

# 2009 CAPCA Spring Conference

## Engaging The Public



**Presented By:**

**Elizabeth B. Partlow, Esquire**

**[beth.partlow@ogletreedeakins.com](mailto:beth.partlow@ogletreedeakins.com)**

**Ogletree  
Deakins**

# Public Participation:

- “Any process that involves the public in problem-solving or decision-making and uses public input to make decisions.”

*International Association for Public Participation*

# How do we define the “success” of a public participation process?

- Success of the participatory process
- Success of the outcome of the process

# Formal Opportunities for Public Participation

- Regulation Development
- Siting
- Permitting
- Cleanup/remediation
- Redevelopment

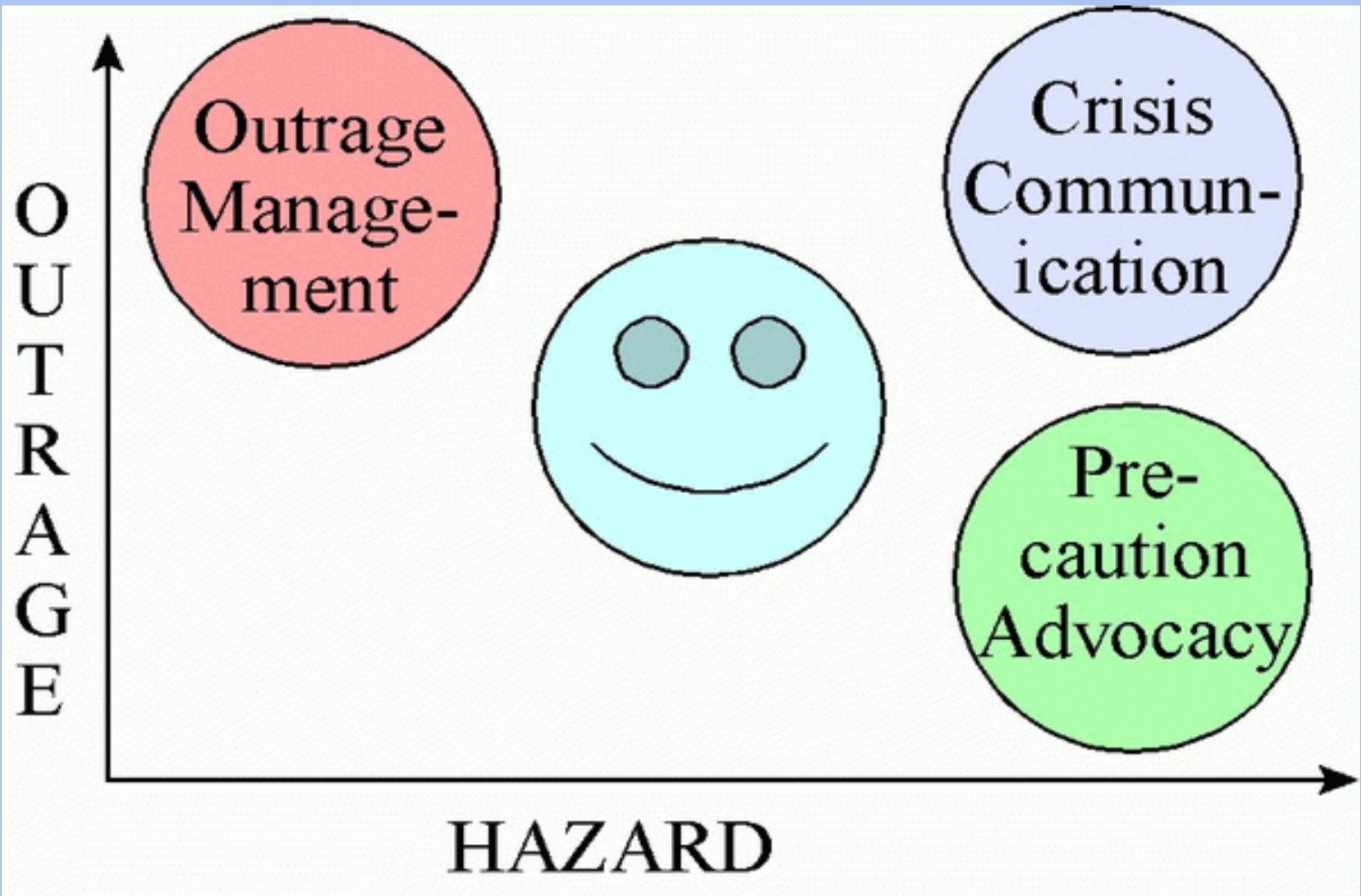


# Forms of Public Participation

- **Public notice and comment periods**
- **Public meetings**
- **Workshops**
- **Citizen advisory committees**
- **Communication with regulators, legislators, reporters**

# Dr. Peter Sandman's Formula:

$$\text{Risk} = \text{Hazard} + \text{Outrage}$$



Source: [www.psandman.com](http://www.psandman.com)

# From EPA's Website:

- Environmental Justice is 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. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from the environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.



# The Environmental Justice Movement

- 1982: Warren County, North Carolina, proposed PCB Landfill
- 1983: GAO Environmental Justice Study
- 1987: United Church of Christ Study
- 1990: EPA Environmental Equity Workgroup established
- 1992: National Law Journal report on penalties

# Executive Order 12898 (February 11, 1994)

Each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

# Executive Order 12898 (February 11, 1994), cont.

- Interagency working group
- Development of agency strategies
- Federal agency responsibilities
- Data Collection

# Executive Order 12898 (February 11, 1994), cont.

- Public Participation and access to information
  - Public may submit recommendations to federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies
  - Translation, whenever practicable and appropriate, of “crucial public documents, notices and hearings” for limited English-speaking populations
  - Agencies to work to ensure that public documents are concise, understandable, and readily accessible
  - Public meetings by Working Group

# Executive Order 12898 (February 11, 1994) cont.

6-609. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

# Environmental Justice Tools:

## 1. NEPA

- Requires agencies to take a “hard look” at the environmental impact of the proposed government action.
- Requires the public to be informed of the impact considerations during the decision-making process.

*However, NEPA requires a process, not a result.*

# Environmental Justice Tools:

## 2. NHPA

- Enacted to encourage the preservation and protection of America's historic and cultural resources.
- Also requires a process, not a result.

# Environmental Justice Tools:

## 3. Citizens' suits under environmental statutes

- Not truly environmental justice remedies.
- Require finding of violation of requirements of the statute.

# Environmental Justice Tools:

4. Equal Protection Clause of the Fourteenth Amendment: No state may deny to any person within its jurisdiction the equal protection of the laws.
  - Supreme Court has ruled that the Equal Protection Clause does not prohibit government action with disproportionate impact unless there is proof of intent to discriminate. *Washington v. Davis*, 426 U.S. 229 (1976).

# Environmental Justice Tools:

## 5. Title VI of the Civil Rights Act of 1964

Section 601: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”

*But* Supreme Court held that the same discriminatory intent required by the Equal Protection Clause is required under 601. *Guardians Ass’n v. Civil Service Comm’n*, 463 U.S. 582 (1983).

Section 602 authorizes federal agencies and departments that provide federal money to promulgate regulations to implement the requirements of 601.

# EPA's Title VI Regulation:

Recipients of federal funding “shall not choose a site or location of a facility that has the purpose or effect of ... subjecting individuals to discrimination under any program or activity ... on the grounds of race, color, or national origin or sex.”

*South Camden Citizens in Action v. N.J. Dep't of Env. Prot.*, 145 F.Supp. 2d 446 (D.N.J. 2001), rev'd 274 F.3d 771 (3d Cir. 2001), cert. denied, 536 U.S. 939 (2002).

# What does a driver's license case have to do with environmental justice?

*Alexander v. Sandoval*, 532 U.S. 275 (2001).



# Other possible environmental justice remedies:

- Title VI administrative complaint
- State statutory and/or common law claims
- Regulatory revisions requiring agencies to make affirmative findings
- “Return of penalty” provisions

# Dr. Sandman's Principles for Outrage Control:

1. Stake out the middle, not the extreme.
2. Acknowledge prior misbehavior.
3. Acknowledge current problems.
4. Discuss achievements with humility.
5. Share control and be accountable.

# A final observation from Jean Giraudoux (1882-1944)

The secret of success is sincerity. Once you can fake that, you've got it made.