

ARTICLES

# Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities

by Patrice L. Simms

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*Summary*

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Environmental justice communities are especially disadvantaged when it comes to direct community intervention in matters critical to their well-being. Opportunities may exist, however, to institutionalize resources for those communities' benefit. In particular, environmental enforcement actions could prove a reliable and effective conduit to access resources and obtain environmental and public health benefits, tailored to communities' self-identified needs. This Article focuses on the supplemental environmental project (SEP) as a mechanism to accomplish this, and proposes SEP Community Empowerment Partnerships (SCEPs). This deliberate strategy—involving government entities, NGOs, academic institutions, funders, and private firms—could help more effectively fold communities into settlement decisions, and allow them to leverage SEPs as an additional tool to advance the restorative goals of environmental justice.

Environmental justice is a subject that has become very much part of the mainstream environmental discourse. Most government agencies and environmental advocacy organizations (and even some industry groups) express notional support for the principles of environmental justice.<sup>1</sup> There has been a mismatch, however, between rhetoric and action when it comes to addressing the concrete needs of marginalized communities.<sup>2</sup> This is true across the policymaking spectrum, from agenda setting, to rulemaking, to permitting, to enforcement.<sup>3</sup> While poor communities and communities of color often carry disproportionate environmental burdens, and suffer disproportionately from environment-related illnesses (such as

1. See U.S. Environmental Protection Agency (EPA), *Environmental Justice*, <http://www.epa.gov/environmentaljustice/> (last updated Mar. 13, 2017) (EPA's environmental justice efforts have been far-reaching in recent years); Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATURAL RESOURCE DEFENSE COUNCIL (NRDC), Mar. 17, 2016, <https://www.nrdc.org/stories/environmental-justice-movement> (nonprofits like NRDC have been actively discussing environmental justice themes); Sierra Club, *Environmental Justice*, <http://www.sierraclub.org/environmental-justice> (last visited Apr. 8, 2017); U.S. Department of Energy, *Environmental Justice*, <http://energy.gov/lm/services/environmental-justice> (last visited Apr. 8, 2017); U.S. Department of Justice, *Environmental Justice*, <http://www.justice.gov/ej> (last updated Feb. 2014) (even the Department of Justice has been talking openly and aggressively about environmental justice in recent years). Some members of industry have been willing to discuss and even evaluate their own behavior as it relates to environmental justice. See, e.g., LEADING CHANGE: WASTE MANAGEMENT LLC, SUSTAINABILITY REPORT (2016) at 91, available at [https://www.wm.com/sustainability/pdfs/2016SustainabilityReport\\_WM.pdf](https://www.wm.com/sustainability/pdfs/2016SustainabilityReport_WM.pdf).
2. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 238 (1997):  
Environmental enforcement decisions may also favor some at the expense of others. Agencies lack sufficient funds to enforce every violation, and enforcement agencies have considerable discretion in choosing enforcement priorities. Enforcement issues arise in connection with many different types of environmental laws, including national, state, and local pollution control laws, laws establishing agricultural pesticide practices, laws to alleviate lead poisoning, and the like. To the extent governmental decision makers place less priority on enforcement in communities of color and low-income communities, these communities may not receive "equal concern and respect."  
(citing Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT 625, 640, 648-51 (1994)).
3. The Barack Obama EPA, recognizing this deficit under the leadership of Administrator Lisa Jackson, did recommit the Agency to meaningfully confronting environmental justice across "five cross-agency focus areas: (1) incorporating environmental justice into rulemaking; (2) considering environmental justice in permitting; (3) advancing environmental justice through compliance and enforcement; (4) supporting community-based action programs; and (5) fostering administration-wide action on environmental justice." Tonya Lewis & Jessica Owley, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, 29 BYU J. PUB. L. 183, 192-93 (2014) (citing U.S. EPA, PLAN EJ 2014, at 8-20 (2011) [hereinafter EPA PLAN EJ 2014]). EPA's EJ 2020 similarly committed the Agency to continued action on environmental justice. U.S. EPA, EJ 2020 ACTION AGENDA 1 (2016) [hereinafter EPA EJ 2020]. However, *implementation* is really what matters, and it is unlikely that even the conceptual commitment will continue under a Donald J. Trump Administration.

asthma and cancer),<sup>4</sup> they are rarely in a position to independently vindicate their legal rights.<sup>5</sup> Few effective and reliable institutionalized structures have emerged to help address this serious shortcoming.<sup>6</sup>

These communities are especially disadvantaged when it comes to direct community intervention in matters critical to their well-being. Existing federal entities such as the Interagency Working Group on Environmental Justice (IWG), the National Environmental Justice Advisory Council (NEJAC), and the U.S. Environmental Protection Agency's (EPA's) Office of Environmental Justice (OEJ) are valuable, but are not, alone, up to the task. While they offer a platform for engaging on a broad policy basis, and OEJ provides some targeted community resources (such as capacity-building grants, workshops, and informational tools),<sup>7</sup> none of these entities have either the resources or the mandate to provide direct assistance to communities in an advocacy setting.<sup>8</sup> Nor have state-level institutions

or nongovernmental organizations (NGOs), by and large, effectively filled the gap.<sup>9</sup> As a result, for the most part, marginalized communities have little access to the kind of direct assistance that would be necessary for them to even *begin* to compete in the policymaking space with other stakeholders (including, chiefly, regulated industry).<sup>10</sup>

Opportunities may exist, however, to institutionalize certain resources for the benefit of those communities most affected by environmental decisionmaking. In particular, already existing environmental enforcement actions could prove a reliable and effective conduit for communities to access resources and obtain valuable environmental and public health benefits, tailored to communities' self-identified needs. In order to take advantage of these opportunities, federal and state officials, NGOs, academic institutions, and the philanthropic community will need to develop strategic partnerships with community-based groups. If properly implemented, these relationships both would significantly enhance the capacity of communities to meaningfully engage in defense of their own well-being, and could serve to foster alliances that would promote more extensive coordination and collaboration.

The central mechanism to accomplish this, and the focus of this Article, is the supplemental environmental project (SEP).<sup>11</sup> However, in order to successfully leverage this tool, relevant parties will need to put in place a discrete framework with certain core features, designed to maximize opportunity and participatory efficacy.

The encouragement of strong relationships between these entities, and the identification and full utilization of SEPs to promote community health, should be objectionable to no one. Benefits of successful SEP implementation include: for communities, direct and indirect public health, environmental, and economic improvements<sup>12</sup>; for industry, improved community relations and community

4. See, e.g., Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371, 386 (2008) (describing "advances in environmental justice research that better determine where people live in relation to where hazardous sites are located than do earlier, more traditional methods").

5. See Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. & POL'Y 215, 266 (1996).

6. Some structures have developed that are intended to confront environmental justice from a broader public policy perspective; for example, the Executive Order on environmental justice signed by President Bill Clinton in 1994, among other things, creates the Interagency Working Group on Environmental Justice (IWG). The Executive Order provides that the IWG shall:

(1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations; (2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy . . . in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner; (3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies . . . ; (4) assist in coordinating data collection . . . ; (5) examine existing data and studies on environmental justice; (6) hold public meetings . . . ; and (7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, Exec. Order No.12898, 59 Fed. Reg. 7629, 7629-30 (Feb. 16, 1994) [hereinafter Federal Actions to Address Environmental Justice]. Similarly, EPA in 1992 created the National Environmental Justice Advisory Council (NEJAC), an advisory body chartered pursuant to the Federal Advisory Committee Act (FACA) to "provide independent advice and recommendations to the Administrator about broad, cross-cutting issues related to environmental justice." EPA CHARTER, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, available at [https://www.epa.gov/sites/production/files/2016-10/documents/nejac\\_2016\\_renewal\\_charter\\_9-12-16.pdf](https://www.epa.gov/sites/production/files/2016-10/documents/nejac_2016_renewal_charter_9-12-16.pdf) [hereinafter NEJAC CHARTER].

7. See generally U.S. EPA, *Environmental Justice*, <https://www.epa.gov/environmentaljustice> (EPA's web portal for the OEJ) (last updated Apr. 10, 2017).

8. The NEJAC and the IWG effectively have no budget of their own, and OEJ's budget has been declining over the past years along with other EPA programs (e.g., in response to "sequestration" and other fiscal policy). See Howard A. Latin, *Climate Change Regulation & EPA Disincentives*, 45 ENVTL. L. 19, 56 (2015) (noting that "[a]side from politically motivated budget cuts, EPA has also been subjected to the so-called budget sequestration treatment" that was the product of congressional budget negotiations during the Obama

Administration). See also Annise Katherine Maguire, *Permitting Under the Clean Air Act: How Current Standards Impose Obstacles to Achieving Environmental Justice*, 14 MICH. J. RACE & L. 255, 262 (2009) (observing that during the George W. Bush Administration, EPA proposed cutting funding for environmental justice programs by 28%).

9. See discussion *infra* Part I.B.

10. Concern about the ability of communities to compete in these decisionmaking debates is by no means confined to differences with industry. Indeed, communities often find themselves aligned in opposition to positions favored by government agencies and even those championed by mainstream environmental nonprofits. See, e.g., Ngoc Nguyen, *Climate-Change Law: Why CA Environmentalists Are Fighting Each Other*, NEW AM. MEDIA, Mar. 14, 2011 (describing how, in 2011, environmental justice advocates and green groups were at odds over a climate pollutant trading program in California).

11. As discussed *infra* Part II, a SEP is:

an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with the applicable laws.

U.S. EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE 1 (2015) [hereinafter EPA 2015 SEP POLICY].

12. See PUBLIC LAW RESEARCH INSTITUTE, SUPPLEMENTAL ENVIRONMENTAL PROJECTS: A FIFTY STATE SURVEY WITH MODEL PRACTICES 47-48 (2007) (hereinafter SEP 50 STATE SURVEY).

integration, positive publicity, and more constructive relationships with environmental enforcement officials<sup>13</sup>; and for society, greater general social equity (remedial resources flowing to the locus of the most harm), and the encouragement of innovation.<sup>14</sup> Nor is there any sound reason for political opposition to more effective deployment of SEPs, even in the current conservative political climate, with a Donald J. Trump presidency and a Republican-controlled U.S. Congress.<sup>15</sup>

As a general proposition, SEPs are an available option when violations of environmental law result in enforcement action. Such enforcement is typically initiated by state or federal enforcement agencies,<sup>16</sup> and most such actions end in settlement.<sup>17</sup> Unhappily, in these situations, the com-

munities most affected by the unlawful conduct are usually not meaningfully included in the settlement process.<sup>18</sup> However, a deliberate strategy—involving government entities, NGOs, academic institutions, funders, and perhaps private firms—could help to more effectively fold communities into settlement decisions, and allow communities to leverage SEPs as an additional tool to advance the restorative goals of environmental justice.

This Article goes beyond other articles that have conceptually addressed the environmental justice benefits of SEPs,<sup>19</sup> by first concisely distilling the underlying structural challenges that have resulted in underutilization of SEPs in this context, and then outlining the core operational features of a community SEP partnership program and the principal functions of each partnership participant.

Part I provides an overview of environmental justice. This section briefly explores the origins and defining principles of the environmental justice movement, and addresses the chronic resource-related challenges associated with creating functional instrumentalities to advance environmental justice principles. Part II introduces the SEP as a tool available to state and federal enforcement officials, and discusses the failure of SEPs to live up to their full potential in promoting environmental justice. Part III provides a detailed overview of how a SEP-driven integrated framework for empowering communities might work, and presents an organizational model for collaboration among

13. *Id.* at 45, 48 (generally discussing the benefits of SEPs, including to “promote a cooperative relationship between the regulator and the violator, to the benefit of both, . . . [to] allow for greater fairness to the regulated industry, . . . [and to] reduc[e] adversarial tensions”); see also BARNES & THORNBURG LLP, SAME TUNE, NEW STEPS: DANCING THROUGH U.S. EPA’S UPDATE TO ITS POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS (2015) (in a legal alert for its industry clients describing SEPs as a “win-win” proposition), available at <http://www.btlaw.com/files/Uploads/Documents/2015%20Alerts/Environmental/Alert%20-%20Updated%20SEP%20Policy.pdf>.

14. *Id.* at 46 (observing that “[b]ecause violators may perform SEPs using new technologies or processes, regulators may gain [valuable] insight into new compliance and pollution prevention techniques”).

15. One must presume that environmental enforcement, even at the federal level, will not evaporate entirely. And state enforcement of both federal and state environmental laws is certain to continue (especially in more proactive states). To the extent that enforcement does occur, there is no principle of fiscal conservatism that necessarily prefers diversion of environmental enforcement penalties into the U.S. Treasury, rather than leveraging such monies to assist those communities that have been harmed by pollution releases. In fact, the current strain of populism would instruct otherwise—invest more in people than in government, focus on local economies and jobs, and allow “state and local taxpayers [to] decide for themselves what is best for their own communities,” rather than funneling money through the federal purse. REPUBLICAN PLATFORM 2016, at 16, available at <https://prod-cdn-static.gop.com/static/home/data/platform.pdf>. See also Robert F. Blomquist, *Six Thinking Hats for the Lorax: Corporate Responsibility and the Environment*, 18 GEO. INT’L ENVTL. L. REV. 691 (2006) (an inventive piece describing the proceedings of an imaginary gathering of corporate leaders, government officials, academics, and environmental advocates convened

(1) to consider whether multinational enterprises can currently integrate environmental concerns over and above their basic legal responsibilities consistent with their fiduciary responsibilities to shareholders, and (2) to assess the wisdom of creating new legal and policy mechanisms to explicitly allow (and even encourage) multinational enterprises to lawfully go beyond environmental compliance to pursue environmental leadership.

16. The majority of enforcement actions are brought by states. See Karl R. Heisler, *Understanding Environmental Enforcement*, 2011 WL 4452201, at \*4 (Aug. 2011); Robert W. Collin, *Environmental Justice in Oregon: It’s the Law*, 38 ENVTL. L. 413, 427 (2008) (noting also that “[t]he EPA delegates its power to run federal environmental programs to the States in most cases. Under this delegated authority, States control permit issuance, modification, and renewal. They also control the enforcement of environmental laws”); David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 29 (2000). Enforcement may also be initiated by private citizens under the “citizen suit” provisions of most environmental statutes. See generally Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990). See also ROBERT ESORTHY, CONGRESSIONAL RESEARCH SERVICE, FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 14 (2014) (discussing the role of citizens in environmental enforcement).

17. See Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law & Ethics*, 25 NAT. RESOURCES & ENV’T 3, 7 (2011); John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, 18 NAT. RESOURCES & ENV’T 10, 15 (2004)

(noting that “the vast majority of civil environmental enforcement cases are still resolved through settlement”).

18. Communities may be invited to comment on draft settlements once they have been negotiated between the enforcement officials and the alleged violator, but as a practical matter this is often little more than token participation because the settling parties have by then decided upon all the important contours of the settlement agreement (which are unlikely to be seriously revisited). See SUZIE CANALES, SUPPLEMENTAL ENVIRONMENTAL PROJECTS: THE MOST AFFECTED COMMUNITIES ARE NOT RECEIVING SATISFACTORY BENEFITS (2006), available at <http://www.citizenarchive.org/documents/SEPsReportJune2006.pdf> (concluding with respect to the settlement-related public notice and comment process, that “[t]o be asked to comment after the negotiations are complete is pointless. It gives the illusion of meaningful community input when in fact it isn’t being allowed”); Steven Bonorris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 185, 213-15 (2005) [hereinafter *Environmental Enforcement in the Fifty States*] (discussing “idea banks” as a mechanism to better involve communities in identifying restorative measures in connection with environmental enforcement).

19. See, e.g., Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217 (2007); *Environmental Enforcement in the Fifty States*, supra note 18; John Rosenthal et al., *Supplemental Projects as Tools for Environmental Justice and Economic Development in Small Towns*, 30 HUM. RTS. 13 (2003); David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181 (1998). A number of students have also published some interesting notes addressing SEPs. See, e.g., Eric Anthony DeBellis, *Implementing Supplemental Environmental Project Policies to Promote Restorative Justice*, ECOLOGY L. CURRENTS, Mar. 11, 2016; Douglas Rubin, *How Supplemental Environmental Projects Can and Should Be Used to Advance Environmental Justice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179 (2010); Brooke E. Robertson, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U. L. REV. 1025 (2009); Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects*, 44 A.F. L. REV. 1 (1998); Leslie J. Kaschak, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. LAW. 465 (1996).



community advocates, NGOs, federal and state enforcement officials, funders, and academic institutions, which can provide a starting point for establishing effective SEP community empowerment partnerships. The Article concludes with a call to these parties to begin taking the necessary steps to help SEPs live up to their environmental justice potential.

## I. Environmental Justice—Hope, Rhetoric, and Resources

### A. A Not-So-Basic Introduction to Environmental Justice

The problem of environmental injustice is not a new one. Since before the adoption of our contemporary domestic environmental laws, certain communities in the United States, especially poor communities and communities of color, have carried a disproportionate share of environmental burdens.<sup>20</sup> While scholars have not necessarily settled on a single definition of “environmental justice,” most definitions share some common thematic features.<sup>21</sup>

The starting point for many discussions is EPA’s definition, which identifies environmental justice “as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>22</sup> EPA further defines “fair treatment” and “meaningful involvement” as follows:

Fair treatment means that no group of persons should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.

Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s

contribution can influence the regulatory agency’s decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.<sup>23</sup>

As more than one scholar has observed, EPA’s definition is unsatisfactory (or at least incomplete) in a number of respects. Among other things, on its face, its “focus on fair treatment *regardless* of race, fails to take into account the racial dimensions of environmental justice.”<sup>24</sup> Moreover, EPA’s definition seems to lack a positive restorative or compensatory intention. That is, it provides no instruction about whether or how communities that have borne a “disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies” should be made whole.<sup>25</sup>

A helpful reference point in attempting to reveal a more satisfying definition of environmental justice is the collective aims of the environmental justice movement itself. To be sure, as the EPA definition suggests, the environmental justice movement concerns itself to no small degree with questions of distributive justice in the management of environmental programs, and with problems of procedural justice that derive from systemic failures inherent in environmental decisionmaking processes. EPA’s definition, however, appears to be (perhaps intentionally) framed in the most simplistic of terms, which portray only in caricature the array of concerns that lay at the center of environmental justice advocacy, and that emerge from social, economic, and political inequities with a longer and more complicated pedigree.

For a more generous exchange on the topic, it is helpful to reflect on the principles of environmental justice adopted during the First National People of Color Environmental Leadership Summit in 1991.<sup>26</sup> These 17 principles<sup>27</sup> go well beyond the superficial platitudes that have come to typify many mainstream discussions. They reveal, at the heart of environmental justice, a deep and abiding connection with and concern for the natural world, and the recognition of a right to exist in a world “free from ecological destruction,” in which human influences are moderated by principles of sustainability.<sup>28</sup> Rather than articulating merely relativistic rights, many of the 1991 principles address a “fundamental right” (unconcerned with any disproportionality) to maintain a certain relationship with one’s ecological environment.<sup>29</sup>

20. See generally Bullard et al., *supra* note 4 (describing the environmental justice landscape); Crystal Gammon, *Pollution, Poverty, and People of Color: Asthma and the Inner City*, SCI. AM., ENVTL. HEALTH NEWS, June 20, 2012, <https://www.scientificamerican.com/article/pollution-poverty-people-color-asthma-inner-city/>. See also Jeanne Marie Zokovitch Paben, *Green Power and Environmental Justice—Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1078 (2014) (discussing the environmental justice impact of raw materials developed for power production); Alan Ramo, *California’s Energy Crisis—The Perils of Crisis Management and a Challenge to Environmental Justice*, 7 ALB. L. ENVTL. OUTLOOK J. 1, 25 (2002) (noting the environmental justice implications of siting of fossil fuel plants); Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 745 (1994) (noting the “connection between this nation’s reliance on fossil fuels, and the disproportionate negative environmental impact it has on communities of color”) (citing HENRY HOLMES, ENERGY POLICY AND COMMUNITY ECONOMIC DEVELOPMENT 2 (1992)).

21. See Shannon M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, 114 W. VA. L. REV. 49, 54-56 (2011) (exploring the meaning of environmental justice); Cheryl A. Calloway & Karen L. Ferguson, *The “Human Environment” Requirements of the National Environmental Policy Act: Implications for Environmental Justice*, 1997 DET. C.L. MICH. ST. U. L. REV. 1147, 1150-51 (1997) (discussing the range of definitions that have been applied to “environmental justice”).

22. EPA EJ 2020, *supra* note 3, at 1; EPA PLAN EJ 2014, *supra* note 3, at 3.

23. U.S. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, DRAFT ENVIRONMENTAL JUSTICE METHODOLOGY FOR THE DEFINITION OF SOLID WASTE FINAL RULE 1 (2009), available at <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0315-0264>.

24. Pearl Kan, *Towards a Critical Poiesis: Climate Justice and Displacement*, 33 VA. ENVTL. L.J. 23, 55 (2015).

25. See EPA PLAN EJ 2014, *supra* note 3, at 3.

26. Environmental Justice/Environmental Racism, *Principles of Environmental Justice*, <http://www.ejnet.org/ej/principles.html> (last modified Apr. 6, 1996).

27. *Id.*

28. *Id.* (see principles 1 and 3).

29. *Id.* (see principle 4, recognizing a “fundamental right to clean air, land, water and food”).

Moreover, the principles reflect a view not only that people have a right to an uncompromised environment, but also that where that right is violated, responsible parties should be held accountable.<sup>30</sup> Accountability in this context expressly incorporates an obligation to make whole both the environment and any affected people or communities.<sup>31</sup> Further, the 1991 principles acknowledge the complicated interactions between one's natural, work, and home environments<sup>32</sup> and the different challenges faced by urban and rural populations,<sup>33</sup> and expressly identify the critical influence of multinational corporations, military activity, and education as factors affecting environmental justice values.<sup>34</sup> They also tether environmental justice to principles of international human rights, recognize the importance of cultural integrity as a component of the "environment," and highlight the special legal status of native people in the United States.<sup>35</sup>

To be certain, the 1991 principles do tackle disproportionality; where they do so, however, they explicitly acknowledge the historic role that racism has played in environmental inequity, recognizing that the pursuit of environmental justice is inseparable from the struggle to secure "political, economic and cultural liberation that has been denied [people of color] for over 500 years of colonization and oppression."<sup>36</sup> In this context, the principles demand "public policy based on mutual respect and . . . free from any form of discrimination or bias,"<sup>37</sup> a fundamental right to self-determination, and the right of all communities "to participate as equal partners at every level of decision-making."<sup>38</sup>

Clearly, the 1991 principles plumb a depth that EPA's definition only vaguely suggests.<sup>39</sup> In doing so, they illustrate the degree to which environmental justice is inextricably intertwined with other indicators of inclusion, such as economic well-being, cultural respect, political power, quality of education, and access to the important elements of social infrastructure that open the door of opportunity. As this author has observed before, "[a]t its core, the environmental justice movement, in its many manifestations, is bound together by a set of principles that emerge from a shared experience of abuse and isolation."<sup>40</sup>

Through this lens, it is clear that environmental justice can be understood to encompass not just fair treatment under environmental laws and policies, but a much broader array of values and expectations that help define quality of life. Indeed, a view of environmental justice that focuses exclusively on the specific policy choices and decisionmak-

ing of environmental agencies (like EPA) will ultimately fail to effectuate widespread and lasting change, because other forces play a major role in propagating environmental injustice.<sup>41</sup>

As Luke Cole observed two decades ago:

[A]t the decisionmaking level, environmental justice struggles are not about right and wrong. They are not struggles about what is the best thing to do in a particular situation. They are struggles about power. They are struggles about political and economic power, and the exercise of that power. To win in an environmental justice struggle, one has to build that power. Just being right alone, or just having truth on your side alone, does not win.<sup>42</sup>

There is a robust reservoir of data exploring the degree to which certain communities are subject to disproportionate environmental burdens.<sup>43</sup> As Prof. Kathy North-

41. Consider that marginalized communities are likely to have far fewer social amenities in their neighborhoods (often lacking even basic amenities such as grocery stores), earn less money for the same work, have less education and a shorter life expectancy, accumulate less wealth, and generally benefit less from membership in society. See Paul A. Diller, *Combating Obesity With a Right to Nutrition*, 101 GEO. L.J. 969, 986 (2013) (observing that food deserts might be better characterized as "food swamps" because the void created by the absence of mainstream grocers is frequently filled by fast-food chains, takeout restaurants, and "corner stores" that sell a high proportion of obesogenic items like fried foods, candy, processed snack foods, and soft drinks"); Avi Brisman, *Food Justice as Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 8-9 (2009) (discussing food deserts and noting that they "are residential areas that lack convenient access to the components of a fresh and healthful diet [and] are overwhelmingly concentrated in low-income areas"); Nareissa Smith, *Eatin' Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197 (2009); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 122-23 (2004) (observing for example that because African Americans earn less they are "less likely to be able to buy a home and take advantage of the tax benefits available for homeowners"); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 316 (2003) (noting that "[r]ace creates, governs, influences, and dominates our social order," and detailing how this is so); Daniel A. Farber and Philip P. Frickey, *Is Caroleene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 727 (1991):

Members of racial minorities, blacks in particular, have reason to feel like outsiders in America. Compared to majority group members in the same socioeconomic class, blacks earn less (even when education and experience are factored in), have higher unemployment rates, experience greater housing segregation, receive lower quality education, and have a shorter life expectancy.

(citing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 25-128 (1990); THOMAS SHAPIRO ET AL., *INSTITUTE ON ASSETS AND SOCIAL POLICY, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* (2013), available at <https://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> (describing, e.g., one study showing "the total wealth gap between white and African-American families nearly tripl[ing]" over a 25-year period ending in 2009, as communities of color have reaped less and less of the benefit of economic growth)).

42. Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 449, 451 n.11 (1996) (explaining further that this framing focuses "only on the decisionmaker's view of the struggle, not the community's view. For a community group, the struggle is absolutely about right and wrong, about what is best to do for a community").

43. I will not reiterate the substance of that data here in full, although there are numerous sources to which one can refer for a virtual buffet of information. Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 497-515 (1997). See also Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in *CONFRONTING ENVIRONMENTAL*

30. *Id.* (see principles 6 and 9).

31. *Id.*

32. *Id.* (see principles 4 and 8).

33. *Id.* (see principles 14, 15, and 16).

34. *Id.* (see principle 12).

35. *Id.* (see principles 10, 11, and 12).

36. *Id.* (see preamble).

37. *Id.* (see principle 2).

38. *Id.* (see principle 5).

39. See EPA PLAN EJ 2014, *supra* note 3, at 3.

40. Patrice L. Simms, *On Diversity and Public Policymaking: An Environmental Justice Perspective*, 13 SUSTAINABLE DEV. L. & POL'Y 14, 15 (2013).

ern puts it, “there is presently a strong consensus that, in the United States, the benefits associated with industrial and economic growth inure to the rich and politically empowered, but the burdens associated with the national effort to control pollution fall on those who are poor or politically weak.”<sup>44</sup> While the analysis and discussion of burdens is relatively robust, as are discussions of legal and policy mechanisms through which agencies might begin to address environmental justice issues,<sup>45</sup> what is largely missing are concrete mechanisms that *communities* can access to take a more direct role in defining problems and crafting and pursuing solutions.<sup>46</sup>

A central tenet of environmental justice, after all, is that communities should speak for themselves and should play a direct and substantial role in identifying solutions to environmental (and other) problems.<sup>47</sup> Indeed, only such an approach can begin to cure the underlying structural infirmity—the lack of community power.<sup>48</sup>

In essence, with the emergence of a relative consensus about the existence and general contours of the environmental justice problem, what communities really need are solutions that help to put them in control of their own destinies.

## B. Environmental Justice—A Chronic Lack of Resources

A significant contributing factor in the persistence of environmental inequity is the epidemic level of underfunding among organizations in underserved, low-income, and minority communities. The federal government, state governments, NGOs, and charitable foundations have never made a serious and sustained financial commitment to provide legal or technical resources to empower communities to effectively advocate on their own behalf, even where doing so would be in clear alignment with institutional objectives.<sup>49</sup> The predictable result is a chronic lack of resources that stands as an enduring barrier to substantial progress at the community level.

To its significant credit, EPA’s OEJ has accomplished much within its very limited means and authority. For example, it has created and made available some powerful informational tools, such as EJSCREEN.<sup>50</sup> OEJ also serves as a resource to provide some modest funding and other support for community-based capacity-building and other environmental justice-related activities.<sup>51</sup> This includes programs at the community, state, regional, and national levels.<sup>52</sup> At the community level, these programs provide

RACISM: VOICES FROM THE GRASSROOTS 15, 22 (Robert D. Bullard ed., 1993); Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS* 163-76 (Paul Mohai & Bunyan Bryant eds., 1992); BENJAMIN A. GOLDMAN, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 8 (1993); Bullard et al., *supra* note 4, at 385 (noting that “the number of research studies examining racial and socioeconomic disparities around environmentally hazardous sites has grown dramatically and steadily over the twenty years since publication of *Toxic Wastes and Race*,” and identifying several studies that have helped to advance our understanding of the challenges that communities face); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 630 & nn.30-31 (1992); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 *U. COLO. L. REV.* 921, 926 (1992) (identifying 16 studies that document racial inequity in environmental burdens); Evan J. Ringquist, *Assessing Evidence of Environmental Inequities: A Meta-Analysis*, 24 *J. POL’Y ANALYSIS & MGMT.* 223, 223-47 (2005).

44. Northern, *supra* note 43, at 497-515 (she goes on to provide specific statistical and illustrative support for this proposition).

45. See, e.g., LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NOW IS THE TIME: ENVIRONMENTAL INJUSTICE IN THE U.S. AND RECOMMENDATIONS FOR ELIMINATING DISPARITIES (2010) (outlining policy recommendations and implementation strategies primarily focused on the actions of federal agencies); U.S. EPA, EJ 2014 LEGAL TOOLS (2010) (detailing legal authorities under the various statutes that EPA administers that might be used to the benefit of environmental justice communities). Additionally, EPA has recently issued guidance addressing how it will consider environmental justice issues in the context of agency rulemaking. U.S. EPA, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTIONS (2015), available at <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

46. In 1992, for example, Cole called on “environmental lawyers and poverty lawyers . . . [to] begin to . . . recognize the intersection of their disciplines, and mutually come to practice a new, empowering type of legal advocacy—environmental poverty law.” Cole, *supra* note 43, at 620-21. Similarly, other articles have addressed various proposed strategies for empowering communities, such as through participation in brownfield redevelopment proceedings, federal support for small and minority businesses, or community pollution monitoring. See Josephine M. Balzac, *Public Engagement “Reach In, Reach Out”: Pursuing Environmental Justice by Empowering Communities to Meaningfully Participate in the Decision-Making Processes of Brownfields Redevelopment and Superfund Cleanups*, 9 *FLA. A&M U. L. REV.* 347, 350-51 (2014) (discussing the requirements of public engagement within the Superfund and brownfields law and providing examples of available community involvement resources); Jenny J. Tang, *Public Participation in Brownfield Redevelopment: A Framework for Community Empowerment in Zoning Practices*, 3 *SEATTLE J. ENVTL. L.* 241 (2013) (offering “a moderate framework for fostering adequate public participation that can be applied to zoning practices by environmental justice advocates”); Major Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 *OHIO N.U. L. REV.* 1227, 1257 (1996) (addressing how “small disadvantaged businesses (SDBs) and minority business enterprises (MBEs) can be used to a greater extent as a means of promoting environmental justice in the federal sector”); Christine Overvest & Brian Mayer, *Harnessing the Power of Information Through Community Monitoring: Insights From Social Science*, 86 *TEX. L. REV.* 1493 (2008) (addressing “the importance of collecting and

diffusing site-specific information for influencing the responsiveness and accountability of firms and regulators”).

47. WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE, AND ENVIRONMENT (Dana A. Alston ed., 1990).

48. See generally U.S. EPA, *Environmental Justice Grants and Resources*, <https://www.epa.gov/environmentaljustice/environmental-justice-grants-and-resources> (last updated Jan. 20, 2017); U.S. EPA, *EJSCREEN: Environmental Justice Screening and Mapping Tool*, <https://www.epa.gov/ejscreen> (last updated Dec. 19, 2016).

49. See, e.g., DANIEL R. FARBER & DEBORAH MCCARTHY, NORTHEASTERN UNIVERSITY, GREEN OF ANOTHER COLOR: BUILDING EFFECTIVE PARTNERSHIPS BETWEEN FOUNDATIONS AND THE ENVIRONMENTAL JUSTICE MOVEMENT 29-35 (2001), available at <http://www.northeastern.edu/nejr/wp-content/uploads/Another-Color-Final-Report.pdf> [hereinafter GREEN OF ANOTHER COLOR].

50. See U.S. EPA, *EJSCREEN*, *supra* note 48. As described by Prof. Marie Paben, “EJSCREEN is a geospatial tool that cross-references census block group levels with different demographic and environmental data. An EJSCREEN examines twelve environmental indicators, plus race and income of communities, and creates nationally consistent data methods for considering whether a community has an environmental justice concern.” Paben, *supra* note 20, at 1103.

51. See U.S. EPA, *Environmental Justice Grants and Resources*, *supra* note 48.

52. See U.S. EPA, *Environmental Justice Funding for Communities*, <https://www.epa.gov/environmentaljustice/environmental-justice-grants-funding-and-technical-assistance> (last updated Apr. 10, 2017).



access to small grants<sup>53</sup> and collaborative problem-solving cooperative agreements,<sup>54</sup> and for communities affected by the *Deepwater Horizon* oil spill, the possibility of collaborative agreements to “help [them] address and adapt to the spill’s long-term effects.”<sup>55</sup> In addition, EPA’s Environmental Justice Showcase Communities effort “brings together governmental and non-governmental organizations and pools their collective resources and expertise on the best ways to achieve real results in communities.”<sup>56</sup>

EPA’s programs, while commendable, are quite limited. The small grants program, for instance, issued grants to fewer than 40 recipients in fiscal year 2013,<sup>57</sup> and EPA describes the program as limited to a total value of \$1,200,000, with up to four grants per EPA region and individual awards in amounts of no more than \$30,000 per year.<sup>58</sup> The Showcase Communities program is similarly limited; as EPA explains, the Agency “has committed \$1,000,000 to address environmental justice challenges in ten communities across the nation. The Agency is providing \$100,000 per project over the next two years to help alleviate the environmental and human health challenges facing many American communities.”<sup>59</sup> These programs represent only a drop in a very large bucket, and other sources of funding and support are equally difficult to come by.

Aside from EPA’s dedicated programs, community-based environmental justice-related concerns receive scant attention when compared to other environmental issues, and the philanthropic contributions and other allocation of resources to community-based projects reflect this general posture of neglect. A 2001 report by Northeastern Univer-

sity’s Departments of Sociology and Anthropology looked at (among other things) funding of environmental organizations generally and the funding of environmental justice groups in particular.<sup>60</sup> The study found that

[i]n contrast to the traditional environmental movement, it appears as if foundations are not offering adequate support to the environmental justice movement. In fact, given the number of organizations and the size of the constituencies being served, our calculations would suggest that *the environmental justice movement is perhaps the most underfunded social movement in the country today.*<sup>61</sup>

The study found, for example, that in 1996, of the estimated “\$745.2 million in total foundation grants to the environment . . . only \$27.498 million in grants came to the environmental justice movement in 1996.”<sup>62</sup> Moreover, “[o]n average, only two-tenths of one percent of all foundation grant dollars [to any cause] are dedicated to the environmental justice movement.”<sup>63</sup> This scarcity of essential resources, not surprisingly, has been a source of chronic frustration for communities and environmental justice policy advocates.<sup>64</sup>

Cole, in 1995, offered some penetrating insights regarding this philanthropic dilemma:

On a practical level, the rush of the major players to get involved has meant that money that might have supported actual grassroots work in environmental justice is now being siphoned off to Big Ten [conventional environmental groups]<sup>65</sup> and other national groups working on what they define as “environmental justice.” Major national groups are competing with local environmental justice groups for funding from the same small pool of foundations. The Big Ten groups have been successful in raising

53. See U.S. EPA, *Environmental Justice Small Grants Program*, <https://www.epa.gov/environmentaljustice/environmental-justice-small-grants-program> (last updated Apr. 11, 2017).

54. See U.S. EPA, *The Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program*, <https://www.epa.gov/environmental-justice/environmental-justice-collaborative-problem-solving-cooperative-agreement-0> (last updated Jan. 20, 2017).

55. See U.S. EPA, *Cooperative Agreements to Support Communities Affected by the BP Oil Spill*, <https://www.epa.gov/environmentaljustice/cooperative-agreements-support-communities-affected-bp-oil-spill> (last updated Sept. 8, 2016).

56. U.S. EPA, *Environmental Justice Showcase Communities by Region*, <https://www.epa.gov/environmentaljustice/environmental-justice-showcase-communities-region> (last updated Mar. 15, 2017). As far back as 1995, EPA was pursuing Environmental Justice Community Partnership Pilot projects. These projects were described during a meeting of the NEJAC as “new partnerships between the federal government and communities that have the potential to assist in identifying and prioritizing their environmental concerns, as well as developing more expertise.” U.S. EPA, Office of Environmental Justice, *In the Matter of the Fifth Meeting of the National Environmental Justice Advisory Council*, 9 ADMIN. L.J. AM. U. 623, 675 (1995) (noting that such projects are “not about the federal government coming in and doing something for communities, but rather about providing tools and information that will empower communities”).

57. See U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL JUSTICE SMALL GRANTS FY2013 SUMMARIES BY REGION (2013), available at <https://archive.epa.gov/compliance/environmentaljustice/grants/web/pdf/ej-smgrants-recipients-2013.pdf>.

58. U.S. EPA, OFFICE OF ENVIRONMENTAL JUSTICE, ENVIRONMENTAL JUSTICE SMALL GRANTS PROGRAM REQUEST FOR APPLICATIONS (RFA) AMENDMENT No. 2 (2014), available at <https://archive.epa.gov/compliance/environmentaljustice/grants/web/pdf/ej-smgrants-rfp-2015.pdf>.

59. U.S. EPA, *Environmental Justice Showcase Communities by Region*, <https://www.epa.gov/environmentaljustice/environmental-justice-showcase-communities-region> (last updated Mar. 15, 2017).

60. GREEN OF ANOTHER COLOR, *supra* note 49, ch. III. See also DANIEL FABER & DEBORAH MCCARTHY, A DIFFERENT SHADE OF GREEN: A REPORT ON PHILANTHROPY AND THE ENVIRONMENTAL JUSTICE MOVEMENT IN THE UNITED STATES (2000); FOUNDATIONS FOR SOCIAL CHANGE: CRITICAL PERSPECTIVES ON PHILANTHROPY AND POPULAR MOVEMENTS (Daniel Faber & Deborah McCarthy eds., 2005).

61. GREEN OF ANOTHER COLOR, *supra* note 49, at 31 (emphasis added).

62. *Id.* at 33.

63. *Id.*

64. See, e.g., Dimple Chaudhary et al., *Making Environmental Justice a National Priority*, RESPONSIVE PHILANTHROPY 6 (Summer 2006).

65. As Cole explained it: “The traditional environmental movement— institutionally represented by the ‘Big Ten’ environmental groups, including the Environmental Defense Fund, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club—began its most recent wave of activity as a grassroots movement in the late 1960s.” Luke W. Cole, *Foreword: A Jeremiad on Environmental Justice and the Law*, 14 STAN. ENVTL. L.J. ix, xi-xii (1995). As Deoohn Ferris has argued, referring to “mainstream environmental groups” (as distinguished from “environmental justice groups”) tends to further marginalize the latter by inaccurately suggesting that their concerns are somehow less valid or that they are not (or should not be) part of the public environmental dialogue and norm. See Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN’S L.J. 23, 88 (1996) (citing Deoohn Ferris, Executive Director, Washington Office on Environmental Justice, Remarks at Crit Networks’ Conference on the Politics of Class and the Construction of Identity, Washington, D.C. (Mar. 11, 1995)). Prof. Robert Verchick notes that a preferable term is “conventional environmental groups.” I also use the terms “orthodox environmental groups” and “traditional environmental groups.”

funds—far more successful, not coincidentally, than well-established, highly effective community groups actually doing environmental justice work. This success is based on two factors.

The first factor is a Catch-22: those organizations which have never received a foundation grant find it impossible to get one, while those which have had years of success raising money have found no difficulty in raising money to do what they call environmental justice work. Ironically, the call in 1990 by grassroots activists for the Big Ten to pay more attention to environmental justice issues may have had the unintended effect of causing Big Ten groups to appropriate much of the meager foundation money available for environmental justice work.

The second factor is related to the effect that legal groups have had on the movement: legal groups, because they play within the system, are much less of a threat to that system and are thus more attractive grantees than the more radical grassroots groups. Employees of the legal groups look and think like the funders, and are largely drawn from the same social class, in contrast to the racially and economically diverse environmental justice movement.<sup>66</sup>

The resulting resource deficiency, when coupled with the hyper-technical nature of many environmental policy issues, often erects an insurmountable obstacle to effective participation by environmental justice groups.<sup>67</sup> As Prof. Eileen Gauna has observed, this gives rise to conditions under which “community-based groups [cannot] have their concerns adequately addressed because well-resourced, concentrated interest groups speaking in technical language that the average person cannot understand dominate the arena.”<sup>68</sup> This lack of funding and its consequences, many have argued, is a structural failure with roots in the historic development of the mainstream environmental movement,<sup>69</sup> and the lack of diversity among environmental policymakers and traditional environmentalists.<sup>70</sup> Another contributing factor may be the special relationship between policymakers and these concentrated interest

groups, influenced by the revolving door of professionals who move between policymaking agencies, corporate lobbying firms, and traditional environmental nonprofits.<sup>71</sup>

Particularly surprising perhaps is the degree to which traditional environmental organizations, many of which are quite well-funded,<sup>72</sup> have historically allocated little attention or resource to addressing local community environmental concerns. This is true despite a significant overlap in interest, and the potential for powerful alliances that make both groups more effective.<sup>73</sup>

66. Cole, *supra* note 65, at xiv.

67. See Eileen Gauna, *Environmental Law, Civil Rights, and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 34, 50 (2012); Eileen Gauna, *The Environmental Justice Misfit, Public Participation, and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 13-14 (1998).

68. Gauna, *Environmental Law*, *supra* note 67, at 50.

69. As Cole has noted:

The earliest environmental activity after that of Native Americans was by elite preservationists and conservationists around the turn of the century, and was hardly “grassroots.” . . . The environmental movement of the late 1960s borrowed tactics from the contemporaneous Civil Rights Movement, including mass demonstrations such as Earth Day in 1970, which involved millions of people. Shortly after Earth Day, however, the traditional environmental movement began to turn away from its grassroots to focus on national policy. And it directed that focus from Washington, D.C., seeking to become a national player through federal legislation and lawsuits.

Cole, *supra* note 65, at xii.

70. Simms, *supra* note 40. See also DORCETA E. TAYLOR, *THE STATE OF DIVERSITY IN ENVIRONMENTAL ORGANIZATIONS: MAINSTREAM NGOs, FOUNDATIONS, AND GOVERNMENT AGENCIES* (2014) [hereinafter *STATE OF DIVERSITY*].

71. See *Revolving Door*, OPENSECRETS.ORG, <https://www.opensecrets.org/revolving/> (last visited Apr. 8, 2017) (a database of information about people moving between government and the private sector). See also Douglas N. Jones, *Regulatory Concepts, Propositions, and Doctrines: Casualties, Survivors, Additions*, 22 ENERGY L.J. 41, 59 (2001) (discussing the “problem of the revolving door and regulatory agency personnel changes”); Kenneth A. Manaster, *Ten Paradoxes of Environmental Law*, 27 LOY. L.A. L. REV. 917, 923 n.15 (1994) (observing that of “five former U.S. Assistant Attorneys General for Environment and Natural Resources, at least one . . . earlier had practiced with a national environmental law organization. Four of the five are now associated with large, private law firms, and the fifth with a private environmental management corporation”); Wang Xi et al., *Assessing Environmental Governance of the Hudson River Valley: Application of an IPPEP Model*, 31 PACE ENVTL. L. REV. 1, 101 (2014) (expressing the opinion that the “‘revolving’ door compromises the integrity of decision-making by regulators”).

72. Among top such groups are NRDC (2015 annual revenue of about \$133 million, see <https://www.nrdc.org/finances-and-annual-report/>); Sierra Club (2015 annual revenue of about \$109 million, see [https://www.sierraclub.org/sites/www.sierraclub.org/files/Sierra%20Club%202015\\_IRS%20F990\\_FINAL\\_PUBLIC%20DISCLOSURE%20COPY.pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/Sierra%20Club%202015_IRS%20F990_FINAL_PUBLIC%20DISCLOSURE%20COPY.pdf)); the Environmental Defense Fund (2016 annual revenue of about \$164 million, see <https://www.edf.org/finances>); the Nature Conservancy (2016 annual revenue of about \$803 million); Friends of the Earth International (2015 annual revenue of about \$2.1 million, see <http://www.foei.org/wp-content/uploads/2017/02/2015-financial-statements.pdf>); Earthjustice (2016 annual revenue of about \$55 million, see <https://view.publitas.com/earthjustice/2016-annual-report/page/11>); Wilderness Society (annual budget of about \$29 million, see [https://wilderness.org/sites/default/files/TWS\\_AR\\_2016\\_LowResSingles\\_0.pdf](https://wilderness.org/sites/default/files/TWS_AR_2016_LowResSingles_0.pdf)); and Greenpeace USA (2015 annual revenue of about \$36.8 million, see <http://www.greenpeace.org/usa/wp-content/uploads/2015/06/Greenpeace-Inc.-Public-Disclosure-2015.pdf>).

73. Environmental justice groups, in fact, have a lot to offer. As one recent report puts it:

For decades, the environmental justice (EJ) movement has been at the forefront of defining and addressing environmental issues as they relate to people and the places we live, work, play, and worship. Environmental justice has played a unique and essential role in centralizing the experiences of the most vulnerable communities—low-income communities of color—within the broader environmental debate. Through this work, EJ has fundamentally shifted the nature of the environmental movement in the United States by linking racial justice to environmental issues. . . . EJ’s unique contribution . . . is its perspective. From the vantage point of the most vulnerable and impacted communities EJ asks the question: How can we create a shared future where there are no winners or losers? . . . EJ organizers were among the first working to combat greenhouse emissions and to hold polluters accountable to their communities and the broader public. Their efforts have shut down some of the worst polluters, forced other corporations to retrofit their facilities, and established case law to reduce overall emissions and prevent hot spots. At the same time, EJ organizations have developed model programs and policies to promote energy independence and equitable, sustainable communities. . . . [Moreover,] EJ organizations address the underbelly of proposed solutions to [environmental problems], highlighting the impacts . . . on vulnerable communities. From this vantage point, environmental justice leaders often catch key gaps in mainstream policy proposals that others do not.

KRISTEN ZIMMERMAN, MOVEMENT STRATEGY CENTER, *DARE TO CHANGE: ENVIRONMENTAL JUSTICE LEADERSHIP FOR CLIMATE JUSTICE, SUSTAINABLE COMMUNITIES, AND A DEEP GREEN ECONOMY* 5, 11 (2010).



Whatever the cause, the result has been that the voices of certain communities have played a muted role in land use planning, development, environmental policymaking, and siting decisions, as well as in environmental enforcement.<sup>74</sup> And the benefits of environmental policies and enforcement efforts have, predictably, accrued disproportionately to the benefit of others.<sup>75</sup>

### C. Nonprofits' Rhetoric Has Been Slow to Translate Into Meaningful and Sustained Partnerships

Especially disappointing is the historical failure of traditional NGOs to engage effectively with communities to empower local involvement and action on critical environmental issues.<sup>76</sup> Since “environmental justice” emerged as a rallying cry for communities in the 1980s<sup>77</sup>—ultimately giving rise to various federal policy initiatives, including adoption of Executive Order No. 12898<sup>78</sup> and the creation of EPA’s OEJ—traditional environmental nonprofits have given notional support to the values and aims of environ-

mental justice advocates. That support, at various points, was even accompanied by tangible efforts at conciliation.

For example, during the early 1990s, many traditional environmental groups hired environmental justice staff or initiated other environmental justice projects,<sup>79</sup> only to have these efforts end with frustration, both on the part of environmental justice advocates and the traditional organizations.<sup>80</sup> One problem was the treatment of environmental justice as a distinct box to check or a discrete “project” to pursue in isolation. In reality, as noted already, environmental justice is a set of values that must help to inform almost all aspects of the work that any environmental policy organization does. Absent a proper understanding of what it means to support environmental justice, traditional organizations’ early efforts floundered, and ultimately receded (especially as public policy discussions about environmental justice were relegated to the back burner during Republican presidential administrations).<sup>81</sup>

As a result, community groups and environmental justice advocates often found themselves in conflict with traditional environmental organizations.<sup>82</sup> And when the two did work together, local environmental groups were often

74. Gauna notes, for example, that

[a]ction-forcing suits [under U.S. environmental laws] are often luxuries that underfunded citizen groups cannot afford to undertake. Although the timely issuance of standards and requirements is desirable, community-based environmental justice organizations are often preoccupied attempting to remedy exigent local conditions, usually on shoestring budgets. Even if a community group has sufficient resources to launch an action-forcing suit against the Administrator for failure to perform a nondiscretionary duty, such nondiscretionary duties may not be the highest priority for environmental justice advocates.

Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 71-72 (1995). Environmental justice advocates still manage to play an important role in some federal policymaking. See Jalonnie L. White-Newsome, *Here's How Environmental Justice Advocates Improved Obama's Clean Power Plan*, *GRIST*, Aug. 13, 2015 (discussing the role that environmental justice advocates played in EPA rulemaking to address greenhouse gases from electric generating units), <http://grist.org/climate-energy/heres-how-environmental-justice-advocates-improved-obamas-clean-power-plan/>. However, these groups are forced to carefully pick and choose where to focus extremely limited resources, and usually must engage as outsiders to the process—unlike the well-funded industry advocates, and even major environmental nonprofits, who are invited into the process much earlier and have a fundamentally different relationship with policymakers.

75. See Kaswan, *supra* note 2, at 265-75.

76. See Faith R. Rivers, *Bridging the Black-Green-White Divide: The Impact of Diversity in Environmental Nonprofit Organizations*, 33 *WM. & MARY ENVTL. L. & POL'Y REV.* 449, 451 (2009) (observing that “environmental justice advocates have bemoaned the dearth of ‘mainstream’ environmental nonprofit organization support for this cause”) (citing Bullard, *supra* note 43, at 22). As others have observed, it is important to acknowledge that the traditional environmental movement is not monolithic; it is comprised of many individual organizations, each of which has its own agenda and advocacy approach, its own culture, and its own unique perspective. See, e.g., EDUARDO LAO RHODES, *ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM* 32 (2005). It is useful, nonetheless, to address certain common characteristics of the orthodox movement that help to illuminate the nature of tensions over time with environmental justice advocates.

77. Many cite the local struggle of a rural black township in Warren County, North Carolina, as the principal birthplace of the modern environmental justice movement. See Anhthu Hoang, *Warren County's Legacy for Federal and State Environmental Impact Assessment Laws*, 1 *GOLDEN GATE U. ENVTL. L.J.* 91, 91-92 (2007) (explaining that the township was targeted for siting of a landfill to bury some 60,000 tons of polychlorinated biphenyls (PCB)-contaminated soil).

78. Federal Actions to Address Environmental Justice, *supra* note 6, amended by Exec. Order No. 12948, 60 *Fed. Reg.* 6381 (Jan. 30, 1995).

79. As a recent study on diversity among traditional environmental organizations notes, for example, “[a] short-lived initiative, the Environmental Consortium for Minority Outreach (TEC) came into being in 1990 after minority and social justice activists sent a letter to environmental organizations that were part of the Green Group [an association of major national conservation groups] accusing them of employing racist hiring practices.” *STATE OF DIVERSITY*, *supra* note 70, at 21.

80. Veronica Eady discusses, for example, the tensions that arose in connection with the mainstream environmental movement’s early forays into environmental justice. Veronica Eady, *Warren County and the Birth of a Movement: The Troubled Marriage Between Environmentalism and Civil Rights*, 1 *GOLDEN GATE U. ENVTL. L.J.* 41, 48 (2007) [hereinafter *Birth of a Movement*]. See also Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 283, 374-81 (2007) (discussing some of the differences in perspective between environmental justice advocates and traditional environmentalists).

81. See generally *Birth of a Movement*, *supra* note 80. See also Miranda Welbourne, *The Environmental Justice Movement's Response to Hurricane Katrina, a Critique: Problems Faced, Successes, Failures, and the State of the Movement One Year Later*, 32 *T. MARSHALL L. REV.* 125, 137 (2006) (“The Bush administration was never receptive to environmental protection and with the traumatic events of 9/11, any concern for the environment, including environmental justice, became subservient to the national cause of fighting terrorism.”); Tom Stephens, *An Overview of Environmental Justice*, 20 *T.M. COOLEY L. REV.* 229, 245 (2003).

82. See *Birth of a Movement*, *supra* note 80, at 46-49. As others have observed, for example, “there is considerable disagreement between EJ groups and traditional environmental groups on how greenhouse gases should be regulated, mostly notably as to cap and trade. EJ groups oppose cap and trade.” Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons From the Field*, 31 *WASH. U. J.L. & POL'Y* 121, 156 n.26 (2009). This has played out most recently in connection with EPA’s proposal to address greenhouse gas emissions from electric generating units. Environmental justice advocates submitted comments on that rule “strongly object[ing] to any carbon trading mechanism being present as an option” for controlling greenhouse gases in that rule, while traditional environmental groups generally supported the rule including the cap-and-trade features. See Letter From Environmental Justice Leadership Forum on Climate Change to Gina McCarthy, Administrator, EPA, Comments for EPA’s Proposed Clean Power Plan 2 (Dec. 1, 2015), available at [http://www.ejleadershipforum.org/wp-content/uploads/2015/07/Env-Just-Leadership-Forum-on-Climate-Change\\_-\\_Docket-ID-No.-EPA-HQ-OAR-2013-0602\\_final.pdf](http://www.ejleadershipforum.org/wp-content/uploads/2015/07/Env-Just-Leadership-Forum-on-Climate-Change_-_Docket-ID-No.-EPA-HQ-OAR-2013-0602_final.pdf). See also Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 *ELR* 10287 (May 2008).

left with a bad taste in their mouths, feeling as though their interests were subordinated to the goals of “big green.”<sup>83</sup>

Ironically, empowering and partnering with community-based activists can result in more effective issue advocacy, a fact that the green movement seemed to lose sight of despite the fact that many of its early successes were the product of civil rights movement-inspired grassroots public actions.<sup>84</sup> Recently, however, there has been a resurgence of interest among green groups in making commitments to environmental justice partnerships and pursuing meaningful strategies to empower community advocacy. Both the Sierra Club and the Natural Resources Defense Council (NRDC) have top leaders who are people of color and who have expressed a desire to expand and intensify those organizations’ support for environmental justice efforts.<sup>85</sup>

For example, in an interview, Rhea Suh, the new president of NRDC, expressed her view that:

It’s also the responsibility of big organizations like NRDC to say, “We’re not going to be able to get everything we want to get done on our own, and we have to have partnerships.” We’re not going to be the experts in this local community—and nor should we ever be the experts in this local community—so we need to support the local community experts, because they’re the boots on the ground and they know what’s happening. It’s not simply [having them] show up at our rally, it’s supporting these organizations for their own missions, which are wholly complementary to the missions and objectives that NRDC wants to pursue.<sup>86</sup>

In a heartening turn of events, one of the oldest and most influential traditional environmental groups, the Sierra Club, elected its first African-American president in 2015—Aaron Mair.<sup>87</sup> The implications for that organization’s commitment to environmental justice are significant; Sierra Club is already one of the most actively engaged at the grassroots level with environmental justice advocates (in no small measure because of Leslie Fields, director of

the Club’s Environmental Justice and Community Partnerships program).<sup>88</sup> After his election, Mair, a longtime advocate for civil rights and urban environmental causes, expressed the following sentiments about the Club and its relationship to environmental justice work:

Today the environmental justice movement is recognizing and taking ownership of the values that people of color hold with respect to their use of the environment. They can play a significant role in protecting it, but things cannot be only from the perspective or point of view of whites. It must include all points of view so that when laws and regulations are fashioned they’re not advantaging one group over another. The environmental justice movement has affirmed the rights of people of color with regard to their access to clean land, clean air and clean water, and that minority communities cannot, should not be the dumping ground.<sup>89</sup>

Other organizations, including Earthjustice, the nation’s largest and most prolific nonprofit environmental litigation firm, have similarly made recent, high-level commitments to environmental justice.<sup>90</sup> And even the philanthropic community has begun to rethink its laissez-faire attitude toward environmental justice. For example, a 2012 report from the National Committee for Responsive Philanthropy,<sup>91</sup> prepared with input from an advisory committee comprised of representatives from some of the most influential environmental funders,<sup>92</sup> explained:

[W]e can secure more environmental wins by decreasing reliance on top-down funding strategies and increasing funding for grassroots communities that are directly impacted by environmental harms and have the passion and perseverance to mobilize and demand change. History supports this approach. From women’s suffrage to the civil rights movement to early environmental wins, grassroots organizing has clearly been a vital lever of victory. Campaigns against dirty energy as well as, notably, the success of grassroots campaigns against environmental regulations show the power and impact of community driven change. It’s not merely that grassroots organizing wins change at the local level but, in case after case,

83. See Nannette Jolivet Brown, *The Many Faces of Environmental Justice: Which One Speaks the Truth?*, 56 LA. B.J. 420, 421 (2009) (noting, among other things, how early “alliances between environmental justice advocates and mainstream groups . . . haven’t remained galvanized”); ANGELA PARK, EVERYBODY’S MOVEMENT: ENVIRONMENTAL JUSTICE AND CLIMATE CHANGE 26-28 (2009), available at <http://www.racialequitytools.org/resourcefiles/ESCeverybodymovement.pdf>.

84. See PARK, *supra* note 83, at 26-28; MICHEL GELOBTER ET AL., THE SOUL OF ENVIRONMENTALISM: REDISCOVERING TRANSFORMATIONAL POLITICS IN THE 21ST CENTURY 10 (2005), available at <http://community-wealth.org/content/soul-environmentalism-reconsidering-transformational-politics-21st-century>.

85. Even the Environmental Defense Fund (EDF) has expressed a view that “collaboration on environmental justice issues leads to stronger, more inclusive action.” See Marcelo Norsworthy, *Collaboration on Environmental Justice Issues Lead to Stronger, More Inclusive Action*, EDF, Feb. 11, 2014, <https://www.edf.org/blog/2014/02/11/collaboration-environmental-justice-issues-leads-stronger-more-inclusive-action>.

86. Brentin Mock, *NRDC’s New President Gets Serious About Diversity*, GRIST, Jan. 5, 2015, <http://grist.org/people/nrdcs-new-president-gets-serious-about-diversity/>.

87. Tom Valtin, *Aaron Mair Elected Sierra Club President*, SIERRA CLUB THE PLANET, May 18, 2015, <http://www.sierraclub.org/planet/2015/05/aaron-mair-elected-sierra-club-president>.

88. See Sierra Club, *Environmental Justice*, *supra* note 1.

89. James Edward Mills, *An Interview With the First African-American President of the Sierra Club*, HIGH COUNTRY NEWS, Aug. 29, 2015.

90. In 2015, Earthjustice underwent a restructuring that saw the creation of a “healthy communities” program, headed by Lisa Garcia—a former environmental justice advocate, and former environmental justice leader at EPA during the Obama Administration. See *EPA Environmental Justice Head Lisa Garcia Joins Earthjustice*, EARTHJUSTICE, Apr. 16, 2014, <http://earthjustice.org/news/press/2014/epa-environmental-justice-head-lisa-garcia-joins-earthjustice> (announcing the hiring of Garcia as the vice president of litigation for health). In the interest of full disclosure, the author also sits on the board of Earthjustice.

91. SARAH HANSEN, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, CULTIVATING THE GRASS ROOTS: A WINNING APPROACH FOR ENVIRONMENT AND CLIMATE FUNDERS (2012), available at [https://www.ncrp.org/wp-content/uploads/2016/11/Cultivating\\_the\\_grassroots\\_final\\_lowres.pdf](https://www.ncrp.org/wp-content/uploads/2016/11/Cultivating_the_grassroots_final_lowres.pdf).

92. This included representatives from the Ford Foundation, the Joyce Foundation, the Environmental Grantmakers Association, and the Jessie Smith Noyes Foundation, among others. *Id.*

builds the political pressure and climate for national change as well.<sup>93</sup>

Whether these changes will usher in a new paradigm remains to be seen, but they offer the promise of reconciliation between the environmental elite and the grassroots, between “big green” and community-driven environmental justice advocacy.<sup>94</sup> This is a critical evolutionary process for the environmental movement,<sup>95</sup> and it comes at a time when environmental advocacy is likely to take on singular importance in the face of the Trump Administration’s emphasis on deregulation, promotion of fossil fuels, and unrestrained economic development. This is a time for creative reconceptualization of environmental advocacy; a time to begin to change the power dynamic that has left many communities behind, and that threatens to weaken the broader environmental movement as the United States becomes increasingly diverse and increasingly divided between haves and have-nots.<sup>96</sup>

The framework outlined below presents one small piece of a much larger puzzle. It proposes a strategy through which states, NGOs, academic institutions, funders, and federal agencies can help empower local communities (including low-income communities and communities of color) to address significant environmental problems—and do so guided by the needs and priorities of the communities themselves. In particular, this approach contemplates the creation of mutually beneficial strategic alliances and institutionalized structures to more effectively, and more deliberately, leverage SEPs in connection with federal and state environmental enforcement actions.

## II. The Unrealized Potential of SEPs

State and federal environmental enforcement authorities initiate thousands of actions each year in the United States.<sup>97</sup> Environmental enforcement, as a result, is one

of the most influential activities when it comes to polluter behavior. And the vast majority of these cases end in settlement agreements,<sup>98</sup> which not only assess penalties but also specify injunctive relief (such as the installation of emission control technology), and often direct violators to undertake remedial steps to address the impacts of their noncompliance (by, for example, performing environmental cleanups).<sup>99</sup> Under the right conditions, the potential for local benefits from such environmental enforcement actions is considerable. Whether this happens or not can be influenced by the degree to which affected communities themselves are involved in selecting the violators’ remedial obligations.

While in most cases local communities will not be in a position to directly participate in settlement proceedings in a meaningful way—except where local groups are actually *parties* to the enforcement action—SEPs may offer a tool for such groups, by proxy, to play a significant role. In order to empower local communities in this manner, two things will be necessary: (1) the proper policy architecture to provide communities with access to the settlement process, and (2) access to legal and technical expertise to develop locally valuable off-the-shelf SEPs. For this to happen, states, NGOs, academic institutions, and federal enforcement authorities, with meaningful support from the funding community, will need to cooperate to build an effective and sustainable model for engagement.

### A. Understanding SEPs: A Basic Primer

SEPs are enforcement-related tools through which defendants in environmental enforcement cases can mitigate monetary penalties by agreeing to undertake environmentally beneficial projects that they would not otherwise be obligated to perform.<sup>100</sup> As EPA explains in its SEP policy guidance document:

SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compli-

93. *Id.* at 1.

94. Indeed, there has even been some philanthropic interest in funding SEP-related initiatives. See ROSE FOUNDATION PROPOSAL TO CREATE AND MANAGE THE CVRWQCB DISADVANTAGED COMMUNITY SEP FUND, [http://www.waterboards.ca.gov/centralvalley/board\\_decisions/tentative\\_orders/1403/22\\_sep\\_resolution/4\\_sep\\_rosefound\\_proposal.pdf](http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/1403/22_sep_resolution/4_sep_rosefound_proposal.pdf) (describing a Rose Foundation commitment to funding support for community-based SEP projects in the Central Valley of California).

95. See GREEN OF ANOTHER COLOR, *supra* note 49, at 2-5.

96. *Id.* See also U.S. CENSUS BUREAU, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 9, tbl. 2 (2015) (showing U.S. population projections based on race for the year 2060); GABRIEL ZUCMAN, STANFORD CENTER ON POVERTY AND INEQUALITY, WEALTH INEQUALITY (2016) (generally discussing the increase in wealth inequality in the United States, and observing, among other things, that “[t]he share of wealth held by the top 0.1 percent of households is now almost as high as in the late 1920s, when *The Great Gatsby* defined an era that rested on the inherited fortunes of the robber barons of the Gilded Age”).

97. In 2016, EPA initiated more than 1,700 environmental enforcement cases (including civil cases referred to the Department of Justice, administrative penalty order complaints, and environmental crimes cases opened). U.S. EPA, *Enforcement Annual Results Numbers at a Glance for Fiscal Year 2016*, <https://www.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-2016> (last visited Apr. 8, 2017). And according to EPA’s Enforcement and Compliance History Online (ECHO), there are (in the aggregate) exponentially more formal and informal enforcement actions filed by states. See U.S. EPA, *ECHO—Enforcement and Compliance History*

*Online*, <https://echo.epa.gov/> (last updated Apr. 13, 2017) (EPA provides detailed enforcement data, organized by environmental media, under the “Analyze Trends” link). See also ESWORTHY, *supra* note 16 (discussing in general the role of federal and state authorities in the enforcement of environmental laws).

98. Kristi Smith, *Who’s Suing Whom: A Comparison of Government and Citizen Suit Environmental Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 387 (2004) (noting that a majority of environmental enforcement actions are resolved by consent decree, whether the cases are initiated by the government or by private citizens).

99. See generally U.S. EPA, *Enforcement Annual Results Numbers at a Glance for Fiscal Year 2016*, *supra* note 97 (describing the aggregate benefits of EPA’s enforcement activities).

100. See EPA 2015 SEP POLICY, *supra* note 11. EPA also operated for many years under a SEP policy issued in 1998. See Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24796, 24797-98 (May 5, 1998). See also WILLIAM L. THOMAS ET AL., CRAFTING SUPERIOR ENVIRONMENTAL ENFORCEMENT SOLUTIONS 11-12 (2000); Kristl, *supra* note 19; MONICA KIRK & LANGDON MARSH, ENVIRONMENTAL ENFORCEMENT SOLUTIONS: HOW COLLABORATIVE SEPs ENHANCE COMMUNITY BENEFITS 18, fig. 7 (2006).



ance with applicable laws. In settlements of environmental enforcement cases, the United States Environmental Protection Agency . . . requires alleged violators to achieve and maintain compliance with federal environmental laws and regulations, take action to remedy the harm or risk caused by past violations, and/or to pay a civil penalty. In certain instances, SEPs may be included in the settlement. . . . The primary purpose of [EPA's] SEP Policy is to encourage and obtain environmental and public health protection and benefits that may not otherwise have occurred in the settlement of an enforcement action.<sup>101</sup>

EPA further explains, “[a] primary incentive for a defendant to propose a SEP is the potential mitigation of its civil penalty.” That is, a defendant who voluntarily elects to undertake a qualifying SEP may end up paying a lower enforcement-related monetary penalty.<sup>102</sup>

Settlements that include a SEP must always include a settlement penalty that [in the aggregate] recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s), . . . a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty.<sup>103</sup>

Thus, when a defendant elects to undertake a SEP, EPA may rely on that fact as a mitigating circumstance to impose a lower final monetary penalty.<sup>104</sup>

At least in the federal context, there are significant limitations imposed on the availability of SEPs, which constrain the extent to which federal agencies can rely on them. As EPA explains:

To include a proposed project in a settlement as a SEP, Agency enforcement and compliance personnel should

1. Ensure that the project conforms to the basic definition of a SEP . . . ;
2. Ensure that all legal guidelines are satisfied . . . ;
3. Ensure that the project fits within one (or more) of the designated categories of SEPs . . .<sup>105</sup>;

101. EPA 2015 SEP POLICY, *supra* note 11.

102. Of course, enforcement penalties are critical to almost every environmental regulatory program because they “help maintain a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply” with regulatory requirements. EPA 2015 SEP POLICY, *supra* note 11, at 22.

103. *Id.* at 21.

104. *Id.* EPA is careful to point out, however, that “SEPs are not penalties, nor are they accepted in lieu of a penalty.” *Id.* Moreover, EPA has carefully crafted guidelines on how to calculate minimum acceptable penalty amounts when a defendant does adopt a SEP. *Id.* at 22-24.

105. EPA identifies seven discrete types of acceptable SEPs, including public health, pollution prevention, pollution reduction, environmental restoration and protection, assessments and audits, environmental compliance promotion, and emergency planning and preparedness. EPA 2015 SEP POLICY, *supra* note 11, at 12-17. EPA also indicates that “[p]rojects that do not fit within one of the seven categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of this Policy, are allowable as SEPs subject to [EPA] approval.” *Id.* at 17. EPA also identified projects categorically not allowable as SEPs. *Id.* at 17-18.

4. Determine the appropriate amount of penalty mitigation to reflect the project's environmental and/or public health benefits using the evaluation criteria . . . ; and
5. Ensure that the project satisfies all of the EPA procedures, settlement requirements and other criteria.<sup>106</sup>

Additionally, SEPs cannot involve activities that defendant entities would otherwise be legally required to perform.<sup>107</sup> And SEPs must involve projects that have some nexus to the violation that gave rise to the enforcement action.<sup>108</sup> In this regard, “[p]rojects must relate to the underlying violation(s) at issue in the enforcement action.”<sup>109</sup> That is, they must be designed to reduce:

- a) The likelihood that similar violations will occur in the future;
- b) The adverse impact to public health and/or the environment to which the violation at issue contributes; or
- c) The overall risk to public health and/or the environment potentially affected by the violation at issue.<sup>110</sup>

Also, because they are inherently *voluntary* remedial projects, when a defendant elects to pursue a SEP, “EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may the EPA retain authority to manage or administer the SEP.”<sup>111</sup>

SEPs are available not just in federal enforcement proceedings, however, but are recognized tools in the context of most state enforcement regimes as well.<sup>112</sup> And in the context of such state programs, they are considerably more flexible—as most of the federal legal and policy limitations do not apply to states.<sup>113</sup> Moreover, EPA (and many

106. *Id.* at 1-2.

107. EPA explains that this includes any activities that the defendant, or any other third party, is likely to be required to perform:

1. As injunctive relief, including as a mitigation project, in the instant case;
2. As injunctive relief in another legal action the EPA, or another regulatory agency, could bring;
3. As part of an existing settlement or order in another legal action; or
4. By any other federal, state, or local requirement

EPA 2015 SEP POLICY, *supra* note 11, at 6-7. These limitations are necessary to avoid violations of federal laws intended to prevent executive agencies from diverting funds from the U.S. Treasury to effectively supplement their congressionally appropriated budgets. Miscellaneous Receipts Act (MRA), 33 U.S.C. §3302(b). *See also Environmental Enforcement in the Fifty States*, *supra* note 18, at 189, 199-201 (generally discussing SEPs and observing that EPA's policy memoranda “are designed to ensure that SEPs do not exceed the Federal Government's authority and do not run afoul of any statutory requirements, especially the Miscellaneous Receipts Act”).

108. EPA 2015 SEP POLICY, *supra* note 11, at 7. As EPA explains, “Nexus is the relationship between the violation and the proposed project. Nexus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement.” *Id.*

109. *Id.* at 8.

110. *Id.* at 8.

111. *Id.*

112. *Environmental Enforcement in the Fifty States*, *supra* note 18, at 210 (generally discussing state SEP policies).

113. *See id.* at 195 (discussing the general absence of legal limitations on state SEPs).

states) also specifically recognizes SEPs as a mechanism for obtaining environmental justice-related benefits. EPA says, in this regard:

Defendants are encouraged to consider SEPs in communities where there are [environmental justice (EJ)] concerns. SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located near the areas affected by violations will be protected. However, due to the non-public nature of settlement negotiations there are legal constraints on the information the EPA can share during settlement negotiations. . . . [T]he EPA strongly encourages defendants to reach out to the community for SEP ideas and prefers SEP proposals that have been developed with input from the impacted community. During the public comment period required for many judicial settlements and certain administrative settlements, community members are afforded an opportunity to review and comment on any of the settlement's terms, including any SEPs that may be part of the resolution. . . . [B]ecause promoting environmental justice through a variety of projects is an overarching goal, EJ is one of the six critical factors on which SEP proposals are evaluated. . . . SEPs that benefit communities with EJ concerns are actively sought and encouraged.<sup>114</sup>

Indeed, recent environmental justice initiatives by both EPA and the U.S. Department of Justice have identified SEPs as an important ingredient in a successful recipe to address disproportionate environmental burdens.<sup>115</sup>

Despite these seemingly positive protestations, however, SEPs remain the exception and not the rule in environmental enforcement cases.<sup>116</sup> EPA has issued guidance addressing the involvement of communities in environmental enforcement actions<sup>117</sup>; advocates complain that EPA still does not reliably engage communities in the process of formulating SEPs to ensure that they maximize community input and incorporate measures that most closely reflect community priorities.<sup>118</sup>

SEPs mostly derive from administrative enforcement cases as opposed to judicial enforcement.<sup>119</sup> State and federal environmental enforcement actions, in turn, mostly derive from three statutes: the Clean Air Act (CAA),<sup>120</sup> the Clean Water Act (CWA),<sup>121</sup> and the Resource Conservation and Recovery Act (RCRA).<sup>122</sup> According to a study of enforcement over a 12-year period from 2001 to 2012, the CAA had the highest number of enforcement cases overall, followed by the CWA and RCRA.<sup>123</sup> For each type of action, states brought significantly more cases than did the federal government.<sup>124</sup>

Indeed, according to one study, states are generally responsible for between 80% and 90% of all environmental enforcement actions.<sup>125</sup> However, when considering total penalties collected from such cases, despite the lower numbers of cases, the federal enforcement actions resulted in substantially higher aggregate penalties.<sup>126</sup> The highest penalties were under the CWA, followed by RCRA and then the CAA.<sup>127</sup> For example, federal enforcement of the CWA resulted in more than \$500 million in penalties over the time period studied, while state enforcement of the CAA netted only about \$100 million.<sup>128</sup>

In light of the large number of enforcement cases and high aggregate dollar value, it seems clear that the opportunities for restorative benefits are rich. However, SEPs continue to be underutilized as a mechanism to address the array of environmental challenges that marginalized communities face. The reasons for this, ultimately, are identifiable, and steps could be taken to empower communities to take greater advantage of SEP-related opportunities.

### III. Conceptualizing a More Integrated Approach—SEP Community Empowerment Partnerships

While other scholars have addressed the potential associated with leveraging SEPs for the benefit of marginal-

114. EPA 2015 SEP POLICY, *supra* note 11, at 4.

115. See EPA PLAN EJ 2014, *supra* note 3, at 14; DEPARTMENT OF JUSTICE GUIDANCE CONCERNING ENVIRONMENTAL JUSTICE 6 (2014).

116. See KIRK & MARSH, *supra* note 100, at 18, fig. 7; NATIONAL POLICY CONSENSUS CENTER, ENVIRONMENTAL ENFORCEMENT SOLUTIONS: HOW COLLABORATIVE SEPs ENHANCE COMMUNITY BENEFITS (2007) at 18, available at [http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1003&context=nccpp\\_pub](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1003&context=nccpp_pub) (From 2001 to 2005, "on average, roughly five percent . . . of all enforcement, including both judicial and administrative, concluded with a SEP. [Moreover] . . . administrative SEPs outnumbered judicial SEPs by a factor of 10 to 1."). See also DIKA KUOH, MASTERS PROJECT, LEVERAGING ENFORCEMENT TO ENHANCE COMMUNITY: THE USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS TO PROMOTE ENVIRONMENTAL JUSTICE 6 (2013) [hereinafter LEVERAGING ENFORCEMENT].

117. U.S. EPA, *Environmental Protection Agency—Federal Register Notice: Interim Guidance for Community Involvement in Supplemental Environmental Projects*, <https://www.epa.gov/enforcement/environmental-protection-agency-federal-register-notice-interim-guidance-community> (last updated Sept. 15, 2016) [hereinafter *Interim Guidance for Community Involvement*].

118. See generally CANALES, *supra* note 18.

119. LEVERAGING ENFORCEMENT, *supra* note 116, at 18 (looking at all federal and judicial enforcement action that resulted in SEPs over a period from 2001 to 2012). Interestingly, Dika Kuoh's data shows that the largest numbers of federal SEPs were seen in the years 2003-2008, with the highest single-year volume in 2004. *Id.* at 19 (fig. 4) (consistent with the idea that more conservative administrations may not be inherently hostile to SEPs).

120. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.

121. 33 U.S.C. §§1251-1387; ELR STAT. FWPCA §§101-607.

122. LEVERAGING ENFORCEMENT, *supra* note 116, at 18-19. Kuoh defined "non-trivial" as any enforcement case involving a penalty of at least \$1,000; 42 U.S.C. §§6901-6992k; ELR STAT. RCRA §§1001-11011.

123. *Id.* at 18-19, fig. 3 (most federal cases, however, were brought under the CWA).

124. *Id.*

125. See SEP 50 STATE SURVEY, *supra* note 12, at 22.

126. LEVERAGING ENFORCEMENT, *supra* note 116, at 18-19.

127. *Id.* Total aggregate penalties for federal cases were approximately \$500 million under the CWA, \$300 million under RCRA, and \$175 million under the CAA. *Id.* at 19 (fig. 4). As Kuoh points out, however, monetary penalties are not distributed evenly; certain states had significantly larger aggregate penalties (these included California, Louisiana, New York, and Texas). *Id.* at fig. 6a. It is worth noting, however, that major events (like the *Deepwater Horizon* disaster) have the potential to dramatically affect year-to-year penalty data (this is not reflected in Kuoh's data however).

128. *Id.* at 19.

ized communities, those analyses have not confronted, or attempted to resolve, the fundamental impediments to more effective SEP deployment.<sup>129</sup> Indeed, conceptually, the idea that SEPs might provide significant opportunities for marginalized communities is pretty straightforward. The more compelling questions involve identifying the nature of the obstacles that currently prevent communities from taking full advantage of SEPs, and conceiving of a means to remove or overcome these obstacles.<sup>130</sup>

Ultimately, to make progress, it will be necessary to answer these questions. The discussion that follows offers some insights about why communities cannot participate more effectively, and a concrete (although still general) proposal for a structural answer to this persistent problem.

In the end, the challenges that marginalized communities face when it comes to full participation in SEP development are the product of procedural, informational, and resource deficiencies. As discussed below, in order to overcome these deficiencies, the NGO and philanthropic communities will need to make a serious commitment to community partnerships—translating notional support for environmental justice objectives into meaningful action. Academic institutions, and state and federal enforcement officials, will also have important roles to play.

### A. Clarifying the Impediments to Full Community Participation in SEP Development

The necessary first step to empowering communities to participate more fully in the development and utilization of SEPs is understanding the source of their current disenfranchisement. Here, the underutilization, or ineffective deployment, of SEPs in service of community-driven objectives can be conceptualized as a problem with three relatively distinct components: (1) a process failure (the absence of institutionalized prompts in the enforcement process to reliably ensure that SEPs are consistently explored as an option); (2) an informational failure (a lack of knowledge on the part of communities about SEPs in general, and about the existence of particular enforcement actions that might provide opportunities to realize SEP-related benefits); and (3) a resource failure (a deficiency in technical, science, health, and legal expertise, available to communities, to develop meaningful projects that best reflect community priorities).

As an initial obstacle to effective community involvement in the formulation of SEPs, the environmental enforcement process is not designed to be an inclusive affair. There are serious confidentiality-related concerns that restrain enforcement authorities from disclosing ongoing enforcement activities,<sup>131</sup> and violators are often unwilling to invite the direct participation of community groups for fear of complicating the enforcement proceedings.<sup>132</sup> The issue of confidentiality in civil settlements is certainly not without its critics<sup>133</sup>—indeed some have more generally advocated for broader transparency,<sup>134</sup> and EPA itself acknowledges the importance of sharing SEP development information with affected communities.<sup>135</sup> However, there is continued resistance to what is perceived as “attempts to transform the court into an advocate . . . or an information clearinghouse.”<sup>136</sup>

131. See *Environmental Enforcement in the Fifty States*, *supra* note 18, at 192; Rosenthal et al., *supra* note 19, at 13.

132. As John Rosenthal, environmental counsel to the National Conference of Black Mayors, put it:

Some cite confidentiality as a reason; others state that including outsiders in the negotiation process is a disincentive to industries and other businesses to enter into SEP projects. These entities may be concerned that outsiders could learn trade secrets, alter the process, prove difficult in negotiations, or harbor unreasonable expectations or demands.

Rosenthal et al., *supra* note 19, at 13.

133. See Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 304 (1999) (discussing the “Confidentiality Debate” and observing that it “reflect[s] the broader systemic debates concerning the value of settlement, the proper judicial function, and the importance of party autonomy”).

134. See *id.* at 304-05, observing that

[p]ublic access advocates . . . question how critical confidentiality really is to the compromise of most cases when trial represents a lengthy, expensive, and risky alternative. They dismiss cost and delay arguments as mere “housekeeping” or efficiency concerns that should not overshadow the public benefits that flow from open judicial proceedings.

Such benefits include more “public debate” and more efficient resolution of related litigation (fostering “systemic efficiency”) (citations omitted).

135. In its 2015 SEP policy, for example, EPA states:

EPA should encourage input on project proposals from the local community that may have been adversely impacted by the violations. Case teams should encourage defendants to seek community input as early in the SEP development process as possible. Ideally, community input should be sought by the defendant and the EPA collaboratively, but in some cases the EPA should consider seeking community input even in the absence of the defendant’s participation (e.g., cases in areas with environmental justice concerns). If a case team is aware of community interest in particular SEPs, the case team should feel free to share that information with the defendant. Soliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility.

EPA 2015 SEP POLICY, *supra* note 11, at 18; see also *Interim Guidance for Community Involvement*, *supra* note 117.

136. *Id.* at 306. SEPs, however, present a unique case (at least at the federal level), as EPA generally views them as available only as a *pre-litigation* tool. Kristl, *supra* note 19, at 223 (explaining that due to concerns about compliance with the Miscellaneous Receipts Act, EPA “believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances”) (citing U.S. EPA, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA’S POLICY ON CIVIL PENALTIES (1984)). Ultimately, the confidentiality debate is not central to the workability of the

129. See *supra* note 19. See also LEVERAGING ENFORCEMENT, *supra* note 116; NATIONAL POLICY CONSENSUS CENTER, ENVIRONMENTAL ENFORCEMENT SOLUTIONS: HOW COLLABORATIVE SEPs ENHANCE COMMUNITY BENEFITS (2006), available at [http://www.ecy.wa.gov/services/enforce/settlements/NPCC\\_seps\\_report.pdf](http://www.ecy.wa.gov/services/enforce/settlements/NPCC_seps_report.pdf).

130. Detailed evaluations of the mechanics of the SEP process, and the various legal and procedural contours of the federal SEP policy, are useful and ultimately necessary to determine how best to utilize SEPs on behalf of communities. However, considerable information is already available about how SEPs work, and further analysis of the complexities of the SEP process is beyond the scope of this Article (and probably unnecessary). In the end, understanding the mechanics of SEPs is not enough; one must also confront the practical realities that keep communities from taking advantage of the opportunities that SEPs offer.



In the end, because of limited access to the process, and relatively short settlement time lines once information does become available, it is simply too late to begin the process of considering SEPs, informing the affected community, and locating and deploying resources to develop community-driven project proposals, after enforcement officials have already effectively completed settlement negotiations with the defendant.<sup>137</sup> Therefore, in order to make full and most effective use of SEPs for the benefit of communities, the structural mechanisms to allow for meaningful participation must be fully in place in *anticipation of* (not in reaction to) the emergence of enforcement-related SEP opportunities.

More important perhaps, enforcement officials typically do not build in procedures to ensure that outreach to potentially affected communities occurs in advance of initiating enforcement, even in ways that might protect the identity of the alleged violators. Nor do agencies typically routinize proactive outreach to communities in advance of geographically focused, or industry-specific, enforcement initiatives—where it might be possible to predict with some accuracy which communities are likely to be affected based on region or on the type of industry subject to enforcement efforts (which, in turn, would provide insights into the kinds of SEPs that might be most promising). In these and other ways, the enforcement process itself is not structurally optimized to facilitate consideration of community-driven SEPs, or generally to maximize community involvement.

In addition to these process flaws, there are some very basic informational impediments to effective community participation. Among these is the fact that marginalized communities are often unaware that SEPs are even an available mechanism for obtaining restorative environmental benefits. And even when communities do know about SEPs generally, they are likely to have little access to information about how to engage with enforcement officials, how to find out about enforcement cases, or how to effectively offer input regarding enforcement-related options.<sup>138</sup>

As a result, even when a community might be inclined to participate, it may never find out about enforcement cases, or even if it does, it may not know how to appropriately engage in order to advocate for a SEP, to offer up its own views about what the community needs, or to otherwise meaningfully participate in SEP development.<sup>139</sup> In order to participate, communities must have access to informa-

tion regarding what SEPs are and how they work. They must also have access to accurate and usable information about the enforcement process, about how to work with enforcement officials, and about what kinds of enforcement actions are underway or anticipated, or at least what types of enforcement actions are reasonably likely to arise in the future (and therefore what kinds of SEPs are likely to be viable).<sup>140</sup>

Finally, even in the absence of the process- and information-related barriers discussed above, communities will often lack the resources to access the science, health, technical, and legal expertise necessary to meaningfully advocate for particular SEP approaches that would best reflect community priorities. SEP development can be a technically burdensome, procedurally complicated, and legally nuanced undertaking,<sup>141</sup> and may be out of the reach of many communities without professional assistance. The process often involves multiple layers of scientific, legal, and economic analyses, and sometime delicate dealings with enforcement agencies and implementing defendants.

Thus, in order to meaningfully contribute to SEP development efforts, in the absence of some kind of supportive infrastructure, communities may need to independently access and manage a substantial suite of resources. An inability to do so thus may stand as an effective obstacle to meaningful engagement. Accordingly, empowering communities in the context of SEP participation will require mustering resources to put to work on their behalf.<sup>142</sup>

Identifying the shortcomings that stand in the way of the full utilization of SEPs for environmental justice gains is one thing; identifying how to address those shortcomings, however, is something else entirely.

## B. A Conceptual Model to Maximize the Restorative Potential of SEPs for Environmental Justice Communities

An effective model for empowering environmental justice communities using SEPs should leverage already existing, or anticipated, federal and state enforcement actions, and identify mechanisms to overcome the process-related, informational, and expertise deficits that keep communities from meaningfully and consistently engaging.

SEP community empowerment partnerships, discussed in more detail in Part II.B., but a less opaque settlement process would certainly help to make such efforts less cumbersome and more efficient.

137. See *Environmental Enforcement in the Fifty States*, *supra* note 18, at 220-21 (generally discussing the current state of public involvement in SEP development, which, while encouraged, occurs after the settlement process has effectively been completed and seeks only back-end input from communities).

138. As noted *supra* note 135, EPA encourages community input, but the effectiveness of these efforts is mixed at best.

139. Some scholars have observed “that community groups receive late, if any, notice about impending SEP negotiations.” *Environmental Enforcement in the Fifty States*, *supra* note 18, at 207.

140. Recall that SEPs must have a nexus with the underlying violation. See *supra* note 107 and accompanying text.

141. BARNES & THORNBURG LLP, *supra* note 13 (observing in a “legal alert” for its industry clients that

[r]egulated entities seeking amicable and optimal settlements with [EPA] and Department of Justice (DOJ) must navigate complex substantive and procedural issues, negotiate stipulated penalties, monetary penalties, response costs and damages, and injunctive relief, and always account for financial assurance, insurance, monitoring, potential third-party claims, and other requirements that structure the parties’ post-settlement relationship.

142. That is not to suggest that communities always agree internally about what course of action to pursue, but allowing communities to take ownership of those decisions, and abandoning the patriarchal “we know what’s best” posture is essential for authentic empowerment.

Accomplishing this will require coordination among several key players, namely, environmental NGOs (with support from the philanthropic community), academic institutions (through environmental institutes, law clinics, or other programs), and state and federal enforcement officials. The general architecture outline below is intended to reflect a manageable methodology for providing meaningful support that should have concrete and relatively immediate benefits.

At its core, this model would (1) help to identify ongoing or anticipated environmental enforcement cases in which communities might participate; (2) identify and engage potentially affected stakeholder communities through regional partnerships; (3) provide or facilitate technical assistance to community organizations in the formulation of SEP proposals; and (4) assist with engagement and advocacy as appropriate (and as consistent with the community's desires) in connection with specific environmental enforcement proceedings or initiatives. This Article refers to these proposed organizational arrangements as "SEP community empowerment partnerships" (SCEPs).

The first, and perhaps most critical, element of an effective SCEP is the full engagement of environmental NGOs, in partnership with community organizations and academic institutions. The NGO-community partnerships would serve the following functions:

- To help build and maintain a platform for local and/or regional collaborative networks among local, state, or regional grassroots advocacy groups;
- To operate as a hub for bidirectional information flow—from communities identifying their needs and priorities related to existing environmental burdens, public health and economic challenges, and restorative objectives; and to communities from the broader environmental advocacy community and from environmental enforcement officials regarding existing or anticipated environmental enforcement activities and initiatives, the process and timing for engagement, and other vital information about SEP-related participation opportunities;
- To directly provide, or facilitate access to, the technical, scientific, and legal expertise required to assess viable SEP options and develop detailed and discrete SEP proposals that respond to community needs and reflect community priorities;
- To provide for information sharing within, between, and among local and regional groups, to ensure (among other things) that experiences regarding successful, innovative, or promising SEP ideas, productive engagement strategies, or effective procedures are widely disseminated so they can be utilized to maximum effect;

- To assist communities in assessing the effectiveness of implemented SEPs, and developing feedback regarding implementation that can serve to improve the performance or enhance the benefits of ongoing SEPs, or inform the development of subsequent future SEPs.

Logistically, such an effort would require some uniform, national core coordination to provide specific guidance on structure and process, to facilitate outreach efforts to local and regional community groups, to facilitate engagement with federal and perhaps state officials, to disseminate information, and to help identify funding and connect local and regional groups with financial and technical resources. This coordination is probably best performed by a small national coordinating committee, composed of representatives from environmental justice advocacy groups, NGOs, and academic institutions. A primary initial task of the national SCEP coordinating committee would be to engage with the funding community to identify resources to launch the SCEP effort.<sup>143</sup>

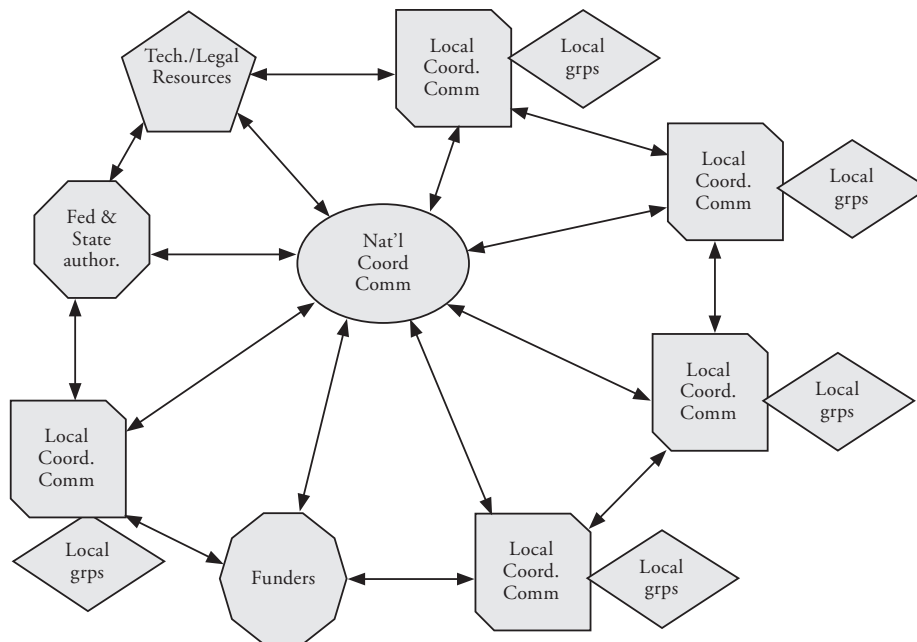
Second, the national committee would work to identify local or regional "hosts" for the SCEP's core work. That is, the core activities designed to empower local or regional organizations would be decentralized. In specific states or regions, a host organization (or host organizations)—such as an environmental NGO or an academic institution—would partner directly with local or regional groups, forming a local/regional SCEP coordinating committee. At this level, the local/regional committee would do the critical work, described above, involving identification of grassroots environmental justice groups and local information gathering and dissemination.

The local/regional committee would also coordinate with state and federal officials (regarding ongoing or anticipated local or regional environmental enforcement cases or initiatives), and, based on the needs and priorities of the local groups, would help them craft discrete off-the-shelf SEP proposals that would be made generally available to environmental defendants. These committees would also assist local groups with advocacy in connection with the adoption of specific SEPs, and (perhaps with assistance or guidance from the national committee) would provide, or help local groups access, technical and legal resources.

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143. The funding community would need to step up to the plate here, and make a commitment that is both significant and lasting. All too often, insufficient and uncertain funding hampers environmental justice efforts, which starves promising efforts before they have the opportunity to mature. Moreover, significant funding would need to go directly to local groups as a part of this partnership, and not flow through the mainstream NGOs as gatekeepers. Local groups' ability to grow needed capacity depends in part on establishing strong relationships directly with funders, and having the resources to devote significant time and energy to environmental justice-related efforts.

Figure 1



This arrangement of responsibilities might be visualized as the figure above demonstrates.<sup>144</sup>

The backbone of this work would be the local coordinating committees' efforts with local and regional advocates to develop specific, well-thought-out, and detailed off-the-shelf SEP projects that defendants in environmental enforcement cases might easily adopt. The committees would help local advocates identify promising projects that meet community needs and that are likely to meet relevant SEP-related legal standards (e.g., regarding nexus, avoidance of miscellaneous receipts problems, etc.). They would also help access the funding necessary for the community to prepare SEP proposals, and help the community access and manage technical resources.

Once prepared, local committees might help local groups submit these SEPs to existing "SEP libraries," in states that have such existing repositories,<sup>145</sup> or the local committees themselves might hold them as a separate environmental justice SEP resource that federal and state enforcement officials could identify for environmental

defendants upon initiating enforcement actions. This critical aspect of the work is meant to address two of the most intractable problems that prevent the full utilization of SEPs to benefit communities: (1) the availability of technical and legal resources for SEP development, and (2) the challenge of timing—having quality, community-derived SEPs available to introduce on short notice into ongoing enforcement proceedings.

Clearly, the constructive engagement of federal and state enforcement offices would be essential for the success of any SCEP effort. In particular, the national and local committees would work with enforcement authorities to identify opportunities for information sharing—especially opportunities for the committees to obtain

timely information about specific enforcement cases, broader enforcement initiatives, and enforcement-related priorities that might provide insights about what types of SEPs would be most promising and where. As a strategic matter, the formation of early local/regional coordination committees would make the most sense in states that are likely to be most supportive of SCEP efforts—and that are likely to have the capacity to effectively engage—and in regions where partnering NGOs or academic institutions have a presence.<sup>146</sup>

Finally, there may be meaningful opportunities, either nationally or within specific states or regions, to engage productively with industry as well. As noted already, there are good reasons for environmental defendants to support the utilization of SEPs, and there may be instances where the respective interests of industry and communities align sufficiently for effective collaboration.<sup>147</sup>

#### IV. Conclusion

By no means are SCEPs a panacea.<sup>148</sup> They are a tool that may provide significant benefits, and that may do so in a

144. In the end, of course, the structure and particular features of any such program should reflect the needs, priorities, and organizational preferences of engaged communities and environmental justice advocates. To this end, any such effort should adopt a model that contemplates periodic reassessment of structure and function, and that is driven primarily by the desires and concerns of participating community groups.

145. See, e.g., U.S. EPA, *Supplemental Environmental Project (SEP) Library for Texas*, <https://www.epa.gov/tx/supplemental-environmental-project-sep-library-texas> (last updated Oct. 28, 2016); Maricopa County, AZ, *SEP Idea Library & Submissions*, <https://www.maricopa.gov/2218/SEP-Idea-Library-Submissions> (last visited Apr. 13, 2017); INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, GUIDANCE DOCUMENT, SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) IDEA LIBRARY (2013), available at [https://www.in.gov/idem/files/enforcement\\_sep\\_idea\\_library.pdf](https://www.in.gov/idem/files/enforcement_sep_idea_library.pdf). SEP libraries, which exist in many states, are of little benefit to environmental justice advocates absent the resources necessary to do the work to develop projects for submission. For this reason, such libraries, without an infrastructure like that contemplated for SCEPs, are insufficient.

146. Moreover, the local committee model is intended to be scalable, so the SCEP effort could be piloted in a handful of locations, and if successful could then be replicated with the same or new partner organizations in additional locations.

147. See *supra* note 13 and accompanying text.

148. As Prof. David Dana suggests, for example, the community benefits of SEPs are certainly not guaranteed—SEPs, on occasion, may turn out to be less effective or less beneficial than initially anticipated. Dana, *supra* note 19. Nonetheless, pursuing a more effective and more community-focused SEP strategy is desirable, even if the full benefits of the SEP may not be entirely realized. Bringing the voices and perspectives of communities meaningfully into the enforcement discourse, and attempting to institutionalize some measure of restorative justice, is justification enough. Even if only partially successful in practice, a community-driven SEP (1) should not take away from the deterrent effect of enforcement so long as the SEP (regardless of



way that is efficient enough to be attractive to all potentially involved parties—community groups, NGOs, funders, academic institutions, enforcement authorities, and environmental defendants. In the end, however, it will be just another small contribution to a much broader effort to achieve the goals of environmental justice.

In any event, it is clear that the time has come for the environmental movement, including mainstream environ-

mental groups and the philanthropic community, to take the plunge when it comes to supporting environmental justice. It is equally clear that SEPs have not lived up to their full potential when it comes to providing environmental justice benefits, and SCEPs may be one small, but significant, way to take a step in the right direction.

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effectiveness) is sufficiently expensive; and (2) accomplishes some degree of community empowerment merely by providing communities with greater access to resources, helping to develop important empowerment networks, building community-centered expertise, and providing some role for the community in the negotiating process. In any event, for such communities, monetary penalties funneled into the U.S. Treasury are surely no more beneficial.