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REMEDIETING THE UNEQUAL ENFORCEMENT OF ENVIRONMENTAL LAWS

ROBERT R. KUEHN*

INTRODUCTION

Noncompliance with environmental laws is widespread. In a 1993 survey, more than two-thirds of corporate counsel admitted that at some point in the past year their businesses operated in violation of state or federal environmental laws.¹ Widespread violations of air pollution, water pollution, waste disposal, groundwater monitoring and drinking water requirements have been found.²

Government efforts to enforce environmental laws have increased in recent years. Federal enforcement actions under the Resource Conservation and Recovery Act ("RCRA") increased from 1,755 in 1991, to 1,935 in 1992, and 2,110 in 1993.³ Penalties assessed by the United States Environmental Protection Agency ("EPA") for environmental violations reached an all-time high in Fiscal Year 1992.⁴ Over $78 million in judicial and administrative penalties were assessed by EPA in 1992, an increase of about $5 million from 1991.⁵ EPA judicial enforcement actions have in-

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¹ Environmental Vise: Law, Compliance, Nat’l L.J., Aug. 30, 1993, at S1. The reasons given for the noncompliance include: employees can disobey instructions; inspectors must find noncompliance to justify their job or visit; full compliance with all environmental laws is not possible. Id. at S2.


⁴ More Money Received in Penalties Than Ever, But Number of Cases Declines, EPA Report Says, [Current Developments] Env’t Rep. (BNA) 354 (1993) [hereinafter More Money Received in Penalties Than Ever].

⁵ Id.
creased steadily from a little over 100 in Fiscal Year 1982 to 360 in Fiscal Year 1992; administrative actions have grown from around 860 in Fiscal Year 1982 to over 3,600 in Fiscal Year 1992.\(^6\)

State judicial enforcement actions increased from 400 in Fiscal Year 1985 to 574 in 1992; state administrative actions have fluctuated between 8,600 and 12,700 from 1985 to 1992, with water, air and hazardous waste cases showing an increase, and pesticide cases a decrease.\(^7\)

The effects of noncompliance can be serious. Unauthorized releases of toxic chemicals may pose acute health hazards to those living in the vicinity of the facility. Moreover, if permits and pollution standards are carefully set at levels that provide an adequate margin of safety, and if noncompliance results in greater amounts of pollution being emitted than calculated by the agency in making its determination, then the surrounding community may not, in fact, be provided the protection required by the law or assumed by the agency.\(^8\) In addition, the failure to enforce means that an accurate history of noncompliance, and an accurate portrayal of the status of the facility and its operator, will not be available to the agency or the public in subsequent permit or enforcement proceedings.\(^9\)

Citizens have a right not only to expect that environmental laws will be vigorously enforced, but also a right to expect that when the government does enforce the laws, it will do so in a fair and equitable manner. EPA has repeatedly identified equitable treat-


\(^7\) See More Money Received in Penalties Than Ever, supra note 4; U.S. E.P.A., supra note 6, at 3-5 to 3-6, App. Historical Enforcement Data.

\(^8\) It has been argued that companies accept permit limitations with the understanding that if there are compliance problems, the agencies will deal with those issues informally. See Theodore L. Garrett, Citizens Suits: A Defense Perspective, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,162 (1986). It has also been noted that technology-based requirements under the Clean Water Act are premised on the assumption that plants will not be able to achieve 100% compliance and, therefore, a certain amount of noncompliance is not intended to be subject to enforcement action. Id. at 10,163. In setting risk-based standards, EPA does not take into account a certain amount of willful noncompliance. Telephone interview with Dr. Ellen Silvergeld, Environmental Defense Fund (Apr. 12, 1994).

ment of the regulated community as a primary goal of its enforcement efforts.\textsuperscript{10} What should be an equally important goal of EPA and state environmental protection agencies is ensuring that their enforcement efforts do not discriminate against any community or class of persons. Government efforts to detect noncompliance with environmental laws and the government's response to such noncompliance should not differ because a community may be comprised of racial minorities or low income persons.

While nondiscrimination against minorities and low income persons in enforcement of laws is expected by citizens and mandated by the law, the published enforcement policies of EPA do not identify this as a goal of the agency. This silence stands in stark contrast to the agency's repeated concern for evenhanded treatment of regulated industries. Perhaps because environmental agency enforcement policies have not acknowledged the need to ensure that the agency's actions do not discriminate, evidence has recently been presented indicating that the government's enforcement of environmental laws has discriminated against racial minorities and low income persons.

This article seeks to explore the government's unequal enforcement of environmental laws in communities comprised of racial minorities or low income persons. It first examines the evidence that government agencies have enforced environmental laws with less frequency or intensity in these communities. It then identifies ways that citizens can force government agencies to more aggressively and fairly enforce environmental laws in minority or low income communities. The final section proposes some preliminary steps that can be taken by environmental agencies under existing statutes to help address unequal enforcement.

I. EVIDENCE OF UNEQUAL ENFORCEMENT

Many studies have shown that racial minorities and low income communities are exposed to a disproportionate amount of

America's pollution and waste. These studies have tended to focus on the disproportionate health hazards to which minorities and the poor are exposed and on the discriminatory impact of the siting of waste and toxic pollution facilities. However, largely unstudied is whether government agencies have unequally enforced existing environmental laws.

A. Unequal Penalties

In September 1992, the National Law Journal released the results of an eight-month study of EPA's enforcement of environmental laws. The study examined all civil judicial enforcement cases concluded by EPA between 1985 and March 1991, except those cases for which information on the facility or surrounding community was not available. The National Law Journal then compared the penalties in “white” communities to those in “minority” communities.

The study found that, in general, penalties against violators of environmental laws in minority communities were lower than those imposed for violations in largely white areas. Penalties under RCRA, the federal law that regulates the present treatment, storage and disposal of hazardous waste, at sites having the

11 See, e.g., Bunyan Bryant & Paul Mohai, Environmental Racism: Reviewing the Evidence, in Race and the Incidence of Environmental Hazards 163, 167 (Bunyan Bryant & Paul Mohai eds., 1992) (of 15 studies to date on distribution of environmental hazards, "in nearly every case the distribution of pollution has been found to be inequitable by income. And with only one exception, the distribution of pollution has been found to be inequitable by race. Where the distribution of pollution has been analyzed by both income and race (and where it was possible to weigh the relative importance of each), in most cases race has been found to be more strongly related to the incidence of pollution."); Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecology L.Q. 619, 622-27 & nn.8-18 (listing studies); Richard J. Lazarus, Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection, 87 Nw. U. L. Rev. 787, 801-06 & nn.49-77 (1993) (listing studies).


13 Id. at S4. Of the 1,091 cases, 929 concluded with some penalty. Id.

14 Id. Communities were classified using the most recent available census data, and the facility's ZIP code was used to define the adjacent community. Id. To compare white and minority communities, the communities around the facilities were divided into “four equal groups, or ‘quartiles’, ranging from those with the highest to those with the lowest white population.” Id. The study then compared the quartile with the highest white population (the “white community”) with the quartile with the lowest white population (the “minority community”). Id.
greatest white population were over 500% higher than penalties at sites with the greatest minority populations, averaging $335,566 in the white areas and only $55,318 in the minority areas.¹⁵ Lower average penalties for minority communities were also found in federal enforcement cases under the Clean Water Act (28% less), Clean Air Act (8% less) and Safe Drinking Water Act (15% less), and in cases enforcing violations of multiple statutes (306% less).¹⁶ Only in cases filed under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") against those who have not complied with orders or other requirements to clean up old waste sites were penalties in minority areas higher than in white areas (9% higher).¹⁷ The average penalties imposed for violations of all the environmental laws was $153,067 in white areas compared with $105,028 in minority areas.¹⁸

Examining the influence of income, the study found that the average penalties imposed for violations of all environmental laws was $146,993 in high income communities, and only $95,664 in low income communities.¹⁹ However, the pattern varied depending on the particular environmental law. In Clean Water Act cases, penalties in low income communities were 91% lower than those in high income communities, and in multimedia cases, average penalties were $315,000 in high income areas compared to $18,000 in low-income areas.²⁰ In four of the six types of cases examined, facilities in low income communities actually paid higher penalties. In RCRA cases, penalties in poorer areas were 3% higher than in areas with the highest median incomes; in Clean Air Act cases, 29% higher; in Superfund cases 24% higher; and in Safe Drinking Water Act cases, 63% higher.²¹ The National Law Journal concluded:

[T]he pattern of penalties varied so markedly depending on the particular law the polluter is accused of violating that the income of a community is not a reliable predictor of whether

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¹⁵ Id. at S4.
¹⁶ Id.
¹⁷ Lavelle & Coyle, supra note 12, at S4.
¹⁸ Id. at S2.
¹⁹ Id. No explanation is provided of how a community is defined as "high income" or "low income," although it appears to have been done by quartiles based on median income. Id.
²⁰ Id.
²¹ Id.
those who pollute it will be dealt with more harshly. On the other hand, minority communities consistently saw lower average fines than white communities under every type of environmental law except the Superfund law governing abandoned toxic waste sites where they came out slightly ahead.\textsuperscript{22}

Although the \textit{National Law Journal} report has been described as the most comprehensive investigation to date on the disparity of EPA's enforcement actions,\textsuperscript{23} the study's methodology has been criticized. The study's arrangement of communities in quartiles based on the percentages of white and minority residents resulted in sites identified as "minority communities" having white populations of up to 84\% in Superfund cases and 79\% in enforcement cases.\textsuperscript{24} This method of dividing populations was defended by the authors of the study as being a common and accepted method for studying populations, and also necessary because "more detailed breakouts of minority share would have resulted in too few cases or sites in each category."\textsuperscript{25} However, the study's methodology resulted in some predominately white communities being labeled "minority" communities.\textsuperscript{26}

EPA's initial reaction to the \textit{National Law Journal} study was to "acknowledge the concerns, but question[ ] some of the ways the data were interpreted and used."\textsuperscript{27} One of EPA's first acts was to

\begin{itemize}
  \item \textsuperscript{22} Lavelle & Coyle, \textit{supra} note 12, at S4.
  \item \textsuperscript{23} Lazarus, \textit{supra} note 11, at 818 n.125.
  \item \textsuperscript{24} See Lavelle & Coyle, \textit{supra} note 12, at S4.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} See Mary Bryant, \textit{Unequal Justice? Lies, Damn Lies, and Statistics Revisited}, SONREEL News (A.B.A. Sec. Nat. Resources, Energy, and Env't Law), Sept./Oct. 1993, at 3; Lazarus, \textit{supra} note 11, at 818 n.125. By way of comparison, the Environmental Equal Rights Act of 1993, a bill pending in the U.S. House of Representatives, identifies an "environmentally disadvantaged community" to include areas where the percentage of ethnic and racial population is greater than either the percentage of the population in the state or in the United States of all such individuals. H.R. 1924, 103d Cong., 1st Sess. § 7014(d)(1)(A) (1994).
  \item \textsuperscript{27} Environmental Fines Lower, Cleanups Slower in Minority Communities, \textit{Law Journal Charges}, [Current Developments] Env't Rep. (BNA) 1416, 1417 (1992); see also Lavelle & Coyle, \textit{supra} note 12, at S4. The EPA Deputy Administrator for Enforcement called the focus on penalties "an unreliable point of departure" for studying equity. \textit{Id.} EPA preferred using the number of inspections at a facility or the amount of time between uncovering a violation and the lodging of charges. \textit{Id.}

Although EPA had issued an extensive report earlier in 1992 on environmental equity, that report only briefly mentioned enforcement-related issues and did not address the possibility that the agency's own enforcement decisions could be discriminating against minorities and low income persons. See U.S. E.P.A., \textit{Environmental Equity: Reducing Risk For All Communities}, \textit{Workgroup Report to the Administrator} 3-4, 27-29 (1992) [hereinafter EPA Equity Workgroup Report]; see also EMC Workgroup, U.S. E.P.A., \textit{Environmental Equity: Reducing Risk For All Communities}, Supporting Document (1992)
hire a statistician to challenge the data. The statistician concluded that the "allegations were not supported by the statistics on which it relied, finding that the differences found for RCRA and Clean Air Act violations and the differences in Superfund cleanup methods were not statistically significant." Nevertheless, EPA ultimately concluded that the findings of its statistician "does not prove that the Agency is not discriminatory in its enforcement efforts, merely that the Journal failed to demonstrate discrimination as a matter of fact. In any event, there is clearly a perception that the Agency is biased that must be addressed." EPA's Region IX office recently completed a comparison of RCRA penalty assessments in minority and non-minority areas. The study reviewed administrative penalty assessments by the region in California, Arizona and Hawaii between 1987 and 1992. "Minority" areas were defined as those with an ethnic minority of greater than 25% for Arizona and Hawaii and greater than 30% for California.

[hereinafter SUPPORTING DOCUMENT] (discussing evidence of disparate impact and some problem areas within EPA programs, but not addressing disparate enforcement).

In response to the National Law Journal article, EPA established the Enforcement Management Council ("EMC"), a workgroup composed of legal and technical staff from EPA headquarters and regional offices that was directed to examine the issue of equity in the agency's enforcement actions and issue a report by the summer of 1993. See U.S. E.P.A., Responses by the Environmental Protection Agency to Questions by the United States Commission on Civil Rights on Environmental Equity and Civil Rights Enforcement, reprinted in Louisiana Advisory Comm. to the U.S. Commission on Civil Rights, The Battle for Environmental Justice in Louisiana . . . . Government, Industry and the People 82, 89 (1993) [hereinafter Louisiana Advisory Comm. Report]. 28 EMC Workgroup on Equity in Enforcement, Equity in the Enforcement of the Federal Environmental Laws, 80 (undated draft) (unpublished manuscript on file with author) [hereinafter EMC Enforcement Workgroup Report]. At least one other reviewer has questioned whether the findings were statistically significant. See Bryant, supra note 26, at 4. "Statistical significance reflects the margin of error in the results, and is stated in terms of the percentage of the time the study's results would have occurred by chance alone." Id.

29 EMC Enforcement Workgroup Report, supra note 28, at 80.

30 U.S. E.P.A., Region 9 EPA Waste Compliance Study—Final Draft, passim (1994) [hereinafter Waste Compliance Study]. Thirty administrative penalties were analyzed in California, eight in Arizona, and seven in Hawaii. Id. Nevada and Guam were excluded from the analysis because no penalties were assessed by EPA in Nevada during the five-year period and census data was unavailable for Guam. Id.

By way of comparison, the National Law Journal study reviewed 929 civil judicial penalties resulting from either negotiated consent decrees or court judgments. See Lavelle & Coyle, supra note 12, at 54. The National Law Journal noted the difference in fiscal year 1990 between the average size of the penalties resulting from judicial cases ($264,000 per case) and those assessed administratively by EPA ($16,000 per case). Id.; see also supra note 11 and accompanying text.

31 Waste Compliance Study, supra note 30. The Region determined that "[t]hrough research we were able to comfortably ascertain that 25% is the most commonly used national figure to delineate between minority and non-minority areas." Id. The higher percentage was used for California because it was found by the Region to be more demographically
EPA found that for the individual states as well as for the Region as a whole there was "no causal relationship between the percentage minority and the penalty amount assessed. . . . [A]s minority population increases, there is no subsequent trend to support that EPA penalizes less in minority areas." 32 The Region concluded that the results show that it does not discriminate in its RCRA penalty policy application based on the degree of minority population in the surrounding area. 33 No attempt was made to determine if differences in the income level of the surrounding community had an impact on the penalty amounts assessed.

In response to the National Law Journal study, the Georgia Environmental Protection Division reviewed its assessment of hazardous waste fines. 34 It found that, for fines assessed by the agency for violations at eighty sites in Georgia from 1984 through March 1993, the average fine collected in white areas was $33,844, and the average in minority areas was $45,626. 35 The report also found that fines in lower income areas were larger than those in higher income areas, averaging $40,794 in areas with annual household incomes under $20,000, and $20,343 in areas with incomes over $30,000. 36 The state concluded that its enforcement of hazardous waste laws has not shown any discrimination against minority neighborhoods.

Other statistical evidence of possible unequal enforcement is more circumstantial. A study by scientists at the Argonne Na-

diverse than other states. Id. As noted above, the National Law Journal study divided the communities into quartiles and compared the quartile with the highest white population with the quartile with the lowest white population. See supra note 12 and accompanying text.

In California, the Region reviewed the racial compositions using 1990 census data at a 1/4, 1/2, 1 and 4 mile radius from the penalized facility; in Arizona and Hawaii, 1 mile radii analyses were completed. Waste Compliance Study, supra note 30.

32 See Conclusions, in Waste Compliance Study, supra note 30. The Region did a regression analysis (a method that allows one to determine whether a causal relationship exists to support a trend) using R-square and t-statistic methods for the regional and California penalty data. Id. Because of the small universe of data for Arizona and Hawaii, the Region simply ranked the penalty amounts to determine whether a trend existed or not. Id.

33 Id.


35 See Conclusions, in Waste Compliance Study, supra note 30. The study used 1990 census tract information to determine the racial makeup and average income of areas within one-half mile of each site. Id. “Minority areas” were defined as those areas with greater than 50% minority population. Id.

36 Id.
tional Laboratory found that higher percentages of both African Americans and Hispanics live in areas that are out of compliance with federal air quality standards.\textsuperscript{37} Fifty seven percent of all whites, 65\% of African Americans, and 80\% of Hispanics live in counties with substandard air quality.\textsuperscript{38} That these areas are in noncompliance is a reflection, at least in part, of a failure of EPA to aggressively enforce air quality standards.\textsuperscript{39}

Anecdotal evidence of unequal enforcement is widespread. Lax government enforcement of restrictions on leaking underground storage tanks,\textsuperscript{40} hazardous waste incineration,\textsuperscript{41} lead smelters,\textsuperscript{42} petro-chemical plant emissions,\textsuperscript{43} and the cleanup of the Anacostia River in Washington, D.C.,\textsuperscript{44} have all been attributed to discriminatory practices and policies of environmental agencies. It has also been noted that EPA was quick to authorize government buyouts of the homes of residents living around the predominantly white Superfund sites at Love Canal and Times Beach, but


\textsuperscript{38} Id.

\textsuperscript{39} See Lazarus, supra note 11, at 818-19. The inability or unwillingness of EPA to enforce federal pesticide laws has been cited as another example of unequal enforcement; ninety percent of the farm workers in the United States are persons of color. See id. at 819 & nn.132-33; Ivette Perfecto & Baldemar Velasquez, Farm Workers: Among the Least Protected, EPA J., Mar./Apr. 1992, at 13-14; Hawley Truax, Minorities at Risk, ENVIRONMENTAL ACTION, Jan./Feb. 1990, at 19, 20-21.

\textsuperscript{40} See Daniel O'Connor, Leaking Underground Storage Tanks and Urban Neglect, RACE, POVERTY & THE ENVIRONMENT, Winter/Spring 1993, at 31, 32 (review of government enforcement files lead to conclusion that suburban gas stations with leaking underground storage tanks were given more attention by California Water Quality Board than leaking tanks at inner city sites).

\textsuperscript{41} See ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 66-68 (1990) (officials in Louisiana were charged with ignoring longstanding complaints of poor, minority community until state official finally visited area and experienced toxic odors coming from nearby hazardous waste incinerator).

\textsuperscript{42} See Robert D. Bullard, Race and Environmental Justice in the United States, 18 YALE J. INT'L L. 319, 332-33 ("The city finally took action after a series of articles on lead appeared in the local Dallas newspapers . . . Dallas was clearly lax in its enforcement of health and land use regulations in the African American community."); Poor, Minorities Want Voice in Environmental Choices, CONG. Q., Aug. 21, 1993, at 2257. ("Local residents, who are predominantly poor and Hispanic, last March sued the federal and state government, charging the bureaucrats were intentionally lax in cleaning up the toxic aftermath because West Dallas is a minority community.").

\textsuperscript{43} See John Gonzalez, Texas Groups Force Cleanups by Pulling the Right Strings, FORT WORTH STAR-TIMES, Apr. 1, 1993, at A1. ("There is no doubt in my mind that the reason we have been so slow in solving this is that it hasn't affected the population as a whole, only the minority community," Odessa NAACP President Gene Collins said.).

\textsuperscript{44} See Charles Lee, Developing Working Definitions of Urban Environmental Justice, RACE, POVERTY & THE ENVIRONMENT, Winter/Spring 1993, at 3, 4 (during efforts to make Potomac River pristine, Anacostia River, which runs through minority and low income neighborhoods of Washington, was ignored).
has been unwilling to authorize a buyout in the African-American town of Triana, Alabama.\textsuperscript{46}

B. Unequal Cleanup of Waste Sites

The September 1992 \textit{National Law Journal} study also examined EPA's responses under the Superfund program to abandoned toxic waste sites. All sites on EPA's National Priority List ("NPL") of Superfund sites were examined, except for sites for which there were no available census information or no evidence of nearby residential populations.\textsuperscript{46} The study found that sites in minority areas took 20\% longer to be placed on the NPL than sites in white areas—white areas waited 4.69 years from the date of discovery of the site until its listing on the NPL, while minority areas waited 5.63 years.\textsuperscript{47}

The study did find, however, that by the time the actual cleanup of the site began, minority sites were only 4\% behind the white sites, 10.4 years compared to 9.9 years.\textsuperscript{48} But there were wide variations among EPA's regional offices. In EPA's Midwest Region, EPA took an average of 4.1 years longer to begin comprehensive, long-term cleanups in minority areas; in the West, 3 years longer; and in the Great Plains, 2.7 years.\textsuperscript{49}

The \textit{National Law Journal} also found that EPA chose less protective remedies at minority sites. Under section 121(a) of CERCLA, Congress directed EPA to prefer remedies that permanently and significantly reduce the volume, toxicity or mobility of the hazardous substances over remedies that do not involve such treatment.\textsuperscript{50} The study found that at minority sites, EPA chose "containment", the capping or walling-off of a hazardous waste site, 7\% more frequently than the permanent treatment method


\textsuperscript{46} See Lavelle & Coyle, supra note 12, at S4. The final analysis included 1,177 of EPA's 1,206 NPL sites as of March, 1992. \textit{Id.}

\textsuperscript{47} \textit{Id.} at S2, S6.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.} at S4, S6.

\textsuperscript{50} 42 U.S.C. § 9621(a) (1988) (EPA is to select cleanup remedy utilizing permanent solutions "to the maximum extent practicable").
preferred by the law; at white sites, EPA ordered the preferred treatment 22% more than containment.\textsuperscript{51}

The study also found a difference between rich and poor communities in the pace of cleanup and in the permanence of the remedies selected, but not as great as the differences between minority and white communities. The time from discovery to listing on the NPL is 10% slower for poor communities than for wealthy, compared to the 20% longer it takes when comparing minority with white sites.\textsuperscript{52} Comparing containment versus permanent treatment of sites, the study found that EPA chose containment 35% more frequently at high income sites and only 18% more frequently at lower income sites.\textsuperscript{53}

A 1990 study by Clean Sites sought to determine if potential Superfund sites in rural poor counties were receiving the same amount of attention from EPA as sites nationally.\textsuperscript{54} The study concluded that eligible rural poor sites were placed on the Superfund NPL at half the rate of other sites. While 4% of the all eligible sites\textsuperscript{55} end up being placed on the NPL, only 3.2% of sites in rural counties and only 2.1% of sites in poor counties are on the NPL.\textsuperscript{56} The significance of being placed on the NPL is that only those sites are eligible for long term cleanup actions using federal Superfund monies.\textsuperscript{57} Clean Sites found that, in contrast to the differences in listing on the NPL, sites in rural poor counties were receiving at least the same level of EPA attention for site inspections and emergency removal actions.\textsuperscript{58}

\textsuperscript{51} See Lavelle & Coyle, supra note 12, at S2, S6.
\textsuperscript{52} Id. at S2, S4.
\textsuperscript{53} Id. at S2.
\textsuperscript{54} See Clean Sites, Hazardous Waste Sites and the Rural Poor: A Preliminary Assessment, passim (1990) [hereinafter Clean Sites] "Rural poor counties" were designated as those counties where, in 1986, there was no metropolitan area with a population greater than 50,000 and where the average annual per capita income was at or below $9,320. Id. at 3. This designation included the 15% of counties in the United States with the lowest per capita incomes. Id.
\textsuperscript{55} Id. Defined as the greater than 34,000 sites in the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), EPA's inventory of sites at which hazardous substances have been stored, treated or disposed without a hazardous waste permit. Id. at 7; see also Peter B. Prestley, The Future of Superfund, ABA J., Aug. 1993, at 62 (34,652 sites in CERCLIS as of June, 1991).
\textsuperscript{56} Clean Sites, supra note 54, at 48-49.
\textsuperscript{57} See 40 C.F.R. § 300.425(b)(1) (1992). "Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action." Id. Any site in CERCLIS, even if not on the NPL, is eligible for emergency removal, planning, or enforcement activities by EPA. Id.
\textsuperscript{58} Clean Sites, supra note 54, at viii-ix, 45-46.
Clean Sites speculated that one reason rural sites were less frequently listed on the NPL was that one of the primary factors used in evaluating sites for the NPL was the size of the population affected by the release of hazardous substances.59 The authors of the study could find no reason to explain why EPA was only half as likely to place poor counties on the NPL.

A recent study by Rae Zimmerman analyzed the pattern of Superfund cleanups in minority communities using the NPL designation process and whether a record of cleanup decision has been issued by EPA.60 The study first compared Hazardous Ranking System (“HRS”) scores for minority and low income populations with the average score for all Superfund NPL sites.61 The findings showed that, on average, there was not a statistically significant difference between the HRS scores in minority communities as compared to those for all NPL sites.62 Poverty was also not found to yield a statistically significant result.63

The Zimmerman study also reviewed whether a Record of Decision (“ROD”) had been issued for the site.64 The higher the black population is around the NPL site, the less likely it is that EPA has yet issued a ROD; the higher the Hispanic population, the more likely it is that the site already has a ROD; per capita income was not significantly related to the existence of a ROD.65 Looking at subsets of populations, NPL sites in relatively poorer communities with relatively high black populations tended to have 20% fewer of their sites with RODs; a similar, but less

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59 Id. To be placed on the NPL, a site must score sufficiently high on the “Hazard Ranking System” (“HRS”). Hazardous Sites in Poor, Rural Counties Receive Less Attention Than Other U.S. Sites, [Current Developments] Env’t Rep (BNA) 1961 (1990). Prior to the issuance of the revised HRS in 1990, the size of the affected population was often a determining factor for listing sites. Id.

60 Rae Zimmerman, Social Equity and Environmental Risk, 13 RISK ANALYSIS 649 (1993).

61 Id. at 659-60. The HRS is “the method used by EPA to evaluate the relative potential of hazardous substance releases to cause health or safety problems, or ecological or environmental damage.” 40 C.F.R. § 300.5 (1993). If a site scores above 28.5, then it is eligible for listing on the NPL. Id. at § 300.425(c) & app. A.

62 Zimmerman, supra note 60, at 660.

63 Id.

64 Id. at 660-63. An ROD is the agency’s decision as to the appropriate long-term cleanup remedy for the site. See 40 C.F.R. § 300.430(d)(4) (1993).

65 See Zimmerman, supra note 60, at 660. The lack of a ROD indicates that the site has not advanced as far in EPA’s cleanup process. Hence, a delay in issuing an ROD would indicate a delay in beginning the final cleanup. The author postulated that the differences in minority composition of communities with RODs seemed to have occurred during the designation of the site on the NPL, rather than at the later ROD stage. Id. at 664.
strong, correlation was found for sites in poor Hispanic communities. In looking at all NPL sites, Zimmerman also found that RODs were more likely to have been issued where "controversy" existed. However, the existence of controversy in low income minority communities was not associated with the signing of RODs, although it did have that affect in communities with fewer minorities.

An analysis by John A. Hird of EPA Superfund cleanups found that the pace of cleanup depended mostly on the site's potential hazard, not on socioeconomic factors. Hird looked at NPL sites and used three measures to determine the speed of cleanups. He then compared the pace of the cleanup with the economic and racial characteristics of the county in which the site was located. He found virtually no relationship between an NPL site reaching a particular cleanup stage and the county's socioeconomic characteristics.

Two studies by EPA's Region II offer conflicting evidence of unequal cleanup of Superfund sites. A study in 1990 by Robert Huang compared the amount of time spent in the initial phases of the Superfund cleanup process and the demographics of communities around the sites. Huang found statistically significant relationships showing that waste sites in New York and New Jersey progressed faster through the pre-remedial stages of the Superfund process if the communities within a one-mile radius of

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66 Id. at 660-61.
67 Id. at 661-62. "Controversy" was measured by the extent of media coverage and the opinions of Superfund site managers. Id.
68 Id. at 662.
70 Id. at 335-37. The three cleanup stages analyzed were: if the Remedial Investigation/Feasibility Study ("RI/FS") had been started; if the ROD had been signed; and if a long-term remedial action had begun. Id. at 335-36. The study reviewed the 788 sites that were either proposed for listing or already listed on the NPL as of January 1, 1989. Id. at 331-32, 336.
71 Id. at 336. By way of comparison, Zimmerman's study focused on the geographic level of "communities", representing the smallest formal level of political decisionmaking. Zimmerman, supra note 60, at 653. The National Law Journal study defined the geographical area by ZIP code, looking at persons residing in the same ZIP code as the facility or site. See Lavelle & Coyle, supra note 12, at S4.
72 Hird, supra note 69, at 336-37.
73 ROBERT HUANG, ENVTL. PROTECTION AGENCY, EPA REGION II EQUAL EMPLOYMENT OFFICE'S SUPERFUND EQUITY STUDY (1990). The study focused on the amount of time spent in the pre-remedial phases, defined as the stages of site discovery, preliminary assessment, site inspection, and hazardous ranking system calculation. Id. at 18.
the site had higher household incomes. The study did not find a relationship between the speed of the cleanup and the racial composition of the community.

A more recent Region II study by Zimmerman found that the socioeconomic characteristics of the communities within one mile of NPL sites had only a negligible effect on the timing of the steps in Region II's Superfund cleanup process. Zimmerman's Region II study compared the pace of cleanup activities with the surrounding community's percentage of Hispanics, percentage of minority races, and income as portrayed by house value. The study found a general absence of relationship between the timing of the steps in the cleanup process and racial population, ethnic population or income. The study concluded that the timing of the steps in Region II's cleanup process, once a site is placed on the NPL, are largely internally driven by Superfund program timetables and that socioeconomic characteristics only negligibly affect the process. The results of Regions II's latest study are consistent with the National Law Journal's finding that the pattern of the Superfund cleanup enforcement was quite uneven across the country, with cleanup actually beginning more quickly at minority sites than at white sites in Region II.

C. Possible Causes of Unequal Enforcement

Additional empirical studies of possible unequal enforcement are clearly needed to determine the presence or scope of any discrimination and to help identify ways to address the inequality. The studies to date are few and, because of the complexity of the

74 Id. at 23. The study involved the 191 National Priority List sites in New York and New Jersey but did not include Region II NPL sites in Puerto Rico. Id.
75 Id.
76 RAE ZIMMERMAN, AN ENVIRONMENTAL EQUITY STUDY FOR INACTIVE HAZARDOUS WASTE SITES (1994).
77 Id. at 69, 71. The cleanup activities examined included the dates of: site discovery; proposal to NPL; final listing on NPL; combined remedial investigation/feasibility study initiation; combined remedial investigation/feasibility study completion; and record of decision. Id. at 51-68.
78 Id. at 72.
79 Id. at 85, 87.
80 Lavelle & Coyle, supra note 12, at S6.
81 Besides additional studies of penalty amounts and the rate and scope of Superfund cleanups, other indicators of enforcement distribution and effectiveness that have been suggested include: frequency of inspections; amount of time between when the violation is discovered and when enforcement action is taken; and the frequency and scope of the agency's response to citizen complaints. See Lavelle & Coyle, supra note 12, at S4.
factors that might go into an agency's exercise of its enforcement responsibilities, the factors that might influence a disparate impact are many. EPA recognizes the need for further study, but has also acknowledged the need to act now to address the issue of disparate enforcement. Both EPA and U.S. Department of Justice officials have repeatedly stated that their agencies will be directing more of their enforcement resources to poor and minority communities where persons are suffering disproportionate risk.

82 For example, some of the variables that could also explain a difference in penalty assessments between communities are: the strength of the evidence and law against the violator; the economic benefit enjoyed by the noncompliance; the ability of the violators to pay the penalties; the use of non-penalty or injunctive relief in lieu of penalties; the degree of community interest or pressure; the degree of political influence exerted by a community's elected officials; the presence of anomalous high or low penalty assessments in the analysis; the definitions of key terms defining the different groups and geographical areas compared; the value of money over time; the general increase in penalty assessments over time; and whether the penalty was assessed by the agency, or a court or entered upon consent of the parties.

83 During the press briefing after the issuance of the President's Executive Order on Environmental Justice, EPA Administrator Carol Browner stated that EPA has "undertaken a project to look at the findings of [the National Law Journal] study to understand whether in fact what the study suggested is occurring . . . . [I]t is a comprehensive analysis that we are undertaking to ensure that we don't, in fact, have lower penalties being applied in certain communities." EPA Administrator Carol Browner & Attorney General Janet Reno, Press Briefing 4 (Feb. 11, 1994) (on file with author).

In 1993, EPA identified two additional ongoing studies of its enforcement policies and programs: a review by Region II to determine if affluent communities are more able to speed up the Superfund cleanup process and an Office of Solid Waste & Emergency Response ("OSWER") analysis to determine whether racial or socioeconomic inequities occur in the RCRA enforcement process. Draft Memorandum from EMC Workgroup on Equity in Enforcement to Enforcement Management Council passim (April 14, 1993) (on file with author). A fact sheet for the unreleased Region II study states that socioeconomic characteristics of the population near a site showed no apparent influence on the timing of the cleanup process. See U.S. E.P.A., REGION II, FACT SHEET—U.S. EPA REGION 2 SUPERFUND EQUITY STUDY (1994) (final report on study not released to public). OSWER is analyzing 300 Superfund sites to determine if certain phases of the cleanup and certain types of cleanup remedies vary because of race or income; that study will likely be completed by the end of 1994. Telephone Interview with Jim Maas, Superfund Revitalization Office, OSWER (Mar. 28, 1994).

In addition to studies by EPA of its own enforcement actions, it is very important that independent studies be undertaken on the impact of the states' enforcement activities. Because state environmental agencies undertake the majority of enforcement actions and are likely to have fewer policies or procedures in place to guide their enforcement decisions, state enforcement decisions may well be more likely to exhibit bias or discriminatory impact than EPA's well-established enforcement programs. See supra notes 6-7 and infra note 91 and accompanying texts.

Even if the empirical data of unequal enforcement of environmental laws is scarce and open to criticism, the conditions that could give rise to discriminatory enforcement are present. The causes of unequal enforcement are likely to be the same structural causes that have been blamed for the general unequal distribution of environmental hazards among minorities and low income communities. Racist attitudes, lack of economic and political clout, and lack of participation in government decisionmaking all play a causal role.85 "To be sure, poor minority communities face some fairly high barriers to effective mobilization against toxic threats, such as limited time and money; lack of access to technical, medical or legal expertise; relatively weak influence in political or media circles; and cultural and ideological indifference or hostility to environmental issues."86

In fact, the conditions that give rise to the discriminatory impact of environmental hazards may be even greater when the government acts as enforcer, since few areas of the law invest more discretion in agency employees or are more hidden from the public's view and oversight than an agency's enforcement actions.87 The initial decision about which facilities to inspect and how often to check for violations is generally left to the discretion of the agency, although some statutes do provide for annual or biannual inspections.88 Once the agency gets notice of a violation, it can choose to take an informal response, such as a phone call, site

85 See Anthony R. Chase, Assessing and Addressing Problems Posed by Environmental Racism, 45 RUTGERS L. REV. 335, 344-46 (1993); Lazarus, supra note 11, at 806-25.
86 See Regina Austin & Michael Schill, Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice, 1 KAN. J.L. & PUB. POL’Y 69, 71 (1991); see also Paul Mohai & Bunyan Bryant, Race, Poverty, and the Environment: The Disadvantaged Face Greater Risks, EPA J., Mar./Apr. 1992, at 6, 7. "The residents tend to be unaware of policy decisions affecting them; they are not organized; and they lack the resources (time, money, contacts, knowledge of the political system) for taking political action. Minority communities are at a disadvantage not only in terms of resources, but also because of under-representation on governing bodies." Id.
87 See generally Bob Anderson, Documents Show More Inspections, Fewer Penalties Issued by DEQ, SUNDAY ADVOCATE, Dec. 6, 1992, at B1 (state environmental official decides to cut back on number of penalties issued and refuses to issue penalty notices given to him by enforcement personnel where there was no evidence in record that violations were continuing).
88 See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. § 6927(d), (e) (1988) (mandating inspections of facilities operated by state or local governments every year and all other facilities no less than every other year); LA. REV. STAT. ANN § 30:2012(D) (West Supp. 1994) (monitoring inspections of all permitted facilities shall be made at least once a year). The Texas Air Control Board has instituted a risk-based target list of priority sources for inspections. See TEXAS ENVTL. EQUITY & JUSTICE TASK FORCE, TEXAS ENVIRONMENTAL EQUITY & JUSTICE TASK FORCE REPORT 11 (1993).
visit, warning letter or notice of violations; an administrative remedy, such as an administrative penalty assessment or compliance order; a judicial action for penalties or injunctive relief; or a criminal prosecution. The process for cleaning up waste sites, and the decisions regarding which, when, and how, provide similar opportunities for the exercise of discretion.

While agencies often develop guidance documents to assist them in determining the acceptable response or size of any penalty, those guidance documents are not binding on the agency and are designed with sufficient flexibility to allow the decisions to be influenced, whether intentionally or not, by the nature of the community in the area where the violator operates. The next section

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89 See Wasserman, supra note 10, at 19.
90 See Paul R. Portney & Katherine N. Probst, Cleaning Up Superfund, 114 Resources 2, 4 (1994). The authors state:
If one looks closely at the cleanup remedies EPA has selected at Superfund sites all around the United States, it is hard to see any uniform pattern suggesting strict adherence to the concept of permanence. Rather, remedy selection seems to depend at least in part upon which EPA regional office is in charge of a given site, the amount of press attention devoted to the site, and the extent of public involvement there.

Id.; EMC Enforcement Workgroup Report, supra note 28, at 24-25 (identifying areas of discretion for agency officials in process of cleaning up Superfund sites).


State environmental agencies are likely to have even fewer guidance documents, and therefore exercise greater discretion in enforcement decisionmaking. See, e.g., Jocelyn F. Olson, State Enforcement of Environmental Laws, in ALI-ABA COURSE OF STUDY—ENVIRONMENTAL LITIGATION 159, 179 (1990) (no formula used by Minnesota in determining how much penalty is enough); U.S. Gen. Accounting Office, Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators 12 (1994) [hereinafter U.S. Gen. Accounting Office] (EPA's oversight of state penalty assessments is limited largely because EPA has not required states to adopt their own civil penalty policies); see also In re BASF Corp., 538 So. 2d 635, 645 (La. Ct. App. 1988) (penalty assessed in private and without documentation or reasons supporting amount), writs denied, 539 So. 2d 624 (La. 1989), 541 So. 2d 900 (La. 1989).


The policies and procedures set out in this document and in the “Framework for Statute-Specific Approaches to Penalty Assessment”, are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Id.; see also U.S. E.P.A., Resource Conservation & Recovery Act Inspection Manual 1-3 (1989). (“The procedures are general and are not intended to be prescriptive, in deference to Regional and State differences in approaches and procedures.”).

93 "When it comes to implementation and policy, a lot of decisions appear to be based on the politics of what's appropriate for that community. And low-income and minority communities are not given the same priority, nor do they see the same speed at which some-
discusses the extent to which the government, in spite of its often broad prosecutorial discretion, can be forced to act more equitably in its enforcement of environmental laws.

II. FORCING ADDITIONAL OR MORE EQUITABLE GOVERNMENT ENFORCEMENT

It is the government, in the first instance, that has the responsibility to ensure compliance with environmental laws. Government also has a responsibility to ensure that its enforcement of environmental laws does not discriminate against minority or low income communities. Where environmental agencies do not appear to be enforcing environmental laws sufficiently or in an equal manner, at least three different types of legal remedies are available under existing laws: civil rights laws; forcing the government to undertake mandatory enforcement duties; and challenging inadequate government enforcement actions.

A. Using Civil Rights Remedies

An often discussed remedy to environmental discrimination is civil rights lawsuits. The initial litigation and scholarly discussion is perceived as a danger and a threat ...." Lavelle & Coyle, supra note 12, at S4 (quoting Professor Robert D. Bullard); Joel A. Mintz, Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970-1987, 18 ENVTL. L. 683 (1988) (chronicling ability of EPA officials to slow or stop enforcement of hazardous waste laws); Lazarus, supra note 11, at 816-18 (detecting violation and subsequent decision to bring enforcement action are not controlled by legislature, but by "extra-legal" variables that can be influenced by community members).

The General Accounting Office has been very critical of EPA's practice of often significantly reducing penalty assessments, even below the economic benefit of noncompliance, without adequate documentation or justification for the reduction. See U.S. GEN. ACCOUNTING OFFICE, supra note 91, at 1-2.

EPA's Deputy Administrator for Enforcement stated: "We want to guarantee that no segment of society is bearing a disproportionate amount of the consequences of pollution." Lavelle & Coyle, supra note 12, at S4.

sion has focused primarily on claims that the government’s action in approving the siting of a facility violated the Equal Protection Clause of the Constitution. To date, federal Equal Protection lawsuits have not been successful in remedying environmental discrimination.96

The failure of Equal Protection claims has resulted primarily because of the difficulty of proving intent.97 To prove a claim of racial discrimination under the Equal Protection Clause, a plaintiff must prove that the defendant possessed a racially discriminatory intent or purpose; discriminatory impact alone is insufficient.98 Under Village of Arlington Heights v. Metropolitan Housing Development Corp.,99 a plaintiff may use circumstantial evidence, including statistical proof, to give rise to an inference of intent. Nevertheless, the environmental discrimination cases that have sought to prove intent through the use of statistics showing a disparate impact on minorities have not been successful.100 Although it has been suggested that the equal protection guarantees in state constitutions may offer more protection and may ease the difficulty of proving intent,101 thus far, no plaintiff has been able to prove that a discriminatory environmental decision violated his or her right to equal protection under either federal or state law.


96 See Reich, supra note 95, at 290 ("Federal law has generally proven inadequate to deal with environmental race discrimination."); Frey, supra note 95, at 71 ("No plaintiff has prevailed using a civil rights argument to stop a proposed siting decision viewed as discretionary."). But see Stephen C. Jones, EPA Targets 'Environmental Racism', NAT'L L.J., Aug. 9, 1993, at 28 ("Although no plaintiff has succeeded in proving discriminatory intent in an environmental justice setting, the decisions to date suggest that it may not be impossible."). 97 See Lazarus, supra note 11, at 830-33; Reich, supra note 95, at 290-91; Godsil, supra note 95, at 410-11.


101 See Reich, supra note 95, at 301-05; Tsao, supra note 95, at 394-99; see also Texas Ctr. for Policy Studies, TOXICS IN TEXAS & THEIR IMPACT ON COMMUNITIES OF COLOR 49 (1993).
A promising civil rights option that is beginning to be used is Title VI of the Civil Rights Act of 1964. Under Title VI, "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The term "Federal financial assistance" is not defined in Title VI, but has been broadly defined by EPA to include any federal grant or cooperative agreement, loan, contract, or other arrangement by which the federal agency provides financial assistance. Because EPA and other federal agencies that play a role in protecting public health and the environment have provided extensive assistance to state and local governments, this threshold requirement will often be present when seeking to challenge an enforcement decision of a state or local environmental agency.

Although the limitation in Title VI to programs receiving federal financial assistance may restrict the ability to use Title VI directly against EPA, federal environmental laws provide for a


105 There is a split of authority on whether a private cause of action exists under Title VI directly against a federal agency where the agency is accused of acting in concert with the recipient. Compare Sobel-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984) and Community Bhd. of Lynn, Inc. v. Lynn Redevelop. Auth., 523 F. Supp. 779, 782 (D. Mass. 1981) (plaintiffs cannot enforce Title VI against federal agency) with Gautreaux v. Romney, 448 F.2d 731, 737-40 (7th Cir. 1971) and Little Earth of Native Tribes v. Department of Hous. and Urban Dev., 584 F. Supp. 1292, 1297 (D. Minn. 1983) and Joseph G. Cook & John L. Sobieski, Jr., CIVIL RIGHTS ACTIONS 17-4 to 17-5 (1993) ("The statute is applicable to discrimination by the pertinent federal authority as well as by the recipient of the assistance.").
ENFORCEMENT OF ENVIRONMENTAL LAWS

transfer of permitting and enforcement authority to state and local governments.\(^{107}\) Generally, where states have had the opportunity to take over the permitting and enforcement of federal environmental laws, they have elected to assume that authority.\(^{108}\) In fact, the majority of environmental enforcement actions are taken by state agencies, not by EPA.\(^{109}\)

The major benefit of using Title VI is that it provides a means to avoid the difficult burden of showing intentional discrimination. In *Lau v. Nichols*, the Supreme Court held that Title VI could be violated if the actions of the funding recipient had a discriminatory effect, even though no purposeful design was present.\(^{110}\) Subsequent Court decisions have clarified that if an agency has promulgated regulations that prohibit discriminatory effects, then a plaintiff need only prove discriminatory impact if the suit is seeking only to enforce the agency regulations.\(^{111}\)

EPA's Title VI regulations provide that any program or activity receiving EPA assistance shall not, on the basis of race, color, or national origin, deny a person any service, aid, or other benefit of the program or subject a person to separate treatment in any way

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109 See *More Money Received in Penalties Than Ever*, supra note 4, at 354. In Fiscal Year 1992, state environmental agencies referred 574 civil cases to state attorneys generals, while EPA referred 361 to the Department of Justice. *Id.* In that same year, states initiated 8,643 administrative enforcement actions; EPA initiated 3,667. *Id.*


111 See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584 (1983). The plaintiff has the burden of persuasion on the ultimate issue of discrimination, but once the plaintiff has met its burden of going forward with evidence proving discriminatory effect, the burden of going forward shifts to the defendant to prove or to articulate a nondiscriminatory justification for the challenged action. NAACP v. Wilmington Medical Ctr., Inc., 491 F. Supp. 290, 314-15 (D.C. Del. 1980), aff’d, 657 F.2d 1322 (3d Cir. 1981). If the defendant produces evidence showing a nondiscriminatory reason, the burden of going forward shifts back to the plaintiff to show that the reason given is a pretext. *Id.*; see also *Larry P. v. Riles*, 793 F.2d 969, 981 n.6 (9th Cir. 1984).
relating to receiving services or benefits. The regulations further provide that a recipient of federal aid shall not use criteria or methods of administering its program that have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Where the recipient of EPA financial aid has previously discriminated, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

Any person who believes he or she has been discriminated against may file a complaint at any EPA office within 180 days of the alleged discriminatory act. EPA's Office of Civil Rights will review the allegations and either accept or reject the complaint. EPA first attempts to resolve the complaint by informal means but, if that is not possible, EPA will begin its complaint investigation. Title VI also provides a private cause of action in federal court against the recipient to enforce the regulations without having to first exhaust available administrative remedies.

Although as many as nine administrative complaints under Title VI have been filed with EPA alleging discrimination in the implementation of state environmental programs, no complaint has alleged discrimination in the enforcement of environmental laws. Instead, the complaints have challenged permit decisions and the use of sewage treatment grant monies. Where evidence is available that indicates a state or local government is enforcing its environmental laws in a discriminatory fashion and where that state has received federal financial assistance for its environmen-

113 Id. § 7.35(b) (1992). The regulations further prohibit a recipient from choosing a site or location for a facility that has the purpose or effect of subjecting persons to discrimina-
114 Id. § 7.35(a)(7).
115 Id. § 7.120(a), (b).
116 Id. § 7.120(d)(1).
117 If the complainant believes that the agency's resolution of the Title VI complaint was incorrect or unlawful, then the agency's final decision can be appealed under 42 U.S.C. § 2000d-2 (1988). See S.E. Chicago Comm'n v. Department of Hous. & Urban Dev., 488 F.2d 1119, 1129-31 (7th Cir. 1973); Adams v. Richardson, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973).
119 Telephone Interview with Suzanne E. Olive, Deputy Director, EPA Office of Civil Rights (March 25, 1994).
120 Id.
tal programs, Title VI would be available to remedy the discrimination. By way of comparison, cases have been brought under Title VI alleging that the government authority provided less police protection to a minority neighborhood.121

Title VI also provides a private cause of action directly against the recipient.122 A majority of the Supreme Court in Guardians Ass’n v. Civil Service Commission held that a private cause of action was available, although the division of opinions appeared to limit such an action to declaratory and injunctive relief unless intent was shown.123 At least one commentator believes that the Court’s recent decision in Franklin v. Gwinnett County Public Schools124 means that “a damage remedy is now generally available for title VI violations, even absent a showing of discriminatory intent.”125

Title VI does expressly provide for the remedies of termination or refusal to grant or continue financial assistance and “any other means authorized by law.”126 Similarly, EPA’s regulations provide that the agency may use any means authorized by law to obtain compliance from the financial recipient, including a referral of the matter to the Department of Justice for prosecution.127

121 See Neighborhood Action Coalition v. City of Canton, 882 F.2d at 1017 (violation of civil rights when a police department fails to respond to calls from a neighborhood because of racial makeup of community). In Dowdell v. City of Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981), aff’d, 698 F.2d 1181 (11th Cir. 1983), and Johnson v. City of Arcadia, 450 F. Supp. 1363, 1376 (M.D. Fla. 1978), the courts found that the towns had violated Title VI because the evidence showed that they had provided inferior municipal services, such as street maintenance, sewerage, and parks, to Black residents.

122 There has been at least one environmental discrimination suit filed under Title VI alleging that local, state, and federal agencies created and refused to remedy hazardous lead emissions from a lead smelter in West Dallas. See Western Dallas Coalition for Envtl. Justice v. United States, No. CA-3-91-2615-R (N.D. Tex.); LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, ENVIRONMENTAL JUSTICE CASES: CASES INVOLVING CHALLENGES TO ENVIRONMENTAL DECISIONS THAT RAISE CLAIMS OF RACE OR NATIONAL ORIGIN DISCRIMINATION 18-20 (1993).

123 463 U.S. 582 (1983). Four Justices held that Title VI provided a private cause of action for compensatory relief upon a showing of discriminatory intent or effect. Id. at 615-34, 635-46 (Justices Marshall, Stevens, Brennan & Blackmun). A fifth Justice agreed that Title VI provided a private cause of action for both intentional and effects discrimination, but stated that a damage remedy was only available where intent was shown. Id. at 593-603 (Justice White).


125 Lazarus, supra note 11, at 836.


127 See 40 C.F.R. § 7.130(a) (1992). The regulations include the remedies of annulling, suspending or terminating EPA assistance, id. § 7.130(b), and also refer to recipients taking steps for achieving compliance, id. § 7.115(c), (d), and taking affirmative action to provide remedies to those who have been injured by the recipient’s previous discrimination, id. § 7.35(a)(7).
Therefore, Title VI provides a means to address discriminatory enforcement by state environmental agencies that receive federal assistance. Because an injured party may invoke the protection of Title VI by merely filing a complaint with EPA within 180 days of the discriminatory act, Title VI also provides an easy means to raise the issue, although the remedies available under an administrative complaint are limited and the result of the complaint may depend a great deal on the zeal and thoroughness of EPA's investigation and handling of the complaint.

B. Forcing Government Compliance With Enforcement and Cleanup Duties

Citizens adversely affected by pollution or waste sites often want government agencies to be forced to take some action to remedy their plight. When the issue is whether or not the government must take enforcement action against a particular violator or to clean up a particular waste site, agencies often claim that they are invested with discretion to decide when and how to use their enforcement resources. The availability of such discretion is not absolute, however, and means are available to force government agencies to comply with legislatively mandated enforcement and cleanup duties.

1. Challenging the Decision Not to Take Enforcement Action

In Heckler v. Chaney, the Supreme Court set forth the general rule that "an agency's decision not to take enforcement action should be presumed immune from judicial review." The Court explained that it is for the agency, not the court, to decide the com-

Within the time period when EPA is reviewing an application for financial assistance, EPA's Office of Civil Rights is to determine whether the applicant is in compliance with EPA's nondiscrimination regulations. Id. § 7.110(a). EPA's Office of Civil Rights may also periodically conduct compliance reviews of any recipient's programs or activities. Id. § 7.115(a). To date, the Office of Civil Rights has only performed pre-award compliance reviews of sewage treatment construction grants, not to determine if an applicant's permitting or enforcement activities were discriminating against any persons. Telephone Interview with Suzanne E. Olive, Deputy Director, EPA Office of Civil Rights (March 25, 1994). However, the Office of Civil Rights intends to expand its pre-award compliance reviews and will likely include questions relating to discrimination in the enforcement of state or local environmental laws. Id. The Office of Civil Rights has not yet performed a periodic compliance review of any state or local environmental program to determine if the applicant's enforcement activities were discriminatory. Id.

129 Id. at 832.
plicated balance of whether a violation has occurred, how the agency should use its limited resources, and whether a particular enforcement action best fits within the agency's policies. Yet, an agency's refusal to take enforcement action is not always unreviewable. "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." In fact, the Court has found that an agency does have a nondiscretionary duty to take enforcement action.

Citizen suit provisions in federal environmental statutes provide that any citizen may file suit against EPA where there is an alleged failure to perform an act or duty which is not discretionary. However, attempts to force EPA to take an enforcement action in a particular case, on the theory that EPA has a nondiscretionary duty to take such action, have generally been unsuccessful.

Under the Clean Water Act, if the Administrator of EPA finds that any person is in violation of certain provisions of the Act, the Administrator: 1) "shall issue an order"; 2) "shall bring a civil action"; or 3) "shall notify the person in alleged violation," and, if the state does not commence an appropriate enforcement action, "shall issue an order . . . or shall bring a civil action." A majority of courts have held that because the Administrator's finding of a

130 Id. at 831-32. The Court also noted that Section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1988), excepted from judicial review action "committed to agency discretion by law". Id. at 828-32.

131 Id. at 833. The Court noted that it was not holding that claims of a violation of constitutional rights were unreviewable, id. at 838, nor was it reviewing a situation where an agency has adopted a policy that amounts to an abdication of its statutory enforcement responsibilities. Id. at 833 n.4.


violation is a precondition to the requirement that the Administrator "shall" bring an enforcement action, and because there is an absence of language indicating a duty on EPA to make that finding or to investigate every citizen complaint, EPA's enforcement duties under the Clean Water Act are not mandatory and a citizen cannot force EPA to take enforcement action against a particular facility or person. However, the argument has been made that although Congress gave EPA complete discretion to decide whether or not to institute a judicial enforcement action, EPA does have a duty to issue administrative compliance orders for some violations and EPA's failure to act should be reviewed by the court under the arbitrary or capricious standard.

The Clean Air Act provides that if the Administrator of EPA finds certain violations, the Administrator "shall" notify the person and the state of the violations. However, Congress again conditioned any obligation to enforce on a finding of violation by EPA and also chose to use the discretionary term "may" to describe the list of enforcement actions that follow notification to the state and violator. As a result, the majority of courts have found that, as with the Clean Water Act, EPA is not obligated under the Clean Air Act to take enforcement action in any particular case.


138 Id.; see also id. § 7413(a)(3) (if EPA finds any person has violated certain provisions, Administrator "may" take administrative, civil, or criminal enforcement action).

The enforcement language in RCRA provides that whenever the Administrator determines that any person has violated the act, the Administrator “may issue an order” or “may commence a civil action.”

Although there are no reported cases on whether this language imposes a duty to enforce, because of the use of the term “may”, the language in RCRA does not appear to clearly withdraw discretion from the agency or to provide guidelines for the exercise of the agency’s enforcement power.

The Safe Drinking Water Act requires that if the Administrator of EPA finds that a public water system in a state with primary enforcement authority is out of compliance, the Administrator “shall” notify the state and the system and, if the violation continues beyond thirty days, “shall” issue an order or commence a civil action.

Similarly, where EPA has not delegated the program to a state, if the Administrator finds a violation of the drinking water regulations, EPA “shall” issue an order or commence a civil action.

Thus, under the Safe Drinking Water Act, EPA does have a mandatory duty to take enforcement action, but once again, only if the Administrator first finds that a public water system is not in compliance with drinking water regulations.

CERCLA, the Toxic Substances Control Act (“TSCA”), Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), and Emergency Planning and Community Right-to-Know Act (“EPCRTKA”) all have enforcement language that either premises any responsibility to act on a prior finding of violation by the


At one time, the Clean Air Act contained language stating that the Administrator “shall” commence a civil action whenever a major source of air pollution violates certain provisions. However, the additional language “as appropriate” was inserted after the term “shall” during the 1990 amendments and has weakened any claim of a mandatory duty to file suit. Compare 42 U.S.C. § 7413(b) (1988) with 42 U.S.C. § 7413(b) (1988 & Supp. IV 1992).

141 See generally Heckler v. Chaney, 470 U.S. 821, 833-34.
143 Id. § 300g-3(a)(2).
Administrator or describes EPA's responsibility to act through use of the discretionary term "may." 148

Therefore, the ability to require EPA to take enforcement action in a particular case is limited. Although under the Clean Water Act and Safe Drinking Water Act a finding of a violation means that EPA "shall" take some enforcement action, courts have generally been unwilling to hold that EPA has a nondiscretionary duty to make a finding of violation whenever evidence of a violation is present.

There are instances, however, where Congress has spoken with sufficient clarity to impose mandatory enforcement duties. For example, under section 3007 of RCRA, EPA "shall commence" a program to thoroughly inspect every hazardous waste facility "no less often than every two years as to its compliance." 149 In this instance, Congress has set the enforcement priorities of the agency and there is no need to presume that a failure of EPA to inspect a facility at least annually is immune from judicial review.

An inability to challenge a particular enforcement decision does not mean that a citizen is precluded from challenging a systematic or widespread failure by an agency to undertake enforcement action in a substantial category of cases. 150 "Where agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its

148 Section 109 of CERCLA states that EPA "may" assess administrative penalties for violations and "may" bring a civil action in U.S. District Court to assess or collect penalties. 42 U.S.C. § 9609(a)-(c) (1988).

TSCA requires EPA to take action when certain risks of injury are found, but only upon an initial finding by the Administrator that such risk is present. 15 U.S.C. §§ 2603(a), (f), 2604(f), 2605(a) (1988). The authority of EPA to commence a civil action under TSCA is conditioned by the use of the term "may", but any person who violates sections 15 or 409 of TSCA "shall" be liable to the United States for a civil action which "shall" be assessed by EPA by an order made on the record after a hearing. Id. § 2606(a), (a)(1), (a)(2)(A).

FIFRA provides that the Administrator "may" assess a civil penalty for violations of the Act. See 7 U.S.C. § 1361(a)(1), (2) (1988). Where a delegated state program fails to enforce the Act, EPA "may" act upon the complaint. Id. § 136w-2(a).

Under EPCRTKA, EPA "may" order facilities to comply with the act, "may" assess administrative penalties, and "may" bring a civil action to enforce the act. 42 U.S.C. § 11,045(a)-(d) (1988).

149 42 U.S.C. § 6927(e)(1) (1988). RCRA imposes the same obligation to perform mandatory annual inspections on states having an authorized hazardous waste program. Id.

150 Cass R. Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 678-79 (1985); see Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985). ("Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities.").
The reason is that such pattern of nonenforcement by the executive branch is contrary to the goals of the statute and the will of the legislature and, therefore, a usurpation of the legislative function. Courts have even allowed lawsuits seeking to require a federal agency to enforce its Title VI regulations. Although an agency may have discretion over the exact means of enforcing Title VI, the agency could not avoid its responsibility to enforce the statute. Therefore, where it is alleged that an agency has altogether failed to enforce a particular provision of a statute, a court should assume jurisdiction over an action challenging that failure.

Promising means of challenging an environmental agency’s failure to enforce may be available under state citizen suit provisions or in a mandamus action. As discussed above, most enforcement actions are brought by state environmental agencies so the ability to force states to take additional enforcement actions could help alleviate any unequal enforcement.

A mandamus action is the traditional remedy available to compel performance of a ministerial act or mandatory duty by a public official. In reviewing both mandamus and citizen suit actions, some state courts have expressed the same reluctance as federal courts to order enforcement actions in a particular case.

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151 Public Citizen Health Research v. Commissioner, Food & Drug Admin., 740 F.2d 21, 32 (D.C. Cir. 1984); see also Adams v. Richardson, 480 F.2d 1159, 1162-63 (D.C. Cir. 1973) (agency cannot consistently fail to enforce law).

152 See Sunstein, supra note 146, at 678.


154 Id. at 1163 (while agency may decide between two alternative means of enforcing Title VI, consistent failure to use either means is dereliction of duty reviewable in courts).


156 See supra notes 6-7 and accompanying text.

157 See BLACK'S LAW DICTIONARY 961 (6th ed. 1990); see also OHIO REV. CODE ANN. § 2731.01 (Baldwin 1990). ("Mandamus is a writ, issued in the name of the State to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.").

posing view would look to whether the legislature has defined the state agency's duties to include the enforcement of environmental regulations and conclude that "[a]lthough the method of enforcement is discretionary, enforcement is not."159

A recent and potentially far-reaching use of mandamus was in the case of Gregory v. Fox.160 In that case, plaintiffs sued the Arizona Department of Environmental Quality alleging that the agency had violated its nondiscretionary duty to issue cease and desist orders to violators of state water pollution control laws and regulations. Under Arizona law, the Department must annually publish a list of all water pollution control facilities found to be in violation of the law,161 and where the agency has reasonable cause to believe that a person has violated the law, the agency shall issue a cease and desist order.162

Under a consent decree, the state agreed that if its review of self-monitoring and other compliance-related reports reveals any violation or if the agency fails to receive a legally required submital from a water pollution facility, then the state "shall" send written notice of the violation to the facility representative.163 If the recipient of the written notice does not comply with a notice of violation or enter into a consent order, the agency "will" issue either a unilateral compliance order or pursue judicially imposed penalties or injunctive relief.164 The decree clarifies that no single failure of the agency to comply with the decree or to address viola-

pollution control commissioner to enforce city's pollution ordinances); Clear Vue Acres Homeowners Ass'n v. Commonwealth, 517 A.2d 335, 336 (Pa. Commw. Ct. 1974) (no duty of state environmental agency to commence legal action against those who fail to comply with agency order).


162 Id. § 49-142.A.


164 Id. at 5-6.
tions at a single facility will constitute a violation of the decree.\textsuperscript{165} However, a pattern of repeated or frequent noncompliance "shall constitute a violation of this decree."\textsuperscript{166}

In the end, the ability to force an environmental agency to take enforcement action depends on the extent to which the legislature, or the agency itself through regulations,\textsuperscript{167} has imposed a mandatory duty on the agency. Particularly where a party is not attempting to force the agency to take a specific enforcement action and where the legislature has identified enforcement as a duty of the agency, mandamus may be an available legal remedy to compel an agency to take action, or to take additional action, to address violations of environmental laws in a community.

2. Forcing the Cleanup of Waste Sites

EPA has clear obligations regarding the cleanup of waste sites, and there are remedies available to force EPA to take cleanup action. State cleanup statutes and implementing regulations may likewise impose mandatory duties on state agencies that are enforceable through a mandamus or citizen suit action.\textsuperscript{168}

Under Section 105(d) of CERCLA, any person who is or may be affected by a release or threatened release of hazardous substances from a waste site may petition EPA to conduct a preliminary assessment of the hazards associated with the release.\textsuperscript{169} If EPA has not performed a preliminary assessment of the site, then

\textsuperscript{165} Id. at 6.
\textsuperscript{166} Id.
\textsuperscript{167} See Morton v. Ruiz, 415 U.S. 199, 235 (1974). The Court stated: "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Id.; see also Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986). ("It is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned ... for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.").
\textsuperscript{169} 42 U.S.C. § 9605(d) (1988). A preliminary assessment is a review of existing information, including on-site or off-site reconnaissance, if appropriate, to determine if a release of hazardous substances may require additional investigation or action. 40 C.F.R. § 300.5 (1993).
EPA "shall", within twelve months of receipt of the request, either complete the assessment or provide an explanation of why an assessment is not necessary.\textsuperscript{170} The importance of a preliminary assessment is that it is one means of determining if an emergency removal action is needed; additionally, it is the first step in determining if a site should be placed on Superfund’s NPL and be eligible for federally-funded cleanup of the waste.\textsuperscript{171}

CERCLA also requires the Agency for Toxic Substances and Disease Registry ("ATSDR") to perform a health assessment for each site on the NPL and for those sites proposed for listing on the NPL.\textsuperscript{172} The health assessment "shall be completed" no later than December, 1988, for facilities proposed for the NPL prior to October 1986; for all sites proposed after October 1986, the assessment shall be completed within one year of the date the site is proposed by EPA.\textsuperscript{173} Citizens or physicians may petition ATSDR for a health assessment at any site, regardless of whether or not it is listed or proposed for listing on the NPL.\textsuperscript{174} If a petition is submitted and ATSDR does not initiate a health assessment, ATSDR shall provide a written explanation of why a health assessment is not appropriate.\textsuperscript{175} Although ATSDR health assessments have been severely criticized,\textsuperscript{176} they are used by EPA to determine what actions should be taken to reduce human exposure at a site and may influence both EPA’s choice of remedy and the speed with which a cleanup is performed.\textsuperscript{177}

As mandatory responsibilities of EPA, the requirements to perform a preliminary assessment and health assessment are enforceable against EPA under CERCLA’s citizen suit provision.

\textsuperscript{170} 40 C.F.R. § 300.5 (1993); see also 40 C.F.R. § 300.420(b)(5)(iii) (1993). EPA is required to eventually perform a preliminary assessment on all of the 34,000 or more sites in CERCLIS. 40 C.F.R. § 300.420(b) (1993).
\textsuperscript{171} See 40 C.F.R. § 300.420(b)(ii), (iv) (1993).
\textsuperscript{174} Id. § 9604(i)(6)(B).
\textsuperscript{175} Id. CERCLA does not impose a time limit within which ATSDR must respond to a petition, nor does the statute establish a time within which ATSDR must complete a health assessment performed in response to a citizen or physician petition. Id.
Section 310 of CERCLA authorizes any person to commence a civil action against EPA where there is an alleged failure to perform any act or duty under CERCLA that is not discretionary.\(^\text{178}\) If successful, the citizen can request the court to order EPA to perform the assessments and may recover attorney's fees and costs.\(^\text{179}\)

Attempts to force EPA to list a site on the NPL or to speed up its timetable for making a cleanup decision are more problematic. When EPA decides to list a site on the NPL, it must publish its proposed decision in the *Federal Register* and solicit public comments.\(^\text{180}\) In contrast, EPA's regulations do not call for any public notice or opportunity to comment on the agency's decision not to list a site on the NPL. Because the decision to list a site on the NPL is characterized as rulemaking by EPA\(^\text{181}\) and because the decision not to promulgate a rule is reviewable by a court,\(^\text{182}\) the decision not to place a site on the NPL should be a final agency action reviewable under section 113(b) of CERCLA.\(^\text{183}\) However, because the decision not to place a site on the NPL is not publicized, it would be difficult for an aggrieved citizen to learn of EPA's decision. Even if a citizen were to learn of this decision, review would be according to the deferential arbitrary and capricious standard and would be based on the administrative record.\(^\text{184}\)

Even more problematic is challenging the actual cleanup decision of the agency, such as on the grounds that it is not sufficiently protective of public health. EPA's regulations provide opportunities for public participation in the agency process for making cleanup decisions\(^\text{185}\) and require that EPA consider community ac-

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\(^{178}\) *Id.* § 9659(a)(2). As with citizen suit provisions in other federal statutes, no action may be commenced before 60 days following notice to EPA of the intent to sue. *Id.* § 9659(e). One court held that it lacked jurisdiction to review EPA's failure to perform a mandatory health assessment at a Superfund NPL site. *See Hanford Downwinders Coalition*, Inc. v. Dowdle, 841 F. Supp. 1050 (E.D. Wash. 1993).

\(^{179}\) *See* 42 U.S.C. § 9659(c), (f) (1988).


\(^{181}\) *See* id.

\(^{182}\) *See* Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979).


\(^{184}\) *See* Kent County v. EPA, 963 F.2d 391, 393, 395-96 (D.C. Cir. 1992); Anne Arundel County v. EPA, 963 F.2d 412, 415 (D.C. Cir. 1992).

ceptance when selecting the appropriate cleanup remedy. Section 113(h) of CERCLA, however, prohibits a challenge to EPA's cleanup decision until after the cleanup is taken or secured. This prohibition on precleanup review has even been interpreted to extend to situations where the plaintiffs alleged that they would suffer irreparable injury were judicial review delayed until after the cleanup was completed.

Courts do have jurisdiction to review a constitutional challenge to the statute itself, rather than to EPA's administration of the statute. There is also authority for allowing a state agency to file suit in state court if some aspect of the ongoing or proposed cleanup would violate a state hazardous waste program. Under RCRA's citizen suit provisions, a citizen should have a similar opportunity to address any violations of RCRA at or during a CERCLA cleanup.

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188 See Boarhead Corp. v. EPA, 923 F.2d 1011, 1022 (3d Cir. 1991). The court professed: "In Boarhead's situation post clean-up review is likely to be inadequate to redress harm that occurred to archaeological and historical resources on Boarhead Farm during the EPA's clean-up. Nevertheless, the statute's plain language eliminates Boarhead's opportunity to obtain judicial review even in such circumstances." Id.; Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology, 999 F.2d 1212, 1218 (8th Cir. 1993) (no jurisdiction even where plaintiffs alleged imminent endangerment to public health), petition for cert. filed, 62 U.S.L.W. 3503 (U.S. Jan. 7, 1994) (No. 93-1124). But see Third Circuit Hears Argument on Power to Enjoin Superfund Harm, Toxics L. Rep. (BNA) 1099, 1099-1100 (1994) (at oral argument in United States v. Princeton Gamma-Tech Inc., court expresses hostility to government contention that courts have no power under CERCLA to enjoin irreparable harm resulting from cleanup activities).
189 See Reardon v. United States, 947 F.2d 1509, 1514-17 (1st Cir. 1991) (finding jurisdiction to review claim that EPA's filing of lien notice under Section 107(l) of CERCLA without hearing deprived plaintiffs of property without due process).
190 See United States v. Colorado, 990 F.2d 1565, 1575-80 (10th Cir. 1993) (state's efforts to enforce its EPA-delegated RCRA authority to ensure cleanup is in accordance with state laws and is not "challenge" to EPA response action), cert. denied, 114 S. Ct. 922 (1994). For criticism of this decision, see Review Urged of Ruling Giving State Cleanup Role Within U.S., Hazardous Waste Litig. Rep. (Andrews) 25,869, 25,870 (Jan. 5, 1994) (EPA characterizes case as allowing collateral attack on CERCLA cleanup decision); Robert H. Foster, Hazardous Waste Liability: Problem Solving Outside the Judicial Branch, Toxics L. Rep. (BNA) 841 (1993) (case will result in additional substantive and procedural requirements for cleanups); see also Louisiana v. Reilly, No. 92-274 (W.D. La. Apr. 6, 1992) (section 121(e)(2) of CERCLA states that statute right to bring action to enforce state waste disposal standards; section 113(h) does not prohibit enforcement action by state).
191 See United States v. Colorado, 990 F.2d at 1578 (Congress did not prohibit RCRA citizen enforcement suits where CERCLA response action is underway); Ouachita Parish Police Jury v. American Waste & Pollution Control Co., 606 So. 2d 1341, 1346-50 (La. Ct. App.) (court upholds injunction against disposal of waste from Superfund site; disposal
III. PROPOSALS FOR FURTHER GOVERNMENT ACTION

Citizens should not have to force their government either to enforce the law or to enforce the laws more equitably. In the first instance, it is the government agencies, therefore, that need to direct their attention and resources towards ensuring nondiscriminatory enforcement. Federal and state environmental agencies can do much to address any unfair disparate impacts from their enforcement activities without having to amend existing statutes or regulations.

EPA and state environmental agencies could take a first step towards ensuring that their laws and regulations are enforced equally in minority and low income communities by increasing the agency’s awareness both of the possible problem of unequal enforcement and of the demographics and socioeconomic status of the communities around regulated facilities. Because enforcement activities may be influenced by the demographics of the community and the ability of the community to participate in the agency’s decisionmaking processes, knowledge of the community’s characteristics can help the agency better recognize any unintentional bias that might affect the agency’s enforcement-related decisions.

Outreach and education are other important ways to remedy unequal access. EPA is aware that low income and minority communities are less likely to be aware of the agency’s activities and responsibilities and are, therefore, less likely to participate in the agency’s decisionmaking process. The degree of attention paid by an agency to a violating facility or waste site can be strongly

would violate section 121(d)(3) of CERCLA and landfill’s agreement with local government), writ denied, 609 So. 2d 234 (La. 1992), cert. denied, 113 S. Ct. 2339 (1993). But see Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control and Ecology, 999 F.2d 1212, 1217-18 (8th Cir. 1993) (distinguishing United States v. Colorado because case was action brought by state, not by citizen), cert. denied, 62 U.S.L.W. 3657 (U.S. Apr. 4, 1994).

192 See U.S. E.P.A., ENVIRONMENTAL JUSTICE STRATEGY (DRAFT 4) 5 (1994). "Each region should identify affected communities or populations using EPA-developed general national guidance. Criteria in that guidance may include: demographic racial and ethnic makeup of a community, income levels, population sensitivity, environmental exposures, past regulatory practices, and previous and ongoing interactions with the community." Id.; TEXAS ENVTL. EQUITY AND JUSTICE TASK FORCE, A REPORT TO THE TEXAS WATER COMMISSION & THE TEXAS AIR CONTROL BOARD 19 (1993) (hereinafter TEXAS ENVTL. EQUITY AND JUSTICE TASK FORCE) (recommending development of database of information on enforcement actions, demographic and socioeconomic information, health data, complaints, etc., to help agency be proactive with respect to equitable treatment of all communities).

193 See SUPPORTING DOCUMENT, supra note 27, at 19 (agency employees noted that poor and racial minority communities are rarely involved in agency rulemakings and seem una-
influenced by the amount of attention drawn to the site by the local community.  

The ability of an affected community to influence enforcement decisions takes both knowledge of the enforcement process and resources. Little information is provided by EPA, and probably less by states, identifying particular violations that have been detected and what enforcement responses the agency intends to pursue. Although EPA publishes its administrative penalties and proposed settlements in the Federal Register, this notice would not likely reach affected communities, particularly communities whose members lack knowledge of and access to the Federal Register. In fact, EPA has no policy or procedure for notifying a community when a violation is detected at a facility in their neighborhood.

Educating the community about the enforcement process and providing more accessible notice concerning both violations and proposed enforcement actions will enable communities to express their views and will encourage agencies to take greater account of community concerns when exercising enforcement judgment.

aware of their ability to use agency resources and to petition ATSDR to perform health assessments).

194 See Zimmerman, supra note 60, at 661-62; Hazardous Waste Company Shuts Down Operations Under State Court Settlement, Toxics L. Rep. (BNA) 1275 (1991) (attorney general credits citizen activists for alerting state officials to continuing problems at facility); see also Community Activists Can Push Company to Take Extra Steps, NAT'l L.J., Aug. 30 1993, at 55 (more than 50% of corporate general counsel said community activists had forced company to focus additional attention on environmental concerns at their facilities).

195 See 28 C.F.R. § 50.7 (1992) (Department of Justice shall lodge consent decrees and provide opportunity for public comment and consideration of comments); 33 U.S.C. § 1315(g)(4) (1988) (before assessing administrative penalty under Clean Water Act, EPA shall provide public notice and opportunity to comment); 42 U.S.C. § 7413(g) (Supp. IV 1992) (before EPA consent decree or settlement agreement of any kind is final under Clean Air Act, EPA shall provide opportunity by notice in Federal Register for persons to comment); 42 U.S.C. § 7003 (1988) (prior to final entry of EPA settlement of RCRA imminent hazard claim, agency must provide notice and opportunity for public to comment).

196 See Samara F. Swanston, Legal Strategies for Achieving Environmental Equity, 18 YALE J. INT'L L. 337, 342 (1993) (if trained to monitor environmental notices, citizens can have greater say in environmental decisions). EPA's Enforcement Management Council Workgroup identified improved access to information on enforcement and increased awareness of ways to participate in the enforcement process as two ways to empower the public and address unequal enforcement. See EMC Enforcement Workgroup Report, supra note 28, at 11, 17-19. "A powerful opportunity for insuring equity may be the education of the public, particularly disadvantaged communities, about how the environmental enforcement process and their citizen enforcement authorities operate under environmental law. This would be a significant step in empowering the public." Id.

In apparent recognition that the "public participation" provisions in CERCLA have become more like public relations efforts and not the meaningful involvement that communities expect, the Clinton Administration's Superfund reauthorization bill would require EPA to provide for "early, direct and meaningful community involvement in each significant
requirement that agencies publish notice, in a timely and accessible manner, of all violations detected by inspectors and of the enforcement actions pending and concluded would foster greater community involvement.\textsuperscript{197} Such notice would not only make it easier for communities to influence the enforcement process, it could have a deterrent effect by embarrassing the offending parties into future compliance.\textsuperscript{198}

Because most environmental enforcement actions are taken by state agencies and because those agencies are even less likely than EPA to have guidance documents to help ensure that enforcement decisions are made in an unbiased, systematic way,\textsuperscript{199} a greater effort must be made to force states to take steps to ensure that their enforcement decisions do not discriminate. EPA acknowledges the applicability of Title VI to its financial assistance programs,\textsuperscript{200} but has not, to date, investigated possible discriminatory enforcement activities by state and local agencies receiving federal financial assistance.\textsuperscript{201}

Although much of the enforcement of federal environmental laws has been delegated to the states,\textsuperscript{202} EPA has the ability through its pre-award review and enforcement monitoring activities under Title VI to ensure that state enforcement actions do not discriminate.\textsuperscript{203} EPA also retains the authority, through its delegation regulations and agreements, to oversee state implementation and enforcement of federal environmental laws.\textsuperscript{204} Therefore,
EPA can encourage, and indeed even force, state agencies to address the issue of discriminatory enforcement.

EPA has often proposed to target enforcement against industries located near poor or minority areas. In light of the strong evidence that minority and low income communities are being exposed to a disproportionate amount of pollution and risk to their health, targeted enforcement seeks to focus the agency’s resources (for example, inspections or administrative or judicial actions) on the areas and persons who are suffering the greatest risks. A similar strategy is to develop enforcement initiatives that focus on types of pollution problems that are more prevalent in minority or low income communities. An example is to target enforcement of pesticide regulations or rules on lead, two hazards for which minorities are at greater risk.

As an example of targeted enforcement, EPA cites to a 1990 lawsuit filed in East Chicago against a steel plant that resulted in a $3.5 million penalty and commitment by the company to spend $26 million to reduce pollution. Yet even with all of the discussion about targeted enforcement, few cases have been filed that direct enforcement resources towards disadvantaged communities.

See, e.g., Marianne Lavelle, Unequal Enforcement to be Probed, NAT'L L.J., Apr. 5, 1993, at 3; Environmental Equity Warrants Consideration This Session of Congress, Lawyers, Activists Say, [Current Developments] Env't Rep. (BNA) 3089 (1993); Memorandum from EMC Workgroup on Equity in Enforcement to Enforcement Management Council 13 (Apr. 14, 1993) (draft on file with author); see also Memorandum from Myles E. Flint, Acting Assistant Attorney General et al., Environment and Natural Resources Division, U.S. Department of Justice, to All Section Chiefs 4 (Sept. 3, 1993) (on file with author) (alternative strategies for bringing environmental justice cases may include initiatives targeting violators of environmental laws in identified burdened communities).

See TEXAS ENVTL. EQUITY AND JUSTICE TASK FORCE, supra note 192, at 19. Targeted enforcement in high risk areas has also been recommended for state agencies as a way of balancing enforcement resources between high-income areas that may file a large number of complaints and low-income areas that are more affected but may not complain or may find their complaints disregarded. Id.

See supra note 11 and accompanying text.

See Lavelle & Coyle, supra note 12, at 3; supra note 188 and accompanying text. In order to identify and target enforcement resources, the agency will need better information on the demographics and socioeconomic status, as well as the risks, in communities. Id.


EPA has also identified the June 1993 filing of an enforcement action against Sherwin Williams in a heavily industrialized, low-income minority community in southeast Chi-
Environmental agencies could also improve enforcement in communities that are disproportionately affected by pollution and waste by making greater use of nonmonetary sanctions against violators. When the penalty is paid by a violator, it will often go into the U.S. Treasury or the general fund for the state and not directly to the agency for use in environmental programs. In those communities subjected to greater pollution, with the accordingly greater risks to health and welfare, paying money to the government may do little to reduce the risks, except for the deterrence value of the penalty.

In a Supplemental Environmental Project ("SEP"), the violator agrees, as part of a settlement, to expend money remediating the adverse consequences of the violations or undertaking steps beyond those required by law to reduce pollution from the facility. A SEP might include a pollution prevention or reduction project, a project to restore or repair damage done to the environment, an audit to identify deficiencies that may be contributing to the violations, or an enforcement-related public awareness project.

EPA has identified SEPs as a means of addressing the issue of the disproportionate impact of pollution and waste on certain communities, and there is no reason why SEPs could not also be used as an example of targeted enforcement. See Steven A. Herman, EPA's Enforcement Priorities for Fiscal Year 1994, Nat'l Envtl. Enforcement J., Feb. 1994, at 3, 11. Region X is using environmental justice factors to determine which facilities will be scheduled for multimedia inspections. Id. Proposed legislation would force EPA to conduct compliance inspections every two years at all toxic chemical facilities in the 100 counties with the highest toxic chemical releases. See S. 1161, 103d Cong., 1st Sess. § 5(d) (1993); H.R. 2105, 103d Cong., 1st Sess. § 201 (1993).

211 Under the Miscellaneous Receipts Act, 31 U.S.C. § 3302(a), (b) (1994), unless Congress directs otherwise, public funds shall be deposited in the Treasury. States, however, often use penalties to run environmental programs and, therefore, may have less incentive to reduce fines and redirect the money to community projects. See Growth Expected in Program to Cut Fines in Exchange for Pollution Prevention, [Current Developments] Envtl. Rep. (BNA) 2692, 2694 (1993) [hereinafter Growth Expected in Program]; see also La. Rev. Stat. Ann. § 30:201(C) (West Supp. 1994) (all sums recovered through penalties shall be paid into Environmental Trust Fund).


213 Id. at 2-4. Under EPA's policy, general education or environmental awareness projects, contributions to research, and projects unrelated to enforcement but otherwise beneficial to the community are not allowed. Id. at 5; Growth Expected in Program, supra note 211, at 2692. SEPs are now included in 5 to 10 percent of settlements of EPA enforcement cases. As an example, EPA reduced a proposed administrative penalty from $34,000 to $1,000 in exchange for the company's agreement to make improvements to the plant that would substantially reduce emissions of chemicals. See Facility Improvements Allowed in Lieu of Penalties, [Current Development] Envtl Rep. (BNA) 164 (1990).
in a like manner by state agencies. SEPs should be encouraged where they will directly benefit the community, not just the violator. Where an agency does not require the implementation of a SEP as part of a settlement, citizens could object to the settlement on the grounds that it does not adequately protect the public interest and is not fair to the community surrounding the noncomplying facility.

Finally, additional legal and technical resources for minority and low income communities would help alleviate unequal enforcement. It is perhaps not a coincidence that some of largest penalties imposed by EPA have been against facilities that have

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215 See LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, POLICY RECOMMENDATIONS TO THE PRESIDENTIAL TRANSITION TEAM FOR THE UNITED STATES DEPARTMENT OF JUSTICE I(1) (1992) (requesting that for areas experiencing disproportional impact, Department should focus on settlements and confer benefits of environmental protection through creative means). To retain the deterrent effect of a SEP, companies should not be able to deduct the SEP expenses as a cost of doing business, particularly since EPA does not allow companies to deduct the cost of penalties. See Growth Expected in Program, supra note 211, at 2693 (corporate environmental attorney states companies love SEPs because "they can deduct the expense as a cost of doing business."); U.S. E.P.A., MODEL CERCLA RD/RA CONSENT DECREE, reprinted in 22 Chem. Waste Lit. Rep. 1010, 1040 (1991) (example of EPA language on prohibiting deductibility of penalties for tax purposes).

216 See generally United States v. Akzo Coatings, 949 F.2d 1409, 1435 (6th Cir. 1991) (standard for court approving settlement is whether proposed decree's terms are fair, reasonable, and adequate; protection of public interest is key consideration); United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977) (appropriate standard is whether decree adequately protects public interest).

The United States has taken the position that a court may not order an environmental project by the defendant in lieu of paying penalties, although the parties to a consent decree may themselves agree to such an arrangement. See Public Interest Research Group v. Powell Duffryn Terminals Inc., 913 F.2d 1350, 1355 (9th Cir. 1990) (court, rather than through agreement of parties in decree, shall be paid to Treasury; district court is without authority to order penalties be paid into trust fund to be used for improving New Jersey's environment), cert. denied, 498 U.S. 1109 (1991); Sierra Club, Inc. v. Electronic Controls Design, 909 F.2d 1350, 1355 (9th Cir. 1990) (while court cannot order defendant in citizens' suit to make payments to organization other than Treasury, prohibition does not extend to settlement agreement). But see United States v. City of San Diego, 21 Envtl. L. Rep. (Envtl. L. Inst.) 21,223, 21,226 (S.D. Cal. 1991) (court finds section 309(d) of Clean Water Act permits court to consider permanent water conservation projects as form of penalty and in lieu of $2.5 million penalty payable to U.S. Treasury). The 1990 amendments to Clean Air Act authorize district courts to apply up to $100,000 towards beneficial mitigation projects in lieu of being deposited into the Treasury. 42 U.S.C. § 7604(g)(2) (Supp. IV 1992).

Although a court may not be able to order that penalty funds be directed to an environmentally beneficial project, a court could refuse to enter the decree by finding that the failure to address the health and environmental problems of the community makes the decree unfair. Even were the citizens not successful in blocking entry of the decree, their opposition may influence the government to pay more attention to the needs of the community in future settlement agreements.
also been the subject of legal enforcement action by citizens. Current Justice Department officials have expressed their desire to assist citizen suit plaintiffs, representing a change from past government hostility towards such suits. The government could also assist citizens in the legal arena by eliminating the practice of opposing citizen intervention into government enforcement actions, thereby making it easier for citizens to intervene.

The Technical Assistance Grants ("TAG") program under CERCLA provides government grants of up to $50,000 for community organizations to obtain technical assistance in interpreting information at Superfund NPL sites. EPA has recognized the potential of TAGs to help increase the involvement and effectiveness of minority and low income communities. However, the TAG program has been underutilized by the public, in part because of the

217 See Lavelle & Coyle, supra note 12, at S6. "One factor that seems clear from the cases NLJ analyzed is that citizen involvement raises penalties. Top penalties among the RCRA and multilaw cases were levied where citizens took the dramatic step of joining the litigation." Id. The authors cite as examples $1.2 million fine against Penntech Papers, Inc., where EPA brought its action after a citizen suit, and $2.8 million fine against Environmental Waste Control, Inc., where citizens intervened in federal enforcement action. Id.

218 Compare Environmental Laws to be Top Priority with New Administration, DOJ's Hubbell Says, Daily Rep. for Executives (BNA) A-194 (1993) (Department of Justice official says department intends to begin program to help community groups that wish to file citizens suits; will work to strengthen citizen suit sections within Clean Water Act when it comes before Congress for authorization; and would seek to broaden use of citizen suits) with Thomas E. Hookano, The Government Perspective, 17 Envtl. Lit. Rep. 10,260, 10,261 (1987) (Department of Justice official expresses concern that citizen suits could have detrimental effect on government enforcement efforts by leading to inappropriate remedies, diverting government resources away from government priorities, and shifting government resources away from enforcement and toward regulatory and administrative process by encouraging more challenges by industry to permit conditions).


administrative burdens associated with applying for, obtaining and using the grants.\textsuperscript{222} TAGs are an example of government assistance to community organizations seeking to address pollution in their communities that could, and should, be expanded under CERCLA and replicated in other statutes.\textsuperscript{223}

CONCLUSION

It is time to bring the government's enforcement of environmental laws out from behind closed doors and inaccessible agency proceedings and into the communities that are directly affected by the pollution. The empirical evidence of unequal enforcement is conflicting, and there is clearly a need for more data to determine the extent of discrimination as well as to focus better on the causes and cures. The often unbridled prosecutorial discretion enjoyed by the government, coupled with enforcement decisions that are either unsupported in the record or not made with the participation or consultation of the community, surely create conditions that make unequal enforcement not just possible, but expected. Moreover, when repeated observations confirm that the enforcement decisions of environmental agencies are influenced by the degree of pressure and attention placed on a particular problem, there is a demonstrated need to ensure that enforcement decisions do not overlook those communities that may well be suffering both from a disproportionate amount of pollution and an inability to participate effectively in the enforcement process.

The enforcement of environmental laws is a very formalized legal undertaking. Inspections are made according to prescribed procedures, violations are determined by comparing the behavior to standardized legal norms, the accused are provided with legal proceedings to challenge the charges, and the case is resolved

\textsuperscript{222} See U.S. GEN. ACCOUNTING OFFICE, EPA's SUPERFUND TAG PROGRAM—GRANTS BENEFIT CITIZENS BUT ADMINISTRATIVE BARRIERS REMAIN 1-2 (1992); see also S. 1834, 103d Cong., 2d Sess. § 102(a), (b) (1994); H.R. 3800, 103d Cong., 2d Sess. § 102(a), (b) (1994) (the Clinton Administration's Superfund reauthorization bills propose amendments to EPA's TAG authority that will address some concerns).

\textsuperscript{223} See S. 1161, 103d Cong., 1st Sess. § 7 (1993); H.R. 2105, 103d Cong., 1st Sess. § 301 (1993). The proposed Environmental Justice Act would establish TAGs awarded by the Secretary of Health and Human Services to any individual or group in an environmental high impact area for use in obtaining technical assistance relating to environmental compliance inspections and health studies. \textit{Id.}
ENFORCEMENT OF ENVIRONMENTAL LAWS

through a negotiated legal document or by a judicial officer.\textsuperscript{224} These laws and procedures are difficult to navigate for even the experienced environmental lawyer, and almost impossible for many communities.\textsuperscript{225} Making enforcement proceedings more accessible to communities and increasing the availability of legal assistance for low income and minority communities must be part of any solution to unequal enforcement of environmental laws. If the accused will surely have its legal representative challenging any proposed enforcement action, and if the agency seems primarily concerned about ensuring fair and equitable treatment of the regulated community, then the persons most affected by the non-compliance must be assured of having an equal opportunity to have their interests directly and adequately represented in the proceedings.\textsuperscript{226}

The participation need not, and indeed should not, be by lawyers alone. The observation that most community environmental struggles are not won solely through the hands of lawyers is profoundly accurate.\textsuperscript{227} If equal enforcement of environmental laws is to be achieved, then all aspects of the enforcement process need to be opened up to the residents of the affected communities—their participation in making enforcement policies and decisions must be sought out, their opinions and desires respected and addressed, and their ability to protect their own communities and police the facilities in those communities enhanced. Without such effective

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\textsuperscript{224} See ABA COMM. ON ENVIRONMENTAL LAW, REPORT TO THE HOUSE OF DELEGATES 14 (1993) (report to ABA on environmental justice identifies impediments that prevent full participation by minority and low-income communities in environmental decisionmaking).

\textsuperscript{225} Id.

\textsuperscript{226} The American Bar Association's House of Delegates adopted a resolution urging agencies to give priority attention to the problem of environmental discrimination by, among other things, improving agency procedures governing access to information and decision making process; distributing information about environmental impacts and applicable laws; and urging increased delivery of legal services in the area of environmental law to minority and low income communities. ABA, RESOLUTION (Aug. 11, 1993); see also Steven Keeva, A Breath of Justice, ABA J., Feb. 1994, at 88, 90; ABA Sec. on Individual Rights & Responsibilities, Not in My Backyard, HUMAN RIGHTS, Fall 1993, at 26, 29. See generally Richard J. Lazarus, The Meaning and Promotion of Environmental Justice, 5 MD. J. CONTEMP. LEGAL ISSUES 1, 11 (1994).

\textsuperscript{227} See Cole, supra note 11, at 648. "Poor people understand that environmental hazards are not legal problems, but political problems." Id. Cole has advocated that "lawyers play second fiddle to community organizations." Keeva, supra note 226, at 92. Others have argued that achieving environmental justice for poor and minority communities will require that lawyers be prepared to use not just litigation, but also public education, community organizing, legislative activities, and civil disobedience. Id. at 91 (quoting Alice Brown, NAACP Legal Defense Fund); see also Godsil, supra note 95, at 426-27 (advocating use of civil rights era techniques to ensure government accountability).
citizen participation and government accountability, one should not be surprised to find environmental laws unequally enforced.