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The Cincinnati Environmental Justice Ordinance: Proposing a New Model for Environmental Justice Regulations by the States

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THE CINCINNATI ENVIRONMENTAL JUSTICE ORDINANCE: PROPOSING A NEW MODEL FOR ENVIRONMENTAL JUSTICE REGULATIONS BY THE STATES

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I.	INTRODUCTION	177
II.	A HISTORY OF THE GOVERNMENTAL RESPONSE TO ENVIRONMENTAL JUSTICE	181
	A. <i>Environmental Justice at the Federal Level</i>	227
	1. Legislating Environmental Justice	227
	2. Suing for Environmental Justice	228
	3. Establishing Environmental Justice Agency Policies	230
	B. <i>Environmental Justice at the State Level</i>	232
	C. <i>Environmental Justice at the Local Level</i>	234
III.	REGULATING AND ENFORCING ENVIRONMENTAL JUSTICE THROUGH THE STATES.....	237
	A. <i>The Cincinnati Ordinance as Model for Environmental Justice Regulations</i>	237
	1. Gathering Data	238
	2. Providing Meaningful Public Participation.....	239
	3. Ensuring Equitable Enforcement.....	239
	B. <i>Centralization-Decentralization Debate Applied to Environmental Justice Regulations</i>	240
	1. The Centralization-Decentralization Debate	240
	2. Centralization	242
	3. Decentralization.....	245
IV.	CONCLUSION	247

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I. INTRODUCTION

Spacious skies, amber waves of grain, and purple mountain majesties¹—these words recall iconic images of the environment that American citizens know and love. But the environmental justice movement views the environment in a much more simple way—it defines the environment by the various everyday places where Americans “live, work and play.”² The Environmental Protection Agency (EPA) describes that the goal of the environmental justice movement is to obtain “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”³ The environmental justice movement implicates principles from traditional environmentalism—such as preservation and conservation of natural resources—but applies them with respect to people. Specifically, environmental justice is concerned with preserving the quality of life in communities that face disproportionately high levels of pollution from the disparate enforcement of environmental laws.⁴

¹ KATHARINE LEE BATES, *AMERICA THE BEAUTIFUL AND OTHER POEMS* 3 (1911).

² PATRICK NOVOTNY, *WHERE WE LIVE, WORK AND PLAY: THE ENVIRONMENTAL JUSTICE MOVEMENT AND THE STRUGGLE FOR A NEW ENVIRONMENTALISM* 3 (2000).

³ *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmental-justice/> (last visited Nov. 9, 2010). The EPA defines fair treatment to mean that “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.” *Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/environmental-justice/basics/index.html> (last visited Jan. 15, 2011). The EPA defines meaningful involvement to mean:

1. [P]eople have an opportunity to participate in decisions about activities that may affect their environment and/or health;
2. the public’s contribution can influence the regulatory agency’s decision;
3. their concerns will be considered in the decision making process; and
4. the decision makers seek out and facilitate the involvement of those potentially affected.

Id.

⁴ It is important to reiterate that environmental justice issues do not arise as the result of illegal acts, or violations of environmental laws or policies, but simply from the inequitable enforcement of environmental laws. Furthermore, environmental injustice does not always arise from malicious or intentional discriminatory decisions and can simply be the result of a lack of foresight. For example, one of the most horrendous environmental disasters and examples of environmental injustice in Love Canal, New York gained national attention in the late 1970s. Eckardt C. Beck, *The Love Canal Tragedy*, *EPA JOURNAL*, January 1979, available at <http://www.epa.gov/history/topics/lovecanal/01.htm>. Commonly referred to as the “Love Canal tragedy,” residents in this small town in upstate New York were victims of severe toxic waste poisoning when the city built houses and a school on land that had previously been a hazardous waste dump. *Id.* The previous owners of the dump had covered up the waste with dirt and sold the land for one dollar, but the true costs were much more crippling. Leeching chemicals and toxic wastes from the dump caused many birth defects, and the quality of life plummeted. *Id.* One reporter explained that, “[p]uddles of noxious substances were . . . in their yards, some were in their basements, others yet were on the school grounds. Everywhere the air had a faint, choking smell. Children returned from play with burns on their hands and faces.” *Id.* Subsequent environmental regulations—such as the

The environmental justice movement's focus on the human impact of environmental regulations requires more than merely writing and enforcing a uniform and static policy like those found in purely environmental regulations. Continually gathering data, providing opportunities for public participation, and providing the means to ensure equitable enforcement of environmental laws is the basis for effective environmental justice regulations.⁵ While the purpose and goals of the environmental justice movement borrow heavily from the areas of environmental and civil rights law,⁶ neither field encourages continual governmental responsiveness nor relies on dynamic regulation procedures to achieve its goals. The success of the environmental justice movement, however, depends on having dynamic regulatory framework and government that will respond to results of new data and the desires of the public. Currently, there are no formal policies or regulations in place to achieve environmental justice. Therefore, environmental justice plaintiffs rarely succeed in obtaining recovery for their injuries. In the absence of any formal environmental justice regulations in the United States, this Note proposes a new model statute, to be implemented at the state level, that uses data collection and public participation to achieve environmental justice, equitable enforcement of environmental laws, and the fair distribution of pollution.

Over the years, little has been done to provide legal remedies for victims of environmental injustice. Although the EPA has recognized environmental justice as a nation-wide problem, its attention to the movement consistently falls short of any formal or legally enforceable regulations.⁷ Similarly, state and local environmental justice strategies do not have the force of law, and do little to regulate, enforce, or ensure environmental justice. In 2009, however, the City of Cincinnati passed an

Clean Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act—seek to prevent future environmental tragedies like Love Canal. *Id.* But environmental regulations do not address problems that have already occurred, nor do they consider the forward-looking issues of discrimination and equitable enforcement. For example, in the 1990s, the New Jersey Department of Environmental Protection (NJDEP) granted a permit for a cement manufacturing company under the Clean Air Act. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 450-51 (D.N.J. 2001). The community had already been burdened by two Superfund sites and fifteen contaminated hazardous waste sites, yet the proposed facility would have emitted various pollutants—including mercury, lead, and carbon monoxide—into the air. *Id.* at 450. The NJDEP granted this permit in spite of the “pre-existing poor health of the residents” and “the cumulative environmental burden already borne by this impoverished community.” *Id.* at 451. Therefore, even legal permitting decisions can result in the inequitable distribution of pollution.

⁵ See *infra* Part III.A.

⁶ Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 3 (2002). To a certain extent, civil rights and environmental law overlap, making it a sound basis for environmental justice policies. *Id.* However, environmental regulations are premised on the idea of enhancing the majority's preferences for environmental reform, whereas civil rights laws are premised on the idea of protecting underrepresented populations from majoritarian pressures. *Id.* at 4. Where these two premises diverge, conflicts in how to regulate environmental justice occur. *Id.* at 3. Therefore, the environmental justice movement must be viewed independently from the environmental and civil rights movements in order to achieve its own unique goals.

⁷ See *infra* Part II.A.3.

Environmental Justice Ordinance (“the Ordinance”),⁸ the first of its kind in the country to create regulation and enforcement measures specifically to achieve environmental justice.⁹ The Ordinance, written in response to air pollution problems in the City of Cincinnati, utilizes data collection and public participation procedures to prevent further degradation of the environment across the city. Additionally, the Ordinance addresses one of the major shortcomings of other environmental justice regulations by increasing the local government’s accountability for its permit decisions, and therefore serves as a model for future environmental justice regulations.¹⁰

The majority of environmental justice policies today exist as extremely decentralized municipal ordinances or as extremely centralized government agency strategies. Each system of regulation presents distinct advantages.¹¹ Therefore, an analysis of the Ordinance within the context of the ongoing debate between the benefits of centralized versus decentralized environmental regulations (the centralization-decentralization debate)¹² examines the advantages of each scheme of regulations more extensively. However, each argument in favor of one type of regulation represents a disadvantage of the other, so this Note argues that by implementing environmental justice regulations at the state level, with the Cincinnati Ordinance as a model, the benefits of both local and national policies can be combined while mitigating the relative disadvantages.

To illustrate the inadequacies of both federal and local level attempts to achieve environmental justice, Part II of this Note canvasses a brief history of the environmental justice movement at the federal, state, and local levels, including a description of the specific provisions of the Ordinance. As the history of the movement will show, neither the federal, state, nor local level governments provide effective or efficient legal remedies for environmental justice. However, state administrative agencies, whose regulatory authority mirrors those at the federal level, have the flexibility to expand their environmental justice policies with the cooperation of state legislatures. Part III of this Note then provides an analysis of the Ordinance regarding the effectiveness of its provisions in achieving the goals of the environmental justice movement. The Ordinance provides an effective model for future environmental justice policies because it enhances government accountability. Additionally, Part III analyzes the Ordinance with respect to the centralization-decentralization debate. Theoretically, environmental justice regulations can be promulgated at any level of government—either by the national government as the supreme law of the land or under the state and local police powers. However, an analysis of the Ordinance within the context of the centralization-decentralization debate is necessary to show that practical considerations weigh in favor of neither

⁸ CINCINNATI, OH., CODE OF ORDINANCES § 1041 (2010) (effective Feb. 1, 2011).

⁹ David C. Crowley, *Vice Mayor Crowley on Environmental Justice Ordinance*, THE CINCINNATI BEACON, June 30, 2009, available at http://www.cincinnati-beacon.com/index.php?contents/comments/vice_mayor_crowley_on_environmental_justice_ordinance/.

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part III.B.3.

¹² See *infra* Part III.B.

local nor national environmental just policies, but for regulations at the state level instead.

II. A HISTORY OF THE GOVERNMENTAL RESPONSE TO ENVIRONMENTAL JUSTICE

During the environmental movement in the 1970s, evidence indicated that poor and minority urban populations suffered more from environmental hazards, yet the environmental movement focused primarily on preservation, conservation, and environmental aesthetics rather than public health or the potential impact of pollution on overburdened communities.¹³ Therefore, environmental justice advocates, seeking to remedy the pollution disparities suffered by low-income and minority communities, searched for legal remedies outside of the environmental movement. Due to the minority-majority demographics of many communities facing environmental hazards and being overburdened with pollution, grassroots organizers turned towards strategies from the Civil Rights movement.¹⁴ Unfortunately, neither environmental nor civil rights laws have provided adequate remedies for environmental justice claims, and all levels of government agencies have been reluctant to adopt mandatory environmental justice regulations. The Ordinance, however, provides mandatory environmental justice regulations specifically written to achieve the movement's goals.

A. Environmental Justice at the Federal Level

1. Legislating Environmental Justice

The environmental justice movement derives its goals from both the environmental and civil rights movements. Both those movements achieved great successes when federal statutes provided plaintiffs with causes of action. Accordingly, in the early 1990s, two legislative efforts aimed to address environmental justice by regulating the distribution of new facilities in order to prevent individual communities from suffering from disproportionately high pollution levels.¹⁵ In 1992, Representative John Lewis and Senator Al Gore introduced the "Environmental Justice Act of 1992."¹⁶ This statute sought "to help those people who face the greatest risk of exposure to toxic substances and pollution"¹⁷ by identifying "environmental high impact areas."¹⁸ It also imposed a

¹³ OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE 6 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003).

¹⁴ *Id.* at 7. Principles from the Civil Rights movement were invoked in the famous Warren County protests, a series of non-violent protests in opposition to the North Carolina governor's decision to dispose hazardous soil in a predominantly African American community. *Id.*

¹⁵ Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 352-53 (1995).

¹⁶ Environmental Justice Act of 1992, H.R. 2806, 102d Cong. (1992); Environmental Justice Act of 1992, S. 2806, 102d Cong. (1992). See Mank, *supra* note 15, at 353 (providing background information on the proposed environmental justice legislation).

¹⁷ 138 CONG. REC. S7 489 (1992) (statement of Sen. Gore); Claire L. Hasler, Comment, *The Proposed Environmental Justice Act: "I Have a (Green) Dream,"* 17 U. PUGET SOUND L. REV. 417, 417 (1994).

moratorium on siting or permitting any new facility in a high impact area.¹⁹ However, the legislation died in committee hearings.²⁰ Just the next year, another congressional environmental justice statute met the same fate.²¹

Since these two legislative attempts, Congress has not proposed any other environmental justice statutes. Therefore, environmental justice plaintiffs must seek remedies under already existing civil rights and environmental laws.

2. Suing for Environmental Justice

Without statutes specifically written to provide environmental justice remedies, plaintiffs are restricted to pursuing environmental justice under civil rights and environmental laws. Although environmental justice incorporated principles from both bodies of law, neither area of law specifically addresses the goals of environmental justice, and the courts have imposed strict standards that often bar recovery on environmental justice claims.

Due to the disproportionate rate at which low-income and minority communities are burdened with environmental hazards, environmental justice plaintiffs may pursue claims under the Equal Protection Clause of the Fourteenth Amendment.²² Typically, these claims allege the government discriminated against racial minorities in its decision to site polluting facilities in a low-income or minority neighborhood.²³ However, the Supreme Court held that plaintiffs alleging racial discrimination under the Equal Protection Clause must prove that the discriminatory intent motivated the governmental action.²⁴ Under this standard, it is insufficient to simply prove that the government's actions had a discriminatory effect.²⁵

¹⁸ Mank, *supra* note 15, at 353.

¹⁹ *Id.*

²⁰ Hasler, *supra* note 17, at 445.

²¹ *Id.* The Environmental Justice Act of 1993 was designed to “establish a program to assure nondiscriminatory compliance with all environmental, health and safety laws and to assure equal protection of the public health.” *Id.* The 1993 act would have functioned very similar to the Environmental Justice Act of 1992, requiring “EPA to publish a list of geographic areas with the highest amounts of toxic chemicals. It would require EPA to inspect all toxic chemical facilities operating in Environmentally High Impact Areas (EHIAs) and impose a moratorium on the siting of new chemical facilities in EHIAs.” EPA09: Establish a Blueprint for Environmental Justice Throughout EPA’s Operations, U.S. ENVTL. PROT. AGENCY, available at <http://govinfo.library.unt.edu/npr/library/reports/EPA9.html> (last visited Nov. 9, 2010).

²² U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²³ *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979).

²⁴ *Washington v. Davis*, 426 U.S. 229, 239 (1976); Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 218 (2005).

²⁵ *Washington*, 426 U.S. at 242.

[A] law, neutral on its face and serving ends otherwise within the power of the government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

Similarly, the Supreme Court applies a strict standard to environmental justice claims under Title VI of the Civil Rights Act of 1964. Section 601 of Title VI prohibits discrimination by programs and governmental entities, such as state environmental agencies, that receive funding from the federal government.²⁶ Therefore, citizens can sue state programs and attack policies and decisions on discrimination grounds.²⁷ However, as with claims under the Equal Protection Clause, individual section 601 claims require proof of intentional government discrimination, a standard that often bars recovery.²⁸

An even more limited avenue for recovery exists under 42 U.S.C. § 1983, which creates a cause of action for any person who is deprived of a federal right guaranteed by the laws and Constitution of the United States.²⁹ A § 1983 cause of action only

Disproportionate impact is not irrelevant, but it is not the sole touchstone of . . . invidious racial discrimination forbidden by the Constitution.

Id.; see also Outka, *supra* note 24, at 218. The devastating effect this standard had on environmental justice cases is illustrated by *Bean v. Southwestern Waste Management Corp.* *Bean*, 482 F. Supp. at 673. In *Bean*, plaintiffs presented statistical evidence that two-thirds of all solid waste dumps in the Houston metropolitan area were placed in predominantly African-American communities. *Id.* at 678. However, because of the fact that the Texas Department of Health, the agency responsible for siting decisions, did not grant permits to all of the dumps cited in the statistical data, that evidence did not meet plaintiffs' burden of proving discriminatory intent by the Department. *Id.* at 677-78.

²⁶ Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000(d) (2006).

²⁷ Outka, *supra* note 24, at 223. Specifically, Section 601 of the Civil Rights Act establishes that no person "on the ground of race, color, or national origin, [shall] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964 § 601.

²⁸ *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.* 463 U.S. 582, 582 (1983) (holding in a plurality decision that unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations); see also Outka, *supra* note 24, at 223. Additionally, Section 602 of the Civil Rights Act gives funding agencies the power to require recipients of federal money to develop regulations to implement Section 601. But the Supreme Court held that Congress does not create a "freestanding private right of action to enforce regulations promulgated under § 602" in the absence of clear intent within the statute to create such a right. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Applying the Court's holding from *Sandoval*, the Third Circuit denied recovery for an obvious case of environmental injustice in Camden, New Jersey. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001). In *South Camden*, the New Jersey Department of Environmental Protection granted a permit for a cement grinding plant in a poor minority community whose residents were already burdened with "two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating . . . chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station" and faced the approved development of a sewage treatment plant, trash incinerator, and power plant. *Id.* at 775. The district court had granted relief to the citizens group on the basis of disparate impact from the multiple polluting facilities in the city, but on appeal the Third Circuit reiterated that the statute proscribes only intentional discrimination. *Id.* at 774.

²⁹ 42 U.S.C. § 1983 (2006). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . .

exists when: the alleged statutory violation is also a violation of a federal right intended to benefit the plaintiff; the plaintiff can demonstrate that the protected right is not “vague and amorphous”; and that protection of the right is mandatory under the federal statute.³⁰ Holding that only Congress can create a federal right by a statutory mandate, the Court found that EPA regulations providing freedom from disparate impact of environmental decisions are valid but do not create a federal right beyond the scope of the statute.³¹ Therefore, EPA regulations provided for freedom from disparate impact of pollution, but the regulations did not create a cause of action under § 1983 because the regulations are “too far removed from Congressional intent to constitute a federal right” by statutory mandate.³²

3. Establishing Environmental Justice Agency Policies

Unlike Congress and the courts, which have continually failed to address environmental justice concerns, federal executive agencies have authorized numerous policies and strategies to promote environmental justice. Before engaging in any rule making or policy making decision, the executive agencies responded to claims of environmental justice by conducting studies in order to either substantiate or refute claims of environmental injustice.³³ Finding that these studies supported environmental justice claims, executive agencies began addressing environmental justice concerns.³⁴ The EPA, for example, formed the Environmental Equity Workgroup to generate its own study regarding the issues surrounding environmental justice.³⁵ The EPA study concluded that environmental injustice

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

³⁰ *S. Camden*, 274 F.3d at 779 (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).

³¹ *Id.* at 790.

³² *Id.* (citing *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997)).

³³ OUR BACKYARD, *supra* note 13, at 8. The GAO report was commissioned by two congressmen, one of whom was arrested for participating in the Warren County protests. *Id.* United Church of Christ, whose members played a major role in organizing the Warren County protests, commissioned a study that further supported a finding of environmental injustice by the GAO report. *Id.*

³⁴ Many government offices now have environmental justice policies, strategies, or guidance documents. *EJ IWG Compendium*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/interagency/iwg-compendium.html> (last visited Nov. 28, 2010). In addressing environmental justice issues, a department may establish its own strategies, or it may collaborate with other departments and agencies through the Federal Interagency Working Group on Environmental Justice (EJ IWG). *Id.* Executive Order 12,898 created the EJ IWG, with the purpose to improve federal environmental justice efforts by coordinating policies of fifteen federal agencies and numerous other White House offices. *Federal Interagency Working Group on Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/interagency/iwg-compendium.html> (last visited Jan. 15, 2011).

³⁵ *Basic Information: Background*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/environmentaljustice/basics/ejbackground.html> (last visited Nov. 16, 2010).

manifested itself primarily through disproportionate siting of polluting facilities and hazardous waste facilities in minority communities.³⁶ As a result, the EPA also concluded that environmental justice needed to be a priority for the agency.³⁷

At the same time that Congress was deliberating the Environmental Justice Act, the EPA independently started to create procedures for addressing the causes of environmental injustice. Following through on the recommendations of the Environmental Equity Workgroup, the EPA created the Office of Environmental Justice in 1992.³⁸ In 1993, the EPA declared environmental justice to be a guiding principle of its strategic plan to reduce the disproportionately high amount of pollution and hazardous waste facilities in minority communities.³⁹ In 1994, President Clinton issued Executive Order 12,898, which was “designed to focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice.”⁴⁰ Executive Order 12,898 affirmed the work being done by agencies such as the EPA to promote environmental justice despite the frustrations experienced in the legislative and judicial branches of government. Executive Order 12,898 requires the EPA and its regional offices to consider environmental justice issues in all of its permitting decisions.⁴¹ Therefore, as a result of Executive Order 12,898, the EPA continually updates its strategic plan for environmental justice. However, neither the strategic plan nor the President’s Executive Order creates any binding requirements for the agencies to implement or enforce environmental justice policies. Furthermore, an evaluation in 2006 by the Office of the General Inspector of the EPA confirmed that EPA programs and regional offices failed to conduct environmental justice reviews required by Executive Order 12,898 in order to

³⁶ U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 26 (1992), available at <http://www.epa.gov/compliance/environmentaljustice/resources/reports/annual-project-reports.html>.

³⁷ *Id.*

³⁸ *Basic Information: Background, supra* note 35. Originally the Office of Environmental Equity, created in 1992, the name was changed to its present form in 1994. *Id.* The Office of Environmental Justice coordinates and oversees all of EPA’s environmental justice policies, as well as managing EPA’s financial resources to ensure that it can achieve the EPA’s objectives. *Id.*

³⁹ A strategic plan explains the EPA’s strategic goals to advance its environmental and human-health mission. U.S. ENVTL. PROT. AGENCY, FY 2011-2015: EPA STRATEGIC PLAN 1 (2010). The current strategic plan identifies working towards environmental justice as one of the EPA’s “Cross-Cutting Fundamental Strategies” that will change the way in which EPA approaches its work. *Id.*

⁴⁰ Memorandum on Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 1 PUB. PAPERS 241 (Feb. 11, 1994). The Executive Order provided that each federal agency must develop environmental justice strategies in order to provide a framework for analyzing the disparate impact of environmental hazards from their programs, policies, and activities. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). The Executive Order also created the Interagency Working group to work on collaborative projects and coordinate efforts by government agencies and other White House offices. *Id.*

⁴¹ Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617, 650 (1999).

“identify and address disproportionately high and adverse health or environmental effects on minority and low-income populations.”⁴²

Recently, however, the EPA Administrator, Lisa Jackson, refocused the agency on incorporating environmental justice objectives into its projects through two new initiatives. First, the EPA introduced “Plan EJ 2014,” a comprehensive strategy to be used as a roadmap for integrating environmental justice into all of EPA’s programs.⁴³ The Administrator intends for Plan EJ 2014 to protect overburdened communities from further harm and empower those communities to actively improve their health and environment by establishing partnerships with government organizations.⁴⁴ Second, the EPA is in the process of revising its guidelines for considering environmental justice during the rulemaking process.⁴⁵ These internal guidelines help EPA staff to determine whether a permitting decision raises environmental justice concerns and how to address those issues.⁴⁶ In spite of the positive reactions to Plan EJ 2014 and the EPA’s new guidelines, these initiatives are reminiscent of earlier “strategies” and “objectives” that do not have the force of law and are not binding on agency actions.⁴⁷

Therefore, although the federal executive branch has not ignored the issue of environmental justice, neither has it provided remedies for victims of environmental injustice. Instead of promulgating agency regulations providing environmental justice plaintiffs with causes of action under environmental laws, the EPA merely requires “consideration” of environmental justice issues.⁴⁸ Therefore, within the framework of the federal government, environmental justice plaintiffs have very limited avenues for recovery.

B. *Environmental Justice at the State Level*

Federal environmental laws do not only give federal agencies regulatory authority over environmental issues, but they also delegate certain decision-making

⁴² OFFICE OF INSPECTOR GEN., REPORT NO. 2006-P-00034, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES 3 (September 18, 2006), available at www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf.

⁴³ *Plan EJ 2014*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/environmentaljustice/resources/policy/plan-ej-2014.html> (last visited Nov. 17, 2010).

⁴⁴ *Id.*

⁴⁵ U.S. ENVTL. PROT. AGENCY, EPA’S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION i (2010), available at <http://www.epa.gov/compliance/environmentaljustice/resources/policy/ej-rulemaking.html>.

⁴⁶ *Id.* at ii.

⁴⁷ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law.”).

⁴⁸ *Lazarus & Tai*, *supra* note 41, at 651. Although Executive Order 12,898 requires the EPA and its regional offices to consider environmental justice issues, a guidance document from EPA Region V explicitly states that “[t]he appropriate response to a finding of disproportionate effect will rarely be permit denial; and this should be clearly explained to the public.” *Id.* at 652.

powers to state administrative agencies.⁴⁹ The authority to grant permits for new polluting facilities is one aspect of environmental regulation that federal environmental statutes have delegated to the states.⁵⁰ However, because there is no federal environmental justice statute requiring or setting standards for environmental justice concerns, any environmental justice regulations by state agencies must be instituted at the discretion of the state legislature. States have different approaches to environmental justice, and some proactive legislatures have developed environmental justice strategies.⁵¹

Ohio, like many other states, has assumed permitting authority under several different environmental laws. For example, the state legislature delegated to the Ohio Environmental Protection Agency (“Ohio EPA”) permitting authority under the federal Clean Air Act,⁵² Clean Water Act,⁵³ and the Resource Conservation and Recovery Act (“RCRA”).⁵⁴ And, to the extent that any federal statutes implement environmental justice policies, the Ohio EPA has the authority to consider those issues in the permitting process. For example, the director of Ohio EPA may rescind or amend any solid waste facility permits that “create a nuisance” or “create a health hazard.”⁵⁵ However, because federal environmental laws do not require consideration of environmental justice issues, the state agencies, like the Ohio EPA, that obtain environmental regulatory power are likewise not required to consider environmental justice issues.

Much like the federal EPA, the state administrative agencies have discretion over whether to initiate environmental justice regulations. In spite of their ability to enact formal environmental justice policies and regulations, however, most states decline the opportunity to do so, limiting their initiatives to strategies that rarely result in

⁴⁹ State agencies, like other administrative agencies at the federal level, are created by statute and obtain delegated power from enabling legislation. Gregory C. Ward, *Lussier v. Maryland Racing Commission: Maryland’s Court of Appeals Upholds a Fine Imposed by an Administrative Agency Despite a Lack of Specific Authorization to Fine From the General Assembly*, 27 U. BALT. L. REV. 515, 516 (1998).

⁵⁰ *Panel Tells U.S. EPA to Make Environmental Justice a Larger Concern*, 13 BUS. & THE ENV’T 15 (2002). For example, in 2000, state and local environmental agencies issued 99% of all air permits, 96% of all wastewater discharge permits, and 98% of all waste permits. *Id.* The trend of states taking over permitting regulations, therefore, shows that the states have a strong interest in regulating environmental issues. However, the states have traditionally been less concerned with promoting civil rights as with protecting the environment. Yang, *supra* note 6, at 28. This “schizophrenic” tension in state authority presents another shortcoming of the existing approach to environmental justice regulations, which relies exclusively on borrowing from environmental and civil rights law. *Id.*

⁵¹ Clifford Rechtschaffen, *Strategies for Implementing the Environmental Justice Vision*, 1 GOLDEN GATE U. ENVTL. L.J. 321, 321-22 (2007).

⁵² OHIO REV. CODE ANN. § 3704.03 (West 2010).

⁵³ OHIO REV. CODE ANN. § 6111.021(A) (West 2010); *see also* OHIO REV. CODE ANN. § 6111.01(L) (West 2010) (defining the Federal Water Pollution Control Act to mean the act as amended by the Clean Water Act).

⁵⁴ OHIO REV. CODE ANN. § 3734.02(E)(3)(b) (West 2010).

⁵⁵ OHIO REV. CODE ANN. § 3734.02 (West 2010).

formal or legally enforceable regulations.⁵⁶ Therefore, victims of environmental injustice are left without a cause of action under both federal and state laws.

C. *Environmental Justice at the Local Level*

Although municipalities and local governments have more limited power than state or federal governments, they often act as laboratories of experimentation for new laws and regulations.⁵⁷ Due to the lack of available remedies and enforcement mechanisms for environmental justice at the federal and state levels, environmental justice advocates typically have fought for environmental justice regulations through nonprofit advocacy organizations. But one of the most recent examples of environmental justice advocacy, the Environmental Justice ordinance⁵⁸ passed by the City of Cincinnati in 2009, diverges from traditional environmental justice advocacy and represents an innovation of environmental justice regulations using municipal police power to regulate and enforce environmental justice principles.⁵⁹

⁵⁶ Rechtschaffen, *supra* note 51, at 322. The California legislature, known for being progressive and environmentally friendly, has passed environmental justice statutes and an environmental justice strategy. *Id.* However, even the California Environmental Protection Agency “has yet to adopt any substantive environmental justice regulations.” *Id.*

⁵⁷ Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 246 (2000) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Justice Brandeis noted the important role of small governments within the federal system as laboratories for experimentation, explaining:

Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Liebmann, 285 U.S. at 310-11.

⁵⁸ CINCINNATI, OH., CODE OF ORDINANCES § 1041 (2002) (effective Feb. 1, 2011).

⁵⁹ *See generally* OHIO CONST. art. XVIII, § 3 (granting a municipal corporation the ability to use its police power to protect the health, safety, morals or general welfare of the public); *City of Cincinnati v. Correll*, 49 N.E.2d 412, 414 (Ohio 1943). A related issue, but outside the scope of this article, is whether the Ordinance, as a municipal ordinance, would be preempted by state or federal law. As a brief introduction to the topic, in Ohio, municipal laws enacted under the police power must not “conflict with general laws.” OHIO CONST. art. XVIII, § 3. General laws are ones that operate “uniformly throughout the state . . . which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions.” *Village of Sheffield v. Rowland*, 716 N.E.2d 1121, 1123 (Ohio 1999) (quoting *Garcia v. Siffrin Residential Ass’n*, 407 N.E.2d 1369 (1980)). To determine whether a municipal ordinance conflicts with a general law of the state, the courts will ask “whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Id.* (quoting *Struthers v. Sokol*, 140 N.E. 519 (Ohio 1923)). Therefore, an analysis of state preemption of the Ordinance would require determining whether state environmental permitting laws are general laws of the state, and then whether the Ordinance, which adds additional permitting requirements, is in conflict.

The Ordinance, the first of its kind in the nation, has created a new model for environmental justice regulation.⁶⁰ Numerous reports and studies indicated the poor air quality and high pollution levels in the Cincinnati area,⁶¹ and still more studies indicated the adverse health effects of such pollutants on the general public.⁶² Therefore, under the authority of the police power to “protect[] the citizenry from material, cumulative adverse impacts on health or the environment,” the City Council of the City of Cincinnati enacted the Environmental Justice ordinance (“the Ordinance”) on June 24, 2009.⁶³

The City Council based the Ordinance on the basic environmental justice principle of providing the fair treatment and meaningful involvement to all people under environmental laws,⁶⁴ and added the goals of eliminating the adverse health effects caused by air contaminants and removing the threat of serious or permanent harm from local industrial accidents.⁶⁵ Implementing these goals, the Ordinance requires any “proposed project” to obtain an environmental justice permit in order to operate within the city.⁶⁶ A proposed project must submit information regarding the type of facility and the activities that will be conducted there, as well as a detailed risk analysis of the impact on the community within a one-mile radius of the proposed project.⁶⁷ An appointed city official (the Examiner) must then review the

Federal preemption, on the other hand, can occur either by express preemption or field preemption. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634 (1973). In the case of field preemption, the Supreme Court will assume that the States’ historic police powers are not superseded by a federal law unless “that was the clear and manifest purpose of Congress.” *Id.* Therefore, to determine whether a conflict between local or federal law exists, the court must consider congressional intent.

⁶⁰ Crowley, *supra* note 9.

⁶¹ CINCINNATI, OH., CODE OF ORDINANCES § 1041 (2002) (effective Feb. 1, 2011). The City Council’s resolution passing the Ordinance cited the American Lung Association’s 2009 “State of the Air” Report listing Cincinnati as the eighth worst for particulate pollution and the fifteenth worst for ozone pollution among metropolitan areas in the nation. *Cincinnati Environmental Justice*, CINCINNATI OFF. OF ENVTL. QUALITY <http://www.cincinnati-oh.gov/cmgr/pages/-17684-/> (last visited Nov. 28, 2009).

⁶² *Cincinnati Environmental Justice*, *supra* note 61. The Hamilton County Department of Environmental Services (HCDOES) collected data showing residents in the Cincinnati area faced cancer risks of more than ten in one million. *Id.* The cancer risk in Cincinnati greatly exceeds the federal standard of one in one million adopted by multiple federal agencies, including the EPA. *Id.* The HCDOES study is supported by the EPA’s National Air Toxics Assessment Report, which concluded that the pollution levels in the Cincinnati air yielded cancer risks ranging from 30 in one million to 180 in one million. *Id.*

⁶³ *Id.* at 18.

⁶⁴ CINCINNATI, OH., CODE OF ORDINANCES § 1041-3 (2002) (effective Feb. 1, 2011).

⁶⁵ *Cincinnati Environmental Justice*, *supra* note 61, at 4-5.

⁶⁶ CINCINNATI, OH., CODE OF ORDINANCES § 1041-5-F (2002) (effective Feb. 1, 2011). A proposed project is any activity for which a permit must be obtained from either the Ohio EPA or federal EPA under numerous other environmental laws. CINCINNATI OH., CODE OF ORDINANCES § 1041-5-L (2002) (effective Feb. 1, 2011).

⁶⁷ CINCINNATI, OH., CODE OF ORDINANCES § 1041-5-B (2002) (effective Feb. 1, 2011).

information and grant a proposed project an environmental justice permit if it will not have a “material, cumulative adverse impact” on human health or the environment in the community.⁶⁸ Therefore, this ordinance provides, for the first time, the legal authority for a permit to be denied solely for environmental justice reasons.

Many nonprofit and local organizations in the Cincinnati area supported enacting the Ordinance.⁶⁹ However, the city council faced—and continues to struggle against—opposition from local businesses and industry leaders.⁷⁰ Specifically, the Cincinnati Regional Chamber of Commerce objected to the Ordinance because it would impede economic development in the city and asserted the City could not afford the costs associated with the new administrative procedures.⁷¹ Although the City Council overcame the objections from the Chamber of Commerce and other industrial leaders and passed the Ordinance, implementation of the ordinance had to be delayed for lack of funding in the budget. The new effective date of the Ordinance, February 1, 2011, remains contingent upon available funding in the city’s budget.⁷²

Within the context of environmental justice policies at the federal, state, and local levels, the Ordinance presents a new and revolutionary system for addressing, enforcing, and ensuring the goals of environmental justice by conditioning permits solely on environmental justice factors.⁷³ However, as a municipal ordinance, the reality of the financial constraints of a city and the strong opposition from political and economic leaders may completely bar implementation. Therefore, a subsequent

⁶⁸ CINCINNATI, OH., CODE OF ORDINANCES § 1041-7 (2002) (effective Feb. 1, 2011). A “Proposed Project will have a ‘material, cumulative adverse impact’ on the health or the environment of the community” when the operation would cause a public nuisance. *Id.* For the purpose of the Cincinnati Ordinance, the Examiner can find a public nuisance if there is a reasonable basis to determine that the proposed project will, “1) cause an excess cancer risk; 2) cause an excess risk of acute health effects; 3) cause an excess risk in the event of an accident; or 4) constitute an Air Pollution Nuisance as defined in OAC 3745-15-07.” *Id.*

⁶⁹ E-mail from Rocky Merz, Pub. Info. Officer, Cincinnati Health Dep’t, to David Crowley, Vice Mayor of the City of Cincinnati (May 27, 2009, 11:46 EST) (on file with author); E-mail from Fariba Nourian, Citizen of Cincinnati, to Cincinnati City Council (May 27, 2009, 10:30 EST) (on file with author); Letter from Tony Stieritz, Dir., Catholic Soc. Action, to David Crowley, Vice Mayor of the City of Cincinnati (May 26, 2009) (on file with author).

⁷⁰ Letter from Ellen G. van der Horst, President and CEO, Cincinnati USA Regional Chamber, to Mark L. Mallory, Mayor of the City of Cincinnati (June 16, 2009) (on file with author). The Cincinnati USA Regional Chamber so strongly opposed the Ordinance that it created an Environmental Justice Taskforce to conduct studies regarding the financial impact and the economic burdens the regulations would cause. *Id.*

⁷¹ Memorandum from Milton Dohoney, Jr., Cincinnati City Manager, to the Economic Development Committee (Sept. 9, 2009) (on file with author).

⁷² Brian M. Babb, *Update on Cincinnati Environmental Justice Ordinance*, KEATING MUETHING & KLEKAMP PLL (Dec. 18, 2009), <http://www.kmklaw.com/news-publications-136.html> (last visited Nov. 27, 2010).

⁷³ Environmental justice considerations include fair treatment under environmental laws and freedom from disproportionately high and adverse health of environmental effects. CINCINNATI, OH., CODE OF ORDINANCES § 1041-1 (2010) (effective Feb. 1, 2011).

analysis of the effectiveness with which the Ordinance will achieve the goals of environmental justice, followed by an analysis of the advantages and disadvantages of environmental regulations at different levels of government within the federal system, will provide how the provisions of the Ordinance can be most effectively and efficiently implemented.

III. REGULATING AND ENFORCING ENVIRONMENTAL JUSTICE THROUGH THE STATES

The main goal of environmental justice is to provide equitable enforcement of environmental statutes and to implement procedures to ensure the fair distribution of the burdens of pollution among all people.⁷⁴ However, as the above overview of the government's handling of environmental justice issues shows, the Supreme Court's strict judicial standards, lax administrative agency guidelines, and strategies fail to enforce, ensure, and implement procedures necessary to achieving environmental justice. The Ordinance represents a new form of environmental justice policy that presents a cause of action and remedy to environmental justice plaintiffs. Additionally, the Ordinance provisions address the goals of environmental justice and ensure enforcement of environmental justice regulations through a formal and legally enforceable regulation. However, a variety of practical, legal, and policy issues prevent the Ordinance from providing an efficient means for implementing environmental justice regulations. Nonetheless, if adopted at the state level by administrative agencies, the Ordinance serves as an effective model for future environmental justice regulations.

A. *The Cincinnati Ordinance as Model for Environmental Justice Regulations*

A true environmental justice policy must address the goals of the environmental justice movement—to equitably enforce environmental statutes and implement procedures to ensure environmental justice results.⁷⁵ Numerous commentators, advocates, and critics have analyzed and written about the necessary components of an effective environmental justice policy,⁷⁶ but a comprehensive study conducted by the National Academy of Public Administration (“the Academy”) identified that the primary reason government agencies fail to achieve environmental justice is because

⁷⁴ Mank, *supra* note 15, at 425 n.1.

⁷⁵ See *Environmental Justice*, *supra* note 3 (the goals of the environmental justice movement are based on the EPA's definition of environmental justice). The proposed Environmental Justice Acts in the early 1990s provide an example of an environmental justice policy that some commentators believe would have failed to achieve the movement's goals. Hasler, *supra* note 17, at 445. Specifically, critics claimed that both statutes failed to provide equitable protection from environmental injustice, did not ensure the immediate response of government enforcement, and did not include provisions for meaningful redress. *Id.* Whereas the Ordinance provides immediate redress by using a nuisance standard, the Environmental Justice Acts would not have taken effect until at least three years after enactment, in order to give the EPA and the Department of Health and Human Services time to conduct research and collect data. *Id.* at 453. The proposed acts also would not have achieved equality because they only provided protection for the one hundred counties with the highest total weight of toxic chemicals. *Id.* at 447. Finally, although the proposed acts would have implemented moratoria on building new polluting facilities, they did not create a cause of action to provide recourse for other environmental justice situations. *Id.* at 458.

⁷⁶ See generally Hasler, *supra* note 17; Yang, *supra* note 6; Rechtschaffen, *supra* note 51; Mank, *supra* note 15.

their policies do not include measures that keep the agencies accountable for their actions.⁷⁷

By isolating government accountability as the most important aspect of an environmental justice policy, the Academy concluded that government or agency regulations will not be effective unless they incorporate gathering data, providing opportunities for meaningful public participation, and other administrative procedures to ensure equitable enforcement into their provisions.⁷⁸ Each of these three additional components will enable a government agency to internally track its progress towards achieving environmental justice. Furthermore, these factors will also increase government transparency, and the public will be able to hold the governmental entity or agency accountable for any shortcomings towards achieving its environmental justice goals.⁷⁹ The Ordinance, unlike other government policies, addresses each of these factors and stands as an effective model for future environmental justice regulations.

1. Gathering Data

Gathering data regarding local pollution rates and their impact on human health and making such information publically available increases an agency's accountability by providing it with the information to assess the accuracy and effectiveness of its environmental justice policies.⁸⁰ The Ordinance requires the collection of data in several ways. First, each permit application must include a list of substances to be emitted or stored by the facility and an accident risk analysis.⁸¹ Also, the Examiner may consider various sources of data relating to pollution burdens, disease rates, increases in emissions, cancer risks, and the general health, safety, and welfare of the community in which the proposed project is going to be located.⁸² All the information collected must be made available to the public for review,⁸³ thereby providing the city with data to assess the effectiveness of its policies. Furthermore, the Ordinance requires the city to publish bi-annual city-wide

⁷⁷ NAT'L ACAD. OF PUB. ADMIN., ENVIRONMENTAL JUSTICE IN EPA PERMITTING: REDUCING POLLUTION IN HIGH-RISK COMMUNITIES IS INTEGRAL TO THE AGENCY'S MISSION (2001) (hereinafter "ENVIRONMENTAL JUSTICE IN EPA PERMITTING"); NAT'L ACAD. OF PUB. ADMIN., MODELS FOR CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE 11 (2002) (hereinafter "MODELS FOR CHANGE"); see also Ann E. Goode & Suellen Keiner, *Managing for Results to Enhance Government Accountability and Achieve Environmental Justice*, 21 PACE ENVTL. L. REV. 289, 308 (2004).

⁷⁸ Goode & Keiner, *supra* note 77, at 294.

⁷⁹ *Id.*

⁸⁰ *Id.* at 302-03.

⁸¹ CINCINNATI, OH., CODE OF ORDINANCES § 1041-5-A (2002) (effective Feb. 1, 2011). But note that this does not require disclosures of the amounts of substances to be stored, or projected amounts of emissions, which would provide more detailed data with which to calculate the impact that a proposed project would have on the surrounding community.

⁸² CINCINNATI, OH., CODE OF ORDINANCES § 1041-9 (2002) (effective Feb. 1, 2011).

⁸³ CINCINNATI, OH., CODE OF ORDINANCES § 1041-13 (2002) (effective Feb. 1, 2011).

pollution reports⁸⁴ that will ensure the city does, in fact, assess the effectiveness of its policies.

2. Providing Meaningful Public Participation

Complete and prompt public notification of permitting actions facilitates accountability by building a relationship of trust with the public and empowering the public to identify environmental justice issues.⁸⁵ However, the Academy concluded that only providing legal notices or making information available at a government office fails to yield meaningful public participation.⁸⁶ Rather, “culturally competent outreach, including language translation and explanation of scientific and technical issues, meetings . . . [and] longer comment periods,” has greater success of generating meaningful public participation.⁸⁷

The Ordinance provides measures for prompt public notification of permitting activities, but it should be modified to provide more complete notification. The Ordinance requires the Office of Environmental Quality to send written notice within ten days of the application being completed and requires the City to make the application information available to the general public within ten days following the written notice being sent.⁸⁸ Although the Ordinance provides prompt written notification,⁸⁹ the public would have more complete access to the information if the Ordinance included opportunities for open discussion in public meetings, or provided assistance interpreting the data. Adding those measures to the existing public notice provision in the Ordinance would increase public participation and increase the City’s accountability to a well-informed public.⁹⁰

3. Ensuring Equitable Enforcement

Relying on methods similar to data collection and public participation, the Academy found that agencies and governments can improve and ensure equitable enforcement by taking advantage of the local community’s knowledge of the facilities and concerns, implementing enforcement actions that include monetary

⁸⁴ CINCINNATI, OH., CODE OF ORDINANCES § 1041-21 (2010) (effective Feb. 1, 2011). In making the application information available to the public, the Ordinance applies some of the Academy’s recommendations for improving public access to pollution information. Specifically, the Academy recommends using the Internet and other low-cost or no-cost media outlets to disseminate information regarding permitting actions. Goode & Keiner, *supra* note 77, at 304. The Cincinnati Ordinance incorporates this suggestion by requiring public notice through the City’s website “of all projects that are subject to the provisions of [the Ordinance].” CINCINNATI OH., CODE OF ORDINANCES § 1041-13 (2010) (effective Feb. 1, 2011).

⁸⁵ ENVIRONMENTAL JUSTICE IN EPA PERMITTING, *supra* note 77, at 73.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ CINCINNATI, OH., CODE OF ORDINANCES § 1041-13 (2010) (effective Feb. 1, 2011).

⁸⁹ *Id.*

⁹⁰ The Ordinance allows the Office of Environmental Quality to develop additional administrative policies and procedures not already contained within the Ordinance. CINCINNATI, OH., CODE OF ORDINANCES § 1041-25 (2010) (effective Feb. 1, 2011).

penalties, and evaluating the results of such enforcement measures.⁹¹ The Academy recommends using proactive methods of community outreach, similar to those recommended for facilitating meaningful public participation, to access community knowledge and build a relationship with the affected community.⁹² The Ordinance provides both civil and criminal enforcement procedures with monetary penalties,⁹³ but its public participation and data collection provisions do not require community outreach and therefore restricts access to community knowledge that would help the Examiner make permitting decisions. However, by revising the public notice provisions of the Ordinance to include procedures for community outreach, rather than merely notification, it will better ensure equitable enforcement of its provisions.

*B. Centralization-Decentralization Debate Applied to Environmental Justice Regulations*⁹⁴

Considering the minimal alterations and improvements suggested above, the Ordinance provides effective and mandatory environmental regulations to ensure the enforcement of environmental justice policies. However, an analysis of the Ordinance and its development within the centralization-decentralization debate of environmental regulations shows that the Ordinance will be more effective if incorporated into state administrative agency regulations, rather than as a municipal ordinance.

1. The Centralization-Decentralization Debate

Within the field of environmental law, federal statutes and federal agency regulations govern the majority of environmental regulations.⁹⁵ Although the

⁹¹ Goode & Keiner, *supra* note 77, at 307; MODELS FOR CHANGE, *supra* note 77, at 11.

⁹² MODELS FOR CHANGE, *supra* note 77, at 12.

⁹³ CINCINNATI, OH., CODE OF ORDINANCES § 1041-27 (2010) (effective Feb. 1, 2011). A civil compliance order will be issued on the basis of any information that indicates a person violated the Ordinance. *Id.* The order may include revocation of a permit, and may include a fine not in excess of \$15,000. *Id.* Similarly, if the violator does not comply with the terms of the order, the Director of the Office of Environmental Quality may revoke the permit and issue a fine not in excess of \$15,000 for each day of noncompliance. *Id.* Additionally, any knowing violation, omission, or material misrepresentation is a misdemeanor in the first degree and subject to a fine. *Id.*

⁹⁴ See generally Weiland, *supra* note 57. “The . . . centralization/decentralization debate influences the many doctrines that compose intergovernmental relations in the United States,” such as preemption and just environmental law. *Id.* at 249. The debate has also been applied to land use regulations under a theory entitled the “quiet revolution.” See generally Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231 (2008). The quiet revolution argues, “[the] states should take back their police power to regulate extralocal issues in a manner that maintained . . . the existing land use system and the respect for local autonomy.” *Id.* at 231-32. Environmental justice is closely related to both fields of environmental law and land use regulation. Based on those similarities and the factor of intergovernmental relations implicit in any regulatory scheme within a federalist system of government, this Note applies the centralization-decentralization debate to the discussion of the Ordinance and the environmental justice movement.

⁹⁵ ENVIRONMENTAL FEDERALISM 259 (Terry L. Anderson & Peter J. Hill eds., 1997).

environmental justice movement is closely related to the environmental regulations and policies, it does not follow that environmental justice policies should likewise be centralized through a national statute and federal agency control. During the development of environmental regulations in the 1970s, lawmakers and politicians analogized social and political movements as wars—such as the war on poverty—to describe the widespread need for reform in areas such as poverty and the environment.⁹⁶ Therefore, widespread concern for the environment during this time motivated the federal lawmakers to use the full scope of their regulatory authority to reverse the trend of environmental degradation.⁹⁷

Aside from the historical and political rationales for national environmental regulations, national control of environmental regulations was and still is justified by two main practical considerations. First, the federal government caused many of the large-scale and panic-inducing environmental problems—such as nuclear power plants, dams, and overgrazing of federal lands—through federal programs.⁹⁸ As such, it is within the federal government’s scope of authority and its responsibility to change environmental policies.⁹⁹ Second, federal environmental regulations are justified because environmental problems are inherently interstate—pollution will inevitably cross state lines into and out of numerous jurisdictions.¹⁰⁰ However, the actions that cause pollution and environmental problems originate on a local level and vary depending on local conditions.¹⁰¹ Therefore, there is also an argument to be made that environmental problems are inherently local, and can be more efficiently regulated at the local level of government.¹⁰²

Developing environmental justice regulations involves similar considerations of nationally centralized or locally decentralized regulations. Just like environmental issues, environmental justice issues vary widely depending on the local natural, social, political, cultural, economic conditions. Requiring such specific problems to be handled by through a cumbersome federal bureaucratic chain of command would limit the government’s ability to respond quickly in order to protect residents from environmental hazards and preserve their quality of life.¹⁰³ Furthermore, the federal

⁹⁶ *Id.* at 260. The greater political context of the 1970s, including great unrest over the Vietnam War, encouraged lawmakers to analogize social movements to wars and to use the full scope of federal power to fix domestic problems. *Id.* By analogizing domestic environmental problems to military conflicts, lawmakers could introduce sweeping national policies and “boast that they had won the fight before it began.” *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* A popular mantra in the 1970s described the interstate nature of the environment and pollution as, “[e]verything is connected to everything else.” *Id.*

¹⁰¹ *Id.* at 263.

¹⁰² *Id.* at 259.

¹⁰³ *Id.* at 263. The complex bureaucratic chain of command refers not only to people and agencies involved, but also the hierarchy of different written regulations. *Id.* For example, resolving any single environmental issue requires looking at the EPA regulations, any agency guidance documents that interpret the relevant regulation, and then any additionally applicable state plans, policies, strategies, or regulations. *Id.*

“command and control regulatory strategy”¹⁰⁴ imposes controls on localities in spite of local wishes, squanders resources, and cannot adequately account for wide disparities in local conditions.¹⁰⁵ However, state or local governments have a more limited jurisdiction, and would be able to “assess particular problems as they arise and decide what should be done, just as sensible human beings handle issues that arise in their lives.”¹⁰⁶ Nonetheless, extreme local control of environmental justice issues at the municipal level has its shortcomings too, which relate primarily to the inefficiencies that would arise from having a wide variety of environmental justice policies within a very small geographic area. Each argument in favor of centralized environmental regulations represents a disadvantage of decentralized regulations, and vice versa. But, as the following comparison of arguments for both centralized and decentralized environmental regulations shows, the advantages of both can be amplified while the disadvantages can be mitigated by implementing regulations at the state level.

2. Centralization

Centralizing environmental regulations at the national level has numerous advantages. The primary arguments in favor of centralizing environmental regulations in the federal government are that it: (1) overcomes problems associated with negative externalities; (2) results in a predictable and uniform regulatory environment; (3) provides consideration for varied interests through the political process; (4) overcomes lack of capacity experienced at lower levels of governments, and (5) it furthers environmental regulations as a national moral imperative.¹⁰⁷

First, centralizing environmental justice regulations minimizes negative externalities suffered by a local government when pollution crosses into and out of neighboring jurisdictions.¹⁰⁸ Negative externalities occur when one agent’s actions impose costs on others, such as when pollution from one city travels to another.¹⁰⁹ As a municipal ordinance, the Ordinance ensures that proposed projects within Cincinnati will not contribute to disproportionately high pollution levels within its boundaries, but it cannot control the negative externalities caused by pollution or permitting decisions in neighboring cities. These negative externalities undermine the purpose of the Ordinance “to provide Environmental Justice to all citizens of Cincinnati.”¹¹⁰ Implementing the Ordinance at a higher level of government will internalize the problem of negative externalities by enforcing environmental justice regulations across municipal jurisdictional boundaries.

Secondly, centralized environmental justice regulations will also provide the benefits of a uniform regulatory environment.¹¹¹ Uniform regulations help achieve

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Weiland, *supra* note 57, at 238-44.

¹⁰⁸ *Id.* at 239.

¹⁰⁹ *Id.*

¹¹⁰ CINCINNATI, OH., CODE OF ORDINANCES § 1041-3 (2002) (effective July 24, 2009).

¹¹¹ Weiland, *supra* note 57, at 241-42.

environmental justice by establishing a baseline for fair treatment and meaningful participation in local permitting decisions while allowing industries to operate within a predictable regulatory structure.¹¹² Uniformity and predictability results in lower costs for businesses, an issue that is especially relevant in low-income environmental justice communities. In Cincinnati, industries in the Chamber expressed concern that the costs of complying with the Ordinance would deter economic development within the City.¹¹³ Any amount of regulation will increase business costs and burden taxpayers, and the administrative procedures in the Ordinance and regulatory are no exception.¹¹⁴ However, imposing the same permitting requirements on businesses throughout the state or country will prevent an individual city from losing businesses to neighboring municipalities because of stricter permit requirements and allow a greater number of taxpayers to share the financial burden.

Thirdly, although centralized regulations result in uniform regulations, those uniform regulations represent a greater variation of interests through the political process.¹¹⁵ Whereas powerful interests can influence and even dominate local politics, the influence of special interests is diluted at the state and federal levels of government.¹¹⁶ At a higher level of government, small environmental justice

¹¹² *Id.* at 242-43.

¹¹³ Letter from Ellen G. van der Horst, *supra* note 70. Specifically, one Cincinnati chemical corporation noted that “the Ordinance would impede our ability to react to changes in the global specialty chemicals market.” Letter from Gregory E. Pflum, Vice President and CAO, Cognis Corp., to David Crowley, Vice Mayor of the City of Cincinnati (May 13, 2009) (on file with author).

¹¹⁴ Memorandum from Milton Dohoney, Jr., *supra* note 71. The City Council agreed that the Ordinance would have an impact on economic development in the City, but minimized the magnitude of its effects and argued that the increased reputation for sustainability and livability would attract new businesses and residents. *Id.*

¹¹⁵ Weiland, *supra* note 57, at 241.

¹¹⁶ *Id.* The ability for special interests to dominate local politics can be further illustrated by a number of “syndrome behaviors.” OUR BACKYARD, *supra* note 13, at 107. Syndrome behaviors represent common categories of actions “taken when citizens are affected, or think they are going to be affected, by environmental hazards and actions by politicians who are forced to respond to citizens’ concerns.” *Id.* Syndrome behaviors are particularly relevant in environmental justice, because people rely on others—politicians, legislators, and government officials—to offer protection from environmental hazards. *Id.* at 110. Several of the most common syndrome behaviors are: Not In My Backyard (NIMBY); Not In My Term Of Office (NIMTOO); Not In My Election Year (NIMEY); Put It In Their Backyard (PIITBY); and Why In My Back Yard (WIMBY). *Id.* at 111-12. Each syndrome behavior results in response to different situations. For example, NIMBY occurs in politically proactive communities, usually those that are economically affluent, whose residents fight strongly against polluting facilities in their communities. *Id.* at 112. NIMTOO tends to occur in politically active communities when a politician avoids the opposing desires of businesses and residents by delaying passing laws, or refusing to pass laws, while in office. *Id.* at 114. NIMEY, on the other hand, has little to do with the political activity of the community, but more with timing in relation to re-election. *Id.* at 117. With election or re-election on the horizon, many decisions are heavily politicized and “motivated by the [politician’s] desire to survive and advance politically.” *Id.* The PIITBY syndrome response is the most likely to lead to environmental injustice in low-income and minority communities. *Id.* at 118. When politically active and affluent communities make strong NIMBY arguments, politically weak communities are often the chosen location for hazardous or polluting facilities. *Id.* Finally, a WIMBY syndrome

advocates and grassroots organizations can join together and have a greater chance of defeating powerful political and economic interests. Although the Cincinnati City Council was able to overcome opposition from industries, the Ordinance barely survived the four-year long process.

Fourthly, centralized environmental justice regulations will also solve the problem of a city's lack of capacity to fund the environmental justice regulations.¹¹⁷ Estimated to cost \$125,000, the Chamber argued that the City could not afford to implement the regulations in light of a projected budget deficit.¹¹⁸ The Chamber's prediction came true, and the City Council had to formally postpone implementing the Ordinance due to a lack of funding in the City's budget.¹¹⁹ Arguably, increasing the scope of environmental justice regulations at the state or federal level would increase administrative costs. However, it would also increase the tax base and avoid the Chamber's primary concern of deterring business growth because of its stricter permit requirements.

Finally, centralized environmental justice regulations will strengthen the movement by establishing it as a national moral imperative.¹²⁰ Environmental issues used to be perceived as problems that only worried affluent citizens, but there is widespread support for environmental issues.¹²¹ In Cincinnati, numerous community organizations and concerned citizens expressed widespread support for the Ordinance.¹²² As with the environmental and civil rights movements, centralized regulations provided plaintiffs with legal remedies—something still lacking for the environmental justice movement. By providing legal remedies and strengthening environmental justice as a national moral imperative, centralized regulations will help achieve the goals of environmental justice—to ensure equitable enforcement of environmental laws for all people.

response is most common in the low-income and minority communities, which tend to be "more reactive than proactive in their responses to decisions concerning environmental hazards." *Id.* at 119. With the success of environmental justice policies so closely tied to political syndrome responses, it is necessary to dilute the effects of those political whims by centralizing environmental justice regulations.

¹¹⁷ Weiland, *supra* note 57, at 240.

¹¹⁸ Letter from Ellen G. van der Horst, *supra* note 70. The Chamber President further noted:

At a time when the City of Cincinnati faces a projected \$40 million budget deficit, creating a new unfunded mandate detrimental to business growth could only have a negative impact. Without significant business growth, the City's tax revenues will likely decrease and it will become more difficult to reduce the City's projected deficit.

Id.

¹¹⁹ Babb, *supra* note 72. The current effective date, February 1, 2011, remains conditional upon adequate funding within the City budget. *Id.*

¹²⁰ Weiland, *supra* note 57, at 243.

¹²¹ *Id.* at 244. The National Environmental Policy Act (NEPA), and the Reagan Administration's failure to dismantle it, is evidence of generally widespread concern for environmental issues. *Id.*

¹²² *See, supra* note 69.

3. Decentralization

Alternatively, proponents of decentralization argue that local governments are best suited to control environmental law and policy because: 1) environmental problems are place-specific, 2) it encourages responsiveness between government and its citizens, 3) it encourages experimentation and development of innovative policies, 4) it allows for flexibility in handling complex problems, and 5) it encourages inter-jurisdictional competition.¹²³

The main argument in favor of decentralized environmental regulations is that environmental concerns are place-specific, varying based on the climate and topography of the area.¹²⁴ Beyond physical geographic characteristics, environmental justice issues can also vary depending on the cultural, economic, and historical characteristics of the region,¹²⁵ such that uniform centralized regulations are ineffective.¹²⁶ The Ordinance addresses these place-specific issues by providing opportunities for local public participation, where concerned and informed residents can establish the context for the problem.¹²⁷ Furthermore, the Ordinance requires the proposed project's permit application to include risk-analysis data for the surrounding area within a one-mile radius, allowing the Examiner to fully consider the impact of the proposed project given the very specific environmental, social, and economic factors of a given neighborhood or community.¹²⁸ The Ordinance incorporates another tier of place-specific regulations by requiring bi-annual research studies of air quality within the City of Cincinnati.¹²⁹ By basing permitting decisions on individual public concerns, community-level, and city-wide data, the Ordinance allows for its provisions to be adapted to a wide variety of environmental justice issues based on location. Therefore, if expanded to a state-wide regulation, the

¹²³ *Id.* at 244-48.

¹²⁴ *Id.*

¹²⁵ For instance, Cincinnati's environmental justice problems have to do mostly with air pollution from industrial manufacturing. CINCINNATI, OH., CODE OF ORDINANCES § 1041 (2010) (effective Feb 1, 2011). The environmental justice issues in South Camden, New Jersey, concerned issues of air pollution as well. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001). The Warren County protests and Love Canal tragedy illustrate another form of environmental justice issue, dealing primarily with hazardous waste issues. *OUR BACKYARD*, *supra* note 13, at 6; Beck, *supra* note 4. Finally, the history of colonization and land being taken away from indigenous people provides the basis for environmental justice organizations in the American Southwest. *NOVOTNY*, *supra* note 2, at 28-31. These examples do not exhaust the different variations of environmental justice issues. A national environmental justice policy would have to address all of those issues equally, or else fail to adequately achieve environmental justice throughout the country. Such a regulation, however, would almost certainly be overwhelmingly complex to the point of being ineffective.

¹²⁶ Weiland, *supra* note 57, at 244-45.

¹²⁷ CINCINNATI OH., CODE OF ORDINANCES § 1041-13 (2010) (effective Feb. 1, 2011).

¹²⁸ See CINCINNATI OH., CODE OF ORDINANCES § 1041-5-B (2002) (effective Feb. 1, 2011) (defining "community" to mean the area surrounding the Proposed Project encompassing a one-mile radius).

¹²⁹ CINCINNATI OH., CODE OF ORDINANCES § 1041-21 (2010) (effective Feb. 1, 2011).

Ordinance would still incorporate its adaptability to specific situations by basing all permitting decisions on the data collected during the application process and other administrative procedures.¹³⁰

Secondly, decentralized regulations will encourage government responsiveness to problems of environmental justice. Encouraging responsiveness between a local government and its citizens is based on the idea that it encourages the spirit of liberty by bringing the government within the people's reach.¹³¹ Environmental justice is an issue that impacts people's everyday quality of life, and cannot be achieved unless government provides a forum for communication. The Ordinance includes public participation provisions that provide administrative procedures to facilitate communication and responsiveness between government and its citizens.¹³² Public meetings and notification procedures similar to those in the Ordinance are common at the local level, but could also be conducted by a state agency. Therefore, even if extrapolated and expanded to a state agency, the Ordinance will retain the benefit of making a government responsive to its people.

Thirdly, decentralization allows local governments to develop and adopt innovative policies.¹³³ The Ordinance is a new and innovative policy that developed within a municipal "laboratory" of experimentation.¹³⁴ By working on a smaller scale and within a local government, the passion and dedication of a few people can create an entirely new policy and reform an entire area of law.¹³⁵ The Ordinance began as the special project of the vice-mayor of Cincinnati, and his hard work created an entirely new kind of ordinance.¹³⁶ Therefore, providing an innovative solution to the problem of environmental justice, the logical next step for the Ordinance is to integrate it into either state or national agency regulations.

Fourthly, decentralized regulations allow for flexibility.¹³⁷ The idea of flexibility within a local government is contrasted with the stereotypical rigidity of bureaucratic institutions that result from cumbersome chains of command and fixed standard operating procedures.¹³⁸ Environmental justice issues, however, are very complex

¹³⁰ CINCINNATI OH., CODE OF ORDINANCES § 1041-15 (2010) (effective Feb. 1, 2011). As a state-wide ordinance, the permitting decisions would still be based on the risk-analysis data provided in the application, and it would retain a provision for municipalities to periodically update their own data through comprehensive studies. Of course, adapting the Ordinance to the state level would require creating additional administrative positions to collect data, but those decisions could be made by the agency, and would not alter the provisions of the Ordinance.

¹³¹ Weiland, *supra* note 57, at 246.

¹³² CINCINNATI OH., CODE OF ORDINANCES § 1041-13 (2002) (effective Feb. 1, 2011).

¹³³ Weiland, *supra* note 57, at 245.

¹³⁴ *Id.* at 246.

¹³⁵ Crowley, *supra* note 9. The Ordinance was the first of its kind in the country, and exists almost exclusively because of the passion and perseverance of Vice Mayor Crowley. *Id.* He fought for the passage of the Ordinance for four years against strong opposition from the Cincinnati business community. *Id.*

¹³⁶ *Id.*

¹³⁷ Weiland, *supra* note 57, at 245.

¹³⁸ *Id.*

and incorporate a wide range of variations that require flexibility, but the Ordinance contains specific provisions that require regulatory flexibility, rather than simply relying on the flexible character of local government. For instance, the Ordinance allows for flexibility by requiring continual collection of data from each permit application and review of each application.¹³⁹ Additionally, instead of setting uniform minimum or maximum standards, the Ordinance applies a nuisance standard to review permitting decisions.¹⁴⁰ Therefore, because the Ordinance contains specific provisions that require regulatory flexibility, the Ordinance could be adopted and centralized at a state agency without compromising the benefit of decentralized regulations their ability to handle complex environmental justice issues.

The last argument in favor of a local decentralized environmental justice policy is that it will encourage interjurisdictional competition.¹⁴¹ The phenomenon of interjurisdictional competition is predicated on the theory that individuals can vote for government services either through their words or actions.¹⁴² Thus, different communities or jurisdictions would adopt different regulations based on the desires of the people. Although this option could also result in a given jurisdiction having no environmental justice regulations, the case of the Ordinance shows that in a small enough jurisdiction, one person or a small group of people can influence the course of local regulations. Furthermore, interjurisdictional competition combined with the ability of local governments to innovate new regulations would allow the Ordinance, as a model, to be changed and improved to suit each jurisdiction and its needs.

IV. CONCLUSION

The current regime of environmental justice policies and remedies are insufficient to achieve the goals of the environmental justice movement. Throughout the 1990s, the federal government resisted incorporating environmental justice policies into the federal statutes and the common law of the courts. The executive branch and its administrative agencies proved more willing to address environmental justice concerns, but executive orders and agency strategies are only enforced at the discretion of the agency and place no binding requirements on the agencies. Therefore, the primary shortcoming of current environmental justice policies at the federal, state, and local levels is that there is no statutory mandate that requires agencies or municipalities to implement and enforce environmental justice goals. Similarly, agency strategies that lack the force of law leave plaintiffs to pursue environmental justice claims under environmental or civil rights laws, whose strict

¹³⁹ CINCINNATI, OH., CODE OF ORDINANCES § 1041-15 (2010) (effective Feb. 1, 2011).

¹⁴⁰ *Id.* A nuisance determination is based on the review of facts specific to each case, rather than a pre-set and rigid standard operating procedure and the examiner will only issue a permit if he determines that “a Proposed Project will pose a material, cumulative, adverse impact on the health of the environment of a community.” *Id.*

¹⁴¹ Weiland, *supra* note 57, at 247.

¹⁴² *Id.* A “public choice” model of interjurisdictional competition shows that citizens can use their voices to customize the mix of services provided by the government, and can leave a jurisdiction in order to move to a community that has services to suit individual preferences. *Id.* at 247. Although the public choice model yields socially desirable results, it will also give rise to jurisdictions that care little about environmental protection. *Id.* It follows that in such jurisdictions, environmental justice issues would be most severe, yet the local government would be the least responsive.

standards typically bar recovery. To actually achieve environmental justice, the states must adopt regulations that establish mandatory requirements for administrative agencies to follow, and that provide legal remedies for environmental justice plaintiffs.

The Ordinance from Cincinnati presents a new model for environmental justice regulations because it provides a formal legal remedy for environmental justice claims. Furthermore, analyzing the Ordinance within the centralization-decentralization debate shows that the regulation will be most effectively implemented at the state level. Implementing the Ordinance at the state level is ideal because it is neither completely centralized nor decentralized, and can therefore maximize the benefits of each. By passing statutes like the Ordinance, state legislatures can achieve environmental justice by empowering their administrative agencies to regulate the fair treatment of all people under environmental laws.