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## **A NEW HOPE, WITH A NEW NEPA:** HOW EXISTING ENVIRONMENTAL IMPACT STATEMENTS FAIL TO PROTECT PEOPLE OF COLOR AT THE FEDERAL LEVEL

*Jasleen Shokar*\*

*Environmental Justice is a highly complex issue which centers on the fight to ensure a healthy environment for communities of color, the effects of which have been largely ignored by the federal government. The National Environmental Policy Act (NEPA) contains promising mandates such as the creation of an Environmental Impact Statement wherein the federal government must consider how any projects it pursues could affect the quality and health of the surrounding natural and human environment. However, the law has been interpreted to require little judicial enforcement beyond meeting basic procedural requirements of the code and largely ignores the role racism plays in determining which communities suffer the brunt of the impact of harmful federal action. This Article concludes congressional legislative action is required to ensure there are more consistent, nuanced, and stronger protections for underserved communities and the creation of accessible avenues for affected communities to defend themselves. Further, the White House Council of Environmental Quality (CEQ) should be abolished to protect the longevity of improved regulations codified by Congress and ensure communities remain protected as the political pendulum swings between administrations.*

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## I. Introduction

In response to the disastrous aftereffects of Hurricane Harvey in Houston and the monsoon floods in India in 2017, Beyoncé Knowles-Carter said, "Natural disasters don't discriminate. They don't see if you're an immigrant, Black or White, Hispanic or Asian, Jewish or Muslim, wealthy, or poor. We're all in this together."<sup>1</sup> Natural disasters may not discriminate, but people sure do.<sup>2</sup> Environmental racism is a growing issue in the United States.<sup>3</sup> Although this problem has gained a lot of attention in recent years, it did not appear overnight.<sup>4</sup> The environmental justice

<sup>1</sup> Kevin Lui, 'Natural Disasters Don't Discriminate.' *Beyoncé Makes Heartfelt Appeal for Hurricane Harvey Relief*, TIME (Sept. 13, 2017), <https://time.com/4939064/beyonce-hurricane-relief-houston-telethon/> [<https://perma.cc/J6L7-LGP8>]

<sup>2</sup> See Brian Willis, *New Study Shows Environmental Racism and Economic Injustice in Health Burdens of Particulate Pollution in U.S.*, SIERRA CLUB (Feb. 22, 2018), <https://www.sierraclub.org/press-releases/2019/08/new-study-shows-environmental-racism-and-economic-injustice-health-burdens> [<https://perma.cc/D4YG-8XSV>] (showing racism is a cause of the disproportionate affect man-made pollution has on communities of color).

<sup>3</sup> See Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480–85 (2018) <https://doi.org/10.2105/AJPH.2017.304297> [<https://perma.cc/T9AX-3MGP>] (quantifying results of a study that indicate black populations suffer more than other ethnic groups from pollution).

<sup>4</sup> See Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, THE ATLANTIC (Feb. 22, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> [<https://perma.cc/5B2Q-MT5A>] (illustrating the history of the environmental justice movement and its more recent acknowledgements by government agencies).

movement involves both advocating for safer living environments, including air and water conditions, as well as ensuring healthier working conditions for people who work in industries that handle toxic substances.<sup>5</sup> The environmental justice movement began taking form as an offshoot of the 1960s Civil Rights Movement.<sup>6</sup> In 1968, Reverend Dr. Martin Luther King, Jr. helped Memphis sanitation workers protest unhealthy working conditions at their Memphis, Tennessee municipal sanitation site.<sup>7</sup> This was the first time there was a concerted effort to bring attention to an environmental justice issue at the national level.<sup>8</sup> This followed boycotts, sit-ins, and daily marches from the sanitation workers that failed to garner a response from city officials.<sup>9</sup> Communities of color have consistently suffered as a result of poor environmental conditions where they live and work.<sup>10</sup> The environmental movement spiked in the 1970s when a slew of important advocacy organizations including the Natural Resources Defense Council, the Environmental Defense Fund, Earthjustice (previously known as the Sierra Club Legal Defense Club), and the Environmental Law Institute were either formed or reborn.<sup>11</sup>

Out of this movement came a large chunk of the landmark environmental laws that govern environmental issues to this day, such as the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, the Endangered Species Act, and waste disposal laws.<sup>12</sup> Meanwhile, in El Paso, Texas, a study by the Centers for Disease Control conducted in the early 1970s found that over half of the children who lived within a one-mile radius of the American Smelting and Refining Company (ASARCO) had blood lead levels four times what is considered acceptable.<sup>13</sup> The majority of these children were Hispanic. In the shadow of a

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<sup>5</sup> See *id.* (explaining the health and safety repercussions of living near or working at toxic sites).

<sup>6</sup> See U.S. Env'tl. Prot. Agency, *Environmental Justice Timeline*, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> [<https://perma.cc/J2CZ-9BYB>] (explaining the origins of the environmental justice movement) [hereinafter *Environmental Justice Timeline*].

<sup>7</sup> See *id.* (explaining the importance of recognizing the connection of race to environmental justice issues).

<sup>8</sup> See *Civ. Rts. Digit. Libr. of Georgia*, *Memphis Sanitation Workers Strike*, [http://crdl.usg.edu/events/memphis\\_sanitation\\_strike/?Welcome](http://crdl.usg.edu/events/memphis_sanitation_strike/?Welcome) (summarizing the details of the first environmental protest of a project which affected the health of people) (last visited Apr. 22, 2023).

<sup>9</sup> See *id.* (detailing the specific acts and events surrounding this environmental justice protest).

<sup>10</sup> See Casey Berkovitz, *Environmental Racism Has Left Black Communities Especially Vulnerable to COVID-19*, THE CENTURY FOUND. (May 19, 2020), <https://tcf.org/content/commentary/environmental-racism-left-black-communities-especially-vulnerable-covid-19/?agreed=1> [<https://perma.cc/N4ML-HME2>] (detailing the impact on the health of Black Americans as a result of environmental racism).

<sup>11</sup> See Jedidiah Britton-Purdy, *Environmentalism Was Once a Social-Justice Movement*, THE ATLANTIC (Dec. 7, 2016), <https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831/> [<https://perma.cc/734C-ED89>] (outlining the policy outputs from the origins of the environmental justice movement).

<sup>12</sup> See *id.* (explaining the passage and contents of a landmark environmental law).

<sup>13</sup> See John Burnett, *A Toxic Century: Mining Giant Must Clean Up Mess*, Nat'l Pub. Radio

smelting company on the US-Mexico border, a city marked by racial segregation, class division, and inequality was born.<sup>14</sup> The CDC study went on to influence the Environmental Protection Agency's 1973 decision to remove lead components from gasoline, but the problem of environmental racism persisted.<sup>15</sup>

In the 1970s, there was no concerted national effort to address this form of oppression, and individual communities who protested environmental racism were isolated from one another.<sup>16</sup> It was not until 1982, when Warren County, North Carolina, a predominantly Black community, was chosen by the state to house a toxic landfill and waste site that the environmental justice movement was truly considered a major national issue.<sup>17</sup> The National Association for the Advancement of Colored People (NAACP) became involved and a Congressional delegate from the District of Columbia was arrested during one of the protests.<sup>18</sup> After the Warren County protests, environmental justice issues entered the national consciousness, but would continue to be sidelined for decades.

Certain groups, such as Indigenous populations in both the continental United States and non-contiguous states and territories, have a complex, historical fight over land jurisdiction that complicates their fight for justice.<sup>19</sup> The government's extraction of natural resources has presented a unique issue for Indigenous peoples because it is both environmentally hazardous and economically challenging.<sup>20</sup> The Mescalero Apache tribe in New Mexico has been a site of government extraction of uranium since the 1950s.<sup>21</sup> Originally, the government was extracting substances for nuclear superiority during the Cold War, however due to economic necessity,

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(Feb. 4, 2010), <https://www.npr.org/templates/story/story.php?storyId=122779177> [<https://perma.cc/ALG7-UBYB>] (explaining how a largely Hispanic community suffered major health defects as a result of environmental racism).

<sup>14</sup> See Lauren Villagran, *Before Flint, Before East Chicago, There Was Smelertown*, NAT. RES. DEF. COUNCIL (Nov. 29, 2016), <https://www.nrdc.org/onearth/flint-east-chicago-there-was-smelertown> [<https://perma.cc/5JRW-DNHL>] (outlining the social and cultural influences which alienated the community from protection).

<sup>15</sup> See Burnett, *supra* note 13 (elaborating on the health risks discovered as a result of long-term exposure to harmful chemical plants).

<sup>16</sup> See U.S. Dep't of Energy, *Environmental Justice History*, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> [<https://perma.cc/QWN4-BWVH>] (summarizing the isolated and frenetic attempts of communities to advocate for themselves) [hereinafter *Environmental Justice History*].

<sup>17</sup> See *Environmental Justice Timeline*, *supra* note 6 (detailing the selection of a predominantly Black community for a toxic waste facility).

<sup>18</sup> See *Environmental Justice History*, *supra* note 16 (detailing the selection of a predominantly Black community for a toxic waste facility).

<sup>19</sup> See Louis G. Leonard III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 651–53 (1997) (explaining how indigenous populations have been heavily targeted by environmental racism and pollution).

<sup>20</sup> See *id.* at 6–8.

<sup>21</sup> See *id.* at 8.

tribes have continued to let it occur.<sup>22</sup> The Mescalero Apache tribe has gone so far as to construct and operate a nuclear toxic waste site on their land.<sup>23</sup>

Further, a 2016 study examining the likelihood of exposure to pollutants showed an increase in exposure levels in heavily segregated communities, indicating that health inequities in ethnic and racial groups are linked to the disproportionate exposure.<sup>24</sup> Economically disadvantaged groups and racial minorities tend to live in areas with lower property value, making them appealing places to build freeways and factories.<sup>25</sup> As a result, there is more pollution and human contact with harmful chemicals and fumes.<sup>26</sup> Exposure to bad air quality can result in decreased lung functioning, asthma, chronic bronchitis, and nonfatal heart attacks.<sup>27</sup> These adverse health effects, built up over time, have also increased the Black community's vulnerability to COVID-19, a largely respiratory infection.<sup>28</sup>

#### A. Houston Case Study

Over the course of this article, I will refer to the North Houston Highway Improvement Project (NHHIP), a proposed highway expansion project in Houston, Texas.<sup>29</sup> It is one of the best examples of government ignorance of environmental racism and a testament to what needs to be addressed for successful pushback on harmful projects and protection of vulnerable communities. In 2002, this billion-dollar project was announced, with plans to reconstruct several freeways that run through the heart of Houston.<sup>30</sup> Initial planning began in 2005, but an Environmental Impact Statement was not drafted until 2017. I will discuss why there was a substantial delay in this process—despite the use of federal funds, which trigger NEPA requirements—and other issues. The NHHIP project chugged

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<sup>22</sup> *See id.* at 8.

<sup>23</sup> *See id.* at 8.

<sup>24</sup> *See Mercedes A. Bravo et al., Racial isolation and exposure to airborne particulate matter and ozone in understudied US populations: Environmental justice applications of downscaled numerical model output*, 93 ENVTL. INT'L 247 (2016) (expressing findings that health disparities are far more prevalent in segregated communities of color).

<sup>25</sup> *See Berkovitz, supra* note 10 (explaining the social underpinnings of society that force segregation on predominantly Black communities and into potentially environmentally hazardous areas).

<sup>26</sup> *See id.*

<sup>27</sup> *See* U.S. Env'tl. Prot. Agency, *Health and Environment Particulate Matter* <https://web.archive.org/web/20061002182639/http://epa.gov/pm/health.html> (last visited Apr. 21, 2023) (explaining the health risks that can result from bad air quality common to construction sites and freeways).

<sup>28</sup> *See id.* (expounding on the idea that these environmental risks integrated into living conditions will make Black communities more susceptible to COVID-19).

<sup>29</sup> *See* Jack Murphy, *End Of The Road? A highway expansion project in Houston is the site of a battle over environmental justice*, THE ARCHITECT'S NEWSPAPER (May 31, 2021), <https://www.archpaper.com/2021/05/nhhip-highway-expansion-houston-ite-of-battle-over-environmental-justice/> (describing the highway reconstruction plan).

<sup>30</sup> *See id.*

along without reaching an agreement with the City of Houston for more than twenty years after its initial proposal.<sup>31</sup>

## II. Background

### A. What is an environmental impact assessment/statement?

Environmental issues caused by development have not gone entirely ignored by the U.S. and other world governments.<sup>32</sup> Environmental Impact Assessments (EIAs) exist in more than half the world's countries.<sup>33</sup> It is predominantly understood to be a "planning tool" used to assess the potential environmental shortfalls and hazards of any given project.<sup>34</sup> It creates an objective assessment of a certain project from which alternative plans or solutions can be developed.<sup>35</sup> Planning tools using logic and scientific evidence when dealing with environmental devastation and other forms of hostile economic impacts are categorized as a part of the technocratic paradigm.<sup>36</sup> This moral guidance indicates that governments do not have to choose between serving the best interests of the people versus what is best for economic development, but rather there is a choice that can merge the two.<sup>37</sup> It is from this philosophy that EIAs have risen.<sup>38</sup>

However, the use of EIAs has drifted away from its thoughtful intentions and has instead become political fodder in the battle between economic prosperity and environmental preservation.<sup>39</sup> In the U.S, NEPA was signed into law by Richard Nixon in 1969, marking a new era in environmental law and protections, with a provision requiring an Environmental Impact Statement (EIS) for any federal projects that may affect the "quality of the human environment."<sup>40</sup> Originally, the predecessor to the EIS was the EIA, and throughout this paper I will be referring to the concept of these reports as the EIA and NEPA's version as the EIS.<sup>41</sup> Within

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<sup>31</sup> See *Tex. Dep't of Transp., NHHIP Project Website* <https://www.txdot.gov/nhhip/timeline.html> (last visited Apr. 21, 2023) (illustrating the project timeline and major milestones).

<sup>32</sup> See Leonard Ortolano & Anne Shepherd, *Environmental Impact Assessment: Challenges and Opportunities*, 13 *IMPACT ASSESSMENT* 3 (1995) (explaining the steps some countries including the U.S have taken to address environmental issues).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Nick von Tunzelmann, et al., *Technological paradigms: past, present and future*, 17 *INDUS. & CORP. CHANGE* 467, 467–84 (2008) (explaining how the concept of technological paradigms can shed light on the appropriate form of action for a country).

<sup>38</sup> See Ortolano & Shepherd, *supra* note 32, at 5 (showing how EIAs were developed under this theory of government-sanctioned scientific development).

<sup>39</sup> *Id.*

<sup>40</sup> See 42 U.S.C. §§ 4321–4370h.

<sup>41</sup> See Ortolano & Shepherd, *supra* note 32, at 5 (explaining the origin of the EIA philosophy); see also *Am. Bar Assoc., What is an Environmental Impact Statement?* (Dec. 17, 2018)

the legal regime generated by NEPA, there are pollution-control regulations, infrastructure planning tools that focus on a project's environmental effects, and a focus on public health regarding clean air and water.<sup>42</sup>

NEPA's EIS was developed in response to the government's own role in environmental destruction and the adverse health impacts that followed.<sup>43</sup> With the passage of NEPA, all federal agencies were required to complete an assessment of their projects and determine any possible adverse environmental impacts that may result from them.<sup>44</sup> These EISs included a preliminary risk assessment for the project, a determination of the scope of potential issues, and a set of guidelines for the federal agencies to ensure their projects meet.<sup>45</sup> Today the federal government and some state governments can mandate EISs for certain types of projects and set individual guidelines for how to report on them.<sup>46</sup> If an agency failed to meet the threshold set out by NEPA, then there were opportunities for citizens to comment on and even sue the federal agencies in breach.<sup>47</sup> That is exactly what our friends in Houston did after the highway reconstruction project, NHHIP, was approved.<sup>48</sup> Harris County, encompassing the majority of Houston's downtown area affected by the freeway expansion, sued the Texas Department of Transportation for failing to include the environmental impact of the highway expansion project on communities, neighborhoods, and businesses immediately surrounding it, mostly inhabited by people of color, in their impact report.<sup>49</sup>

An important distinction to be made about EISs is they do not exist to mediate or eradicate environmental harm.<sup>50</sup> They are merely a public acknowledgement and notification of potential harm to a community about the environment.<sup>51</sup> This is why the City of Houston stepped in. The city saw that the report was not mitigating any damages, and certainly did not account for harm to people through pollution, displacement, and other health and safety risks inflicted as a result of the highway expansion.<sup>52</sup> However, NEPA contains no provisions requiring

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legal-docs--what-is-an-environmental-impact-statement-/ [https://perma.cc/8YBD-K6SA] (describing the purpose and beginning of the development of environmental impact statements).

<sup>42</sup> See 42 U.S.C. §§ 4321–4370h.

<sup>43</sup> See *id.*; see also Ortolano & Shepherd, *supra* note 32, at 5 (discussing the environmental problems created by the United States government as a catalyst for environmental protections).

<sup>44</sup> See 42 U.S.C. §§ 4321–4370h.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; see also *Am. Bar Assoc.*, *supra* note 41 (describing the purpose and process of an environmental impact assessment).

<sup>47</sup> See 42 U.S.C. § 4332.

<sup>48</sup> ABC 13 Eyewitness News, *Harris County Attorney's Office suing TxDOT over I-45 expansion project*, ABC 13 (Mar. 11, 2021), <https://abc13.com/north-houston-highway-improvement-project-harris-county-attorneys-office-sues-txdot-sued-over-expansion-of-i-45-traffic/10407638/> (describing the City of Houston's lawsuit).

<sup>49</sup> *Id.* (explaining why the City of Houston sued the Texas Department of Transportation).

<sup>50</sup> See *Am. Bar Assoc.*, *supra* note 41 (asserting the purpose of an environmental impact statement as a harm indicator, rather than a purely prevention-based tool).

<sup>51</sup> See *id.* (explaining further about the limits of an assessment of this nature).

<sup>52</sup> Murphy, *supra* note 29 (explaining on what grounds the City of Houston found the existing impact statement ineffective).

dissolution of a project because it surpasses a specific, measurable limit of a certain toxin, or impacts a certain percentage of a city's population.<sup>53</sup> It only requires that agencies go through the environmental assessment process.

If there is a project that occurs on any federal land, using federal money, or falls under the jurisdiction of a federal agency, certain requirements regarding an assessment of the physical and cultural impacts in addition to human health and environmental impacts must be completed.<sup>54</sup> Typically, a report would also suggest viable alternatives and identify potential elements to eliminate from the plan, though there is no requirement to adopt them.<sup>55</sup> Even other states that necessitate additional requirements, such as the California Environmental Quality Act (CEQA), do not force the adoption of the most sustainable or environmentally friendly plan.<sup>56</sup> The CEQA asks for proposed mitigation measures and requires a detailed description to justify their inability to follow the most environmentally-friendly option at their disposal.<sup>57</sup> There has not been a comprehensive evaluation on the overall effect of EISs on the environment or public health, but individual case studies have indicated that there is far more commitment to meeting administrative requirements than to actively engaging in the spirit of the EIA and following through on a commitment to bettering the environment and human health outcomes.<sup>58</sup> This is clear with the Houston highway expansion, where schools and churches along the construction sites that teach and care for children were not considered important enough to include in mitigating measures or even mention as in need of protection.<sup>59</sup> There is further debate about whether the EIAs as set out in NEPA have any significant substantive impact, or if they are largely procedural.<sup>60</sup>

An analysis of 17 Supreme Court cases concluded the court's interpretation is that NEPA imposes purely procedural obligations.<sup>61</sup> Furthermore, often federal agencies have some administrative discretion such as waiving requirements or

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<sup>53</sup> See *Am. Bar Assoc.*, *supra* note 41 (pointing out there are no specific parameters or concrete units of measurement used to regulate what is considered harmful to the environment in evaluating these assessments).

<sup>54</sup> See National Environmental Policy Act § 102, 42 U.S.C. § 4332.

<sup>55</sup> See *id.*; see also *Am. Bar Assoc.*, *supra* note 41 (explaining the inclusion of alternatives in an agency's plan).

<sup>56</sup> See Californians Advocating Responsible Rail Design, *How to Write an EIR Comment* (Aug. 10, 2011), <http://calhsr.com/environmental-review/how-to-write-an-eir-comment/> [<https://perma.cc/85RA-FKPT>] (discussing California's environmental quality report with a similar lack of enforcement for viable alternatives or suggestions found during the assessment to make a potential project more environmentally friendly).

<sup>57</sup> See *id.* (detailing the CEQA's requirements for failing to include mitigating measures in a project).

<sup>58</sup> See Ortolano & Shepherd, *supra* note 32, at 9 (explaining the lack of implementation of substantial change of the law).

<sup>59</sup> Murphy, *supra* note 29 (explaining what was not considered in the original report).

<sup>60</sup> See Ortolano & Shepherd, *supra* note 32, at 9 (commenting on the successes and failures of the program and how its usefulness is impacted by its recommended and mandated methods).

<sup>61</sup> See Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1507, 1514 (2012) (analyzing the type and methodology of requirements stipulated by NEPA).



allowing a project to go forward without an EIA at all.<sup>62</sup> Despite these discrepancies, the “mitigating” element of the EIA is found to be largely successful.<sup>63</sup> Types of mitigating elements adopted by proponents of a project include eliminating one aspect of a project, scaling down certain aspects, redesigning or restructuring, or introducing a rehabilitation or repairing project for areas of the environment that will suffer as a result of the project.<sup>64</sup> These mitigations are not major, central components of a project.<sup>65</sup> However, some EIAs don’t require actual adoption of mitigating measures.<sup>66</sup> There is also no requirement about exactly when an EIA must be conducted.<sup>67</sup>

Often EIAs are initiated after the planning stages of the project and well into the actual construction process.<sup>68</sup> Major decisions regarding location and the fundamental nature of a project have typically already occurred prior to any EIA.<sup>69</sup> EIAs are also not standardized in application; they are applied to individual projects rather than certain kinds of projects such as dams.<sup>70</sup> EIAs also serve primarily as predictive models rather than on any follow-up models.<sup>71</sup>

A huge accountability issue with the EIA revolves around inadequate public involvement.<sup>72</sup> The biggest problem is that public opinion is often solicited too late, though public comment is a required part of the EIA in the United States. As mentioned previously, since the EIA process is often adopted after key decisions such as location and the type of project has been identified, public feedback—particularly about location—often serves no meaningful purpose and is not considered in the course of the EIA or by the proponent of the project. Luckily for the population of Houstonians impacted by the proposed highway expansion, the mayor and county judge have led public scrutiny against the project alongside business owners, community members, and other stakeholders.<sup>73</sup> This strong opposition force isn’t focused on abolition of the project, but is a well-organized response seeking methodical and enduring change in the project to better suit the needs of the city and protect its people. Support from those in public office was essential for Houston’s response because it drew attention to those asking for changes in a way the agencies involved could not ignore.

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<sup>62</sup> See *National Environmental Policy Act* § 102, 42 U.S.C. § 4332.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Ortolano & Shepherd, *supra* note 32, at 19–20 (explaining these reports can be conducted at any time during the project prior to completion).

<sup>69</sup> *Id.*

<sup>70</sup> See 42 U.S.C. § 4332; see also Ortolano & Shepherd, *supra* note 32, at 3 (analyzing the irregularity in the applicability of environmental reports).

<sup>71</sup> See Ortolano & Shepherd, *supra* note 32, at 7 (clarifying how models created in this context are used).

<sup>72</sup> See *id.* at 19 (examining the insufficient public involvement in evaluating a project).

<sup>73</sup> Murphy, *supra* note 29 (illustrating the steps the government of Houston has taken in this project).

Public health impact in addition to environmental impact is the original purpose of NEPA and its procedural requirements.<sup>74</sup> Limiting the influence and ability to impact the process hinders citizens' ability to oppose plans that interfere with their communities. In addition, social impact assessments and risk assessments are also routinely omitted from EIAs.<sup>75</sup> These assessments focus on the social impacts on people and highlight any risks to human health made possible by the project. One reason this occurs is due to the narrow legislative definitions of "environmental impact" that do not explicitly include human health.<sup>76</sup>

## B. Origins of the scientific boom and innovation

The twentieth century saw a massive scientific boom in the late '50s and '60s in the United States.<sup>77</sup> The motivation for this significant expansion in funding for the sciences was largely political as the government was hot off of the heels of World War II, and was heading directly into the Cold War.<sup>78</sup> The United States was undeniably considered the "world's dominant technological superpower" during this period and the global transmission of technological advancements and breakthroughs in scientific innovation often originated from the United States.<sup>79</sup>

As a result, a domestic shift in the procedural aspects of research and development occurred.<sup>80</sup> Political interference with scientific innovation meant that a few strong industry leaders were no longer leading innovation and discovery of new and improved methods.<sup>81</sup> Instead, an influx of federal funding was funneled to universities and smaller entrepreneurial firms in order to create a larger network of competing organizations to increase production.<sup>82</sup> Not lost in this rapid incline of development was the environmental impact of such a steep shift in scientific research and development.<sup>83</sup>

Though NEPA seemed to be an ambitious law set out to achieve great feats, its Achilles' heel focuses on the law's substantive and procedural mandates and the Supreme Court's subsequent decisions deciphering which mandate ruled what issues.

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<sup>74</sup> See *National Environmental Policy Act* § 2, 42 U.S.C. § 4321.

<sup>75</sup> See Ortolano & Shepherd, *supra* note 32, at 21 (explaining how technical language in the law can allow agencies to ignore social impacts of their projects).

<sup>76</sup> See 42 U.S.C. § 4321.

<sup>77</sup> See von Tunzelmann et al., *supra* note 37, at 470 (describing the technological "science push" version of scientific policy).

<sup>78</sup> See *id.* (highlighting the federal government interest in funding scientific scholarship and experimentation).

<sup>79</sup> See *id.* at 470–71 (elaborating on the effects of federally funding American scientific innovation).

<sup>80</sup> See *id.* at 470–72 (pointing out how as a result of the subsidization by the government, a new economy emerged around scientific innovation).

<sup>81</sup> See *id.* (noting the expansion of the scientific industry).

<sup>82</sup> See *id.* (explaining how the dispersion of innovation created scientific hubs around universities and private companies).

<sup>83</sup> See *id.* at 476, 481 (criticizing the lack of inclusion of a diverse group of thinkers into the new scientific economy).

### C. NEPA's Mandates

The creation of EISs for agency developments and projects falls under the procedural wing of NEPA's two-part mandate.<sup>84</sup> The inclusion of this rule had two major outcomes that coincided with the act's goals.<sup>85</sup> First, agencies could circumvent the need for an EIS completely by conceding certain parts of their projects that in turn would reduce their environmental impact below the "significant" threshold.<sup>86</sup> This threshold was set out by the President's Council on Environmental Quality, another offshoot of NEPA legislation.<sup>87</sup> Second, the mere existence of the EIS impacts the agency's decision-making process due to the simple act of compiling data.<sup>88</sup> It is easy to ignore information you do not have, but going through the process of creating a report caused agencies to include findings and modify their projects.

Another positive offshoot of NEPA for environmental activists was the passage of parallel bills in two-thirds of the states enacting further environmental protection guidelines for development within their respective states.<sup>89</sup> Some states even included more broad provisions that extended these regulations to private developments.<sup>90</sup>

Unfortunately, this is where the good news regarding EISs come to an abrupt halt, and its shortcomings take over. The United States has effectively reduced the value of an EIS by confining its success to the document merely existing.<sup>91</sup> The only mandate NEPA truly holds is that an entity must produce the report and ensure it lives up to administratively-designed standards.<sup>92</sup> There is little purpose or accountability attached to the document or its proposed outcomes after it is deemed appropriate by the bureaucratic process.

The Supreme Court is another obstacle to the EIS's effectiveness.<sup>93</sup> By the mid-1980s, legal academics characterized the Supreme Court's decisions on NEPA

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<sup>84</sup> See *National Environmental Policy Act* § 2, 42 U.S.C. § 4321.

<sup>85</sup> See Lazarus, *supra* note 61, at 1518 (explaining procedural mandates could not be circumvented and required each agency to complete them).

<sup>86</sup> See *id.* at 1517 (elaborating on the importance of requiring this provision in overall environmental outcomes of government projects).

<sup>87</sup> See 42 U.S.C. § 4321; See also COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19–20 (Jan. 1997), <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf> (detailing the effectiveness of agencies not being able to ignore the impetus to consider environmental effects of their projects).

<sup>88</sup> See Lazarus, *supra* note 61, at 1519–20 (supporting the idea that presented with information on environmental improvements an agency is less likely to ignore the findings).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See 42 U.S.C. § 4321; See also Ortolano & Shepherd, *supra* note 32, at 20 (detailing the lack of follow-up or meaningful oversight of the aftermath of these projects).

<sup>92</sup> See 42 U.S.C. § 4321.

<sup>93</sup> See Lazarus, *supra* note 61, at 1521 (2012) (explaining what initial Supreme Court interpretations set the precedent for decades of rulings).

cases to be “disdain[ful].”<sup>94</sup> This designation came as a result of decades of Supreme Court rulings in favor of the plaintiff, filed by the Solicitor General on behalf of federal agencies.<sup>95</sup> These cases sought a more lenient reading of NEPA.<sup>96</sup> For every case that has proceeded to oral argument in front of the Supreme Court, the Court ruled in favor of the Solicitor General.<sup>97</sup>

In *Kleppe v. Sierra Club*, the Court ruled in favor of the federal government on whether NEPA’s EIS requirement is triggered by a plan for federal action or consideration for development of a region.<sup>98</sup> The respondents argued that both courses of action should trigger NEPA’s EIS requirement, but the Court ruled that “mere contemplation of regional development” is not enough to trigger the EIS requirement.<sup>99</sup> The Court held that determining if government interest in a region should yield a comprehensive environmental report shall be “left to the expert discretion of the responsible agency.”<sup>100</sup>

However, the Court consistently rejected arguments that would greatly narrow NEPA’s mandate and often produced broad readings of the law.<sup>101</sup> In the 1973 decision considering *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the battle for how narrow the Supreme Court would rule on the law played out.<sup>102</sup> Justice Harry Blackmun threatened to dissent on a draft opinion written by Justice Potter Stewart because of Blackmun’s restrictive language.<sup>103</sup> *SCRAP* concerned the Interstate Commerce Commission (ICC) and its proposed surcharge on railroads.<sup>104</sup> The District Court for the District of Columbia had ruled that ICC violated NEPA on the grounds it failed to “consider adequately the adverse impact of the surcharge.”<sup>105</sup> The Court ultimately held that NEPA could not authorize a judicial injunction based on preliminary stages of planning and a separate Congressional statute did not allow for judicial injunction of ICC decisions.<sup>106</sup> This is significant, because it was not what the original opinion hinged upon.<sup>107</sup> According to Justice Blackmun’s notes, he intended to withhold his crucial vote in favor of the opinion Justice Stewart needed over a slightly

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<sup>94</sup> *Id.* (addressing the criticism by academics of the Supreme Court’s interpretation of the law).

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 1524–25 (elaborating on the lopsided outcome of these cases in their lenient readings in favor of the agencies rather than the protective law).

<sup>97</sup> *Id.*

<sup>98</sup> *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *see also Lazarus, supra* note 61, at 1525–26 (introducing the first case that ruled on NEPA from a full Supreme Court).

<sup>102</sup> *SCRAP*, 412 U.S. at 733–34.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

different justification.<sup>108</sup> The original, draft opinion for the Court stated “while sufficient injury to individual interests ha[d] been alleged, it [was] doubtful whether the allegations [could] be proved,” and that “substantial individual injury must be proved to justify equitable relief.”<sup>109</sup> This willingness by the courts to leave decisions about when an EIS is necessary entirely unmonitored and without consequence for omission leaves questions about the EIS’s overall effectiveness. Without a mandate on enforcement, it is difficult to assure results from an EIS at all.

### III. Analysis

#### A. Shortfalls of the EIS framework

Among the shortfalls of the EIS framework is the lack of emphasis on the social impacts of development on human health. Projects such as the storage of toxic substances, offshore oil drilling, and developments that release pollutants all impact human health. There is a limited definition of “environment” supplied in the act and it is construed to indicate a physical environment rather than a broader understanding.<sup>110</sup> A broader understanding would include risks to human health and other social impacts. Social impact and human risk assessments have not been mandated parts of the EIS and, due to the stringent definition of “environment,” are often excluded procedurally.<sup>111</sup>

Within the parameters of this issue, we come to the focal point of this comment: the EIS’s complete disregard of the negative impact that commercial development has on communities of color.<sup>112</sup> This unique issue draws attention to disparities surrounding race that must be resolved by reforming environmental impact reports to mandate awareness and prevent further inequality.<sup>113</sup> A 1994 report compiled by Benjamin Goldman reviewed 64 separate studies. 63 of those studies found an environmental disparity related to either race or income level.<sup>114</sup> The only report that did not find the same was compiled by a waste management company.<sup>115</sup>

This evaluation found race was a more significant “predictor,” in a vast majority of the studies, in determining whether there were environmental disparities.<sup>116</sup> The

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *National Environmental Policy Act* §§ 2-209, 42 U.S.C. §§ 4321–4347.

<sup>111</sup> See Ortolano & Shepherd, *supra* note 32, at 21 (emphasizing the lack of focus and statutory language on human impacts of projects).

<sup>112</sup> See Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 498–99 (summarizing the various studies that indicate race and environmental impact are linked).

<sup>113</sup> *Id.*

<sup>114</sup> See BENJAMIN GOLDMAN, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 8, 13 (1994) (acknowledging the severe discrepancies between certain racial groups earlier on in the law’s application).

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

<sup>116</sup> *Id.*

racial disparities were also more likely to be found near newer developments rather than older ones.<sup>117</sup> Goldman indicated this may be a result of a 1974 EPA report designating ten counties it believed appropriate for housing hazardous waste facilities where “more than one million people of color live in these EPA recommended counties for large hazardous waste facilities, comprising a 58 percent greater share of their total population than the average for the country as a whole (32 percent as compared to 20 percent in the U.S.).”<sup>118</sup>

Ultimately, this assessment indicates three important findings about how race is more closely associated with health disparities as a result of environmentally hazardous developments than any other factor evaluated.<sup>119</sup> First, race was more “significantly associated with the location of commercial hazardous waste facilities” than any other factor that was studied.<sup>120</sup> Second, race was “the single best predictive factor” when considering where hazardous waste sites should be placed despite the “socioeconomic characteristics of [other] communities” also considered.<sup>121</sup> Third, in air pollution, lead poisoning in children, and location of municipal landfills and incinerators, race was found to be “an independent factor, irrespective of economic class” in predicting these outcomes.<sup>122</sup> There are convincing connections between toxins such as air pollutants and exposure to roaches, pollen, or mold that lead to asthma diagnoses in adults and aggravation of conditions in children.<sup>123</sup>

As the result of a medical waste incinerator being placed in the South Bronx in 1993, rates of asthma cases went up to an average of 2,500 new cases each year.<sup>124</sup> A 1994 study found in New York City that “when compared with Caucasians, the rate of hospital admissions for asthma-related problems was 4.91 times greater for Hispanics and 4.16 times greater for African-Americans.”<sup>125</sup>

The Trump Administration’s EPA admitted as much with regard to the health disparities experienced by communities of color as a result of manmade pollutants, even as they sought to “roll back regulations on pollution.”<sup>126</sup> Addressing the issue of environmental racism in American society has the same repercussions as

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Northern, *supra* note 112, at 502 (summarizing the most important findings of this study).

<sup>120</sup> See GOLDMAN, *supra* note 114, at 13 (detailing the specifics of how race was considered to be the most prevalent connection to the creation of these projects).

<sup>121</sup> See Northern, *supra* note 112, at 502 (explaining that race could be used to accurately predict the location of hazardous waste sites that were likely to be detrimental to human health).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See Valerie Burgher, *Rail Against the Machine, Environmentalists Go Head to Head in the Bronx*, THE VILLAGE VOICE, May 14, 1996, at 13.

<sup>125</sup> See Vera A. De Palo et al., *Demographic Influences on Asthma Hospital Admission Rates in New York City*, 106 CHEST 447, 448 (1994) (connecting the previous statistic about asthma to other racial groups in the same areas).

<sup>126</sup> See Trump’s EPA Concludes Environmental Racism Is Real, THE ATLANTIC (FEB. 22, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> [<https://perma.cc/5B2Q-MT5A>] (explaining clear findings of the disparaging effects of pollution on communities of color).

addressing racism itself. Also at play is the conceptual issue with environmental justice problems; most people hear environmental and are puzzled as to how a natural event, a methodical and seemingly random occurrence, can affect one community differently from another. What they fail to realize is, as humans manipulate the environment, we become arbiters of the impact. In a sense, we are picking and choosing who will feel the outcomes of our actions as we decide what part of the land to manipulate.

We have started to lose sight of how impactful our lives are on the environment and are no longer making decisions with nature's will in mind. We make decisions not on what is best for others, but what "is possible to do," and the federal government will exercise this right to the fullest when determining what action to take.<sup>127</sup>

The mistreatment of communities of color and denial of fairness continues as disparities in environmental regulation enforcement are present.<sup>128</sup> An all-inclusive study of every environmental law case from 1985 to 1992 found race-based discrepancies in the likelihood of a community suffering environmental harm.<sup>129</sup> Pollution law violations that occurred in minority communities procured lower financial penalties than the same violation in mostly White communities.<sup>130</sup> The study goes on to determine the government also drags its feet when responding to environmental issues in minority communities.<sup>131</sup> In addition, the government accepts solutions that are not up to par with scientific consensus to remedy the violation or environmental disparity being considered in minority communities.<sup>132</sup>

Additionally, only in some cases regarding multilingual communities were the contents of an EIS even offered in another language.<sup>133</sup> The United States Department of Energy released their EIS in Spanish for a proposed radioactive facility in New Mexico and the United States Department of Housing and Urban Development released their EIS in Spanish for proposed housing projects in Puerto Rico.<sup>134</sup> Under NEPA, federal agencies facing more scrutiny under federally-mandated processes are more likely to follow through on commitments to addressing the language barrier to public participation.<sup>135</sup>

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<sup>127</sup> See von Tunzelmann et al., *supra* note 77, at 481 (commenting on how as a society we have stopped considering the consequences of our actions).

<sup>128</sup> See Northern, *supra* note 112, at 505 (asserting a similar lack of consequence consideration for communities of color resulting in their mistreatment).

<sup>129</sup> See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 NAT'L L.J. S2, 1 (1992) (explaining the lack of harsh penalties for pollution in communities of color).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 297 (1992) (describing only some agencies' willingness to accommodate communities who speak other languages).

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

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

The EIS largely neglects specific issues of social impact and human health risk even though they are purported to be an “integral part” of the EIS’s mission and outcome.<sup>136</sup> EISs are a largely bureaucratic operation, and a natural remedy to this could be to expand the role the public has in these decisions.<sup>137</sup> Currently, there is a codified requirement for public involvement in EISs through NEPA, but it is weak.<sup>138</sup> Furthermore, it typically comes along too late in the process to have any meaningful impact.<sup>139</sup> Instead, the project is likely far enough along in production that only small concessions can be made, or maybe none at all.

In addition, some interactions between citizens and proponents of the plan are “reduced to public relations or defending a decision that has (with the possible exception of mitigation measures) already been made.”<sup>140</sup> At that point, public opposition to a project can only really try to stop the completion of the project or ask for mitigating measures that may force a concession of some of the less environmentally-friendly aspects of the project. However, due to the lack of authority of agencies enforcing the EIS, any mitigating measures are often not implemented.

Sometimes, the proponent of a project may even ask residents in the area to take their own precautions such as installing a certain type of window to offset potential noise disruptions.<sup>141</sup> It is evident among EIS experts there are not enough procedures or required actions in NEPA to ensure changes to projects are being made.<sup>142</sup> This hinders the effectiveness of an EIS because these proposed changes are largely ignored by advocates of the projects. There have been several Congressional proposals to amend NEPA to include measures that require action and implementation that strengthen the value of the EIS. Unfortunately, not a single one has passed.

A remedy to this issue would be to ensure the EIS is a legal document. Firstly, this ensures that any findings included in the document, including potential mitigating measures that would offset the harm caused by the project, bind the proponents of the project. This means that failure to make the concession listed or avoid full implementation of mitigating measures would have legal consequences. This could also allow citizens to take the company to court if certain measures aren’t being met or executed. This leads to another issue: the lack of continued monitoring after they have begun development.

The predictive models used in EISs are only one of a series of “forecasting capabilities” used to calculate the expected change on the environment as a result

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<sup>136</sup> See Ortolano & Shepherd, *supra* note 32, at 21 (explaining about the omission of social risks in a report).

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

<sup>138</sup> See *National Environmental Policy Act* § 10242 U.S.C. § 4332.

<sup>139</sup> See Ortolano & Shepherd, *supra* note 32, at 19 (elaborating on the uselessness of the public comment period).

<sup>140</sup> *Id.*

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

<sup>142</sup> See 42 U.S.C. § 4332.



of a project.<sup>143</sup> This means there is room for a second or follow-up EIS report once the project has begun.<sup>144</sup> This not only checks to see how the project is faring, but also provides feedback on the EIS predictive models to gauge whether they are even effective in forecasting the appropriate issues.

Another remedy to this issue would be to ensure there are periodical, mandated reports that occur after the EIS and during the operational life of the facility.<sup>145</sup> This way, there is a continuous flow of information to the agencies, and they can in turn ensure there is progress on implementation and monitor outcomes and processes of the project. This would also help standardize terms and the legal designations of certain projects and programs.<sup>146</sup> Many states have considered incineration facilities to be renewable energy facilities due to technicalities in the code that ask for energy production values, but overlook other potential harmful aspects of incineration facilities.<sup>147</sup> This oversight has been noted by the EPA, but there is little jurisdictional leeway for them to weigh in or contradict these decisions.<sup>148</sup> The EPA is limited to encouraging states to reevaluate their designations using other measures of pollution.

Allowing individual states to circumvent thorough environmental review causes faster approvals of these types of projects and facilities due to this state-level designation.<sup>149</sup> These decisions by some of the states, leave vulnerable communities unprotected and unable to find means to protest these toxic facilities cropping up in their communities.

#### B. Lack of Judicial Protection or Enforcement

Now that the flaws of preexisting EIS formatting and creation have been discussed, we must move on to the latter of the two-pronged solution. The next part of the resolution concerns how to hold violators of the process accountable and how to enforce the contents of their own EIS on the government entity that wrote them. Without judicial enforcement, administrative procedures can fall flat and fail to comply with the spirit of the law. Procedural aspects of the law are clear and courts can grant injunctive relief against agencies because there is an objective standard on which to base judicial decisions on.<sup>150</sup> At its passage, neither Congress nor any

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<sup>143</sup> See Ortolano & Shepherd, *supra* note 32, at 20 (discussing the highly conceptual nature of the EIS reports which discount the actual results of the project once complete).

<sup>144</sup> *Id.*

<sup>145</sup> See Richard N. L. Andrews, *State Environmental Policy Innovations: North Carolina's Clean Smokestacks Act*, 43 ENVTL. L. 881, 883 (2013) (emphasizing the importance of continued federal monitoring for facilities that pose harm to public health).

<sup>146</sup> See Ana Isabel Baptista & Kumar Kartik Amarnath, *Garbage, Power, and Environmental Justice: The Clean Power Plan Rule*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 403, 422–23 (2017) (emphasizing that many states and jurisdictions use different standards to measure impact).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See T. Mary McDonald, *The Relationship between Substantive and Procedural Review under NEPA: A Case Study of Scrap v. U.S.*, 4 ENVTL. AFF. 157, 158 (1975) (characterizing the reasons

environmental activists had predicted the extensive role the law would play in environmental law litigation.<sup>151</sup> Section 102 of the act sets forth the two-pronged mandate that ultimately governs NEPA.<sup>152</sup>

What is considered NEPA's substantive mandate occurs in § 102(1), where "Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]."<sup>153</sup> Its procedural mandate occurs in the following item § 102(2), "to the fullest extent possible, . . . all agencies of the Federal Government" must create "environmental impact statements" which contain "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment".<sup>154</sup> The main issue with the language used in the act is that there is no language that requires its mandates to be "subject to judicial enforcement through litigation."<sup>155</sup>

Though there has been no consensus on what specifically served as a catalyst for the surge of NEPA litigation, Judge Skelly Wright's opinion in the United States Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission* comes incredibly close.<sup>156</sup> Wright emphasized the court's support of NEPA's aims, writing "the commitment of the Government to control, *at long last*, the destructive engine of material 'progress'" will not be "lost or misdirected in the vast hallways of the 48 federal bureaucracy."<sup>157</sup> Judge Wright declared NEPA's substantive policy as a "flexible one," and NEPA's procedural requirements as "not highly flexible" and "establish[ing] a strict standard of compliance."<sup>158</sup> The juxtaposition of these two opposing standards left room for disagreement regarding NEPA's role and scope, thus spurring increased litigation to find answers.

In *Calvert Cliffs*, the Atomic Energy Commission (AEC) argued that although the Commission had the "responsibility for the preparation of EISs," there was no mandate that they considered any of the findings and environmental effects while making decisions on the development of their project.<sup>159</sup> In terms of the court's role, Judge Wright did not outright strip the courts of the ability to reverse a substantive decisions made by an agency, but rather held that they couldn't "unless

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why courts tend to err on the side of finding procedural bases on which to rule rather than substantive).

<sup>151</sup> See Lazarus, *supra* note 61, at 1515 (citing a senator who helped author the bill and documenting his surprise at the court's influence).

<sup>152</sup> See *National Environmental Policy Act* § 102, 42 U.S.C. § 4332.

<sup>153</sup> *National Environmental Policy Act Implementing Regulations*, 32 C.F.R. § 174.17 (1971).

<sup>154</sup> *Id.*

<sup>155</sup> See Lazarus, *supra* note 61, at 1515 (discussing a deliberate omission by the drafters of the law to not include courts in the process).

<sup>156</sup> *Id.*

<sup>157</sup> *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.”<sup>160</sup>

Despite focusing on distinctions between the Section 102 mandates in NEPA, Wright declared federal agencies couldn't claim indifference or lack of “statutory authority to concern [themselves] with the adverse environmental effects of [their] actions.”<sup>161</sup> Following Justice Wright's categorization of the procedural mandate as inflexible, other courts grounded their decisions within the procedural mandate, rather than the substantive one.<sup>162</sup> Litigation followed the act well into the following decades, but there was no challenge to the validity of the law: it was here to stay.

In cases where there is substantive ground on which to rule, where the federal agency in question has either not considered alternative options to the proposed action by conducting a cost/benefit analysis or considered not proceeding with a costly project, courts have refused to provide an equally “probing review.”<sup>163</sup> There is no overarching provision in NEPA that calls for judicial review or enforcement of certain aspects of the law; only a good faith effort at fulfilling two decisions on the basis of the EIS neither of which is to implement a change.<sup>164</sup> These decisions are first, that agencies “must choose the alternative course of action with the optimal environmental cost/benefit ratio, weighing potential environmental damage against expected project benefits,” and second, that “agencies must decide whether this cost/benefit ratio warrants proceeding with the proposal at all.”<sup>165</sup> As a result, the courts have slowly, over time, honed in on their method of evaluation. Substantive review requires the courts to determine whether federal agencies have chosen the least harmful course of action for the environment and decide whether it is “consistent” with other crucial aspects of national policy.<sup>166</sup>

The first determination to be made by the judiciary is whether an EIS was required at all in a situation.<sup>167</sup> This is determined by whether or not the project pursued by the agency would in any stage “significantly” affect the overall “quality of the human environment.”<sup>168</sup> If the substance of the case calls for further procedural aspects of the law to be determined, it is based on whether they were

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Lazarus, *supra* note 61, at 1517–18 (explaining the precedence of this ruling).

<sup>163</sup> See McDonald, *supra* note 150, at 163 (“Curiously, however, when compliance with NEPA's substantive duties is expressly at issue courts have exercised less probing review.”).

<sup>164</sup> *Id.* (explaining the rule “First, agencies must choose the alternative course of action with the optimal environmental cost/benefit ratio, weighing potential environmental damage against expected project benefits.” and “Second, agencies must decide whether this cost/benefit ratio warrants proceeding with the proposal at all,” and their mandate of completion.).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 164 (“Essentially, an agency decision may be reversed on its substantive merits if it is arbitrary and capricious or clearly gave insufficient weight to environmental factors. . .”).

<sup>167</sup> *Id.* at 159.

<sup>168</sup> *Id.* at 158.

made in “good faith.”<sup>169</sup> The EIS created by an agency should be a thorough report that is both complete and meets the standard of analysis NEPA requires.

In addition to the aforementioned process, at the penultimate stages of their decision-making, the agency must balance economic benefit with environmental harms in good faith.<sup>170</sup> This two-fold test allows the judiciary considerable flexibility in evaluating agency action and ensuring it complies with NEPA. This is an important test that speaks to the intentions of the drafters of NEPA and when used appropriately, could allow the spirit of the law to be carried through via the judiciary. NEPA demands good faith and an agency can't embark on a project that substantially harms the environment in good faith. An agency making a self-interested decision that involves circumventing environmentally protective actions and instead harms the environment, provides the court with a chance to take action on “procedural grounds,” rather than use the less traveled substantial route.<sup>171</sup>

The substantive requirements of NEPA force agencies to make two decisions based on their completion of the EIS. Firstly, agencies have the opportunity to choose an alternative course of action that accounts for the best environmental outcome.<sup>172</sup> This includes considering the cost/benefit ratio which entails hedging potential agency benefits against potential environmental harm.<sup>173</sup> It is upon the cost/benefit ratio the second question is considered by the courts. Agencies must decide based upon their findings if proceeding with the proposal is appropriate. This can result in additional judicially sanctioned reversal of any agency decision, originally laid out in *Environmental Defense Fund v. Corps of Engineers, United States Army*.<sup>174</sup> This court adopted the standards suggested earlier by *Calvert Cliffs* and *Citizens to Preserve Overton Park v. Volpe*.<sup>175</sup>

The court ruled that the standard of review should first decide if the decision was “within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>176</sup> The courts analyze whether the agency thoroughly considered all relevant

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<sup>169</sup> *Id.* at 163 (“The demands of good faith enable the judiciary to evaluate agency thought processes far more effectively, and on a more subjective basis, than mere review of the adequacy of documents produced by agencies.”).

<sup>170</sup> *Id.* (“Furthermore, the procedural requirement that agencies conduct a good faith consideration and balancing of environmental factors affords a judicial basis for ensuring agency compliance with the substantive goals of NEPA.”).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See *Envtl. Def. Fund v. Corps of Eng'rs of U.S. Army*, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973)

<sup>175</sup> See McDonald, *supra* note 150, at 164 (“The leading case on judicial review under NEPA's substantive rights, *Environmental Defense Fund v. Corps of Engineers, United States Army*, adopted the standards of review suggested by *Calvert Cliffs* and *Citizens to Preserve Overton Park v. Volpe*.”).

<sup>176</sup> See 470 F.2d at 300 (“The court must then determine, according to the standards set forth in §§101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. . .’) (citations omitted).

factors or if the decision itself was an error in judgment on behalf of the agency.<sup>177</sup> Next, the judiciary must determine whether “the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. . . .”<sup>178</sup> Since this ruling, several other courts have also used this standard now known as the “substantial inquiry” test.<sup>179</sup>

Despite the development of judicial rulings to preserve the EIS and its requirements, there is evidence the EIS has not achieved its goals in its current written form.<sup>180</sup> NEPA is supposed to offer avenues for those willing to advocate for affected communities to have their voices heard. This occurs through the public comment stage of the EIS and the releasing of public health data and the geographic distribution of the environmental hazards of the project.<sup>181</sup> However, this would require self-organization of the public rather than requiring the federal agency to be cognizant of the issue as an automatic requirement of the law.

A community should not only be aware of federal projects in their area, but also ensure they engage in the process of having their voices heard. This is a large burden to place on an already underserved community as they go about their daily lives. The requirement of a federal agency to advertise the project is sufficient notice and enough on their part to inform those who may be impacted.<sup>182</sup>

However, NEPA merely suggests agencies promote their proposal through “local media, publication in newsletters that may be expected to reach interested persons, notice to community organizations, notice to state or area-wide clearinghouses, direct mailing to owners or occupants of nearby or affected property, or posting of notice on- and off-site in the area where the action is located.”<sup>183</sup> Whether this is meant to be an exhaustive list is irrelevant; the fact that these are “suggested” methods of informing the public indicates that NEPA’s mandate may be met by an agency satisfying just one of these methods of communication. This is surely not enough to argue existing legislation protects these groups.

The closest NEPA gets to using language that indicates an emphasis on awareness for underserved communities is when it asks a federal agency to review

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<sup>177</sup> See McDonald, *supra* note 150, at 164 (“Following the lead of the Eighth Circuit, several courts have adopted substantive review under the same standard.”).

<sup>178</sup> See 470 F.2d at 300 (“The court must then determine, according to the standards set forth in §§101(b) and 102(1) of the Act, whether ‘the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. . . .’” (citations omitted)).

<sup>179</sup> See McDonald, *supra* note 150, at 164 (“Following the lead of the Eighth Circuit, several courts have adopted substantive review under the same standard, which has become known as the “substantial inquiry” test.”).

<sup>180</sup> See John Ruple & Mark Capone, *NEPA - Substantive Effectiveness under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 39, (2016) (explaining how NEPA’s goals in practice are not met because the “least environmentally damaging alternative” need not be chosen).

<sup>181</sup> See Stephen M. Johnson, *NEPA and SEPA’s in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 573–74 (1997) (explaining after the report is complete it must be released to the public).

<sup>182</sup> *Id.*

<sup>183</sup> See 40 C.F.R. pt. 1506.

the health and socioeconomic impacts of their actions.<sup>184</sup> Stephen M. Johnson, author of *NEPA and SEPA's in the Quest for Environmental Justice*, concedes that Executive Order No. 12,898—signed by President Bill Clinton—was accompanied by a memorandum which stated a variety of health and socioeconomic impacts must be considered, but failed to clarify “to what extent agencies must consider those impacts.”<sup>185</sup> Johnson challenges the notion that socioeconomic impacts may not include environmental racism concerns by evaluating several courts’ reasoning regarding their interpretation of “environmental impacts.”<sup>186</sup>

In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Supreme Court broadly interpreted the term “environmental impact” to include certain health effects, thus allowing a more thorough consideration of health effects on low-income communities or communities of color.<sup>187</sup> This oversimplifies the issue.

Health is not the only way lower income communities and communities of color are impacted. There are also socioeconomic damages, psychological harm, and lack of community cohesion. For example, contamination of air or water—in addition to health problems—can also lead to a disruption in homes, schools, and businesses. This has effects on education standards, a person’s ability to pay bills if they can’t work as a result of building contamination, and it can even force a family out to the street if their home is affected.

The issue of environmental racism is systemic, and it cannot be prevented by community organizing. Man-made pollution can affect a person’s health, their jobs, their children’s future, and their own livelihood. These problems cannot be resolved by hinging our hopes on the court’s interpretation of a certain phrase. We must safeguard this problem with further language included in laws that explicitly require agencies to evaluate environmental racism in their projects. Approaching a solution in this manner is considered part of a larger school of thought about how “persistent racism cannot be remedied with existing civil rights laws because current legal doctrine legitimates racial categories and subordination.”<sup>188</sup>

### C. Protections Set Out Under the Executive are Inconsistent and Can Lead to Harmful Consequences

Another entity often cited as the “final arbiter” in determining the adequacy of EIS is the Council on Environmental Quality (CEQ).<sup>189</sup> NEPA included a provision

<sup>184</sup> See Johnson, *supra* note 180, at 579–80 (showing a possible solution in the albeit weak language used to define social and health impacts).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (finding in the court’s interpretation as more possible protection for communities of color, but still lacking the immediacy and mandate necessary to be effective).

<sup>188</sup> Reich, *supra* note 133, at 284 (“These scholars, often characterized as the Critical Race Theory (CRT) school, argue that persistent racism cannot be remedied with existing civil rights laws because current legal doctrine legitimates racial categories and subordination.”).

<sup>189</sup> Alice Karen Hill, *The CEQ: Enforcer of NEPA's Substantive Policy*, 12 HOUS. L. REV. 1110, (1975) (“*Warm Springs Dam Task Force v. Gribble* could be used as precedent to establish the Council on Environmental Quality (CEQ) as the final arbiter of the adequacy of environmental

to create the CEQ so the President has an advising committee on environmental issues.<sup>190</sup> The operative role of the CEQ is to be “statutorily obliged to determine if trends in the quality of the environment are consistent with the policies of NEPA and to appraise governmental activities in the light of those policies.”<sup>191</sup>

The CEQ is an executive agency which represents the president’s own view on environmental matters.<sup>192</sup> If the CEQ determines a project doesn’t follow NEPA guidelines “to restore and maintain the environment in productive harmony between man and nature, then that is the President’s own conclusion unless he specifies otherwise.”<sup>193</sup> It is argued, due to the CEQ’s proximity to the ultimate power in the country, that the CEQ’s determination on a proposal should be the “last word” on the issue.<sup>194</sup>

However, even the cases reviewed by the CEQ had to be brought to lower courts first by environmentalists.<sup>195</sup> In the *Warm Springs* case, the CEQ was officially recognized as having authority on the issue vested in them by Congress’ passing of NEPA.<sup>196</sup> Nevertheless, recognizing their power doesn’t stop the need for more permanent action.<sup>197</sup>

This is dangerous because there is no concrete view on any certain issue.<sup>198</sup> It changes every four to eight years by the administration in power.<sup>199</sup> This level of inconsistency means with each administration, equality and the eradication of environmental racism hangs in the balance.<sup>200</sup> This is also not technically a final say on a project or provision, because the courts can review the decision and Congress can mandate projects through legislation—all three branches of government have jurisdiction to alter the law in this area.<sup>201</sup>

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impact statements (EIS) prepared by federal agencies under the procedural mandates of NEPA.”); *See also* *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1974) (ruling the CEQ was the entity charged with the authority to manage the administration of NEPA).

<sup>190</sup> *See* 40 C.F.R. pts. 1500–16

<sup>191</sup> *See id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *See* Hill, *supra* note 188, at 1111.

<sup>195</sup> *See id.*

<sup>196</sup> *Gribble*, 417 U.S. at 1304-05 (citing the CEQ’s authority in the matter and agreeing that completion of the EIS, not implementation of its findings is all that is required of a federal agency).

<sup>197</sup> *See* Hill, *supra* note 188, at 1119 (referring to the lack of measurements in determining if any harm will result to the environment or human health as a result of the project); *See also* *Gribble*, 417 U.S. at 1304-5 (stating the court’s perspective that completion of requirements, not actual results is what should be used to determine whether compliance has occurred).

<sup>198</sup> *See* Reich, *supra* note 133, at 280–81 (commenting on how there are disagreements about how to address these issues and in addition, as to whether these are issues in need of addressing in a particular way).

<sup>199</sup> *See* Hill, *supra* note 188, at 1123 (explaining how the CEQ is the President’s vessel for the time he is in office, with its regulations and views changing with each person elected).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

In the Trump Administration, NEPA's effectiveness faced disastrous consequences.<sup>202</sup> Trump limited public review and comment period for projects, placed a time limit on cranking out an environmental report, and allowed agencies to create a designation of projects that can bypass an EIS entirely.<sup>203</sup> As mentioned above, all of these provisions were too weak to be entirely effective to begin with.<sup>204</sup> These changes are nothing short of detrimental.<sup>205</sup> The Trump Administration also went so far as to waive EISs for any project built during the economic downturn from the pandemic.<sup>206</sup> This change caused catastrophic effects on the quality of our environment and produced adverse effects on human health.<sup>207</sup>

#### IV. Solution

Ultimately, what is needed is a coordinated effort to strengthen the existing NEPA law to make it clear what each branch's role is regarding application.<sup>208</sup> This solution comes as a rule of three, with change needed in the executive, legislative, and judicial branches.

##### A. Congress Can Enact Protective Amendments to NEPA and New Laws for Environmental Injustice

The largest chunk of the transformation needs to occur within the legislation itself. First, Congress must reinforce important aspects of the law that speak to the spirit of the law. Perhaps the most important change to the EIS is creating a separate category to consider the adverse effects the project may have on minority and low-income communities with a requirement for implementation.<sup>209</sup> Without this

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<sup>202</sup> Lisa Friedman, *Trump Weakens Major Conservation Law to Speed Construction Permits*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html> [<https://perma.cc/67CC-DTS2>] (explaining how Trump's rollback has weakened NEPA's effect).

<sup>203</sup> *Id.*

<sup>204</sup> See Ortolano & Shepherd, *supra* note 32, at 20 (explaining how the current rules are not strict enough to achieve the goals set out in NEPA).

<sup>205</sup> Friedman, *supra* note 201. (“[The changes] eliminat[e] the need for agencies to analyze a project's indirect or “cumulative” effects on the environment and specify[] that they are required to only analyze “reasonably foreseeable” impacts.”).

<sup>206</sup> Coral Davenport and Lisa Friedman, *Trump, Citing Pandemic, Moves to Weaken Two Key Environmental Protections*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/climate/trump-environment-coronavirus.html> [<https://perma.cc/3MU2-2HNW>] (“President Trump signed an executive order that calls on agencies to waive required environmental reviews of infrastructure projects to be built during the pandemic-driven economic crisis.”).

<sup>207</sup> See Andrews, *supra* note 145, at 883 (commenting on the significance of environmental reports for federal agency projects which put public health at risk).

<sup>208</sup> See Ortolano & Shepherd, *supra* note 32, at 9–10 (analyzing the EIS' overall ineffectiveness due to a variety of issues).

<sup>209</sup> See Johnson, *supra* note 180, at 567 (explaining NEPA currently requires the government “consider the disparate impacts that a proposed action may have on minority or low-income communities.”).



designation, it is impossible to guarantee that the range of effects on these communities will be analyzed or at all considered. In each EIS, there must be a section which addresses the minority and low-income communities affected by the agency project and an analysis of the specific impacts their project may have on these communities.<sup>210</sup>

This provision in the EIS must consider how a project could affect vulnerable and marginalized populations differently from that of other communities, largely those with financial resources and political power. The agency must consider health impacts and socioeconomic ones. For example, an agency polluting waters could cause the city government to divert funds from school budgets and teachers to environmental upkeep. This may ensure the grounds of the school are not toxic, but could have a disparaging impact on poorer school districts. Intricate detail is important when assessing the effects a project can have on communities of color.

Next, in order to ensure minority communities and socioeconomically disadvantaged communities can understand these reports, they must be offered in languages other than English.<sup>211</sup> It should be a federal requirement for an agency to release every EIS in Spanish.<sup>212</sup> In addition, other languages spoken in the affected area should be included.<sup>213</sup>

In Houston, the Texas Department of Transportation delivered all information regarding the highway expansion project in English and in Spanish.<sup>214</sup> However, there are over 145 languages spoken in Houston. After English and Spanish, the next most frequently spoken are Vietnamese, Chinese, and Arabic, leaving a question as to why this information was not translated into more languages when 48 percent of people speak a language other than English at home.<sup>215</sup>

This data can be attained by looking to local election offices and State Departments of Public Safety to see what other languages state and local documents are offered in.<sup>216</sup> For example, Harris County, which contains Houston, complies

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<sup>210</sup> Reich, *supra* note 133, at 278 (“The siting of environmental hazards in minority areas not only creates numerous health problems, but also causes socioeconomic damage, including psychological harm to community cohesion.”).

<sup>211</sup> *See id.* at 297 (illustrating the lukewarm approach to providing EIS findings in another language).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See Tex. Dep’t of Transp., Facts about Highway Expansion Project* (showing availability of information in English and Spanish) <https://www.txdot.gov/nhhip/public-engagement/facts-highlights.html>.

<sup>215</sup> *See 24 Hour Translation Services, Houston’s Most Popular Languages* <https://www.24hourtranslation.com/houston-most-popular-languages.html> (last visited Apr. 21, 2023) (showing the statistics of languages spoken in Houston); *See also U.S. Census Bureau, Quick Facts about Houston, Texas*, <https://www.census.gov/quickfacts/fact/table/houstoncitytexas/POP815221#POP815221> (last visited Apr. 21, 2023) (showing 48% of people speak a language other than English in Houston households).

<sup>216</sup> *See Harris County Election Comm’n, Voting Information* <https://www.harrisvotes.com/VotingInfo?lang=en-US> [<https://perma.cc/7Z88-9VLW>] (presenting English, Spanish, Vietnamese, and Chinese language translations in the top right corner of the website for all information regarding election procedures); *see also Asian & Pacific Islander Am.*

with Section 203 of the Voting Rights Act requiring material in certain areas to “provide in-language voting materials in areas with a significant number of limited English proficient voters.”<sup>217</sup> Harris County provides materials in Mandarin Chinese and Vietnamese due to the significant populations of Chinese and Vietnamese speaking and reading voters, therefore the Texas Department of Transportation should have also included literature regarding the highway expansion project in these languages.<sup>218</sup> EIS reports in these areas should be released in the same languages using a similar mechanism for determining what additional languages are necessary.<sup>219</sup>

Subsequently, public participation and knowledge of the project must be improved. Federal projects and their EISs should be presented at a city council meeting to allow public input. In addition, the city public health departments and mayor’s offices should be given a copy of the EIS and allowed an individual assessment of the report. In Houston, changes were made to the existing plan because the mayor’s office and the City of Houston assembled a taskforce for their own independent review of the proposal. If local, state, or federal elected officials ask for a change to the plan it must be implemented unless the remedy asks to “severely alter the purpose of the project deeming it moot.”<sup>220</sup> This is how Houston’s opposition to the highway plan as written has been so successful. In addition to grassroots involvement from community members and stakeholders, strong officials in positions of power such as the mayor and county judge stepped in and sued the Texas Department of Transportation for not considering the adverse effects on communities of color. These elected officials and the City of Houston conducted their own review and negotiated changes, resulting in a new proposal that mitigated issues such as funding for affordable housing for displaced families and additional health and safety measures improving flood water preparedness. Houston subsequently dropped the lawsuit when the Texas Department of Transportation agreed to these changes allowing the project to go ahead.

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*Vote, Texas Election Information* (June 12, 2020) <https://www.apiavote.org/TX> [<https://perma.cc/938A-TXP3>] (citing the Section 203 of the Voting Rights Act which “requires certain jurisdictions to provide in-language voting materials in areas with a significant number of limited English proficient voters.”).

<sup>217</sup> See *Asian & Pacific Islander Am. Vote, supra* note 215 (“Section 203 of the Voting Rights Act requires certain jurisdictions to provide in-language voting materials in areas with a significant number of limited English proficient voters.”) (explaining why Harris County offers election materials in languages other than English and Spanish); see also 52 U.S.C. § 10503 (explains the reasoning behind this rule finding “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process.”).

<sup>218</sup> See *Asian & Pacific Islander Am. Vote, supra* note 215 (explaining how Harris County chose these languages).

<sup>219</sup> See *id.* (“Section 203 of the Voting Rights Act requires certain jurisdictions to provide in-language voting materials in areas with a significant number of limited English proficient voters.”) (explaining the rule behind Harris County’s inclusion of Vietnamese and Chinese language materials); See also 52 U.S.C. § 10503 (“The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process.”).

<sup>220</sup> See Ortolano & Shepherd, *supra* note 32, at 19 (elaborating on what determines the effectiveness of feedback).

It is a lot to ask of a person to come to a city council meeting, which typically occurs on a weeknight. They may need to take time off from work, arrange for someone to take care of their children, and arrange transportation to the center of their city.<sup>221</sup> Harmful projects do not happen exclusively in convenient locations, so this would be an additional burden to the preexisting institutional one on someone who is already disadvantaged. Informing elected officials would at least be notifying an entity who can advocate on behalf of their constituents and even change the law itself. In Houston, these elected officials changed the proposal for the highway expansion and obtained millions of dollars in mediation of the harm.<sup>222</sup> Without the involvement of senior city officials, this would have been impossible.

Further, if the remedy involves an entity or individual other than the federal government to bear the burden, then the federal agency should be fined or otherwise held financially responsible for the upkeep or change required. A federal agency should bear most of the burden of a project before individual citizens or a city is tasked with taking action to protect itself or mitigate damages.

The agency must also bear the burden of sending severely impacted communities in close proximity individual mailing notices, and contacting the elected representatives of those people at the local, state, and national level by both email and mail of the project.<sup>223</sup> This will ensure more experts and people in power are aware of what is going on and can in turn make more people aware. There should be separate mailing materials for minority and low-income community members who could be affected by the agency project, even if they are not in the immediate surrounding area.

The EIS should be a legal document carrying legal weight. This would ensure protections for people affected and would keep the agency accountable based on the findings. This would also severely limit the agency's capacity to ignore their own findings and would allow an avenue for people to sue the agencies for their failure to implement mitigating changes.

A legal document status also paves the way for periodic follow-up to adjust findings and remedy the issue using a predictive model in assessing a community's needs. Predictive models do not take into account the reality of a finished project and changing environments. A follow up on the EIS every five years allows for updates to be made and adjustments accounted for based on operation of the facility or other intervening factors.

Finally, the Green New Deal, a current legislative proposal which offers changes to fix social problems such as economic inequality and racial injustice through modernizing our energy intake and reducing pollution, must also be

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<sup>221</sup> See Reich, *supra* note 133, at 278–79 (challenging the idea these communities have the capacity or know how to effectively advocate against the federal government's will).

<sup>222</sup> See *Tex. Dep't of Transp., Officials Announce Consensus on I-45 Project*, <https://www.txdot.gov/about/newsroom/local/houston/officials-announce-consensus-on-i45-project.html> (last visited Apr. 21, 2023) (explaining the agreement between the City of Houston and the Texas Department of Transportation regarding the highway expansion).

<sup>223</sup> See Johnson, *supra* note 180, at 574–75 (highlighting some of the common ways to inform communities of an upcoming project in their area).

stronger in its emphasis on environmental racism.<sup>224</sup> There are no concrete policies outlined in the current form of the bill, but there must be statutory requirements set for federal agencies. The government needs to lead by example and cannot let federal agencies even recommend a list of places suitable for toxic waste disposal that are all situated near communities of color—specifically Black communities. There must be measures in place that protect our people from its own government; if not we are within no right to regulate private industry. The Green New Deal must develop specific proposals that remedy past problems, not just start a new path forward on new projects.

B. The Judiciary Needs a Clearer And More Defined Role in Gauging Whether NEPA Provisions Are Being Applied Appropriately And Fairly

There also needs to be clear language from Congress regarding the role the judiciary plays. As mentioned above, if the EIS is a legal document, it is subject to judicial enforcement. This would give the courts more confidence in assessing the substantive requirements NEPA set out because there is a clear role for the judiciary to play.<sup>225</sup> Enforcing procedural requirements is important, but following through on the spirit of the law is ideal. Allowing the judiciary an opportunity to review substantive requirements and weigh in on an agency's actions would strengthen the law and deter agencies from not fully investing in the promise of making their project environmentally sound and safe for human health.

C. The CEQ Should be Abolished so the Executive Cannot Alter Policy Without Congress, and Its Regulations Should Be Codified Into Law by Congress.

The CEQ presents a unique challenge because what it stands for is constantly in flux depending on which party is in power and what particular person is the President.<sup>226</sup> Due to this, there is no constant set of recommendations to supply to the President or prevailing point of view to provide a steady outlook into the future. Instead, the CEQ regulations and functionality should be codified into law by Congress. Currently, the CEQ is at the whim of the policy and economic ambitions of an ever-changing executive leader, and this hinders the possibility of lasting change. With the CEQ constantly in flux between different administrations and their goals, it is effectively moot. However, codifying requirements for the EPA or another government agency to create a more permanent board of experts that operate outside the oval office, can encourage greater transparency and reform.

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<sup>224</sup> Lisa Friedman, *What is the Green New Deal?*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html> [https://perma.cc/4QPB-DV3V] (explaining the basic concepts of the Green New Deal).

<sup>225</sup> See McDonald, *supra* note 150, at 157 (explaining why courts tend to prefer to interpret NEPA implementation discrepancies as procedural violations rather than substantive ones).

<sup>226</sup> See Hill, *supra* note 188, at 1111 (stating the CEQ shall “assist and advise the President on environmental matters.”).

Congress can develop an approval process for the siting of any toxic or nuclear waste facility so that checks can be made on the communities that would suffer as a result, and ensure mitigating measures are put in place or the project is stopped altogether. A pillar of this new committee's mission that should be included in legislation is a requirement to ensure no federal project intentionally causes environmental injustice to the country's most vulnerable groups, along with a set of parameters and a syllabus that can be applied to any project.

This committee could also have multiple co-chairs to represent multiple views or political parties as Congress determines is necessary to a staggered two-to-four-year term to diversify the political perspective. It is unnecessary to have the executive branch weigh in to review decided law; it is a power specifically given to the judiciary, not the executive.<sup>227</sup> The only obstacle to this is the judiciary themselves when they ruled that the CEQ has authority over the administration of NEPA.<sup>228</sup> However, this can be overcome by an act of Congress amending NEPA to give the judiciary the sole power of review on provisions and the application of the law.<sup>229</sup>

In order to remedy changes made during the Trump Administration, acts by future President Biden and the Democratic-controlled Congress can overturn these new rules.<sup>230</sup> However, as stated above, Congress should act to divert power from the executive and leave it with Congress to be checked by the judiciary.

## V. Conclusion

The existing form of NEPA does not do enough to protect communities of color or low-income communities. Conflation of the two issues often occurs and is worsened by the lack of teeth in the law. Federal agencies need to have the strictest guidelines for protecting people from being harmed. This federal government set out a mandate to protect its people and allow them to achieve their potential.<sup>231</sup> The actions of the government in defying human health standards for economic prosperity does not illustrate that.

NEPA needs clearer language to assist the judiciary in finding their feet and there needs to be a concerted effort to allow people the opportunity to be informed and then voice their concerns about a project. It also needs explicit language targeting the crux of the issue, that institutional racism directly results in the disparaging health affects plaguing communities of color resulting from hazardous

<sup>227</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>228</sup> See Hill, *supra* note 188, at 1110 (“*Warm Springs Dam Task Force v. Gribble* could be used as precedent to establish the Council on Environmental Quality (CEQ) as the final arbiter of the adequacy of environmental impact statements (EIS) prepared by federal agencies under the procedural mandates of NEPA.”); See also *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1974) (ruling the entity tasked with reviewing administration of NEPA was the CEQ).

<sup>229</sup> See *Gribble*, 417 U.S. at 1304-05 (ruling the CEQ has authority based on their reading of NEPA).

<sup>230</sup> See Davenport & Friedman, *supra* note 205 (“If the rule is made final, but Mr. Biden wins the White House and Democrats take control of the Senate, they could use the Congressional Review Act to quickly undo the Trump-era regulation.”).

<sup>231</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

construction or infrastructure projects. These negative effects are multigenerational affairs that can attack a community's economy and social welfare. NEPA needs to meet this challenge with a strong infrastructure that includes simple remedies such as offering EIS reports in Spanish and other languages, to larger solutions such as requiring an EIS be a legal document.

Our environment and health are inextricably linked to one another. If we cannot guarantee fresh breaths of air and clean drinking water to our people, how can we in good faith dangle the American dream in front of them? We are creating two different realities: one that allows certain people to thrive, and one that eradicates any possibility of it for a different, less advantaged group. We already have communities mere states apart which seem like they are worlds apart: Flint, Michigan did not have constant, clean water for months, yet Vermont is a leader in environmental protection and health.<sup>232</sup> This can only end with immediate action on behalf of the federal government.

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<sup>232</sup> See Nat. Res. Defense Council, *Flint Water Crisis: Everything You Need to Know* (Nov. 8, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [<https://perma.cc/7RZY-5TXA>] (explaining the long history, racist roots and details of the water crisis); See also *The Most Eco-Friendly States in the US*, *USAToday* (Apr. 19, 2019), <https://www.usatoday.com/picture-gallery/travel/2019/04/19/the-most-eco-friendly-states-in-america/39359625/> [<https://perma.cc/LTX9-MEZ6>] (ranking top most environmentally friendly states, placing Vermont first based on a Wall St. created an index of: air pollution levels, state energy generation and efficiency policy, and employment in green jobs).