Public Participation in Environmental Decisions

Make diligent efforts to involve the public . . .
—National Environmental Policy Act (Section 1506.6 [a])

Cindy King, a mother of two, walked to the microphone at a crowded public hearing in Salt Lake City. Utah’s governor and members of the state’s delegation to the United States Congress were seated on the stage in the large auditorium listening to citizens comment on a proposed federal law that would designate areas of Utah’s wild forests and canyon lands as protected wilderness. The law, however, would also leave many wilderness areas unprotected. For this reason, a majority of the citizens speaking at the public hearing criticized the proposed law as too weak. Yet, the officials seemed not to be listening. When she reached the microphone, King said she would stand silently for her allotted time out of respect for the wildlife and living forests that were unable to speak. She added, “Since you are not listening, I will stand in silence to demonstrate the unfairness to those you have not heard.” After three minutes of electrifying silence, the packed auditorium erupted in cheers and foot-stomping in support for the young mother’s silent “statement” (C. King, personal communication, March 29, 2005). Later, lawmakers rejected the flawed wilderness bill when it came to a floor vote in the Senate.
One of the most striking features of the U.S. political landscape during the last 35 years has been the growth in participation by citizens, environmental organizations, business groups, scientists, and community activists in decisions about the environment. Environmental historian Samuel Hays (2000) noted that people have been “enticed, cajoled, educated, and encouraged to become active in learning, voting, and supporting [environmental] legislation and administrative action, as well as to write, call, fax, or e-mail decision makers at every stage of the decision-making process.” Hays explained that all this has been “a major contribution to a fundamental aspect of the American political system—public participation” (p. 194). In fact, such involvement by members of the public and environmental groups often has been the critical element in efforts to protect threatened wildlife habitats, achieve cleaner air and water, and ensure a safer workplace.

Building on the idea of the public sphere, this chapter describes some of the legal guarantees and forums for communication that enable citizens to participate publicly in decisions about the environment. Here, I define public participation as the ability of individual citizens and groups to influence environmental decisions through (1) access to relevant information, (2) public comments to the agency that is responsible for a decision, and (3) the right, through the courts, to hold public agencies and businesses accountable for their environmental decisions and behaviors.

Beyond the First Amendment rights of freedom of speech, press, and peaceable assembly, U.S. laws and court rulings now accord citizens an unprecedented degree of access to information and opportunities to comment upon (and object to) official actions by state and federal environmental agencies. These procedural rights are an attempt to institutionalize the three aspects of public participation by recognizing their underlying principles of (1) transparency, or openness of governmental actions to public scrutiny, (2) direct participation in official decisions, and (3) accountability, the requirement that political authority meet agreed-upon norms and standards. (These tenets are summarized in Table 3.1.)

The first three sections of this chapter identify legal rights that have proved particularly important for citizen communication in environmental decisions: (1) the right to know, (2) the right to comment publicly about proposed projects or rules, and (3) the right of standing to object to a government agency’s actions. Standing is the legal status accorded a citizen who has a sufficient interest in a matter, whereby the citizen may appear in court to protect that interest.

The fourth section describes in greater detail one of the most commonly used modes of public participation, citizen testimony in public hearings, as well as proposals to expand the rights of participation. In the final section, I conclude by describing some of the changes implemented since September 11, 2001, that restrict important aspects of public participation.
A final note on the focus of this chapter: I describe federal law primarily because most states reflect federal standards for public access to information and public participation generally. For example, the EPA delegates to the states the administration of laws regulating clean air and water, and these state programs fall under many of the same requirements for public participation as their federal counterparts. Finally, access to information from local industry about pollution sources is often available to any citizen through federal right-to-know laws.

The Right to Know: Access to Information

There is probably no more firmly held norm of democratic society than the principle of transparency. Simply put, this is openness in government and citizens’ right to know information that is important to their lives. In regard to the environment, the United Nations has declared that the principle of transparency “requires the recognition of the rights of participation and access to information and the right to be informed. . . . Everyone has the right of access

Table 3.1 Modes of Public Participation in Environmental Decisions

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<th>Legal Right</th>
<th>Mode of Participation</th>
<th>Authority</th>
<th>Democratic Principle</th>
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<tr>
<td>Right to Know</td>
<td>Written requests for information; access to documents online, etc.</td>
<td>Freedom of Information Act, Toxic Release Inventory, Clean Water Act, “Sunshine” laws</td>
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<td>Right to Comment</td>
<td>Testimony at public hearings, participation in advisory committees; written comment (letters, e-mail, etc.)</td>
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<td>Right of Standing</td>
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to information on the environment with no obligation to prove a particular interest” (“Declaration of Bizkaia on the Right to the Environment,” 1999, n.p.). Violations of this principle have led to demands to strengthen public right-to-know guarantees. A recent case involving the American meat industry and the Environmental Protection Agency illustrates the type of situation that affects the environment yet sometimes take place out of public view.

On June 11, 2002, representatives of the livestock and poultry industry sent a confidential proposal to EPA officials that would shield large animal factories from U.S. pollution laws. The industry’s proposed Safe Harbor Agreement would exempt many so-called factory farms or concentrated animal feeding operations (CAFOs) from violations of the Clean Air Act and the Superfund law. For a year, closed-door discussions occurred among EPA officials, meat industry representatives, and clean air administrators of many states. However, in May 2003, state officials walked out of the secret negotiations in Washington, D.C., convinced that the industry’s proposal was fatally flawed. At the same time, a copy of the industry’s confidential plan was publicly released by an anonymous source “concerned with the consequences of exempting animal factories from basic environmental protections” (Sierra Club, 2003, para. 1). (You can find more information on this issue at www.sierraclub.org/pressroom/cafo_papers/.)

Using the newly disclosed plan, environmentalist and citizens’ groups mounted public pressure to bring an end to the EPA’s private negotiations with the meat industry. The groups included Environmental Defense; the Center on Race, Poverty, and the Environment; and the Association of Irritated Residents (AIR). They announced that they were objecting to a “sweetheart deal” between EPA and the meat industry, drafted without input from the public, that would allow the industry to evade environmental laws (N. Garrett, personal communication, May 5, 2003). State and local air pollution officials also sent a letter to the EPA administrator, Christine Whitman, expressing “serious concern” over the industry request for a “safe harbor” exempting it from sanctions in the Clean Air Act (Sierra Club, 2003, p. 1). Despite this, the EPA proceeded to issue new regulations that closely mirrored the draft Safe Harbor Agreement negotiated privately with industry (Janofsky, 2005, p. A8).

The disclosure of secret negotiations by a U.S. government agency with an industry it is charged with regulating also illustrates the growing importance of information—and who controls it—in shaping environmental policies. Hays (2000) has noted that political power lies increasingly in an ability to understand the complexities of environmental issues, and “the key to that power is information and the expertise and technologies required to command it.” As a result, Hays said, the most interesting political drama of recent years
has been “the continued struggle between the environmental community and the environmental opposition over the control of information” (p. 232).

Especially in disputes over air pollution or toxic chemical spills, the lack of information and technical expertise can be disempowering for ordinary citizens and other nonspecialists. For example, urban planner Robert Gottlieb (1993) reported that participants in the environmental coalition that pushed for passage of the Clean Air Act in 1970 discovered they were at a disadvantage compared to industry lobbyists. The lobbyists made use of their access to technical knowledge to “amend and otherwise limit the legislation” (p. 133). In contrast, environmental advocates were accustomed to dealing with national parks and the aesthetics of wilderness; but, as Gaylord Nelson, the founder of Earth Day, explained, dealing with complex subjects such as air pollution required a “level of sophistication and expertise that the [environmental] groups had just not acquired” (Gottlieb, 1993, p. 133).

By the late 20th century, however, a move toward transparency in government affairs and greater public access to expertise had begun to reshape the discussion of U.S. environmental policy. New sunshine laws, intended to shine the light of public scrutiny on the workings of government, required open meetings of most government bodies, and several important acts of the U.S. Congress threw open the doors to government records more generally. In environmental affairs, the Clean Water Act of 1972 for the first time required federal agencies to provide information on water pollution to the public. And, as we’ll see below, new requirements under the National Environmental Policy Act to provide environmental impact statements about proposed actions, such as highway construction or the filling of wetlands, proved critically important to groups who monitored government agencies.

Two laws in particular have provided important guarantees of the public’s right to know—that is, their right of access to information about environmental conditions or actions of government that potentially affect the environment. These are the Freedom of Information Act of 1966 and the Emergency Planning and Community Right to Know Act of 1986, which established the Toxic Release Inventory.

The Freedom of Information Act

The move toward greater transparency in government had its roots in an earlier law, the Administrative Procedure Act (APA) of 1946. In the 1940s, in response to charges of agency favoritism and corruption, the APA laid out new operating standards for U.S. government agencies. It required that proposed actions—such as agency regulations to implement a law—be published...
in the Federal Register and that the public be given an opportunity to respond before the action took effect. Nevertheless, there was no accompanying requirement that these agencies make available to the public any records or documents related to their decisions.

As a result of growing public pressure for access to federal documents, Congress passed the Freedom of Information Act (FOIA) in 1966. FOIA provides that any person has the right to see the documents and records of any federal agency (except the judiciary or Congress). Agencies whose records are typically requested by environmental groups include the U.S. Forest Service, the Fish and Wildlife Service, the Bureau of Land Management, the EPA, and the Departments of Energy and Defense. Upon written request, an agency is required to disclose records relating to the requested topic, unless the agency can claim an exemption from disclosure as allowed by the Act. The FOIA also grants requesting parties who are denied their request the right to appear in federal court to seek the enforcement of the act’s provisions.

In 1996, the Congress amended FOIA by passing the Electronic Freedom of Information Amendments. The amendments require agencies to provide public access to information in electronic form. This is done typically by posting a guide for making a FOIA request on the agency’s website. (See FYI: How to Make a Request Under FOIA.) Individual states have adopted similar procedures governing public access to the records of state agencies.

**FYI: How to Make a Request Under FOIA**


To request information from other agencies, see the website for that agency. For example, if you want to know what the U.S. Forest Service office in your area has done to enforce the Endangered Species Act in a recent timber sale, go to the Forest Service’s website for FOIA requests (www.fs.fed.us/im/foia/). There you will find instructions for submitting your request for information. For example, it must be in writing. The site requires that you send your request to the Forest Service regional office or research station that is likely to have the information, or you may send it to the national USFS office if you are unsure. The website gives the addresses of these offices and research stations.

The Forest Service website also includes a sample FOIA request letter and details on FOIA procedures in the Forest Service.
Under the Freedom of Information Act, individuals, public interest groups, scientists, and others routinely gather information from public agencies in the course of monitoring their decisions and enforcement of permits. Individuals and environmental groups also may be interested in investigating management plans for forests, actions taken in designating species as endangered, or plans to decommission military bases. For example, citizens from a community contaminated with toxic chemicals may consider bringing a tort action against the polluter. An environmental tort is a legal claim for injury or a lawsuit, such as those depicted in the films *Erin Brockovich* and *A Civil Action*. In researching such a tort, a group may access information held by the EPA. Under federal law, the EPA is required to maintain records on any company that handles hazardous waste, including records of inspections of its facilities, notices of permit violations, and records of other legal actions taken against the company (Cox, 2000, para. 2). As the group prepares its legal case, it can request all of these documents from the EPA under the agency’s procedures for complying with the Freedom of Information Act.

Public interest and environmental groups also may be interested in information about the actions of the U.S. government itself. A typical case occurred in 2002 when the Alaska Wilderness League, the Sierra Club, the Wilderness Society, and the Defenders of Wildlife submitted two FOIA requests for information about the Department of the Interior’s plans to develop the Arctic National Wildlife Refuge. The FOIA requests called for release of records of any communications between Interior Department officials and oil industry associations or lobbying groups about proposals to open the refuge’s coastal plain to oil drilling. Drilling for oil in the Arctic had been the centerpiece of the energy policy in President George W. Bush’s administration, and the environmental groups reasoned that, “the public deserves to know how and why that decision was made” (Willett, Huffines, Devries, & Keogh, 2003).

Although an important tool for information, a FOIA request may not always be successful. An unsuccessful but high-profile Freedom of Information Act case involved the conservative group Judicial Watch and the Sierra Club, who jointly filed a lawsuit against Vice President Richard Cheney. The two groups had requested the disclosure of documents from closed-door meetings between Vice President Cheney and officials from Enron and other energy companies in 2001 as part of the vice president’s energy task force. The vice president’s office refused to provide the requested documents. The lawsuit therefore asked the courts to direct the vice president’s office to honor the FOIA request. The Sierra Club and Judicial Watch contended that the administration was required to disclose information about the energy task force’s members and its decision-making process because the task force helped to draft energy legislation that went to
Congress. The case went all the way to the U.S. Supreme Court, which ruled in 2005 limiting the grounds for the use of the Freedom of Information Act in the case of the vice president. The Supreme Court then sent the case back to the lower court, which later dismissed the lawsuit (Stout, 2005).

The Emergency Planning and Community Right to Know Act

In 1984, thousands of people were killed when two separate plants released toxic chemicals—one a Union Carbide plant in Bhopal, India, the other a chemical plant in West Virginia. These two incidents fueled public pressure for accurate information about the production, storage, and release of toxic materials in local communities by such companies. Responding to this pressure, Congress passed the Emergency Planning and Community Right to Know Act in 1986, known simply as the Right to Know Act. The law requires industries to report to local and state emergency planners the use and location of specified chemicals at their facilities.

The Right to Know Act also requires the Environmental Protection Agency to collect data annually on any releases of toxic materials into the air and water by designated industries and to make this information easily available to the public through an information-reporting tool, the Toxic Release Inventory (TRI). In the 20 years since the TRI debuted, the EPA has expanded its reporting and now collects data on approximately 650 different chemicals (Environmental Protection Agency, 2003b). The EPA regularly makes this data available through online tools such as its TRI Explorer (www.epa.gov/triexplorer). Other public interest groups also use the TRI database to offer user-friendly links on their own websites for individuals wanting information about the release of toxic materials into the air or water in their local communities.

Act Locally!

Use the Toxic Release Inventory to check for the presence of toxic chemicals in the air, soil, or water in the community where you live or attend school.

To access the TRI database, use either the EPA’s TRI Explorer at www.epa.gov/triexplorer or the user-friendly Scorecard at www.scorecard.org. Sponsored by Environmental Defense, Scorecard makes
Many community activists as well as scholars believe that the Toxic Release Inventory may be the single most valuable information tool available to citizens who are concerned with pollution from industrial plants in their communities. Stephan (2002) reports that the motivation for many of those who pushed for information disclosure laws was the principle that “citizens have a right to know whether the actions of private industry have a negative impact on their lives” (p. 192; Hadden, 1989). For that reason, one of the assumptions of the Toxic Release Inventory is that public access to information can be a means of ensuring community and industry safety. The goal of the Toxic Release Inventory, the EPA states, “is to empower citizens, through information, to hold companies and local governments accountable in terms of how toxic chemicals are managed” (2003b, p. 1).

Sometimes, information disclosure alone may affect polluters’ behavior. For example, Stephan (2002) found that public disclosure of information about a factory’s chemical releases or violation of its air or water permit may trigger a “shock and shame” response. If community members found out that a local factory was emitting high levels of pollution, their “shock” could push the community into action. Furthermore, Stephan explained that a factory itself (that is, those who work there) may feel shame from disclosure of its poor performance. However, he conceded another explanation might be that industry fears a backlash from citizens, interest groups, or the market (p. 194).

Overall, the public’s access to important government information about the environment through the Freedom of Information Act and the Toxic Release Inventory has been a major advance both for the principle of transparency and for environmental protection.
The Right of Public Comment

Town hall meetings and public comments before city councils are a long-standing tradition in the United States. When it comes to the environment, that tradition received a significant boost in 1970, the year millions of citizens first celebrated Earth Day. The National Environmental Policy Act guaranteed that the public would have an opportunity to comment directly to
federal agencies before those agencies could proceed with any actions affecting the environment. At its core, the new law promised citizens that a kind of “pre-decisional communication” would occur between them and an agency that is responsible for decisions that impact the environment (Daniels & Walker, 2001, p. 8).

Public comment typically takes the form of testimony at public hearings, exchanges of views at open houses and workshops, written communications (letters, faxes, e-mails, research reports, and memos), and participation on citizen advisory panels. In this section, I'll focus on the procedural right to comment, provided under the National Environmental Policy Act and under President Clinton’s 1994 Environmental Justice Executive Order. We'll examine the characteristics—and the limitations—of public hearings more fully in the next section. I'll describe the role of citizens’ advisory panels in Chapter 4.

The National Environmental Policy Act

The core authority for the public’s right to comment or participate directly in federal environmental decision making comes from the National Environmental Policy Act, commonly referred to as NEPA. Passed by Congress in 1969 and signed into law by President Nixon on January 1, 1970, NEPA was the first effort to involve the public in environmental decision making in a comprehensive manner. Political scientists Matthew Lindstrom and Zachary Smith (2001) explained that NEPA’s sponsors wanted the public not only to be aware of and informed about projects that might be environmentally damaging but also to have an active role in commenting on alternative actions that an agency had proposed. Thus, NEPA and its regulations “act like other ‘sunshine’ laws . . . in that they require full disclosure to the public as well as extensive public hearings and opportunities for comment on the proposed action” (p. 94).

Two NEPA requirements are intended to give members of the public an opportunity to communicate about a proposed federal environmental action: (1) a detailed statement of any environmental impacts must be made public, and (2) concrete procedures for public comment must be implemented.

Environmental Impact Statements

As implemented by the Council on Environmental Quality, the National Environmental Policy Act requires federal agencies to prepare a detailed environmental impact statement (EIS) for any proposed legislation or major actions “significantly affecting the quality of the human environment” (Council on Environmental Quality, 1997, Sec. 102. [1][c]). Such actions range from constructing a highway to adopting a forest management plan.
Regardless of the specific action that is proposed, all EISs must describe three things: (1) the environmental impact of the proposed action, (2) any adverse environmental effects that could not be avoided should the proposal be implemented, and (3) alternatives to the proposed action (Sec. 102 [1][c]). (In some cases, a less detailed environmental assessment may be substituted.)

**Public Comment on Draft Proposals**

NEPA also requires that, before an agency completes a detailed statement of environmental impact, it must “make diligent efforts to involve the public” (CEQ, 1997, Section 1506.6 [a]). That is, the agency must take steps to ensure that interested groups and members of the public are informed and have opportunities for involvement prior to a decision. As a result, each federal agency must implement specific procedures for public participation in any decisions made by that agency that impact the environment. For example, citizens and groups concerned with natural resource policy ordinarily follow the rules for public comment developed in accordance with NEPA by the U.S. Forest Service, the National Park Service, the Bureau of Land Management, or the Fish and Wildlife Service. Community activists who work with human health and pollution issues are normally guided by Environmental Protection Agency and state rules. The states are relevant because the EPA delegates to them the authority to issue air and water pollution permits for plants, and construction permits and rules for managing waste programs (landfills and the like).

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**FYI: Requirements for Public Involvement in NEPA**

**Public Involvement** (Section 1506.6 [a] [b]): Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. . . .

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements.
The requirements for public comment or communication under NEPA typically occur in three stages: (1) issue surfacing, (2) notification, and (3) comment on draft decisions (Daniels & Walker, 2001). These steps are guided by the rules adopted by the Council on Environmental Quality to ensure that all agencies comply with basic requirements for public participation that are implied in the NEPA statute itself. (See “FYI: Requirements for Public Involvement in NEPA.”)

The process normally starts with issue surfacing. This is a preliminary stage in an agency’s development of a proposed rule or action. Also called scoping, it involves canvassing interested members of the public about some interest—for example, a plan to reallocate permits for water trips down the Colorado River in the Grand Canyon—to determine what the concerns of the affected parties might be. Such scoping might involve public workshops, field trips, letters, and agency personnel speaking one on one with members of the public.

When an agency has a proposal ready for consideration, it must provide notification to the public. The intent to receive public comments on the proposal or action is announced in the media and in special mailings to interested parties; a formal notice also is published in the Federal Register. Typically, a notice describes the proposed regulation, management plan, or action and specifies the location and time of a public meeting or the period during which written comments will be received by the agency.

Finally, NEPA rules require agencies to actively solicit public comment on the draft proposal. Public comments on the draft proposal or action usually occur during public hearings and in written comments to the agency in the form of reports, letters, e-mails, postcards, or faxes. The public also may use this opportunity to comment on the adequacy of any environmental impact statement accompanying the proposal, or it may use the information in the

Inviting Comments (Section 1503.1 [a] [4]):

(a) After preparing a draft environmental impact statement and before preparing a final environment impact statement, the agency shall . . . (4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

EIS to assess the proposal itself. In response, the agency is required to assess and consider comments received from the public. It must then respond in one of several ways: (1) by modifying the proposed alternatives, (2) by developing and evaluating new alternatives, (3) by making factual corrections, or (4) by “explain[ing] why the [public] comments do not warrant further agency response” (Sec. 1503.4).

The success of NEPA’s public participation process obviously depends on how well agencies comply with the law’s original intent. For example, in its study of NEPA’s effectiveness, the Council on Environmental Quality observed that, “the success of a NEPA process heavily depends on whether an agency has systematically reached out to those who will be most affected by a proposal, gathered information and ideas from them, and responded to the input by modifying or adding alternatives throughout the entire course of a planning process” (CEQ, 1997, p. 17).

A successful illustration of NEPA’s effectiveness occurred in 2001 when the Clinton administration announced its sweeping “roadless rule.” The rule, adopted by the U.S. Forest Service, prohibited road building and restricted commercial logging on nearly 60 million acres of U.S. national forest lands in 39 states, including Alaska’s Tongass National Forest. The final rule was adopted on January 5, 2001, after a year and a half of public review and comment. (Here, I must admit a personal interest, having participated as president of the national Sierra Club in helping to mobilize individuals to participate in the public comment process. A more critical review of the process used in the roadless rule can be found in Walker, 2004).

By the end of the process, the U.S. Forest Service had held more than 600 public meetings and had received an unprecedented two million comments from members of the public, environmentalists, businesspeople, sports groups and motorized recreation associations, local residents, and state and local officials. As a result of the public’s review and comment on successive drafts, the rule grew stronger, expanding the amount of protected forest land. After the final rule was adopted, Forest Service chief Mike Dombeck reflected, “In my entire career, this is the most extensive outreach of any policy I’ve observed” (Marston, 2001, p. 12, in Walker, 2004, p. 114). (For the final roadless rule, see http://roadless.fs.fed.us/documents/rule/index.shtml.)

Following its adoption, the Clinton roadless rule has been both praised and criticized for its public participation process, and its implementation initially was delayed by court challenges from logging interests and Western state officials. Environmentalists praised the rule not only for its substantive protections but also for the quality of its process for public comment. “This is a day to celebrate participatory democracy at its finest,” said the Oregon Natural Resources Council’s Ken Rait (Ash, Merritt, & Rait, 2000, para. 1). Others claimed that the process used for the roadless rule missed a chance for a more
collaborative process involving the public. For example, environmental communication scholar Gregg Walker (2004) argued that the process “exemplified a business as usual approach rather than innovation and civic deliberation” (p. 135). (In May, 2005, the U.S. Forest Service dropped the roadless rule altogether after a hasty NEPA process. Environmental groups challenged this ruling, and the case is before the courts as this book goes to press.)

At the heart of the controversy has been a fierce debate over the meaning of public participation and the goals it is intended to serve. Walker asks, “Does the number of public meetings and amount of comment letters received provide sufficient evidence of meaningful public participation?” (p. 115). Similarly, in 2002 the Forest Service proposed a rule change that would disallow counting postcards and form letters as public comments for the purpose of complying with NEPA. (For the status of the rule, see www.fs.fed.us/emc/nfma/index3.html.) I’ll take up this question more generally in the next chapter by describing some of the criticisms of public comment in environmental decision making.

The Executive Order on Environmental Justice

A more recent source expanding the right of public comment is President Clinton’s 1994 Executive Order on Environmental Justice. Shortly after entering office, the president directed all federal agencies to “study the impact of proposed actions [permits for plants, etc.] related to the environment and public health on minority communities and to implement an agency ‘strategy’ for public participation” (Clinton, 1994, p. 7629). The executive order specifically directed each agency to develop an agency-wide environmental justice strategy that included opportunities for public participation and access to information. (See “FYI: The Executive Order on Environmental Justice.”)

One successful use of the Executive Order occurred in 2002 when the public watchdog group Public Employees for Environmental Responsibility (PEER) invoked it in requesting that the EPA’s inspector general issue a report on the environmental justice impacts of President George W. Bush’s proposed Clear Skies Proposal. (The Clear Skies Proposal would revise federal regulations under the Clean Air Act that control emissions from older electric utility plants and refineries.) Clinton’s executive order also has encouraged the development of guidelines by federal agencies for involving minority communities in decisions about the environment. For example, the EPA’s National Environmental Justice Advisory Council (2000) has published a “Model Plan for Public Participation” to guide federal agencies working with such communities (see www.epa.gov/compliance/resources/publications/ ej/model_public_part_plan.pdf. I’ll provide more information about the calls for environmental justice in Chapter 8.)
The effectiveness of an executive order may be somewhat limited. On the other hand, there is no doubt that the National Environmental Policy Act has proved to be one of the most empowering laws passed by the U.S. Congress. In terms of its scope and involvement of members of the public, NEPA has been the cornerstone of the principle of direct participation in governance through the right of citizens to comment directly to agencies responsible for decisions affecting the environment. There remains one other right of public participation, to which I now turn.

**The Right of Standing: Citizen Suits**

Beyond the right to know and public comment is a third route for citizen participation in environmental decisions: the right of standing. A right of standing is based on the presumption that an individual having a sufficient interest in a matter may “stand” before legal authority to speak and seek protection of that interest in court. In both common law and provisions under U.S. environmental law, citizens—under specific conditions—may have standing to object to an agency’s failure to enforce environmental standards or to hold a violator directly accountable.

**Standing and Citizen Suits**

The right of citizens to standing developed originally from common law, wherein individuals who have suffered an “injury in fact” to a legally protected right could seek redress in court (Buck, 1996, p. 66). The definition of injury
required under common law normally meant a concrete, particular injury that an individual had suffered due to the actions of another party. One of the earliest cases of standing in an environmental case involved William Aldred, who in 1611 brought suit against his neighbor Thomas Benton. Benton had built a hog pen on an orchard near Aldred’s house. Aldred complained that “the stench and unhealthy odors emanating from the pigs drifted onto [his] land and premises” and were so offensive that he and his family “could not come and go without being subjected to continuous annoyance” (9 Co. Rep. 57, 77 Eng. Rep. 816 [1611], in Steward & Krier, 1978, p. 117–118). Although Benton argued that, “one ought not have so delicate a nose, that he cannot bear the smell of hogs,” the court sided with Aldred and ordered Benton to pay for the damage caused to Aldred’s property.

Aldred was able to pursue his claim before the court as a result of his and his family’s injury in fact from the offensive odors. But in the 20th century, the principle of injury in fact would be expanded in ways that allowed wider access to the courts by environmental interests. Two developments modified the strict common-law requirement of concrete, particular injury, allowing a greater opening for citizens to sue in behalf of environmental values. First, the 1946 Administrative Procedure Act broadened the right of judicial review for persons “suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action” (5 U.S.C. § 702, in Buck, 1996, p. 67). This was so because, under the APA, the courts generally have held that an agency must “weigh all information with fairness and not be ‘arbitrary and capricious’” in adopting agency rules (Hays, 2000, p. 133). Thus, when an agency’s actions depart from this standard, they are subject to citizen complaints under the APA; that is, citizens have standing under the “arbitrary and capricious” standard for what constitutes an injury. In succeeding years, this provision of the Administrative Procedures Act would be an important tool enabling environmental groups to hold agencies accountable for their actions toward the environment.

The second expansion of standing came in the provision for citizen suits in major environmental laws. The provision for such lawsuits enables any citizen to go into a federal court to ask that an environmental law be enforced. For example, the Clean Water Act confers standing on any citizen or “persons having an interest which is or may be adversely affected” to challenge violations of clean water permits in federal court if the state or federal agency fails to enforce the statutory requirements (Stearns, 2000, para. 378). Using this provision, citizens in West Virginia invoked their right of standing by filing citizen suits against the practice of mountaintop removal, in which coal companies literally push earth from the tops of mountains into nearby valleys, filling streams, in their search for coal (Trial Lawyers for Public Justice, 2002). Other environmental
laws that allow citizen suits include the Endangered Species Act, the Clean Air Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response Compensation and Liability Act (the Superfund law).

The purpose of a citizen suit is to challenge an agency’s lack of enforcement of environmental standards; local citizens and public interest groups are empowered to sue the agency directly to enforce the law. Jonathan Adler (2000), a senior fellow at the Competitive Enterprise Institute, explained the rationale behind this. When federal regulators “overlook local environmental deterioration or are compromised by interest group pressure, local groups in affected areas are empowered to trigger enforcement themselves” (para. 48). This is especially important in cases of agency capture, in which a regulated industry pressures or influences officials to ignore violations of a corporation’s permit for environmental performance (e.g., its air or water discharges).

Landmark Cases on Environmental Standing

Citizens’ claims to the right of standing are subject not only to the provisions of specific statutes (e.g., the Clean Water Act), but also to judicial interpretations of the cases and controversies clause in Article III of the U.S. Constitution. Despite its arcane title, this requirement serves an important purpose. The cases and controversies clause “ensures that lawsuits are heard only if the parties are true adversaries, because only true adversaries will aggressively present to the courts all issues” (Van Tuyn, 2000, p. 42).

To determine if a party is a “true adversary,” the U.S. Supreme Court uses three tests: (1) persons bringing a case must be able to prove an injury in fact, including a legal wrong as allowed by the APA; (2) this injury must be “fairly traceable” to an action of the defendant; and (3) the Court must be able to redress the injury through a favorable ruling (p. 42). Although environmental statutes grant a right of standing, citizens still must meet these three constitutional tests before proceeding.

The main question in granting standing in environmental cases has been the meaning of the Court’s test of “injury in fact.” What qualifies as injury where individual citizens seek to enforce the provisions of an environmental law? The Supreme Court has worked out an uneven and, at times, confusing answer to this question in several landmark cases.

Sierra Club v. Morton (1972)

The Supreme Court’s ruling in Sierra Club v. Morton provided the first guidance for determining standing under the Constitution’s cases and controversies clause in an environmental case. In this case, the Sierra Club sought
to block plans by Walt Disney Enterprises to build a resort in Mineral King Valley in California. Plans for the resort included the building of a road through Sequoia National Park. In its suit, the Sierra Club argued that a road would “destroy or otherwise adversely affect the scenery, natural and historic objects, and wildlife of the park for future generations” (Lindstrom & Smith, 2001, p. 105). Although the Supreme Court found that such damage could constitute an injury in fact, it noted that the Sierra Club did not allege that any of its members themselves had suffered any actual injury, and therefore they were not true adversaries. Instead, the Sierra Club had asserted a right to be heard simply on the basis of its interest in protecting the environment. The Court rejected the group’s claim of standing in the case, ruling that a long-standing interest in a problem was not enough to constitute an injury in fact (Lindstrom & Smith, 2001, p. 105).

Despite its ruling in *Sierra Club v. Morton*, the Supreme Court spelled out a liberal standard for what might constitute a successful claim of standing. It observed that in the future, the Sierra Club need only allege an injury to its members’ interests—for example, that its members would no longer be able to enjoy an unspoiled wilderness or their normal recreational pursuits. The Sierra Club immediately and successfully amended its suit against Disney Enterprises, arguing that such injury would occur to its members if the road through Sequoia National Park were to be built. (Subsequently, Mineral King Valley itself was added to Sequoia National Park, and Disney Enterprises withdrew its plans to build the resort.)

An interesting footnote to legal history occurred in a famous dissent in the original Morton case. Arguing for a more expansive standard, Justice William O. Douglas argued that even trees should have standing. He noted that U.S. law already gave standing to some inanimate objects such as ships and corporations and that environmental goals would be enhanced if citizens could sue on behalf of environmental objects (Buck, 1996; for more information about this argument, see Stone, 1996).

The Court’s liberal interpretation of the test for injury in fact in *Sierra Club v. Morton* and other cases, along with the right of standing in many environmental laws, produced a 20-year burst of environmental litigation by citizens and environmental groups. This trend continued until the Supreme Court issued a series of conservative rulings that narrowed the basis for citizens’ standing.

**Lujan v. Defenders of Wildlife (1992)**

In the 1990s, the U.S. Supreme Court handed down several rulings that severely limited citizen suits in environmental cases. In perhaps the most important case, *Lujan v. Defenders of Wildlife*, the Court rejected a claim of
standing by the conservation group Defenders of Wildlife under the citizen suit provision of the Endangered Species Act. The ESA declares that “any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision” of the Act (ESA, 1973, §1540 [g] [1]). In its lawsuit, Defenders of Wildlife argued that the secretary of the interior (Lujan) had failed in his duties to ensure that U.S. funding of projects overseas—in this case, in Egypt—did not jeopardize the habitats of endangered species, as the law required (Stearns, 2000, p. 363).

Writing for the majority, Justice Antonin Scalia stated that Defenders had failed to satisfy constitutional requirements for injury in fact that would grant standing under the ESA. He wrote that the Court rejected the view that the citizen suit provision of the statute conferred upon “all persons an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law” (Lujan, 1992, p. 573). Rather, he explained, the plaintiff must have suffered a tangible and particular harm not unlike the requirement in common law (Adler, 2000, p. 52). This ruling overturned the standard in Sierra Club v. Morton, in which Sierra Club members needed only to prove injury to their interests—that is, that they couldn’t enjoy their recreational pursuits or enjoyment of wilderness.

Consequently, courts began to limit sharply citizen claims of standing under citizen suit provisions of environmental statutes. Writing in the New York Times, Glaberson (1999) reported that the Court’s rulings in the 1990s were one of the most “profound setbacks for the environmental movement in decades” (p. A1).

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (2000)

In a more recent case, the Supreme Court appeared to reverse its strict Lujan doctrine, holding that the knowledge of a possible threat to a legally recognized interest (clean water) was enough to establish a “sufficient stake” by a plaintiff in enforcing the law (Adler, 2000, p. 52).

In 1992, Friends of the Earth and CLEAN, a local environmental group, sued Laidlaw Environmental Services in Roebuck, South Carolina, under the Clean Water Act citizen suit provision. Their lawsuit alleged that Laidlaw had repeatedly violated its permit limiting the discharge of pollutants (including mercury, a highly toxic substance) into the nearby North Tyger River. Residents of the area who had lived by or used the river for boating and fishing testified that they were “concerned that the water contained harmful pollutants” (Stearns, 2000, p. 382).
The Supreme Court’s majority in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* ruled that Friends of the Earth and CLEAN did not need to prove an actual (particular) harm to residents. Writing for the majority, Justice Ruth Bader Ginsburg stated that injury to the plaintiff came from lessening the “aesthetic and recreational values of the area” for residents and users of the river due to their knowledge of Laidlaw’s repeated violations of its clean water permit (Adler, 2000, p. 56). In this case, the plaintiffs were not required to prove that Laidlaw’s violations of its water permit had contributed to actual deterioration in water quality. It was sufficient that they showed that residents’ knowledge of these violations had discouraged their normal use of the river.

With this ruling, the Supreme Court reaffirmed the rationale of citizen suits that local groups and citizens have an interest in the enforcement of environmental quality under the provisions of specific laws such as the Clean Water Act. However, disagreement over the criteria for citizen standing in environmental cases is likely to continue. At stake are differing interpretations of injury in fact and the rights of citizens of standing to compel the government to enforce environmental laws.

**Citizens’ Communication and Public Participation**

Access to information, public comment, and the right of standing are basic procedural rights of public participation in U.S. environmental decision making, but they shed little light on the communication that occurs as individuals pursue these rights. Here and in the following chapter, I’ll describe some of the characteristics of this communication. The most frequently used modes of individual citizen communication on environmental matters are (1) testimony at public hearings, (2) participation on advisory panels, and (3) collaboration with other parties with an interest in an environmental decision. This section focuses on citizen testimony in public hearings and recent proposals to expand the rights of participation. Chapter 4 will explore the increasing use of citizen advisory panels and informal collaboration by citizens, businesses, agencies, and environmental groups to mediate disputes in environmental conflicts.

**Public Hearings and Citizen Testimony**

Public hearings, workshops, and meetings undoubtedly are the more common modes of participation by ordinary citizens in environmental decision making at both the federal and state levels. Typically, these are forums for public comments to an agency before the agency takes action that might significantly
impact the environment. As we saw earlier, the National Environmental Policy Act requires federal and some state agencies to actively solicit public comment before taking any action. In such cases, the agency normally conducts scoping sessions (workshops or open houses) and public hearings to establish a record of public comment. At the state and local levels, public hearings typically are held before an agency issues a permit for a company to discharge pollutants into the air or water, or to gather input before a town acts on a strictly local matter—for example, deciding the location of a municipal solid waste site, issuing a permit to widen a street, or approving funds to purchase land for a park.

The public hearings and meetings to address environmental questions mainly involve an exchange of information. Typically, an agency will inform citizens about its proposed action, and citizens then provide input or express their opinions about the proposal. Any interested citizen may attend these meetings. There are usually sign-in sheets for those wishing to speak. Before inviting comment from members of the public, the presiding official often will call agency staff or outside experts to testify and provide technical information on matters before the agency. Speakers are limited to a short time in which to comment orally or to read a statement. Some individuals will read from a prepared statement; others speak extemporaneously. Supporters and opponents of a proposal may attend, and both sides speak at the meeting.

The communication at public meetings and hearings may be polite or robust, restrained or angry, as well as informed, opinionated, and emotional. The range of comments reflects the diversity of opinion and interests of the
community itself. Officials may urge members of the public to speak to the specific issue that is on the agenda, but the actual communication often departs from this, ranging from individual citizens’ comments, emotionally charged remarks, personal research, and stories of their family’s experiences, to criticism of opponents or public officials.

Some people may denounce the actions of the agency or respond angrily, even theatrically, to plans that affect their lives or community. At one particularly intense public hearing, I witnessed residents of a rural community place bags of garbage on the stage of the auditorium where elected officials were presiding, to protest plans to allow an out-of-state company to build a hazardous waste incinerator near their homes. The atmosphere in this public hearing was electric, with angry parents and other community members noisily confronting defensive and harried officials on the stage.

The communication in public hearings also can be affected by factors other than personal emotions or concerns about an issue. Ordinary citizens find themselves apprehensive about having to speak in front of large groups, perhaps with a microphone, to unfamiliar officials. They may face opponents or others who are hostile to their views. Sometimes, they must wait hours for their turns to speak. Those with jobs or small children face additional constraints because they must take time from work or find (and often pay) someone to watch their children. I’ll return to these and other constraints in Chapter 8 when I describe some of the barriers to citizen participation in public hearings in low-income communities.

Due to the conditions that are typically imposed by crowded hearing rooms, limited time, volatile emotions, and long waiting times for speaking, many believe that public hearings are not an effective form of public participation. Matthews (1994) reports an all-too-frequent occurrence: “Officials usually make presentations, or get lectured to by some outraged individual. Little two-way communication occurs. And with no feedback, people don’t think they have been heard. The prevailing sense is that a decision was reached long before the hearing was scheduled” (p. 23). Daniels and Walker (2001) go further. They contend that the methods used by some public lands management agencies such as the Forest Service exhibit a “Three-I Model . . . inform, invite, and ignore.” For example, agency officials will inform the public about a proposed action, such as a timber sale, then “invite the public to a meeting to provide comments on that action, and ignore what members of the public say” (p. 9). Other critics have described this as a “decide, announce, and defend” attitude. That is, officials decide a policy beforehand, announce this decision, and then defend their decision at the public hearing. Walker and Daniels argue that such public hearings lack the basic characteristics of a “learning environment,” instead fostering communication that “is intended to convince rather than explore” and therefore discourage citizens from participating (p. 85).
Local public meetings and hearings about environmental matters, although adversarial and impolite at times, reflect the diverse and messy norms of democratic life. At their best, meetings that invite wide participation by members of the public may generate comments and information that help agencies to shape or modify important decisions affecting the environment. Although they occasionally may be confrontational, such hearings provide many citizens their only opportunity to speak directly to government authority about matters of concern to them, their families, or their community.

On the other hand, a growing number of agency leaders and scholars are beginning to explore alternatives to the adversarial and one-way communication modes that characterize environmental public meetings. In Chapter 4, I will describe some of these alternative formats to formal public hearings. For now, I want to alert you to other proposals to strengthen the public’s rights to information and participation in the “green” public sphere.

Act Locally!

Investigate the procedures and types of communication that occur in a local public hearing on the environment in your town, city, or county.

1. **Identify one local agency or committee and the environmental issue it is considering.** What committee or body in your local government deals with environmental problems? Are there upcoming meetings to consider proposals for bike paths? A permit to operate a medical waste incinerator near your campus? A vote to approve funds to purchase green space? A commission to study public transportation? Are its meetings publicly announced? Is the public invited to attend its meetings?

2. **Attend one of the public meetings, and observe the procedures for public comment.** Is the public welcome to comment publicly during the proceedings? Who gets to speak? For how long? What do individuals testifying include in their remarks? Do they present facts? Are they sometimes emotional? Do agency officials treat members of the public respectfully?

3. **Interview two or three members of the public who spoke at the public meeting, as well as an official who presided.** Did members of the public feel that their comments made a difference? Did the officials listen to them? How did the presiding official feel about the quality of communication at the meeting? What effects, if any, did you observe as a result of the public meeting?
Proposals to Expand the Green Public Sphere

Although some feel that the traditional models for public participation nurture adversarial communication, many community activists would like to change the current system in other ways. Many residents who live near hazardous facilities, in particular, have been pushing in recent years to expand the opportunities for public participation in four areas: (1) a right to know more, (2) a right to independent expertise, (3) a right to a more authoritative involvement, and finally (4) a right to act.

A Right to Know More

Since passage of the original Emergency Planning and Community Right to Know Act in 1986, community activists have asked for the right to know more. That is, they have tried to extend the provisions of the law to cover more industries and more types of chemicals. They have also urged that other sources of potential danger be covered under this law. Such dangers can result not only from the toxic chemicals inside the plants but from transport of raw chemicals into and out of plants and the disposal of products containing toxic chemicals. For example, Massachusetts, New Jersey, and the city of Eugene, Oregon, all have enacted laws requiring industries to report information about additional sources of potential exposure to toxic chemicals. As a result, the public interest group INFORM (2003) reports, “Communities located near these facilities have the ability to monitor plant operations and ensure that maximum efforts are being made to protect the environment and public health” (para. 1). (For more recent information about the right-to-know-more initiative and its status, see www.informinc.org/rtkm_00.php.)

A Right to Independent Expertise

Because the proof of harmful effects from exposure to toxic chemicals involves complex issues, advocates from communities with toxic waste sites long have sought access to sources of expertise to aid them in understanding the effects of these chemicals. Often, there is a disparity in the expertise that is available to government agencies or industry, on the one hand, and that which is available to local citizens, on the other. In response to this gap, Congress enacted the Technical Assistance Grant (TAG) Program in 1986. The TAG program is intended to help communities at Superfund sites. (Superfund sites are abandoned chemical waste sites that have qualified for federal funds for their cleanup.) Decisions about the cleanup of these sites are usually based on technical information that includes the type of
chemical wastes and the technology available (EPA, 2003a). The purpose of TAG grants is to provide funds for citizen groups to hire consultants who can help them to understand and comment on the information provided by the EPA and the industries responsible for cleaning these sites.

As I learned in working with Superfund communities while I was president of the Sierra Club, the TAG program does not ensure that local citizens actually have a right to independent expertise. Such a right would allow the community to seek expertise from independent sources and to use this knowledge to assess the EPA or other government agencies’ recommendations. For example, in working with the residents of a small town in Mississippi whose homes bordered an abandoned chemical plant, I learned that their requests to use their TAG grant to hire experts to analyze their well water had been denied. They had been dissatisfied with the EPA’s plans for cleanup of the toxic waste site and distrusted the data supplied to them by the agency. When they asked for support to consult their own experts, they were told the TAG program did not allow funds for communities to generate new (independent) data. Hence, the local activists could not use TAG funds to drill for soil samples to determine whether chemicals had traveled underground from the plant to their wells; nor could they use the TAG funds to conduct their own health studies of the residents in the community who were complaining of rare illnesses (C. Keys, 1995, personal communication).

Dissatisfaction with the limits on the EPA funds for hiring experts has led community activists from toxic sites around the country to push for greater flexibility in the use of TAG grants to secure independent experts to aid their efforts. (For more information about the EPA’s Technical Assistance Grants program, see the “Frequently Asked Questions” about community involvement in decisions about local toxic waste sites at the EPA’s website, www.epa.gov/superfund/tools/tag/faqs.htm.)

A Right to a More Authoritative Involvement

As we learned earlier, most public comment under NEPA and in public hearings is only advisory. Although agencies must consider such comments in reaching a decision, they are not legally bound to change a proposal or rule just because the public opposes it. For example, some advocates for environmental justice were especially critical of the failure of President Clinton’s Executive Order on Environmental Justice to give their communities an “authoritative” role in defining a problem and the range of solutions that might be considered. Christopher Foreman (1998), a senior fellow at the Brookings Institution, expressed this sentiment when he wrote that officials who dealt with underrepresented groups, especially racial minorities, had
found “a relatively safe haven in varieties of consultative—but, again, not authoritative—citizen participation: advisory boards, public forums, community outreach efforts, and access to information” (p. 45). Foreman explained, “By stressing nonbinding mechanisms of inclusion . . . officials pay homage to democratic values, signal benign intent, and hope to deflect criticism” (pp. 45–46; emphasis added).

A more authoritative involvement in environmental policymaking, on the other hand, would include citizens’ input in an agency’s initial framing or definition of a problem, as well as the development of a range of solutions and criteria by which officials and the public jointly reach a decision (Lynn, 1986; and Katz & Miller, 1996). For example, should communities be able to require, as a condition of a company’s air permit, that it contribute to an independent monitoring service for future air pollution and a health fund to support local health clinics and hospitals? Should community groups be part of any team designing a public education campaign about health risks in their community? We’ll explore alternative models for this authoritative public involvement in Chapter 6.

A Right to Act

Starting in the 1980s, labor, public health, and environmental activists focused on a new approach to workplace and community safety, one that labor leader Tony Mazzocchi of the Oil, Chemical, and Atomic Workers Union called the “right to act.” Earlier, Mazzocchi had coined the phrase right to know (Engler, 2001, para. 1). In arguing for a new right to act, he pointed out that the government’s reliance on permits, inspectors, and fines to enforce workplace environmental safety could not ensure that every chemical plant or hazardous facility in a community met safety and health regulations. Going beyond this traditional approach, the right to act asserted that workers and nearby residents should be allowed to inspect workplaces and then to negotiate measures to prevent chemical leaks and other hazards (Engler, 2001). While some unions had won a right to inspect plant operations and correct hazardous work conditions, communities historically have had no means to act directly to monitor facilities near their homes.

One incident in 1998, however, gave a boost to the right to act movement. After three chemical accidents near schools in Passaic, New Jersey, caused the hospitalization of elementary school students, the county enacted the nation’s first right-to-act local ordinance. It allowed the creation of Neighborhood Hazard Prevention Committees made up of residents, workers, and management from local industries. At first, the new ordinance allowed the neighborhood committees to conduct unannounced inspections
of plants or industries and to have the committee’s own technical experts take part in the inspection. However, after criticism from industries, the county altered the ordinance by eliminating inspections that lacked prior permission by the plant or industry (Engler, 2001).

Overall, the prospects of wider opportunities for the public’s participation in environmental decisions are uncertain. Although there have been some advances, new barriers to the right to know and public comment have been erected in recent years. In the final section, I will describe some of the restrictions on public participation that have occurred since the terrorist attacks on New York City and Washington on September 11, 2001. These restrictions have come from two sources: (1) actions taken to protect national security and their corresponding restrictions of civil liberties, and (2) a shift in the policies of environmental agencies that limit citizens’ access to information and right of public comment.

Restricting Public Participation in the Post-9/11 Era

In the immediate aftermath of terrorist attacks on the United States in 2001, the U.S. Congress and the executive branch moved quickly to give new authority to federal law enforcement agencies and intelligence services. However, civil libertarians, public interest groups, and environmentalists soon learned that these actions had troublesome implications for civil society and the Bill of Rights. Historians Gerald Markowitz and David Rosner (2002) reported that, “in the wake of the September 11 attacks, the Bush administration acted to restrict public access to information about polluting industries and restricted journalists’ and historians’ access to government documents previously available through the Freedom of Information Act” (p. 303). One law in particular was responsible for many of these restrictions on the public’s right to know: the Homeland Security Act.

Homeland Security and Restrictions on Public Participation

Scholars and individuals seeking information about the environment from sources that were available to the public before September 11, 2001, first noticed a shift in response by federal agencies. For example, USA Today reported,

When United Nations analyst Ian Thomas contacted the National Archives in March [2002] to get some 30-year-old maps of Africa to plan a relief mission,
he was told the government no longer makes them public. When John Coequyt, an environmentalist, tried to connect to an online database where the Environmental Protection Agency lists chemical plants that violate pollution laws, he was denied access. (Parker, Johnson, & Locy, 2002, n.p.)

In fact, in the eight months following the 9/11 attacks, the federal government removed hundreds of thousands of public documents from its websites; in other cases, access to material was made more difficult. For example, documents reporting accidents at chemical plants, previously available online from the EPA, now may be viewed only in government reading rooms (Parker, Johnson, & Locy, 2002).

The shift to greater secrecy of information appeared to follow the release of a memorandum from the U.S. attorney general urging caution in disclosing material under the Freedom of Information Act. Within days of the 9/11 attacks, Attorney General John Ashcroft (2001) assured federal agencies that they should not fear that their deliberations would be made public, and added, “No leader can operate effectively without confidential advice and counsel” (n.p.). He then directed the agencies to carefully consider the protection of such values and interests when making disclosure determinations under the Freedom of Information Act.

The move to restrict public access to information gained a significant boost shortly after the first anniversary of the 9/11 attacks, when the U.S. Congress passed the Homeland Security Act of 2002. This law contains broad authority for the federal government to take steps to protect national security, including the right to restrict public access to any information that could be used to attack U.S. interests. Although differing political parties and interests agreed that national security measures were needed, the new law posed serious challenges to Americans’ civil liberties. Certainly, the chief complaints against the law came from journalists, environmentalists, civil libertarians, and academics. Environmental groups focused particularly on provisions in the Homeland Security Act that permitted exemptions to the Freedom of Information Act (FOIA).

The FOIA exemptions are in a key provision of the Homeland Security Act, called Critical Infrastructure Information (CII). Wishing to shield information about vulnerabilities in the nation’s energy and transportation infrastructure, such as electrical transmission lines, airlines, and oil and gas pipelines, the law authorizes a level of “extraordinary secrecy” (Fagin, 2003, n.p.) from public scrutiny. Specifically, the CII section allows any federal agency to deny FOIA requests from journalists, environmental groups, and individuals for federal records of permit violations, fines, or other information about oil refineries, drinking water plants, oil and natural gas pipelines, and so forth. Furthermore,
it protects from public scrutiny and prosecution any information that is voluntarily submitted to federal agencies by corporations. Some critics of the Homeland Security Act fear that this secrecy extends to violations of environmental, civil rights, consumer protection, worker health and safety, and other laws. That is, they fear that if information about such violations is voluntarily submitted to the EPA, the information might then be unavailable in any criminal or civil prosecution. (For other concerns about the implications of the Homeland Security Act of 2002, see the Society of Environmental Journalists’ website, www.sej.org/foia/.)

The rationale for the secrecy allowed by the Homeland Security Act seemed to make sense to many in the aftermath of the 9/11 terrorist attacks. USA Today reporters seemed to capture the nation’s mood: “Protecting maps and descriptions of nuclear power plants, hydroelectric dams, pipeline routes and chemical supplies seemed justified, for national security” (Parker, Johnson, & Locy, 2002, n.p.). Nevertheless, many reporters and environmentalists believed that an excessive secrecy also could undermine other vital interests, such as the need for transparency in alerting public agencies to potential safety problems. (See “Another Viewpoint: The Public Need for Critical Infrastructure Information.”)

Another Viewpoint: The Public Need for Critical Infrastructure Information

On November 14, 2002, the Reporters Committee for Freedom of the Press and the Society of Environmental Journalists jointly released a letter to members of Congress, raising concerns about the restrictions on public information planned for the new Homeland Security Act of 2002. In particular, they were concerned about prohibition in the “Critical Infrastructure Information” (CII) section of the law. They wrote:

The threat of terrorism is real . . . However, there exists a definite need for the public to be able to recognize vulnerabilities in order to avert them. Public demand for reliable [energy] infrastructures is possibly the greatest assurance that measures will be taken to strengthen them . . . .

Media organizations have used freedom of information laws extensively to expose defects in pipelines and pipeline management. For example, records obtained by the Austin American Statesman after a 1994 pipeline explosion near Corpus Christi, Texas, showed that Koch, a large utility company entrusted with keeping its pipelines in proper working order, increased pressure in its pipeline “after being warned about corrosion and weaknesses in the steel.”
They also showed that the company underestimated the amount of oil spilled, “a miscalculation of some 70,000 gallons” for nine days, an error that probably hindered cleanup efforts.

It is precisely this kind of information that would be closed to the general public under the proposed CII rules. Whether that information would be useful to terrorists is uncertain, but its usefulness in explaining to the public what did go or can go wrong is inestimable.


More recently, the Department of Homeland Security (DHS) has proposed a significant restriction of public participation under regulations that implement the National Environmental Policy Act. (The new department also was established in the Homeland Security Act of 2002.) In 2004, the DHS proposed rules allowing it to classify as secret certain information generated by the department, including potentially the environmental impact statements required for some of its proposed actions. Although the directive applies only to the DHS itself, it nevertheless affects broad areas related to the environment. For example, DHS jurisdiction includes such concerns as oil spills, transport and handling of hazardous materials, chemical plant security, and plans for responses to nuclear accidents. Such concerns would normally trigger an environmental impact statement or environmental assessment for any action proposed by the agency under the National Environmental Policy Act.

In summary, the government’s response to the attacks of September 11, 2001, although ensuring critical safeguards, also raises serious concerns about the public’s access to information. Although intended to limit information useful to terrorists, some of the restrictions on information also limit the ability of journalists and environmental groups to address perceived problems or to publicize inadequate performance by government agencies or private businesses. The public interest group OMB Watch (2004) stated this dilemma in its criticism of the Department of Homeland Security’s proposed NEPA restrictions: “While it is understandable that classified and proprietary information, or information sincerely vital to national security should sometimes remain secret, a blanket exemption like this is prone to abuse and would hide vast amounts of environmental information” (n.p.). To follow developments in the DHS related to public access to information, see www.dhs.gov and www.ombwatch.org.)
Restricting Public Involvement in Environmental Agencies

Concern for national security has not been the only source of restrictions on the public’s rights of public participation in the years since the 9/11 attacks. A second catalyst has been the shift in management by some federal environmental agencies. This shift was apparent very early in the second Bush administration when the President’s Healthy Forests Initiative became public. The Healthy Forests Restoration Act, which became law in 2003, exempted some 10 million acres of forest land from the requirements under the National Environmental Policy Act for an environmental impact statement and public comment period. In other cases, the White House requested expedited environmental reviews of transportation and energy projects such as highway construction and oil and gas exploration on public lands. And, as noted earlier in this chapter, the Forest Service has revised its rules to ban the use of postcards or form letters in public comment under NEPA.

Perhaps the most far-reaching shift in environmental management that affects public participation occurred in the U.S. Forest Service. In late 2004, the Forest Service announced sweeping new rules to implement the National Forest Management Act (NFMA). The U.S. Congress enacted the NFMA in 1976 to reform management of the nation’s 155 national forests. Specifically, it required that each forest “insure that land management plans be prepared in accordance with the National Environmental Policy Act of 1969” (16 USC 1604[g][1]). As I noted earlier in this chapter, NEPA requires an environmental impact statement and an opportunity for public comment prior to any action that may significantly impact the environment. Yet, the New York Times reported that the new Forest Service rules relax these “long-standing provisions on environmental reviews and the protection of wildlife on 191 million acres of forests and grasslands . . . [and] also cut back on requirements for public participation in forest planning decisions” (Barringer, 2004, p. 1A).

The stated intention of the new rules is to streamline the planning of forest managers, enabling them to revise forest plans faster and disallowing lengthy appeals by environmentalists. The desire to avoid appeals in the courts from environmentalists had been a goal of the second Bush administration from the outset. For example, in unveiling his Healthy Forests Initiative in 2002 to expedite timber sales, President Bush explained: “There’s [sic] so many regulations, and so much red tape, that it takes a little bit of effort to ball up the efforts to make the forests healthy. And plus, there’s [sic] just too many lawsuits, just endless litigation” (Izakson, 2003, n.p.).

On the other hand, many forest advocates believe the forest rule changes mean that the Forest Service can avoid public scrutiny for failures to respect
relevant standards under such laws as the Endangered Species Act—for example, to allow logging in sensitive habitats of endangered species. Their concerns are based in the new rules’ allowance of an exemption, or “categorical exclusion,” from the NEPA process of certain types of forest planning. For example, when a local forest district wished to revise an existing management plan under the old rules, forest managers had to satisfy NEPA requirements for an environmental impact statement and public comment before proposed changes could be put into effect in that forest. Under the NFMA rule changes, they potentially can skip the entire NEPA process when revising an existing forest plan. In its review of the new rules, the nonprofit forest law firm Wildlaw (2005) explained that the final Forest Service regulations eliminate the requirement to prepare an environmental impact statement pursuant to NEPA “whenever a forest plan is revised or significantly amended. Instead, forest plans ‘may be categorically excluded from NEPA documentation’ [219.4(b)], which means that the Forest Service can entirely bypass the NEPA process whenever it revises or amends a forest plan” (para. 9). (For more information on the U.S. Forest Service changes and an extensive review of the new rules, see www.wildlaw.org/WildLaw_NFMA_Regs_White_Paper.doc.)

The changes to the National Forest Management Act illustrate the tension between an understandable desire, on the one hand, of forest managers to complete their planning in an efficient manner and the need, on the other hand, of journalists and environmental groups to scrutinize the work of a public agency to ensure its compliance with environmental standards and public safety.

Conclusion

In this chapter, I’ve identified some of the legal rights and forums that enable you and other citizens to participate directly and publicly in decisions about the environment. Guarantees of the right to know, the right to comment on proposed actions, and the right of standing in court reflect basic norms of a democratic society: transparency, direct participation, and accountability of political and corporate authority to law and agreed-on standards.

Basic to effective participation in environmental decisions is a right to know, to have access to information. One of the more powerful tools for citizens and groups of all kinds is the Freedom of Information Act, which in principle makes available any information or documents used by an agency of the executive branch of government. An even more powerful information tool for investigating sources of pollution where you live or work is the Toxic Release Inventory (TRI). By filing a FOIA request with a federal agency by