

## ENVIRONMENTAL JUSTICE IN OREGON: IT'S THE LAW

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*As states have grappled with new policy approaches and processes to begin resolution of environmental injustices, the issues, approaches, and observations from the first of state level environmental justice task forces and commissions can inform all stakeholders of their efficacy. These new Environmental Justice processes may also develop information useful for future policies of sustainability and increased inclusion of urban environments and their people in long term environmental monitoring, policy, and law.*

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## I. INTRODUCTION

Environmental justice refers to the distribution of environmental rights and benefits by race, class, and income. These include substantive rights like clean air and water, and process rights like notice and the opportunity to participate in environmental decision making. Other terms like environmental racism and environmental equity are also used to describe environmental justice dynamics.<sup>1</sup> Other articles in this issue of *Environmental Law* document the increasing breadth and depth of environmental disproportionality.<sup>2</sup> More and more studies provide evidence of both environmental racism and environmental disparity as they become more longitudinal. One of the most recent nongovernmental reports is *Toxic Wastes and Race at Twenty: 1987–2007*, which documents, once again, some of the environmental disparities. They found that:

- People of color make up the majority (56%) of those living in neighborhoods within roughly two miles of the nation's commercial hazardous waste facilities, nearly double the percentage in areas beyond two miles (30%).
- People of color make up more than two-thirds (69%) of the residents in neighborhoods with clustered facilities.
- Nine out of ten U.S. Environmental Protection Agency (EPA) regions have racial disparities in the location of hazardous waste sites.
- Forty of forty-four states (90%) with hazardous waste facilities have disproportionately high percentages of people of color in host neighborhoods—on average about two times greater than the percentages in non-host areas (44% vs. 23%).<sup>3</sup>

<sup>1</sup> See Robert W. Collin, William Harris & Timothy Beatley, *Environmental Racism: A Challenge to Community Development*, 25 J. BLACK STUD. 354 (1995) (discussing equity and racism in environmental law and planning). See also Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121 (1994) (discussing all three terms); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495 (1992) (discussing environmental racism).

<sup>2</sup> See, e.g., Eileen Gauna, *El Dia de los Muertos: The Death and Rebirth of the Environmental Movement*, 38 ENVTL. L. 457 (2008); Lisa Widawsky, Comment, *In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice*, 38 ENVTL. L. 577 (2008).

<sup>3</sup> ROBERT D. BULLARD ET AL., *TOXIC WASTES AND RACE AT TWENTY: 1987–2007*, at 152–53

These findings provide an early baseline for both environmental disparity and challenges to sustainable policies. As polices and laws about Environmental Justice have developed at the U.S. EPA, states have followed its lead.<sup>4</sup> This Article examines the development of state environmental justice activities in Oregon.<sup>5</sup>

States are an important link in environmental policy and intergovernmental relations. Most federal environmental money is funneled to states through the regional offices of a particular agency, and from there to states and municipalities. In the late 1990s, states were threatened with rescission and termination of these substantial revenue flows if they violated Title VI of the 1964 Civil Rights Act.<sup>6</sup> Under the Act, if state agencies were acting in a racially discriminatory manner, as alleged by many environmental activists, then the states' funding was potentially jeopardized.<sup>7</sup> In most states it would be unlikely that the state itself would replace lost federal funding at the same level. Although the U.S. Supreme Court ultimately held that citizens do not have a private right of action under Title VI, it served notice that environmental justice was a serious concern, and one that does not go away.<sup>8</sup>

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(2007), available at <http://www.ucc.org/assets/pdfs/toxic20.pdf>.

<sup>4</sup> The National Environmental Policy Act provides the legal foundation for federal environmental impacts assessments and statements. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2000). There are points in the Environmental Impact process where environmental justice issues arise. Federal agencies are required under Executive Order 12,898 to consider environmental justice issues in their practices and policies. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). The Council on Environmental Quality suggests incorporation of environmental justice principles during the following stages of preparation of an Environmental Impact Statement: scoping; public participation; determining the affected environment; analyzing disproportionate impacts on low income, minority, or Tribal populations; considering alternatives under the environmental impacts assessment to mitigate impacts; and in the Record of Decision. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 10–16 (1997), available at <http://www.nepa.gov/nepa/regs/ej/justice.pdf>. The Council on Environmental Quality has oversight functions over the EPA. *Id.* at 1.

<sup>5</sup> My spouse Professor Robin Morris Collin and I have been a part of many environmental justice activities in Oregon and continue to participate in state environmental justice activities. As activists and scholars, we take a keen interest in seeing the implementation of environmental justice as a sound foundation for newly developing policies of sustainability. Professor Robin Morris Collin has taught Sustainability Law and Policy for 15 years and was the first to teach such a course in a U.S. law school.

<sup>6</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–1 (2000).

<sup>7</sup> *Id.*

<sup>8</sup> See *Alexander v. Sandoval* (*Sandoval*) 532 U.S. 275, 293 (2001). While *Sandoval* held that Title VI did not allow private litigants to directly enforce the statute or its implementing regulations through a lawsuit, the door was still briefly open for private parties to allege a Title VI violation in a lawsuit filed under 42 U.S.C. § 1983. See Melissa A. Hoffer, *Closing The Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzaga*, 38 NEW ENGLAND L. REV. 971, 992–1000 (2004) (discussing post-*Sandoval* uses of § 1983 in private lawsuits to enforce regulation promulgated under Title VI that prohibits actions that have discriminatory effects). However, the ability of private plaintiffs to use § 1983 as a mechanism for enforcing the anti-discriminatory effects regulation promulgated under Title VI in court now appears to have been foreclosed. See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the Court held that § 1983 could not be used by a private party to sue for a violation of a statute that does not

Subsequently, many states have embraced some principles of environmental justice.<sup>9</sup> In few states, if any, is there state recognition of environmental justice policy, principles, or practices without federal financial leverage. This is also true of many environmental policies. Environmental policy becomes effective when states and localities begin to facilitate the implementation of these policies. The same will hold true with environmental justice policy development at the state level.

Part II of this Article discusses the general context of state environmental justice activities. The role of states in environmental justice policy development is a very dynamic and controversial area. States are key players in the intergovernmental relations that underscore U.S. environmental public policy. Although “best practices” may be in the eyes of a particular stakeholder, I note developments in practices and procedures. I give particular attention to the New Jersey approach to environmental justice. That state has a history of large, rapid urbanization and industrialized pollution, large populations of racial and ethnic subgroups, and poverty. To discount cities in any environmental policy is to essentially ignore meaningful implementation of current and potential environmental policies. This Part concludes with a discussion of the federal context of state environmental justice decisions and policies, focusing on federalism and institutional norms around Race.

The next Part describes the evolving Oregon Environmental Justice experience. I begin with a brief description of environmentalism in Oregon as part of the policy context. Then I describe the first two state environmental justice initiatives, their processes and recommendations, and summarize some of the main policy recommendations of the two state reports. This section concludes with a description of ongoing efforts of the newly formed Oregon Environmental Justice Task Force.

In conclusion I share my observations about the emerging policy context of sustainability and environmental justice as they co-evolve into “hard” law from their social policy context. Here I note Maryland’s Environmental Justice and Sustainability Commission.

## II. THE ROLE OF STATES IN ENVIRONMENTAL JUSTICE POLICY

### A. *Federalism and Evolving Environmental Justice Policy*

Federalism systematically combines the principles of supremacy and localism in a way uniquely suited to finding just and sustainable solutions to

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clearly provide for a private right of action. *Id.* at 286. Taken together, *Sandoval* and *Gonzaga* effectively preclude environmental justice advocates and other private parties from filing a lawsuit to enforce Title VI’s ban on actions that produce a discriminatory effect. Hoffer, *supra*, at 999. However, private individuals can still allege a Title VI violation through the administrative complaint process. *Id.* at 1003.

<sup>9</sup> See THE PUB. LAW RESEARCH INST., ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES (Steven Bonnoris ed., 3rd ed. 2007), available at [http://www.uchastings.edu/site\\_files/plri/EJ2007.pdf](http://www.uchastings.edu/site_files/plri/EJ2007.pdf) (summarizing the environmental justice approaches of every state).

local environmental problems. Goals of environmental justice and sustainable development may be directed by the federal government, but implementation of environmental policy is always local in some manner. Three models of federalism have shaped U.S. environmental policy. The first is delegated federal authority, the second is cooperative federalism, and the third is federal preemption. The three models of environmental federalism have different implications for environmental justice and sustainability policy. The first general model of environmental federalism is to provide financial assistance to encourage states to develop appropriate environmental programs and policies on their own. This is the primary federal approach for land management and solid waste disposal.<sup>10</sup> This model would greatly benefit state environmental justice initiatives because resources for the extensive public participation, data gathering and analysis, and interagency coordination required by the first wave of state environmental justice programs are very expensive in terms of time, money, and human resources. States with large areas of cumulative wastes, industrialization, and large, racially and economically segregated populations still have considerable leeway to go beyond federal requirements in all instances. States also have considerable leeway to do what they have done all along regarding environmental justice and sustainability—nothing. The second general model of environmental federalism is the cooperative federalism approach. Here, federal agencies set national environmental standards and states can choose to implement them or let the federal government do so.<sup>11</sup> This model would be awkward for state environmental justice programs. It would be awkward because federal standards of environmental justice are new to many state environmental agencies. Some would argue that it is awkward, but necessary. The recalcitrance and countervailing embracement of environmental justice by state environmental agencies directly affects the development of environmental policy, as the discussion of the two Oregon Environmental Justice reports will illustrate. Most state environmental agencies receive funding from the EPA.<sup>12</sup> Generally, if states want EPA money they must

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<sup>10</sup> See, e.g., Solid Waste Disposal Act, 42 U.S.C. § 6948(a) (2000) (authorizing federal financial assistance to states for the development and implementation of approved solid waste management plans); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600(a)(5) (2000) (declaring that the “Federal Government should be a catalyst to encourage and assist” states in the management of forest and rangeland).

<sup>11</sup> See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1342(b) (2006) (authorizing state administration of National Pollution Discharge Elimination System (NPDES) permits); Clean Air Act, 42 U.S.C. § 7416 (2000) (declaring the retention of authority by states to “adopt or enforce” air pollution emission standards more stringent than the federal standards); Toxic Substances Control Act, 15 U.S.C. § 2684 (2000) (authorizing state administration and enforcement of lead exposure reduction requirements). See also U.S. ENVTL. PROT. AGENCY, REGION 10 OFFICE OF COMPLIANCE AND ENFORCEMENT, REGION 10 HAZARDOUS WASTE COMPLIANCE PROGRAM REVIEW PROGRAM EVALUATION REPORT FOR FEDERAL FISCAL YEARS 2000, 2001, 2002, at 10–13 (2005), available at [http://yosemite.epa.gov/R10/OWCM.NSF/ed6c817875102d2d8825650f00714a59/cce81107a83d0609882570370069c3c6/\\$FILE/Region10\\_RCRA\\_states\\_program\\_review\\_final.pdf](http://yosemite.epa.gov/R10/OWCM.NSF/ed6c817875102d2d8825650f00714a59/cce81107a83d0609882570370069c3c6/$FILE/Region10_RCRA_states_program_review_final.pdf) (comparing the relative performance of hazardous waste state and federal enforcement programs).

<sup>12</sup> See, e.g., ROBERT W. COLLIN, THE ENVIRONMENTAL PROTECTION AGENCY: CLEANING UP

comply with minimal statutory requirements. In some instances, states are free to alter regulatory policies so long as they reach the same federally required environmental results. The third model of environmental federalism is the direct preemption of state law.<sup>13</sup> This model could be awkward for the same reasons as the cooperative federalism model. Direct preemption of state law may be necessary to implement regional strategies of environmental clean up, sustainability, and environmental justice, especially where state law conflicts with federal law.

As environmental policy matures and includes more citizen monitoring and involvement, the role of communities will increase.<sup>14</sup> Those communities most affected by past, present, and future environmental impacts will need monitoring before any type of sustainability assessment, evaluation, or policy can begin. The strength of the environmental justice mantra “We Speak for Ourselves” lies both in its authentic voice and in the needs for future global, domestic, state, and local environmental policies to be based on accurate and complete information. The awkward and evolving dynamics of U.S. environmental federalism combine with vague and shadowy intergovernmental relations and political polarization of environmental issues and controversies to overshadow the fundamental need of environmental policy for citizen input and accurate environmental information. The polarization of land use planning at the local level and environmental regulation at the state and federal levels is a failure of intergovernmental communication. This need for communication not only fuels grassroots environmental activism and gives rebirth to the U.S. environmental movement, but it is fundamentally necessary to develop and implement effective and sustainable policies. Sadly, land use planning and high level environmental regulations do share an important characteristic: they are poorly enforced. It could be argued that it is hard to enforce one but not the other, and this could be true to the extent that land use planning and environmental regulations touch on the same issues. It may also be the reason for the hard intergovernmental schism between the two.

U.S. environmental policy is rapidly developed by federal agencies enacting federal legislation. However, states are not preempted by federal environmental laws except in narrowly defined cases.<sup>15</sup> Because of this environmental federalism, states are free to pursue cleaner, cheaper, and

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AMERICA’S ACT 2 (2006) (stating that “[a]ssistance with permit writing, compliance and enforcement, and the public’s right to know are a few of the basic activities supported by the regional offices for the states”).

<sup>13</sup> See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 169–70 (2005–06) (listing examples where federal environmental statutes preempt state law).

<sup>14</sup> See Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37, 84–89 (1998) (discussing how community participation can bridge disconnections in environmental policy and enforcement).

<sup>15</sup> See, e.g., Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995) (stating that “Congress has taken care to ensure that federal environmental law rarely preempts state standards”).

smarter environmental policies.<sup>16</sup> There is still major tension between states and the federal environmental agencies over regulatory standards. Some fear that letting states control environmental policy will result in a “race to the bottom.”<sup>17</sup> Politically, this means that elected and appointed government officials would reduce environmental regulations to gain support of industry and compete with each other to do so. Even if environmental regulations were not reduced, some states may audit or privilege environmental information<sup>18</sup> or otherwise deflect citizen complaints and demur enforcement. Any so called “race to the bottom” in environmental regulation would tend to jeopardize environmental justice communities. Environmental justice issues demand as much information as possible and anything that compounds the historic exclusion of the most environmentally affected places and people only builds barriers to future policies of sustainability and ecosystem integrity.<sup>19</sup>

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<sup>16</sup> See, e.g., Peter Lehner, *A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1091, 1115 (2001) (stating “[t]he federal government sets the standards and designs what a program should look like, and then, in almost all cases, delegates that program to the state governments to implement”). States are also free to pursue dirtier, more expensive, and less intelligent environmental policies so long as they achieve the environmental result sought by federal environmental law.

<sup>17</sup> The race to the bottom theory as a rationale for strong federal environmental regulation has been debated among legal commentators. Professor Richard L. Revesz, now dean of the New York University School of Law, spurred this debate through arguing in a law review article that there is no regulatory race to the bottom to induce industrial relocation. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992). Other legal commentators have challenged his argument. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271, 278 (1997) (arguing that “the very neoclassical model favored by the revisionists to support their claims, when combined with empirical realities, tends to undermine the claim that interstate competition leads to efficiency, indicating instead that such competition in the real world should, in fact, be viewed as presumptively detrimental to social welfare”); Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL’Y F. 225, 230 (1997) (arguing that federal environmental regulation is necessary, in part, to prevent, “states from reducing social welfare in response to competition for industry”); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 68 (1996) (arguing that “significant failures would likely occur in competition among the states if the federal government were to repeal its minimum environmental standards”). Despite the arguments levied against his view, Revesz maintains that the race to the bottom theory is not a strong justification for stronger federal environmental regulation relative to state regulation. See Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536 (1997) (explaining that his “starting point is a rebuttable presumption in favor of decentralization”). See also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 556 n.2 (2001) (noting disagreement with the “race-to-the-bottom rationale as an across-the-board argument for federal intervention” and citing legal commentators that have agreed with Revesz’s position).

<sup>18</sup> See generally John A. Lee & Bertram C. Frey, *Audit Immunity Laws and Self-Disclosure Policies: A State-by-State Comparison*, [35 Rep. Supp.] Env’t Rep. (BNA) S-3, S-3 (July 9, 2004) (discussing state audit immunity laws and self-disclosure policies).

<sup>19</sup> Emily Fisher, *Sustainable Development and Environmental Justice: Same Planet, Different Worlds?*, 26 ENVIRONS ENVTL. L. & POL’Y J. 201, 207 (Spring 2003) (explaining that

*B. Agency Institutional Norms Surrounding Race*

Race is a major unacknowledged factor in the human interface between human health, pollution, toxins, and waste. Studies of different scales over varying amounts of time have proven time and again that Race is the primary factor in environmentally disproportionate practices and policies.<sup>20</sup> The footprint of Slavery extended long and wide in the United States. Explicit, acknowledged racism existed recently enough to have modern environmental consequences, especially in urban areas. Institutional, unacknowledged racism propels that impact to present and future environmental decisions, unless directly addressed. Race may not be real in any respected scientific sense<sup>21</sup> but, as an ideology, racism is real and has consequences for the environment, for all environmental policies, and for the foundation of sustainability. The environment may not countenance race or racism, but it shows that we do. William E. B. DuBois observed that it is the color line in the United States that establishes the standard of acceptance.<sup>22</sup> Skin color is a major unacknowledged factor setting the standards for U.S. public policy, program planning and implementation, and there is no special reason that environmental policy is any different. Sustainable policies and programs must be the first exception to the normative de facto practices of environmental decision making that excludes people of color.<sup>23</sup>

Racist views and practices, both individually and institutionally, produce at least two outcomes in environmental policy development. First, “whites” ignore or discount the distinctively different orientations of people of color to nature and the environment as less important than those presented by whites. For example, when asked to define environment and nature, people of color across many ranges of ethnicity describe a broad range of phenomena: the creation of Nature, living and dead, contemporary

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communities suffering from industrial pollution and ecological damage must be in a position to resist or negotiate the establishment of damaging facilities).

<sup>20</sup> See generally RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan Bryant & Paul Mohai eds., 1992) (discussing the many environmental justice studies disaggregating race and income).

<sup>21</sup> See Charmaine D.M. Royal & Georgia M. Dunston, *Changing the Paradigm From ‘Race’ to Human Genome Variation*, 36 NATURE GENETICS 5, 5 (Supp. 2004) (noting that “paradigms of human identity based on ‘races’ as biological constructs are being questioned in light of the preponderance of data on human genome sequence variation”); see also Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real*, 60 AM. PSYCHOL. 16, 16 (2005).

<sup>22</sup> WILLIAM E. B. DUBOIS, *THE SOULS OF BLACK FOLK* 3 (First Vintage Books/Library of America ed., Vintage Books 1990) (1903).

<sup>23</sup> This includes lack of actual notice of major environmental and land use prospective decisions, lack of ecological or human health risk assessments that accurately and comprehensively measure risk in a demographically sensitive manner, and a lack of acknowledgement of past environmental and land use acts based explicitly on race. See, e.g., BROWN UNIV. STEERING COMM. ON SLAVERY AND JUSTICE, *SLAVERY AND JUSTICE* (2006), available at [http://www.brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf) (discussing the legacy of slavery in the educational setting and recommending ways for Brown University to address this legacy).

and future, flora and fauna, and where we live, work, play, and worship. The conservationist-based U.S. environmental movement instead focuses its work on so-called “wilderness,” wild places, and wild animals. This concept of the environment is sometimes considered racist because indigenous people who called these places home did not consider them wild.<sup>24</sup>

Second, there is the generally unproductive racial tension from confrontation as marginalized urban communities and communities of color are forced to challenge the predominantly white, male, upper class elite who dominate the environmental movement in government, industry, and the environmental advocacy area.<sup>25</sup> This will be a challenge in developing socially defensible sustainability policies. Those born into the privilege of a safe, clean place to live, work, and play can lose sight of that privilege. Unacknowledged privileges of place are underscored by environmental ignorance of ecological connections in a region over time. By losing sight of the privileges of place, the majority culture increases the separation between itself and those on the receiving end of pollution and racism. With economic separation between the classes greater than at any other recorded time, the groundwork is laid for continued separation.<sup>26</sup> In the United States, this separation has a strong historical and current racial component. As noted by one researcher in this area:

The idea of race exists because people give it a particular meaning, a meaning that changes with time, place, and circumstances. But one constant remains—the privileging of whiteness through different devices, social patterns, and even laws. This racial positioning is maintained in part through an unwritten rule that cannot be discussed. In fact, the corollary rule mandates that we talk about the social desire for equality while avoiding an examination of white racial privilege or any other privilege.<sup>27</sup>

State and federal administrative agencies have absorbed the racist norms of the privileged in many painful instances. The disenfranchisement and large land loss suffered by African American farmers at the hands of federal agencies is well documented.<sup>28</sup> In the area of environmental policy, the consequences of racist norms in the provision of public services is very visible in terms of how the environmental policies were shaped and implemented in urban areas.<sup>29</sup>

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<sup>24</sup> See generally THIS SACRED EARTH: RELIGION, NATURE, ENVIRONMENT (Roger S. Gottlieb ed., 1996) (describing how various religions and cultures view nature).

<sup>25</sup> Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 502 (2000).

<sup>26</sup> See David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1 (reporting that Internal Revenue Service figures show that the portion of national income going to wealthiest Americans is the largest since Depression era).

<sup>27</sup> STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA, at xi (1996).

<sup>28</sup> See *Pigford v. Veneman*, 292 F.3d 918, 920 (D.C. Cir. 2002) (discussing a class action lawsuit by 22,000 African American farmers from 15 states alleging racial discrimination in U.S. Department of Agriculture credit and benefit programs).

<sup>29</sup> See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in*

*C. The Urban Context of Environmental Justice and Sustainability*

The Environmental Justice movement emerged from African American communities which had been excluded from environmental protection by default and design, by de facto and de jure racism directed specifically and institutionally at enslaved and freed people of African descent.<sup>30</sup> After Emancipation, many freed slaves went north into urban centers. Some stayed in the South in enclaves of segregated communities. Jim Crow and inequalities in mortality, healthcare, education, housing, and employment followed and persist today where they are most evident in urban areas and in rural enclaves. Environmental racism is not a separate type of racism exercised in abstract environmental venues; it is the same unexamined, institutionalized racism now evident because of objectively measurable environmental disproportionality.<sup>31</sup> This is first evident in clean up policies in urban areas, but endemic in most environmental enforcement areas.<sup>32</sup>

Environmental policy in urban areas across the United States is relatively new. Urban areas are much more complex than parks or other areas with low population. The U.S. EPA was formed in 1971, about the same time as many state environmental agencies. Urban areas in the United States had at least a century of unrestrained industrialization, with no environmental regulation and often no land use control whatsoever.<sup>33</sup> U.S.

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*Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2 (examining the speed and thoroughness of Superfund clean up activities in white areas as compared to African American communities, and concluding, that even adjusting for income differences, clean up was quicker and more comprehensive in white communities); see also David Arnold, *Pollution Checking Said to Lag in Mass., EPA: Minority Areas Have Lower Rate*, BOSTON GLOBE, Jan. 21, 2003, at B1 (providing examples of inequitable compliance with environmental laws in low-income areas).

<sup>30</sup> See ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 1 (3d ed. 2000) (summarizing the disproportionate environmental stressors that low-income and minority groups are subjected to, and noting that these groups are under-represented in the environmental justice movement); see also Robert W. Collin & Robin Morris Collin, *Urban Environmentalism and Race*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 221 (1997) (discussing the history of racial inequity as a factor in the environmental movement).

<sup>31</sup> See SCI. ADVISORY BD., U.S. ENVTL. PROT. AGENCY, *AN SAB REPORT: REVIEW OF DISPROPORTIONATE IMPACT METHODOLOGIES*, at ii (1998) (reporting on testing models to determine if there are disproportionate levels of pollution and other toxins in low-income and predominately African American populations).

<sup>32</sup> Robin Morris Collin & Robert W. Collin, *Environmental Reparations*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* 209–14 (Robert D. Bullard ed., 2005).

<sup>33</sup> See ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003) (discussing U.S. land development history and the fluidity of private property concepts); see also DANIEL H. COLE, *POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION* (2002) (comparing and contrasting property ownership regimes in terms of environmental protection); Gerald Friedman, "A Question of Degree": *The Sanctity of Property in American Economic History*, in *NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP* 29, 45 (2003) (discussing changes in private property concepts that allowed greater environmental regulation); Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J.L. & LIBERTY 987, 993 (2005) (discussing a change in perspective on land use regulation from a local zoning problem

environmental movements, from James Audubon in the East to John Muir and Gifford Pinchot in the West, focused on unpopulated areas, not cities.<sup>34</sup> U.S. environmental movements did not consider public health as a primary focus, but emphasized conservation and preservation of nature and biodiversity. Cities were also the dynamic melting pot of new immigrants, and three waves of African Americans migrated North after the Civil War.<sup>35</sup> These groups faced substantial discrimination in housing, employment, education, and municipal services.<sup>36</sup> As industry and technology rapidly expanded in the cities, so too did these populations. As waste from these industries increased and accumulated over time in the cities, so too did the exposure from these wastes faced by immigrants, African Americans, and low income people generally. These populations face tremendous displacement pressure, but African Americans and other people of color also face difficult challenges in obtaining new housing within the same community (or elsewhere) after displacement. For example, when these populations are displaced, they often face paying a disproportionately high percentage of income for housing as well as suffer from the loss of important and intangible community culture.

Displacement does not provide opportunities to escape environmental dangers. Often it intensifies exposures by forcing displaced people toward less desirable locations and land uses because of economically limited choices. Often these undesirable uses are not residential, but are environmentally degrading, such as waste sites. Over time, exposure to environmentally degrading land uses can affect the public health of the community, and some communities have recently begun to seek redress in the courts.<sup>37</sup>

The lack of environmental considerations in U.S. land use planning is also a serious obstacle to implementation of environmental policy.<sup>38</sup> State

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to a broader environmental concern in early 1970s); Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1814 (2004) (discussing environmental racism and property).

<sup>34</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, U.S. ENVTL. PROT. AGENCY, UNINTENDED IMPACTS OF REDEVELOPMENT AND REVITALIZATION EFFORTS IN FIVE ENVIRONMENTAL JUSTICE COMMUNITIES 1 (2006), available at <http://www.epa.gov/compliance/resources/publications/ej/nejac/redev-revital-recomm-9-27-06.pdf>.

<sup>35</sup> See URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 5 (1997) (describing the massive migration in the 1880s, the migration of 1.5 million African American Americans during and after World War I, and the migration of 5 million African Americans between the 1940s and 1960s).

<sup>36</sup> P.R. HAY, MAIN CURRENTS IN WESTERN ENVIRONMENTAL THOUGHT 14 (2002).

<sup>37</sup> See *Settlement Reached Over Contamination: Residents Exposed to Toxic Ash Buried in Jacksonville Neighborhoods*, BRADENTON HERALD (Bradenton, FL.), Aug. 24, 2005, available at 2005 WLNR 13290542 (explaining that in 2003 residents of predominantly black neighborhoods in Jacksonville, Florida sued the city of Jacksonville for exposure to toxic ash from four municipal trash incinerators that operated from the 1910s to the 1960s. The ash was buried in the residents' neighborhoods, and the residents claimed in their lawsuit that ash exposed them to arsenic, lead, mercury, and other toxins. The parties settled the lawsuit for \$75 million in 2005).

<sup>38</sup> See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 411 (2002).

environmental policy can founder without local land use compliance and enforcement. Municipalities themselves can be polluters. The level of intergovernmental communication about environmental issues between the actual local land use decision makers and regulatory state agencies is very poor. There are seldom state or federal environmental officials participating in any type of local land use decisions, even when environmental permit applications, modifications, and renewals are directly impacted and involved.<sup>39</sup> State environmental justice policy will fill part of this vacuum.

Land use itself is very exclusionary by both race and income.<sup>40</sup> Some have noted that zoning's roots began in the 1920s in New York City and Boston to control the public health contagion allegedly from Irish immigrants crammed into tenement housing with no light or air or sewer.<sup>41</sup> Zoning segregates incompatible land uses by preventing some uses and encouraging others. Housing discrimination by Race and ethnicity has a long history in the United States. Because the place where one lives determines one's available educational opportunities, housing location may affect life chances for equal opportunity in later employment. Housing, education, employment, and municipal service disparities by Race are inevitably reflected in the environment. As both the world and the United States have become increasingly urbanized, these disparities accumulate until they are reflected in public health and ecosystem integrity. New environmental paradigms, such as sustainability and environmental justice, increase scrutiny of these disparities.<sup>42</sup>

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<sup>39</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 34, at 17.

<sup>40</sup> In discussing the evils of apartments and their tenants, the U.S. Supreme Court stated:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Vill. of Euclid, Ohio v. Ambler Realty Co. 272 U.S. 365, 394–95, (1926).

<sup>41</sup> See Norman Krumholz, *Zoning*, in THE ENCYCLOPEDIA OF HOUSING 641 (Willem van Vliet ed., 1998).

<sup>42</sup> See generally Ann E. Goode & Suellen Keiner, *Managing For Results to Enhance Government Accountability and Achieve Environmental Justice*, 21 PACE ENVTL. L. REV. 289, 289 (2003–2004) (discussing National Academy of Public Administration studies with respect to federal, state, and local government responses to environmental justice concerns).

Environmentalists have not given serious consideration to environmentally hostile attitudes and policies towards cities generally, and African-Americans specifically. From the inception of the United States, our founders thought of cities as having a negative impact on people and a corruptive force on our then emerging democracy. Thomas Jefferson thought of cities as “pestilential to the morals, the health, and the liberties of man.”<sup>43</sup> He went on to write about the people he thought lived in cities:

The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body. It is the manner and spirit of a people which preserve a republic in vigour. A degeneracy in these [cities] is a canker which soon eats to the heart of its laws and constitution.<sup>44</sup>

In the 1893 Columbia Exposition, the great city planner Daniel Burnham called for an environmentally healthy city.<sup>45</sup> He labeled it “White City.”<sup>46</sup> In the early 1900s cities began to be referred to as Jungles.<sup>47</sup> In the 1960s, the small number of whites who gentrified some parts of some cities were referred to as “urban pioneers.” The metaphor of city and jungle carries with it attitudes and prejudices about the people who reside there. If the metaphor is continued, then cities can only be civilized when the pioneers have settled the jungle, or when whites are the majority. The anti-city theme in U.S. environmentalism persists today in the literature. Some environmental writers describe cities as follows: “The first and most obvious thing about cities is that they are like organisms, sucking in resources and emitting wastes.”<sup>48</sup>

After years of legal slavery and segregation by race, what remains are tremendous entrenched disparities in economic, physical, and environmental well being.<sup>49</sup> Environmentalists must consider what happens when generations of disparities confront emerging policies promoting sustainability. In the United States, as long as these disparities remained isolated in the cities and away from suburbs they were deemed an

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<sup>43</sup> Letter from Thomas Jefferson to Doctor Benjamin Rush (Sep. 23, 1800), in 9 WORKS OF JEFFERSON 146, 146–47 (Paul Leicester Ford ed., 1905).

<sup>44</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden, ed., Univ. of N.C. Press 1955) (1787).

<sup>45</sup> Encyclopedia of Chicago, Antecedents and Inspirations, <http://www.encyclopedia.chicagohistory.org/pages/300002.html> (last visited Apr. 13, 2008).

<sup>46</sup> Encyclopedia of Chicago, World’s Columbian Exposition, <http://www.encyclopedia.chicagohistory.org/pages/1386.html> (last visited Apr. 13, 2008).

<sup>47</sup> See, e.g., GEORGE ADE, *The Spotlighters and Spotter*, in HAND-MADE FABLES 81, 83 (1920) (stating “[a]fter the newly arrived Delegate from the Asphalt Jungles had read a Telegram . . .”).

<sup>48</sup> See TIMOTHY BEATLEY, GREEN URBANISM 3 (2000).

<sup>49</sup> See generally COMM’N ON BEHAVIORAL & SOC. SCIENCES & EDUC., NAT’L RES. COUNCIL, AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES (Neil J. Smelser et al. eds., 2001) (an authoritative compilation of demographic data on racial differentials in all aspects of American society including justice, labor and employment, health, education, neighborhoods, and other sectors); see also Robin Morris Collin, *Brown and Me: Brown’s Theory of an Educational Remedy for Citizenship*, 9 HOWARD SCROLL: THE SOCIAL JUSTICE LAW REVIEW 73 (2007).

acceptable price of both industrial expansion and later, environmental protection.<sup>50</sup> Any sustainability policy must revisit the burdened people and places of the cities to implement environmental measures that really improve the environment for everyone rather than shift costs and environmental burdens onto politically and economically marginalized communities. One partial but potentially powerful remedy to the wrongs of environmental injustice is direct and continuing recognition of the resulting impairment to freedom. As noted by Herbert Marcuse:

Pollution and poisoning are mental as well as physical phenomena, subjective as well as objective phenomena. The struggle for an environment ensuring a happier life could reinforce, in individuals themselves, the instinctual roots of their own liberation. When people are no longer capable of distinguishing between beauty and ugliness, between serenity and cacophony, they no longer understand the essential quality of freedom, of happiness. Insofar as it has become the territory of capital rather than of man, nature serves to strengthen human servitude.<sup>51</sup>

One of the best practical vehicles to begin this process is to examine the environmental injustices with open hearings under the authority of the state. With multi-stakeholder participation and engaged public involvement, these processes can expose areas where environmental injustice exists and where environmental improvements should be made. But the recent history of U.S. government interaction with African Americans and their land did not lay a foundation of trust. When EPA was formed in 1970, its urban influence was very limited and narrow, but as EPA gained necessary statutory authority in the 1970s and through the present, its policies have evolved and become more applicable to urban areas. But again, as applied, these policies recreate and buttress the racially isolated and burdened character of the nation's urban areas. An example is the development of Brownfields, an environmental policy that seeks to reuse urban land so that Greenfields in the suburbs stay green.<sup>52</sup> Brownfield rehabilitation and development programs aim to restore and clean up reusable industrial sites.<sup>53</sup> Empty, abandoned sites of toxic, potentially toxic, or formerly toxic

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<sup>50</sup> See generally Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87 (1998) (describing how sustainability in the suburbs is intimately linked to sustainability in the city, how sprawl destroys the environment, and the need for inclusionary decision making). See also Manuel Pastor, *Building Social Capital to Protect Natural Capital: The Quest for Environmental Justice*, in NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP 77, 77-78 (2003) (presenting research demonstrating that reducing social inequality promotes greater environmental protection efforts); ROBERT RIDDELL, *SUSTAINABLE URBAN PLANNING: TIPPING THE BALANCE* 198-203 (2004) (discussing the environmental costs of suburbia and exurbia).

<sup>51</sup> Herbert Marcuse, *Ecology and Revolution*, in *ECOLOGY: KEY CONCEPTS IN CRITICAL THEORY* 51, 53-54 (Carolyn Merchant ed., 1999).

<sup>52</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 34, at 4.

<sup>53</sup> K. A. Dixon, *Reclaiming Brownfields: From Corporate Liability to Community Asset*, in NATURAL ASSETS: DEMOCRATIZING ENVIRONMENTAL OWNERSHIP 57 (James K. Boyce & Barry G.

sites in communities depress property values and generally decrease wealth. The goal is to get them reused, and thereby preserve the greenfields and open spaces. The greenfields and open spaces are generally in suburban, predominantly white areas. Under the Brownfields programs, land that can be cleaned up, sometimes to minimal standards, is cleaned so that it can be reused. These programs are one of EPA's first steps toward urban environmentalism and towards sustainability. As such, it reveals both policy faults of privilege based policy, and policy challenges to sustainability. The use of government environmentalism to protect privileged people in safe and clean places underscores the policy premise of a major U.S. clean up policy. Instead, clean up of urban land to "Greenfield" levels would benefit all communities and lay a foundation for sustainability. State environmental justice advisory boards, commissions, and Task Forces face many Brownfields and waste issues.

#### *D. Why States Matter*

All environmental issues are local in some sense, and States are the primary points of implementation of environmental programs and policies. The EPA delegates its power to run federal environmental programs to the States in most cases. Under this delegated authority, States control permit issuance, modification, and renewal. They also control the enforcement of environmental laws. Environmental enforcement is a controversial issue in most communities where there are other environmental conflicts.<sup>54</sup> Environmental Justice is entering serious policy consideration at the state level. It is a controversial and often racially charged political process. As information about environmental disparities becomes better known, especially in an emerging public health context, states seek to address constituents concerns. As environmental knowledge increases through information resources like the "Scorecard.org" website<sup>55</sup> and, as environmentally degrading practices distribute and accumulate pollution and waste unequally, the evidence becomes harder to ignore. Enforcement of environmental law often leaves concerned citizens frustrated. In underserved environmental justice communities, activists want service and assistance from state environmental agency personnel equal to that which is allocated to industries for "compliance assistance." The industrial clients of the state and federal environmental protection agencies have enjoyed a unique form of public participation—private agency consultation.<sup>56</sup> Industrial and government stakeholders claim that these sessions help to work out any potential problems with environmental compliance that could stem from misunderstanding the rapid changes and permutations of

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Shelley eds., 2003).

<sup>54</sup> See ROBERT W. COLLIN, *BATTLEGROUND: ENVIRONMENT* (forthcoming 2008) (discussing environmental enforcement problems at international borders).

<sup>55</sup> Scorecard: The Pollution Information Site, <http://www.scorecard.org> (last visited Apr. 13, 2008) (providing customized profiles of local pollution and environmental quality).

<sup>56</sup> See COLLIN, *supra* note 12, at 203–04.

environmental regulations.<sup>57</sup> In an age where industries seek to shelter environmental audits and generally hide other environmental information, often with the complicity of government, these one-on-one consultations become the basis for public policy before communities are included and do not create a landscape of trust, accountability, or environmental transparency.

Many environmental compliance and enforcement issues in the United States require that the resident or citizen act only through the state agency. For example, any “evidence” produced by citizens is subject to exclusion by the enforcing agency for a variety of reasons well within judicially enforced norms of discretion.<sup>58</sup> Permit violations are not self or community enforcing. This enforcement regime frustrates concerned residents who share a common experience of exclusion, insufficient access, and lack of accountability by the permit holder and permit grantor. Because States are the proving ground of environmental policy, this frustration often manifests itself as meager stakeholder support of state agency policies. Historically, regional offices of federal agencies like the EPA seldom get involved in state environmental political issues if they can avoid it. However, a surge of environmental justice complaints, coupled with documentation to the regional office and the legal threat of revenue impingement via a Title VI violation, has prompted serious federal consideration of state level environmental justice policy.<sup>59</sup>

As clean up of waste sites emerged as a national policy, and populations grew, cities required serious consideration from state environmental agencies. Cities may be particularly vulnerable to the new types of natural disasters that occur in the wake of global warming and population expansion along ocean coasts.<sup>60</sup> Cities are also becoming more environmentally engaged as society seeks more sustainable and ecological solutions.<sup>61</sup> Additionally, other environmental justice populations are

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<sup>57</sup> See, e.g., OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA, GUIDE FOR MEASURING COMPLIANCE ASSISTANCE OUTCOMES 5 (2007), available at <http://www.epa.gov/compliance/resources/publications/assistance/measures/comeasuring.pdf> (“Activities include seminars, conferences, training, and forums where the primary focus is to provide environmental assistance to help regulated entities or other assistance providers understand how to comply with environmental requirements.”).

<sup>58</sup> See, e.g., 01-001-001 ME. CODE R. § 13 (Weil 2008) (describing how the Commissioner and the Board may rely upon their expertise and competence to evaluate the evidence before them); LA. REV. STAT. ANN. § 49:956 (2003) (explaining how Agencies may exclude “incompetent, irrelevant, immaterial, and unduly repetitious evidence”); 294 NEB. REV. STAT. § 84-914 (1999) (explaining the rules of evidence).

<sup>59</sup> See, e.g., TITLE VI IMPLEMENTATION ADVISORY COMM., NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS, (1999), available at <http://www.epa.gov/ocem/nacept/titleVI/titlerpt.html> (last visited Apr. 13, 2008) (reviewing and evaluating state and local programs and recommending overall implementation goals for Title VI).

<sup>60</sup> See MARK PELLING, THE VULNERABILITY OF CITIES: NATURAL DISASTERS AND SOCIAL RESILIENCE 27–28 (2003) (discussing the possibilities of sustainability, development, and environmental disasters in urban areas).

<sup>61</sup> See International Council for Local Environmental Initiatives: Local Governments for Sustainability, <http://www.iclei.org> (last visited Apr. 13, 2008) (explaining that there is an international association of over 700 local governments committed to implementing sustainable

emerging in rural areas, addressing issues such as the employment and living conditions of farm workers.

The recent and rapid inclusion of urban areas in U.S. environmental policy forces acknowledgement of past urban policies with racial motivations and detrimental environmental consequences. The result of many past urban policies is degraded ecology and health threats to residents.<sup>62</sup> Those living in urban areas are exposed to the cumulative health impacts of living near large numbers of polluting facilities, including bus stations, highways, and sewage treatment plants.<sup>63</sup> Cities generally have the highest percentages of people of color<sup>64</sup> and the most pollution in the United States. States with a history of urbanization and industrialization are at the cutting edge of environmental justice because they must deal with this inherited urban ecology in order to implement any other environmental policies. Again, recent studies underscore this emerging dynamic. In December 2005, the Associated Press (AP) published a report showing that African Americans are 79% more likely than whites to live in neighborhoods where industrial pollution is suspected of posing the greatest health danger.<sup>65</sup> The AP study found African Americans in nineteen states were more than twice as likely as whites to live in neighborhoods with high levels of pollution.<sup>66</sup> The AP analyzed the health risk posed by industrial air pollution using toxic chemical air releases self-reported by factories.<sup>67</sup> Many industries under-report their emissions and some industries are allowed fugitive, de minimus, and catastrophic event emissions that are not counted.<sup>68</sup> Industries that do emit chemicals in small quantities may not even require a permit.<sup>69</sup> Nonetheless, the AP used reported emissions only to calculate a health risk score for each square kilometer of the United States.<sup>70</sup> The scores can be used to compare health risks from long-term exposure to industry pollution from one area to another. The scores are based on the amount of toxic pollution released by each industrial facility, the path the pollution takes as it spreads through the air, the level of danger to humans posed by each different chemical released, and the number of males and females of different ages who live in the exposure paths.<sup>71</sup> It does not

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development programs, which continues to grow at approximately 10% per year).

<sup>62</sup> See, e.g., ROBERT D. BOLLARD & GLENN S. JOHNSON, JUST TRANSPORTATION: DISMANTLING RACE & CLASS BARRIERS TO MOBILITY 14–21 (Robert D. Bullard & Glenn S. Johnson eds., 1997) (discussing transportation policies in urban areas and resulting environmental and health effects).

<sup>63</sup> *Id.* at 18.

<sup>64</sup> U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, THE BLACK POPULATION: 2000, at 5–7 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

<sup>65</sup> David Pace, *More Blacks Live with Pollution*, ASSOCIATED PRESS, Dec. 14, 2005, ¶ 1, <http://hosted.ap.org/specials/interactives/archive/pollution/part1.html>.

<sup>66</sup> *Id.* ¶ 6.

<sup>67</sup> *Id.* ¶ 18.

<sup>68</sup> Clean Air Act, 42 U.S.C. § 7412 (2000).

<sup>69</sup> *Id.*

<sup>70</sup> Pace, *supra* note 65, ¶ 25.

<sup>71</sup> *Id.* ¶ 18.

include pollution from water or waste, or other cumulative exposure pathways in urban areas from mobile sources.<sup>72</sup>

### *E. The New Jersey Experience*

The New Jersey State Environmental Justice Executive Order is one of the most far reaching environmental justice processes so far at the state level. It allows for citizens to file grievances and then engages all stakeholders in the solution.<sup>73</sup> After making a series of findings, the Executive Order describes a process. The Order's findings are that communities of color and low income communities in New Jersey are sited in areas with historically higher densities of known contaminated sites, that childhood asthma is increasing and is more prevalent in Black and Latino/Hispanic communities, and that the federal Government has emphasized environmental justice in its environmental policies.<sup>74</sup> The Executive Order underscores the commitment of New Jersey to a healthy environment, public input into decision making, empowerment through public involvement, emphasis of older urban and suburban areas using Smart Growth, and the importance of cumulative impacts.<sup>75</sup> It also explicitly

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<sup>72</sup> *Id.* ¶ 20.

<sup>73</sup> New Jersey's Environmental Justice Exec. Order No. 96 (Feb. 18, 2004), *available at* <http://www.state.nj.us/infobank/circular/eom96.htm>. Many public participation and involvement plans use the term "stakeholders" to describe a broad variety of participants who have an interest in a given environmental decision. Stakeholders may have different degrees of power and capacity, and different types of participation. Stakeholders may or may not have currently cognizable causes of action. A usual set of national stakeholders generally includes environmental justice, environmentalist, labor, state environmental agencies, industry, and federal environmental agency representation. States may include others such as faith-based organizations, or exclude others, such as national environmental groups.

<sup>74</sup> New Jersey's Environmental Justice Exec. Order No. 96 (Feb. 18, 2004), *available at* <http://www.state.nj.us/infobank/circular/eom96.htm> (last visited Apr. 13, 2008).

WHEREAS, New Jersey's communities of color and low-income communities have historically been located in areas of the State having a higher density of known contaminated sites as compared to other communities, with the accompanying potential for increased environmental and public health impacts; and

WHEREAS, studies by the Centers for Disease Control and Prevention (CDC) and other federal agencies have documented that the prevalence of childhood asthma is increasing, and that this increase is linked in part to poor air quality, and that prevalence is far higher for Black and Latino/Hispanic communities; and

WHEREAS, the Federal government has underscored the importance of Environmental Justice in Executive Order 12898 and created the National Environmental Justice Advisory Council to integrate environmental justice into the Environmental Protection Agency's policies, programs, initiatives and activities . . .

<sup>75</sup> WHEREAS, the State of New Jersey is committed to ensuring that communities of color and low-income communities are afforded fair treatment and meaningful involvement in decision-making regardless of race, color, ethnicity, religion, income or education level; and

WHEREAS, the State of New Jersey is further committed to promoting the protection of human health and the environment, empowerment via public involvement, and the

ties the executive level of powerful state agencies into the Environmental Justice Task Force<sup>76</sup> and allows the Task Force to expand to include new state agency members if the issues before it require their expertise.<sup>77</sup> The membership of the Task Force is quite diverse. The Executive Order requires the Advisory Council, which meets quarterly, to be composed of fifteen individuals, at least one-third of whom represent grassroots or faith-based community organizations; other members are to be selected from the following communities: “academic public health, statewide environmental, civil rights and public health organizations; large and small business and industry; municipal and county officials; and organized labor.”<sup>78</sup> Additionally, a number of state agencies, including the Department of Health and Senior Services (DHSS) and the Department of Law and Public Safety (DL&PS) have collaborated to address environmental health and quality of life issues in urban, suburban, and rural communities of color and low income communities.<sup>79</sup>

The New Jersey Executive Order also specifically addresses the needs to disseminate information to low income people efficiently across the

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dissemination of relevant information to inform and educate, especially in people of color and low-income communities; and

WHEREAS, the State of New Jersey is committed to enabling our older urban and suburban centers to be made more attractive and vital, creating a broader range of choices and more livable communities for families and businesses in New Jersey, consistent with the State Development and Redevelopment Plan and principles of Smart Growth; and

WHEREAS, the cumulative impact of multiple sources of exposure to environmental hazards in low-income and people of color communities, and the roles of multiple agencies in addressing the causes and factors that compromise environmental health and quality of life in these communities require an interagency response; and

WHEREAS, the Department of Community Affairs (DCA), the Department of Environmental Protection (DEP) the Department of Health and Senior Services (DHSS), and the Department of Law and Public Safety (DL&PS) have entered into collaborative interagency work to address environmental health and quality of life issues in communities of color and low income . . .

6. The Commissioner of DEP and Commissioner of DHSS, or their appointed designees, shall convene a multi-agency task force, to be named the Environmental Justice Task Force, which will include senior management designees, from the Office of Counsel to the Governor, the Attorney General's office, the Departments of Environmental Protection, Human Services, Community Affairs, Health and Senior Services, Agriculture, Transportation, and Education. The Task Force shall be an advisory body, the purpose of which is to make recommendations to State Agency heads regarding actions to be taken to address environmental justice issues consistent with agencies' existing statutory and regulatory authority. The Task Force is authorized to consult with, and expand its membership to, other State agencies as needed to address concerns raised in affected communities.

*Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ¶ 6.

<sup>78</sup> *Id.* ¶ 7.

<sup>79</sup> *Id.*

digital and language divide. It also addresses disproportionate exposure to environmental hazards.<sup>80</sup> New Jersey sees much subsistence fishing in its many waterways and coasts, and the Executive Order addresses some of the resulting concerns.<sup>81</sup> New Jersey is a heavily urbanized industrial state and air pollution is a major concern, and the Executive Order addresses human health problems such as asthma, requiring the Department of Transportation (DOT) and the Department of Environmental Protection (DEP) to collaborate to reduce particulate matter in affected communities.<sup>82</sup>

One significant development in state environmental justice policy is the Task Force's ability to hear directly from affected communities and act to directly solve their problems. One of the main environmental justice rallying points is "We Speak For Ourselves." As the Executive Order states: "Any community may file a petition with the Task Force that asserts that residents and workers in the community are subject to disproportionate adverse exposure to environmental health risks, or disproportionate adverse effects resulting from the implementation of laws affecting public health or the environment."<sup>83</sup>

Before communities file a petition with the Task Force they must have it signed by at least fifty workers or residents, and at least twenty-five of the residents must be in the affected community.<sup>84</sup> The Task Force then will develop a set of criteria for state agencies to intervene in specific environmental justice communities. The Executive Order requires that "state agency resource constraints" be explicitly considered.<sup>85</sup> After that, the Task Force meets directly with the selected communities. If the petitioning community requires an agency not within the jurisdiction of the Task Force Chair, the Chair must then include "a senior management representative from the relevant agency."<sup>86</sup> Then the Environmental Justice Task Force develops an "action plan" for each of the selected communities to address the "environmental, social and economic factors that affect their health or environment."<sup>87</sup> The Executive Order calls for clear action steps to reduce current environmental burdens and to avoid or reduce future environmental burdens.<sup>88</sup> The New Jersey Executive Order also empowers the Task Force

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<sup>80</sup> See *id.* ¶¶ 1-3 (ordering the Executive Branch agencies to protect human health and provide opportunities for meaningful involvement for all people, including the mandatory establishment of a Spanish language website to communicate significant public health and environmental information to non-English speaking citizens).

<sup>81</sup> See *id.* ¶ 4 (requiring DEP, DHSS, and the Department of Agriculture to coordinate development of "appropriately protective fish consumption advisories" and disseminate that information, in particular to those communities of color and low income communities that rely more heavily on subsistence fishing).

<sup>82</sup> See *id.* ¶ 5 (emphasizing the reduction of diesel emissions from stationary and mobile sources).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶ 8a.

<sup>85</sup> *Id.* ¶ 8b.

<sup>86</sup> *Id.* ¶ 8c.

<sup>87</sup> *Id.* ¶ 8d.

<sup>88</sup> See *id.* (indicating that the action plan will specify community deliverables, timetables, and an explanation of other resources necessary to implement the plan, and the action plan will

to follow through with community environmental justice complaints. The entire process is underscored with active citizen involvement in problem description, solution development, and solution implementation.<sup>89</sup> The Task Force also has the mission of recommending legislative and regulatory changes necessary to achieve Action Plans, as well as publicly reporting the status of the Action Plan after eighteen months.<sup>90</sup>

The New Jersey Executive Order moves state environmental justice processes to the next level of policy making, enforcement, and dispute resolution. The Task Force can take environmental cases, have public hearings about them, and work collaboratively with state, county, and local agencies to solve them. The Task Force process is inclusive and accountable to communities in its duties. Its duties are to monitor, report, and follow through with all aspects of the Action Plan.

Communities of color and low income communities are specifically included by the Executive Order's requirements that a petitioner must demonstrate that the community qualifies as a disproportionately-impacted minority or low income community.<sup>91</sup> Demographic information about the area of concern is required.<sup>92</sup> The environmental concerns in neighborhoods are addressed in as much detail as possible.<sup>93</sup> Both qualitative and quantitative information about the site, and any and all impacts to people and the environment are sought.<sup>94</sup> This can include information from many different government agencies, residential monitoring, and schools.<sup>95</sup> The Environmental Justice Task Force also actively seeks input from the petitioning community about possible solutions or needs that would help address the environmental concerns raised in the petition.

The Task Force specifically asks the petitioners to assess their own capacity to participate in Action Plan implementation.<sup>96</sup> They ask the complainant to be part of the solution. This is a radical departure from most judicial and alternative dispute resolution processes, where the winner gets her way and the loser remedies or mitigates any illegal behavior. This aspect of the New Jersey Executive Order is key in building a foundation for future policies of sustainability. By making those with environmental concerns part of the solution—with the collaboration of the most relevant local, state, and

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be delivered to relevant Departments).

<sup>89</sup> *See id.* ¶ 8e–f (explaining that the Task Force shall monitor and make recommendations to facilitate implementation of the plans, and Departments shall implement the strategy. Additionally, DEP and DHSS shall determine the most significant environmental and health risk facing each of the selected communities.).

<sup>90</sup> *Id.* ¶ 8g–h (requiring the Task Force to “identify and make recommendations . . . appropriate to achieve . . . the purposes . . . of the Action Plan” and to “prepare and publicly release” a status report on the Action Plan within 18 months of the Task Force's establishment).

<sup>91</sup> N.J. ENVTL. JUSTICE TASK FORCE, GUIDANCE FOR SUBMITTING AN ENVIRONMENTAL JUSTICE PETITION 3 (2007), available at <http://www.state.nj.us/ejtaskforce/ejpetition.pdf>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 4.

federal agencies—the changes in personal consumption patterns necessary for most versions of sustainability can be monitored and ecologically altered.<sup>97</sup> Solutions to problems of both environmental injustice and sustainability require an assessment of the capacity of the community to engage in the process from beginning to end. This is not an educational needs assessment or a usual community outreach program; these types of policies are often viewed as paternalistic and sometimes hostile to legitimate community concerns. While they may be useful individually in a given context, they are not measures of the capacity of a community. These are yet to evolve. In order to assess the capacity of the community to be part of the solution, the Environmental Justice Task Force asks whether the signatories and/or stakeholders submitting the petition are an organized group or whether the group is being established in furtherance of this petition process, how long has the group been in existence, what sort of activities have they been involved in, and whether the signatories either work or live outside of the affected area.<sup>98</sup> The Environmental Justice Task Force also inquires about other interested stakeholders.<sup>99</sup> They ask if representatives from several organizations are acting as the main stakeholders in the petition. They also ask the petitioners whether they would prefer to have a public meeting with the Environmental Justice Task Force or to meet privately with representatives of the Task Force. This is an important nuance of inclusion. Marginalized, oppressed, and private people may fear retaliation for complaining too loudly. Marginalized people, such as many homeless people, may not have the capacity to engage in environmental decision making simply due to their lack of food and shelter. Oppressed people, such as many farmworker communities, fear retaliation against them and their community in the form of lost work and lower living conditions. Private people may be employed by a potential polluter and fear job blackmail.<sup>100</sup> They may have family or past family members employed by a potential polluter. They may simply not want to be publicly known. This “witness protection” is to examine whether the community has the capacity to engage in a solution. The protection of the voices of the “canaries in the coalmine”<sup>101</sup> is also as necessary for the resolution of environmental injustices as it is for acquiring the necessary environmental information for

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<sup>97</sup> See ROBERT W. COLLIN & ROBIN MORRIS COLLIN, *FRAMEWORKS FOR THE FUTURE* (forthcoming 2009) (discussing three sets of concerns and definitions around sustainability: Volume One is about Equity and Fairness, Volume Two is about Economics and Business, and Volume Three is about Environmental and Ecological Approaches). See *generally* ENVTL. LAW INST., *STUMBLING TOWARD SUSTAINABILITY* (2002) (discussing sustainable development and offering different recommendations for applying sustainable development concepts).

<sup>98</sup> N.J. ENVTL. JUSTICE TASK FORCE, *supra* note 91, at 4.

<sup>99</sup> *Id.*

<sup>100</sup> See RICHARD KAZIS & RICHARD L. GROSSMAN, *FEAR AT WORK: JOB BLACKMAIL, LABOR AND THE ENVIRONMENT* 13 (1982) (discussing the ultimatum often thrown down by employers for workers to either support industry or lose their jobs).

<sup>101</sup> See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11–12 (2002) (presenting the metaphor of the miner's canary to “capture[] the association between those who are left out and social justice deficiencies in the larger community.” The canary's “distress is the first sign of danger that threatens us all.”).

sustainability. The New Jersey Environmental Justice Task Force inquires into the willingness and ability of the petitioners to mobilize around the Environmental Justice issue with questions about circulating flyers and information to help educate and communicate with neighbors and questions about community meeting space.<sup>102</sup> They ask about volunteer capacity to actually implement the Action Plan. They require an informal assessment of communication and information needs.<sup>103</sup> The Environmental Justice Task Force wants to hear about any communication breakdowns that have hindered the petitioners from getting more information about the concerns raised in the petition.<sup>104</sup> They want to make absolutely certain the petitioning community has all the information it wants and that the appropriate state agencies have allowed the petitioning community to clearly articulate the full nature of its complaint.<sup>105</sup>

To date, the New Jersey Environmental Justice Task Force has accepted petitions from the cities of Camden, Linden, Long Branch, Newark, and Ringwood.<sup>106</sup> The Task Force has rejected petitions from Jersey City and Roselle.<sup>107</sup> Even the petitions not accepted are handled with care and scrutiny. Further, “[p]etitions that are not accepted during the current cycle will be further discussed with the petitioner and, if appropriate, will be automatically given priority status for review in the next open cycle.”<sup>108</sup>

It is clear from the first set of cases selected by the New Jersey Task Force that none were tabled for lack of community capacity. The cases selected represent large, complex, primarily urban, environmental justice controversies.<sup>109</sup> Pioneering in several respects, the Task Force is merging public health and environmental concerns into a more ecological and urban framing of the issues. It is proceeding to resolve these disputes in a collaborative, multi-stakeholder, multi-agency process that involves petitioners in the solution and seeks complete and thorough accountability. Moreover, it uses a place study type of approach as opposed to case

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<sup>102</sup> See N. J. ENVTL. JUSTICE TASK FORCE, *supra* note 91.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Env'tl. Justice Program, N.J. Dep't of Env'tl. Prot., Petition Update, <http://www.nj.gov/dep/ej/pupdate.html> (last visited Apr. 13, 2008).

<sup>107</sup> *Id.*

<sup>108</sup> N.J. ENVTL. JUSTICE TASK FORCE, *supra* note 91, at 5. The basis for not currently accepting a petition, explained by the Environmental Justice Task Force in the Jersey City Petition Statement of Findings, is that the complaint is “being addressed by appropriate agencies and that additional effort by the EJ [Task Force] will not substantially contribute to the current process to resolve” the complaint. N.J. ENVTL. JUSTICE TASK FORCE, N.J. DEP'T. OF ENVTL. PROT., STATEMENT OF FINDINGS, JERSEY CITY 1 (2005), available at [www.nj.gov/dep/ej/docs/ejps04sofjersey\\_city.pdf](http://www.nj.gov/dep/ej/docs/ejps04sofjersey_city.pdf). The Environmental Justice Task Force further noted that it will “monitor the progress of this project and the petitioners can request that the petition be reactivated in the event that the current process becomes ineffective or no longer appropriate.” *Id.* at 2. In addition, the Task Force makes recommendations to the state’s transportation and environmental agencies to provide the Task Force with a quarterly update on the progress of the project. *Id.*

<sup>109</sup> Env'tl. Justice Program, *supra* note 106.

studies.<sup>110</sup> A place study incorporates the culture and ecology of a given geographic location in an environmental analysis. The case study approach seeks to generalize from one case to another, from one ecosystem to another, yet at the present time, our ecological knowledge base is not enough to meaningfully generalize from one ecosystem to another. The case study approach in environmental public policy development does not yield meaningful results because of these large gaps in ecological knowledge. The knowledge gaps may be so large that we do not know the depth of our ignorance yet. The place study approach used by the National Environmental Justice Advisory Council accommodates this epistemological uncertainty by incorporating on-site environmental information with human memory of the place. Likewise, the New Jersey approach attempts to coordinate many stakeholders and agencies to achieve an environmental result in a given place or community.

The evaluation of petitions and the selection of cases is a very labor intensive process. It can involve local, state, and federal agencies. The work load required is greater because of the continued engagement with tabled petitioners. Public process, environmental accountability, and intergovernmental communication are not usual expenditures for any one stakeholder. The New Jersey Environmental Justice Task Force is the convening stakeholder for environmental justice disputes and, as such, absorbs much of the cost. The process would confound most cost-benefit approaches with short-term, currently tangible measures of benefit. However, longer term, more qualitative measures may be needed in the context of remedying past environmental imbalances and moving forward in a sustainable manner. The cost-benefit discussion is an important one in policy development if environmental justice is to move out of the research, development, and advisory committee role and into mainstream, state level environmental policy. The discussion of benefits and costs is confounded by ecological ignorance in most urban areas. In discussions about sustainability and cost-benefit analyses, the amount which unknown future lives is discounted is a major unknown factor. We would submit the same is true in environmental justice analyses. State environmental justice task forces and commissions are labor intensive when successful, but require new ways of measuring their effectiveness.

### III. OREGON AND ENVIRONMENTALISM

Oregon has a reputation and history of environmental protection going back to its historic bottle recycling legislation in 1971.<sup>111</sup> Oregon was also one of the first states to adopt state land use planning in the early 1970s.<sup>112</sup> State environmental groups like 1000 Friends of Oregon strongly supported

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<sup>110</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 34, at 4–8.

<sup>111</sup> See Or. Dep't of Env'tl. Quality, Oregon Bottle Bill, Then and Now, <http://www.deq.state.or.us/lq/sw/bottlebill/thenandnow.htm> (last visited Apr. 13, 2008).

<sup>112</sup> Act of May 29, 1973, 1973 Or. Laws 127, ch. 80 (codified at OR. REV. STAT. §§ 197.005–197.795 (2007)).

the implementation of legislation of that type.<sup>113</sup> Oregon has also been a battleground state for environmentalists and loggers. Endangered species like the spotted owl sparked acrimonious litigation still remembered in rural towns with closed logging operations like mills.<sup>114</sup>

Oregon also has an unusually homogenous population; it is among the “whitest” states in the nation.<sup>115</sup> It also has a long history of excluding African Americans with laws and practices.<sup>116</sup> According to the Official 2002 General Election Voters’ Pamphlet of Oregon Statewide measures explaining Measure No. 14, the exclusion of African Americans extended to numerical thresholds for judges as well as owning property or residing in Oregon.<sup>117</sup> This ballot measure removed the references to race in the state constitution, but kept the original language a part of the historical record.<sup>118</sup> These statutes elsewhere were called “sundown” provisions. These statutes remained on the books until a citizen initiative recently removed them, and, even then, it was by a slim margin.<sup>119</sup>

Oregon is in some ways a state of many small towns. Numerous low income communities in these towns are economically dependent on natural resource extraction including logging, mining, and grazing. Often, issues in these areas remain unaddressed because they remain unknown. The federal government is a large landowner. Many who are dependent on logging,

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<sup>113</sup> See, e.g., 1000 Friends of Oregon, History, <http://www.friends.org/about/history.html> (last visited Apr. 13, 2008) (describing the group’s support of the implementation of Oregon’s land use planning laws).

<sup>114</sup> See Susan Palmer, *A Spotted Owl Fix*, REGISTER-GUARD (Eugene, Or.), May 6, 2007, available at 2007 WLNR 9283750 (stating “[s]ince the implementation in 1994 of the Northwest Forest Plan—a region wide management strategy that set aside large blocks of forest reserves on public lands—the northern spotted owl] has been almost continually present in the nation’s courtrooms.”).

<sup>115</sup> U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (P.L. 94-171), SUMMARY FILE FOR STATES, at tbl.2 (Apr. 2, 2001) (showing Oregon’s percentage of white people as 86.5% and the national average as 75.1% and showing Oregon’s percentage of African Americans as 1.6% and the national average as 12.3%).

<sup>116</sup> See generally ELIZABETH MCLAGAN, *A PECULIAR PARADISE: A HISTORY OF BLACKS IN OREGON, 1778–1940* (1980) (describing Oregon’s history of racially discriminatory legislation). Racist attitudes were expressly enshrined in Oregon’s original constitution. Cheryl A. Brooks, Comment, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 738–39 (2004). The state’s constitutional delegates submitted to voters questions on whether Oregon should allow slavery and whether to allow free blacks or “mulattoes” in the state. *Id.* at 739. Voters decided against allowing slavery but approved the provision excluding free blacks from the state, making it the only state ever admitted into the Union with a black exclusion clause in its constitution. *Id.* The Original constitution also prohibited Chinese from owning property and both Chinese and blacks from voting. *Id.* at 738. The black exclusion provision was repealed in 1926, the provision prohibiting Chinese and blacks from voting was repealed in 1927, and the provision prohibiting Chinese who were not residents of the state when the constitution was adopted was repealed in 1946. See Charlotte B. Rutherford, *Laws of Exclusion: A Foundation of My Childhood*, 64 OR. ST. B. BULL., Jan. 2004, at 29, 32. In 1868, Oregon arguably rescinded its original ratification of the Fourteenth Amendment of the U.S. Constitution and did not officially ratify it again until 1973. Brooks, *supra*, at 732.

<sup>117</sup> State of Oregon, Oregon Voters Pamphlet (2002).

<sup>118</sup> *Id.*

<sup>119</sup> See Rutherford, *supra* note 116, at 32.

mining, and grazing have leases with the federal government. This can increase the application of federal environmental justice requirements like Federal Executive Order 12898.<sup>120</sup> When an environmental decision is made to preserve old growth forests, for example, it has direct burdens on many rural Oregon communities.<sup>121</sup>

About half of the population of Oregon is in Portland. One of the whitest cities in the United States, minorities in Portland represent 22.1% of total residents.<sup>122</sup> Statewide, minorities make up about 9.5% of the population.<sup>123</sup> Portland's most racially diverse community is Albina, though concentrated pockets of racial minorities exist all over Oregon in farm working communities and Tribal lands. The Albina community consists of fifteen neighborhoods in north and northeast Portland. The total population exceeds 70,000 residents.<sup>124</sup> Albina's neighborhood boundaries are defined by the Albina Community Plan, a long term strategy developed by citizens, business, and the city.<sup>125</sup> The Albina community contains 17% of Portland's total population and 39% of the total people of color in the city.<sup>126</sup> Many people of color in Albina are African Americans, with growing populations of Latino, Native, and Asian Americans.<sup>127</sup> There are approximately 500 brownfield sites in the city of Portland,<sup>128</sup> and many of them exist in this community. In Albina, many of these sites were potentially hazardous but not yet assessed.<sup>129</sup> Fear of clean up liability prevents real property contaminated like this from attracting buyers. Without a brownfield assessment as part of due diligence, these properties remain in limbo—uncleaned, untaxed, and unproductive. A property assessment done by a

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<sup>120</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), *amended by* 60 Fed. Reg. 6381 (Jan. 30, 1995).

<sup>121</sup> Rural communities often face similar environmental justice challenges and opportunities for sustainable policy. *See generally* FREDERIC O. SARGENT ET AL., RURAL ENVIRONMENTAL PLANNING FOR SUSTAINABLE COMMUNITIES (1991) (discussing case studies of rural environmental planning for sustainability).

<sup>122</sup> U.S. Census Bureau, State & County Quick Facts: Portland (city), Oregon, <http://quickfacts.census.gov/qfd/states/41/4159000.html> (last visited Apr. 12, 2008).

<sup>123</sup> U.S. Census Bureau, State & County QuickFacts: Oregon, <http://quickfacts.census.gov/qfd/states/41000.html> (last visited Apr. 13, 2008).

<sup>124</sup> *See* BUREAU OF PLANNING, PORTLAND, OREGON, ADOPTED ALBINA COMMUNITY PLAN, PORTLAND CITY COUNCIL ORDINANCE NO. 167054 (Sept. 30, 1993), *available at* <http://www.portlandonline.com/shared/cfm/image.cfm?id=58586> (containing a map of Portland neighborhoods that comprise the Albina neighborhood); City Of Portland, Portland Maps, <http://www.portlandmaps.com> (last visited Apr. 13, 2008) (containing census data for Albina community neighborhoods).

<sup>125</sup> *Id.*

<sup>126</sup> Megan Virgili, THE COLOR OF POPULATION: POSSIBLE LINKS BETWEEN RACE AND POLLUTION IN THE ALBINA COMMUNITY OF NORTH/NORTHEAST PORTLAND 16 (2001), *available at* [https://secure.willamette.edu/dspace/bitstream/10177/334/1/Virgili\\_Megan\\_SSRD\\_2001.pdf](https://secure.willamette.edu/dspace/bitstream/10177/334/1/Virgili_Megan_SSRD_2001.pdf).

<sup>127</sup> *See id.* at app. 2 (indicating rapid growth in minority populations in Albina from 1990 to 1996).

<sup>128</sup> Maria Thi Mai, *Southeast Portland Blight to Bright*, Portland City Commissioner, Mar. 16, 2006, <http://www.commissionersam.com/node/650> (last visited Apr. 13, 2008).

<sup>129</sup> *See, e.g.*, CHARLES BARTSCH, LINKING BROWNFIELD REDEVELOPMENT AND HOUSING 2 (2006), *available at* <http://www.nemw.org/documents/brownfieldhousing.pdf> (noting the “many small-scale contaminants” in Albina).

government official may disclose environmental contaminants that a due diligence property search would not uncover. The Albina community has experienced some brownfield redevelopment activity. This minority community is diverse and rich in history. It has a large number of community assets such as a strong religious community, support systems for children, parks, and civic organizations.<sup>130</sup> The City of Portland has been awarded two brownfield programmatic grants, both premised on cleanup of waste sites and community involvement.<sup>131</sup> The latter brownfield grant was awarded to Portland as a Showcase Community.<sup>132</sup> In 1998, when Portland was awarded the Showcase award, city officials asked the north/northeast neighborhood to form a Community Action Council (CAC).<sup>133</sup> The CAC held three community forums.<sup>134</sup> After interested property owners delivered presentations on their site, the CAC voted on which sites to recommend for publicly funded assessments.<sup>135</sup> This resulted in a general shift of grant money away from southwest Portland to north/northeast Portland, and in seven applications from local property owners. Portland later determined that an extensive site assessment and selection process was not cost effective.<sup>136</sup> Only eight sites were funded for assessment and fewer proposed. Most of the property owners did not seek assessment because they perceived remediation as out of their reach due to limited access to capital, lack of development expertise, fear of liability, fear of reporting requirements, and distrust of local government.<sup>137</sup> However, as one recent report explains:

Currently, the City of Portland is trying to communicate that many of the brownfield sites are not as contaminated as perceived and that cleanup is possible. They no longer focus on north/northeast Portland, but have an open door policy for proposals from the entire city. Recent brownfield efforts are designed to stimulate an increase in mixed-use development in the city while preventing urban sprawl. Redevelopment efforts along the waterfront seek to improve water quality, preserve open spaces, and create new jobs and housing.<sup>138</sup>

As noted in the reports that follow, Oregon has environmental justice issues. These issues were documented in reports by advisory groups appointed by Governor Barbara Roberts—the 1994 Citizens Advisory

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<sup>130</sup> See, e.g., NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, UNINTENDED IMPACTS OF REDEVELOPMENT AND REVITALIZATION EFFORTS IN FIVE ENVIRONMENTAL JUSTICE COMMUNITIES 22 (2006), available at <http://www.epa.gov/compliance/resources/publications/ej/nejac/redev-revital-recomm-9-27-06.pdf>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., *id.*

<sup>138</sup> *Id.*

Committee Report<sup>139</sup>—and Governor John Kitzhaber—the 1998 Governor’s Environmental Justice Advisory Board Report, also known as the GEJAB Report.<sup>140</sup> Both reports list fundamental environmental equity concerns and emphasize the concerns of some selected stakeholders.

#### *A. Oregon’s Native People*

Issues regarding the water rights of Native American people often arise. Many tribes are concerned that water quality is being degraded by agricultural and industrial processes of other known water users. This impairs their rights to instream flows of water of a usable quality. Many Native American tribes contend that their water rights as granted in treaties are being ignored for the benefit of others. For example, the damming of the Columbia River, the Snake River, and other rivers and creeks for hydroelectric power and commercial navigation threaten salmon treaty rights.<sup>141</sup>

#### *B. Oregon’s Farm and Forestry Workers*

Oregon farm and forestry workers are exposed to pesticides and poor living and working conditions. As noted in the GEJAB report: “Oregon OSHA [Occupational Safety and Health Administration] more than tripled its camp inspections in 1998 (154 inspections, up from 42 in 1997) and has levied over \$81,000 in penalties for safety violations. Some camp inspections found very poor sanitation, including open drainfields of raw sewage.”<sup>142</sup> Additional problems affecting farmworkers and their families may remain unknown because farmworkers are under a severe threat of retaliation if they report any wrongdoings to the federal government. Employers may evict whole farmworker groups on the unfounded suspicion of a complaint to the government. There is little farmworkers can do, especially if they or their employers are undocumented.

#### *C. Oregon’s Urban Area: Portland*

North/Northeast Portland contains a strong African American community in its diverse population. It is also the place where the largest concentrations of abandoned industrial and commercial sites exist

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<sup>139</sup> OR. ENVTL. EQUITY CITIZEN ADVISORY COMM., A REPORT TO THE GOVERNOR: ON ENSURING ENVIRONMENTAL EQUITY IN OREGON (1994).

<sup>140</sup> GOVERNOR’S ENVT’L JUSTICE ADVISORY BD., 1998 ANNUAL REPORT, IMPLEMENTATION OF ENVIRONMENTAL JUSTICE, *in* OR. NATURAL RES. AND ENVTL. AGENCIES (1999) [hereinafter GEJAB REPORT].

<sup>141</sup> *See, eg.*, Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN. L. REV. 41, 54, 55 (2006) (discussing the impact of dams on the Columbia River on the supply of salmon at traditional Indian fishing sites).

<sup>142</sup> GEJAB REPORT, *supra* note 140, at 9.

contiguous to residential areas. It is an area heavily impacted by traffic and air pollution. This area has the largest proportion of pre-1950's housing stock in the city of Portland.<sup>143</sup> One of the early Environmental Justice grassroots organizations there was the Environmental Justice Advisory Group (EJAG).<sup>144</sup> While Portland remains the most urbanized area, other Oregon areas are among the fastest growing in the United States, including Bend, Oregon.<sup>145</sup> Many of the people coming to Oregon's cities and towns are Hispanic.<sup>146</sup>

#### *D. Governor Roberts and the Citizen Advisory Committee*

The Oregon Environmental Equity Citizen Advisory Committee (the Committee) was formed in December 1993 under Governor Barbara Roberts.<sup>147</sup> Her office directed the state Department of Environmental Quality (DEQ) and the Oregon Health Division to examine how the State's environmental programs may contribute to discriminatory environmental problems.<sup>148</sup> Through the DEQ director, Fred Hansen, she appointed members of this committee to help oversee this agency task. Committee membership was limited to twelve.<sup>149</sup> Appointments were made on the basis of geographic diversity, cultural diversity, and experience with Oregon environmental justice issues.<sup>150</sup>

The Committee's charge was fourfold. Their first charge was to simply gather quantitative and qualitative information on environmental equity.<sup>151</sup> Their second charge was to enhance public and governmental awareness of environmental equity.<sup>152</sup> Their third charge was to identify issues regarding regulatory practices that could create greater risk to environmental justice communities.<sup>153</sup> Their last charge was to propose

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<sup>143</sup> See, eg., CITY OF PORTLAND BUREAU OF WATER WORKS, PROJECT XL PROPOSAL (Mar. 21, 1997), available at <http://www.epa.gov/projectxl/portland/032197.htm> (noting that "[r]esidents of north and northeast Portland communities are more likely to . . . live in pre-1950s housing").

<sup>144</sup> Professor Robert W. Collin was a founding member of the Environmental Justice Advisory Board. For a complete list of founding members, see Press Release, Governor's Office, State of Oregon, Governor Appoints Environmental Justice Advisory Board (Feb. 25, 1998), available at [http://www.sos.state.or.us/archives/governors/Kitzhaber/web\\_pages/governor/press/p980225.htm](http://www.sos.state.or.us/archives/governors/Kitzhaber/web_pages/governor/press/p980225.htm).

<sup>145</sup> See, eg., Press Release, U.S. Census Bureau, Population Change in the 100 Fastest-Growing Metropolitan Statistical Areas: April 1, 2000 to July 1, 2006 (Apr. 5, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/cb07-51tbl3.pdf> (showing Bend as the fourth fastest growing area).

<sup>146</sup> See, eg., OREGON HIV HOUSING TASK FORCE, MEETING MINUTES: Apr. 13, 2005, at 3 (2005), available at <http://egov.oregon.gov/DHS/ph/hiv/services/docs/april2005.pdf> (stating that "[t]here has been a 144% increase in the growth of Hispanic communities").

<sup>147</sup> OR. ENVTL. EQUITY CITIZEN ADVISORY COMM., A REPORT TO THE GOVERNOR ON ENSURING ENVIRONMENTAL EQUITY IN OREGON I, 5-6 (1994).

<sup>148</sup> *Id.* at 1.

<sup>149</sup> *Id.* at 6.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

recommendations on an interagency approach to assure equity in all state environmental regulatory decisions.<sup>154</sup>

In December of 1993, Governor Barbara Roberts convened the first environmental justice Task Force, called the "Oregon Environmental Equity Citizen Advisory Committee."<sup>155</sup> It was composed of stakeholders from the Black United Front in Portland, the Klamath Tribe restoration committee, the Confederated Tribes of Warm Springs membership, the Marion County Health Department, Pacific Power and Light, the Oregon Environmental Council, Legal Services, Yamhill County's Community Action Agency, and a land use planner working in North/Northeast Portland and Albina.<sup>156</sup> Two trainers, one in cultural diversity and another in cultural dynamics, were also appointed.<sup>157</sup>

This report was well staffed. There were five project staff members, mainly from DEQ. There were eleven State Agency Task group members, with strong DEQ representation.<sup>158</sup> A least a dozen other agency staff responded to issues and provided background information to the Committee.<sup>159</sup>

### 1. Process

The process began in the fall of 1993 when DEQ sent out hundreds of letters providing information and requesting telephone interviews. Through the use of these interviews with the stakeholders, DEQ staff identified about twenty potential environmental justice issues. The Committee then grouped these twenty issues into six general environmental justice issues. The six issues identified were: 1) public participation and communication procedures of the state Natural Resource Agencies; 2) exposure to water pollution; 3) farmworker exposure to pesticides; 4) exposure to household pollutants (lead); 5) land use siting of facilities; 6) and the clean up of contaminated sites. For the first six months of 1994, the Committee held monthly public meetings focusing on one of the six issues at various locations around Oregon. The purpose of these meetings was to discuss the impact of environmental hazards on minority and low income groups in Oregon.<sup>160</sup>

### 2. Report Recommendations

The Committee concluded that immediate action was necessary to ensure "environmental equity ethics" were incorporated into the State's natural resource programs.<sup>161</sup> They issued six directives, one for each category of issues. They directed that state agencies ensure that minority

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<sup>154</sup> *Id.*

<sup>155</sup> *See generally id.*

<sup>156</sup> *See id.* at iii (listing Citizen Advisory Committee members).

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at v (listing staff and task group members).

<sup>159</sup> *Id.* at v.

<sup>160</sup> *Id.* at 7.

<sup>161</sup> *Id.* at 2.

and low income communities are included and are aware of public communication and involvement procedures.<sup>162</sup> For issues of human exposure to water pollution, farmworker exposure to pesticides, exposure to household pollution, land use siting of facilities, and contaminated site cleanup, the Committee directed state agencies to incorporate environmental equity ethics in their policies.<sup>163</sup>

The Citizen's Committee made extensive recommendations. Their report made six basic topical recommendations, and the second environmental justice Task Force followed up on those recommendations in the same topical areas.

These areas were:

1. Agency public communication and participation procedures,
2. Human exposure to water pollution,
3. Farmworker exposure to pesticides,
4. Exposure to household pollutants,
5. Land use siting of noxious facilities, and
6. Clean up of contaminated sites.<sup>164</sup>

They also made six specific recommendations to institutionalize environmental equity:

- Establish an "Environmental Equity Advisory Board" within the state's natural resource agency structure. One purpose of this board would be to oversee the implementation of the Committee's recommendations,
- Mandate diversity in state agency employment practices,
- Require diversity training for agency staff,
- Require cultural competency training for all staff, and
- Involve concerned citizens and neighborhoods in a manner which would ensure that diverse viewpoints are included in the environmental decision making process.<sup>165</sup>

In terms of Agency communications and citizen participation procedures, the Committee made the following recommendations:

- Identify organizations with established channels for reaching minority and low income communities. Use their communication and outreach to address environmental issues,

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 9.

<sup>164</sup> *Id.* at 1.

<sup>165</sup> *Id.* at 9.

- Target educational and outreach efforts to diverse audiences, address primary language, education levels, and cultural implications,
- Ensure that agencies work with the public school system to provide students with educational and informational materials on environmental issues,
- Maintain a log of bilingual employees used for assistance in communication,
- Require permit applicants to provide contact information to residents in an affected area,
- Develop a state policy to facilitate public access for low income and minority groups to state agency records regarding environmental regulations,
- Develop an inventory of meeting facilities around the state that meet American with Disability Act Requirements, and
- Direct information on environmental concerns to renters or property occupants, as well as homeowners.<sup>166</sup>

In terms of water resource issues, the Citizen's Committee made the following recommendations:

- Improve state efforts to collect data on and provide information to groups who consume greater amounts of fish and other aquatic species than the general population, and
- Continue to keep rural communities informed about potential water pollution exposure from residential wells.<sup>167</sup>

In terms of farmworker exposure to pesticides, the Citizen's Committee made the following recommendations:

- Explore innovative methods of providing information to and improving communication with farmworkers and their families on pesticide exposure,
- Address the linkage between the economic needs of workers and failure to report and pursue pesticide use infractions,
- Expand efforts to conduct research on the health effects of pesticide exposure,
- Encourage affordable housing initiatives as opportunities to give farmworkers and families alternatives to living on site, as well as to facilitate their access to community resources, and

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<sup>166</sup> *Id.* at 13–14.

<sup>167</sup> *Id.* at 17–18.

- Encourage alternatives to pesticide use.<sup>168</sup>

In terms of household pollution, the Committee made only one recommendation: that agencies should improve efforts to educate minority and low income groups on the potential hazards related to household pollutants of lead, radon, and asbestos.<sup>169</sup>

In terms of land use siting of facilities, the Committee made the following recommendations:

- Enhance participation of affected communities in land use siting and review process, and
- Ensure equity in community development.<sup>170</sup>

In terms of the cleanup of contaminated sites, the Committee made one recommendation: the State should improve ongoing efforts to update available information on suspected and confirmed hazardous substance release sites.<sup>171</sup>

### *3. Challenges to Implementation*

The major challenge recognized and addressed by the Committee was institutionalizing principles and policies of environmental justice. They recognized the need for more accurately and consistently collected information.<sup>172</sup> Lacking the status of “hard law,” this Committee knew that many of their recommendations could go unheeded.

Another challenge was the lack of inclusion of industrial stakeholders, including industries as well as their trade group representation. Many industries rely on their trade association for participation in the ever shifting regulatory landscape. Many trade associations are well equipped with research resources and knowledge of current industry practices. Participation by industry, or any stakeholder, in an Environmental Justice Task Force recognizes they are part of the community and part of the solution. Industrial interests may be reluctant to participate because of fear of citizen suits or liability for clean up. Trade associations might help span this challenge to truly inclusionary dialogue.

#### *E. The Governor’s Environmental Justice Advisory Board*

The GEJAB Task Force was created by Executive Order 97–16 from Governor Kitzhaber on August 1, 1997.<sup>173</sup> GEJAB did not have the authority

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<sup>168</sup> *Id.* at 25–26.

<sup>169</sup> *Id.* at 30.

<sup>170</sup> *Id.* at 33.

<sup>171</sup> *Id.* at 36.

<sup>172</sup> *Id.* at 9, 17–18.

<sup>173</sup> Or. Exec. Order No. 97-16, (Aug. 1, 1997), *available at* [http://arcweb.sos.state.or.us/governors/Kitzhaber/web\\_pages/governor/legal/execords/eo97-16.pdf](http://arcweb.sos.state.or.us/governors/Kitzhaber/web_pages/governor/legal/execords/eo97-16.pdf).

to make or enforce laws, rules, or operating procedures, and the Oregon State legislature had denied the GEJAB the ability to receive a \$200,000 grant in its emergency session.<sup>174</sup>

### 1. Process

The GEJAB board consisted of fourteen members, twelve voting members and two ex officio members.<sup>175</sup> The appointments were based on the basis of ability, experience, interest in serving, and capacity to serve as a community advocate. The members represented minority and low income communities. Environmental, agricultural, and industrial interests from geographically disparate areas of the state rounded out the GEJAB. Board members represented diverse economic, racial, cultural, and environmental stakeholders. Members were expected to serve as a liaison between their communities and state government.<sup>176</sup>

The GEJAB's main charge was to evaluate how the State's natural resource and environmental protection agencies were implementing directives from the 1994 Oregon Environmental Equity Citizen Advisory Committee report discussed above. A corollary of this charge was to identify which recommendations made in the 1994 report were being addressed by state environmental agency programs and policies. GEJAB was to propose solutions to environmental injustices in Oregon.<sup>177</sup>

The GEJAB held its first meetings in Portland, Oregon from April to July of 1998.<sup>178</sup> Meetings were also held in Hermiston, Klamath Falls, and Milton-Freewater.<sup>179</sup> The GEJAB also requested all state natural resource agencies provide them with responses to a detailed questionnaire about policies responding to the 1994 report. Many did not initially respond and those that did had responses that were sketchy and vague.<sup>180</sup> The GEJAB cautioned that its evaluation represented an initial assessment only. Without resources, it was not possible to gather additional information from communities throughout the state on how environmental justice issues affect them.<sup>181</sup>

### 2. Report Recommendations

This agency policy posture made it difficult for the GEJAB to measure any progress, if any, toward to the 1994 report directives. GEJAB also found that most state natural resource agencies could not produce any data or information on race, ethnicity, and income of the communities affected by

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<sup>174</sup> GEJAB REPORT, *supra* note 140, at 12.

<sup>175</sup> *Id.* at 1.

<sup>176</sup> *Id.* at 12–13.

<sup>177</sup> *Id.* at 14.

<sup>178</sup> *Id.* at 1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 16–26.

<sup>181</sup> *Id.* at 26.

their decisions, public processes, or programs.<sup>182</sup> The GEJAB's overall evaluation of the responding state agencies was that most state natural resource agencies had basic programs or policies that addressed the directive of the Citizen's Committee about adequate agency public information efforts. Most claimed they had systems in place to encourage public access to their services. These included outreach efforts and staff fluent in languages other than English.<sup>183</sup>

GEJAB concluded that most state agencies had made limited progress toward incorporation of the Citizen Committee directives on environmental equity. In the language of the report:

Nowhere was this more apparent than in the agencies' inability to analyze their own policies and procedures for patterns of bias. While some agencies . . . did a fairly good job of responding, others provided only a cursory response to GEJAB requests or took the position that the items raised by the 1994 Citizen Environmental Equity Citizen Advisory Committee simply did not apply to their functions.<sup>184</sup>

GEJAB did make other findings based on the agency response and public hearings from 1996 to 1998. However, GEJAB recommended the Governor direct the state natural resource agencies to take these actions:

1. Create a timeline for the adoption and implementation of the directives in the 1994 Citizens Advisory Report. Agencies would then report to the Governor on meeting the implementation schedule.
2. Encourage proactive partnerships between local communities, businesses and state and federal agencies. This will invite collaborative approaches to problem-solving of potential environmentally-related siting and other challenges. The resulting agreements can be then institutionalized via memoranda of understanding or similar documents.
3. Correlate existing data on environmental pollution, permitting, compliance, violations and fines with information on race, ethnicity and economic status to determine if patterns of geographic, racial, or economic bias exist.
4. Make cumulative health impacts of siting and other permitting activities an important environmental regulation and decision-making. Information about these potential impacts will be provided to the public as part of the public participation process.
5. Encourage regulatory agencies to schedule meetings and hearings in the evening whenever possible; provide citizens the option of childcare at these events.
6. Increase agency presence and public engagement in all parts of the state, particularly rural and non-metropolitan areas.

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<sup>182</sup> *Id.* at 2.

<sup>183</sup> *Id.* at 28–29.

<sup>184</sup> *Id.* at 28.

7. Create a position for a citizen advocate in each natural resource or environment-related agency. This staff person would be responsible for providing citizen access to and an understanding of information and agency processes. The advocate will champion citizens' interest in the environmental decision-making process.<sup>185</sup>

GEJAB concluded with a recommendation to extend Executive Order 97-16 until July 2001 and for more resources.<sup>186</sup>

### *3. Challenges and Lessons Learned*

In addition to the challenges of vague agency responses and inadequate demographic data on programmatic impacts, GEJAB faced significant resource deficits. GEJAB had difficult funding and staffing issues.<sup>187</sup> The U.S. Environmental Protection Agency granted Professor Robin Collin and I a \$25,000 grant to hold GEJAB hearings. In a large state with geographically dispersed members it was expensive to meet, however, all GEJAB members were reimbursed for travel via the grant if they requested it. Another major challenge identified by GEJAB was "a need for the Board to include representation from displaced woods-workers and impacted timber communities."<sup>188</sup> The GEJAB report concluded with a commitment to maintaining "a cooperative working relationship with all identified agencies and become an effective conduit to their low income and minority constituencies. A collaborative effort will help make environmental justice issues a high priority for all agencies and for the betterment of our state."<sup>189</sup>

### *F. The 2008 Environmental Justice Task Force*

After Governor Kitzhaber's Environmental Justice Task Force sunsetted, several attempts to resurrect it were made in subsequent legislative sessions.<sup>190</sup> In the fall of 2007, State Senator Avel Gordly's (D-Portland), Senate Bill 420 (the Act) finally succeeded.<sup>191</sup> After a close House vote, Governor Kulongoski signed it into law in August 2007.<sup>192</sup> The Act creates an Environmental Justice Task Force (EJTF)<sup>193</sup> that reports directly to the Governor about state environmental justice concerns and the progress of state agencies towards achieving state environmental justice goals and

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<sup>185</sup> *Id.* at 30-31.

<sup>186</sup> *Id.* at 31.

<sup>187</sup> *Id.* at 26.

<sup>188</sup> *Id.* at 29.

<sup>189</sup> *Id.* at 30.

<sup>190</sup> See, e.g., S.B. 542, 73d Leg. Assem., Reg. Sess. (Or. 2005); S.B. 336, 72d Leg. Assem., Reg. Sess. (Or. 2003); S.B. 792, 71st Leg. Assem., Reg. Sess. (Or. 2001).

<sup>191</sup> S. 420, 74th Leg. Assem., Reg. Sess. (Or. 2007).

<sup>192</sup> Oregon Senate Bill History, <http://www.leg.state.or.us/07reg/pubs/senmh.html> (last visited Apr. 13, 2008).

<sup>193</sup> Relating to Environmental Justice, 2007 Or. Laws 2817, ch. 909, § 2(1).

requirements.<sup>194</sup> The Act also requires natural resource agencies to address environmental justice issues as part of their standard operating procedures and to report annually to the Governor and the EJTF about their actions in underrepresented communities.<sup>195</sup>

For purposes of this Act, “natural resource agency” means the Department of Environmental Quality, the State Department of Agriculture, the Water Resources Department, the State Department of Fish and Wildlife, the State Forestry Department, the Department of State Lands, the Department of Education, the State Department of Geology and Mineral Industries, the Department of Land Conservation and Development, the State Marine Board, the Public Utility Commission, the Department of Transportation, the State Fire Marshal, and the Department of Human Services.<sup>196</sup> This definition is important because a broad range of agency coverage is necessary. This is an important improvement over the prior two environmental justice reports, since most of the important state agencies are covered. This is the foundation of active agency involvement in issue identification, problem monitoring, and resolution. Agencies are strong stakeholders when actively involved, as is within the New Jersey and Maryland environmental justice policies. Different agencies also have their own expertise and data that can be brought to bear on a potential issue. Because of their information and ability to convene many stakeholders, agencies can be good vehicles for collaborative processes. Many state agencies have experience with collaborative environmental decision making.

The EJTF consists of twelve members appointed by the Governor that are well-informed on the principles of environmental justice.<sup>197</sup> The Act also emphasizes that members should represent minority communities, low income communities, environmental interests, industry groups, and geographically diverse areas of the state.<sup>198</sup>

In an effort to ensure diverse viewpoints and perspectives, the Act provides for one appointment from the Commission on Asian Affairs, the Commission on Black Affairs, the Commission on Hispanic Affairs, and the Commission on Indian Services.<sup>199</sup> This also has the effect of ensuring state representation in at least four of the twelve appointments. The mandatory appointments from these commissions are an interesting development. On the one hand, they may help advance principles of environmental justice by facilitating the voices of traditional environmental justice communities. On the other hand, they may advance objectives representative of the state and not individual communities. Generally, these commissions have excellent contacts in the community and other sources of information useful for the EJTF. In a large, spread-out state like Oregon, state agency coverage can be thin. Relying on state agencies and marginalized communities alone does not

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<sup>194</sup> *Id.* § 2(2).

<sup>195</sup> *Id.* § 5.

<sup>196</sup> *Id.* § 1.

<sup>197</sup> *Id.* § 2(1).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

get to all issues of environmental injustice. These commissions can raise environmental justice issues in their own forums and give voice to previously unknown areas of disproportionate environmental impacts. In many instances, these areas can be the same environmental problem areas for the implementation of a sustainability policy.

The EJTF submits an annual report to the Governor setting forth its view of the progress of natural resource agencies toward achieving environmental justice goals.<sup>200</sup> The EJTF is also empowered to investigate any other environmental justice issues it wishes.<sup>201</sup> The EJTF has five basic missions:

1. Advise the Governor on environmental justice issues;
2. Advise natural resource agencies on environmental justice issues, including community concerns and public participation processes;
3. Identify, in cooperation with natural resource agencies, minority and low-income communities that may be affected by environmental decisions made by the agencies;
4. Meet with environmental justice communities and make recommendations to the Governor regarding concerns raised by these communities; and
5. Define environmental justice issues in the state.<sup>202</sup>

Public participation is heavily emphasized in the Act. The Act underscores the requirement that agencies act according to environmental justice principles.<sup>203</sup> Most of the requirements were recommendations in earlier environmental justice commissions and task forces.<sup>204</sup> Some of these requirements may overcome the agency non-responsiveness encountered by earlier state commissions. Each natural resource agency is required to:

1. In making a determination on whether and how to act, to consider the effects of the action on environmental justice issues.
2. Hold hearings at times and in locations that are convenient for people in the communities that will be affected by the decisions stemming from the hearings.
3. Engage in public outreach activities in the communities that will be affected by decisions of the agency.
4. Create a citizen advocate position that is responsible for:
  - a. Encouraging public participation;
  - b. Ensuring that the agency considers environmental justice issues; and

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<sup>200</sup> *Id.* § 2(2).

<sup>201</sup> *See id.* § 3.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* § 4(4)(b).

<sup>204</sup> *See generally* GEJAB REPORT, *supra* note 140.

- c. Informing the agency of the effect of its decisions on communities traditionally underrepresented in public processes.<sup>205</sup>

Getting the leadership of important state agencies directly involved in environmental justice issues is important to developing collaborative processes that resolve issues and problems. The Act requires that all directors of natural resource agencies report annually to the EJTF and to the Governor on the results of the agencies' efforts to:

1. Address environmental justice issues;
2. Increase public participation of individuals and communities affected by agencies' decisions;
3. Determine the effect of the agencies' decisions on traditionally underrepresented communities; and
4. Improve plans to further the progress of environmental justice in Oregon.<sup>206</sup>

The Governor may also require other state agencies to submit such a report.<sup>207</sup> This could be important later. Unlike the New Jersey policy, the Oregon law does not include the state Attorney General and the Department of Justice.<sup>208</sup> As policies and laws come into play when approaching complex environmental issues, it is likely they would get involved. Environmental justice issues can occur in any agency.<sup>209</sup>

The Environmental Justice Act of 2007 shows great promise. In adopting the recommendations of earlier commissions, it has increased the potential for public involvement, active agency involvement, and state agency leadership. Its success will be dependent on active agency engagement and support.

#### IV. SUMMARY AND CONCLUSION

The Oregon Environmental Justice Task Force represents the fruition of work by many people from many different backgrounds for many years. All this work was done on behalf of many different people, including contemporary strangers and future generations. Multi-stakeholder, civil, and inclusionary discourses and investigations into environmentally disproportionate impacts lay an important foundation for all future U.S. environmental policy. Current adversarial approaches are not good vehicles for environmental policy in their present form because they do not consider the best interests of the environment. They do not bring in all stakeholders;

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<sup>205</sup> Relating to Environmental Justice, ch. 909, 2007 Or. Laws 2817, § 4.

<sup>206</sup> *Id.* § 5.

<sup>207</sup> *Id.*

<sup>208</sup> *See id.* § 1.

<sup>209</sup> For example, some argue that prisons are environmental justice issues. *See, e.g.,* David A. Taylor, *Double Jeopardy?*, 111 ENVTL. HEALTH PERSP. A 84 (2003) (documenting prisons built on sites contaminated by hazardous industrial waste).

they consume very expensive judicial resources; they are not easily accessible by the public; and they provide poor environmental solutions with little or no follow through. Adversarial decision making can also create generations of ill will that spills over to other environmental issues that may never reach a court. While issues of industrial amnesty and reparations for environmental racism<sup>210</sup> have not yet evolved in U.S. environmental policy, environmental justice task forces and commissions may have the opportunity to consider them.

*A. Environmental Justice and Sustainability Together in State Policy: The Case of Maryland*

Another promising approach is the Environmental Benefits District (EBD) approach being developed by Maryland.<sup>211</sup> The EBD approach contemplates multiple stakeholders and many levels of government working together to address environmental, economic, and equity issues in targeted communities. These communities will include disadvantaged neighborhoods and may also include “community legacy areas.”<sup>212</sup> Drawing on legislative and executive mandates,<sup>213</sup> the Maryland Commission of Environmental Justice and Sustainable Communities uses EBDs to focus state agency resources on

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<sup>210</sup> See Robin Morris Collin & Robert W. Collin, *Environmental Reparations*, in THE QUEST FOR ENVIRONMENTAL JUSTICE 209 (Robert D. Bullard ed., 2005). Reparations for African Americans have occurred in the United States and is currently relevant as a legal remedy in Oregon. When Florida became the sixth state to apologize for slavery in 2008, and when recounting Florida’s horrific involvement with slavery, the Governor noted past reparative efforts. As noted in the *New York Times*,

Florida has made other efforts to address the consequences of institutional racism; in 1994, the state allocated \$2.1 million to surviving victims of the Rosewood massacre, the 1923 attack on a black town in North Florida . . . [The governor] said he was open to evaluating whether broader reparations for slavery would be worth pursuing.

Damien Cave & Christine Jordan Sexton, *Florida Legislature Apologizes for State’s History of Slavery*, N.Y. TIMES, Mar. 27, 2008, at A18. In Oregon, the state legislature is considering stronger regulation of the mortgage loan industry because an analysis by the Oregon Center for Public Policy found a racial pattern in the state’s subprime lending. Press Release, Oregon Center for Public Policy, OCPP Finds Racial Pattern in Oregon’s Subprime Lending (Jan. 31, 2008); S.B. 1090, 74th Leg. Assem., Spec. Sess. (Or. 2008). University researchers in Oregon have recently made the case for reparations for racism in Oregon, given the historic housing and lending discrimination against African Americans. Salem-News.com, Study: Black Americans Should Get Reparations for Housing Discrimination (Jan. 16, 2008), [http://salem-news.com/articles/january162008/housing\\_discrimination\\_study\\_011608.php](http://salem-news.com/articles/january162008/housing_discrimination_study_011608.php) (last visited Apr. 13, 2008). As this Article goes to press, there are several cases under consideration for filing by the Portland NAACP in federal court related to racial discrimination in the housing lending market in Oregon.

<sup>211</sup> See Joe Palazzolo *Environmental Designation Gives Pigtown a Leg Up with its Cleanup*, BALTIMORE SUN, Mar. 12, 2006, at 1B.

<sup>212</sup> MD. DEP’T OF THE ENV’T, ENVIRONMENTAL BENEFITS DISTRICT: A FRAMEWORK FOR COMMUNITY REVITALIZATION (DRAFT) 3, available at [http://www.mde.state.md.us/assets/document/environmental\\_justice/EBD%20White%20Paper%20102103.pdf](http://www.mde.state.md.us/assets/document/environmental_justice/EBD%20White%20Paper%20102103.pdf).

<sup>213</sup> 1997 Md. Laws 759 (Priority Funding Areas Act of 1997); Md. Exec. Order No. 01.01.2003.33, available at <http://www.dsd.state.md.us/comar/01/01.01.2003.33.htm>.

targeted communities, facilitating “sound land use policy, economic growth, community revitalization, and environmental protection.”<sup>214</sup> The Commission on Environmental Justice and Sustainable Communities was previously established by Executive Order on January 1, 2001 and statutorily signed into law on May 22, 2003.<sup>215</sup> The Commission is “tasked to examine environmental justice and sustainable communities’ issues that may be associated with creating healthy, safe, economically vibrant, environmentally sound communities for all Marylanders in a manner that allows for democratic processes and community involvement.”<sup>216</sup> The contemplated process of targeting communities begins with identification of state resources, rather than the community self identification or petition process. Once communities are identified, agencies are encouraged to provide these communities with analyses such as cumulative risk assessments, community characterizations, epidemiological assessments, and visioning and other goal setting processes. The Maryland approach specifically ties environmental justice with sustainability in the same fact finding function. Unlike pure environmental justice state approaches, it is not community driven.

### *B. Environmental Justice and Sustainability in Global Environmental Policy*

As the rest of the world moves toward internationally recognized goals of sustainable development, the United States remains consciously and ominously apart. The United States has resisted changes to slow climate change and shift our economy away from fossil fuel dependence. Even as oil companies make record profits and negatively affect the cost of living and quality of life for millions of people, the United States gives oil companies \$13.5 billion in tax breaks.<sup>217</sup> The United States has also resisted inclusive and participatory public involvement in environmental decision making and in land use decision making generally. The National Environmental Protection Act (NEPA),<sup>218</sup> the Freedom of Information Act (FOIA),<sup>219</sup> the Emergency Planning and Community Right-to-Know Act (EPCRA),<sup>220</sup> and the Clean Water

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<sup>214</sup> Md. Dep’t of the Env’t, Environmental Benefits Districts (EBD), [http://www.mde.state.md.us/assets/document/environmental\\_justice/EBD%20Fact%20Sheet.pdf](http://www.mde.state.md.us/assets/document/environmental_justice/EBD%20Fact%20Sheet.pdf) (last visited Apr. 13, 2008).

<sup>215</sup> Exec. Order No. 01.01.2001.01, Md. Code Regs. 01.01.2001.01 (2001); MD. CODE ANN., ENVIR. § 1-701 (2007), available at [www.mde.state.md.us/assets/document/environmental\\_justice/ejreport01/ej\\_2001\\_Annual\\_Report\\_partA.pdf](http://www.mde.state.md.us/assets/document/environmental_justice/ejreport01/ej_2001_Annual_Report_partA.pdf).

<sup>216</sup> Md. Dep’t of the Env’t, Commission of Environmental Justice and Sustainable Communities (CEJSC), [http://www.mde.state.md.us/programs/multimedialograms/environmental\\_justice/implementation/cejsc.asp](http://www.mde.state.md.us/programs/multimedialograms/environmental_justice/implementation/cejsc.asp) (last visited Apr. 13, 2008).

<sup>217</sup> See H. Josef Hebert, *Congress Approves Fuel Economy Mandate*, USA TODAY, Dec. 18, 2007 (noting that provisions of a bill that would have removed tax breaks for oil companies were removed from final version of the energy bill that passed through Congress).

<sup>218</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2000); see JAY E. AUSTIN ET AL., *JUDGING NEPA: A “HARD LOOK” AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* 3, 8 (Env’t. Law Inst. 2006), available at <http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf> (showing research indicating bias in NEPA cases by federal judges based on political party affiliation of appointing President).

<sup>219</sup> Freedom of Information Act, 5 U.S.C. § 552 (2000).

<sup>220</sup> Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–05,

Act (CWA)<sup>221</sup> are exemplary laws that require, facilitate, or encourage public involvement in decision making, but they do not address significant barriers to participation like institutional racism, educational and technological disparities of the stakeholders, and poverty.

U.S. sustainable development law and policy often omits or overlooks the equity consequences of their policies. For some this omission is intentionally made to avoid any engagement with a social justice agenda that might force compromise on economic or environmental interests. For others, this omission is unintentional and results from a sense of urgency about environmental or economic interests and the invisibility of excluded groups from the processes and institutions created to implement sustainable development in the United States. In either event, absence of equity considerations in the U.S. sustainability movement is globally glaring. The United Nations' Agenda 21 and its local iterations call for governmental action at the most local level that is effective.<sup>222</sup> This call has led states and municipalities around the globe to implement and support sustainable development.<sup>223</sup> Too frequently, U.S. leadership advocates plans and projects that achieve sustainability on the backs of poor communities and communities of color. Environmental Justice is the indispensable and often missing element in U.S. sustainable development policies. The

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11041-50 (2000).

<sup>221</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

<sup>222</sup> The Rio Declaration on Environment and Development, Principle 10, provides:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

U.N. Conference on Env't & Dev., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 10, U.N. Doc A/Conf.151/26, available at <http://www.unep.org/documents.multilingual/default.asp?DocumentID=78&ArticleID=1163>. Similarly, the United Nations Conference on Environment and Development, Agenda 21, provides:

Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilizing and responding to the public to promote sustainable development.

U.N. Conference on Env't and Dev., *Agenda 21*, ch. 28, U.N. Doc A/Conf.151/PC/100/Add.1, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter28.htm>.

<sup>223</sup> The International Council on Local Environmental Initiatives' Local Agenda 21 campaign promotes the implementation of local sustainability initiatives. See ICLEI Global, Local Agenda 21 (LA21) Campaign, <http://www.iclei.org/index.php?id=798> (last visited Apr. 13, 2008); ICLEI, About LA21, <http://www.iclei.org/index.php?id=820> (last visited Apr. 13, 2008).

Environmental Justice Movement is the critical missing link between sustainability in theory and sustainability in practice, as it provides an environmental lens on justice.<sup>224</sup> Environmental justice is the human face peering into a sustainable future.

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<sup>224</sup> See ANDREW DOBSON, *JUSTICE AND THE ENVIRONMENT* (1998) (discussing conceptions of environmental sustainability and theories of distributive justice); Dr. Deborah M. Robinson, *Environmental Racism: Old Wine in a New Bottle*, ECHOES, 2000, <http://www.wcc-coe.org/wcc/what/jpc/echoes/echoes-17-02.html> (last visited Apr. 13, 2008) (isolating examples of environmental racism and reviewing the history of the environmental justice movement). See also Robert W. Collin & Robin Morris Collin, *Equity as the Basis of Implementing Sustainability: An Exploratory Essay*, 96 W. VA. L. REV. 1173, 1173–90 (1994); Robert W. Collin & Robin Morris Collin, *Sustainability and Environmental Justice: Is the Future Clean and Black?*, 31 ENVTL. L. REP. 10,968, 10,968–85 (2001); ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (3rd ed. 2000) (addressing issues pertaining to equity, fairness, and the struggle for social justice by African American communities).