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Ann E. Goode

Suellen Keiner

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Managing for Results to Enhance Government Accountability and Achieve Environmental Justice

ANN E. GOODE & SUELLEN KEINER*

Over the past three years, the National Academy of Public Administration (the Academy) has conducted a series of three studies¹ on how federal, state, and local governments have responded to environmental justice concerns. These government initiatives have been designed to address the widely recognized fact that some low-income and people-of-color communities are exposed to significant environmental and public health hazards.²

* We would like to acknowledge the Academy panel members who guided these studies:

Philip J. Rutledge, *Chair*, Professor Emeritus, School of Public and Environmental Affairs; James Barnes, Professor, School of Public and Environmental Affairs and Professor, School of Law, Indiana University; Teodoro Benavides, City Manager, City of Dallas, Texas; Jonathan B. Howes, Special Assistant to the Chancellor and Professor of Planning and Policy, University of North Carolina at Chapel Hill; Valerie Lemmie, City Manager, City of Cincinnati, Ohio; David Mora, City Manager, Salinas, California; James Murley, Director, Joint Center for Environmental and Urban Problems, Florida Atlantic University; Sylvester Murray, Professor of Public Administration, Cleveland State University; Eddie Williams, President, Joint Center for Political and Economic Studies.

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1. NAT'L ACAD. OF PUB. ADMIN., ENVIRONMENTAL JUSTICE IN EPA PERMITTING: REDUCING POLLUTION IN HIGH-RISK COMMUNITIES IS INTEGRAL TO THE AGENCY'S MISSION (2001), available at <http://www.epa.gov/compliance/resources/publications/ej/napa-epa-permitting.pdf> [hereinafter ENVIRONMENTAL JUSTICE]; NAT'L ACAD. OF PUB. ADMIN., MODELS FOR CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE (2002), available at [http://209.183.198.6/NAPA/NAPAPubs.nsf/0/95ffb0b62b4e26d85256be3004ff436/\\$FILE/Final+State+EJ+2002.pdf](http://209.183.198.6/NAPA/NAPAPubs.nsf/0/95ffb0b62b4e26d85256be3004ff436/$FILE/Final+State+EJ+2002.pdf) [hereinafter MODELS FOR CHANGE]; NAT'L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING (2003), available at [http://209.183.198.6/NAPA/NAPAPubs.nsf/0/f0fec3e70316db4b85256d650052f125/\\$FILE/EJ.pdf](http://209.183.198.6/NAPA/NAPAPubs.nsf/0/f0fec3e70316db4b85256d650052f125/$FILE/EJ.pdf) [hereinafter ADDRESSING COMMUNITY CONCERNS].

2. ENVIRONMENTAL JUSTICE, *supra* note 1, at v.

The Academy's research has shown that effective programs to address critical environmental justice issues can play an important role in refining and enhancing this nation's ability to improve environmental protection for *all* its citizens. If properly addressed, these initiatives can also enhance the public's trust and engagement in a more inclusive, pro-active government. In turn, this increased public participation will strengthen our democratic processes and better enable all citizens, including those who are the most vulnerable or least enfranchised, to increase their influence over decisions that impact their health and environment, indeed even their lives.

The Academy's three studies have identified the need for:

- Strategies that prioritize actions in communities exposed to the greatest hazards, both in terms of overall risk and geographic/localized concerns;
- Enhanced, meaningful citizen participation that will enable the public to influence all levels of government decisions that affect their lives;
- Improved community-right-to-know procedures that will create greater public understanding and awareness, as well as transparency of agency processes and accountability, plus better information about neighborhood health and environmental conditions;
- Collecting relevant, comprehensive, and reliable data on local emissions and exposures to facilitate agency decisions that reflect actual environmental conditions and potential health risks;
- Effective federal, state, and local enforcement of existing environmental, health, and zoning laws; and
- Better coordination among all three levels of government to achieve improved efficiency and effectiveness for preventing future environmental justice problems and addressing current concerns.³

Increasing allegations about environmental justice problems have challenged agencies' usual ways of protecting public health and the environment. They have also highlighted the limitations of current administrative processes and tools and will require innovative problem solving, pollution prevention, transparency, and accountability at all three levels of government. Ultimately, agencies' most important tasks are to identify communities experienc-

3. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 11.

ing the highest risks, correct hazardous conditions, and establish effective decision-making processes and accountability mechanisms that ensure new problems are not created, while existing issues are resolved with appropriate public involvement, disclosure, and follow-through.

Reducing pollution burdens on every citizen should be at the heart of environmental regulatory programs. Thus, addressing environmental justice concerns effectively requires that agencies implement performance-based management systems, establish goals for reducing risks, respond to citizens' other key health concerns, measure results against articulated agency goals, assign clear responsibility for measuring and achieving promised results, and create transparency and easy public access to relevant information. Indeed, these functions are a vital part of the core responsibilities for all three levels of government to be effective, whether in protecting public health and the environment or in any other agency programs.

Between 2001 and 2003, the Academy conducted three studies that examined the various initiatives taken by federal, state, and local governments to address environmental justice concerns. The three studies found that the need to achieve accountability for results was a common theme across all levels of government. For these studies, the Academy relied on the U.S. Environmental Protection Agency's (EPA's) definition for environmental justice:

Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. *Fair treatment* means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies. *Meaningful involvement* means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in

the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.⁴

Academy Finds Some Progress, but Accountability is Still Lacking

At all three levels of government, the Academy's studies found encouraging progress, but two consistent and recurring problems were the failure to integrate environmental justice initiatives fully into core agency programs and the lack of performance measures or accountability mechanisms. The Academy's first report, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities is Integral to the Agency's Mission*,⁵ focused on the environmental permitting process and the extent to which EPA has incorporated environmental justice concerns into its permitting programs by using its current legal authority under the Clean Air Act,⁶ the Clean Water Act,⁷ and the Resource Conservation and Recovery Act.⁸ The Academy's study found that EPA has clearly articulated policy commitments to environmental justice, resources dedicated to the issue, projects designed to address some specific community concerns, and legal authorities that can be used to address environmental justice issues. But the Academy also found that EPA still has not integrated its environmental justice initiatives into its core programs and functions, such as permitting, standard setting, and rulemaking.⁹

In 2002, the Academy's second report examined how four state environmental agencies have addressed environmental justice concerns. That report, *Models for Change: Efforts by Four States to Address Environmental Justice*,¹⁰ found that Indiana, California, Florida, and New Jersey have used a variety of approaches to address environmental justice problems, including:

- Enacting new legislation;
- Proposing new regulations;

4. MODELS FOR CHANGE, *supra* note 1, at 1-2 (quoting OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, GUIDANCE TO ASSESSING AND ADDRESSING ALLEGATIONS OF ENVIRONMENTAL INJUSTICE, WORKING DRAFT 7 (2001)).

5. See ENVIRONMENTAL JUSTICE, *supra* note 1.

6. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

7. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

8. Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (2000); see also ENVIRONMENTAL JUSTICE, *supra* note 1, at 1.

9. See ENVIRONMENTAL JUSTICE, *supra* note 1, at 17-18.

10. MODELS FOR CHANGE, *supra* note 1.

- Issuing executive orders, policies, or other directives;
- Launching in-depth public health studies;
- Convening advisory committees composed of diverse stakeholders; and
- Implementing various directives and management measures.¹¹

While the variety of state approaches provides heartening evidence that at least a few states are attempting to address environmental justice concerns, this study also identified the need to strengthen accountability and integrate environmental justice into the states' core environmental protection and public health programs.¹² For instance, in Florida, the leadership for environmental justice has arisen outside the state's environmental agency, which does not believe it has the legal authority to consider these issues.¹³ The need for strengthened accountability was true for even the most expansive state programs. California has adopted legislation requiring that state agencies address environmental justice issues, plus other innovative approaches and tools, some of which were based on risk reduction strategies. However, California's initiatives still lack measurable program objectives and accountability measures.¹⁴

The Academy found similar gaps in local government efforts to address environmental justice. Yet, local governments are a critical part of the equation because they generally make the initial land use and zoning decisions that determine where various kinds of facilities can be sited, and many of their past decisions have produced serious environmental justice problems. The Academy's third study, *Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning*,¹⁵ documents both the current and historic relationship between local planning and zoning and environmental justice issues. The relationship is sufficiently strong that one scholar has described local zoning and land use planning as "a root enabling cause of disproportionate burdens [and] environmental injustice."¹⁶

11. *Id.* at 1.

12. *Id.* at 2.

13. *Id.* at 55, 61.

14. *See id.* at 114.

15. ADDRESSING COMMUNITY CONCERNS, *supra* note 1.

16. *Id.* at 25 (quoting Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572 (2002)).

After examining the five communities—Huntington Park, California; Austin, Texas; Chester, Pennsylvania; Altgeld Gardens in Chicago, Illinois; and St. James Parish, Louisiana—the Academy identified a similar need for local governments to integrate their environmental justice programs into the fabric of their land use planning and zoning decisions and to develop accountability measures. The Academy urged localities to utilize their full regulatory and common law authority to reduce hazards in low-income and people-of-color communities by preventing or reducing pollution, mitigating environmental impacts on nearby neighborhoods, and resolving community complaints about noise, odor, and traffic.¹⁷ The Academy's research also highlighted the importance of inter-governmental coordination because agencies at each level of government have unique legal authorities, expertise, technical tools, and other resources to prevent or mitigate neighborhood impacts from nearby pollution sources.¹⁸

Accountability Issues

One of the Academy's most important findings was that, at all three levels of government, initiatives addressing environmental justice concerns fail to integrate these efforts into the basic fabric of core agency functions and lack performance and accountability measures to determine the effectiveness of environmental justice programs.¹⁹ The Academy's finding thus corresponds to the principle issues raised by representatives from people-of-color and low-income communities, which have included the following:

- Failure to monitor or reduce high levels of risk in their communities;
- Lack of timely, credible data that are easily accessible to the public;
- No meaningful public involvement in decisions affecting community welfare;
- The need for technical support to enable neighborhood groups to participate effectively; and
- Uneven enforcement of existing environmental, health, and zoning laws, especially against pollution sources near low-income or people-of-color neighborhoods.

17. *Id.* at 13.

18. *Id.* at 11.

19. ENVIRONMENTAL JUSTICE, *supra* note 1, at 17.

Monitoring Exposures and Reducing Risks

In its first report, the Academy found that EPA has failed to adopt specific outcome measures for its various commitments to environmental justice, and has not established any methods for measuring progress in achieving established goals.²⁰ Thus, EPA still does not have a routine process for identifying communities with high exposure levels or giving them priority attention, either to prevent pollution or to reduce existing public health hazards.²¹ Identifying these high-risk communities is an important first step that would enable EPA to set quantifiable goals for its program managers to reduce environmental hazards.

Because high-risk communities often result from cumulative exposures created by a variety of pollution sources, EPA and organizations like the National Research Council²² and the Presidential/Congressional Commission on Risk Assessment and Risk Management²³ have supported the need for cumulative risk assessments. However, the science for conducting cumulative risk assessments when issuing or revising environmental permits is currently not adequate for making reliable decisions.²⁴ Nonetheless, EPA and several states have proposed developing tools to analyze exposures of disproportionately impacted communities, such as EPA's guidance for investigating complaints under Title VI of the 1964 Civil Rights Act²⁵ and the Texas legislature's requirement that its environmental agency adopt a method for assessing cumulative environmental and public health impacts.²⁶

In addition, while the Academy was conducting the first phase of its research during 2001, EPA had a number of projects underway or recently completed that were designed to produce better tools for assessing and reducing cumulative risks. These approaches include guidance on risk reduction for toxic emissions in local areas, a pilot project on indoor and ambient toxics, a methodology for analyzing community-specific cumulative exposures, and Title VI guidance.²⁷ All of these efforts are now building a valuable body of knowledge that will advance EPA's ability to as-

20. *Id.* at 2.

21. *Id.* at 45.

22. *Id.*

23. *Id.*

24. *See id.* at 47.

25. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

26. *See ENVIRONMENTAL JUSTICE*, *supra* note 1, at 46.

27. *Id.* at 52.

sess community exposures in areas with high cumulative levels of pollution. Similarly, a few state agencies have developed strategies, like the Neighborhood Assessment Work Plan of California's Air Resources Board, that can be used to evaluate and address local pollution impacts.²⁸

Sensitivity to reducing localized risks must also be considered when EPA or states conduct rulemaking, as well as when they review site-specific permit applications. Just as an individual permit can have significant implications for an already overburdened community, a rulemaking that does not take into consideration potential localized impacts that may cause or increase disproportionate environmental impacts can also produce significant public health risks for over-exposed communities, and thereby exacerbate environmental justice concerns instead of providing solutions. EPA's recent revisions to the New Source Review (NSR) program²⁹ provide a telling example of why accountability for environmental justice problems must begin by considering these impacts when developing or revising national rules.

The Academy's Congressionally mandated study of the Clean Air Act's New Source Review program, *A Breath of Fresh Air: Reviving the New Source Review Program*,³⁰ noted that older, more polluting facilities tend to be concentrated in people-of-color and low-income communities.³¹ Understanding whether current or proposed rulemaking and enforcement activities may actually reduce emissions can have significant implications for communities near facilities covered by the NSR program. For example, a 2001 study on unequal exposure to pollution hazards from such sources in Massachusetts found:

- Four of the five dirtiest power plants in the state are located in low- to moderately-low-income communities and one is located in a high-minority community (greater than twenty-five percent minority),³² and

28. MODELS FOR CHANGE, *supra* note 1, at 97.

29. Clean Air Act, 42 U.S.C. §§ 7470-7499, 7501-7515 (2000).

30. NAT'L ACAD. OF PUB. ADMIN., *A BREATH OF FRESH AIR: REVIVING THE NEW SOURCE REVIEW PROGRAM* (2003), available at http://www.nam.org/Docs/REP/26401_NAPA_NSR_April-2003.pdf?DocTypeID=9&TrackID=&Param=@CategoryID=790@TPT=A+Breath+of+Fresh+Air%3A+Reviving+New+Source+Review+Program [hereinafter *A BREATH OF FRESH AIR*].

31. *Id.* at 72.

32. DANIEL R. FABER & ERIC J. KRIEG, PHILANTHROPY & ENVIRONMENTAL JUSTICE RESEARCH PROJECT, NORTHEASTERN UNIV., *UNEQUAL EXPOSURE TO ECOLOGICAL*

- These five plants are responsible for more than 50 percent of the power plant pollution in all of New England and are legally emitting at a rate that is from 2.9 to 4.0 times the emission rate of plants built after 1977 because of a loophole in clean air laws.³³

Another recent report from the Harvard School of Public Health found that:

[C]urrent emissions from [two of these] plants alone can be linked to 43,300 asthma attacks and nearly 300,000 daily incidents of upper respiratory symptoms per year among the 32 million people residing in New England, eastern New York, and New Jersey. An additional 159 premature deaths can be attributed to this pollution each year. However, the health risks are greatest for those living in communities adjacent to these plants. Twenty percent of the total health impact occurs in the 8 percent of the population that lives within 30 miles of the facilities.³⁴

Low-income and people-of-color communities are also exposed to disproportionate pollution burdens, in addition to the emissions produced by facilities close to their homes. The Massachusetts study further noted that:

- On average, communities with median household incomes of less than \$30,000 face a cumulative exposure rate to all environmentally hazardous sites and facilities that is three times greater than all other communities in the state.³⁵
- On average, communities where people of color make up twenty-five percent or more of the population face a cumulative exposure rate to all environmentally hazardous sites and facilities which is nearly nine times greater than communities where less than five percent of the population are people of color.³⁶

HAZARDS: ENVIRONMENTAL INJUSTICES IN THE COMMONWEALTH OF MASSACHUSETTS 30 (2001), available at http://www.environmentalleague.org/Unequal_Exposure_Report.pdf.

33. *Id.* at 28-29.

34. *Id.* at 32; see also JONATHAN LEVY ET AL., CLEAN AIR TASK FORCE, HARVARD SCHOOL OF PUBLIC HEALTH & SULLIVAN ENVIRONMENTAL CONSULTING, ESTIMATED PUBLIC HEALTH IMPACTS OF CRITERIA POLLUTANT AIR EMISSIONS FROM THE SALEM HARBOR AND BRAYTON POINT POWER PLANTS (2000), available at <http://www.hsph.harvard.edu/papers/plant/executive.pdf>.

35. FABER & KRIEG, *supra* note 32, at iii.

36. *Id.*

- Unequal exposure to air pollutants for lower-income families and people of color is further aggravated by substandard housing; inadequate health care; a lack of public parks and safe spaces; a lack of social service; and so forth.³⁷

Additionally, existing environmental laws are not equally enforced in some of these same communities. In 2003, *The Boston Globe* reported that, while twenty-seven percent of major industrial sources in Massachusetts holding environmental permits had been inspected in the past two years, only fifteen percent of the major sources in minority communities were inspected.³⁸ The cumulative consequences of failure to target agency efforts on reducing environmental justice problems, by both federal and state enforcers, can create disproportionate environmental burdens and potential health risks for these communities.

Such concerns are not limited to Massachusetts. A 2002 report by a coalition of Georgia civil rights and environmental organizations highlighted their concerns about the national rulemaking for the NSR program as applied to power plants, which they described as “the primary backstop against disaster for many communities that face an unrelenting increase in toxic emissions.”³⁹ These environmental justice advocates believe strongly that EPA’s recent revisions of the NSR rules do not resolve the following very serious gaps in that program:

- Requiring emission reductions when facilities are modified;
- Utilizing the provision for non-attainment areas that requires permit applicants to perform an analysis of alternative sites, processes, and controls and to obtain offsetting reductions of emissions from other sources;
- Providing meaningful public involvement in the permitting process for facilities in low-income and people-of-color communities; and
- Ensuring that NSR requirements are fully enforced, especially at older facilities located in or near these communities.⁴⁰

37. *Id.* at 20.

38. David Arnold, *Pollution Checking Said to Lag in Mass*, BOSTON GLOBE, Jan. 21, 2003, at B1, available at 2003 WL 3375764.

39. GA. COALITION FOR THE PEOPLES’ AGENDA, AIR OF INJUSTICE: AFRICAN AMERICANS & POWER PLANT POLLUTION 4 (2002), available at http://www.catf.us/publications/reports/Air_of_Injustice.pdf [hereinafter AIR OF INJUSTICE].

40. A BREATH OF FRESH AIR, *supra* note 30, at 73.

NSR's provisions for non-attainment areas are particularly significant to environmental justice advocates because of the requirements for an analysis of "alternative sites, sizes, production processes, and environmental control techniques."⁴¹ An air permitting agency must then consider the possible economic benefits of the proposed source and whether the environmental and social costs imposed on the community would outweigh the benefits if the permit were approved. In fact, the NSR program appears to be unique in allowing EPA to grant permits only if applicants can demonstrate, through evaluation of the environmental effects on a community, that a facility's benefits outweigh its costs.⁴²

This proviso, however, will not help to reduce pollution in over-exposed communities if EPA's nationwide NSR regulations raise the basic thresholds that trigger the requirement for permits. Environmental justice advocates view the original criteria for NSR permits as important regulatory limits that can have significant implications for protecting local air quality. They therefore have opposed any expansion of exemptions and exclusions from NSR requirements and urge vigorous, equitable enforcement of NSR because they believe that older facilities will not otherwise reduce their emissions.⁴³ Additionally, they believe that any NSR reforms to allow emission trading and banking must have a credible system to account for emission trades, comprehensive and reliable monitoring data, and a requirement that participating facilities meet all other legal obligations.⁴⁴ Otherwise, emission trading has the potential to create "hot spots" of increased pollution in their communities.

The significance of the Georgia Coalition's concerns becomes even clearer in light of nationwide data on pollution exposures:

- Seventy-one percent of African Americans live in counties that violate air pollution standards;
- Sixty-eight percent of African Americans live within thirty miles of a coal-fired power plant;
- African Americans are hospitalized for asthma at more than three times the rate of whites;
- Death from asthma for African Americans is twice as likely as for whites; and

41. Clean Air Act, 42 U.S.C. § 7503(a)(5) (2000).

42. ENVIRONMENTAL JUSTICE, *supra* note 1, at 20-21.

43. A BREATH OF FRESH AIR, *supra* note 30, at 73.

44. *Id.*

- Infants who live in highly polluted cities during the first two months of life have higher mortality rates than infants living in cities with the cleanest air.⁴⁵

Only one of the four state agencies in the Academy's second report considered risk reduction as the primary cornerstone for its environmental justice program. Beginning in 1999, the California Assembly passed six bills that established a strong state policy to address environmental justice problems, including a requirement that the California Environmental Protection Agency (CalEPA) integrate these concerns into the design and operations of all its programs.⁴⁶ Responsibility for overall coordination for environmental justice initiatives resides in the Governor's Office of Planning and Research.⁴⁷ Two California agencies, the California Air Resources Board (CARB) and the South Coast Air Quality Management District (AQMD) are responsible for initiatives that include priority setting and risk reduction strategies for low-income and people-of-color communities.⁴⁸

AQMD has based much of its risk reduction strategy on the results of its second Multiple Air Toxics Exposure Study (MATES II) conducted in 1998, which monitored and evaluated air pollution at various neighborhoods in the South Coast Air Basin.⁴⁹ The study proved that it is possible to characterize neighborhood air quality accurately, identified diesel emissions as the greatest health risk for the region, and validated the existence of local "hot spots."⁵⁰ As the result of MATES II, AQMD developed an air toxics control plan for the South Coast Basin.⁵¹ The public then reviewed and commented on the plan, which is designed to reduce air toxics by an additional thirty-one percent from otherwise expected levels by 2010.⁵² AQMD also routinely uses three measures of progress on its environmental justice efforts: further reduced health risks; greater community access and involvement; and economic incentives for accelerated mitigation.⁵³ AQMD's risk reduction efforts include the clean school bus program to purchase or retrofit buses with funds from air pollution penalties

45. AIR OF INJUSTICE, *supra* note 39, at 3.

46. MODELS FOR CHANGE, *supra* note 1, at 89.

47. *Id.* at 89.

48. *Id.* at 85.

49. *Id.* at 106.

50. *Id.*

51. *Id.* at 107.

52. *Id.* at 108.

53. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 78.

for school districts near or downwind of the facilities paying the penalties, purchasing more air quality monitors, and memoranda of understanding for facilities' binding commitments to reduce emissions below their current permit limits.⁵⁴

CARB also has included risk reduction techniques in its environmental justice strategy, which was developed by doing community assessments in the field to develop specific facts about neighborhood exposures and then initiating concrete actions, such as reducing diesel emissions, in response to identified problems.⁵⁵ In 2000, CARB also developed a Neighborhood Assessment Work Plan to evaluate and address community exposures to air toxics that included, among many other elements, a risk reduction strategy.⁵⁶

In many instances, the Academy found that these California programs offer important elements of effective accountability, including some examples of measurable performance goals, clear lines of responsibility, and public transparency by reporting progress monthly on web sites. California's accountability mechanisms have also included: state law requirements for the Secretary for the Environment to submit a report to the Governor and the Assembly beginning in January 2004; quarterly reports to the Assembly on program progress through 2002; a CalEPA advisory committee on environmental justice to identify agency gaps; and coordination by the Governor's Office of Planning and Research for all of the state's environmental justice initiatives.⁵⁷

The California agencies, however, do not have specific evaluation processes built into their initiatives,⁵⁸ and environmental justice elements have not been fully integrated into all of their core regulatory programs and functions. For instance, California's Regional Clean Air Incentives Market (RECLAIM) program for trading air emissions does not require that reductions be made in the same local impact area.⁵⁹ This omission presents a significant problem for local communities. For example, Huntington Park is not in attainment for particulate matter, but still faces the prospect of a new power plant being built by the next jurisdiction im-

54. *Id.* at 79.

55. MODELS FOR CHANGE, *supra* note 1, at 101.

56. *Id.* at 97.

57. *Id.* at 110-11.

58. *Id.* at 110.

59. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 77.

mediately adjacent to the already over-exposed neighborhoods of Huntington Park.⁶⁰

The Academy also found that risk reduction efforts often began only after substantial community pressure, and were not the result of any agency's routine risk reduction strategy that had measurable outcomes. Nor did states or localities have mechanisms in place to assure accountability for continued progress over time. In Austin, Texas, local agency actions reduced overall risks in predominantly Hispanic East Austin, but they were reacting to community pressures rather than adopting a pro-active risk reduction strategy.⁶¹ Likewise, in Chester, Pennsylvania, local officials eventually responded to community pressure and adopted city ordinances limiting development of new heavy industrial facilities near residential areas, along with performance standards to minimize environmental impacts and prevent future environmental justice problems,⁶² but not before low-income neighborhoods had already become saturated with pollution sources. And Chester still has not adopted measurable goals for reducing pollution or reducing public health risks, except for lead exposures.⁶³

Collecting Credible, Comprehensive, and Accessible Data

There is an integral relationship between an agency's ability to set meaningful pollution reduction goals and the adequacy of its data about current pollution levels. Overall, the issue of adequate data for evaluating environmental justice concerns is part of a larger problem: lack of credible, comprehensive data on current pollution levels that can be used to measure progress toward improving environmental conditions.⁶⁴ In previous studies, the Academy has raised concerns about the credibility of environmental data collected by EPA and the states because there is no independent organization to establish guidance for data collection and to analyze and assess its accuracy.⁶⁵ The lack of data to measure performance by EPA, states, and localities in key functions like enforcement, including the impact on reducing or preventing pol-

60. *Id.*

61. *Id.* at 110.

62. *Id.* at 117.

63. *Id.* at 117.

64. NAT'L ACAD. OF PUB. ADMIN., SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR EPA 166 (1995).

65. *Id.*

lution, also means that the public cannot hold them accountable. Nor can anyone determine the effectiveness, efficiency, or equity of local, state, and EPA enforcement actions or compliance assistance programs.⁶⁶ In addition to these basic concerns, the lack of data on local environmental conditions also presents a significant challenge for determining whether environmental justice initiatives are producing effective results because these issues are often local in nature.

The Academy's research has shown that having adequate, publicly available information on local environmental impacts and their implications for public health will enhance the accountability of local governments. For instance, in Huntington Park, California, the city government became aware of the potential health impacts of air emissions after nearby residents observed particulate emissions from a cement re-processing facility, which was not operating within the terms of its permit, and after the MATES II study found diesel particulate emissions to be the most significant health risk for the region.⁶⁷ The MATES II study provided irrefutable evidence that there were potential health risks for local citizens and gave the city government the basis for taking action.⁶⁸

In response to the MATES II study, Huntington Park established its Air Quality Improvement Task Force, developing an action plan for itself and recommendations for regional and state air agencies.⁶⁹ The city revised its zoning ordinance for commercial/office/mixed-use zones to authorize conditions in environmental permits based on the proximity of a facility to residences. It also required mitigation of diesel emissions and established an improved working relationship with the local air quality district to make better use of its information and technical expertise when responding to the health risks faced by city residents.⁷⁰

The Academy has found that availability of data and tools for analysis are particular problems when attempting to correlate pollution impacts with health concerns. In reviewing environmental justice issues in St. James Parish, Louisiana, for instance, the

66. NAT'L ACAD. OF PUB. ADMIN., *EVALUATING ENVIRONMENTAL PROGRESS: HOW EPA AND THE STATES CAN IMPROVE THE QUALITY OF ENFORCEMENT AND COMPLIANCE INFORMATION 2* (2001), available at [http://209.183.198.6/NAPA/NewNAPAHome.nsf/0/6022ee30a042a23d85256aa100038dc1/\\$FILE/entire_doc.pdf](http://209.183.198.6/NAPA/NewNAPAHome.nsf/0/6022ee30a042a23d85256aa100038dc1/$FILE/entire_doc.pdf) [hereinafter *EVALUATING ENVIRONMENTAL PROGRESS*].

67. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 63.

68. *Id.* at 63, 71.

69. *Id.* at 59.

70. *Id.*

Academy found the community was most concerned about adverse health impacts due to multiple exposures from the many chemical industries in the area, often called "Cancer Alley."⁷¹ While industry and state officials object to this designation because overall cancer rates in that area are not substantially different from the rest of Louisiana, community and environmental groups have expressed concerns that analyzing health data on a regional or parish (county) basis may fail to detect cancer clusters or other health impacts that are very localized.⁷² Also, in some instances, existing health data may not be collected or disaggregated by race, making it difficult to develop comparative analyses.⁷³ Moreover, in 1999 the National Academy of Science recommended improving the scientific basis for collecting data needed by policy makers to address environmental justice concerns due to the lack of current tools to analyze small, local samples of exposed citizens.⁷⁴

Public access to environmental data is also a key concern of community groups, who want to ensure they have current data on local issues of greatest concern to them. The approach of the South Coast AQMD for making data publicly accessible provides a good example of how to solve this problem by:

- Improving data to conduct risk assessments of local "hot spots" and including these data in the Community Health Air Pollution Information System;
- Launching a database available on the Internet, which allows the public to find facilities that have received violation notices and includes descriptions of their violations;
- Surveying community-based organizations and other local stakeholders to determine their needs for future enhancements of the AQMD website;
- Establishing community clean air data depositories, which are updated monthly at eight locations chosen by community leaders for use by residents without access to computers;
- Identifying low- or no-cost media outlets to publish notices of community meetings and permitting ac-

71. *Id.* at 193 (citing John McQuaid, 'Cancer Alley': *Myth or Fact*, NEW ORLEANS TIMES-PICAYUNE, May 23, 2000, at A9).

72. *Id.*

73. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 194.

74. *Id.* at 193.

tions, including notices of new applications for air pollution permits;

- Holding evening “living room” sessions to listen to the concerns of local residents in less formal settings more conducive to dialogue;
- Conducting on-site outreach to teachers, parent-teacher associations, and students about air quality issues; and
- Translating relevant documents into Korean and Spanish.⁷⁵

While the above strategies are not the only ways an agency could improve local citizens’ access to environmental data, these examples highlight important and innovative approaches in working with community leaders to determine how residents can best gain access to and use that information.

Providing Meaningful Public Participation

The Academy found that, in order for agencies to ensure citizens have opportunities for meaningful public participation, the public must be able to comment on proposed government actions at the earliest possible stage. They must also have adequate information to form the basis for their comments, and government officials responsible for those decisions must be skilled in facilitating public involvement. The Academy’s research on environmental justice issues and permitting processes shows that, to obtain meaningful citizen participation, agencies need to:

- Use all of their discretionary authority for providing early notice to communities about permit applications;⁷⁶
- Revise permitting regulations to ensure that nearby communities receive early notification of permit applications;⁷⁷
- Engage the public in all steps of local or state procedures for land use planning, zoning, siting, and permitting decisions;⁷⁸
- Provide appropriate technical assistance and information to citizens so they can make informed comments;⁷⁹
- Expand public participation in other environmental programs important to high-risk neighborhoods, including

75. *Id.* at 79.

76. ENVIRONMENTAL JUSTICE, *supra* note 1, at 6.

77. *Id.*

78. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 22.

79. See ENVIRONMENTAL JUSTICE, *supra* note 1, at 74.

rulemaking, standard-setting, enforcement, technical and compliance assistance, research, and emissions monitoring;⁸⁰ and

- Provide training, information, and financial assistance so community groups can learn how to participate effectively in agency decision-making processes, like rulemaking, zoning, and permitting.⁸¹

Effective public engagement must also be based on trust and respect. Thus, agencies must take active steps to increase citizens' meaningful access to government decision-making processes. Agencies must provide reasonable flexibility in facilitating that process by holding meetings at times and places convenient for most citizens to attend, translating information when appropriate, and providing the public with accurate, timely, understandable, and complete information about facilities, emissions, compliance standards, and enforcement activities.⁸² It is equally important for agency officials to be responsive and respectful to the public in addressing their concerns. To ensure that that happens, agencies should provide appropriate training to their staff on how to conduct effective outreach and public involvement.⁸³

Ensuring Equitable Enforcement

The fact that people-of-color and low-income communities are exposed to significantly greater amounts of pollution and other public health hazards—often because of proximity to older, more polluting facilities—is compounded by agencies' failure to enforce environmental laws aggressively in those communities.⁸⁴ In 1992, the National Law Journal's special investigation, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, found significant inequities in enforcement penalties.⁸⁵ Penalties at hazardous waste sites near white populations were as much as five hundred percent greater than at sites near minority neighborhoods, and were forty-six percent higher for white communities near sources of air, water, or waste pollution.⁸⁶ This study also found that abandoned hazardous waste sites in minor-

80. MODELS FOR CHANGE, *supra* note 1, at 12.

81. ENVIRONMENTAL JUSTICE, *supra* note 1, at 4.

82. *Id.* at 73.

83. *Id.* at 75.

84. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 32.

85. *Id.* (citing Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law—A Special Investigation*, NAT'L L.J., Sept. 21, 1992, at S1-S12).

86. *Id.*

ity areas that were eligible for Superfund clean-ups took twenty percent longer to be placed on the National Priorities List than those in white areas, and Superfund cleanups began twelve to forty-two months later at sites in minority communities.⁸⁷

In a previous study, the Academy has noted, "Collecting data limited solely to enforcement and compliance assistance activities provides little insight into how these activities contribute to actual improvements in environmental conditions, compliance with environmental laws, and fairness of the regulatory system across industries or among states."⁸⁸ Moreover, merely counting these activities as a measure of agency performance means "Congress, EPA, the states, and the public cannot readily evaluate the effectiveness, efficiency, or equity of state and EPA enforcement and compliance assistance efforts due to these problems with existing data."⁸⁹

To address public concerns more effectively, the Academy has recommended that EPA, states, and localities collect relevant data and utilize demographics on environmental justice communities as criteria when targeting certain locations and types of facilities for inspections and other enforcement actions.⁹⁰ This process would be further facilitated if EPA and the states could identify high-risk communities by monitoring environmental conditions in specific neighborhoods, which would also assist the agencies in prioritizing their initiatives to address environmental justice problems. Other approaches that the Academy recommended for improving federal, state, and local enforcement include:

- Taking advantage of community knowledge about the day-to-day operations at nearby facilities;
- Choosing the type of enforcement action—administrative, civil, or criminal—that is most appropriate for the seriousness of violations;
- Imposing monetary penalties that, to the extent permitted by law, reflect a facility's history of non-compliance and the gravity of the violation, especially any increased pollution exposures in densely populated neighborhoods; and
- Evaluating the actual results of enforcement activities to ensure they address the most serious hazards,

87. *Id.*

88. EVALUATING ENVIRONMENTAL PROGRESS, *supra* note 66, at 2.

89. *Id.*

90. ENVIRONMENTAL JUSTICE, *supra* note 1, at 7.

protect the greatest number of people at risk, and effectively deter future violations.⁹¹

Achieving Enhanced Accountability

Real accountability by federal, state, and local environmental agencies for achieving environmental justice means fully integrating these efforts into all of the agencies' core programs and functions, as well as implementing results-based management to track progress and creating transparent, easily accessible ways of sharing information with the public about agency actions and decisions. To enhance government accountability, the Academy recommends:

- Providing leadership at the highest levels to address environmental justice as a mandatory and integral part of everyday agency operations through legislation, executive orders, policy statements, and regulations;⁹²
- Utilizing all available statutory and common law authorities at each level of government to address environmental justice;⁹³
- Establishing performance criteria and accountability processes for all agency managers and staff;⁹⁴ and
- Adopting outcome-based performance measures that will enable agency managers to know whether their environmental justice initiatives are producing improved environmental conditions, more meaningful public participation, greater availability of timely information, and more equitable enforcement of environmental laws.⁹⁵

Already there are many valuable federal, state, and local efforts to address environmental justice problems through strong policy statements, state legislation, executive orders, pilot programs, individual initiatives at specific problem sites, and guidance documents. However, all three levels of government still have not achieved real accountability for this issue because environmental justice concerns are not yet truly integrated into the routine agency functions at any level of government. Instead,

91. *MODELS FOR CHANGE*, *supra* note 1, at 11.

92. *ENVIRONMENTAL JUSTICE*, *supra* note 1, at 27.

93. *See id.* at 2; *see also* ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 13.

94. *ENVIRONMENTAL JUSTICE*, *supra* note 1, at 5.

95. *MODELS FOR CHANGE*, *supra* note 1, at 4.

these efforts are still viewed as a sideline or a discretionary activity, even in agencies where many commendable activities have begun to address important concerns.

For instance, a strongly worded policy statement issued by former EPA Administrator Christine Todd Whitman in 2001 urged EPA to integrate environmental justice into all of EPA's programs and activities.⁹⁶ Yet, the 2002 environmental justice action plan for at least one major EPA media program merely encouraged staff to consider these issues when they develop new programs or implement existing ones.⁹⁷ This same program has a commendable list of individual activities, like developing tools for source characterization that could help to collect data in high risk areas, but the action plan contains no explicit requirement or guidance on how to incorporate these issues into core functions like the permitting or rulemaking processes. Until there is evidence that environmental justice issues are routinely considered in all EPA rulemakings, like the December 2003 draft proposal for NSR that would require power plants to reduce mercury emissions and other toxic pollutants and to institute an emission trading system,⁹⁸ then EPA's efforts fall far short of real accountability for addressing environmental justice concerns.

EPA's December 2003 draft mercury trading regulation is a recent example of the need to evaluate the impact of EPA's proposed rules for their environmental justice implications. The agency should pay serious attention to the complaints of African American environmental justice advocates about mercury pollution from power plants, which is a particular concern for residents of low-income and minority neighborhoods because:

- One third of African Americans are avid anglers who eat fish more often and in larger quantities than whites, and fish consumption is the primary source of methyl mercury exposure to people;⁹⁹

96. Memorandum from Christine Todd Whitman, Adm'r, U.S. ENVTL. PROT. AGENCY, EPA's Commitment to Environmental Justice (Aug. 9, 2001), *available at* http://www.epa.gov/compliance/resources/policies/ej/admin_ej_commit_letter_081401.pdf.

97. OFFICE OF AIR AND RADIATION, U.S. ENVTL. PROT. AGENCY, 2002 ACTION PLAN TO INTEGRATE ENVIRONMENTAL JUSTICE 9 (2002), *available at* <http://www.epa.gov/compliance/resources/reports/actionplans/ej/oar-ej-actionplan.pdf>.

98. See Eric Pianin, *White House, EPA Move To Ease Mercury Rules*, WASH. POST, Dec. 3, 2003, at A01, *available at* <http://www.washingtonpost.com/ac2/wp-dyn/A29807-2003Dec2?language=printer> (last visited Mar. 12, 2004).

99. AIR OF INJUSTICE, *supra* note 39, at 3.

- The developing nervous systems of fetuses and infants are susceptible to adverse effects from methyl mercury;¹⁰⁰
- Eight percent of women of childbearing age have mercury in their blood exceeding levels deemed safe by EPA;¹⁰¹
- Non-Hispanic black females between the ages of sixteen to forty-nine have higher blood level concentrations of mercury than any other females sampled;¹⁰²
- As of December 2003, forty-one states have issued fish-consumption advisories due to mercury poisoning;¹⁰³ and
- Coal-fired power plants are the nation's largest source of unregulated airborne mercury pollution.¹⁰⁴

By proposing a trading program for mercury, rather than a technology-based emission standard that requires specific reductions, EPA may impose on some already high-risk communities an increased burden of mercury pollution and its potential health consequences that will last for a long period of time. Instead, EPA's new rulemakings or other initiatives, like changes to the Toxic Release Inventory's reporting requirements, should not only ensure that the agency is not exacerbating current pollution problems or limiting public access to more precise information about local emissions, but should also serve as opportunities to ensure that environmental justice concerns are addressed in the requirements and standards of all future policies, programs, and rules.

For the states, the California programs provide encouraging examples of how environmental justice can be incorporated into the fabric of a state agency's core programs and how existing legal authorities can be used effectively to address these concerns. The Assembly's mandate that environmental justice must be incorporated into all California programs and activities has been an important catalyst for producing real improvements that have also been helped by making the Governor's office responsible for overall coordination of the state's environmental justice efforts. Cali-

100. NAT'L CTR. FOR ENVTL. HEALTH, SECOND NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS 18 (2003), available at <http://www.cdc.gov/exposurereport/pdf/secondner.pdf> [hereinafter NAT'L CTR. FOR ENVTL. HEALTH].

101. Pianin, *supra* note 98.

102. See NAT'L CTR. FOR ENVTL. HEALTH, *supra* note 100, at 17-18.

103. Pianin, *supra* note 98.

104. *Id.*

fornia agencies that were reviewed by the Academy, including CalEPA, CARB, the South Coast AQMD, and the Department of Toxic Substances Control, have undertaken numerous rulemaking, tool development, monitoring, and other actions directed at reducing hazards in low-income and people-of-color neighborhoods, increasing community access to relevant information, and enhancing opportunities for public participation in agency decisions that affect local environmental conditions. As noted earlier, however, there is still room for improvement in some California programs, such as RECLAIM, that have not considered the environmental justice implications of localized impacts from emission trading and have lacked outcome-based performance measures to provide accountability for agency managers.

The Academy found some examples of local government efforts to correct planning and zoning problems that may cause or exacerbate environmental justice concerns; but the Academy's third study also showed that much remains to be done to improve existing local statutory and common law authorities, and decision-making processes. These improvements could include more diverse membership on planning and zoning bodies, earlier public notice about and involvement in local decisions that affect minority and low-income residents, and proactive local leadership to address environmental justice issues.

As a basic matter, accountability also means knowing what party is responsible for taking action. Some disadvantaged communities have difficulty finding any level of government or a specific agency that will acknowledge responsibility, coordinate with the appropriate entities on responding to environmental problems, and do a "full and creative examination of all [their legal] authorities" to address community concerns.¹⁰⁵ The Academy's study of Altgeld Gardens in Chicago, Illinois showed that community residents have spent many years complaining to all three levels of government about noxious odors possibly emanating from acres of drying sewage sludge located just across the street from Altgeld. Yet even after residents there forced various government agencies to conduct investigations, the odor problem still to persists and the sludge has not been cleaned up.¹⁰⁶

Thus, the Academy has found that environmental justice programs at all three levels of government must establish goals, per-

105. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 159.

106. *Id.* at 156-60.

formance measures, accountability mechanisms, and an evaluation process to ensure that they produce effective results. Indeed, it is true that what gets measured gets done. Yet, it is also critical that agencies measure appropriate outcomes and not fall into the trap of simply counting an increased number of outputs or activities as progress. It is possible for agencies to set objectives for reducing community hazards that are sensitive to both national and local needs. It is equally possible for them to set meaningful objectives for improving public engagement, increasing access to information, collecting adequate data, and equitably enforcing existing environmental and health laws.

Since the Academy published its 2001 study on EPA's programs, there is some evidence that the agency is trying to develop a performance-based approach to environmental justice. The Accountability Workgroup of EPA's Environmental Justice Steering Committee has recommended modifications to the environmental justice action plans of all the media programs and regional offices to ensure they include appropriate measures of performance.¹⁰⁷ The workgroup has also developed general categories of activities like risk reduction, outreach, and communication.¹⁰⁸ Next, the workgroup needs to identify specific, quantifiable outcomes for achieving environmental justice that address the agency's core programs and regulatory functions, and adopt objectives for determining whether the agency is making progress toward the goal of integrating environmental justice concerns into EPA's routine operations.

Additionally, in 2003, EPA developed a draft "Toolkit for Assessing Potential Allegations of Environmental Justice" and published it for public comment.¹⁰⁹ The purpose of this document is to:

- Provide a *conceptual* framework for understanding environmental justice as a civil rights issue as well as an environmental issue; and
- To present a systematic approach for responding to potential environmental injustice situations or proac-

107. *EPA Gears Up for Next Environmental Justice Action Plans*, ENVTL. JUST. Q. (Summer/Fall 2003), at 5, available at <http://www.epa.gov/compliance/resources/newsletters/ej/ej-newsletter-fall-2003.pdf>.

108. *Id.*

109. U.S. ENVTL. PROT. AGENCY, DRAFT TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (2003), available at http://www.epa.gov/compliance/resources/publications/ej/ej_toolkit.pdf.

tively attempting to avoid environmental injustices in the first place.¹¹⁰

According to the draft, the agency can also use these methodologies to assess its proposed actions, which could include rulemaking.¹¹¹ While this toolkit represents encouraging progress, the document's primary audience is described as EPA's environmental justice coordinators, rather than managers responsible for the media programs, policies, rules, and other routine operations. The draft's main focus, as the title implies, also appears to be a case-by-case assessment of various allegations of injustice, rather than a guide for incorporating environmental justice into core agency functions.¹¹² Nonetheless, if the final version of these methodologies produces a requirement for conducting environmental justice assessments of all EPA policies, media programs, and proposed rules, it would represent a significant step forward in providing substantive guidance toward integrating environmental justice concerns into core agency activities.

Grassroots community activists have usually been the catalysts for action to address environmental justice problems at all three levels of government. By raising these important issues—working with, and sometimes prodding agencies at all levels to address environmental justice problems—citizens groups have been a critical force in identifying pollution sources and developing new, effective solutions to environmental justice concerns that are important to everyone.¹¹³ While community pressure will remain a critical force for improving agency programs, the Academy has found that governments at all three levels must also exercise proactive leadership to protect the health and welfare of all citizens, especially those who are the most vulnerable. This leadership must include clear accountability for improving environmental conditions everywhere, and especially in the low-income and people-of-color communities that are already exposed to high levels of pollution.

110. *Id.* at 1.

111. *Id.*

112. *Id.* at 1, 2.

113. ADDRESSING COMMUNITY CONCERNS, *supra* note 1, at 11.