 275, at 308, 315.

Other impediments to meaningful public involvement arise from what Professor Carol Rose has termed "the information problem."²⁷⁹ This phrase is not merely descriptive of the technology gap, but refers to the difficulties agencies face in publicizing environmental issues in a way that captures the public's attention. Challenges arise because pollution problems are commons problems, not personal ones.²⁸⁰ Motivating individuals to become involved in environmental matters is a challenge, especially when regulators are confronted with an uninformed or free-riding public.²⁸¹ A reverse sort of paternalism can also result if participants, instead of seeking greater environmental protection, endorse solutions that are less protective of human health than what the administrators endorse.²⁸² The fact that pollution problems are commons-based also makes the identification of stakeholders onerous because of the often large number of diverse interests involved, and because individuals might not even realize they have interests at stake.²⁸³

New initiatives in environmental policy and regulation, both foreign and domestic, represent further challenges to public participation. Efforts to halt environmental calamities are becoming more and more global, evidenced by the United States' entry into more bi- and multi-lateral environmental agreements. These international arrangements run the risk of being "lifted out of domestic processes and placed in a legal context that barely acknowledges the existence of individuals,"²⁸⁴ creating a danger that global agreements will be drafted in the absence of public participation.²⁸⁵ On the domestic front, new approaches to regulation attempt to lessen regulatory burdens, yet may overlook public participation.²⁸⁶ Efforts such as the brownfields initiatives and EPA's Project XL program,²⁸⁷ mentioned earlier, herald a well-intentioned shift in the approach to regulation, but demonstrate

²⁷⁹ Rose, *supra* note 274, at 1024.

²⁸⁰ *See id.*

²⁸¹ *See id.*; Carol M. Rose, *Legal Theory and Philosophy: Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name is Preference*, 87 MICH. L. REV. 1631, 1643 (1989); *see also* Farber, *supra* note 40, at 72.

²⁸² *See* Lucero, *supra* note 187, at 15; *see also* Farber, *supra* note 258, at 1034.

²⁸³ *See* Potter, *supra* note 200, at 22.

²⁸⁴ David A. Wirth, *The Uneasy Interface Between Domestic and International Environmental Law*, 9 AM. U. J. INT'L L. & POL'Y 171, 173 (1993).

²⁸⁵ *See id.* at 174.

²⁸⁶ *See* Steinzor, *supra* note 249, at 10,527.

²⁸⁷ Under Project XL, companies request substantial reductions in or exemptions from pollu-

that new initiatives pose environmental justice and other stakeholder problems.

Another reality faced by public participation proponents is the fragmentation of national environmental efforts. The piecemeal enactment of federal environmental laws has left the nation with a patchwork quilt of legislation.²⁸⁸ The many discrete areas of regulation promote ad hoc decisions rather than solutions resulting from coordinated deliberation.²⁸⁹ Not only might one agency fail to coordinate efforts with another, but decisionmaking within individual agencies may be disjointed and inconsistent.²⁹⁰ Fragmentation stymies coordination and results in duplicated participation efforts that bring added and unnecessary costs to agencies and the public alike.

Perhaps the greatest foe of public participation initiatives is what some perceive to be a decline in environmentalism.²⁹¹ Michael Greve, a proponent of this view, sees the decline in the ascendance of interest groups,²⁹² the emphasis on cost-benefit analyses,²⁹³ and judicial retreat from doctrines that once allowed a freer manipulation of laws²⁹⁴ in preference of firm rules that are highly deferential to agencies.²⁹⁵ Greve describes the law as moving toward private orderings and principled restraints on environmental regulations²⁹⁶ and away from public value-based policies. If this is so, the public voice is likely to become increasingly distant.²⁹⁷

B. *Suggestions and Trends*

Despite the considerable difficulties that threaten public participation in environmental decisionmaking, defeat is not inevitable. There is little question, however, that efforts must be made to ensure that

tion regulations in one area, promising that their efforts elsewhere will result in environmental performance that is superior to what would exist under existing regulations. *See id.* at 10,528.

²⁸⁸ *See* Rose, *supra* note 274, at 1039.

²⁸⁹ *See* Kaufman, *supra* note 2, at 873.

²⁹⁰ *See id.*

²⁹¹ *See generally* MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* (1996).

²⁹² *See id.* at 2.

²⁹³ *See id.* at 3.

²⁹⁴ *See id.* at 34.

²⁹⁵ *See id.* at 66.

²⁹⁶ *See* GREVE, *supra* note 291, at 118.

²⁹⁷ For a rebuttal of Greve's analysis, see Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 *MISS. L.J.* (forthcoming, 1999).

the public voice is not reduced to a whisper or lost altogether in the next generation of environmental regulation. It is imperative that those who seek to improve participation programs not only identify the problems, but also take careful note of the suggestions that have been made to rectify the problems and recognize emerging trends. Confronting and responding to the challenges, suggestions, and trends is the first step toward devising positive participation strategies for agencies and the public alike.

The suggestions and trends that most affect public participation in environmental decisionmaking can be distilled from current participation initiatives and the commentary they have engendered. The developments are many, but essentially they can be divided into three categories. External trends and suggestions are those that deal with the lawmaking process and environmental policy in general. They are referred to as external because they represent developments that are external to public participation but which nevertheless have a direct impact on participation initiatives. Suggestions and trends dealing with coordination and scope are those that focus on the substance and quantity of participation programs. Finally, there are suggestions and trends touching on implementation, which stress new methods and perspectives to be employed by agencies and participants in carrying out participation programs.

1. External Trends

The discussion of external trends in public participation programs begins where the discussion of problems left off. If, in fact, the environmental movement is fading, it certainly poses a problem for participation efforts, but it also points to an important trend in the lawmaking process. The growth and influence of special interest groups is suggested as one manifestation of the decline in environmentalism, and it is a phenomenon that has significant impact on the legislative process. Legislators may hope to promote their own ideologies, yet they are constantly sought out by constituents and special interest groups, all with their own agendas.²⁹⁸ In the face of the constant tug and pull of viewpoints, it may at times seem remarkable that any coherent lawmaking is accomplished. Some public choice theorists would agree, suggesting that the process results in meaningless

²⁹⁸ See FARBER & FRICKEY, *supra* note 268, at 33.

laws.²⁹⁹ Studies, however, suggest that political parties and legislative committees inject a sense of coherence into the policymaking process.³⁰⁰ If this is so, it becomes more important than ever for public dialogue to become part of the lawmaking process to bring public views to the attention of lawmakers and to avoid capture by industry.³⁰¹ Public input at this early stage of the political process would assure that public values are incorporated into statutory language to guide later implementation decisions, making them less likely to be based exclusively on economic factors.³⁰²

Two other external trends include an increased reliance on the states to provide environmental protection and efforts to decrease the regulatory burden on industry. State assumption of environmental programs is becoming a more prevalent means of curtailing pollution and offers hope for more frequent and less formal participation by the public.³⁰³ Recently-proposed RCRA legislation, for example, would increase state involvement in overseeing certain types of RCRA clean-up actions. The bill's provisions include public participation requirements that mirror those of the Superfund, and exceed those called for in earlier legislative drafts.³⁰⁴ The current emphasis on decreased regulation is another political trend. Unlike state-assumed programs, however, this trend may threaten participation efforts if agencies overlook or restrict the public's role while attempting to streamline environmental regulations for industry.³⁰⁵

A final external trend is the increased sensitivity to environmental justice issues. Despite efforts such as EPA's Environmental Justice Checklist and its incorporation into permit improvement efforts, it is believed that environmental justice issues remain largely ignored by large environmental organizations,³⁰⁶ and may be neglected when new administrative initiatives are implemented.³⁰⁷ There is no question, however, that the government is committed to improving the quality of participation by disempowered groups and that those efforts will continue.

²⁹⁹ See *id.* at 38.

³⁰⁰ See *id.* at 58.

³⁰¹ See *id.* at 61.

³⁰² See Farber, *supra* note 258, at 1021-22.

³⁰³ See generally Goodenough, *supra* note 165.

³⁰⁴ See 28 Env't Rep. (BNA) 2016 (Feb. 6, 1998).

³⁰⁵ See *supra* notes 246-50 and accompanying text.

³⁰⁶ See *supra* note 282 and accompanying text.

³⁰⁷ See *supra* notes 246-47 and accompanying text.

2. Trends Dealing with Coordination and Scope

Concerns about the coordination and scope of participation programs fall into the second grouping of suggestions and trends. Coordination has been suggested at various levels. For example, inter-agency coordination has been proposed to make public participation programs more efficient under NEPA³⁰⁸ and the ESA,³⁰⁹ and as part of permit reinvention.³¹⁰ Intra-agency coordination has also been suggested as a way to make separate participation programs within individual agencies more consistent.³¹¹ Concerns that large environmental organizations fail to speak for local disadvantaged communities have led to suggestions for a different type of coordination,³¹² one that would pull together the efforts of inner-city environmental justice advocates and those of large environmental groups.³¹³

A recognition that the environmental and cultural aspects of the world work together has resulted in a number of trends affecting the scope of participation programs. The acceptance of the ecosystem approach to environmental planning and the implementation of sustainable development within communities are two examples.³¹⁴ Other scope-related suggestions stress the need to address environmental issues in a global context with common values in mind³¹⁵ and to make public advocates more aware of the interdependence between people and places.³¹⁶

The broadened scope of public participation can also be seen in the expanded public role in some of EPA's newer programs. Those programs, which now encourage the public to become involved in monitoring environmental compliance,³¹⁷ provide the public with an opportunity for input well beyond the start-up phase of a project. The EPA has also begun to engage the public not merely in facility-specific permitting decisions, but in the development of national programs as well.³¹⁸

³⁰⁸ See *supra* note 124 and accompanying text.

³⁰⁹ See *supra* notes 208-09 and accompanying text.

³¹⁰ See *supra* note 235 and accompanying text.

³¹¹ See *supra* notes 124 & 152 and accompanying text.

³¹² See *supra* note 282 and accompanying text.

³¹³ See Dan Tarlock, *City versus Countryside: Environmental Equity in Context*, 21 *FORDHAM URB. L.J.* 461, 491-92 (1994).

³¹⁴ See *supra* notes 125, 222-25 and accompanying text.

³¹⁵ See Tarlock, *supra* note 313, at 491-92; see also *supra* notes 31-32 and accompanying text.

³¹⁶ See *supra* notes 66-67 and accompanying text.

³¹⁷ See Guana, *supra* note 245, at 79-80; Permit Concept Paper, *supra* note 227, at 41,252.

³¹⁸ See Corrective Action for Releases From Solid Waste Management Units at Hazardous

3. Trends Dealing with Implementation

The final category of suggestions and trends focuses on the implementation of participation programs. Certainly the trends in coordination and scope will inevitably impact the management of participation programs by agencies and the public alike. Yet there are other developments that are also relevant to management practices. To begin, administrators are responding to demands for earlier public input³¹⁹ by providing the public with information sooner.³²⁰ Proactive initiatives are also becoming more common,³²¹ examples include the provision of easily accessible technical assistance to the public,³²² the distribution of reader-friendly materials, and greater reliance on the Internet.

But agencies must do more than provide information early in the course of the decisionmaking process. Additional suggestions point to a need to engage the public in a dialogue to allow participants to inform and actually shape decisions. For this to occur, public values must be incorporated into all decisions, even those as technical as risk assessment.³²³ Efforts must also be made to implement the consensus-building approach so that the public can become a partner in the decisionmaking process.³²⁴

In addition to stressing early public involvement and public partnership in shaping decisions, the EPA is taking steps to evaluate the successes and failures of participation programs. Its decision to begin monitoring the success of participation programs in connection with permitting will add to its management task, but the dearth of quantitative studies dealing with public participation underscores the importance of this effort.³²⁵

Many of these trends and suggestions seem to be based on a perspective that adds a new gloss to the goals of public participation. Traditionally, public participation was thought to improve decision-

Waste Management Facilities, 61 Fed. Reg. 19,432, 19,441 (1996) (to be codified at 40 C.F.R. Ch. I) (proposed May 1, 1996).

³¹⁹ See Hathaway, *supra* note 143, at 28; McWilliams, *supra* note 243, at 711.

³²⁰ See Susskind, *supra* note 215, at 2-3; see also 28 Env't Rep. (BNA) 2016-17 (Feb. 6, 1998) (noting EPA efforts to provide the public with access to environmental information and inform the public of its work).

³²¹ See, e.g., *supra* notes 182-84 and accompanying text.

³²² See Folk, *supra* note 186, at 217.

³²³ See Farber, *supra* note 258, at 1037-38.

³²⁴ See *supra* notes 215-17 and accompanying text.

³²⁵ See KWEIT & KWEIT, *supra* note 8, at 35.

making by letting the public voice be heard. The focus was on a single decision. Today, public participation increasingly is viewed not merely as a method by which well-informed decisions can be reached, but also as a way to empower communities³²⁶ and create community leaders.³²⁷ The sense of efficacy that accompanies this empowerment, that arises when involved citizens see their participation activities as part of a "larger whole,"³²⁸ is a secondary end-product that is taking on greater significance.

IV. STRATEGIES AND SPHERES

Decisionmakers and public advocates need to develop sound participation strategies to address the myriad of problems that currently exist. The text below presents a series of strategies that emerge from the suggestions and trends outlined above. The section concludes by proposing a preliminary framework that allows the strategies to be implemented in a more complete and effective manner.

A. *Strategies*

1. Agencies

Even though the suggestions and trends affecting public participation are many, environmental decisionmakers can address most of them by employing three core strategies: first, they must accept the idea that the public should have the opportunity to influence agency decisions; second, they must incorporate the ecosystem approach to environmental planning into their participation programs; and third, they must enhance the structure and management of their programs.

a. *Decisionmaking as a Partnership*

Allowing the public to shape environmental decisions will help achieve community empowerment and enhance the public's trust. To accomplish this core strategy, administrators must first accept the public as a partner in the decisionmaking process. Beyond this, efforts should focus on the breadth of participation programs, the handling of information, and program procedures. The more expansive the

³²⁶ See *supra* note 53 and accompanying text.

³²⁷ See *supra* note 54 and accompanying text.

³²⁸ COMMON FIRE, *supra* note 61, at 236.

participation program, the more effective it will be. The public should be involved in local as well as national programs, and participation should be encouraged at all stages of the decisionmaking process. Programs can also be expanded by inviting participants to help monitor programs so they can make suggestions for modification and help track environmental compliance of regulated entities.³²⁹ Special care should be taken to ensure that new environmental initiatives meet these objectives.³³⁰

The Environmental Justice Checklist should continue to be used to ensure that all voices are heard. This critical step will help guarantee that poor and minority community participants are allowed to work as partners in the decisionmaking process. Environmental justice measures need to be incorporated into the implementation of all participation programs, especially those that seek to change significantly the regulatory process. These steps will allow a more diverse public to help shape decisions and will serve the goals of empowering communities and developing community leadership.

Informational challenges should also be handled in ways that further the core strategy of allowing the public to influence decisions. Unless both the public and agency are adequately educated, there is little chance that participation will be meaningful or that agency response will be fully informed. In distributing information to the public, agencies should use documents that are user-friendly and accessible.³³¹ Technical assistance for the public should be easily attained,³³² and if scientific uncertainty exists, agencies should confront it honestly and explain the nature of the uncertainty to the public.³³³ Agencies should realize that taking these steps may require nothing less than developing a new mode of communication, one that makes use of images, visioning techniques, perhaps even drama and stories.³³⁴ In addition, agencies need to devise creative ways to distribute information to the public. The EPA's use of the Internet and colorful, appealing kits³³⁵ are positive beginning efforts.

Information management is two-sided, and demands that agencies consider not only how information is distributed to the public, but how

³²⁹ See *supra* note 237 and accompanying text.

³³⁰ See *supra* notes 246–50 and accompanying text.

³³¹ See *supra* notes 232 & 234 and accompanying text.

³³² See *supra* note 193 and accompanying text.

³³³ See *supra* note 267 and accompanying text.

³³⁴ See Rose, *supra* note 274, at 1041–42; COMMON FIRE, *supra* note 61, at 132.

³³⁵ See *supra* note 223 and accompanying text.

they receive and review information from the public. Agencies need to devote more time to informing themselves, and must become good listeners. In particular, decisionmakers need to be open to all communication from the public that will help them learn about the relevant community.³³⁶ In this way public values can be assimilated into the decisionmaking process.³³⁷ Because the public may not know how to communicate relevant information to decisionmakers, however, agencies must also develop ways to solicit information from participants and open the lines of communication in a way that makes participants feel comfortable about exchanging information with them.

Acceptance of the public's role in shaping decisions will be greatly aided by institutionalizing the consensus-building approach. If implemented properly, consensus building places solutions that are proposed by administrators on an equal footing with those of the public, and results in decisions that are accepted by all.³³⁸ In addition, consensus building requires agencies to make careful choices regarding the forum for public meetings,³³⁹ to have all parties agree on experts at the earliest possible time,³⁴⁰ and to use neutral facilitators to help reach consensus.³⁴¹ It also requires that decisionmakers take the time to articulate agendas for each step in participation programs before undertaking any action.³⁴² All of these steps serve to make the public's participation more influential.

b. *The Ecosystem Approach*

The second core strategy for decisionmakers requires that they be guided by the ecosystem approach to environmental regulation. This comprehensive approach is now an accepted component of environmental policy,³⁴³ and is likely to continue to play an important role in the regulatory process. Implementing this strategy in participation programs will require coordinating initiatives and data from many agencies. In addition, both the agencies that promote projects and

³³⁶ The EPA does take steps in this regard in CERCLA cleanup decisions. *See supra* notes 182-89 and accompanying text.

³³⁷ *See supra* notes 189, 191-92 and accompanying text. A greater sensitivity to common values is in keeping with neorepublican theory. *See supra* notes 31-32 and accompanying text.

³³⁸ *See supra* notes 217-18 and accompanying text.

³³⁹ *See* Yost, *supra* note 119, at 37.

³⁴⁰ *See* Lin, *supra* note 201, at 423.

³⁴¹ *See* Hathaway, *supra* note 143, at 35.

³⁴² *See* KWEIT & KWEIT, *supra* note 8, at 60.

³⁴³ *See supra* note 236 and accompanying text.

interested stakeholders will need to be informed about the far-ranging impacts of those projects. More than ever, interagency collaboration and a willingness to engage diverse public groups will be called for,³⁴⁴ as will the ability to think systemically and holistically.³⁴⁵

Incorporating the ecosystem approach into the decisionmaking process, while at the same time allowing participants to shape decisions, will undoubtedly be a challenge. The consensus-building approach will be of particular help in this regard, because it will remind participants that they are partners, not dictators, in the overall process. A strong management strategy will also help to coordinate these seemingly conflicting strategies.

c. *Management*

The first two core strategies—committing to allow the public to shape decisions and incorporating an ecosystem approach into public participation programs—are substantive in nature. To be implemented, these strategies need to operate within a sound overall management structure that supports participation efforts.³⁴⁶ Of the utmost importance is the development of internal training programs to complement all of the relevant strategies. Training should include nothing less than the education of every agency employee who is involved in a project, not merely those who will have direct contact with stakeholders. Without system-wide training about public participation, the first two core strategies cannot be fully achieved.³⁴⁷ Education should stress the importance of cooperative learning and group processes,³⁴⁸ include consensus-building instruction, and provide information about traditional and nontraditional methods of public participation. Flexibility in dealing with diverse communities and in developing and adapting participation programs to changing circumstances must be emphasized. Staff education should attempt to do nothing less than change administrative thinking from treating public participation as an afterthought to recognizing it as an inherent part of every step in the decisionmaking process.

³⁴⁴ See COMMON FIRE, *supra* note 61, at 234.

³⁴⁵ See *id.* at 108.

³⁴⁶ See Howard Kenison et al., *Conclusions, in* ABA/PUBLIC PARTICIPATION 40, 44 (ABA Public Service Division, Standing Committee on Environmental Law) (1994).

³⁴⁷ See *supra* note 226 and accompanying text.

³⁴⁸ See IACOFANO, *supra* note 56, at 15.

A companion to the training component of the agency management strategy should be the development of an internal monitoring program to evaluate the problems and successes of participation initiatives.³⁴⁹ Ongoing evaluation will allow decisionmakers to catch errors in the design of its public participation programs in time to correct them. Even if the detection of problems comes too late to make revisions, administrators will be able to prevent the problem from recurring in the future. The evaluation process should include in-depth questionnaires administered as a project comes to an end, to be completed by agency staffers as well as public participants. Informal interim interviews with administrators and participants should also be conducted to monitor programs in progress.³⁵⁰ Ongoing evaluation must become a standardized practice, and it will become increasingly important as the structure of public participation becomes more complex.

The management strategy should also make greater use of public relations. Public involvement programs need to be publicized in a positive way to help improve the agency's image with the public at large. Any public relations effort should also give credit to members of the public who have been involved in the project, which will increase the participants' sense of empowerment and efficacy.³⁵¹ Individuals who have devoted time and effort to see a project through will certainly be gratified to hear or see their names in the media, and may be inspired to pursue future participation opportunities. Publication of program successes will also help to improve the status of participation programs within agencies.

The implementation of consensus building will require a restructuring of participation programs and will thus impact agency management efforts. However, consensus building is primarily substantive in nature, since it changes the scope and nature of the concerns that enter into decisionmaking, as well as the weight those concerns are given. For that reason, consensus building has been presented as an important component of the initial core strategy. Nevertheless, the impact of the approach on the process of decisionmaking requires that it be mentioned as a management tool as well.

³⁴⁹ See Permit Concept Paper, *supra* note 227, at 41,252.

³⁵⁰ In an age where studies are routinely conducted on nearly every subject, it is odd that few have been devoted to public participation programs. See *supra* notes 326-28 and accompanying text.

³⁵¹ See *supra* notes 59-60 and accompanying text.

2. Participants

Members of the public who desire to become involved in environmental matters also need to devise strategies to enhance their experience and to assure that their participation is worthwhile. To some extent, the core strategies for the public parallel those for agencies because they, too, need to stress management and comprehensiveness. In addition, the public must develop a networking strategy.

a. *Management*

The management of public participation programs is not the sole concern of agencies. Community groups can enhance their experience with decisionmakers if they, too, devise plans of action at an early stage of a project.³⁵² Management strategies must include measures that clearly delineate the leadership structure of the participant group, assure thorough preparation for meetings with administrators, demand agency agendas for all meetings, and require the distribution of complete and understandable communication to all concerned. Additionally, management strategies should coincide with the consensus-building approach to the greatest extent possible.³⁵³ Ongoing evaluation of participation efforts should also be part of the public's management plan.

b. *Comprehensiveness*

The comprehensiveness strategy deals with the depth of the various components of a participation program. For public advocates, this strategy is perhaps the most demanding, but it is crucial to the success of their efforts. It requires nothing less than a revised mind set for participants, which can only be achieved by accepting increased demands for self-education, a broader role in environmental initiatives, and a modification of traditional participation expectations.

The most effective public participants will be those who are well-educated about the project at hand; it is they who will be best prepared to interrelate with decisionmakers. If environmental decisionmakers recognize the public's role in shaping environmental solutions, participants should have little difficulty gaining access to the information they need to implement this strategy. Nevertheless, efforts must

³⁵² See *supra* notes 217 & 220 and accompanying text.

³⁵³ See *supra* notes 217-21 and accompanying text.

be made to find out how to get needed information. Information distributed to the public should be increasingly accessible and comprehensible to lay members of the public, but if this is not the case, the public should be prepared to seek technical assistance on its own. The public should also realize that administrators, in their attempt to become more responsive to public values, will need to become more informed about them. Participants must therefore be prepared to offer insight to decisionmakers in a timely and complete manner. Participants, like decisionmakers, must be willing to learn a new language to enable them to provide clear and meaningful information to the agency about public concerns. Public-generated information cannot come across as an incoherent, emotional outpouring, but must be professionally presented with as much supporting documentation as possible.

Like agencies, participants need to enlarge the scope of their participation efforts. The public's traditional participation role has been in the process leading to an initial project or permitting decision having environmental impact. Agencies are now offering the public new opportunities for participation, inviting its input in national as well as local programs and in monitoring and enforcement efforts. Participants should be prepared to suggest meaningful ways for them to become involved in these expanded areas when they feel it will be beneficial.

The public's strategy on comprehensiveness should also explore the benefits of involvement in the policy formation stage of environmental efforts. In particular, the public should not diminish or overlook the role played by political parties in the development of environmental policy.³⁵⁴ Strengthening the environmental agendas of political parties may make it more likely that candidates with a strong commitment to the environment will be supported by the parties and ultimately elected. This may, in turn, decrease the influence of special interests. Once elected, these lawmakers can work toward the enactment of strong environmental policies that are informed by public values. If the resulting statutory language clearly sets forth strong environmental policies, agencies will be less likely to misinterpret the public will.

Another way for the public to strengthen its input into policy decisions is to increase its involvement in environmental organiza-

³⁵⁴ See *supra* notes 100-04 and accompanying text.

tions. These organizations often wage battle with special interest groups in legislative committees.³⁵⁵ Organizations that are well-informed about the public's agenda will have the needed access to advance those aims with policy makers at a time when legislative decisions are being refined.

The public's strategy on comprehensiveness also requires a modification of expectations. All too often members of the public have been dissatisfied with participation experiences because they simply hoped for too much.³⁵⁶ It is important to align participation efforts with the consensus-building approach, with the understanding that a deliberated decision requiring give and take is the goal of participation. Total agency approval of the public's wishes may be a beginning strategy, but may not be the end result. Developing a temperament that allows for the patient consideration of administrative viewpoints will require a new discipline.

The geography of participant expectations must also change. Public efforts often target environmental decisions of a local nature.³⁵⁷ While it is likely that localized environmental decisions will continue to garner public interest, the public must come to realize that region-wide considerations may ultimately dictate results of a seemingly local nature. This is likely to be the case as the ecosystem approach takes hold and as planners and decisionmakers pay increased attention to the spill-over effects of environmental decisions.

c. Networking

A core networking strategy must also be developed by public participants. Public input in environmental decisionmaking will be at its most efficient if various public groups ally themselves with one another. Opportunities are rich in this regard. It has been suggested, for example, that environmental justice advocates and national environmental organizations establish coalitions.³⁵⁸ Alliances will not only help to strengthen the public voice and bring a clearly-articulated public position to the table, but by bringing together diverse public and environmental interests, alliances can also help to bring the ecosystem approach into the public's equation.

³⁵⁵ See *supra* notes 92–98 and accompanying text.

³⁵⁶ See *supra* note 58 and accompanying text.

³⁵⁷ See *supra* note 57 and accompanying text.

³⁵⁸ See *supra* notes 312–13 and accompanying text.

Public participation strategies for agencies and participants stress a broadened vision, partnership, education, and management. There is little question that a significant commitment of time and effort will be required to implement these strategies. This undertaking is nonetheless needed if the most persistent problems with public participation are to be addressed and if the current trends and suggestions for improvement are to be incorporated into public participation programs.

B. *A Comprehensive Vision*

Implementation of the foregoing strategies will go a long way toward improving the quality of public participation in environmental decisionmaking. Yet, without something more, even the most thorough implementation will fall short of achieving optimum results. The isolated efforts of decisionmakers and the public, no matter how enlightened, will likely fail to achieve an ideal level of efficiency and coordination. To reach that level of success, the next generation of public involvement in environmental policy development and implementation needs to function within an overall structure that allows independence and interplay between discrete spheres of public influence.

The ultimate goal of participation programs is to democratize the decisionmaking process by increasing the quantity and quality of public influence. The many goals, suggestions, and strategies detailed thus far demonstrate that the public's opportunities to participate in this process exist at three levels: the lawmaking level, where national environmental policy is determined; the policy implementation level, where agencies develop programs to implement laws on a national and regional basis; and the local level, where smaller projects are undertaken. These three levels, in turn, suggest a hierarchy of public influence in environmental decisionmaking. Specifically, public participants can inject values into national environmental policy, provide input in decisions that incorporate ecosystem or regional concerns, and can bring community interests to bear in local decisions.

Agencies and public groups need to acknowledge the existence of these three levels of public influence as they develop and implement their participation strategies. This can only occur if efforts are made to coordinate national, regional, and local participation efforts. Coordination must not only address the interplay between public groups

and agencies on local, regional, and national levels, but must preserve the integrity of independent localized efforts.

Accepting a need for an overall coordination represents the final component of successful public participation at the new millennium. The coordinating framework will serve as a capstone to guide the efforts of agencies and individuals who become involved in the environmental process. Conceptualizing a structure that achieves the requisite level of coordination becomes possible if the three spheres of public influence are borne in mind. A clearer picture emerges with the aid of holistic thought and imagery, two of the newer insights to participation.³⁵⁹

A coordinating framework can be imagined as three concentric spheres. Such a structure would place one sphere that encompasses local participation efforts within another that represents regional or ecosystem-wide efforts, which would be embraced by an all-encompassing globe representing national initiatives. Within the largest orb, programs for public participation in the development of national environmental policy would operate.³⁶⁰ At this level, public values would inform the development of environmental policy.

Specific public participation functions occurring in the outermost sphere would include involvement in political parties and environmental organizations, as well as political campaign activity and voting. The major actors at this level would include lawmakers, political parties, national environmental organizations, the EPA, voters, and all members of the public who are concerned about the development of environmental policy. Although political parties and environmental organizations may not fully recognize their role in shaping a national participation program, it would seem that with only limited effort they could modify their agendas to address such an important matter. Environmental activists should search out political parties that have clearly-articulated national environmental platforms. Likewise, political parties must seek to attract new members who can be instrumental in bringing broad-based public values into the lawmaking process. The parties can then endorse candidates who are committed to their value-based environmental policies and hope that those policies are

³⁵⁹ See *supra* notes 66 & 332 and accompanying text.

³⁶⁰ It is also possible to imagine participation in global environmental matters taking place at this level. Global environmental developments are, however, beyond the scope of this article. They are nevertheless of the utmost importance and deserve attention. See *supra* notes 284-85 and accompanying text.

ultimately brought to Congress. Similarly, environmental organizations can, through solicitation and integration of input from members, allow public values to inform their legislative positions, which they can then bring before lawmakers, legislative committees, and the EPA. Such a two-pronged national effort will thus focus on public participation as a mechanism to inject public values into the federal lawmaking and administrative process.

The intermediate sphere of the participation model represents public influence in the implementation of environmental policy at the regional level. It is within this sphere that the EPA would most actively implement the core strategies discussed earlier.³⁶¹ Public efforts functioning within this sphere would assure input in ecosystem and regional planning and would likely include involvement on regional advisory boards, efforts in state and local political campaigns, lobbying before state and local lawmakers and legislative committees, and the formation of alliances between public groups that address regional and ecosystem-wide interests. If participation efforts are successful at the national level of the model, the participation strategies within this sphere would operate under national environmental policies that reflect public values. To assure the success of the intermediate sphere of public participation, a new participation professional is likely to emerge, one who could bring ecosystem and regional concerns to the attention of the public and who could assist in forging alliances between various groups. This new professional may be a staff member of the EPA or state environmental agency, a member of a national or regional environmental organization, or an independent consultant, but, in any event, is a person who will become a key player in the participation process.

The inner-most sphere of the participation model would focus on public influence in local environmental decisions. Participation carried out at this level would include the type of grassroots effort familiar to neighborhood activists. This form of participation would take on new characteristics, however, such as a reliance on consensus building, proactive techniques, and the development of networks between local groups involved in the same effort. In addition, because this level of the participation model would operate within both the national and intermediate participation spheres, any local efforts would be guided, where appropriate, by national environmental policies as well as eco-

³⁶¹ See *supra* text at IV.A.1 of this article.

system- and region-wide efforts. The participation consultant mentioned above could also be available to assist local groups in gaining access to pertinent information.

The participation efforts within all spheres must be allowed to operate independently yet as part of an overall system. Without this nesting concept, public participation could undoubtedly function, but would suffer from being less involved in the trends of comprehensiveness, coordination, and ecosystem and regional planning. Keeping the proposed spherical framework in mind would keep policymakers and public participants alike aware of the interrelationship between national policies, regional concerns, and local issues.

The concentric-sphere image is offered as a tool to help coordinate the many strategies detailed earlier. It represents one way of thinking about public participation in environmental decisionmaking that might assist those who design participation programs. The real need is for a new breed of participation professional who can assist in coordinating national and ecosystem concerns with those of local communities and who can forge much needed alliances between groups that share related concerns.

CONCLUSION

This article has detailed the foibles of public participation in environmental decisionmaking. Agencies and those who voice public concern about the environment have begun to face the deficiencies of participation programs, and are slowly implementing a number of valuable suggestions. As promising as this may appear, it is clear that the new generation of public participation cannot succeed in a free-for-all atmosphere; rather, participation strategies must be systematically devised by agencies and participants alike.

Participation programs will fail to reach their highest potential, however, if these strategies operate in isolation. Instead, they must be designed and carried out within some sort of a coordinating framework. It has been suggested here that one such framework could be based on the three levels of public influence in environmental decisionmaking. Imagining these levels as spheres of public influence that are coordinated with, and constructed around, one another, is one way to begin designing public participation for the next century. The boundaries between these spheres of public influence must remain flexible, even permeable, to allow the exchange of information and values from one level to another. This exchange is crucial if environ-

mental decisions are to be broadened beyond the “narrow scope” that concerned Judge Kaufman so many years ago, and if they are to take into account public values, ecosystem and regional dependencies, and neighborhood concerns.