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## **WEIGHING AND BALANCING SOCIAL AND ECONOMIC CONSIDERATIONS OF SITING LANDFILLS TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS**

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### ***Introduction***

Environmental justice in permitting new landfills is best addressed as one element of many weighed in an agency discretionary decision-making process. Siting landfills necessarily includes consideration of technical, social, economic and political issues.<sup>1</sup> Currently, the landfill permitting process in New Mexico examines only technical, scientific, and geological factors. In effect, a permit must be granted if all of the technical specifications and notice requirements are met. To adequately address all of the impacts on a community when a landfill is sited nearby, an agency should have both the discretion to weigh and balance all relevant factors and the authority to grant or deny a permit based on its assessment of all potential impacts.

An agency should consider all of a community's concerns in its decision-making process. Community concerns shed light on the adverse impacts that arise when a landfill is sited. Adequately addressing these concerns requires public participation at the earliest steps of assessing the appropriateness of a proposed site. Incorporating public participation as soon as a potential site is identified will prevent siting disputes and ensure that the environment is adequately protected without disparate impact on affected communities.

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<sup>1</sup> U.S. EPA, EPA/530-SW-90-019, SITES FOR OUR SOLID WASTE: A GUIDEBOOK FOR EFFECTIVE PUBLIC INVOLVEMENT 5 (1990).

An agency's discretionary power can be adequately governed by using a defined procedure to assess all of the relevant factors using best practices, best science and best data.<sup>2</sup> Existing federal laws can be used as guidelines for legitimate discretionary decision-making by a state agency. The National Environmental Policy Act (NEPA) provides procedure; Title VI of the Civil Rights Act of 1964 (Title VI) provides sources that define environmental justice considerations; and various environmental laws provide the necessary scientific standards.

NEPA's "hard-look" analysis of environmental impacts looks at all of the impacts a potential facility has on a community. This includes those factors that distinguish environmental justice concerns – social and economic issues. Weighing and balancing the socio-economic situation of a community along with the environmental impacts of a landfill allows an agency to consider a landfill's combined effects on the well-being of a community.

Further, incorporating disparate impact factors that have been addressed under Title VI will enable an agency to adequately address environmental justice issues in a NEPA-like balancing process. Numerous cases, studies and publications concerning Title VI have tackled the complexities surrounding environmental justice concerns. These sources have refined disparate impact analysis and can provide definitions and methods of assessment useful in weighing the environmental justice factor in the siting process. In addition, publications and data sources in both the private and public sector provide adequate scientific standards, census information, and economic data necessary for objective decision-making that protects the environment and prevents disparate impacts without unduly hampering economic development.

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<sup>2</sup> See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472–73 (2001) (noting use of "customary practices," "best scientific knowledge" and "best available evidence" in acceptable standards) (citations omitted).

An in-depth report on implementing environmental justice concerns prepared by the Title VI Implementation Advisory Committee highlights issues that must be considered.<sup>3</sup> A state model for environmental justice must determine what impacts are relevant, what constitutes an affected community and how to measure cumulative risks<sup>4</sup> and synergistic effects.<sup>5</sup> It must also consider an applicant's proposed mitigating actions and any existing justifications for siting a landfill in a particular location.

An effective agency permitting process will include a "pre-approval" preliminary step in the permit application process. Before an applicant provides the agency with the requisite technical information necessary to fully evaluate the proposed site, the agency must be satisfied that the applicant has considered all impacts that a proposed facility would impose on a community. Further, the agency must be satisfied that the applicant has provided this information to the community and actively involved the community in the siting decision. A pre-approval step will document the applicant's preliminary assessment of a proposed facility's impacts on the affected community. At this stage the applicant should also show that information regarding potential impacts has been circulated and community involvement has been encouraged at the earliest possible stage of the siting decision. Responsibilities for providing early public

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<sup>3</sup> NAT'L ADVISORY COUNCIL FOR ENVTL. POLICY & TECH., REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS 1 (1999) [hereinafter NACEPT REPORT], *available at* <http://www.epa.gov/ocem/nacept/titleVI/titlerpt.html> (last visited March 26, 2005).

<sup>4</sup> "Cumulative risk" is defined as "the combined risks from aggregate exposures to multiple agents or stressors." RISK ASSESSMENT FORUM, U.S. EPA, EPA/630/P-02/001F, FRAMEWORK FOR CUMULATIVE RISK ASSESSMENT 6 (2003) [hereinafter FRAMEWORK FOR CUMULATIVE RISK], *available at* <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=54944> (last visited Mar. 26, 2005). "Aggregate exposure" refers to "the combined exposure of an individual (or defined population) to a specific agent or stressor via relevant routes, pathways, and sources." *Id.* at 7.

<sup>5</sup> Synergistic effects are those resulting from combinations of toxins or stressors. *See id.* at 43-48 (2003).

participation and evaluating the social and economic concerns of a community should be shared among the affected community, the permit applicant, and the state. The pre-approval step will ensure early public participation and provide a preliminary assessment of a community's concerns.

A point system can provide a reliable, concrete method to assess the environmental impacts of a proposed facility. Identifying existing facilities with an adverse impact on a community and allocating points to each facility in proportion to its impact on the community will provide the state permitting agency and the applicant with a tool to measure cumulative risk and synergistic effects of existing and potential stressors.

Finally, a state agency must have discretionary authority to grant or deny a permit after weighing and balancing all of the impacts of a proposed facility. Industry and agency arguments regarding expense and administrative burdens are valid concerns. Generally, more regulation increases costs and imposes additional time considerations on both the applicant and the agency. However, early efforts to involve all stakeholders can prevent later expenses that would be incurred when an affected community actively resists the siting of a facility. A focused, collaborative effort involving the community, the applicant and the permitting state agency will provide an effective and efficient method of protecting the interests of each and every stakeholder when siting a landfill.

### ***The Evolution of Environmental Justice Concerns***

Environmental justice has been defined as “[t]he fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture, income, or education level with regard to the development, implementation, and enforcement of environmental laws, regulations

and policies.”<sup>6</sup> The goal of the environmental justice movement is to prevent the disparate impact of pollution or environmental hazards on any population.<sup>7</sup> Siting a new landfill could disproportionately affect a disadvantaged community already burdened by facilities with adverse environmental impacts.

Environmental justice joins civil rights law and environmental law.<sup>8</sup> Various grassroots actions relating to the junction of these fundamental movements date back to the 1960’s.<sup>9</sup> Numerous studies have been conducted to ascertain whether environmental impacts unjustly imposed adverse effects on disadvantaged communities.<sup>10</sup> In 1994, Presidential Executive Order 12898 officially recognized the existence of environmental justice issues and committed the federal government to considering these concerns in federal actions and enforcement of environmental laws.<sup>11</sup>

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<sup>6</sup> N.M. ENV’T DEP’T, ENVIRONMENTAL JUSTICE IN NEW MEXICO, at <http://www.nmenv.state.nm.us/Justice/index.html> (last visited Mar. 23, 2005); see also U.S. EPA, ENVIRONMENTAL JUSTICE: FREQUENTLY ASKED QUESTIONS, at <http://www.epa.gov/compliance/resources/faqs/ej/index.html#faq2> (last visited Mar. 23, 2005).

<sup>7</sup> *Id.* New Mexico has yet to adopt an official definition of environmental justice. See ALLIANCE FOR TRANSP. RESEARCH INST., UNIV. OF N. M., FINAL REPORT: A REPORT ON ENVIRONMENTAL JUSTICE IN NEW MEXICO 2 (2004) [hereinafter ATR INSTITUTE] available at <http://www.unm.edu/~ejpc/EJReport-Final-Feb22-05.pdf> (last visited Mar. 12, 2005).

<sup>8</sup> See, e.g., Melissa A. Hoffer, *Closing the Door on Private Enforcement of Title VI and EPA’s Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzaga*, 38 NEW ENG. L. REV. 971, 972–73 (2004).

<sup>9</sup> There are many comprehensive histories of the environmental justice movement. See, e.g., JONI ADAMSON ET AL., THE ENVIRONMENTAL JUSTICE READER: POLITICS, POETICS & PEDAGOGY (2002); Eileen Gauna, *An Essay on Environmental Justice: The Past, the Present, and Back to the Future*, 42 NAT. RESOURCES J. 701 (2002); Hoffer, *supra* note 8.

<sup>10</sup> Rhoda J. Yen, *Green Versus Green: When the Economic Needs of Minority Communities Clash with Environmental Justice Concerns*, 17 J. NAT. RESOURCES & ENVTL. L. 109, 119–27 (comparing studies on the disproportionate environmental effects on minority communities).

<sup>11</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629, 3 C.F.R. § 859 (Feb. 11, 1994) (*reprinted in* 42 U.S.C. § 4321) (“[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse

The Executive Order explicitly provides that it does not “create any right ... enforceable at law or equity by a party.”<sup>12</sup> Nor does it create a right to judicial review of a federal action.<sup>13</sup> In a Memorandum accompanying this Order, the President emphasized that existing law, especially the National Environmental Policy Act, Title VI of the Civil Rights Act of 1964, and the Clean Air Act, should be used to promote environmental justice.<sup>14</sup>

As of today, no federal legislation has been enacted nor regulations promulgated to specifically require consideration of environmental justice issues. Many documents have been created and many task forces and working groups have met to develop policies and methodologies appropriate for environmental justice action yet no law requires denial of a permit on grounds of environmental injustice.<sup>15</sup>

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human health or environmental effects of its programs, policies, and activities on minority ... and low-income populations[.]”).

<sup>12</sup> *Id.* at 7632–33.

<sup>13</sup> *Id.*

<sup>14</sup> Presidential Memorandum Accompanying Executive Order 12,898, 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994).

<sup>15</sup> *See, e.g.*, NAT’L ENVTL. JUSTICE ADVISORY COUNCIL (NEJAC), ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS: A REPORT ON THE PUBLIC MEETING CONVENED BY THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL 9 (1999) (discussing lack of authority to deny a permit on environmental justice grounds) *available at* [http://www.epa.gov/compliance/resources/publications/ej/permit\\_recom\\_report\\_0700.pdf](http://www.epa.gov/compliance/resources/publications/ej/permit_recom_report_0700.pdf) (last visited Mar. 17, 2005); Transcript, U.S. EPA, NEJAC COMMITTEE MEETING, at 55–65 (Apr. 13, 2004) (discussing “bias for action” in contrast to doing more research), *available at* <http://www.epa.gov/compliance/resources/publications/ej/nejacmtg/transcript-neworleans-041304.pdf> (last visited Mar. 26, 2005). *See generally* U.S. EPA, EPA’S FRAMEWORK FOR COMMUNITY-BASED ENVIRONMENTAL PROTECTION, EPA 237-K-99-001 (1999); OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. EPA, 2004 PLAN TO INTEGRATE ENVIRONMENTAL JUSTICE 22–36 (2004), *available at* <http://www.epa.gov/compliance/resources/reports/actionplans/ej/oswer-ej-actionplan-2004.pdf> (last visited May 10, 2005).

Those who oppose consideration of environmental justice raise economic concerns.<sup>16</sup> They also argue that an adverse decision based on environmental justice considerations invalidly restricts their property rights.<sup>17</sup> Further dispute exists over whether a citizen has an “inherent” right to a healthy environment.<sup>18</sup> Critics of those who allege discrimination against minorities often argue over which came first, the “chicken or the egg” – whether landfills were intentionally located in disadvantaged communities or whether those with low incomes settled where landfills already existed.<sup>19</sup> Some argue that landfills are not intentionally sited to discriminate; facilities are sited where land is less expensive. Property values then decline with the construction of the facility and minorities move in because the housing costs are more affordable.<sup>20</sup>

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<sup>16</sup> See NACEPT REPORT, *supra* note 3, at 133; Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 465–66 (2002); see also THOMAS PRUGH ET AL., *THE LOCAL POLITICS OF GLOBAL SUSTAINABILITY* 2 (2000).

<sup>17</sup> Foster, *supra* note 16, at 466 (2002).

<sup>18</sup> Tessa Meyer Santiago, Note, *An Ounce of Preemption Is Worth a Pound of Cure: State Preemption of Local Siting Authority as a Means for Achieving Environmental Equity*, 21 VA. ENVTL. L.J. 71, 90 (2002). Recently, after years of trying to find relief through administrative channels, citizens of Mossville, Louisiana, filed a petition with the Inter-American Commission on Human Rights of the Organization of American States alleging U.S. human rights violations for interfering with the fundamental right to “life, health and a clean and ecologically secure environment.” Bill Walsh, Healthy Building Network, *Is There a Human Right to a Healthy Environment? Communities Near Louisiana Vinyl Plants File Historic Complaint with Inter-American Commission on Human Rights*, Mar. 10, 2005, at <http://www.healthybuilding.net/news/mossville-031005.html> (last visited Mar. 17, 2005); see also MEETING SUMMARY OF THE WASTE AND FACILITY SITING SUBCOMMITTEE OF THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL 7-5 to 7-6 (Dec. 5, 2001) (reporting on situation in Mossville as of meeting date), available at [http://www.epa.gov/compliance/resources/publications/ej/nejacmtg/sum\\_waste\\_subcom\\_1201.pdf](http://www.epa.gov/compliance/resources/publications/ej/nejacmtg/sum_waste_subcom_1201.pdf) (last visited Mar. 18, 2005). See generally Declaration of the U.N. Conference on the Human Environment ¶ 3, U.N. Doc. A/Conf.48/14 (1972), available at <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503> (last visited May 10, 2005).

<sup>19</sup> Gauna, *supra* note 9, at 702–04; Hoffer, *supra* note 8, 976–77.

<sup>20</sup> Gauna, *supra* note 9, at 702–04.



Notwithstanding these arguments, pressure is being put on states to consider the disparate impact of environmental risks on minority populations. How can this best be accomplished in New Mexico?

### ***Landfill Law in New Mexico***

An examination of current New Mexico law reveals inherent limitations on an agency's decision-making authority in a permitting decision. New Mexico began regulating the disposal of solid waste relatively recently. The first comprehensive state law governing solid waste disposal, the Solid Waste Act (SWA), was passed in 1990.<sup>21</sup> Hazardous waste is regulated by the Hazardous Waste Act (HWA), passed in accordance with the federal Resource Conservation and Recovery Act.<sup>22</sup> Under both acts, the Environmental Improvement Board has the authority to regulate the siting of landfills.<sup>23</sup>

Extensive regulations were promulgated by the New Mexico Environment Department (NMED) under the SWA and have been enforced since the effective date of August 17, 1994.<sup>24</sup>

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<sup>21</sup> N.M. STAT. ANN. §§ 74-9-1 to 74-9-42 (1978) (regulating municipal landfills, construction and demolition landfills, and special waste landfills); *see also* N.M. ENV'T DEP'T, 2000 ANNUAL REPORT: SOLID WASTE IN NEW MEXICO 1 (2000) [hereinafter NMED 2000 ANNUAL REPORT], *available at* [http://www.nmenv.state.nm.us/swb/2000\\_annual\\_report.doc](http://www.nmenv.state.nm.us/swb/2000_annual_report.doc) (last visited Apr. 11, 2005). The first solid waste management regulations were promulgated in 1974 pursuant to section 12-12-11(A)(3) of New Mexico's 1953 compilation. N.M. STAT. ANN. § 12-12-11(A)(3) (1953, Repl. Vol. 3, Supp. 1973). N.M. Mun. League, Inc. v. N.M. Env'tl. Improvement Bd, 88 N.M. 201, 204, 539 P.2d 221, 224 (Ct. App. 1975). The court in *N.M. Municipal League* used the standard for determining whether a statute is vague to uphold the 1974 solid waste regulations. *Id.* at 207-09, 539 P.2d at 227-29. The "void for vagueness" doctrine and due process has been used to strike down regulations that restrict the siting of landfills. Bruce J. Parker & John H. Turner, *Overcoming Obstacles to the Siting of Solid Waste Management Facilities*, 21 N.M.L. REV. 91, 101 (1990).

<sup>22</sup> N.M. STAT. ANN. §§ 74-4-1 to 74-4-14 (A)(5)(d) (1978); *see also* 42 U.S.C. §§ 6921-6939e (2000).

<sup>23</sup> N.M. STAT. ANN. §§ 74-4-4(A)(5)(d), 74-9-8 (1978).

<sup>24</sup> *See* N.M. ADMIN. CODE tit. 20, § 9.1 (2004); NMED 2000 ANNUAL REPORT, *supra* note 21, at 1. Regulations implementing RCRA are incorporated by reference in the New Mexico

Regulations regarding the siting of landfills are concerned with physical and technical standards using data that are easily measurable.<sup>25</sup>

NMED maintains that satisfactory siting of a landfill requires examination of more than the scientific and technical measurements mandated by statute and regulation:

In the past, a unilateral decision, made by a city official, could determine where a waste disposal site was located. Today the decision-making process must include: the mode of collection, recycling programs, hazardous waste handling, regulatory compliance for air emissions, site geology, technical feasibility, permitting, *environmental justice issues*, development costs, construction costs, operational costs, closure costs, post closure costs, and financial assurance. The complexity of siting, permitting, and operating an MSW landfill, in conjunction with health and regulatory issues, has led some communities to make decisions based on popular trends rather than critically assessing local needs, options and solutions.<sup>26</sup>

Despite the many complex problems that come into play when siting a landfill, New Mexico, among other states, has consistently regulated by measuring only quantitative criteria. Determining a suitable location for a landfill is a technical, social, economic and political

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Administrative Code. N.M. ADMIN. CODE tit. 20, §4.1 (2004). *See generally* 40 C.F.R. §§ 260–265 (2004). Section 264.18 particularly addresses location standards. *Id.* § 264.18. Regulated entities were subject to these rules pursuant to state authority as of Jan. 25, 1985. *See* U.S. EPA, State and Regional Authorization Information, *State Reports: New Mexico* (as of Dec. 31, 2004), available at <http://www.epa.gov/epaoswer/hazwaste/state/stats/nm.pdf> (last visited March 16, 2005). Federal regulations for RCRA were substantially rewritten in 1988.

<sup>25</sup> *See* N.M. ADMIN. CODE tit. 20, § 9.1.201.B.8, B.10, B.11 (regarding information required in the permit application); 9.1.201.C (regarding notice requirements); 9.1.202 (Additional Permit Requirements for Municipal or Special Waste Landfill Facilities); 9.1.203 (Additional Permit Requirements for Construction and Demolition Landfills); 9.1.206 (Additional Permit Requirements for Solid Waste Facilities That Accept Special Waste); 9.1.301–303 (regarding maximum size and siting criteria); *see also* § 9.1.306 (design criteria).

<sup>26</sup> NMED 2000 ANNUAL REPORT, *supra* note 21, at 14 (emphasis added); *see also* N.M. STAT. ANN. § 74-1-9(B) (1978) (“In making its regulations, the [environmental improvement] board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to: (1) character and degree of injury to, or interference with health, welfare, animal and plant life, property and the environment; (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and (3) technical practicability, necessity for, and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation.”)

problem.<sup>27</sup> Since the HWA and SWA were enacted, New Mexico has done an admirable job of ensuring compliance with today's technical standards in siting landfills. However, local communities are increasingly demanding that permitting authorities also consider social, economic and aesthetic impacts, the so-called "quality of life" issues. Moreover, the significance of cumulative burdens on a community demands attention.<sup>28</sup>

Economic issues such as "effect on property values, construction and operating costs, impact on local industry, and compensation plans" should be addressed.<sup>29</sup> Social issues, or "quality of life" concerns, that must be considered include "equity in site choices, effect on community image, aesthetics, [and] alternative and future land uses."<sup>30</sup> The various interests of community groups and others in local control are some of the political issues involved.<sup>31</sup> Where a private landfill is located in a rural community, the applicant can often escape dealing with these important interests that are apart from the technical criteria imposed by the state.<sup>32</sup> However, these concerns should be addressed.<sup>33</sup> Responsibility for ensuring that these concerns

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<sup>27</sup> U.S. EPA, EPA/530-SW-90-019, SITES FOR OUR SOLID WASTE: A GUIDEBOOK FOR EFFECTIVE PUBLIC INVOLVEMENT 5 (1990) [hereinafter SITES FOR OUR SOLID WASTE].

<sup>28</sup> See, e.g., FRAMEWORK FOR CUMULATIVE RISK, *supra* note 4; SCIENCE POLICY COUNCIL, U.S. EPA, GUIDANCE ON CUMULATIVE RISK ASSESSMENT (1997); see also NACEPT REPORT, *supra* note 3, at 6. The National Environmental Justice Advisory Council's meeting in April of 2004 focused on cumulative risks and impacts. See Transcript, U.S. EPA NEJAC COMMITTEE MEETING, at 8 (Apr. 13, 2004), available at <http://www.epa.gov/compliance/resources/publications/ej/nejacmtg/transcript-neworleans-041304.pdf> (last visited Mar. 26, 2005). The Final Report from this meeting is not yet available.

<sup>29</sup> See SITES FOR OUR SOLID WASTE, *supra* note 27, at 6.

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

<sup>31</sup> *Id.*; see also OFFICE OF SOLID WASTE, U.S. EPA, WRAP: A MODEL FOR REGIONAL SOLID WASTE MANAGEMENT PLANNING 118 (1977) (discussing a computer program to evaluate sites for landfills by, *inter alia*, addressing "the costs of moving from less political acceptability to greater political acceptability").

<sup>32</sup> Cf. James O'Reilly, State and Local Government Solid Waste Management § 8:8 (2d ed. & database supp. Oct. 2004).

<sup>33</sup> See SITES FOR OUR SOLID WASTE, *supra* note 27, at 6.

are addressed falls on the state when local governments fail to provide opportunities for adequate public participation and appropriate applicant response.

Zoning law exacerbates the social disparities that have indirectly resulted from this narrow focus on technical and scientific considerations.<sup>34</sup> Those with greater political clout are protected by land use and zoning regulations. Thus, landfill developers move to rural areas where there is less local regulation. Local zoning ordinances have concentrated polluting facilities by excluding them from particular areas reserved for commercial or residential uses.<sup>35</sup> This exclusion has led to a concentration of facilities in nearby areas that have, or had, little or no zoning laws, particularly the closest unincorporated areas to major centers of population.<sup>36</sup>

In New Mexico, an applicant is not required to present an evaluation of alternative sites in making a siting decision. Those responsible for siting and permitting facilities have rarely “considered such factors as quality of life and aesthetic, historic, cultural, economic, or social

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<sup>34</sup> See Hoffer, *supra* note 8, at 1007. See generally Patrick Walsh & Philip O’Leary, *Evaluating a Potential Sanitary Landfill Site*, WASTE AGE, at 74, 75 (May 2002), available at <http://images.wasteage.com/files/121/wsamay74-83.pdf> (last visited March 16, 2005).

<sup>35</sup> Cf. James O’Reilly, *State and Local Government Solid Waste Management* § 8:8 (2d ed. & database supp. Oct. 2004). See generally *Atlixco Coalition v. County of Bernalillo*, 1999-NMCA-088, ¶ 10, 127 N.M. 549, 552, 984 P.2d 796, 799 [hereinafter *Atlixco Coalition II*]. “Regardless of the state’s regulation of the landfill ... the county retains authority to regulate land use within its boundaries.” *Id.* (citing N.M. STAT. ANN. §§ 3-31-1, 74-9-42 (1978); N.M. ADMIN. CODE tit 20, § 9.1.1004 (2004)).

<sup>36</sup> See, e.g., CLARK COUNTY, ILL., COUNTY ZONING: A REPORT FROM YOUR COUNTY BOARD, at [http://www.clarkcountyil.org/zoning\\_report.htm](http://www.clarkcountyil.org/zoning_report.htm) (last visited Apr. 11, 2005); Paul Mackie, *Georgia Commissioners Jailed in Landfill Fight*, COUNTY NEWS ONLINE, at <http://www.naco.org/CountyNewsTemplate.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=10337> (last visited Apr. 11, 2005).

impacts.”<sup>37</sup> Further, they fail to consider the cumulative nature of ecological and health impacts.<sup>38</sup>

Recent controversy over siting landfills in New Mexico has generally centered on permit applications submitted to NMED by a private party in contrast to those applications made by a local government entity.<sup>39</sup> This is likely due to the accountability factor. Officials in local governments are held politically accountable for siting a landfill in an undesirable location.<sup>40</sup> A local government must make an investment in informing the public and seeking public input before a final siting decision. It is just as important for a private developer to inform the public that it evaluated alternative sites before deciding that a particular location was most suitable.<sup>41</sup>

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<sup>37</sup> Cf. U.S. EPA, EPA-530-K-00-005, SOCIAL ASPECTS OF SITING RCRA HAZARDOUS WASTE FACILITIES 7 (April 2000) [hereinafter EPA, SOCIAL ASPECTS], *available at* <http://www.epa.gov/epaoswer/hazwaste/tsds/site/k00005.pdf> (last visited March 16, 2005).

<sup>38</sup> *Id.*

<sup>39</sup> *See generally Atlixco Coalition II*, 1999-NMCA-088, ¶ 10, 127 N.M. at 552, 984 P.2d at 799; *In re Application of the Northeastern N.M. Regional Landfill for a modification for the Northeastern N.M. Regional Landfill*, 2003-NMCA-043, 133 N.M. 472, 53 P.3d 499; *Colonias Dev. Council v. Rhino Env'tl. Servs., Inc.*, 2003-NMCA-141, 134 N.M. 637, 81 P.3d 580, *cert. granted*, 2003-NMCERT-3, 135 N.M.52, 84 P.3d 669; *Joab, Inc. v. Espinosa*, 116 N.M. 554, 865 P.2d 1198 (1993) (affirming agency decision granting conditional permit for expansion of landfill and denying permit for medical waste incinerator); *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 2, 125 N.M. 786, 788, 965 P.2d 370, 372 (1998) [hereinafter *Atlixco Coalition I*] (affirming agency decision in regard to property boundary, cover design and financial assurance but remanding for “more reasoned decisionmaking” in regard to proposed permit conditions); U.S. EPA, NPDES Permit No. NM0030503: Authorization to Discharge Under the National Pollutant Discharge Elimination System, Part II, at 1 (“[T]he Northeast New Mexico Regional Landfill ... is owned and operated by Herzog Environmental Inc.”); *see also* O’Reilly, *supra* note 35, § 8:8 (“Private sector landfills are likely to grow because of their avoidance of ... electoral politics that must govern decisions on municipally owned waste sites.”).

<sup>40</sup> *See* Walsh & O’Leary, *supra* note 34, at 74, 76.

<sup>41</sup> *Id.* at 74, 76–77.

Any applicant should be able to show that public concerns were adequately considered when making that evaluation.<sup>42</sup>

An application by a private party cannot be denied by NMED unless the application violates the statutes or regulations.<sup>43</sup> The plain language of the regulation seems to give discretion to NMED by providing for denial of an application when a determination is made “that the permitted activity endangers public health, welfare or the environment.”<sup>44</sup> However, subsection J provides that a permit *shall* be issued if the applicant meets all the regulatory requirements and the “application demonstrates that neither a hazard to public health, welfare or the environment nor undue risk to property will result.”<sup>45</sup> It could be inferred from subsection J that the application requirements define the circumstances under which a hazard or undue risk would exist. By definition, meeting these requirements guarantees an applicant that his action cannot be defined as a hazard or undue risk.

*Colonias Development Council v. Rhino Environmental Services, Inc.*, an appeal of a landfill permitting decision, reveals the practical issues and statutory difficulties that must be addressed to allow a state agency the necessary discretion and sufficient authority to consider social and environmental justice concerns and respond to an affected community’s concerns.<sup>46</sup>

Rhino Environmental Services (Rhino), a private party, applied to NMED for approval of a municipal landfill on a site located in the southwestern corner of Otero County near the

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<sup>42</sup> OFFICE OF SOLID WASTE MGMT. PROGRAMS, U.S. EPA, DECISION-MAKERS GUIDE IN SOLID WASTE MANAGEMENT 109 (1976) (“[A]n intensive public information campaign is an essential early step in site acquisition.”); *see also id.* at 6–7 (comparing public and private ownership and operation of waste facilities).

<sup>43</sup> *See* N.M. ADMIN. CODE tit. 20, § 9.1.212.P (2004).

<sup>44</sup> *Id.* § 9.1.212.P.3 (2004).

<sup>45</sup> *Id.* § 9.1.212.J (emphasis added).

<sup>46</sup> 2003-NMCA-141, 134 N.M. 637, 81 P.3d 580, *cert. granted*, 2003-NMCERT-3, 135 N.M.52, 84 P.3d 669.

community of Chaparral, New Mexico.<sup>47</sup> A permit to construct and operate the landfill was granted.<sup>48</sup> On behalf of the Chaparral community, the Colonias Development Council (CDC) challenged the NMED decision to grant the permit on grounds that NMED did not comply with the Solid Waste Act and its implementing regulations because it “failed to consider the ‘social impact’ of the landfill.”<sup>49</sup>

Chaparral is located approximately two miles from the proposed landfill site.<sup>50</sup> It straddles two counties, Dona Ana and Otero,<sup>51</sup> and two solid waste districts.<sup>52</sup> The landfill proposed by Rhino is the fourth landfill to be sited near Chaparral, a disadvantaged, unincorporated community located near the border of Mexico about fifteen minutes from El Paso/Juarez.<sup>53</sup> Existing landfills import a significant amount of wastes and Rhino has indicated an intention to do the same.<sup>54</sup>

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<sup>47</sup> N.M. ENV’T DEP’T, BORDERING NEW MEXICO: MAJOR ENVIRONMENTAL ISSUES ALONG THE STATE’S INTERNATIONAL BORDER WITH MEXICO, at 21 (Nov. 2002) [hereinafter BORDERING NEW MEXICO], available at <http://bbrs.nmsu.edu/scerp/SCERP/NMED/Introduction.htm> (last visited Apr. 11, 2005); see also *Colonias*, 2003-NMCA-141, ¶ 2, 134 N.M. at 640, 81 P.3d at 583.

<sup>48</sup> *Colonias*, 2003-NMCA-141, ¶ 1, 134 N.M. at 639–40, 81 P.3d at 582–83.

<sup>49</sup> *Colonias*, 2003-NMCA-141, ¶ 1, 134 N.M. at 640, 81 P.3d at 583.

<sup>50</sup> Daryl Smith, N.M. Pub. Health Ass’n, *Solid Waste Landfill in Chaparral ... Not?*, NMPHA HEALTH LETTER (Spring 2000), at <http://www.nmpa.org/2000-03.htm#solid> (last visited May 10, 2005).

<sup>51</sup> Daryl T. Smith, N.M. Pub. Health Ass’n, *Chaparral ... Texas Dump?*, NMPHA HEALTH LETTER (Sept. 2005), at <http://www.nmpa.org/2000-09.htm#dump> (last visited Apr. 11, 2005); CHAPARRAL, NM, at <http://www.chaparralnm.net/poll.shtml.htm> (last visited May 4, 2005).

<sup>52</sup> See NMED 2000 ANNUAL REPORT, *supra* note 21, at 9, 11 (identifying solid waste districts for Otero County and Dona Ana County).

<sup>53</sup> COLONIAS DEV. COUNCIL, SOUTHERN COLONIAS, at <http://www.colonias.org/Southern.htm> (last visited Apr. 11, 2005); Smith, *Chaparral ... Texas Dump?*, *supra* note 51; CHAPARRAL, NM, *supra* note 51; see also BORDERING NEW MEXICO, *supra* note 47, at 21.

<sup>54</sup> *Id.*

Chaparral is a designated colonias – an “unincorporated rural [settlement] with inadequate housing, roads, potable water or wastewater services.”<sup>55</sup> There is extreme poverty.<sup>56</sup> There is a lack of sanitary infrastructure and “pressing human needs of food, shelter and medical care.”<sup>57</sup> In Dona Ana County alone there are 36 colonias.<sup>58</sup> Of the population in Dona Ana County, 25.4% live below the poverty level.<sup>59</sup> Per capita income is about 65% of the national average.<sup>60</sup> Both Dona Ana and Otero counties are among the poorest in New Mexico and New Mexico is among the poorest states of the nation.<sup>61</sup> Most residents of colonias are “first- and second-generation, low-income families of Mexican descent.”<sup>62</sup> Clearly, the socio-economic background of this colonias exemplifies a community that is disadvantaged and most at-risk to environmental and health dangers – a community with valid environmental justice concerns.

The court in *Colonias* specifically held that NMED is not required to consider the social impact of a new landfill on an affected community.<sup>63</sup> The plaintiff, CDC, asserted that NMED must consider social impact to fulfill one of the purposes of the New Mexico Solid Waste Act (SWA): to “protect the public health, safety and welfare.”<sup>64</sup> CDC also relied on the Environmental Improvement Board’s obligation to adopt regulations “that assure that the relative interests of the applicant, other owners of property likely to be affected and the general public

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<sup>55</sup> *Id.* at 3, 23.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 23.

<sup>63</sup> *Colonias Dev. Council v. Rhino Env'tl. Servs.* 2003-NMCA-141, ¶¶ 15–17, 134 N.M. 637, 642–43, 81 P.3d 580, 585–86, *cert. granted*, 2003-NMCERT-3, 135 N.M.52, 84 P.3d 669.

<sup>64</sup> *Id.* ¶ 10, 134 N.M. at 641, 81 P.3d at 584; *see also* N.M. STAT. ANN. § 74-9-2(C) (1978).



will be considered prior to the issuance of a permit for a solid waste facility.”<sup>65</sup> However, the court refused to interpret this general language as a requirement to consider social impact.<sup>66</sup>

Whether or not NMED would be permitted to address social impact was not expressly discussed but the court’s rationale could be easily read to prohibit such consideration.

The court described an examination of social impacts as a “Pandora’s box ... unlimited, multifaceted, and without standards.”<sup>67</sup> In performing such an examination, NMED would be “transform[ed] ... into a legislative body.”<sup>68</sup> The court emphasized that the Legislature must specifically indicate its intent to require consideration of both social and economic concerns by defining specific methods and standards to be used in examining these issues.<sup>69</sup>

Several facts in *Colonias* likely contributed to the dissatisfaction in and opposition from the community. The applicant was a private party that had already decided on what site was most suitable for its landfill. There is no evidence that alternative sites were considered prior to that decision. There is no evidence that the concerned community was consulted or contacted by the applicant prior to the public hearing held by NMED. Any required contact with local government was likely with the county government in which the site is located and this county has a tax base

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<sup>65</sup> *Colonias*, 2003-NMCA-141, ¶ 10, 134 N.M. at 641, 81 P.3d at 584; *see also* N.M. STAT. ANN. § 74-9-8(A) (1978).

<sup>66</sup> *Colonias*, 2003-NMCA-141, ¶ 14, 134 N.M. at 641–42, 81 P.3d at 584–85.

<sup>67</sup> *Id.* ¶ 16, 134 N.M. at 642, 81 P.3d at 585.

<sup>68</sup> *Id.* ¶ 15, 134 N.M. at 642, 81 P.3d at 585.

<sup>69</sup> *See id.* ¶¶ 15–16, 134 N.M. at 642, 81 P.3d at 585. Before the legislature can act to provide authority for NMED’s consideration of social and economic factors in permitting of hazardous waste facilities, section 74-4-4 must be amended to allow regulations more stringent than those required by the federal government. *Compare* N.M. STAT. ANN. § 74-4-4 (1978), *with* An Act Relating to Environmental Regulation: Providing That Certain Rules Adopted Pursuant to the Hazardous Waste Act May Be at Least as Stringent as Those of the Federal Government, SB 668, 47<sup>th</sup> Leg., 1<sup>st</sup> Sess. (N.M. 2005). This Act never reached the floor for a vote. Currently, NMED cannot impose regulations more stringent than those provided by the federal government for hazardous waste facilities under the Resource and Conservation Recovery Act. *See generally* 42 U.S.C. §§ 6921–6939e (2000).

interest in siting the landfill. Moreover, NMED did not, and could not, respond to the community concerns regarding social impacts of the landfill that were presented by community members at the requisite public hearing.

One problem magnified by the community resistance in Chaparral is that the required public notice and hearing serves no purpose if NMED cannot respond to the true concerns of the public. The public feels betrayed when it is asked to participate by commenting on a permit yet its comments are not taken into consideration when the “decision” to grant the permit is made. To adequately address the concerns of a community, the public must be afforded an early opportunity to participate and NMED must have the authority to respond to the community’s concerns. It is unfortunate that NMED does not have the authority or discretion to adequately address the environmental health issues that it acknowledges exist in the colonias.<sup>70</sup> Recent actions in New Mexico in regard to environmental justice concerns recognize the need for consideration of social and economic issues and greater public participation.

### ***Recent Actions in New Mexico Regarding Environmental Justice***

New Mexico actively began addressing environmental justice issues in early 2004.<sup>71</sup> The Secretary and Deputy Secretary of NMED appointed an Environmental Justice Planning Committee (Planning Committee) to discuss and develop protocol for public participation.<sup>72</sup> The Planning Committee included diverse stakeholders. These representatives from local community groups, Pueblos and Tribes, governmental consultants, and environmental activist organizations

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<sup>70</sup> See generally BORDERING NEW MEXICO, *supra* note 47, at 26–29.

<sup>71</sup> ATR INSTITUTE, *supra* note 7, at 2.

<sup>72</sup> *Id.* at i. The Secretary also appointed an Environmental Justice Policy Committee (Policy Committee) in June 2004 to address the issues raised in the Listening Sessions and make recommendations for action accordingly. *Id.* at 2. Governmental, environmental, academic and business groups are represented in the Policy Committee. *Id.*

hosted a series of public listening sessions (Listening Sessions) to determine what environmental justice concerns exist in grassroots New Mexico.<sup>73</sup>

Stakeholders in minority and low-income communities were recruited to contribute information and make recommendations at the Listening Sessions.<sup>74</sup> They were particularly targeted because they are susceptible to disproportionate risk of adverse effects from polluting facilities.<sup>75</sup> Officials from state, regional, municipal and tribal governments were invited to participate as designated “Listeners.”<sup>76</sup>

A Final Report on the Listening Sessions was issued in November of 2004. The Final Report emphasized the importance of communicating with community members and “ensuring the full and fair participation by all potentially affected communities in the decision-making process.”<sup>77</sup> It noted that fully addressing the concerns of local communities requires a consideration of social and economic effects that a facility has on the affected community.<sup>78</sup>

Proponents of legislation and regulations that encompass environmental justice issues have significant obstacles to overcome. New Mexico’s relatively short legislative sessions are in themselves a formidable burden.<sup>79</sup> In addition, the general political climate is to avoid additional state expenditure as well as additional regulatory requirements that would impose a burden on

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<sup>73</sup> *Id.* at 1–2.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 6–7.

<sup>78</sup> *Id.* at 7. The Final Report includes summary reports of the Listening Sessions and a detailed matrix of public comments made during those sessions. *See id.* apps. B–E; *id.* at 27.

<sup>79</sup> *See* N.M. CONST. art. IV, § 5.

economic development. Thus, any new requirements must avoid excessive duties or financial burdens on the agency and provide incentives for business to comply with new regulations.<sup>80</sup>

Though state legislators may be reluctant to impose additional requirements on the waste industry, they should consider that some of the largest landfills permitted in recent years are privately owned and operated to profit from disposal of out-of-state wastes in New Mexico.<sup>81</sup>

Requiring a privately owned facility to be as politically responsible as a governmental entity for siting waste facilities is a legitimate way to control the import of wastes.<sup>82</sup>

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<sup>80</sup> In the recent legislative session, two bills promoting environmental justice concerns were introduced but never made it to the floor for legislative action. *See* N.M. Legislature, 2005 Regular Session, Bill Finder for 2005, *available at* <http://legis.state.nm.us/lcs/BillFinderNumber.asp?year=05> (last visited Apr. 10, 2005). The Healthy Communities Act, a commendable endeavor to protect disadvantaged communities, was introduced in the 2005 Senate. *See* S.B. 710, 47<sup>th</sup> Leg., N.M., 1<sup>st</sup> Sess. 2005. A Joint Memorial was also introduced to implement the “precautionary principle.” *See* S.J.M. 54, 47<sup>th</sup> Leg., N.M., 1<sup>st</sup> Sess. 2005. The precautionary principle advocates taking precautionary measures when an “activity threatens harm to human health or to the environment ... even if cause-and-effect relationships are not fully established scientifically.” *Id.* at 2. The Joint Memorial would have provided a task force to recommend ways to implement the precautionary principle. *Id.* at 4.

<sup>81</sup> *See* NMED 2000 ANNUAL REPORT, *supra* note 21, at 11 (identifying Camino Real Landfill in Sunland Park as the state’s largest in terms of tons of waste disposed); Erin Ward, *State of the Environment: New Mexico-Chihuahua Border Region*, at 8, *at* <http://www.scerp.org/bi/BIV/ward.pdf> (last visited Apr. 11, 2005) (“The Camino Real Landfill ... receives the bulk of its waste from Texas and Mexico[.]”); Southwest Research & Information Center, *Problems with Proposed New Landfills in New Mexico*, VOICES FROM THE EARTH (Winter 2001), *at* <http://www.sric.org/voices/2001/v2n4/landfillv2n4.html> (last visited Apr. 11, 2005) (asserting that both the proposed Triassic Park hazardous waste facility in Chaves County and the Rhino Environmental Services landfill near Chaparral in Otero County will be importing wastes from other states and/or Mexico); U.S. EPA, NPDES Permit No. NM0030503: Authorization to Discharge Under the National Pollutant Discharge Elimination System, Part II, at 1 (“[T]he Northeast New Mexico Regional Landfill ... is owned and operated by Herzog Environmental Inc.”). “The requirement to return maquiladora wastes to the United States has already increased the potential for disposal of prohibited, regulated hazardous waste in New Mexico solid waste landfills.” Ward, *supra*, at 9. “The economics of transportation, coupled with the availability of inexpensive and geologically suitable land, is expected to increase pressure for disposal capacity in New Mexico by out-of-state concerns.” *Id.*

<sup>82</sup> An out-of-state waste facility developer prompted passage of the Solid Waste Act. Richard S. Glassman, *Rights of New Mexico Municipalities Regarding the Siting and Operation of Privately*

***Federal Law Related to Environmental Justice Considerations***

A state agency can look to existing federal laws for guidance in addressing community concerns about social and economic impacts of new landfills. Like the New Mexico waste facility siting laws, most environmental statutes focus on the technical and scientific standards that are necessary to protect the environment and the physical health of the public. However, two federal laws can be used to link the environment and civil rights. As noted in the Executive Order, The National Environmental Policy Act (NEPA)<sup>83</sup> and Title VI of the Civil Rights Act of 1964 (Title VI)<sup>84</sup> encompass the broader perspective necessary to address environmental justice.<sup>85</sup>

***National Environmental Policy Act (NEPA)***

NEPA requires a federal agency to examine social and economic factors in an assessment of environmental impacts.<sup>86</sup> When taking actions that affect the environment, the policy of the Federal Government is “to use all practicable means and measures ... to fulfill the *social*,

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*Owned Landfills*, 21 N.M.L. REV. 149, 149 (1990); *see also* Douglas Meiklejohn, *The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of Enchantment*, 21 N.M.L. REV. 167, 167 (1990). Perhaps a similar impetus will prompt the necessary legislation to respond to environmental justice concerns. For a helpful discussion on waste law that might survive a commerce clause challenge, see Jason M. Rael, Student Writing, *Down in the Dumps: Can States Regulate Out-of-State Waste Flow and Survive the Commerce Clause*, 38 NAT. RESOURCES J. 489, 496–506 (1998). “[T]he threshold question is whether the regulatory power of the state is working to unfairly discriminate against the interests of out-of-state parties.” *Id.* at 497.

<sup>83</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2000) [hereinafter NEPA].

<sup>84</sup> 42 U.S.C. §§ 2000d–2000d-7 (2000).

<sup>85</sup> *See also* 40 C.F.R. §§ 7.10–7.135, 1500–1508 (2004).

<sup>86</sup> *See* NEPA, § 101(a), 42 U.S.C. § 4331(a) (2000). *See generally* U.S. EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA’S NEPA COMPLIANCE ANALYSES (1998), *available at* [http://www.epa.gov/compliance/resources/policies/ej/ej\\_guidance\\_nepa\\_epa0498.pdf](http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf) (last visited Mar. 26, 2005).

*economic and other requirements* of present and future generations.”<sup>87</sup> This policy is implemented under the governmental responsibility to act “to the end that the Nation may ... assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings ... [and] preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice[.]”<sup>88</sup> This statutory language emphasizes all of the values and concerns that arise in a community when it is faced with environmental impacts.

Under NEPA all agencies are to “utilize a systematic ... approach ... [to] insure the integrated use of the natural and *social sciences* ... in decisionmaking which may have an impact on man’s environment.”<sup>89</sup> NEPA policy requires that all federal agencies provide methods to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”<sup>90</sup> A NEPA evaluation “should at least indicate those considerations, *including factors not related to environmental quality*, which are likely to be relevant and important to a decision.”<sup>91</sup> NEPA recognizes that a community’s societal values must be taken into consideration when an agency is making a decision that results in environmental impacts.

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<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> NEPA, § 101(a), 42 U.S.C. § 4331(b) (2000).

<sup>89</sup> NEPA § 102, 42 U.S.C. § 4332(2)(A) (2000) (emphasis added).

<sup>90</sup> NEPA § 102, 42 U.S.C. § 4332(2)(B) (2000); *see also* 40 C.F.R. § 1502.23 (providing for analysis of “unquantified environmental impacts, values, and amenities” when a cost benefit analysis is prepared relevant to choosing among environmentally different alternatives). NEPA provisions are replete with qualifying language. Section 4331 uses the language “all practicable means, consistent with other essential considerations of national policy.” 42 U.S.C. § 4331(b). Section 4332 is qualified with the language “to the fullest extent possible.” *Id.* § 4332.

<sup>91</sup> 40 C.F.R. § 1502.23 (2004) (emphasis added).

Regulations clarify that economic or social effects do not in themselves require evaluation under NEPA.<sup>92</sup> If, however, an environmental impact statement is required<sup>93</sup> and social and environmental effects are interrelated, then “all of these effects on the human environment” must be addressed.<sup>94</sup>

Further support for consideration of social and economic factors is found in the provisions of NEPA that establish the Council on Environmental Quality (CEQ).<sup>95</sup> A member of the CEQ must be “exceptionally well qualified” to, *inter alia*, “be conscious of and responsive to the scientific, *economic, social, esthetic, and cultural needs and interests* of the Nation.”<sup>96</sup> The duties and functions of the CEQ include developing and recommending policies that “foster and promote the improvement of environmental quality to meet the *conservation, social, economic, health and other requirements and goals* of the Nation.”<sup>97</sup>

NEPA also addresses the cumulative impact of environmental effects – a core concept in environmental justice.<sup>98</sup> The scope of an environmental impact statement under NEPA may

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<sup>92</sup> *Id.* § 1508.14.

<sup>93</sup> *Id.* § 1501.4.

<sup>94</sup> *Id.* § 1508.14. An environmental impact statement is required for any major Federal action that “significantly” affects the quality of the human environment. NEPA § 102, 42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1508.27 (defining “significantly” in terms of context and intensity). Factors used to ascertain whether or not an action will have significant impact are not limited to those effects related to health. *See* 40 C.F.R. § 1508.27. Section 1508.27 provides a nonexclusive list of factors that should be considered: proximity to historic or cultural resources, loss or destruction of significant scientific, cultural or historical resources, and “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” *Id.* § 1508.27(b).

<sup>95</sup> NEPA § 202, 42 U.S.C. § 4342 (2000).

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> NEPA § 204, 42 U.S.C. § 4344(4) (2000) (emphasis added).

<sup>98</sup> *See, e.g.*, NACEPT REPORT, *supra* note 3, at 12–13.

include consideration of cumulative actions with both direct and indirect impacts.<sup>99</sup> NEPA regulations define cumulative impact:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.<sup>100</sup>

NEPA cases provide an example for assessing cumulative impact without the arduous mathematical analysis that the EPA seems to demand in its Title VI investigations.<sup>101</sup> NEPA publications,<sup>102</sup> cases and administrative decisions can provide adequate guidance for state agency decision-making that considers social, economic and cumulative impacts.<sup>103</sup> While

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<sup>99</sup> 40 C.F.R. § 1508.25 (2004).

<sup>100</sup> *Id.* § 1508.7.

<sup>101</sup> *Compare* Fuel Safe Wash. v. F.E.R.C., 389 F.3d 1313, 1329–30 (10<sup>th</sup> Cir. 2004) (holding FERC’s consideration of cumulative impacts of the proposed project and other reasonably foreseeable projects in the same area was sufficient “hard look”) *with* Draft Revised Demographic Information, Title VI Administrative Complaint, In re La. Dep’t of Env’tl. Quality/Permit for Proposed Shintech Facility (Apr. 7, 1998), *available at* <http://www.epa.gov/civilrights/docs/shintech/apr98/cover48.pdf> (last visited Mar. 20, 2005). *See also* Klamath-Siskiyou Wildlands Center v. Bureau of Land Mgmt., 387 F.3d 989, 993–98 (9<sup>th</sup> Cir. 2004) (holding Bureau of Land Management assessment of cumulative impacts was inadequate without a hard look at detailed information on all projects in the area).

<sup>102</sup> *See generally* COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRES., ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) [hereinafter EJ GUIDANCE UNDER NEPA].

<sup>103</sup> *See, e.g.,* Coalition for Canyon Preservation v. Hazen, 788 F. Supp. 1522 (D. Mont. 1990) (discussing agency decision based on public interest review of proposed permits under Clean Water Act section 404 and respective regulation, 33 C.F.R. § 320.4(a)); Fuel Safe Washington v. F.E.R.C., 389 F.3d 1313 (10<sup>th</sup> Cir. 2004) (detailing “hard look” NEPA analysis of natural gas pipeline permit).



there are few NEPA cases that consider environmental justice, the few that do exist provide a detailed explanation and evaluation of the NEPA “hard look” process.<sup>104</sup>

A NEPA-like analysis of relevant factors, including those identified by an affected community, would be an effective method for the detailed analysis necessary to evaluate environmental justice concerns in permitting decisions. The “hard look” process is sufficiently definite to serve as a framework for state authority to consider environmental justice concerns in a discretionary permitting decision.

*Title VI of the Civil Rights Act of 1964 (Title VI)*

Generally, civil rights cases in other subject areas, including employment, education and housing, have defined, detailed and analyzed the core issues concerning federal action and disparate impact on protected classes.<sup>105</sup> Relief from a permitting decision under Title VI is rare, however, if not nonexistent. Nevertheless, Title VI and related cases and publications spotlight the factors that must be assessed when addressing environmental justice issues.

Opponents of environmental actions often file complaints alleging violations of Title VI.<sup>106</sup> The core of Title VI, section 601, provides that “[n]o person ... shall, on the ground of

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<sup>104</sup> See generally, e.g., *In re La. Energy Servs., L.P.*, 47 N.R.C. 77, 1998 WL 191134 (holding a NEPA cost-benefit analysis could weigh both negative and positive socioeconomic effects of reactor and nonreactor facilities); *Senville v. Peters*, 327 F. Supp. 2d 335 (D. Vt. 2004).

<sup>105</sup> See generally Memorandum from Mary M. O’Lone, Civil Rights Law Office, to Ann E. Goode, Director, Office of Civil Rights, regarding Response to EPA’s Title VI Implementation Advisory Committee Request for Legal Research, *in* NAT’L ADVISORY COUNCIL FOR ENVTL. POLICY & TECH., REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE NEXT STEPS FOR EPA, STATE AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS, SE48 ALI-ABA 123, 222–73 (1999).

<sup>106</sup> See, e.g., *Franks v. Ross*, 313 F.3d 184 (4<sup>th</sup> Cir. 2002); see also U.S. EPA, Title VI Complaints Filed with the EPA (2004), at <http://www.epa.gov/civilrights/docs/t6csdec012004.pdf> (last visited Mar. 20, 2005) [hereinafter “Title VI Complaints”].

race, color, or national origin ... be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>107</sup> Private parties can enforce section 601 by proving discriminatory intent.<sup>108</sup> Regulations promulgated by the U.S. Environmental Protection Agency (EPA) pursuant to section 602 expand the applicability of Title VI by including sex with “race, color, or national origin.”<sup>109</sup> In addition, the United States Supreme Court has interpreted section 602 to prohibit disparate impact or effect.<sup>110</sup>

The many Title VI complaints in the environmental permitting context led the EPA to issue *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (“Interim Guidance”).<sup>111</sup> The *Interim Guidance* was intended for recipients of federal funds who issue environmental permits.<sup>112</sup> Since the *Interim Guidance* was issued, the EPA and the Supreme Court have increasingly narrowed construction of Title VI law such that relief on environmental justice grounds is difficult to achieve.<sup>113</sup> The Supreme Court precluded private

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<sup>107</sup> Civil Rights Act of 1964, Title VI, sec. 601, 42 U.S.C. § 2000d (2000).

<sup>108</sup> Hoffer, *supra* note 8, at 979.

<sup>109</sup> See Civil Rights Act of 1964, Title VI, sec. 602, 42 U.S.C. § 2000d-1 (providing authority to promulgate regulations implementing section 601); 40 C.F.R. § 7.35(c) (2004) (“A recipient shall not choose a site or location of a facility that has the purpose or effect of subjecting [an individual] ... to discrimination ... on the grounds of race, color, or national origin or sex[.]”).

<sup>110</sup> *Alexander v. Choate*, 469 U.S. 287, 292–94 (1985) (“[Title VI] delegated to the agencies in the first instance the complex determination of what sorts of *disparate impacts* upon minorities constituted significant social problems, and were readily enough remediable, to warrant altering the practices of the Federal grantees that had produced those impacts.”). For a brief but helpful outline of Title VI analysis, see Tessa Meyer Santiago, Note, *An Ounce of Preemption Is Worth a Pound of Cure: State Preemption of Local Siting Authority as a Means for Achieving Environmental Equity*, 21 VA. ENVTL. L.J. 71, 80–83 (2002).

<sup>111</sup> See Office of Civil Rights, U.S. EPA, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (1998), available at <http://www.epa.gov/civilrights/docs/interim.pdf> (last visited Apr. 10, 2005) [hereinafter “Interim Guidance”].

<sup>112</sup> See *id.*

<sup>113</sup> See U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* and *Draft Revised Guidance for*

rights of action alleging disparate impact under section 602 in *Alexander v. Sandoval*.<sup>114</sup> Thus, a private party must show intent to discriminate pursuant to section 601.<sup>115</sup> This restriction eviscerated any Title VI private party action because proving intent to discriminate in siting landfills is very difficult, if not impossible.<sup>116</sup>

Moreover, administrative resolution of Title VI complaints filed with the EPA pursuant to section 602 has not been favorable to environmental justice advocates.<sup>117</sup> Widespread opposition to EPA's *Interim Guidance* surfaced in a rider to a Congressional appropriations bill in 1998.<sup>118</sup> The rider prevented the use of any monies appropriated in that bill to investigate Title VI complaints until *Final Guidance*, yet to be established, is adopted.<sup>119</sup> Title VI environmental litigation came to a standstill and has never been effectively revived.<sup>120</sup>

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Investigating Title VI Administrative Complaints Challenging Permits (*Draft Revised Investigation Guidance*), 65 Fed. Reg. 39650, 39691 (June 27, 2000) (noting recipients of federal assistance are not required "to address social and economic issues" under Title VI) [hereinafter "Draft Guidance"].

<sup>114</sup> 532 U.S. 275 (2001) (holding there is no implied private right of action under section 602 of Title VI disparate impact claims).

<sup>115</sup> *Id.*

<sup>116</sup> Hoffer, *supra* note 8, at 980–84.

<sup>117</sup> For a summary of Title VI complaints filed with the EPA, see *State Summary Table of EPA Title VI Administrative Complaints*, at <http://www.epa.gov/civilrights/docs/t6stdec012004.pdf> (last visited Mar. 20, 2005); see also U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 37–43 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf> (last visited Mar. 20, 2005); Title VI Complaints, *supra* note 106.

<sup>118</sup> Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 2496, tit. III (1998) (contains a rider provision preventing EPA's investigation and disposition of Title VI complaints, as of the date of the act's enactment); see also NACEPT REPORT, *supra* note 3, at 4.

<sup>119</sup> Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 2496, tit. III (1998) (contains a rider provision preventing EPA's investigation and disposition of Title VI complaints, as of the date of the act's enactment).

<sup>120</sup> See Title VI Complaints, *supra* note 106.

Further, the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Draft Guidance), issued in 2000, narrowly construes both Title VI language and its implementing regulations. The draft focuses on examinations and comparisons of data yet it absolves recipient agencies from addressing statistical analyses in areas for which they have no authority.<sup>121</sup> Thus, EPA's *Draft Guidance* is of limited use in effectively achieving relief from disparate effect through Title VI claims.<sup>122</sup> However, the *Draft Guidance* and other reports on Title VI environmental issues are helpful in ascertaining manageable standards that can be used to address the social, economic, and cumulative impacts of toxic substances, or stressors,<sup>123</sup> and regulate the facilities that have the potential to impose these stressors on affected communities.<sup>124</sup>

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<sup>121</sup> See Draft Guidance, 65 Fed. Reg. 39650, 39,675, 39691 (June 27, 2000). *But see* EJ GUIDANCE UNDER NEPA, *supra* note 102, at 2 (recommending agencies consider multiple effects even if not within the control of the agency).

<sup>122</sup> Proponents of environmental justice communities have submitted public comments questioning EPA's restriction of disparate impact analysis to technical and scientific factors. These commenters point out that EPA's proposed investigation for Title VI complaints unfairly limits the factors to be considered. *See, e.g.,* Center on Race, Poverty, and the Env't, Cal. Rural Legal Assistance Found., Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* 46 (Aug. 26, 2000). They allege EPA's interpretation of Title VI is unfaithful to the plain language of the statute language and implementing regulations. Further, it generally ignores Title VI jurisprudence that has considered factors that range beyond physical impact. *See generally id.*; The Lawyers' Committee for Civil Rights Under Law and the N.A.A.C.P. Legal Defense and Educational Fund, Inc., Comments on the Environmental Protection Agency's *Draft Revised Guidance* (Aug. 28, 2000).

<sup>123</sup> The term "stressor" is generally defined in the *Draft Guidance* as "any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems." In addition to chemical toxic substances, the term includes physical factors, such as noise, extreme temperatures, and fire, as well as biological factors such as disease pathogens or parasites. Draft Guidance, 65 Fed. Reg. 39,650, 39,667 (June 27, 2000). Other EPA documents have included socioeconomic factors in the definition of "stressor." *See* FRAMEWORK FOR CUMULATIVE RISK, *supra* note 4, at 2, n.2 (identifying lack of necessary health care, lack of habitat, and harmful

*Title VI Implementation Advisory Committee*

A draft template for state and local environmental justice programs was proposed by the “Implementation” Workgroup III of the EPA’s Title VI Implementation Advisory Committee.<sup>125</sup> Significant controversy existed over key elements of the template and prevented final endorsement by the Committee.<sup>126</sup> The disputes encountered in this process highlight the difficulties that must be overcome in implementing any regulatory program that addresses environmental justice issues.

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events such as car accidents as stressors). A stressor may be “an activity that, directly or indirectly, alters or causes the loss of a necessity.” *Id.* at xvii. “The stressor may not cause harm directly, but it may make the target more vulnerable to harm by other stressors.” *Id.* at 2.

<sup>124</sup> EPA’s concentrated and narrow focus on technical factors and gymnastic scientific analysis could in itself be considered a violation of Title VI. It is difficult to imagine a disadvantaged community with the resources to confront a well-funded corporate entity in a “high tech” battle of experts and data. EPA’s “due weight” policy effectively puts the burden of countering a recipient’s defenses on the community alleging a Title VI violation. *See* Draft Guidance, 65 Fed. Reg. at 39,674–75. It is unclear how a Title VI assessment in New Mexico is carried out. Barring any express assignment of this duty to another agency, it is likely the Attorney General would be charged with defending any Title VI claim brought against the State of New Mexico. *See* N.M. STAT. ANN. § 8-5-2 (1978). NMED, as a recipient of any financial assistance from the EPA, must ensure that no permitted activity is performed with discriminatory intent or results in a discriminatory effect. *See* Title VI Complaints, *supra* note 106, at 1 (listing Complaint ID 04R-04-R6 filed by South Valley Coalition of Neighborhood Associations et al. alleging a violation of Title VI by NMED). Any local government or state agency “that receives EPA funds ... [is] subject to Title VI, including those programs and activities that are not EPA funded.” Draft Guidance, 65 Fed. Reg. at 39,697. Whatever state agency is responsible for ensuring compliance when the state is the recipient could assume the responsibility for assessing qualitative environmental justice issues in any permitting decisions. Whether or not this task would rest with solely with NMED or would best be performed in conjunction with other agencies is an internal administrative matter that should be resolved prior to the effective date of any environmental justice regulations.

<sup>125</sup> NACEPT REPORT, *supra* note 3, at 1. The Committee was appointed by the EPA Administrator in 1998. *Id.*

<sup>126</sup> *Id.* at 2.

First, Committee members disagreed over what type of adverse impacts should be included in an analysis of disparate effects.<sup>127</sup> Some members believed disparate effect should be limited to actual harm or imminent threat to public health.<sup>128</sup> Others believed strongly that all adverse effects, including economic, social and cultural wellbeing, should be included.<sup>129</sup> Related dispute also existed over the extent to which cumulative risks<sup>130</sup> and synergistic effects<sup>131</sup> should be considered in assessing disparate effect.<sup>132</sup> Views ranged from those who believed compliance with existing environmental laws should overcome a Title VI claim to others who contended proof of a disparate impact caused by cumulative sources should result in denial of a permit or withdrawal of federal funds even if compliance with environmental laws has been established.<sup>133</sup>

Participants also disagreed about how to define the “affected community” and “general population.”<sup>134</sup> Some preferred a radius approach while others proposed a “site-specific analysis of exposure pathways.”<sup>135</sup> The degree of disproportionate adverse effect on the affected community that would be sufficient to establish a Title VI complaint was also a source of

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<sup>127</sup> *Id.* at 7.

<sup>128</sup> *Id.* at 7.

<sup>129</sup> *Id.* at 7.

<sup>130</sup> “Cumulative risk” is defined as “the combined risks from aggregate exposures to multiple agents or stressors.” FRAMEWORK FOR CUMULATIVE RISK, *supra* note 4, at 6 (2003). “Aggregate exposure” refers to “the combined exposure of an individual (or defined population) to a specific agent or stressor via relevant routes, pathways, and sources.” *Id.* at 7.

<sup>131</sup> Synergistic effects are those resulting from combinations of toxins or stressors. *See* FRAMEWORK FOR CUMULATIVE RISK, *supra* note 4, at 43–48 (2003).

<sup>132</sup> NACEPT REPORT, *supra* note 3, at 6.

<sup>133</sup> *Id.* at 6.

<sup>134</sup> *Id.* at 8.

<sup>135</sup> *Id.* at 8.

dispute.<sup>136</sup> Some argued that any “statistically measurable difference” would be adequate while others insisted the disparity be “significant” or “substantial.”<sup>137</sup>

Jurisdiction over unregulated sources and sources from other jurisdictions is another contested issue.<sup>138</sup> Some argue that a permitting authority’s jurisdiction extends to neither unregulated sources nor facilities located in other states that have environmental impact in the permitting authority’s state.<sup>139</sup> Thus, an assessment of cumulative risks and synergistic effects on a community could not include unregulated or out-of-state sources, no matter the degree of effect such a source might have. Opposing members argue that regulating agencies have a duty to include these types of sources when assessing threats to the environment and public health.<sup>140</sup>

Disagreement also arose over what types of mitigation would be acceptable. The range of acceptable mitigating activities extends from those relatively unrelated to the impact of the facility in question to those that directly address the adverse affect of the permitted source.<sup>141</sup> Some communities might find that a donation of funds to a health center would be sufficient while another community might insist on a greater number of monitoring wells to further ensure that no toxin reaches water supplies.

Finally, opinions differed over how justifications for adverse effects on communities should be evaluated.<sup>142</sup> Two facets of justification assessment exist: 1) whether justification should be addressed prior to or after mitigation, and 2) whether justification should include

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<sup>136</sup> *Id.* at 7.

<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.* at 8.

<sup>140</sup> *Id.* at 8–9.

<sup>141</sup> *Id.* at 9.

<sup>142</sup> *Id.* at 9.

economic damage to the facility owner or should be limited to demonstrated benefits to the public provided by the facility.<sup>143</sup>

Any regulatory system must address each of these areas of contention if it is intended to fully address environmental justice issues. An agency will have to determine 1) the definition of “affected community” and the relevant degree of disparity between the affected community and the general population, 2) the relevant adverse effects, 3) how to measure cumulative risk and synergistic effects, 4) the sources of stressors that will be included in the agency’s cumulative and synergistic assessment, 5) what constitutes an acceptable mitigating action, and 6) what justifications might prove sufficient to defeat a claim of unlawful disparate effect.

### ***Proposals for State Consideration of Environmental Justice Concerns***

Existing federal law and publications provide both the methodology and the substantive standards necessary to make an informed permitting decision that includes assessments of environmental justice issues. A state agency can make an informed and supported decision that will survive, even discourage, judicial challenge by focusing on early public participation and using the most recent relevant data, best available science, and best practices to perform a NEPA-like analysis of factors established by the state legislature. Objective and manageable standards from existing sources can be identified by a Task Force consisting of all stakeholders. These standards could be implemented in a process similar to that described below to effectively address environmental justice concerns and discourage judicial challenge.

#### ***Public Participation & Pre-Approval Process***

To ensure the proper delegation of authority in light of *Colonias*, current law should be amended with respect to notice and the permitting process. This would necessarily include

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<sup>143</sup> *Id.* at 9.



creation of a “pre-approval” step in the application for siting a landfill. The pre-approval stage would focus on three interrelated requirements: 1) public participation and response to community concerns, 2) assessment of impact on the affected community, and 3) analysis of alternative sites. A pre-approval report to NMED regarding these requirements would have to be submitted and reviewed before a final permit application would be accepted.<sup>144</sup>

An applicant’s duties regarding public participation and subsequent response to community concerns begin with defining the affected community.<sup>145</sup> “Affected community” should be defined at the outset of evaluating a particular location and identified by the applicant using guidelines established by NMED or a collaborating agency. Differences in types of facilities and types of communities necessarily preclude a single approach to defining who is affected. A definition resting on a predetermined radius of a facility would be easy to apply but must be varied or supplemented according to the type of facility. Requisite notice will depend on the type of landfill to be sited.

A larger radial standard should be used for facilities with a greater potential for impact. For example, the affected community of a hazardous landfill would be larger than that of a construction and debris landfill because the potential risks are greater. Further, a landfill that

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<sup>144</sup> Wisconsin requires a “feasibility report” which must include, *inter alia*, a “description of the advisory process undertaken by the applicant prior to submittal of the feasibility report to provide information to the public and affected municipalities and to solicit public opinion on the proposed facility.” WIS. STAT. ANN. § 289.24(d) (Westlaw, current through 2005 Act 2, published 3/11/05); *see also id.* § 289.33 (“Solid and hazardous waste facilities; negotiation and arbitration”). The report must also include information sufficient to make a “determination of need for the facility.” *Id.* § 289.24(f).

<sup>145</sup> NACEPT REPORT, *supra* note 3, at 8. Wisconsin defines “affected municipality” as “[a] town, city, village or county in which ... a ... waste facility is or is proposed to be located” and “[a] town, city, village or county whose boundary is within 1,500 feet of that portion of the facility designated ... for the disposal of solid waste.” WIS. STAT. ANN. § 289.46 (Westlaw, current through 2005 Act 2, published 3/11/05).

serves a populated community located to the north would create a greater physical impact on residents located within the more heavily traveled transportation routes to the landfill. A strict radial standard would not be able to take into account this heavier burden on a population located outside of a specified radius. In addition, facilities located within the same watershed or groundwater basin should be taken into consideration when assessing cumulative risks and synergistic effects on a community. Populations located on a common waterway outside of a specific radius would be at greater risk than a population located within the radius but not near the water source. Thus, an affected community must be measured by 1) physical proximity to the facility, 2) exposure pathways and 3) geographical considerations. Once an affected community has been defined, a socio-demographic analysis of that community should be conducted.

Each permit applicant should be required to hold public meetings and negotiations prior to the applicant's final decision on a site. The applicant must engage in public meetings to inform the public of the anticipated impact on the community. The applicant's preliminary assessment of impacts that will be considered by NMED in the permitting decision will constitute the basis of information that should be discussed at the public meetings. A description and comparison of alternative sites considered and the grounds for favoring a particular site or sites will also provide a structure for public understanding of the proposed project.<sup>146</sup> Any community concerns will be addressed in subsequent mediation and negotiation among representatives of all stakeholders.<sup>147</sup>

A summary of the public participation process and subsequent actions taken to address a community's concerns must be part of a "pre-approval" prior to submission of the formal

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<sup>146</sup> CHARLES R. RHYNER ET AL., WASTE MANAGEMENT AND RESOURCE RECOVERY 280 (1995).

<sup>147</sup> Wisconsin provides for negotiation and mediation in its siting regulations. *See* WIS. STAT. ANN. § 289.33 (West, WESTLAW through 2005 Act, published 3/11/05).

application. The pre-approval report will include a review of the alternative sites considered, a discussion of anticipated impact on the location selected, and a detailed description of the public participation process and the applicant's response to community concerns. The summary should include a synopsis of the applicant's consideration of alternative sites and its reasons for the final site determination.<sup>148</sup> An applicant's consideration of alternative sites should include an examination of technical and scientific factors that can be determined without significant investment, a preliminary assessment of impacts on the community including socio-economic, cultural and historical factors, and the affected community's racial, ethnic and socio-economic status as compared to the general population.

Often the public will oppose a landfill on principle because the community members have had no say in the site chosen.<sup>149</sup> Thus, public participation must involve all stakeholders in the affected community and the local governments. It is important to involve the community as a whole rather than just the county or other local government. Sometimes, action is taken by local officials contrary to the concerns of the local residents.<sup>150</sup> Thus, special efforts must be made to include all residents in an affected community.

#### Cumulative Assessment by Point System

Cumulative risks and synergistic effects in an affected community can be measured by a point system. The point system will measure the potential for cumulative risk and synergistic effects based on types of facilities within the community calculated to be affected by the location

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<sup>148</sup> In re Belle Co., 809 So. 2d 225, 229–30 (La. Ct. App. 2001) (discussing alternative site study).

<sup>149</sup> Walsh & O'Leary, *supra* note 34, at 74, 75.

<sup>150</sup> See, e.g., Franks v. Ross, 313 F.3d 184 (4<sup>th</sup> Cir. 2002).

of a proposed facility.<sup>151</sup> The point system should encompass all potential sources of adverse effects on the environment, including both regulated and unregulated facilities, and proposed, existing and closed facilities. Points would be assigned to any facility with an adverse or potentially adverse effect on the affected community. The point system would also distinguish between facilities in compliance and those out of compliance. The number of points assigned would depend on the degree of adverse effect each particular facility presents to the environment.

For example, a properly permitted existing solid waste municipal landfill in compliance would have fewer points than a Superfund remediation site yet to be completed. Types of considerations would include, at a minimum, the level of permitted releases, potential for accidental releases, actual quantity of releases, gravity of toxins, distance that the releases travel, and noise, dust and traffic contributions. The standard for “adversely affected” could arise from the point system and a comparison of the affected community with the general population.<sup>152</sup>

A detailed methodology can be developed sufficient to survive judicial challenge if it rests on best science, best data, and best practices.<sup>153</sup> Information necessary to measure risks in a

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<sup>151</sup> See Draft Guidance, 65 Fed. Reg. 39650, 39,677–81. See generally City of Santa Fe, N.M. City Code, §§ 14-3.10(C); 14-8.7(C)–(E) (current through Sept. 30, 2004) (regarding point system for architectural design review), available at [http://68.15.49.6/santafe\\_nm/lpext.dll?f=templates&fn=site\\_main-j.htm&2.0](http://68.15.49.6/santafe_nm/lpext.dll?f=templates&fn=site_main-j.htm&2.0) (last visited Mar. 20, 2005); cf. NACEPT REPORT, *supra* note 3, app. E, at 7. See generally Musa Keenheel, Comments, *The Need for New Legislation and Liberalization of Current Laws to Combat Environmental Racism*, 20 TEMP. ENVTL. L. & TECH. J. 105 (2001).

<sup>152</sup> The point system could be constructed to restrict granting permits when an affected community has a maximum number of facilities that adversely affect the community. For example, Wisconsin prohibits a new solid waste disposal facility in certain communities that host two or more approved facilities. WIS. STAT. ANN. § 289.29(2) (Westlaw, current through 2005 Act 2, published 3/11/05).

<sup>153</sup> FRAMEWORK FOR CUMULATIVE RISK, *supra* note 4, at 21 (advocating cooperation among organizations to facilitate the use of best data and tools).

particular geographic area is currently available from a variety of sources including EPA publications,<sup>154</sup> the New Mexico Resource Geographic Information System Program,<sup>155</sup> the U.S. EPA Geographic Information System,<sup>156</sup> the U.S. Department of Labor's census data,<sup>157</sup> and the Bureau of Business and Economic Research at the University of New Mexico.<sup>158</sup> Existing risks and potential risks can be defined using technical criteria in environmental regulations, data on chemical substances and data collected on existing and closed facilities.

*Agency Discretion to Grant or Deny a Permit*

Finally, NMED must have discretion to deny a permit because the affected community is disproportionately and adversely affected by existing facilities or would be disproportionately and adversely affected by the addition of another facility. An NMED decision to deny a permit could conceivably rest on one of three different grounds: 1) an applicant has failed to comply with mandated public participation procedure, 2) siting another landfill would exceed the maximum allowable cumulative risks and synergistic effects points within the affected community, or 3) the permit would be contrary to the public welfare after a NEPA-like "hard look" analysis and weighing of relevant factors.

The industry will argue that the guarantee of approval that exists now is necessary to protect an applicant from loss of investment incurred in meeting the application requirements.

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<sup>154</sup> See, e.g., EJ GUIDANCE UNDER NEPA, *supra* note 102, at 25–26 (defining, *inter alia*, low-income and minority populations).

<sup>155</sup> UNIV. OF N.M. & N.M. INFO. TECH. COMM'N, NEW MEXICO RESOURCE GEOGRAPHIC INFORMATION SYSTEM PROGRAM, *available at* <http://rgis.unm.edu/> (last visited Apr. 3, 2005).

<sup>156</sup> U.S. EPA, ENVIRONMENTAL JUSTICE GEOGRAPHIC INFORMATION SYSTEM, *available at* <http://www.epa.gov/enviro/ej/> (last visited Apr. 3, 2005).

<sup>157</sup> See EJ GUIDANCE UNDER NEPA, *supra* note 102, at 14; *see also* U.S. CENSUS BUREAU, MAPPING CENSUS 2000: U.S. DIVERSITY, *available at* <http://www.census.gov/mso/www/mapdiv.html> (last visited Apr. 3, 2005).

<sup>158</sup> UNIV. OF N.M., BUREAU OF BUSINESS AND ECONOMIC RESEARCH, *available at* <http://www.unm.edu/~bber/> (last visited Apr. 3, 2005).

Any discretion allowed an agency in granting or denying a permit would be an unreasonable risk to the investment in time and money necessary to make an application for a landfill.<sup>159</sup> This valid concern can only be addressed by requiring public participation and investigation of social, economic and other environmental justice concerns at the initial stages of the pre-application process. These issues must take place prior to significant investment but after a determination that the site will meet the most necessary technical requirements.

Industry will also argue that such mandates are too costly. However, the costs of litigation and uncertainty when landfill sites are vehemently opposed by a community are much better spent in a pre-approval stage – working with the public to decide what’s best rather than taking the stance of “decide-announce-defend” policy currently in play by private applicants.<sup>160</sup> Government and industry landfill authorities have emphasized the importance of exploring public opinion prior to making a final decision on a site in order to avoid litigation and other costly delays.<sup>161</sup> The EPA points out advantages to both industry and state government in

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<sup>159</sup> Walsh & O’Leary, *supra* note 34, at 74.

<sup>160</sup> *Id.* at 74, 75; *see also* Parker & Turner, *supra* note 21, at 114–15 (describing the “Keystone Process,” a similar pre-approval public participation process used in Texas). *Cf. id.* at 115–16 (addressing community concerns regarding economic, social, environmental, and other impacts through negotiation and arbitration in the second phase of the siting process).

<sup>161</sup> *See* Walsh & O’Leary, *supra* note 34, at 74; City of Phoenix, *Landfill Siting Study* (October 2001) (request for public input on potential sites); Parker & Turner, *supra* note 21, at 118–19 (cooperation between industry and communities will reduce litigation and help ease disposal capacity crisis).; NACEPT REPORT, *supra* note 3, app. E, at 6 (“[E]arly intervention reduces the possibility that delays will cost industry time, money, and even a competitive advantage[.]”). *See generally* EPA, SOCIAL ASPECTS OF SITING RCRA HAZARDOUS WASTE FACILITIES, EPA530-K-00-005 (April 2000) [hereinafter EPA, SOCIAL ASPECTS], *available at* <http://www.epa.gov/epaoswer/hazwaste/tsds/site/k00005.pdf> (last visited March 16, 2005); EPA, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS, EPA-500-R-00-007, 2-25 (Aug. 2000), (advocating public involvement but, practically speaking, too late to alter the location), *available at* <http://www.epa.gov/permits/publicguide.pdf>. *But see id.* at 3-20 (pre-application public meeting required in permit for RCRA hazardous waste facility).

facilitating public involvement in site selection.<sup>162</sup> Both industry and government will benefit by building trust with the community and thereby reducing the chance for possible litigation or enforcement.<sup>163</sup> Moreover, a local community is likely to bring to the forefront concerns that might escape the attention of a state agency or industry physically removed from the location in question.

NMED concerns will rest on the burden and additional expense of implementing these additional requirements. Existing notice requirements will be expanded and a public meetings requirement will be added. Aside from promulgating additional regulations and ensuring compliance, NMED's tasks will include providing guidance for public meetings and providing a format for the required pre-approval report. It will also be participating as a member of the Task Force appointed to construct the point system. Efforts to pre-identify environmental justice communities throughout the state could alleviate the potential for problems.<sup>164</sup> Finally, in making a permitting decision, NMED will apply a NEPA-like "hard look" analysis of all the factors that impact a community when a new landfill is developed.

### *Weighing and Balancing*

The NEPA-like "hard look" analysis that NMED conducts will involve consideration of any type of impact that could be adverse to the affected community. This will include all factors pertinent to the individual characteristics of the proposed site and the circumstances of the affected community. Relevant factors that could be necessary for adequate evaluation include,

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<sup>162</sup> U.S. EPA, SOCIAL ASPECTS, *supra* note 161, at 3.

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

<sup>164</sup> *But see* NACEPT REPORT, *supra* note 3, app. E, at 6 (discouraging use of the term "redlining" to avoid an impact on development when pre-identifying adversely affected communities); *see also id.*, app. E, at 7 (recommending pre-identification of "communities with a significant "pollution load" and a minority population.")

but are not limited to, environmental and health impacts, the socio-demographic makeup of the affected community as compared to the general population, economic, social, cultural and historical impacts, physical and aesthetic impacts to the site and surrounding properties.

Environmental and health impacts will include an assessment of cumulative and synergistic risks using the point system. The socio-demographics of the affected community will encompass the specific identifying factors of a disadvantaged community such as race, ethnicity, culture, religion, age, gender and income.

An assessment of economic impact will necessarily include the costs and benefits to the public. Benefits to the community could be found in local need for the facility, expansion of the tax base and job creation. Costs to the community might involve property devaluation or a general decline in residential desirability. Effects, both positive and negative, on other economic development in the area must be considered. Other costs of possible significance include costs of alternative sites to the applicant and risks and costs of transporting waste to a different site.

Assessing social, cultural and historical impacts will require examination of patterns of behavior common or relied upon within the community, religious practices or sacred sites, and sites with cultural or historical significance such as archaeological sites or architectural ruins.<sup>165</sup>

Physical impacts that must be considered include noise, dust and traffic resulting from the proposed landfill as well as visual impact on the site itself and aesthetic impact on the locale generally. Only by weighing and balancing all of these factors can NMED adequately consider the concerns of all stakeholders in a landfill permitting decision.

## Conclusion

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<sup>165</sup> RHYNER ET AL., *supra* note 146, at 279. *See generally* CAL. CODE REGS. tit. 14, § 15131 (2004) (concerning evaluation of social and economic considerations in an environmental impact statement).



New Mexico can both provide protection for its disadvantaged communities and protect itself from excessive disposal of out-of-state wastes by incorporating environmental justice concerns as a factor to be weighed in a discretionary permitting process. The population of New Mexico compared to other states is like that of the classes protected by Title VI. New Mexico has a larger minority population and a per capita average income that is substantially below that of the rest of the country.<sup>166</sup> Disproportionate impact of adverse environmental effects from landfills in New Mexico and its local communities can be prevented by mandating early public participation through a pre-approval step in the permitting process, weighing the social and economic costs and benefits to the community, and providing state agencies with discretionary authority to deny a permit for a facility that adversely affects a community.

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<sup>166</sup> New Mexico's minority population is about 35% of the total population, almost 9% greater than that of the country as a whole. U.S. CENSUS BUREAU, NEW MEXICO QUICKFACTS, *at* <http://quickfacts.census.gov/qfd/states/35000.html> (last visited Apr. 12, 2005). Persons of Hispanic or Latino origin represent 42.1% of the population, almost 30% greater than that of the country as a whole. *Id.* A language other than English is spoken in 36.5% of homes in New Mexico. *Id.* In 1999, 18.4% of the state's population was below poverty level, 6% more than that of the entire nation. *Id.*