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Public Participation in the Superfund Cleanup Process

Ellison Folk*

INTRODUCTION

Oroville, California, a small community of approximately 10,000 residents, is home to two Superfund sites created by wood treating companies — Koppers and Louisiana Pacific. In the early 1980's contamination from pentachlorophenol — a wood preservative containing dioxins — was discovered in wells near the Koppers and Louisiana Pacific treatment facilities. Residents in the area had complained of symptoms such as nausea, headaches, and stomach pains. Animals were born deformed, and a cancer cluster was discovered. The state discovered contamination at levels up to 500 times higher than those considered safe for drinking water and warned residents not to drink the water, bathe babies, or eat eggs or beef raised on locally irrigated land. In 1987 an explosion and fire at a wood treating facility forced the evacuation of town residents within a one-mile radius of the plant. The fire burned for days, and dioxins released in the explosion blanketed the surrounding area. With the 1987 explosion and fire, the Environmental Protection Agency (EPA) got involved with the site cleanup plans, and six years after the discovery of the contamination, a cleanup plan was approved.¹

There have been attempts to involve the Oroville community in the process of choosing a cleanup plan. Local residents organized to fight for the cleanup of the Oroville sites, and EPA has consulted with them sporadically. The relationship, however, has been a rocky one. The government's actions have left citizens distrustful. During the fire, local officials waited almost forty hours before evacuating residents.² State officials have given conflicting information, alternately telling residents that

¹ These facts are taken largely from TOXICS AND WASTE MANAGEMENT DIVISION, ENVIRONMENTAL PROTECTION AGENCY REGION IX, COMMUNITY RELATIONS PLAN: LOUISIANA-PACIFIC SITE, BUTTE COUNTY, CAL. (1988) [hereinafter BUTTE COUNTY CRP]; Newman, Orovile Can't Be Fooled, EVERYONE'S BACKYARD, Spring 1988, at 1; Interview with Pamela Cooper, Community Relations Supervisor, in El Cerrito, California (June 28, 1990) [hereinafter Cooper Interview].

² Newman, supra note 1, at 7.
water was safe or unsafe to drink. Residents feel that EPA has been too accommodating towards Koppers in its development of the cleanup plan. The local residents have experienced a significant amount of exposure to hazardous substances over the years, and they feel neglected by the government they thought was supposed to protect them. EPA, for its part, is skeptical of the demands and claims made by Oroville residents. The Agency feels that it has tried to solicit public input, but that the public has often reacted emotionally to EPA efforts to remedy problems at the site.

Oroville is not unique. There are over 30,000 identified hazardous waste sites in the United States, and many of these will impact surrounding communities. With all of the technical and legal minutiae of the Superfund program, it is easy to lose sight of one of the primary motivations for cleaning up the site — the affected public and its concerns. Many articles have focused on the legal and technical complexities of the Superfund program, but despite the dramatic impacts that a Superfund site can have on a community, few have discussed the role the public should play in formulating a Superfund cleanup plan. This Comment focuses on the role that the public does and should play in the Superfund cleanup process.

Relying on information gathered from interviews with EPA and industry employees, contractors, and members of affected communities, this Comment analyzes EPA's program for public participation in Superfund. Part I discusses the value of public participation generally. Part II describes EPA's Community Relations Program. Part III analyzes the extent to which the program fulfills both the promise of public participation and EPA's goals for the program. Finally, part IV proposes methods for improving the Community Relations Program to provide meaningful opportunities for public participation in the Superfund cleanup process.

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3. Telephone interview with Don Speegle, member of Oroville, California Community Work Group and former president of Citizens for Clean Water (Oct. 3, 1989) [hereinafter Speegle Interview].

4. Id.; Interview with Norma Prince, member of Oroville Community Work Group (Oct. 30, 1989) [hereinafter Prince Interview].

5. See Newman, supra note 1, at 1, 7.


8. Interviews were conducted with EPA community relations coordinators, other EPA officials, and citizens involved in the Superfund process in their communities. Because some people requested anonymity, readers should assume that otherwise unattributed factual statements are based on interview notes.
I

THE VALUE OF PUBLIC PARTICIPATION IN THE SUPERFUND CLEANUP PROCESS

Public participation in the political process has a long tradition in democratic society and serves many substantive democratic values. Participation lends legitimacy to the decisionmaking process, and both educates and empowers affected communities. Public input also can result in technically and socially better decisions.

On the other hand, many critics believe that some decisions, especially those involving complex technical and scientific questions, are best left to the experts. The most commonly raised objections to public participation are that the general public is not qualified to deal with technically complex issues, that affected communities are too emotionally involved in the eventual outcome to provide useful input into cleanup plans, and that participation will delay the decisionmaking process. After briefly summarizing the Superfund program, the following section discusses these advantages and disadvantages of public participation as they relate to the Superfund cleanup process.

A. The Superfund Program

Superfund is a complex program designed to identify and clean up hazardous waste sites throughout the country. EPA has compiled a national inventory of over 30,000 hazardous waste sites. Sites are identified for inclusion in the Superfund program through a preliminary assessment, which determines whether additional studies are warranted based on the hazard presented by the contamination. If the preliminary assessment indicates that further investigation is warranted, a site inspection is conducted. At the site inspection stage, EPA investigators collect information, such as chemical analyses of soil and water, which are used in the Hazard Ranking System (HRS) — a screening tool that enables EPA to determine if a site poses a significant risk to public health or the environment. The HRS is a numerical ranking system which

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10. An overview of the Superfund program is provided in PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 24-50, and in OFFICE OF TECHNOLOGY ASSESSMENT, ARE WE CLEANING UP? 3 (1988) [hereinafter ARE WE CLEANING UP].

11. EPA Superfund Hotline, Jan. 28, 1991. This inventory, known as the CERCLIS (CERCLA Information System), includes all sites “potentially appropriate for listing on the NPL.” PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 24.

12. PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 24.

13. Id. at 26.

14. Id. at 26-27. The newly revised HRS, effective March 14, 1991, was announced at
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assesses a site’s potential to cause harm as a result of the migration of hazardous substances through air, groundwater, or surface water. The HRS must consider the effect that contamination of surface water has on drinking and recreational uses and the threat that contamination poses to the human food chain and ambient air. If a site scores above a certain level, it is eligible for inclusion on the National Priorities List (NPL) — a list of those sites which pose a significant risk to public health or the environment. There are 1189 NPL sites at present; NPL sites are given priority in cleanup enforcement actions and are eligible for a cleanup financed by the Superfund.

Cleanup plans are developed for sites listed on the NPL through a remedial investigation and feasibility study (RI/FS) which determines the extent of contamination and environmental problems at the site. Through the RI/FS, cleanup alternatives are evaluated and a preferred cleanup option is identified. Once EPA has chosen a cleanup alternative, the proposed cleanup plan is published for public comment. EPA then issues a record of decision (ROD), which identifies EPA’s cleanup method. The selected cleanup alternative must protect human health and the environment; be cost effective; comply with other environmental standards (such as those set by the Clean Water Act); use permanent solutions, alternative technologies, and resource recovery technologies to the maximum extent practicable; and address whether the treatment will reduce the toxicity, mobility, and volume of the hazardous waste.


15. PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 27.
16. CERCLA § 105(c)(2), 42 U.S.C. § 9605(c)(2) (1988); PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 27.
17. PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 27. Currently, the threshold value is 28.50 on the HRS. This threshold was initially selected so that it would yield 400 NPL sites; it is not based on the significance of risk posed by a site. Id.
19. PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 28. However, the NPL does not necessarily determine priority for removal actions. Technically, EPA may take removal actions at any site meeting the requirements of the National Contingency Plan. As a practical matter, however, NPL sites have been the focus of EPA actions. Id.
20. Id., at 28-37. The regulations regarding the RI/FS can be found at 40 C.F.R. § 300.430 (1990).
21. 40 C.F.R. § 300.430(c), (d) (1990); PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 32-33.
23. 40 C.F.R. § 300.430(f)(4)-(5) (1990); PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 37-40.
24. PROGRESS TOWARD IMPLEMENTING SUPERFUND, supra note 6, at 37. For a list of the nine criteria of evaluation, see 40 C.F.R. § 300.430(e)(9)(iii) (1990).
EPA has several options available for enforcing cleanups at sites listed on the NPL. It can clean up a site itself and then seek reimbursement from potentially responsible parties (PRP's — those parties which may be responsible for the contamination); it can issue an administrative order compelling a responsible party to conduct a site cleanup; or it can seek an enforcement order in court which requires responsible parties to clean up a site. A PRP's willingness to cooperate strongly influences EPA's decision as to who will conduct the cleanup. Until recently, EPA policy was to encourage a PRP to do as much of the investigative and cleanup work — subject to EPA oversight — as it could. If the PRP's agree to clean up the site, EPA will sign a negotiated consent decree with the parties which specifies how the parties will proceed with the cleanup. In mid-1990, EPA instituted a new policy wherein EPA itself will now be responsible for the health risk assessments, while private parties will still be allowed to conduct investigations and perform cleanup work. If EPA chooses to clean up a site, or if a potentially responsible party will not cooperate, the cleanup is financed by the Superfund. EPA then seeks reimbursement for this cleanup from the PRP's. The process for listing and cleaning up a Superfund site is quite complicated and can take years to complete. Superfund decisions rely heavily on technical and scientific information, which even experts in the field may find difficult to understand or evaluate. Knowledge about the risks posed by hazardous wastes is incomplete, and the science of hazardous waste cleanup is still young. There are no guarantees that a

27. Id.
29. Id.
34. A recent Office of Technology Assessment report found that of the Superfund sites it investigated, cleanups were completed an average of 10 years after a site was first identified. See ARE WE CLEANING UP, supra note 10, at 13.
35. See id. at 21.
cleanup program or intermediate measures designed to mitigate the harm posed by a Superfund site will work.

B. The Value of Public Participation in Governmental Decisionmaking

Public participation in the governmental decisionmaking process can serve many goals. Participation in a democratic society promotes democratic values such as legitimacy, accountability, and education, and it may result in better technical and political decisionmaking.

1. Participation and Democracy

a. The Tradition of Participation

Public participation is an ideal of democratic theory. Jean-Jacques Rousseau, a preeminent theorist of democracy and participation, envisioned a society wherein citizens would make the decisions that affect them. Rousseau believed that participation assures a government that is responsible to its citizens. Participation in government also educates people and develops citizens who are individually and socially responsible — those who know the difference between their individual preferences and the public interest. Through involvement in the decisionmaking that affects their lives, individual citizens become more free because they gain control over their lives.

(discussing various safety incidents related to hazardous waste cleanup). Dr. Melius, Chief of the Hazard Evaluations and Technical Assistance Branch at the National Institute of Occupational Safety and Health, stated in response to a question about the actual known health effects of exposure to hazardous wastes: "We don't have the knowledge to accurately estimate the risks. A chemical we now consider to be innocuous may turn out to be carcinogenic." Id. at 12, 15 Envtl. L. Rep. at 10,244.


39. C. PATEMAN, supra note 37, at 24.

40. Id. at 24-25.

41. Id. at 24-27. John Stuart Mill also believed that participation fosters an "active," public-spirited citizenry. Id. at 29. Unlike Rousseau, Mill recognized the complexity of a large-scale modern society and was willing to accept representative government. Id. at 31. He believed, however, that participation on a local level was an essential aspect of a democratic society. Id. Involvement on a local level would allow people to deal with the issues that affect their everyday lives. Id. Like Rousseau, Mill believed that participation would allow people to "learn democracy." Id. (quoting J. MILL, ESSAYS ON POLITICS AND CULTURE 186 (1963)). Voting for national representatives once every few years was not enough: "[a] political act, to be done only once in a few years, and for which nothing in the daily habits of the citizen has prepared him, leaves his intellect and his moral disposition very much as it found them." Id. at 30 (quoting J. MILL, supra, at 229).

Notwithstanding the views of democratic theorists such as Rousseau, some modern political theorists have minimized the importance of participation. These theorists hold that democracy is merely a political method with no substantive ends; participation consists only of voting for competing leaders. See C. PATEMAN, supra note 37, at 3-5 (discussing the views of Joseph Schumpeter). According to this view, participation is valuable only because voting for competing leaders, with the sanction of loss of office, promotes good government. Id.
Participation is also a tradition of democracy. This tradition is reflected in the New England town meetings described by Alexis de Tocqueville over 150 years ago and is found today in the many opportunities for participation provided for in environmental statutes. These provisions span the spectrum of participatory opportunities from public hearings to citizen advisory councils, and from public comment procedures to citizen lawsuits.

b. Participation and Democratic Values

Participation in the decisionmaking process also serves several substantive democratic goals: legitimacy, education, and community empowerment.

i. Legitimacy

Public participation in a decision may lend it legitimacy — especially in the context of Superfund. This is primarily true because many people distrust government. The Superfund program has not been overwhelmingly successful in cleaning up hazardous waste sites. The government did not prevent the contamination of sites, and people do not believe that the government can clean them up. Moreover, affected communities do not trust the potentially responsible parties, who are naturally viewed by the communities as the cause of the contamination. The fact that the government and the responsible parties work closely together in developing a cleanup strategy or negotiating a settlement exacerbates this distrust. The sweetheart deals between industry and EPA during the Gorsuch era have heightened public distrust.

45. See, e.g., Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (1988) (requiring public comment period for most proposed agency actions).
47. Indeed, ten years after Superfund's enactment, only 54 sites have been removed from the NPL. Snyder, Superfund: Cheers and Jeers as 10th Anniversary Nears, ENV'T TODAY, Nov.-Dec. 1990, at 1, 27.
A study of Superfund by the Office of Technology Assessment noted the value of participation in making the process legitimate: "[i]f cleanup strategies are developed behind closed doors, the public will feel disenfranchised and suspicious, eroding public confidence in the Superfund program."50 One person has remarked that having EPA monitor industry and devise a cleanup program is like "having the fox guard the chicken coop."51 People are more willing to accept decisions that they have played a role in making, while those decisions made without the participation or knowledge of the affected parties are often seen as less legitimate.

Distrust of government and industry is compounded by the fact that Superfund cleanups rely on uncertain information and unproven technologies. Scientists often do not know how dangerous particular chemicals are or whether they may have caused a cancer cluster.52 The government cannot decide if a cleanup technology will yield permanent results. Communities, on the other hand, want definite answers and permanent solutions. When government officials give conflicting answers or hedge when discussing the risks posed by a particular substance, people in the community may think that they are lying.53 Lois Gibbs, who has observed the Superfund cleanup process from the perspective of a person whose community (Love Canal, New York) was contaminated by hazardous wastes, believes that community participation in the cleanup decision-making process is crucial to the legitimacy of the outcome. "By involving the communities in these decisions, people will understand the limits of the decisions so they know the background. They know why the decision is made. They feel a part of the final resolution. And they can make a contribution toward achieving the cleanup they can live with."54

ii. Education

Participation in Superfund cleanups also serves educational purposes. Although hazardous waste cleanup technology is very complex,55 citizens with no formal technical background (but who follow the cleanup process closely) can discuss quite easily the advantages and dis-

51. Speegle Interview, supra note 3.
52. See supra note 36.
53. See M. Edelstein, supra note 48, at 76-78 (discussion of the importance of information and the distrust which affects people's perception of the problem).
55. For a discussion of these technologies, see Superfund Strategy, supra note 50, at 171-220.
advantages of different cleanup technologies. People not only learn more about technology, they also learn about the political process. Lois Gibbs is a classic example: a mother and housewife living in Love Canal when the site became the focus of national attention, she organized her neighbors and pressed for more information about the effects of hazardous wastes on her community and for a quick and fair resolution of the problem. She is now the director of a national organization, the Citizens' Clearinghouse on Hazardous Wastes, which educates communities about hazardous waste sites and cleanup. While most people do not go on to become the leaders of national organizations, at local sites throughout the country at least one or two people educate themselves about the site and become actively involved in trying to influence the cleanup process.

iii. Community Empowerment

One of the effects of a hazardous waste site on a community is a feeling of loss of control. Health effects are caused by unknown waste sites and chemicals, and site management decisions are made by government bureaucrats whom local residents have never seen. Lack of involvement in the cleanup process may make people feel helpless and totally dependent on a government agency. Through education and participation, people learn more about the Superfund cleanup process. As communities organize in order to participate in the process, they learn about the political system.

In California, for example, grassroots organizations from many small communities affected by hazardous waste sites have formed a statewide organization to further their political goals. The group, California Communities Against Toxics, works for toxics use reduction, lobbies for changes in California hazardous waste management policies, and sup-

56. E.g., Telephone interview with Ann Coombs, representative of five League of Women Voters organizations in California's Santa Clara Valley (Oct. 27, 1989) [hereinafter Coombs Interview]; Speegle Interview, supra note 3.
58. For a detailed description of overall strategy and methods of organizing a community with regard to environmental issues, see Gibbs, Environmental Community Organizing, in ENVIRONMENTAL LEADERSHIP 63 (S. Langton ed. 1984).
59. For a profile of “activists” in local communities, see M. EDELSTEIN, supra note 48, at 141-42. The involvement and education of only one or two citizens, however, can have drawbacks. These people may develop their own agenda which may not reflect the interests of the larger community. See, e.g., Shaw & Milbrath, Citizen/Government Interaction At Toxic Waste Sites: Lessons from Love Canal, in NATIONAL CONFERENCE ON MANAGEMENT OF UNCONTROLLED HAZARDOUS WASTE SITES 415, 418 (Hazardous Materials Control Research Inst., 1981) (indicating that there was some conflict at Love Canal between homeowners, represented largely by Lois Gibbs, and renters).
60. See M. EDELSTEIN, supra note 48, at 57-60.
61. See id. at 118-19.
62. See id. at 144-46.
ports groups organizing around hazardous waste issues in their local communities.\textsuperscript{63} This form of direct involvement in the political process can serve to empower community members and help them overcome the feelings of helplessness and lack of control that can engulf a community with a Superfund site.

2. \textit{Participation and the Decisionmaking Process}

Many people accept that participation is an ideal of democracy, but argue that the need for efficient and accurate decisionmaking means that complex, technical questions are best left to the experts. The first Superfund statute, which made almost no provision for public participation, clearly reflected this view.\textsuperscript{64} As originally enacted in 1980, the Superfund statute was dominated by the view that experts, working on behalf of the public, could best further the public goals of cleaning up hazardous waste sites efficiently and effectively.\textsuperscript{65}

Public participation can improve the quality of decisions, however. First, they are "technically" better because participation ensures that relevant issues and potential problems are not overlooked. Second, decisions are "socially" better in that they result from the consideration of different perspectives that are important to making informed decisions, but which generally are not included in the decisionmaking process.

\textit{a. Technical Decisionmaking}

Decisions about technical issues are often viewed as the province of the experts — scientists, economists, and the government agencies created to address specific problems.\textsuperscript{66} In the area of Superfund cleanup, for example, experts calculate the levels of risk associated with exposure to certain hazardous substances, identify the source of contamination, know how different hazardous waste cleanup technologies work, and determine the cost of various cleanup technologies. At least initially, lay citizens, even well-educated ones, may have a difficult time understanding these issues.

The technology and science of Superfund decisionmaking are often uncertain. The extent of contamination or its source is often difficult to determine.\textsuperscript{67} What appear to be relatively straightforward questions

\textsuperscript{63.} Interview with Brad Angel, Regional Toxics Campaigner, Pacific Southwest Region, Greenpeace (Oct. 1990).
\textsuperscript{64.} SUPERFUND STRATEGY, \textit{supra} note 50, at 259-60.
\textsuperscript{65.} \textit{Id.} at 260.
\textsuperscript{66.} Telephone interview with Jackie Bogart, Director of the Clean Water Task Force, a coalition of 25 industries dealing with groundwater contamination and Superfund (Oct. 27, 1989) [hereinafter Bogart Interview].
\textsuperscript{67.} See Collins & Tusa, \textit{The ASCE Environmental Engineering Division's Role in Controlled Hazardous Waste Site Management}, in \textit{CONFERENCE ON MANAGEMENT OF UNCONTROLLED HAZARDOUS WASTE SITES} 2, 3 (Hazardous Materials Control Research Inst., 1981)
about the source and type of contamination and the best cleanup method do not have any clear technical answers. Groundwater contamination, for example, can be difficult to treat because it can result from many different sources and chemicals, and because groundwater flows at varying rates and in many directions.

Even basic questions regarding the danger posed by certain chemicals do not have clear answers. The causes of clusters of birth defects and miscarriages may seem logically linked to toxic contamination, but exact causation can be difficult to determine. The danger associated with particular chemicals is also uncertain. When dioxin contamination was discovered at Times Beach, Missouri, an EPA official remarked that "[d]ioxin in Missouri may present one of the greatest environmental problems in the history of the United States. Conversely, it may not."

When inquiries depend on uncertain knowledge, they require assumptions about how an ecosystem or a social system will respond to changes in the environment. Public participation in the cleanup process will not remedy the problems of uncertainty or the use of incomplete technical analyses, but it might enhance the technical decisionmaking process by ensuring that different perspectives and sources of information are not overlooked. A recent study by the Office of Technology Assessment found that the current system for reaching decisions about Superfund cleanups was too narrow in its scope. Among the more significant problems identified by the study were EPA's failure to consider the use of alternative, but readily available technologies, a tendency to choose less expensive, but ultimately less permanent technologies without considering the long-term costs of choosing impermanent cleanup

70. See, e.g., Environmental Protection Agency, Groundwater Contamination Cleanups at South Bay Superfund Sites 2 (1989) [hereinafter South Bay Cleanups] (discussing epidemiological study of Los Paseos neighborhood in San Jose, California).
71. Id. at 4.
alternatives, and a failure to assess cleanup alternatives in view of future land uses for the area.

The primary benefit that public involvement brings to decisionmaking is the different perspectives that private citizens bring to cleanup efforts. The current Superfund decisionmaking process tends to be dominated by government officials working with scientists and consultants who often approach problems from a particular perspective and thus fail to consider other important issues. In the case of Superfund, the scientists or government personnel who perform a cleanup analysis often work closely with the regulated industries. Moreover, the studies upon which Superfund cleanup decisions are based are often performed by the industry responsible for the cleanup site.

EPA's reliance on industry for information and expertise creates an institutional bias favoring potentially responsible parties. EPA is not necessarily captured in the sense that industry controls the decisionmaking process, and the agency clearly believes that it is trying to implement the most cost-effective and expedient solutions. However, without public input, EPA could lose perspective on the problem. It might fail to consider certain cleanup options, it might try to implement a poorly designed study, or it might become so committed to a particular cleanup method that it will fail to recognize potential problems with its application.

While EPA and potentially responsible parties might have a bias towards least-costly options, the public tends to favor more permanent (although perhaps more costly) cleanup solutions. If EPA were forced to listen to public concerns, it might consider more innovative and permanent cleanup technologies. Alternatively, public concern over safety might prompt EPA to make modifications in a cleanup procedure. At a groundwater contamination site in California's San Fernando Valley, for

74. Id. at 12. Although cost considerations led to the use of less permanent technologies, the analysis of a cleanup technology's expense did not consider the long-term costs of choosing an impermanent technology over a permanent one. Id.

75. The OTA also found, among other things, that the studies supporting a cleanup decision were internally inconsistent; that there were mistakes in calculations and estimates; that many critical assumptions of the studies were false; and that conclusions were stated without analysis or documentation. Id. at 19.

76. Goldberg Interview, supra note 28. As discussed earlier, with the exception of risk assessments, EPA tries to require potentially responsible parties to do as much of the work on the site as possible within the bounds of EPA oversight. See supra notes 28-31 and accompanying text.

77. Goldberg Interview, supra note 28.


79. Dioxin Cleanup, supra note 54, at 10-11 (prepared statement of Joel Hirschhorn, senior associate with the Office of Technology Assessment).

80. See id. at 585 (statement of Lois Gibbs).
example, members of the public expressed concern that the use of an aeration tower to strip pollutants from groundwater would contribute to the air pollution problem in Los Angeles. In response to this concern, EPA recommended that cleanup proceed through a combination of air stripping and carbon adsorption, which would reduce the impact on air quality. EPA had not originally planned to use the carbon adsorption system, but in the face of public opposition, the idea that EPA would contribute to the air quality problem in the Los Angeles air basin was considered politically unacceptable.

b. Social Decisionmaking

A participatory decisionmaking process does more than ensure that all important issues are considered. Even the consideration of all the important facts and issues by a small group of decisionmakers, divorced from the social and political context in which the decision will operate, will not guarantee decisions that are acceptable to a community. Better technical decisions are not the only benefit or goal of public participation in the decisionmaking process. Participation also results in decisions that are "socially" better, in that they are more responsive to the needs of the affected community.

Most environmental issues are addressed through a "technocratic" process. This process is not a neutral one: its underlying goals and assumptions value cost minimization, efficiency, and scientific rationality. Technical inquiries are limited by what have been called "golden
rules” and “golden numbers” — immutable rules and numbers which skew the analysis and inhibit discussion of the values underlying them.86 As the policy debate continues, constrained by these assumptions, many of the issues that people really care about — such as health concerns, fears for the next generation, and unknown effects of the cleanup itself — are ignored.87 Technical values are very important to the resolution of environmental controversies, but they provide an incomplete picture of all the elements that go into making a decision. There is a difference between the need to use good technique and provide accurate information and the need to make decisions which take into account people’s values and perceptions.

Two examples illustrate how the public approaches environmental problems differently than technocratic decisionmakers. In one case, a resident near a toxic site in California’s Silicon Valley expressed a concern that EPA’s method of treating groundwater contamination was wasting water at a time when that area was experiencing a severe drought.88 EPA was extracting groundwater and treating it, but it was not reinjecting the water into the aquifer because of other public concerns about safety.89 The resident’s perception of the problem in this situation focused not only on the need to treat contaminated water, but also the need to conserve water.90 In another case, a community relations coordinator has found from working with the public that EPA might better spend its money establishing medical clinics in communities contaminated by a Superfund site to treat medical problems and detect problems early on, instead of conducting long and inevitably inconclusive epidemiological studies about the causes of the illnesses.91

Government has often used the existence of these different approaches to the decisionmaking process as a reason for excluding the public. To the scientist or the economist, the public may be seen as emotional and irrational merely because it refuses to view situations from the same perspective. The public may want unreasonable solutions or may refuse to pay attention to scientific and economic analyses performed to support a decision. In the case of Superfund, there is a definite perception that the public’s demands are unreasonable. Many technical people and government officials do not believe that the public is willing to discuss any cleanup option other than complete removal of the wastes and a

86. See Socolow, Failures of Discourse: Obstacles to the Integration of Environmental Values into Natural Resource Policy, in WHEN VALUES CONFLICT 1, 4-7 (L. Tribe, C. Schelling & J. Voss eds. 1976).
87. Id.
88. Coombs Interview, supra note 56.
89. Id.
90. Id.
91. Telephone interview with Sam Ziegler, former EPA Community Relations Coordinator (Dec. 18, 1989) [hereinafter Ziegler Interview].
restoration of an area to a pristine state. While the difference in approaches has been used as a reason for excluding the public, it is precisely this difference that should justify inclusion of the public. The perspective of those who will live with a cleanup decision should be part of the decisionmaking process. Moreover, some feel that the public has pushed for the use of innovative technologies when EPA has been reluctant to experiment. At the same time, however, the differences in perspective may call for certain types of participatory measures and may indicate the need to limit participation in some areas. For example, a tendency toward emotional reactions or a lack of technical expertise may indicate the need to educate the public about the risks posed by a site, and it may preclude the public from determining the specifics of cleanup alternatives. Nonetheless, the public's ability to remain informed about the process and discuss the general goals of a cleanup measure should not be circumscribed.

c. Risk Assessments

Risk assessments, which play a critical role in the Superfund process, provide an ideal example of the different perspectives and values that people bring to an issue. Risk is classically defined as consisting of two elements: "the severity of the threatened harm, and the probability of its occurrence." In the Superfund program, risk assessments are used to determine an acceptable level of risk for a particular contaminant, and this level serves as a cleanup goal. Superfund risk assessments estimate the possible health and environmental effects of exposure to toxic chemicals at a given site based on existing levels of contamination, potential migration routes, types of exposure, amounts of exposure, and the risk posed by individual contaminants. Risk is expressed as the probability of one person developing cancer due to exposure to contamination at a site. As a general rule, EPA defines the standard acceptable level of risk as the probability that one person in a million would develop cancer due to exposure to contamination at a site. However, EPA is

92. Senior Interview, supra note 83; Interview with Helen King Burke, EPA Community Relations Coordinator, in San Francisco, California (Oct. 11, 1989) [hereinafter Burke Interview].
93. Dioxin Cleanup, supra note 54, at 11, 58 (statement and testimony of Joel Hirschhorn, senior associate with the Office of Technology Assessment). Potentially responsible parties and EPA tend to favor the least expensive cleanup option in the short run without consideration of the long-term impacts and costs of the option. See supra note 74 and accompanying text.
95. SOUTH BAY CLEANUPS, supra note 70, at 14.
96. Id.
97. Id.
98. Id. A one in a million risk is expressed as $10^{-6}$. 
willing to accept risks at between 1 in 10,000 (10^{-4}) and 1 in 10 million (10^{-7}).^{99}

The public's conception of risk differs markedly from EPA's. EPA claims that it uses "very conservative assumptions" in estimating risks from a given level of exposure.^{100} This assertion may be true, but it is beside the point. EPA's perception is that of a detached observer who believes that the risk can be dealt with objectively.^{101} The community affected by a Superfund site, on the other hand, views risk from the perspective of one who bears that risk. A public view of risk, while including rational notions of how many people per million can be expected to contract cancer, is more complex. Risk includes consideration of how one dies, the fear that one may die, how many people will die at one time, how concentrated the location of the deaths will be, the amount of control one has over the potential outcome, who makes the decisions, and who bears the risk.

The various factors that influence the average person's perception of risk can be seen in everyday life. People often fear flying in an airplane more than driving a car, even though flight is statistically safer. The lack of control combined with the potential for catastrophic accidents results in a higher risk calculation than would result from a "rational" process. The segment of the population to be affected by a risk also influences the public's risk assessment. In many ways the controversy over the chemical alar was sparked by a study which concluded that children were at a far greater risk of contracting cancer than adults from the use of alar on apples, even though the risk to the population as a whole was considered acceptable.^{102}

The perception of cancer risks is the best example of differences between EPA and the general public; EPA risk assessments are expressed in excess cancers.^{103} Fear of cancer is pervasive in our society for many good reasons. Cancer develops years after exposure to a hazardous substance, it may strike for no known reason at all, and it can cause a very slow and painful death. The language of an acceptable risk level of 10^{-6} is sanitized and does not express the reality of the fear of contracting cancer.

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99. Id.
100. Id.
101. For a discussion of the differences between the professional's view of risk and the victim's, see M. Edelstein, supra note 48, at 129-34.
102. Alar is a chemical used to ensure that apples, picked before they are ripe, turn red. The Natural Resources Defense Council released a study in 1989 which concluded that children consume more apple products and thus bear a large part of the risk due to alar use. B. Sewell & R. Whyatt, Intolerable Risk: Pesticides in Our Children's Food (Natural Resources Defense Council, 1989).
103. One might wonder why risk assessments are measured only in excess cancers, when the adverse impacts of hazardous waste exposure can include birth defects, miscarriages, nausea, headaches, or chloracne.
cer or dying from it. A poignant example of the difference between an EPA risk assessment and the public's perception of risk comes from the Superfund site in Oroville, California. A resident of the community, who lived two miles from one of the sites when it was listed on the NPL, told me: "I'm sick, I live in a cancer cluster, my well's contaminated with pentachlorophenol, and the EPA tells me the water is safe to drink." Clearly, EPA and the resident do not perceive risk in the same way.

Technical methods for determining risk may be scientifically accepted, but they do not appreciate a community's full range of concerns. Whether a particular community feels that a risk is acceptable is a political and social decision as much as a technical and rational one. A risk assessment is a political decision in its truest sense; it is a decision over who risks what, where, and when.

3. Participation and Delay

Even given the value of participation, some argue that participation delays the Superfund cleanup process. The extra steps required for public participation, such as public hearings and meetings, notice and comment periods, and citizen suits can slow down the cleanup process. Because Superfund sites pose significant public health and environmental hazards, cleanup delay is a serious concern to everyone involved. On the other hand, the Superfund cleanup process now takes on the order of ten years to complete, and most public participation activities could be integrated into that time span without significant delay.

More importantly, public participation may avoid delay in the long run. By rendering the process and decisions more legitimate in the public's eye, participation might avert lawsuits and controversies that ultimately delay a cleanup decision. When a government agency comes to a community with a final decision, there is often resentment, especially if the cleanup decision is an unpopular one. At one Superfund site in California, EPA came to the community with a cleanup plan to incinerate

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104. See Tribe, supra note 85, at 97-98.
105. Speegle Interview, supra note 3.
106. Individuals at the EPA may be sympathetic to the plight of residents and may discuss the fear that people may feel, but the mechanism through which Superfund cleanup decisions are made does not reflect these sentiments.
107. See supra note 34.
108. The Superfund "trump card" seems to be the local Congressperson. Congress, which controls EPA's funding, has a good deal of influence with the Agency, and when a member of Congress pressures EPA, the Agency tends to respond. Often citizens will contact their Congressperson when EPA does not respond to them. This congressional oversight, however, may slow down the cleanup process because the congressional representative may try to get EPA to redo a cleanup analysis, or it may impose arbitrary deadlines which make it more difficult for EPA to fulfill its other responsibilities. As a result, EPA wants to avoid situations where a community becomes so upset that it brings in the congressional representative. Burke Interview, supra note 92.
the wastes on site. The community, which barely knew that they had a Superfund site, "blew up." EPA tried to convince the residents that the plan was an acceptable one, but people were suspicious. The local Congressman got involved and EPA had to start the process of choosing a cleanup alternative all over again.109

C. The Evolution of Opportunities for Participation in the Superfund Cleanup Process

The original Superfund statute made no provision for public participation in the cleanup process, and instead emphasized the role of experts in making cleanup decisions. Pressure for reforms, however, recalled many of the values espoused by Jean-Jacques Rousseau: participation is a right in democratic society, and participation has value in and of itself. The idea that residents have a right to participate in the Superfund cleanup process stems from the feeling that people should be able to make the decisions that affect their lives.110

However, many decisions which affect people do not engender the same demand for participation prompted by a Superfund cleanup. Decisions about foreign affairs, for example, may affect our lives, but most of us are willing to let our participation amount to no more than voting for competing elites. Calls for participation in Superfund cleanups, on the other hand, are much more strident. Citizens of Love Canal, many of whom were evacuated after the discovery that a toxic waste dump had caused miscarriages, cancers, and illnesses in the area, insist that their homes be bought at fair market value.111 Residents of Cloverdale, California refuse to allow EPA to proceed with its cleanup decision to incinerate polychlorinated biphenyls from the Superfund site in their community.112

There are several reasons why demands for participation in Superfund cleanups are (and should be) treated differently from demands for participation in issues of national scope. First, the effects of a hazardous waste site on a local community can be dramatic and very direct. Superfund sites may contaminate a community's drinking supply;113 they

109. Id.
110. See Dioxin Cleanup, supra note 54, at 562 (statement of Laura Lake, Professor of Environmental Science, UCLA).
111. See Gibbs, supra note 58, at 63.
112. Burke Interview, supra note 92.
113. See 1 OFFICE OF TECHNOLOGY ASSESSMENT, PROTECTING THE NATION'S GROUNDWATER FROM CONTAMINATION 11 (1984) (national policymakers should recognize that effects of groundwater contamination are site specific). Twenty-eight Superfund sites in the Silicon Valley of California have caused groundwater contamination throughout the area. See SOUTH BAY CLEANUPS, supra note 70, at 3. Some water supplies may no longer be tapped because of concentrations of chemicals above safe drinking water levels. Id. at 4.
may burn and release pollutants such as dioxin into the air;\textsuperscript{114} and they may release unpleasant odors.\textsuperscript{115} Site cleanups also can be very intrusive. In Love Canal, New York and Times Beach, Missouri, residents were forced to leave their homes and move to other communities.\textsuperscript{116} In an Ohio community, homes contaminated by a nearby Superfund site required a cleanup which consisted of moving people out of their homes for a month, scraping a foot of contaminated soil from their yards, and steam cleaning their rugs and drapes.\textsuperscript{117} Groundwater contamination is often treated by pumping water out of contaminated aquifers, air stripping the chemicals, and reinjecting the water into the aquifer or discharging it into streams, where it reenters the water supply.\textsuperscript{118}

Second, the issues surrounding a Superfund cleanup tend to be local in nature. Sites affect specific communities and involve specific potentially responsible parties.\textsuperscript{119} Most sites affect only the local community; they fail to capture national attention, affect national interests, or involve nationally organized interest groups.\textsuperscript{120} The localized nature of the impact of a Superfund site makes the cleanup process more amenable to participation and the values participation fosters. Because many Superfund sites are landfills, they involve land use issues which are typically considered within the purview of local governments.\textsuperscript{121} Local issues, especially land use decisions, have traditionally been more open to participation from the public than national issues. The use of environmental mediation as a technique for resolving land use conflicts is one example of the growing acceptance of public participation in local affairs.\textsuperscript{122}

Third, the public affected by a Superfund site is locally defined. Terms such as “public participation” or “public interest” convey an image of the public as a monolithic, unarticulated mass of people. In reality, however, there are many “publics” and many “interests.”\textsuperscript{123} Where the decisionmaking process is open to all members of the public in the

\textsuperscript{114}See, e.g., supra text accompanying notes 1-5.
\textsuperscript{115}Odors at a site in Fullerton, California bothered homeowners whose houses were built along the edge of the site and caused EPA to initiate an investigation leading to the Superfund listing of the site.ENVIRONMENTAL PROTECTION AGENCY, REGION IX, FACT SHEET, MCCOLL SUPERFUND SITE 2 (Feb. 1989).
\textsuperscript{116}See M. EDELSTEIN, supra note 48, at 4-5.
\textsuperscript{117}Senior Interview, supra note 83.
\textsuperscript{118}See, e.g., SOUTH BAY CLEANUPS, supra note 70, at 16 (describing the use of air stripping to remove contaminants from groundwater at Superfund sites in the Silicon Valley/South San Francisco Bay area of California).
\textsuperscript{119}Id. at 7-9.
\textsuperscript{120}Gemmill & Berk, supra note 83, at 7.
\textsuperscript{121}See Menell, Beyond the Throwaway Society: An Incentive Approach to Regulating Municipal Solid Waste, 17 ECOLOGY L.Q. 655, 719 (1990).
\textsuperscript{122}See L. BACOW & M. WHEELER, supra note 54, at 361.
\textsuperscript{123}Rosener, Environmental Testimony and Public Hearings: Some Questionable Assumptions, in ENVIRONMENTAL LEADERSHIP 85, 90 (S. Langton ed. 1984).
United States, organized interests, such as the Natural Resources Defense Council and the Chemical Manufacturers Association, tend to dominate. While these groups do represent some segments of society, the public is more than a selection of organized interest groups. In the case of toxic contamination, the affected public also includes people who may or may not be represented by an organization: local residents, homeowners, people whose wells or homes have been contaminated (or not contaminated), and local businesses and employees. Moreover, decisions have different implications for different people—the potentially responsible parties and their employees may have a different conception of what cleanup measures are in the public interest than the citizens whose wells have been contaminated by a Superfund site, and this perspective may be different from that of a representative of the local chapter of the Sierra Club.

The expansion of participatory opportunities in a complex, technical society will be most effective on a local level, where people are directly affected by a problem and where they may have more opportunity to be heard. For all of the technological uncertainty and complexity that surrounds a Superfund cleanup decision, the fact that the impacts of a Superfund site are locally defined may mean that participatory efforts at this level can be more successful in promoting democratic values. Opportunities for participation in national environmental affairs tend to take the form of negotiated rulemaking and notice and comment provisions. These mechanisms are well suited to sophisticated national environmental organizations and interest groups, but removed from the input and understanding of most people. Participation on the local level, on the other hand, may promote accountability, as it provides more face-to-face contact between government decisionmakers and members of the affected community. Local participation may also foster a sense of community cooperation and empowerment through the opportunity to confront a problem and choose from a range of solutions. As society becomes more complex and decisionmaking more centralized, provisions for participation on a local level may return some sense of control to local communities over what is essentially a local problem.

D. Summary

Public participation in Superfund cleanups can be a valuable process. Participation is an ideal of democracy that serves substantive democratic ends. Moreover, a participatory process may enhance the quality of technical decisions, and it may lead to decisions which are more re-

124. See C. Pateman, supra note 37, at 41; Miller & Rein, Participation, Poverty, and Administration, 29 PUB. ADMIN. REV. 15, 21-24 (1969) (discussing how participation in the poverty programs of the 1960's was designed to encourage a sense of community).

125. See M. Edelstein, supra note 48, at 138-46.
sponsive to community concerns. By providing opportunities for participation, EPA may bring legitimacy to a process which has been plagued by credibility problems.

II
THE SUPERFUND COMMUNITY RELATIONS PROGRAM
Although the original Superfund statute made no provisions for public participation in the cleanup process, the value of community participation in Superfund cleanup decisions was not lost on EPA. The Superfund program has been subject to distrust and controversy since its inception, and much of this distrust has stemmed from the perception that the Agency was acting in secrecy and that it was not committed to aggressively cleaning up Superfund sites. The experiences at Love Canal and Times Beach demonstrated the need for EPA to communicate with local communities, and the distrust generated by the Gorsuch years prompted the Agency to make the Superfund program appear more legitimate. As a result, even before Congress directed EPA to do so, the Agency developed the Superfund Community Relations Program designed to facilitate communication between EPA and local communities. This part of the Comment will discuss the goals and the mechanics of the Superfund Community Relations Program and the public participation values it is designed to promote.

A. Statutory Authority
The original Superfund statute had few provisions for formal public participation in the cleanup process. In fact, the only opportunities for public comment were those authorized by the laws governing rulemaking proceedings. Rulemaking, however, sets general agency policy and regulations; it does not cover specific cleanup decisions at specific sites. The only provision authorizing litigation under Superfund did not provide for citizen suits. Superfund did not guarantee the rights of citizens to intervene in negotiations or enforcement proceedings with potentially responsible parties, and some courts have ruled that the public does not have a right to intervene. As a result, local communities were essentially shut out of the Superfund process.

126. See supra notes 47-51 and accompanying text.
128. SUPERFUND STRATEGY, supra note 50, at 259.
129. See id.
131. SUPERFUND STRATEGY, supra note 50, at 259. Circuit courts have split on the issue of intervention by citizen groups. In United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 987 (2d Cir. 1984), the Second Circuit held that the citizen’s organization involved at Love Canal had not made the “strong showing” of inadequate representation which is nec-
Superfund's initial failure to make any provision for public participation contrasted with many other environmental statutes\textsuperscript{132} and was subject to criticism.\textsuperscript{133} In the 1986 Superfund Amendments and Reauthorization Act (SARA),\textsuperscript{134} Congress responded in part to these criticisms by providing for public notice and comment on Superfund cleanup plans. SARA requires that a proposed remedial action plan and a brief explanation of the plan be available to the public and provides for notice and comment on the plan.\textsuperscript{135} If any actions are taken after the adoption of a final remedial action plan which differ significantly from the final plan, EPA or the responsible state must provide an explanation of these changes and the reasons for them.\textsuperscript{136} SARA also requires EPA to establish an administrative record upon which a cleanup decision is made and make this record available to the public.\textsuperscript{137} In one of its more significant provisions, SARA authorizes technical assistance grants (TAG's) to "any group of individuals which may be affected by a release or threatened release at any facility which is listed on the National Pri-
Congress designed these grants to help local community groups hire experts who can explain the technical issues involved in cleaning up a site. However, SARA's requirements form only a small part of EPA's efforts to involve communities in Superfund. Even though Congress did not require any public participation in Superfund until the 1986 amendments, EPA had initiated its own public participation programs as early as 1981. In some ways this program had already gone beyond the requirements of SARA. EPA had instituted some of the notice and comment provisions now required by law, and more importantly, EPA's policy was to keep the public informed about developments at the Superfund site and to bring public concerns back to the Agency. The following section discusses the existing Superfund Community Relations Program, which incorporates and expands SARA's requirements.

B. Community Relations in Superfund

The goal of the Superfund community relations effort is to promote "two-way communication between members of the public, including PRP's, and the lead government agency responsible for response actions." The Community Relations Program has three specific objectives: (1) give the public the opportunity to comment on and provide input into technical decisions, (2) inform the public of planned or ongoing actions, and (3) focus and resolve conflict. These goals and EPA's discussion of the value of community relations in its Guidance reflect the value of public participation discussed in part I. According to the EPA Guidance on the Community Relations Program, "EPA has found that its decision-making ability is enhanced by actively soliciting comments and information from the public." By giving the public input into the process, EPA can make better technical decisions because "communities are able to provide valuable information on local history, citizen involvement, and site conditions." Participation may also result in better "social" decisions because it "enables EPA to fashion a response that is..."
more responsive to community needs." The Community Relations Program also implicitly recognizes that participation may give decisions legitimacy if it "brings into the open alternative viewpoints and channels conflict into a forum where it can serve a useful purpose." The discussion below focuses on the elements of a specific community relations plan. Whether the Community Relations Program actually is successful in realizing these goals will be discussed in the next section.

1. The Community Relations Plan

EPA requires that a community relations effort accompany any Superfund remedial investigation and response. The central component of this effort is the community relations plan, which must be prepared for any remedial response action and any removal that will last more than forty-five days. The community relations plan is designed to convey a working knowledge of the local community, its history, the history of the site, and major community concerns. The plan should also explain the Community Relations Program and provide a framework for addressing community concerns during the remedial response.

Community relations plans play an informational role in the cleanup process. They are available for public review, and they should

145. Id.
146. Id. While never explicitly discussed, legitimacy may have been the primary motivating factor behind the Community Relations Program. The first Guidance for the program appeared in 1983, just after EPA abuses of the Superfund program under Administrator Anne Gorsuch Burford became public. See Benjamin, supra note 49. EPA officials had been called before Congress, Burford had just resigned, Rita Lavelle was indicted for lying to Congress, and stories of "sweetheart" deals with industry abounded. Trust in the Agency and the Superfund program was at an all-time low. The Community Relations Program may have been an attempt to let the public know what was happening at Superfund sites and assure them that EPA was doing its job.

147. COMMUNITY RELATIONS HANDBOOK, supra note 141, at 2-10. In addition to the community relations efforts discussed in the text, EPA has established a toll-free Superfund hotline, which the public can call to request information about the program or a particular site (the number is 800-424-9346). See Gilbert, Alternative Dispute Resolution and Superfund: A Research Guide, 16 ECOLOGY L.Q. 803, 816-17 (1989). EPA also sets up information repositories at convenient locations for the community, such as a school or library. These repositories make available for public review information about a site, including the administrative record, the community relations plan, the proposed remedial plan, fact sheets, a responsiveness summary, and the record of decision. COMMUNITY RELATIONS HANDBOOK, supra note 141, app. at A-19 to A-21. Other community relations efforts include news releases, public meetings, door-to-door canvassing, news conferences, and briefings. See generally id., app. at A-1 to A-65.

148. COMMUNITY RELATIONS HANDBOOK, supra note 141, at 3-10.
149. See id.
150. Id. Plans should contain the following sections: 1) an overview of the plan; 2) a site description; 3) community background; 4) highlights of the Community Relations Program; 5) community relations activities and timing; 6) a contact list of key community leaders and interested parties; and 7) suggested locations for meetings and information repositories. Id. at 3-11.
give the public some sense of the type of hazardous waste site in their community, EPA's plans for the site, and opportunities for public involvement during the cleanup process. Plans should also be available to technical and scientific personnel developing cleanup alternatives. The plans are designed to focus on community perceptions of the site and possible cleanup alternatives, and thus can give technical people a sense of community concerns.

2. Community Interviews

EPA draws much of the information used to develop a community relations plan from community interviews. Community relations coordinators contact key people in the community to identify public concerns and find out how the public wants to be involved in site cleanup activities. The interviews are informal and are often held at the interviewees' homes. To get a full range of public opinion about a site, the EPA Guidance recommends that community relations coordinators conduct interviews with local government officials, nearby property owners, members of the chamber of commerce, representatives of citizens' groups, local civic and neighborhood associations, members of public interest groups like the League of Women Voters and the Sierra Club, and potentially responsible parties. Community interviews are designed primarily to gather information from the community about their perceptions of a site. Generally, staff do not provide citizens with detailed information about the site or activities planned for the site at the time community interviews are conducted.

3. Fact Sheets

Fact sheets, which can be distributed throughout the Superfund cleanup process, play an important role in the community relations process. Because issues surrounding a site cleanup can be quite complex, EPA distributes information, in the form of a fact sheet, about the site, the proposed cleanup alternative, and the progress of cleanup activities. Fact sheets may specifically include the following issues: risk assessments; the criteria used by EPA to select a cleanup alternative; site his-

151. See id. at 3-10 to 3-11.
152. Burke Interview, supra note 92.
153. EPA staff members are in charge of the Superfund community relations for particular sites. Id.
154. COMMUNITY RELATIONS HANDBOOK, supra note 141, at 3-1.
155. See id. at 3-3 to 3-4.
156. Id.
157. See id. at 3-4.
158. See id.
159. Burke Interview, supra note 92; see COMMUNITY RELATIONS HANDBOOK, supra note 141, app. at A-15 to A-16.
tory; cleanup progress; a description of the cleanup alternative; and the financing of Superfund cleanups. They are designed to keep the local community informed about site activities in a straightforward, comprehensive manner. They keep communities informed about issues as they arise, and some Superfund sites may have many fact sheets developed. Fact sheets also may notify the public of upcoming community relations events and opportunities for involvement in the cleanup process.

4. Public Comment and Responsiveness Summaries

The formal opportunities for public involvement in the Superfund cleanup decision arise when the proposed cleanup plan is issued. The proposed cleanup plan must be made available to the public, and it should clearly summarize the cleanup alternatives considered, the preferred alternative, and the rationale for choosing this preferred alternative. Superfund then mandates the opportunity for a public hearing and a thirty to sixty day public comment period. EPA responds to “significant comments, criticisms, and new data” through a responsiveness summary. The responsiveness summary becomes part of the record of decision, and it must be made available to the public.

The public comment period is the only time EPA must respond to community concerns. However, EPA itself admits that: “[p]ublic comment periods only allow indirect communication between citizens and agency officials because the formal responses to the comments may, in some cases, not be provided for some time, and comments may, in some cases, not be responded to individually.” Public meetings during this period, for example, are primarily designed to allow the public to get its

160. See, e.g., COMMUNITY RELATIONS HANDBOOK, supra note 141, app. at A-15 to A-16.
161. Senior Interview, supra note 83.
162. There are at least seven fact sheets for Superfund Sites in California’s San Gabriel Valley. See, e.g., OFFICE OF COMMUNITY RELATIONS, ENVIRONMENTAL PROTECTION AGENCY REGION IX, FACT SHEET NO. 7, SAN GABRIEL VALLEY SUPERFUND SITES: EPA TO PROPOSE BASINWIDE TECHNICAL PLAN (1989) [hereinafter SAN GABRIEL FACT SHEET].
163. See, e.g., id. at 7-9; SOUTH BAY CLEANUPS, supra note 70, at 18-19.
164. CERCLA § 117(a), 42 U.S.C. § 9617(a) (1988); COMMUNITY RELATIONS HANDBOOK, supra note 141, at 4-7.
166. CERCLA § 117(b), 42 U.S.C. § 9617(b) (1988); see 40 C.F.R. § 300.430(f)(3) (1990); COMMUNITY RELATIONS HANDBOOK, supra note 141, at 4-11 to 4-13. Although a hearing is not required if it is not requested, EPA will often hold one anyway. Burke Interview, supra note 92.
168. COMMUNITY RELATIONS HANDBOOK, supra note 141, app. at A-36.
concerns into the record.\textsuperscript{169} The EPA Guidance encourages the use of other community relations techniques to maintain a more direct dialogue between the community and the Agency, but no other activities are required.\textsuperscript{170}

5. Community Work Groups

At Superfund sites where community interest is especially high, EPA may establish community work groups (CWG’s).\textsuperscript{171} These work groups, comprised of interested local citizens, meet regularly to update the community on the status of the cleanup process, such as the development of the cleanup plan, enforcement activities, or the progress of cleanup actions. An EPA community relations coordinator works with the groups and often arranges special programs designed to educate participants about the site, the Superfund process, and cleanup alternatives.\textsuperscript{172}

6. Technical Assistance Grants

Because Superfund sites involve complex technical issues, some people complained that the public was hindered in its ability to understand the technical documents and science used to justify a site cleanup decision.\textsuperscript{173} Congress responded to this issue in SARA by authorizing EPA to grant money to community organizations for technical assistance to help them understand the problems at a site, the remedial investigation and feasibility study, and the remedial cleanup plan.\textsuperscript{174} Technical Assistance Grants (TAG’s) give these groups the technical knowledge necessary to participate more effectively in the selection of a cleanup alternative.\textsuperscript{175}

\textsuperscript{169} Id. at 4-10.
\textsuperscript{170} See id., app. at A-36.
\textsuperscript{171} See, e.g., BUTTE COUNTY CRP, supra note 1, at 15-16.
\textsuperscript{172} For example, the community relations coordinator might arrange to have a technical expert explain a particular cleanup process to the community work group. Burke Interview, supra note 92.
\textsuperscript{173} See Dioxin Cleanup, supra note 54, at 584 (statement of Lois Gibbs); SUPERFUND STRATEGY, supra note 50, at 270-71.
\textsuperscript{174} CERCLA § 117(e), 42 U.S.C. § 9617(e) (1988). The regulations regarding these grants are at 40 C.F.R. §§ 35.4000-35.4130 (1990). See also supra notes 138-39 and accompanying text.
\textsuperscript{175} There are, however, a number of restrictions on the recipients of TAG grants. Grants cannot exceed $50,000. CERCLA § 117(e)(2), 42 U.S.C. § 9617(e)(2) (1988). Waivers from this $50,000 limit may be granted where there are several Superfund sites within close proximity to each other; in these cases EPA may grant up to $50,000 per site to one group. 40 C.F.R. § 35.4090(a) (1990). Community organizations must supply matching funds of 20% of the total grant. Id. § 35.4085(a). Waivers from the matching figure amount will only be granted when the organization establishes that it cannot meet the matching funds requirement. Id. § 35.4090(b). In addition, community organizations must demonstrate that they meet a number of administrative requirements. They must be incorporated nonprofit organizations, id. § 35.4020(b); they must establish reliable procedures for recordkeeping and financial ac-
7. Citizen Suits

While not part of EPA's Community Relations Program, citizen suits are authorized under SARA.176 SARA provides that "any person may commence a civil action" against "any person" who is alleged to be in violation of a "regulation, condition, requirement, or order" issued under CERCLA.177 Citizens may also sue the government for failure to perform a nondiscretionary duty.178 In addition, citizens may challenge a removal or remedial action.179

Notwithstanding these provisions, the right to challenge an action taken under CERCLA is quite limited. Courts have held that citizens may not challenge an EPA remedial action until the remedial action or that phase of the action which is under challenge has been completed.180 This limitation on citizens' ability to challenge a cleanup action until the action has already been completed reflects Congress' recognition of the disadvantage of participation by both public and private interests affected by cleanup decisions: delay in the cleanup process.181

C. Summary

Despite the fact that the original Superfund statute made no provision for public input, EPA has made some significant attempts to keep the public informed about the cleanup process. However, information dissemination, without any give and take between the public and the EPA, is only a first step at involving the public. The public reaction to the program described in the next part indicates that EPA must go beyond merely supplying information in order to involve the public fully in the Superfund process.

177. Id. § 310(a)(1), 42 U.S.C. § 9659(a)(1).
179. Id. § 113(h), 42 U.S.C. § 9613(h).
III
EVALUATING THE COMMUNITY RELATIONS PROGRAM

The Community Relations Program’s primary purpose is to provide information to a community affected by a Superfund site. While some elements of the program allow members of the public to express their concerns, it is not clear that these provisions actually permit citizens to have any direct influence on the decisionmaking process. Drawing on interviews with people who work in EPA’s Community Relations Program, people who live in communities contaminated by Superfund sites, and people who work with potentially responsible parties, this section discusses their reactions to the Community Relations Program. This section identifies those factors, both inherent in the program and related to EPA’s implementation of the program, which prevent the Community Relations Program from truly fostering public participation in the Superfund process, and recommends some changes within the existing structure of the program.

A. Providing Information

If the purpose of the Community Relations Program is an informational one, then its effectiveness will depend on the extent to which EPA provides accurate and readily understandable information to the community. Information plays a crucial role in fostering public participation, especially in the context of Superfund cleanups. Hazardous waste sites present many unknown problems and can be very frightening to the public affected by them. Fear of the unknown, distrust of government and the potentially responsible parties, and a feeling of loss of control can exacerbate tensions in a community affected by a Superfund site. Under these circumstances, information becomes a vital commodity which, if it is not shared, can reinforce a community’s sense of helplessness and resentment.

Most people agree that EPA does a good job of making information available to communities. Even people who were not satisfied at all with EPA’s cleanup effort at a site thought that the Agency did provide them with a lot of information about the site. For example, community relations staff regularly distribute fact sheets, write fact sheets in Spanish if there is a large Hispanic community affected by a site, attempt

182. See supra notes 141-46 and accompanying text.
183. Because these interviews were conducted with interested parties in EPA Region IX, the conclusions of this section about the program’s effectiveness should be limited to that region.
185. Id. at 125.
186. Coombs Interview, supra note 56; Senior Interview, supra note 83.
187. Speegle Interview, supra note 3.
to find out what newspapers people read and where the best place to distribute information and publish public notices would be, and establish community work groups at a few sites where community interest is high.\(^ {188}\) Most people feel that their community knew about the Superfund site, and people who were active in the community knew about the Community Relations Program. People who were actively concerned with cleanup at a site had met the community relations coordinator, and would call EPA “all the time” to get information about the site.\(^ {189}\)

Notwithstanding these activities and the ease with which people will contact EPA, problems remain. The quality of the information presented to a community is sometimes limited. Community relations plans must be developed and approved for every Superfund site before the remedial investigation begins,\(^ {190}\) but, for example, not every site in EPA Region IX actually has a completed plan.\(^ {191}\) EPA has denied requests for information because it felt that compiling the information would take too much time.\(^ {192}\) In one case members of a community work group requested a list of all the contaminants (including volatile and nonvolatile organic compounds and inorganic contaminants) found in the San Fernando Valley’s groundwater, but received only a list of the volatile organic compounds.\(^ {193}\) Because the preferred cleanup alternative would not remove nonvolatile organic compounds or inorganic compounds, members of the community work group felt that information on the presence of these contaminants was important.\(^ {194}\) The work group also felt that EPA’s refusal to honor the request because it would take too much time was disingenuous — a lab technician working on the sites indicated to a member of the group that a list of all the contaminants was available.\(^ {195}\)

There is also a selection process to information distribution that limits the public that EPA works with. EPA does not attempt to distribute information to everyone in the community, but only to those people who are identified as interested parties. When developing a community relations plan, community relations staff contact people they think will be interested in site cleanup activities.\(^ {196}\) Their names are then placed on a mailing list to receive information about the site. The only other way

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188. Burke Interview, supra note 92; Senior Interview, supra note 83.
189. Senior Interview, supra note 83; Speegle Interview, supra note 3.
190. 40 C.F.R. § 300.430(c) (1990).
191. Interview with EPA Community Relations Coordinator.
192. Telephone interview with participant in San Fernando Valley community work group (Dec. 7, 1989) [hereinafter San Fernando CWG Interview I].
193. Id.
194. Id.
195. Id.
196. See supra notes 153-56 and accompanying text.
that people can get on the mailing list is to call EPA and request that information be sent.197

This selection process may mean that potentially interested citizens are not informed about the Superfund site and the cleanup process. In fact, many of the participants in the community relations process are members of the local chapter of the League of Women Voters, the local homeowner's association, or other organized groups. As a result, the program operates with a limited "public" view.198

Certain types of participatory mechanisms address the problem of representativeness. Some community relations coordinators try to remedy the limited selection problem by going door to door in the neighborhood around a site.199 Although not always economically feasible, in some cases, particularly where a community is small, EPA could distribute information to everyone in an affected community by mailing to the zip code in that area.200

The history of technical assistance grants also indicates problems with the commitment to providing information to the community. Although the TAG's were authorized by SARA in 1986, EPA did not begin accepting applications for the grants until April 1988.201 Compliance with the procedural requirements202 of the TAG's is difficult for many local community organizations.203 A member of a community work group in the San Fernando Valley pointed out that although the group was interested in applying for a TAG, it was not eligible because it was not an incorporated nonprofit corporation.204 The process of applying for a grant is difficult; the application requirements are the same as those for states applying for federal funding.205 Even where a group is able to obtain a grant, the reporting and accounting requirements for a small, unstaffed, and inexperienced nonprofit organization can be overwhelming. Recent reforms in the TAG requirements206 are an important

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197. Coombs Interview, supra note 56.
198. To some extent, the problem of limited selection is inherent in any public participation program. Certain types of people are more likely to be involved in public affairs, and these are the people who will be identified for inclusion in the Community Relations Program.
199. Ziegler Interview, supra note 91.
200. Senior Interview, supra note 83.
201. Interview with Jack Lockwood, Technical Assistance Grant Coordinator, EPA, in San Francisco, California (Oct. 11, 1989) [hereinafter Lockwood Interview].
202. See supra note 175.
203. Speegle Interview, supra note 3; Coombs Interview, supra note 56.
204. Fine Interview, supra note 81.
205. Cooper Interview, supra note 1.
206. Initially, the Office of Management and Budget insisted on a 35% matching funds figure, and the regulations required this. Cooper Interview, supra note 1. Recently, however, that amount has been lowered to 20%, which is the minimum permitted by SARA. CERCLA § 117(e)(2), 42 U.S.C. § 9617(e)(2) (1988); see Technical Assistance Grants to Groups at National Priorities List Sites, 54 Fed. Reg. 49,848, 49,851 (1989).
step toward facilitating public involvement, but they do not alleviate many of the procedural burdens associated with the grants.

In Region IX, EPA has approved only three grants, and it is still too early to assess their value. In one case, a local organization applied for a grant on a site that was going to be transferred from Superfund to the Resource Conservation and Recovery Act. Because the TAG's are available only for Superfund sites, EPA denied the grant after the organization had already gone through the application process. The local group, however, complained loudly, and EPA reinstated the grant.

While many agree that EPA is sincere in its efforts to distribute information, it can fail to communicate effectively with the local community. Nothing upsets a community more than the feeling that the government is lying to it about health hazards. People are much less likely to trust government information when experts argue over the health effects of chemicals, when the government reverses itself on the dangers posed by a site, or when information is conflicting, withheld, or unclear. Because of the nature of hazardous waste cleanup, these problems are bound to arise in the Superfund process.

There is a tension between providing accurate information and making the information clear enough that people can understand it. One observer remarked that technical people at EPA "pull their hair out" when they see the information that goes into fact sheets. They often feel that the information is too simplistic, but others, particularly community relations staff, believe it is important that the information be put in terms that people can understand. One EPA employee who works with potentially responsible parties stated that the information in fact sheets was inaccurate. She also felt that EPA should do a better job of communi-

207. Lockwood Interview, supra note 201.
209. These relatively strict provisions for TAG's stand in sharp contrast to earlier EPA grant programs under other environmental statutes. In the early 1970's, for example, EPA funded citizen groups working on air quality concerns. Lewis, EPA and the Public: A Long Relationship, EPA J., Dec. 1985, at 3, 4. Among the activities funded with EPA grants were newsletters, hotlines, demonstrations, and lawsuits. Id. The stringent requirements for the TAG program are most likely due to the Reagan administration's distaste for public participation programs. In early 1981, after Reagan took office, the administration's fiscal year 1982 budget eliminated almost every public participation organization unit in EPA. Cohen, Ingersoll & Janis, supra note 78, at 408.
210. Lockwood Interview, supra note 201; Coombs Interview, supra note 56. This story reveals the ambivalence of EPA to the community relations process. On one hand, the requirements for TAG grants are burdensome, and EPA did not carefully explain to this organization that the sites were to be transferred to RCRA and thus were not eligible for the grant. On the other hand, EPA was willing to respond to pressure from the local organization and finally approved the grant anyway.
211. Senior Interview, supra note 83.
212. Id.
213. Id.
214. Bogart Interview, supra note 66.
cating with PRP's before releasing information about a site to ensure that the information is accurate.215

On the other hand, many citizens do not trust the information provided by EPA because they think it is written from the perspective of industry. These people would be even less trusting if they knew that EPA had consulted with industry before releasing a fact sheet. A resident of Oroville, who lived near a Superfund site, said that the EPA provided him with "tons" of information but that it was "all lies."216

The Superfund process still suffers from the dissemination of conflicting information and hedging of statements, which makes community members suspicious. Technical people, not community relations coordinators, are responsible for presenting information at the public hearings.217 The technical people tend to be uncomfortable speaking in public, they do not like the controversy that often arises at meetings, and they are trained to be equivocal when there are no clear explanations for the causes and risks of contamination. Michael Edelstein tells the story of a town meeting in Wallkill, New York where a county health commissioner, concerned with not overcommitting himself, advised residents that their water was both safe and unsafe to drink.218 This kind of inconsistency leads the public to distrust much of the information that the government provides.

In the cleanup of hazardous wastes, problems like these are bound to arise. Uncertainty is unavoidable. However, even people who trust EPA and believe in the accuracy of the information provided to them feel that EPA could do a better job of conveying the uncertainty and difficulty inherent in the process. Ann Coombs of the League of Women Voters in the Silicon Valley, active in decisions regarding several Superfund sites with contaminated groundwater, feels that EPA should explain why the Superfund cleanup process takes so long.219 She also believes EPA when they tell her the groundwater is safe to drink, but she thinks that EPA could do more to convince others in the area. Another observer feels that EPA is really more open to suggestions from the community than people may think. Nonetheless, she also believes that EPA does not adequately convey this openness to the local community.220

Access to information is critical to a local community affected by a Superfund site. However, a program which is based solely on providing information relegates the public to a passive role in the decisionmaking

215. She tells the story of one occasion when EPA gave her a copy of a fact sheet at the "eleventh hour." She felt that much of the information in the fact sheet was inaccurate, and that her organization was forced to correct it without sufficient warning. Id.
216. Speegle Interview, supra note 3.
217. Burke Interview, supra note 92.
218. See M. Edelstein, supra note 48, at 120-21.
219. Coombs Interview, supra note 56.
220. Senior Interview, supra note 83.
process. As pointed out in an Office of Technology Assessment study, "information dissemination itself offers only a one-way communication that does not substitute for active participation in decisionmaking."\(^{221}\)

**B. Tying Community Relations to the Superfund Decisionmaking Process**

As important as information is to the local community, it is not enough to ensure the public a role in the decisionmaking process. The program has been criticized as being more of a public relations program than a "community relations" program.\(^{222}\) There is no formal mechanism which connects the Community Relations Program to the rest of the Superfund decisionmaking process. Although the Community Relations Program is billed as two-way communication between the community and EPA, in reality the program represents two one-way streets. EPA does give information to the community, and local concerns are communicated to EPA. However, nothing in the program guarantees that community concerns are incorporated into the decisionmaking process.

1. **The Community Relations Plan**

Community concerns are registered primarily through interviews and community relations plans, but these elements of the Community Relations Program are not integrated into the decisionmaking process. The information gleaned from interviews or recorded in a community relations plan will influence a technical decision only if it is known to the technical people who are responsible for developing a remedial plan. However, at least one technical person has remarked that she almost never saw a community relations plan for the sites she worked on.\(^{223}\) The one time she did see a plan, she was surprised to learn that the community was opposed to the cleanup option that EPA was developing as its preferred alternative.

The extent to which technical people will be aware of community concerns depends on the initiative of the community relations coordinator for a site. As a result, the Community Relations Program does not guarantee that community concerns are considered in formulating cleanup plans, much less that the public will actually be involved in developing cleanup options. Reliance on the commitment of the community relations staff, not the requirements of the program itself, to ensure community involvement in the cleanup process results in uneven imple-

\(^{221}\) *Superfund Strategy,* supra note 50, at 257 (emphasis removed).

\(^{222}\) In fact, one citizen interviewed for this Comment, who is sympathetic to EPA, consistently referred to the community relations coordinators as "public relations" people.

\(^{223}\) That it is rare for technical people to look at a community relations plan was confirmed by Janet Senior. *Senior Interview,* supra note 83.
mentation of the program. Already there is evidence that some sites get more attention than others, and without any regulatory force, EPA may choose to avoid community relations activities where it is convenient to do so.

This uneven implementation undermines some of the goals for the Community Relations Program. If EPA is allowed to ignore or walk away from community relations at some sites, the values of public participation discussed earlier, and espoused in EPA guidance, will be lost. If there are no mechanisms for ensuring consideration of public concerns, the legitimacy that could be brought to the process is diminished. The community knowledge embodied in a community relations plan cannot help EPA make better decisions if it is not integrated into the decisionmaking process.

2. The Community Work Groups

Even though most of the community relations activities focus only on providing information to the community, some activities — such as community work groups and interviews — do provide real opportunities for EPA to discuss issues with the local community and bring community concerns back to the technical decisionmakers. However, EPA does not take advantage of these opportunities. EPA still operates its activities in a manner that either gives information (community work groups, fact sheets, or public hearings) or takes information. For example, although the interview process might be an ideal time to discuss site issues with local residents, answer questions that the residents have, and perhaps allay community concerns, the EPA Guidance states that the interviews are not designed for the discussion of site issues, but rather the gathering of information from the community. There is no interaction between the two functions of taking and giving information.

The experience of the community work groups provides particular insights into the Community Relations Program and EPA's attitude toward public participation in the Superfund decisionmaking process.

224. Many of the community relations staff are sincerely dedicated to addressing community concerns, but as will be discussed later, community relations staff face an agency structure which can make their job more difficult.

225. The EPA Guidance says that "the design of the program depends greatly on the level and nature of community concern as expressed by residents during community interviews." COMMUNITY RELATIONS HANDBOOK, supra note 141, at 3-8. Thus, a community where there is a lot of interest will get more attention. In the Community Relations Program, the "squeaky wheel gets the grease." Senior Interview, supra note 83.

226. For example, EPA's use of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. (1988), to prohibit community work groups from reaching consensus on issues and providing recommendations to EPA may be motivated more by a desire to limit the role of the public than to comply with the requirements of FACA. See infra notes 228-32 and accompanying text.

227. See supra notes 153-58 and accompanying text.
Community work groups have the potential to serve as a mechanism for reaching community consensus about a site cleanup. EPA, however, has explicitly rejected this role for the groups. EPA claims that it cannot accept consensus advice or recommendations from the CWG's because such activities would require compliance with the Federal Advisory Committee Act (FACA). Compliance with FACA is not considered "desirable" because of the Act's reporting requirements and the requirement that committee membership be "balanced in terms of the points of view represented." However, EPA does choose community work group members so as to represent the different interests of the affected community. EPA disbanded the CWG at Oroville because it was becoming too "advisory" — the community was becoming too active in voicing its opinions. Some people at EPA also felt this community work group was unrepresentative of the community. Instead of disbanding the group, however, EPA might have tried to broaden its base. Moreover, EPA sanctions the use of advisory committees in the context of other environmental laws such as the Clean Water Act. By refusing to use such committees in the context of Superfund cleanups, EPA is consciously avoiding community advice and is sending the message that it does not want to hear what a community has to say.

Instead, EPA focuses on the informational role of CWG's. This role has led to cynicism on the part of many participants, however. When asked what the community work group established by EPA did, a participant replied, "nothing much . . . listened mostly." At least two members of a work group in the San Fernando Valley wondered if the group was not just "window dressing" for the EPA program there. They thought that EPA ran the groups well and probably listened to them, but that there was no indication that their views mattered. An-

228. See Federal Advisory Committee Act and Superfund Citizens' Committees, Memorandum from Thomas Hagler, EPA Assistant Regional Counsel, to Pamela Cooper, EPA Environmental Protection Specialist (Feb. 13, 1989) [hereinafter EPA Memorandum].
230. EPA Memorandum, supra note 228, at 2 (quoting FACA, 5 U.S.C. app. § 5(b)(2) (1988)). The EPA memorandum does not discuss the issue in depth, but merely states that the work groups would have to comply with FACA and that such compliance would "not be desirable." Id. It may be true that if community work groups were to make formal recommendations, they would have to comply with FACA. However, given the existing requirements for selection of community work groups, it is not clear that compliance with the procedural FACA requirements would be unduly burdensome — especially since most sites do not have community work groups and because EPA does use advisory groups under other environmental statutes. See infra text accompanying note 232.
231. EPA Memorandum, supra note 228, at 2.
233. Prince Interview, supra note 4.
234. Telephone interview with San Fernando Valley Community Work Group members (Dec. 8, 1989) [hereinafter San Fernando CWG Interview II].
other participant indicated that it was never clear what the objective of the CWG was, and he did not feel that it really mattered whether he attended group meetings.\textsuperscript{235} When asked why they continued to attend the meetings, the members replied that at least they are able to get some information about the process and bring it back to their organizations.\textsuperscript{236} But the group's membership has diminished significantly over the past two years, and members who still participate feel that the attrition was due to frustration with the purpose of the CWG.

3. The Public Comment Period

EPA is mandated to respond to community concerns during the public comment period only after a remedial plan is released.\textsuperscript{237} At this time a public hearing is required, but this hearing is not designed for EPA to respond to local concerns.\textsuperscript{238} EPA responds to public concerns raised during the public comment period through a "responsiveness summary," which is available to the public several weeks after comments are registered.\textsuperscript{239} Thus, at the only time EPA is required to respond to community concerns, there is no direct interaction between EPA and the local community.\textsuperscript{240}

The requirement that EPA respond to community concerns raised during the public comment period does further the public participation values of accountability and the fostering of better decisions. It does to some extent address the problem raised above, that the Community Relations Program is not integrated into the decisionmaking process, by requiring decisionmakers to at least consider public concerns.

However, the timing of the responsiveness summary limits its effectiveness. First, it is completed late in the decisionmaking process — after the preferred alternative has been identified. When EPA is not required to respond to public comments until after its decision is essentially made, the value of responses in shaping EPA's decision and making the Agency justify its choice is diminished. Moreover, a remedial plan cannot be challenged in court until after the remedial action under challenge has been completed.\textsuperscript{241} The timing of review reduces the effectiveness that citizen input might have because it will not be considered by a neutral body until after the cleanup has been carried out. These problems will be discussed in more detail below.

\textsuperscript{235} Telephone interview with San Fernando Valley Community Work Group member (Dec. 10, 1989).
\textsuperscript{236} \textit{Id}.
\textsuperscript{237} See supra notes 164-70 and accompanying text.
\textsuperscript{238} See supra notes 168-70 and accompanying text.
\textsuperscript{239} See supra note 166 and accompanying text.
\textsuperscript{240} See COMMUNITY RELATIONS HANDBOOK, supra note 141, app. at A-36.
\textsuperscript{241} See supra note 180 and accompanying text.
C. Timing of the Community Relations Process

The community relations effort starts relatively late in the Superfund process. EPA is not required to interview residents or develop a community relations plan until just before the remedial investigation and feasibility study begins; it takes an average of three and one-half to four years from the time a site is placed on the Superfund inventory to the time the remedial investigation begins.\(^\text{242}\) In relationship to the choice of the cleanup plan itself, this timing should be acceptable: community relations activities are required early enough to ensure that some awareness of community concerns is developed when it counts, before the cleanup decision is made. However, because of the way the community relations requirements are structured, they may not be well integrated into the process through which cleanup options are developed.

The community relations plan and interviews are completed before the remedial investigation and feasibility study begin, but the next mandatory community relations activities do not occur until the proposed cleanup plan is released.\(^\text{243}\) It takes an average of almost three years to develop a cleanup plan,\(^\text{244}\) and if EPA does not interact with the community during this time, residents may feel that EPA reached a decision without any real consideration of public concerns. The initial community contact followed by a long time lag and then the release of a proposed cleanup plan may generate public cynicism about the process. Some participants in the San Fernando Valley CWG said that they sometimes feel like they are left in the dark because the group meets only once every three months.\(^\text{245}\) The Oroville CWG was disbanded over a year before the final cleanup decision was made.\(^\text{246}\)

This time lag is exacerbated by the fact that the public has only a short time to review and comment on the cleanup plan. While it takes an average of over six years from the time a site is placed on the Superfund inventory to the time a proposed cleanup plan is issued,\(^\text{247}\) the mandatory public comment period is only thirty days, with an opportunity for a thirty-day extension.\(^\text{248}\) The documents supporting a cleanup decision are technically complex and extensive, and given the amount of time it takes to develop a cleanup plan, sixty days is a needlessly short time in which to review and comment on the proposed cleanup alternative.

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242. Are We Cleaning Up, supra note 10, at 13 table 1.
243. See supra notes 164-67 and accompanying text.
244. Are We Cleaning Up, supra note 10, at 13 table 1.
245. San Fernando CWG Interview II, supra note 234. The CWG originally met every two months and occasionally every month. Id.
246. Speegle Interview, supra note 3; Prince Interview, supra note 4.
247. Are We Cleaning Up, supra note 10, at 13 table 1.
EPA does try to mitigate the time lag problem by scheduling community relations activities throughout the remedial investigation and feasibility study period — even though such activities are not required by law.\textsuperscript{249} Community work groups, public meetings, and the establishment of an information repository can help keep the public informed about the process as it progresses. Technical assistance grants may enhance the ability of local communities to understand the technical documents as they are released. To the extent that EPA does maintain contact with the local community, all of these activities should be commended. However, they are not mandatory, and implementation of the activities varies from site to site. Moreover, they are still subject to the problems inherent in the Community Relations Program.

\textbf{D. Status of the Community Relations Program Within EPA}

Another problem facing the Community Relations Program is its low status within EPA. Community relations coordinators are often new or young, and the position of community relations coordinator is not considered a "plum" job at EPA. The turnover rate among the staff in the Community Relations Program is high. There is a presumption, whether true or not, that people who stay there are not very good.

The community relations coordinators often do not possess the necessary skills to work efficiently with the public. For example, the coordinators may not know how to run meetings, and they generally have not been trained in conflict management. These skills are extremely important for working with the public. Community relations coordinators must know how to deal with public emotions as well as the community conflicts that are bound to arise during the cleanup process.\textsuperscript{250}

The low status of the program is also reflected by the fact that the Community Relations Program does not have its own budget.\textsuperscript{251} Technical staff people control the funding for community relations at a site.\textsuperscript{252} Funding for the Community Relations Program compared to the total cost of a site cleanup has been characterized as "beans."\textsuperscript{253} Conflicts arise between technical staff and community relations coordinators over

\textsuperscript{249} Ziegler Interview, \textit{supra} note 91.

\textsuperscript{250} Even seemingly simple tasks like the management of meetings are important. The San Fernando Valley CWG experienced problems during its early days such as group conflict, disorganized meetings, and an inability to focus on issues. These problems have abated since a new community relations coordinator took over the site. Interviews with San Fernando Valley CWG members, \textit{supra} notes 192, 234.

\textsuperscript{251} Community relations coordinators differ over how to interpret the fact that they do not control their budget. In Region IX, the Community Relations Program is not a part of Superfund but is instead part of the larger Hazardous Waste Division. Budgets are determined by the regional project manager. Some community relations coordinators felt they had input into the budget decision, while others did not.

\textsuperscript{252} Cooper Interview, \textit{supra} note 1.

\textsuperscript{253} Ziegler Interview, \textit{supra} note 91.
issues that should be within the jurisdiction of the Community Relations Program. For example, the technical staff often disagree with the community relations staff over the wording of fact sheets. This disagreement arises because technical staff feel that the fact sheet may be inaccurate, but others believe that technical staff are overly cautious and insensitive to the general public's need for understandable information.

In addition to the fact that EPA does not always take the Community Relations Program seriously, the community relations staff is itself often ambivalent towards the public and its role in the cleanup process. Community relations staff are often referred to as the community's advocate in the Superfund process. Some people in the Agency feel that community relations coordinators should be advocates for the Agency, not the public. However, while community relations staff tend to see themselves as the community's advocate, some express conflicting attitudes about the public. EPA has something of a siege mentality, and there is a definite feeling that the community people are out to get the Agency. Some EPA staff, including community relations coordinators, believe that the public's demands are unreasonable and that efforts are made to make the Agency look bad when it does not deserve it. This attitude extends beyond the technical staff. One person heard a community relations coordinator refer to environmental groups as "the enemy"; local community groups are often thought to be as bad as the potentially responsible parties.

While there may be reasons for ambivalence towards the public, when a program depends on the efforts of community relations coordinators, their distrust of the public is bound to influence the effectiveness of the program. Because much of the Community Relations Program is not mandatory and the effectiveness of the program depends largely on the community relations staff, their lack of status and influence impairs community relations staff efforts to bring public concerns into the cleanup process.

E. Summary

The Superfund Community Relations Program suffers both from difficulties in implementation and problems inherent in its structure. Access to information is crucial to a community affected by a Superfund

254. See supra notes 212-15 and accompanying text.
255. Senior Interview, supra note 83.
256. Burke Interview, supra note 92.
257. Ziegler Interview, supra note 91.
258. Burke Interview, supra note 92; Ziegler Interview, supra note 91.
259. The challenges and difficulties of dealing with the public are discussed below. See infra notes 261-68 and accompanying text.
site. However, mere access to information is not enough. People need to feel that their concerns are being addressed, and an informational program will not satisfy this need. Currently, the public plays a passive role in the Superfund decisionmaking process. Opportunities to enhance the public role are not fully implemented. The final part of this Comment will discuss methods for improving implementation of the Community Relations Program and the opportunities and difficulties associated with expanding the program beyond its current state.

IV

CONCLUSION: ENCOURAGING PUBLIC PARTICIPATION IN THE SUPERFUND PROCESS

Ideally, a public participation program should maximize the values of participation in the decisionmaking process while minimizing its disadvantages. As the previous discussion indicates, there are areas where the Community Relations Program fails to achieve this goal. However, the program represents, in many ways, a significant attempt to facilitate public participation in the Superfund cleanup process and provides a framework for developing more meaningful opportunities for public participation. Moreover, suggestions for change are bound to be problematic. The Superfund program and the technical issues involved are complex, and it is not clear to what extent the public can, should, or will want to be more involved in the process. Finally, there will always be people dissatisfied with the cleanup process and the lack of opportunities for public involvement. Notwithstanding these difficulties, this part of the Comment proposes some tentative structural reforms which may move the community relations process toward realizing the values of public participation.

A. Impediments to Public Participation

The willingness of EPA and potentially responsible parties to permit greater public participation must be addressed before proposing any specific reforms. As a bureaucratic agency, EPA is unlikely to favor methods of public participation which reduce its control over the cleanup process. An increase in public participation may decrease Agency power.

For similar reasons, potentially responsible parties are also likely to oppose attempts to increase the public's role in the cleanup decisionmaking process. The public is much more difficult to control and influence than a regulatory agency might be. Potentially responsible parties have a relationship with EPA that public participation might make more unpredictable. EPA and the potentially responsible parties often work closely together. Contractors who develop cleanup plans work both for EPA
and potentially responsible parties and create a link between the two parties. Although the relationship between PRP's and EPA is often a contentious one, there is a professional camaraderie among EPA, industry, and the contractors which would be disrupted by increased public involvement.

Beyond these institutional constraints, to a certain extent EPA may feel that more active public participation is unnecessary, and in fact may be detrimental to the cleanup process. EPA personnel feel strongly that they are members of a public agency charged with protecting the public interest.\(^{260}\) No doubt, most EPA staff are sincere in this belief and try to act in this role. However, EPA is only interested in permitting public participation to the extent that it enhances the Agency's perception of what is in the public interest. The Agency sees itself as caught between public and industry demands.\(^{261}\) The information and consultation role that the Community Relations Program now plays allows EPA to control public participation. EPA can use the public view to pressure concessions from industry, without actually giving the public any formal role in the decisionmaking process. This does not mean that EPA is always insensitive to community demands, but it has and will resist attempts to increase public participation.\(^{262}\) Agency resistance to more participation is clearly illustrated by its refusal to allow community representatives to take part in negotiations between the Agency and industry and in its refusal to allow community work groups to reach a consensus and give advice on cleanup strategies.\(^{263}\)

One response to EPA's apparent unwillingness to provide more opportunities for public participation is that EPA's own rhetoric for the Community Relations Program supports more participatory options. The program is designed to promote "two-way communication" between EPA and the public.\(^{264}\) One of the Agency's goals for the program is "[e]nsuring the local community a meaningful voice in those implementation decisions that the community considers most important."\(^{265}\) According to EPA's own criteria, the success of the Community Relations Program is uneven at best:

The real mark of a successful community relations program, we suggest, is that community relations does not itself become an issue. There is no reason why people distressed over a hazardous waste problem should be-

\(^{260}\) Goldberg Interview, supra note 28; Ziegler Interview, supra note 91.
\(^{261}\) Goldberg Interview, supra note 28.
\(^{262}\) For example, EPA generally does not permit the public to participate in negotiations with potentially responsible parties over cleanup plans. See supra note 131 and accompanying text.
\(^{263}\) See supra notes 228-32 and accompanying text.
\(^{265}\) Cohen, Ingersoll & Janis, supra note 78, at 406.
come further distressed because they cannot get information from their
government and cannot voice their concerns.\textsuperscript{266}

As the previous section demonstrates, community relations is sometimes
an issue; government does not always respond to community concerns;
and the Community Relations Program may not be successful in fostering
trust in EPA.

Beyond the rhetoric of EPA's Community Relations Program, participation serves many goals, as discussed in part I of this Comment.
Most significant from the perspective of EPA is the value of legitimacy.
Superfund has been subject to criticism from all sides. Agency credibility
in the Superfund program is a primary concern to EPA staff and political
appointees. If an effective Community Relations Program can increase
the legitimacy of Superfund in the eyes of the public, EPA should be
willing to consider reforms which increase the effectiveness of the pro-
gram. Of course, there may be ways to reform the Community Relations
Program to increase the apparent legitimacy of EPA decisionmaking
without actually providing more opportunities for public participation.
However, the focus of this Comment is to propose reforms which do
both. In the long run, a program providing meaningful participatory op-
tions will be the more successful one. Such a program can address com-
munity concerns early in the cleanup process, perhaps avoiding the
conflict and delay that often characterizes the Superfund cleanup
process.

The following section discusses reforms to the Community Rela-
tions Program which will both improve the level of communication be-
tween EPA and the public and provide more opportunities for formal
public involvement in the decisionmaking process. To the extent that
EPA claims to be concerned with its own legitimacy and meaningful op-
portunities for public participation, this section is intended for the
Agency. But, to the extent that EPA is not providing more opportuni-
ties, this section is an appeal to the political process to recognize the
value of including the public in making Superfund cleanup decisions.

B. Reforming the Community Relations Program

1. Education

An emotional reaction to the discovery of a hazardous waste site in
a community is understandable. When people discover they live in a
cancer cluster or that nearby deformed farm animals are the result of
exposure to hazardous chemicals, they are going to be upset. EPA has
focused on providing information as the key way to deal with this emo-
tionalism. EPA hopes that accurate information will give the public
some perspective on the risks posed by a hazardous waste site and will

\textsuperscript{266} Gemmill & Burk, \textit{supra} note 83, at 9.
assure the public that something is being done about the problem. To the extent that the Community Relations Program has increased access to information, it has made valuable progress from the time of Love Canal and Times Beach.

Merely providing information, however, is not enough. The public must first trust the Agency before it finds the Agency's information believable or feels the Agency's cleanup efforts are sincere. As one community relations coordinator put it, EPA starts with "negative credibility" in the community. Clearly, the Community Relations Program is designed to address this negative credibility, but the success of this effort depends on the way in which EPA delivers information to a community and the amount and methods of community contact.

a. The Community Relations Program Must Begin When a Site Is Listed on the NPL

EPA must try to distribute information to a community as early in the Superfund process as possible. A community's attitude toward a site is shaped in the early days of the Superfund process — at the time a site is listed on the NPL. Many citizens will first learn about a site's existence at this time, develop concerns about the dangers the site poses, and form their initial impressions about EPA's commitment to cleaning it up. Yet community relations activities generally do not start until the remedial investigation and feasibility study begin. In the interim, the public may feel that it is being kept in the dark, or may form the impression that little is being done about the site. These impressions can be very difficult to overcome and may undermine EPA's relationship with the public for years.

EPA should begin the community relations process as soon as the decision is made to list a site on the NPL. Listing on the NPL should trigger the development of the community relations plan, and especially community interviews. At least one fact sheet should be distributed at the earliest possible time. The fact sheet should explain the situation at the current site, what an NPL listing means, how the Superfund process operates, what provisions exist for public participation in the cleanup decisionmaking process, and what the Community Relations Program entails. If EPA takes the initiative by providing information to the community, it may be able to generate a more positive attitude toward the Agency and the cleanup process as a whole.

267. See Thomas, supra note 264, at 2.
268. Ziegler Interview, supra note 91.
b. More Elements of the Community Relations Program Should Be Mandatory

Much of the current Community Relations Program is discretionary, and EPA's commitment to the program varies according to the apparent level of community interest at a site. As a result, the effectiveness of the program varies from site to site.

A reactive program may foster an adversarial relationship between EPA and the community. If EPA is more responsive to outspoken community organizations — if it is, in fact, the squeaky wheel that gets the grease — EPA may inadvertently be encouraging community antagonism. Conversely, less vocal but equally affected communities may be ignored. If more elements of the Community Relations Program were mandatory, EPA would not merely react to community demands, but might give all communities the attention they deserve.

Ironically, the mandatory elements of the current Community Relations Program, perhaps with the exception of the community relations plan, are those that are least adapted to grass roots participation on a local level. The required notice and comment period is most effective at the national level, where well-organized, sophisticated interest groups are involved. On the local level, a three- to eight-week notice and comment period at the end of a four-year remedial investigation and feasibility study has little relevance to the layperson or the local homeowners' association. Moreover, in the absence of any other communication with the community, the notice and comment period may only foster public cynicism and the attitude that EPA has already reached its decision and is only jumping through procedural hoops.

Instead of focusing on participatory techniques which are ill-suited to local involvement, EPA should emphasize those community relations techniques with the potential to develop community trust. Interviews, community work groups, and small community meetings or open houses fulfill community trust requirements because they rely on face-to-face interaction with people.\footnote{269} However, EPA does not use these techniques often enough, and not enough constant communication between the community and EPA occurs. EPA should be required to advertise and hold open houses and small community meetings at least once a year. The opportunity to participate in a community work group should exist at every site, not just those that EPA considers important. The restrictions on TAG grants\footnote{270} — especially the matching funds requirement — should be eased so that more community organizations have access to them. Finally, EPA community relations personnel must be trained in conflict management and in dealing with the public. The use and success

\footnote{269}{Id.} \footnote{270}{See supra note 175.
of participatory techniques depends on the skills and sensitivity of the community relations coordinator. Most importantly, coordinators must be sensitive and open to members of a community affected by hazardous wastes. Whatever ambivalence they may feel about public participation, community relations coordinators should not perceive the public as the enemy.

2. Accountability and Legitimacy

An effective public participation program must promote accountability and legitimacy in the decisionmaking process. While education is a critical first step, it alone cannot lend legitimacy and accountability to the decisionmaking process. Meaningful public participation must provide citizens with opportunities to use this education to influence the decisionmaking process.

The Community Relations Program suffers most in the area of legitimacy and accountability. The current program focuses on education and has the potential to perform this function well. However, the program provides few formal opportunities for the public to influence the decisionmaking process. Where citizen input is solicited, the program does a poor job of demonstrating to the public that the Agency has listened to and acted upon citizen concerns — even when the Agency has in fact made changes in its cleanup plan because of these concerns. For example, EPA consults with the community primarily through the community relations plan and the community work groups. Although these activities are designed to solicit community views for the consideration of Agency decisionmakers, members of the community are often unsure that the Agency is actually listening to their input. The lack of visible interplay between the Agency and the community undermines public confidence in EPA’s efforts to involve the community as well as to clean up the site.

a. Increasing Agency Responsiveness

EPA might address the problem by responding more frequently to citizen concerns. EPA response to community concerns should be required periodically, rather than only issuing a responsiveness summary at the end of a three- to four-year remedial investigation/feasibility study process. Further, for those sites where a community work group is involved, meetings should be regularly scheduled, well before key decisions about site cleanup are made, giving the work group ample time to discuss the alternatives.

Finally, EPA should hold more public hearings where agency personnel are required to listen and respond to community concerns. These

271. See, e.g., supra notes 234-36 and accompanying text.
hearings generally are held when the proposed cleanup plan is issued, but should also be held throughout the development of cleanup alternatives. Community relations coordinators feel that public hearings and confrontational meetings are counterproductive. The community relations Guidance also counsels coordinators to avoid confrontational meetings and to meet with the press separately to avert the conflict that news media might create. While small, intimate meetings with members of the public are valuable, meetings where people can vent their anger and frustration and where the Agency is required to respond can also serve a valuable purpose. Conflict is inevitable in a process like this, and attempts to minimize or avoid conflict may backfire. In fact, one member of a community work group felt that she had more impact when testifying at a public hearing on selection of a cleanup alternative than she did as a participant in the work group.

EPA may well listen to community concerns, but if the public does not perceive that they are listening, consultation loses its value in the eyes of the public. If EPA is required to respond periodically to community views, the community will at least know that their ideas are considered. In addition, required responsiveness summaries throughout the process will ensure that technical people are informed of public views, thus enhancing the potential for public concerns to broaden the scope of the technical inquiry.

To some extent, the most difficult problem in designing public participation programs is that people are looking for substantive results from what many believe to be a procedural program. People do not think that EPA is listening to them because EPA is not doing what they tell it to do. While EPA is willing to listen to community demands and make changes to the cleanup alternative, it will only make these changes to the extent that they fit into EPA's overall goals and constraints. Unless EPA is willing to grant communities a substantive role in the decisionmaking process, there will always be the perception among some that the Community Relations Program is just window dressing. Given that it seems unlikely that EPA will allow the public to play such a role, the challenge for the Agency is to convince people that the Agency does listen to their concerns and tries to incorporate them into the cleanup process. The Agency cannot meet this challenge if it does not maintain contact with a community, even where a community appears to be unreasonable. To the extent that the Agency will draw the line at certain public suggestions and levels of participation, the Agency will always be open to criticism that it does not listen, and the Community Relations Program will not be considered a success.

272. Ziegler Interview, supra note 91.
273. COMMUNITY RELATIONS HANDBOOK, supra note 141, at 3-7.
274. San Fernando CWG Interview II, supra note 234.
b. Delay and Funding

A final criticism of any public participation program is that it will cause delay and cost money. These are legitimate concerns, especially in the context of Superfund. Delay is harmful to all parties, and to the extent that public participation may take money away from site cleanups, there is reason to be concerned about the cost of an expanded Community Relations Program. The realistic response to these concerns is recognizing that public participation may delay the process somewhat and that it will require the commitment of more funds. However, the Superfund cleanup process already takes ten years to complete. Hopefully, most public participation mechanisms will be integrated into the cleanup process. Even if public participation efforts add a year to this process, they would only result in a ten percent increase in time. Moreover, effective public participation can avoid controversies late in the cleanup process when it is more time-consuming to change course. As to funding, the Region IX Community Relations Program does not have its own budget and the amount spent on public participation relative to the cost of cleanup is minimal.275 The suggested reforms will add to the cost of the Superfund program, but as a percentage of the total budget the amount would be quite small.

C. Summary

The preceding proposed reforms in the Community Relations Program are not radical proposals. They build on the existing program, and they center on public participation techniques that either have been used by EPA in the context of other environmental statutes or have become accepted elements of a dispute resolution approach to environmental conflicts. Of course, no Community Relations Program in itself can guarantee public satisfaction with Superfund. Public participation cannot cure technical uncertainty; it cannot provide more funding; and it probably will not result in faster cleanups. Participation can, however, help people understand the difficulties involved in cleaning up a Superfund site. It can provide people with the opportunity to voice their concerns and ensure that EPA listens and responds to them. These reforms are designed to encourage the primary benefits of participation, particularly education, accountability, and legitimacy, while minimizing its drawbacks — emotionalism, unrepresentativeness, and delay.

275. Pamela Cooper, the Chief Officer of the EPA Region IX Community Relations Program, estimates that a community relations program at an average site costs no more than $25,000. Cooper Interview, supra note 1.
CONCLUSION

This Comment has analyzed EPA’s Community Relations Program from the perspective of communities affected by Superfund sites. Although EPA has had some success in keeping communities informed about the progress of a site cleanup, it has not actively involved citizens in the cleanup decisionmaking process. As a result, many affected citizens are dissatisfied with the Community Relations Program. EPA might make the Community Relations Program more effective by implementing a number of program reforms. Specifically, community relations should start earlier in the Superfund listing process, more elements of the program should be made mandatory, and EPA should focus more on techniques that foster trust between the community and the Agency.

Any public participation effort, even an informational one, is bound to be a difficult, frustrating experience. The key to the success of such efforts is to further the values of participation without causing too much delay or permitting too much irrationality to enter the process. Participation exists along a spectrum, and EPA’s efforts fall into an informational and consulting role. In some communities this level of participation is enough. Periodically informing and consulting with the public may generate enough trust that the community is willing to let EPA make cleanup decisions. This may be particularly true of communities where exposure has been low (or actual exposure to contamination nonexistent). But communities that suffer from significant levels of exposure need more attention and more opportunities to participate in decisions that directly affect them. Where distrust of government is high, it is unlikely that information or consultation alone will bring legitimacy to the process. EPA needs to take some risks and experiment with methods that both educate people and give them a role in making the decisions that affect them.