Environmental Justice: Concentration on Education and Public Participation as an Alternative Solution to Legislation

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ENVIRONMENTAL JUSTICE: CONCENTRATION ON EDUCATION AND PUBLIC PARTICIPATION AS AN ALTERNATIVE SOLUTION TO LEGISLATION

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Born out of the struggle for social justice in the late 1970s, the environmental justice movement deals with the link between minority and low

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income communities and the lack of environmental protection afforded to them. Several studies have been conducted that correlate race to the location of hazardous waste sites. In fact, one study often referred to by environmental justice advocates reported that "[r]ace proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities." Analysis of this and other studies reveals that environmental justice concerns are real and reme‌diable.

Although several attempts have been made to pass legislation

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2 See id. The terms environmental racism, environmental equity, and environmental justice have been used interchangeably throughout environmental debates, but Bunyan Bryant, a professor at the University of Michigan School of Natural Resources and Environment and a leading environmental justice advocate, has defined them as follows:

**Environmental Racism:** It is an extension of racism. It refers to those institutional rules, regulations, and policies or government or corporate decisions that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics.

**Environmental Equity:** Environmental equity refers to the equal protection of environmental laws. . . . Therefore laws should be enforced equally to ensure the proper siting, clean up of hazardous wastes, and the effective regulation of industrial pollution, regardless of the racial and economic composition of the community.

**Environmental Justice:** Environmental Justice (EJ) is broader in scope than environmental equity. It refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing and productive.


3 Bryant, *supra* note 2, at 37 (citing U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (June 1, 1983), and COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTES SITES (1987) [hereinafter TOXIC WASTES AND RACE]).

4 TOXIC WASTES AND RACE, *supra* note 3, at xiii.

5 See, e.g., *id.* at 23-27.
addressing environmental justice concerns, no laws have been enacted.\textsuperscript{6} Despite the legislative failures, a major success for the movement occurred on February 11, 1994, when President Clinton issued Executive Order 12,898 ("Order") requiring federal agencies, including the Environmental Protection Agency ("EPA"), to develop strategies that promote environmental justice.\textsuperscript{7} By June 1995, the EPA and twelve other federal entities, had responded to this Order and announced their final environmental justice strategies.\textsuperscript{8}

The EPA’s environmental justice strategy recognizes the problems surrounding minority and low income communities and proposes changes in the permitting process that would diminish the discriminatory siting of hazardous waste sites in those communities.\textsuperscript{9} These changes aim to increase public participation.\textsuperscript{10} In addition, when announcing the EPA’s strategy, Carol Browner, the current EPA Administrator, explicitly stated her commitment to “ensure that low-income and minority communities have access to information about their environment—and that they have an opportunity to participate in shaping the government policies that affect their

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\textsuperscript{9} \textit{ENVIRONMENTAL JUSTICE STRATEGY, supra} note 8, at 8.

\textsuperscript{10} \textit{Id.} at 1-2.
health and environment. These steps made by the EPA change the permitting process which governs hazardous waste facility siting decisions. This Note posits that these changes are sufficient to eradicate current fears of environmental discrimination and therefore, environmental justice advocates should stop rallying around unnecessary and cumbersome efforts to pass legislation governing environmental justice concerns. Instead, advocates should focus their attention on grassroots efforts to educate low income and minority communities on how to maximize their participation in the newly altered permitting process.

This Note examines whether the changes in the federal permitting process sufficiently eliminate the risks of environmental racism, or whether additional legislation concerning environmental justice is necessary. Parts I and II provide historical background information by introducing the stated goals of environmental justice advocates, outlining their proposal for remedying environmental discrimination through legislation, and describing the permitting process employed by the EPA prior to Executive Order 12,898. Next, Part III summarizes the elements of the Order and how it mandated federal agencies to modify their policies to take environmental justice concerns into account. In Part IV the newly developed Environmental Justice Strategy released by the EPA pursuant to the Order is reviewed and the effects of these changes on the permitting process are analyzed. Part V and VI then examine the failures of previous legislative proposals concerning environmental justice issues and the contrast between this failure and the potential positive benefits of changes in permitting policy. Finally, Part VII concludes by finding that grassroots education programs are the most efficient method for achieving the goals of the environmental justice movement. Moreover additional legislation focused on other aspects of the permitting process would be foolhardy and without benefit.

I. GOALS OF ENVIRONMENTAL JUSTICE ADVOCATES

Although the 1970s marked the beginning of the environmental movement, it was not until much later that environmental justice became a significant factor on the environmentalists’ agenda. In 1987, the United Church of Christ Commission for Racial Justice (“Commission”) conducted a study to determine the relationship between environmental hazards and the

11 Id. at 2.
12 Ferris & Hahn-Baker, supra note 1, at 67.
The study concluded that in the 35,749 zip code regions studied, race was the most significant factor in the location of commercial hazardous waste facilities. Based on this study, Reverend Benjamin Chavis, Jr., of the United Church of Christ, coined the term "environmental racism," which has been used to refer to both the intentional and unintentional disproportionate imposition of environmental hazards on minorities. Due to these alarming facts, the Commission proposed recommendations to alleviate environmental discrimination. Among other suggestions, the Commission called upon the President to issue an executive order mandating all executive branch agencies that regulate hazardous wastes to consider the impact of current policies and regulations on minority communities. The study also suggested that the EPA establish an "Office of Hazardous Wastes and Racial and Ethnic Affairs" to ensure that states would give sufficient consideration to the racial and socioeconomic characteristics of any community proposed as a site for a hazardous waste facility. In addition, the Commission proposed that the EPA establish a "National Advisory Council on Racial and Ethnic Concerns" to facilitate the dissemination of information to minority populations throughout the community. This Council was to be comprised of representatives from minority groups in the community.

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13 Toxic Wastes and Race, supra note 3, at 3. The following variables were incorporated in the study: "minority percentage of the population," "mean household income," "mean value of owner-occupied homes," "number of uncontrolled toxic waste sites per 1,000 persons," and "pounds of hazardous wastes generated per person." Id. at 10.

14 Id. at 23. Although socioeconomic status also played an important role in the siting of hazardous waste sites, the Commission concluded that race was more significant. Id. at 15. Communities with the highest composition of minority residents had the greatest number of commercial hazardous waste facilities. Id. at xiii.


16 See discussion supra note 2. Use of the term "racism" to include both intentional and unintentional acts, however, has not been universally accepted. The Supreme Court determined that racially discriminatory violations of the Fourteenth Amendment must include evidence of purposeful and invidious discrimination, which would preclude the use of "racism" to describe unintentional actions. Washington v. Davis, 426 U.S. 229, 242 (1976).

17 Toxic Wastes and Race, supra note 3, at 23-27.

18 Id. at 24.

19 Id.

20 Id.

21 Id.
Commission have been used as a basis for debate within the environmental justice movement.

Most environmental justice advocates generally agree that "all races should share equitably the burdens and risks of hazardous waste facilities." To achieve this equitable distribution, one advocate proposes an "Act of Congress, patterned after a provision of the Civil Rights Act of 1990, in conjunction with an amendment to current federal legislation and model state legislation." The proposed model statute, Title VII of the Civil Rights Act, provides a remedy in employment discrimination cases when a disparate impact is shown. If an environmental justice provision tailored on Title VII was passed by Congress, this would eliminate the need to prove a discriminatory purpose or an intentional act to discriminate. Review for discrimination in hazardous waste facility siting based on this "disparate impact" model would shift focus away from the motivations behind site selection and to the consequences of the decision.

Advocates of using a Title VII-based legislative remedy want "to provide minority communities with a mechanism to prevent their communities from being overburdened by environmental hazards." Under this action, the plaintiffs would need only to establish that there was a disparate impact caused by the hazardous waste facility. The burden would then shift to the defendant to prove that the decision to place the hazardous waste facility in the plaintiff's community is an "environmental necessity." Although the plaintiff can show that alternative sites were available, the defendant will meet the standard of "environmental necessity" if he can prove that the chosen site was "necessary to safely dispose of hazardous wastes." It is clear that these

23 Id.
26 Id. at 422-24.
27 Id. at 422.
28 Id. In order to prove disparate impact, the plaintiffs would have to show that choosing a certain site for the hazardous waste facility "will result in a burden on their community greater than the burden on a white community due to the presence of other pollutants [such as] uncontrolled toxic waste sites, solid waste landfills, or polluting industry." Id.
29 Id. The "environmental necessity" standard would be satisfied by demonstrating that the chosen site was environmentally suitable. Id. at 423.
30 Id.
standards would have to be defined carefully by the legislature and judiciary in order to be effective in alleviating environmental discrimination.

Another aspect of the environmental justice mission concentrates on procedural, geographic, and social equity. Procedural equity deals with the fairness of applying the governing rules, regulations, evaluation criteria, and enforcement in a nondiscriminatory manner. "Geographic equity refers to the location . . . of communities and their proximity to environmental hazards and locally unwanted land uses (LULUs), such as landfills, incinerators, sewage treatment plants, lead smelters, refineries, and other noxious facilities." Social equity is used to describe the role of sociological factors in environmental decisionmaking. The goal for these equity-oriented advocates lies in assuring that "[n]o community—rich or poor, black or white—should be allowed to become a 'sacrifice zone.' . . . [T]he practices that cause the conditions must be made illegal."

In order to achieve environmental justice, these advocates stress that the government must adopt the following five principles: "guaranteeing the right to environmental protection, preventing harm before it occurs, shifting the burden of proof to the polluters, obviating proof of intent to discriminate, and redressing existing inequities." The main method proposed to achieve these principles is the enactment of a federal "fair environmental protection act." This act, which would be modeled after various federal civil rights acts that also promote nondiscrimination, would make environmental discrimination illegal and costly. Along with this federal act, environmental justice advocates desire to direct legislative initiatives at states because "many of the decisions and problems lie with state actions." In addition, this movement supports an interagency approach to combating environmental discrimination that would have the EPA work in concert with other

31 Bullard, supra note 6, at 12.
32 Id.
33 Id. at 13.
34 Id. at 14.
35 Id. at 43.
36 Id.
37 Id. "Unequal protection must be attacked via a federal fair environmental protection act that redefines protection as a right rather than a privilege." Id.
38 Id. The precedents from which this "fair environmental protection act" will be modeled include the Civil Rights Act of 1964, the Fair Housing Act of 1968, the amended Fair Housing Act of 1988, and the Voting Rights Act of 1965. Id. at 15.
39 Id. at 43.
It is clear from the many different aspects of the environmental justice movement that the overarching remedy proposed is the enactment of some form of legislation. Although grassroots efforts are promoted, the concentration of efforts is focused on a bill that would make environmental discrimination illegal. This legislative focus, as proven from past failures, is misguided.

II. EPA PERMITTING PROCESS BEFORE EXECUTIVE ORDER 12,898

Many environmental discrimination complaints derive from the lack of mandatory allowances for public participation in the permitting process of hazardous waste facilities. As the following discussion indicates, prior to Executive Order 12,898, the decision to site a facility depended largely on the facility owners and the permitting agency, with little weight given to outside comments from the affected community. In response to the criticism, in September 1993, the EPA's Office of Solid Waste published the *RCRA Public Involvement Manual* to "assist the U.S. Environmental Protection Agency (EPA) regional offices and RCRA-authorized state regulatory agencies in conducting effective public involvement in RCRA permitting and corrective action programs." Although this manual brought guidance to the

40 Id. at 16. A new interagency approach would require that: grassroots environmental justice groups . . . become full partners in planning the implementation of the new executive order. An advisory commission should include representatives of environmental justice, civil rights, legal, labor, and public health groups, as well as the relevant governmental agencies, to advise on the implementation of the executive order. State and regional education, training, and outreach forums and workshops on implementing the executive order should be organized. The executive order should become part of the agenda of national conferences and meetings of elected officials, civil rights and environmental groups, public health and medical groups, educators, and other professional organizations.

41 See Toxic Wastes and Race, supra note 3, at 24-27; Linda D. Blank, Seeking Solutions to Environmental Inequity: The Environmental Justice Act, 24 EnvTL. L. 1100, 1108 (1994); Bullard, supra note 6, at 43; Godsill, supra note 22, at 397.

42 See bills cited supra note 6.

43 See infra notes 49-67 and accompanying text.

regulatory agencies, the issuance of Executive Order 12,898 forced a drastic change upon this one-sided permitting process.\(^4\)

The Resource Conservation and Recovery Act of 1976 ("RCRA")\(^4\) was passed as an amendment to the Solid Waste Disposal Act\(^4\) to safely manage and dispose of the huge volumes of municipal and industrial solid waste.\(^4\) Under RCRA, owners or operators ("owners") of treatment, storage, and disposal ("TSD") facilities were required to submit a comprehensive permit application governing all aspects of the design, operation, maintenance, and closure of a waste disposal facility.\(^4\) This permit application was then reviewed closely by the regulatory agency to determine whether to grant or deny a permit.\(^5\) As in all other environmental programs, the EPA required some measure of public involvement\(^5\) so that interested citizens and affected parties would have the opportunity to participate in EPA's decisionmaking process with respect to hazardous waste management activities.\(^5\)

Under the pre-executive order permitting process, the first step in receiving a permit for operation of a TSD facility was the submission and review of a permit application.\(^5\) The process required owners to submit a comprehensive permit application subject to RCRA requirements covering all

\(^4\) See infra Part III.
\(^7\) 42 U.S.C. § 6902. RCRA regulations serve as the basis for developing and issuing the permits to each treatment, storage, and disposal facility. See generally id. §§ 6921-6939. It is through the permitting process that the regulatory agency actually applies RCRA's technical standards to the facilities. Id. § 6925.
\(^8\) Id. § 6902(b).
\(^9\) Id. § 6925(c).
\(^10\) Id. § 6974(b); 40 C.F.R. §§ 25.4-25.7 (1995). RCRA requires the regulatory agency to publish "in major local newspapers of general circulation and [to] broadcast over local radio stations notice of the agency's intention to issue such permit," and to give written notice of its intention to issue a permit to "each unit of local government having jurisdiction over the area in which such facility is proposed to be located." 42 U.S.C. § 6974(b)(2). The public has a 45-day period to give written notice of opposition to the agency's intention to issue a permit and to request a public hearing, or the agency on its own initiative can hold an informal public hearing. Id. The agency should try to schedule such hearing at a location "convenient to the nearest population center to such proposed facility and give notice in the aforementioned manner of the date, time, and subject matter of such hearing." Id.
\(^12\) 42 U.S.C. § 6925(c).
components of the operations of the facility.\textsuperscript{54} When the facility owner submitted the permit application, the regulatory agency then had to compile a mailing list so that it could reach any interested members of the public with information about the permit.\textsuperscript{55}

The second step of the permitting process required the regulatory agency to prepare either a draft permit or a decision to deny the permit for the facility.\textsuperscript{56} Regardless of whether the agency decided to approve or reject the application, a fact sheet was required to summarize the factual and legal bases for granting or denying the permit.\textsuperscript{57} In addition, RCRA mandated publication of formal notice of the proposed siting so that the public had a chance to review and comment on any aspect of the facility during a 45-day public comment period following publication.\textsuperscript{58}

If information raising "substantial new questions concerning the initial draft permit decision" was submitted during the comment period, "the regulatory agency should either re-open or extend that public comment period."\textsuperscript{59} Further public comment was possible if a public hearing on the draft permit decision was requested.\textsuperscript{60} Absent a specific request by the community, the regulatory agency had the opportunity to schedule a public

\textsuperscript{54} Id. § 6925(b). Each application must contain:

such information as may be required under regulations promulgated by the Administrator [of the EPA], including information respecting—

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter . . . and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

\textsuperscript{55} Id. at 3-5.

\textsuperscript{56} Id. at 3-5.

\textsuperscript{57} Id. Regulatory agencies could also prepare a statement of basis instead of a fact sheet to accompany the draft permit. Although the regulatory requirements for a statement of basis were similar to those of a fact sheet, the statement of basis generally did not have as much detail. Id. Usually a statement of basis was used to set forth the reasoning for denying a permit. Id.

\textsuperscript{58} Id.; see supra note 51 and accompanying text.

\textsuperscript{59} RCRA Public Involvement Manual, supra note 44, at 3-6.

\textsuperscript{60} 42 U.S.C. § 6974(2); RCRA Public Involvement Manual, supra note 44, at 3-6.
meeting. The *RCRA Public Involvement Manual* favored the use of this ability because it evidenced a willingness on the part of the agency to hear the questions and concerns of the community, and made for facilitated cooperation among all interested parties.

After the closing of the public comment period, the final step of the permitting process was the issuance of the final permit decision. The regulatory agency was directed to evaluate all written and oral comments received during the formal comment period, and either grant or deny the permit. A written response to comments was to be prepared that included "a summary of all significant comments received during the public comment period and an explanation of how they were addressed in the final permit decision or why they were rejected." The *RCRA Public Involvement Manual* emphasized that this written response should show the community how the regulatory agency dealt with their concerns in its decisionmaking process.

This discussion of the permitting process highlights the required public involvement activities between the community and the regulatory agency in the permitting process followed before the Order. Numerous additional activities were suggested in the *RCRA Public Involvement Manual* that the regulatory agency could have utilized in order to further promote the decisionmaking process and ease communication between the parties. These activities were not required though, and it is unrealistic to believe that these voluntary actions were implemented with any frequency.

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63 *Id.*
64 42 U.S.C. § 6925(c)(1). "Upon a determination by the Administrator ... of compliance by a facility for which a permit is applied for under this section with the requirements of this section ..., the Administrator ... shall issue a permit for such facilities." *Id.*
66 *Id.* at 3-7.
67 *Id.*
68 Among the suggested activities, the regulatory agency could either conduct community assessments to determine the potential level of interest in the permitting process, hold workshops and informal meetings about the facility and the RCRA permitting process to inform the community, provide tours of the facility so community members could have a first-hand look at a facility, or conduct news conferences to inform a wide audience of permitting progress. *Id.* at 3-4 to 3-7.
As the result of pressures from community activists for changes in siting policy and permit requirements, President Clinton issued Executive Order 12,898 on February 11, 1994. Environmental justice advocates lauded the action because it was the first major effort on the part of the Clinton administration to support their demands, as well as a major success for the movement in general.

Executive Order 12,898 was the first of its kind to stress the coordination of government agencies in addressing environmental justice problems. The Order defined the federal government’s stance on environmental justice, required federal agencies to develop an environmental justice strategy, and established an Interagency Working Group on Environmental Justice ("Working Group"). President Clinton maintained that the missions of federal agencies included the task of achieving environmental justice. Although the Order did not explicitly state a definition of environmental justice, it stated the responsibilities for federal agencies in federal programs that substantially affect the environment or human health.

Each Federal agency shall conduct its programs . . . in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

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69 Exec. Order No. 12,898, supra note 7.
70 Bunyan Bryant, *Summary, in Environmental justice*, supra note 1, at 208, 217-18. Environmental justice advocates point out that the Bush administration had also expressed support for their concerns, but no changes were made to regulations governing the permitting and siting for industries located near populated areas. *Environmental Justice, 24 Env't Rep. (BNA)* 1663 (Jan. 21, 1994).
71 Bryant, supra note 70, at 218.
72 Exec. Order No. 12,898, supra note 7, at 859-61.
73 Id. at 859.
74 Id. at 861.
75 Id.
This description of federal agency responsibilities is consistent with the stated goals of environmental justice advocates.⁷⁶

The Order mandated that all federal departments and agencies develop an "agency-wide environmental justice strategy . . . that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."⁷⁷ In particular, the strategies were to revise policies so that they

at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.⁷⁸

Essentially, agencies were required to examine their policies to ensure that their activities did not discriminate because of race, color, or national origin, and to make changes in their policies if this credo was violated.⁷⁹

In addition, the Order established a timetable under which the agencies were to develop and finalize their environmental justice strategies.⁸⁰ The timetable required periodic meetings between the agency and the Working Group.⁸¹ Within a year after the issuance of the Order, each agency was required to finalize its environmental justice strategy and present it to the Working Group.⁸² During this year of development, each agency was directed to identify specific projects that could be "promptly undertaken to address

⁷⁶ See supra Part I.
⁷⁷ Exec. Order No. 12,898, supra note 7, at 860.
⁷⁸ Id.
⁷⁹ See id. at 859-61.
⁸⁰ Id. at 860-61.
⁸¹ Id.; see infra notes 82-90 and accompanying text. The Order required federal agencies to inform the Working Group of their progress at checkpoints of 4, 6, 10, 12, and 24 months, and at any other time requested by the Working Group. Exec. Order No. 12,898, supra note 7, at 860-61.
⁸² Exec. Order No. 12,898, supra note 7, at 860.
particular concerns," and to include a schedule for implementing those projects in its strategy. The Working Group was established primarily to provide agencies with guidance during the development of their environmental justice strategies. It was to ensure that the strategies were consistent with the goals of the Order and consistent with one another. Other duties of the Working Group included assisting and coordinating the research and data collection required by the Order, examining existing data and studies on environmental justice, holding public meetings on the implementation of the Order, and developing an interagency model project on environmental justice reflecting cooperation among the agencies. The Administrator of the EPA was directed to organize the Working Group, which would include the heads of several executive agencies and offices. At the end of fourteen months from the date of the Order, the Working Group was required to submit a report describing the implementation of the Order and the final environmental justice strategies for each federal agency.

It is important to highlight the Order's emphasis on grassroots community participation. Environmental human health research, including data collection and analysis, was directed to include diverse segments of the population. Minority and low income communities would be given an opportunity to comment on the development of design and research strategies

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83 Id.
84 Id.
85 Id. at 859.
86 Id.
87 Id. at 860.
88 Id. at 859.
89 Id. Several agencies make up the Working Group including: Department of Defense, Department of Health and Human Services, Department of Housing and Urban Development, Department of Labor, Department of Agriculture, Department of Transportation, Department of Justice, Department of the Interior, Department of Commerce, Department of Energy, EPA, Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, and Council of Economic Advisers. Id. The President reserved the right to designate any other government officials as members of the Working Group. Id.
90 Id. at 861.
91 Bryant, supra note 70, at 218.
92 Exec. Order No. 12,898, supra note 7, at 861.
by federal agencies.93 The public was also allowed to submit recommendations concerning environmental justice proposals to the federal agencies which were then required to convey the recommendations to the Working Group.94 Crucial public documents relating to human health or the environment would be translated for minority communities, and federal agencies were required to make those documents "concise, understandable, and readily accessible to the public."95 The Working Group was also mandated to hold public meetings "for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice."96

President Clinton's objective of focusing federal attention to environmental justice was accomplished efficiently by the issuance of this Order. Instead of concentrating misguided energy in a struggle to push an environmental justice bill through Congress,97 President Clinton utilized his executive power to concentrate on changing federal agencies' policies to address discriminatory impacts on low income and minority communities.

IV. THE EPA'S ENVIRONMENTAL JUSTICE STRATEGY AND ITS EFFECTS

A. The Environmental Justice Strategy Described

Carol Browner, the EPA Administrator, "made environmental justice an EPA priority when she assumed office in 1993."98 By recognizing that many minority and low income communities had concerns about the disproportionate burden of health consequences due to the siting of facilities in those communities, she made a commitment that the EPA would assume a "leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States."99 Soon after the Order, she

93 Id.
94 Id. at 862.
95 Id.
96 Id.
97 See supra note 6, infra Parts V and VI.
outlined a five-point strategy that incorporated environmental justice in EPA operations.\textsuperscript{100}

In the \textit{Environmental Justice Strategy}, the EPA reiterated the belief it shares with the Clinton Administration that "all Americans are important to the future of our nation and deserve to be protected from pollution, regardless of race, color, national origin, or economic circumstance."\textsuperscript{101} As Executive Order 12,898 mandated, the purpose of the Strategy was to "ensure the integration of environmental justice into the Agency’s programs, policies, and activities consistent with the Executive Order."\textsuperscript{102}

The EPA Administrator specified that communities would have access to information about their environment and that they would have an opportunity to participate in the policies that affect their health and environment.\textsuperscript{103} Accordingly, the \textit{Environmental Justice Strategy} was based on the following guiding principles:

1) Environmental justice begins and ends in our communities. EPA will work with communities through communication, partnership, research, and the public participation processes.

2) EPA will help affected communities have access to information which will enable them to meaningfully participate in activities.

3) EPA will take a leadership and coordination role with other Federal agencies as an advocate of

\textsuperscript{100} \textit{Id.} at 6-7. These points indicated that (1) environmental justice must be integrated fully and consistently into the EPA’s policies, programs, and activities; (2) additional research is needed to address human health and environmental risk to high risk populations, including the identification of multiple and cumulative exposures or synergistic effects; (3) environmental data must be collected, analyzed, and disseminated routinely (this is particularly true for data comparing environmental and human health risks to populations identified by national origin, income, and race); (4) compliance monitoring, inspections and enforcement actions must be targeted and have a multi-media force; and (5) there must be early involvement in the Agency’s activities by all stakeholders, and information on human health and the environment should be clear and readily accessible to all stakeholders. \textit{See id.}

\textsuperscript{101} \textit{ENVIRONMENTAL JUSTICE STRATEGY, supra} note 8, at 1.

\textsuperscript{102} \textit{Id.} at 2.

\textsuperscript{103} \textit{Id.}
environmental justice.  

The approach that the EPA took in developing its strategy focused on establishing common sense principles and procedures. The “Common Sense Initiative” is a method which concentrates on cooperation between “communities, environmentalists, industry, States, Tribes, and others to develop cleaner, cheaper, and smarter solutions.”

Along with four other environmental justice mission topics, the EPA chose to direct its attention toward modifying the permitting process through “Public Participation, Accountability, Partnerships, Outreach, and Communication with Stakeholders.” The EPA realized that a comprehensive approach aimed to discover and remedy environmental justice concerns would necessitate early consultation with the members of affected communities. In addition, it concluded that in order to effectively eradicate environmental discrimination, partnership, leveraging of resources, and coordination would be needed, so the expertise of all affected parties would support the process.

1. Public Participation in Facility Siting and Permitting

One of the objectives of the Strategy was to adjust the permitting process of TSD facilities. Therefore, under the new EPA Strategy, the Office of Solid Waste and Emergency Response ("OSWER") made a commitment to address the siting and permitting of those facilities that disproportionately affect minority or low income communities. The main

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104 Id.
105 Id. at 4.
106 Id.
107 Id. Other topics include: (1) Health and Environmental Research; (2) Data Collection, Analysis, and Stakeholder Access to Public Information; (3) American Indian and Indigenous Environmental Protection; and (4) Enforcement, Compliance Assurance, and Regulatory Reviews. Id.
108 Id.
109 Id. at 6.
110 Id.
111 Id.
112 For a discussion of recent changes made in public participation regulations, see infra Part IV.B.
113 ENVIRONMENTAL JUSTICE STRATEGY, supra note 8, at 8.
114 Id.
issue was an improvement in public participation, focusing on “1) early and ongoing public participation in permitting and siting decisions, and 2) active participation in the Agency-wide effort to develop methodologies for defining cumulative risk from multiple sources.”

2. Management Accountability

Another objective of the EPA was to intensify management accountability for environmental discrimination. In order to accomplish this goal, the EPA planned to reorganize the leadership and management of environmental justice activities and developed a system for monitoring environmental justice programs.

3. Outreach and Partnerships

Even though the EPA sought to increase public participation through actual changes in the regulations governing the permitting process, it wanted to ensure that all affected parties would actively participate and provide input earlier in the permitting process. By strengthening the partnerships and coordination with stakeholders, the EPA believed that environmental justice issues would be more freely addressed. Along with receiving input from these groups, the EPA would work toward educating communities about

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115 *Id.*

116 *Id.* Bunyan Bryant suggests that professional researchers need to be held accountable so they will remain honest in the work they produce. He suggests that community groups must become informed so they can challenge professionals on issues involving environmental justice either through consulting other professionals or by consulting their own knowledge. Bunyan Bryant, *Issues and Potential Policies and Solutions for Environmental Justice: An Overview, in Environmental Justice: Issues, Policies, and Solutions* 8, 18 (Bunyan Bryant ed., 1995); see infra Parts VI and VII.

117 *ENVIRONMENTAL JUSTICE STRATEGY, supra* note 8, at 8.

118 *Id.* at 6.

119 When using the term “stakeholders,” the EPA includes “affected communities, Federal, Tribal, State, and local governments, environmental organizations, non-profit organizations, academic institutions (including Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), and Tribal Colleges), and business and industry.” *Id.*

120 See *id.* One route the EPA can travel to identify the needs of affected populations and to facilitate communication and outreach among the stakeholders is the National Environmental Justice Advisory Council which was implemented in April 1994. Gaylord & Bell, *supra* note 98, at 38.
environmental effects and ensuring that minority populations comprehend the impact of facility siting. The EPA also pledged to "work to ensure that future legislation will incorporate techniques to improve public participation."  

4. Technical Assistance and Training

Finally, the EPA focused on examining and improving the existing technical assistance programs for low income and minority communities and creating ongoing training programs on environmental issues for EPA, State, Tribal, and local government personnel. In improving the technical assistance programs, the EPA proposed appropriating grants and promoting assistance for small business, community-based organizations, and Tribal governments. In addition, the EPA committed itself to incorporating an "ongoing orientation and training program for its personnel on environmental justice issues," as well as to assisting in training other officials involved with environmental justice.

B. Potential Effects of the Environmental Justice Strategy

The most beneficial effect of the changes in RCRA policy is the expansion of public participation in the permitting process. This policy allows minority and low income citizens to have a stronger voice in the decision to issue a permit. Although public participation is not a new notion to the permitting process, EPA's prior suggestions, such as the multilingual public notices prior to permit application and the attendance of an interpreter at public meetings concerning the application, were not adequate by themselves to accommodate for the weaknesses inherent in the process.

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121 ENVIRONMENTAL JUSTICE STRATEGY, supra note 8, at 6-7.
122 Id. at 7. The EPA plans to establish a network of translators to assist in conducting the public meetings. Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id. at 8.
operation within minority communities. However, taking those suggestions in conjunction with the public participation regulations, minority and low income communities now have the ability to directly affect the outcome of a permitting decision.

Increased public participation should give sufficient power to communities to govern the decisionmaking process. If a community opposes placement of a hazardous waste facility in their area, the regulatory agency should clearly recognize these concerns at the meetings. Unlike previous permitting decisions, the community now will receive information concerning the existence of an application, the effects of the facility, the health and environmental hazards posed, and the times and dates of meetings in a more appropriate and meaningful manner. Short of an outright ban on placing facilities in minority communities, this modified procedure is effective in allowing minority and low income communities to have a significant part in the decisionmaking process.

V. PAST ENVIRONMENTAL JUSTICE LEGISLATION

As described above, environmental justice did not hit the national agenda until the late 1980s, and it was not until much later that it attracted the attention of Congress.  

Unfortunately, though, none of these proposed bills have been successful. The Environmental Justice Act of 1992 required the EPA, in cooperation with several health-related agencies and the Census Bureau, to identify the top 100 counties, or other geographical units, that contained the highest total weight of toxic chemicals, and then called upon the Secretary of Health and Human Services to research the nature and extent of the health impacts in those areas as compared with other areas. If a significant adverse human health impact from pollution was found, then the Act called for a moratorium (with limited exceptions) on any new pollution sources in that area until pollution was reduced to the level necessary to avoid those

129 See supra Part I.
130 See supra note 6 and accompanying text.
132 Id. § 102(b).
133 Id. § 401.
Like its predecessor, "[t]he Environmental Justice Act of 1993 was designed 'to establish a program to ensure nondiscriminatory compliance with environmental health and safety laws and to ensure equal protection of the public health.'" 135 This proposal also contained "provisions for the identification and ranking of environmental high-impact areas, the reduction of toxic chemicals, and technical assistance grants for community groups." 136

The Environmental Equal Rights Act of 1993137 allowed citizens to challenge and prohibit the construction of waste facilities in "environmentally disadvantaged communities." 138

Any citizen residing in a State in which a new facility for the management of solid waste (including a new facility for the management of hazardous waste) is proposed to be constructed in an environmentally disadvantaged community may submit a petition . . . to prevent the proposed facility from being issued a permit to be constructed or to operate in that community. 139

Besides these three, several other environmental justice bills have been proposed. The Environmental Health Equity Information Act of 1993140 sought to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 ("CERCLA")141 to require the collection of information on the race, age, gender, ethnic origin, income level, and educational level of persons living in communities adjacent to toxic contamination. 142 Another example of an unenacted bill is the Department of

134 Id. § 403.
135 Gaylord & Bell, supra note 98, at 34.
136 Id.
138 Id. § 3(a).
139 Id.
the Environment Act of 1993.143

Some reasons for the congressional defeats of these environmental justice bills are linked to “risk-assessment requirements, unfunded mandates, cost benefit analysis, and industry’s use of the Constitution’s ‘takings’ provisions.”144 Current risk assessment and analysis techniques are not very helpful in proving that minority and low income communities are at risk of environmental discrimination.145 In addition, the lack of authorization for specific funding of these programs “has led to charges that this effort is just another ‘unfunded mandate’ by the government.”146 The costs of enforcing these provisions are allegedly prohibitive because it is argued that the costs greatly outweigh the benefits.147 Industry, which would be greatly debilitated by the passage of these provisions, argues that restricting new construction or growth of waste facilities would constitute a taking of property by the government without just compensation.148

In addition to these general reasons for failure, some specific causes can be cited for the defeat of the Environmental Equal Rights Act of 1993.149 The construction of the bill was overly broad because it allowed any citizen of the state in which the siting of a facility had been proposed to challenge the action.150 The effects of this expansive provision can be envisioned if one imagines a citizen of northern California bringing an issue against a facility to be sited in San Diego. Obviously this would create problems with standing and cause vigorous opposition by industry. Also, a high standard of proof was required of the facility’s proponent once a challenge was brought against

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143 H.R. 109, 103d Cong., 1st Sess. (1993). This bill called for the elevation of the EPA to cabinet status so that it would signify the Clinton administration’s commitment to environmental issues. Id. § 102. The proposal called for the creation of the Bureau of Environmental Statistics, which would be required to coordinate the compilation and dissemination of information concerning environmental discrimination to minority and low income communities and make recommendations for changes. Id. § 108.

144 Gaylord & Bell, supra note 98, at 35.

145 Id. Previous risk assessments did not concentrate on “cumulative, synergistic effects of combined exposure,” and instead were very chemical-specific and media-specific. Id. Therefore they were not helpful in proving specific risks existed in certain high-impact communities. Id.

146 Id.

147 Id.

148 Id.


150 Id. § 3.
The permit would be denied unless the facility’s proponent could demonstrate that there was no alternative location in the state that posed fewer risks and that the proposed facility would neither release contaminants nor increase the impact of present contaminants. This standard would have been next to impossible to meet.

Recently, some environmental justice advocates have criticized solely focusing attention on passing environmental justice legislation:

Typically, national environmental groups center on national legislation, a tactic that does not always benefit communities experiencing disproportionate exposure to toxic hazards. According to experts, any benefits to such communities are usually unintentional. To the extent that this issue has undergone any scrutiny, it is asserted that people of color receive fewer benefits from environmentalists’ efforts to protect the environment than any other segment of the population. To protect communities of color requires not only the application of the law, but a holistic worldview steeped in an environmental and social justice ethic.

Others take the viewpoint that legislation is not the cure because the economic theory of negotiation between the parties is a more effective means to accomplish the same goal. By leaving out the details and specific policies on creating offices for influencing the pollution-allocation process and delineating how public participation is to be improved, advocates of negotiation believe that environmental justice advocates have failed to propose concrete political remedies for environmental inequities. “Instead, environmental justice advocates have primarily sought to advance general concepts of equality, not wishing to endanger their coalition by specifying the precise methods of achieving ‘justice,’ ‘equity,’ and ‘fairness’” in their legislation proposals. “Inflexible siting and permitting policies” set up by

151 Id.
152 Id.
153 Ferris & Hahn-Baker, supra note 1, at 70-71.
155 Id. at 70-71.
156 Id.
legislation, "which deny individuals the opportunity to accept small risks and inconveniences in order to substantially better themselves economically," are seen as patently paternalistic and ultimately unjust. Justice would be better served by giving the community the right to be free from both uncompensated external costs and to negotiate appropriate compensation between themselves and the facility owners.

It is true that as the environmental justice movement gains more support on the national agenda, chances of a bill becoming successful increase multifold. At the same time, however, the vast amount of effort invested in attempts to pass an environmental justice bill would be in vain if the bill is weakly constructed and necessary provisions are sacrificed so that it can muster enough votes to pass. In other words, there is no guarantee that lobbying diligently to pass a bill will give environmental justice advocates the gain they desire.

VI. FUTURE PROSPECTS FOR ENVIRONMENTAL JUSTICE

As indicated, a remedy to environmental discrimination is critical, yet the method overwhelmingly favored by environmental justice advocates, legislation, has proven impotent. The various problems involved in passing an environmental justice bill make this path both difficult and time-inefficient. In response, many states have passed their own environmental justice legislation to deal with state-funded programs.

With changes in the EPA permitting policy, it would be more beneficial for environmental justice advocates to focus their attention on

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157 Id. at 82.
158 Id.
159 Id.
160 Gaylord & Bell, supra note 98, at 35 (citing CTR. FOR POLICY ALTERNATIVES, ENVIRONMENTAL JUSTICE: LEGISLATION IN THE STATES (1994)). Virginia passed a resolution on environmental justice requiring research on the impacts of hazardous and non-hazardous waste facilities on minority communities. See JOINT LEGISLATIVE AUDIT AND REVIEW COMM’N OF VIRGINIA, SOLID WASTE FACILITY MANAGEMENT IN VIRGINIA: IMPACT ON MINORITY COMMUNITIES, H. DOC. No. 33, at 1 (1995). The first states to enact environmental justice legislation were Arkansas and Louisiana, and several states have pending laws addressing environmental justice, including California, Georgia, New York, North Carolina, and South Carolina. Gaylord & Bell, supra note 98, at 35. Texas created a task force to investigate and identify factors contributing to discriminatory environmental impacts, and to recommend remedial actions to the Texas Natural Resource Conservation Commission. Id. (citing CTR. FOR POLICY ALTERNATIVES, supra).
utilizing the new public participation avenues to their utmost advantage. In order to do this, citizens of the communities where facilities will be located must be educated and informed about the new power they yield over the decisionmaking process for siting. Some environmental justice advocates have begun to realize the significance of this power and have suggested grassroots education programs to achieve their goals.

To solve environmental justice problems we need professionals to work . . . with community groups; we need to interact with community groups with the assumption that they are "smart" and knowledgeable about environmental hazards affecting their lives; we need them to view community groups as allies rather than adversaries in working to solve environmental problems; we need them to stake their claim to the community rather than to the whims of powerful interest groups.\(^1\)

A major theme of the symposium on Health Research and Needs to Ensure Environmental Justice,\(^2\) held on February 10-12, 1994, "was the importance of involving grassroots organizations in education and research activities in their communities, and in making sure that communities benefit from these activities."\(^3\) Recommendations resulting from the symposium specifically suggested that federally funded research centers should prepare plans for partnerships with communities of color, and representatives of these partnerships should be active participants in health research for people of color and low income communities.\(^4\) It was determined that the findings of this research must be used to implement educational efforts tailored to specific communities and their problems.\(^5\) In addition, the active participation of affected communities must be assured in the decisionmaking process for

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\(^1\) Bryant, supra note 116, at 18.

\(^2\) The goal of the symposium was to formulate recommendations created by community leaders, workers, business and academic representatives, diverse government personnel, and people from the scientific community, to the federal government and other environmental justice stakeholders. Appendix 2, Executive Summary of the Recommendations from the Symposium on Health Research and Needs to Ensure Environmental Justice, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 227 (Bunyan Bryant ed., 1995).

\(^3\) Id.

\(^4\) Id. at 229.

\(^5\) Id. at 231.
outreach, education, training, and communication programs.\textsuperscript{166}

In 1993, the Virginia General Assembly passed a resolution directing the Virginia Joint Legislative Audit and Review Commission ("JLARC") to discover whether a pattern of racial discrimination had developed in the siting and monitoring process of solid waste management facilities in the Commonwealth.\textsuperscript{167} Because there were no significant differences between the siting process for sites in disproportionately minority communities and sites that were in other communities, JLARC did not find evidence of an intent to discriminate against minorities in its study.\textsuperscript{168} It did find that in some cases siting and monitoring practices had a disproportionate impact on minority communities.\textsuperscript{169}

When examining the siting process for facilities, it noted that there was an insufficient amount of public involvement during the early stages of the planning process.\textsuperscript{170} JLARC concluded that, in order to minimize conflicts in the future between the community and the facility, communities must be allowed to participate in the decisionmaking process before a locality proceeds with the plans for siting a facility.\textsuperscript{171}

If citizen participation is not cultivated before the... plan is submitted to the public, a perception may be generated that all of the important decisions have already been made. Consequently, residents will sometimes come to the conclusion that the project is being rushed through the siting process because of some inherent danger associated with hosting these types of facilities.\textsuperscript{172}

Especially in cases where the facility was being sited in a minority

\textsuperscript{166} Id. at 232.
\textsuperscript{167} Joint Legislative Audit and Review Comm'n of Virginia, supra note 160, at 1. Although this study deals only with non-hazardous waste facilities because there are no hazardous waste facilities in Virginia, it is still very relevant as to the process by which a facility becomes sited.
\textsuperscript{168} Id. at 40-47.
\textsuperscript{169} Id. at 38-40. According to the study, 35% of all proposed landfills and facilities since 1988 (14 of 40) were established in communities which were disproportionately minority. Id. at 38.
\textsuperscript{170} Id. at 47.
\textsuperscript{171} Id. at 49.
\textsuperscript{172} Id.
neighborhood, a failure to involve the public in the early stages of the
decisionmaking process could give rise to "suspicions that the site is being
'dumped in the community' because of the racial composition of the
residents." JLARC determined that the proactive involvement of
community groups was necessary to dissipate problems misconstrued as
environmental racism which were in actuality just a function of poor
planning. As a result, it recommended that the General Assembly consider
"amending the Code of Virginia to require the company applying for a permit
[in a disproportionately minority community] to demonstrate that
representatives from the affected community were given the opportunity to
participate in the process for siting the facility as a condition of permit
approval." This Virginia JLARC study is an example of how states are moving
away from remedying environmental discrimination regarding siting through
legislative mandates, and instead are concentrating on public participation as
the solution. The federal permitting process must also follow in these
footsteps. The changes in the EPA process demonstrate a commitment to
resolving environmental justice problems, and advocates should work in
cooperation with the EPA in utilizing this newly improved process. Further
efforts to pass legislation not only would encounter the problems that blocked
previous attempts at legislation, but would be premature with the changes
already made by the EPA. Environmental justice advocates should work on
educating and informing low income and minority communities about their
role in the decisionmaking process, and then await the results of these
changes. After three or four years of operation under this program, new
studies should be conducted to determine if environmental justice is being
achieved in these communities. By that time, federal legislation may prove
unnecessary because many more states will have passed legislation governing
environmental justice concerns and communities will be better informed on
how to take action for themselves.

VII. CONCLUSION

There is no dispute that environmental discrimination exists, that
minority and low income communities are impacted unfairly by waste

173 Id.
174 Id. at 53.
175 Id.
facilities. Although environmental justice advocates examine the discrimination using varying theories, the goal of all environmental justice advocates is to alleviate this disproportionate impact. Unfortunately the primary method used to combat this situation, lobbying for federal legislation in order to make environmental discrimination illegal, has proven sorely ineffective. Many attempts have been made to create a bill which would withstand the pitfalls of the legislative process, but all have failed.

President Clinton's Executive Order 12,898 in conjunction with the EPA's new environmental justice strategy have created a new avenue for minority and low income communities to seek relief. Increased public participation opportunities at earlier stages of the permitting process allow communities to voice their concerns over the siting of a facility in their areas. These concerns will be heard directly by the regulatory agencies at public meetings, and accommodations must be made so minority communities will understand the mechanics of the permitting process.

These efforts by the federal government will be in vain if they are not utilized to their fullest by environmental justice advocates. In order to receive the greatest benefit from the increased public participation opportunities, communities must be educated. Advocates must inform communities not only about their newly recognized power to input during the decisionmaking process, but also on the environmental and health effects of the facility and the permitting process in general. Citizens now are able to evaluate all of the relevant information concerning the permit application of the facility and determine for themselves whether to allow the facility to be sited in their neighborhoods. These grassroots efforts to allow communities to take control over their own futures will be the most efficient way to alleviate the disproportionate impact of waste facilities in those communities.