

# Harmony Between Man and His Environment: Reviewing the Trump Administration's Changes to the National Environmental Policy Act in the Context of Environmental Racism

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## I. INTRODUCTION

In 1970, Congress passed, with strong bipartisan support, the National Environmental Policy Act (“NEPA”) for the purpose of requiring federal agencies to engage in “efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”<sup>1</sup> For over fifty years, NEPA had propelled towards the accomplishment of this goal by consistently requiring federal agencies to: (1) take into consideration consequential environmental effects inflicted from large scale projects, (2) foster community engagement and participation in the development of the same, and (3) establish a Council on Environmental Quality (CEQ).<sup>2</sup> In totality, with confidence in the actions of the aforementioned listed, NEPA continuously strived to protect our planet and worked to establish “harmony between man and his environment.”<sup>3</sup>

On July 15, 2020, the CEQ finalized changes<sup>4</sup> made under the Trump Administration to modernize NEPA, which included the meaning of “effects,” the option to employ third parties, and changes in page limits.<sup>5</sup> In support thereof, the Administration claimed that the changes “streamline the development of infrastructure projects and promote better decision making by the Federal government.”<sup>6</sup> Specifically, some of these changes include redefining key terms of the

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<sup>1</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1970) (prior to 1975 amendment).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> The National Environmental Policy Act Implementing Regulations, 40 C.F.R. Ch. V, Subch. A (2020).

<sup>5</sup> Council on Environmental Quality, NEPA Modernization, Whitehouse, <https://www.whitehouse.gov/ceq/nepa-modernization/>.

<sup>6</sup> Id.

act, particularly the use of the words: “effect,” “reasonably foreseeable,” and “significance.”<sup>7</sup>  
The Act took effect on September 14, 2020.

However, environmentalists fear that these changes threaten the heart of NEPA’s mission. Though NEPA, prior to the Trump administration’s changes, was not free from criticism, the Act nonetheless succeeded in its goal to require federal agencies to reflect on their environmental impacts while engaging with the community in the process. Now, the degree to which federal agencies will be required to consider their effects on the environment is more limited. Specifically, efforts in “efficiency” and “modernization” will, in reality, result in federal agencies bypassing important steps<sup>8</sup> that allow NEPA to be an effective piece<sup>9</sup> of environmental legislation.

Indeed, these changes will go beyond environmental harm. Often, poor environmental quality disproportionately affects minority communities – exposing individuals within those communities to more harmful levels of pollution and waste. Should the Administration’s overall changes of NEPA remain in effect, minority communities will be the ones continuing to suffer. Time after time, we have seen that minority communities are the bedrock of our nation. Should we allow corporate polluters to continue to poison our planet without check, it will be those minority communities, our foundation, that will suffer. There is no question that the destruction of the cornerstone will be the destruction of the whole.

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<sup>7</sup> Jessica Wentz & Michael Burger, Five Points About Proposed Revisions to CEQ’s NEPA Regulations, Sabin Center for Climate Change Law, <http://blogs.law.columbia.edu/climatechange/2020/01/10/five-points-about-the-proposed-revisions-to-ceqs-nepa-regulations/> (January 10, 2020).

<sup>8</sup> Sally Hardin, The Trump Administration is Poised to Gut Environmental Review. What’s at Stake?, ProtectNEPA, <https://protectnepa.org/nepa-rollback-whats-at-stake-december-2019/>; Union of Concern Scientists, Environmental Racism in Action: The Trump Administration’s Plans to Gut NEPA, EcoWatch, <https://www.ecowatch.com/trump-gutting-nepa-2645437802.html?rebelltitem=1#rebelltitem1>.

<sup>9</sup> See, Counsel on Environmental Quality, THE NATIONAL ENVIRONMENTAL POLICY ACT: A Study of Its Effectiveness After Twenty-five Years, <https://www.blm.gov/or/regulations/files/nepa25fn.pdf> (January, 1997).

The goal of this article is to outline and explain the changes the Trump Administration developed for NEPA and illuminate the consequences thereof. Specifically, these changes are cause for immense concern as they eliminate important protections, otherwise guaranteed by NEPA, that are necessary to ensure the safety of communities affected by large-scale, federal projects.

Communities of color are disproportionately affected by the damage caused to the environment; the changes to NEPA work to perpetuate the suffering of those communities and reinforce environmental racism. Ultimately, the Trump Administration's changes to NEPA are an act of environmental injustice, and the long-term results of these changes will lead to harmful impacts on minority communities around the country.

## II. What is NEPA?

NEPA is legislation that works “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>10</sup> NEPA is procedural in nature--it does not compel federal agencies to make substantive changes to their projects.<sup>11</sup> Nonetheless, enforcing a procedural process by which federal agencies must follow to enact major federal action affects the agency's substantial decisions and guides agencies to make environmentally-friendly decisions.<sup>12</sup> To fulfill its mission, NEPA: (1) requires federal agencies to consider environmental impacts of major activities, (2) implements procedures to ensure community involvement in such activities, and (3) forms the CEQ.<sup>13</sup>

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<sup>10</sup> 42 U.S.C. § 4321

<sup>11</sup> “NEPA is designed to achieve environmentally-positive results through a compulsory procedural mechanism.” Michael B. Nowlin, *NEPA and Environmental Justice*, SN044 ALI-ABA 583, 589 (2008).

<sup>12</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>13</sup> § 102, 83 Stat. 852, 853

## A. Environmental Impacts

First, NEPA requires dual action from federal agencies: to consider the long-term environmental impacts of major, federal actions before taking action (a look before you leap philosophy), and to act with transparency to the public for such projects before they occur.<sup>14</sup> Examples of major federal actions include, but are not limited to: establishing government policies or regulations, undertaking federal projects, issuing federal permits, and dispensing federal funds – even a “failure to act” may be a major federal action, but only if such omission is reviewable by courts.<sup>15</sup>

To ensure transparency, agencies that plan large scale actions are required to draft an Environmental Impact Statement (EIS), which includes the following information:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>16</sup>

The information provided must be of high quality, meaning it shall contain an “accurate, scientific analysis, expert agency comments, and public scrutiny.”<sup>17</sup> In light thereof, upon completion of the EIS, agencies will have a full and comprehensive understanding of the totality of the environmental impacts the proposed project will likely incur.<sup>18</sup> To further ensure the protection of the surrounding environment, agencies must analyze reasonable alternatives<sup>19</sup> to the

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<sup>14</sup> NEPA and Environmental Justice, SN044 ALI-ABA 583, 589

<sup>15</sup> Uma Outka, NEPA and Environmental Justice: Integration, Implementation, and Judicial Review, 33 B.C. Envtl. Aff. L. Rev 601, 603 (2006).

<sup>16</sup> 42 U.S.C.A. § 4332 (Current through P.L. 116-158).

<sup>17</sup> 40 C.F.R. § 1500.1

<sup>18</sup> 40 C.F.R §§ 1500.1(b)-1502.2(a).

<sup>19</sup> A “reasonable alternative” is one that bears a “rational relationship to the technical and economic integrity of the project.” Sierra Club v. March, 714 F. Supp. 539, 577 (1989).

proposed action, including the alternative to take no action at all.<sup>20</sup> Direct effects<sup>21</sup>, indirect effects<sup>22</sup>, and cumulative impacts<sup>23</sup> to the environment must be considered.<sup>24</sup> The adequacy of the final EIS is reviewable based on an “arbitrary and capricious” standard by the reviewing court.<sup>25</sup> Agency action is “arbitrary or capricious” if an agency has:

relied on factors that Congress has not intended it to consider, entirely failed to consider important aspect of problem, offered explanation for its decision that runs counter to evidence before agency, or is so implausible that it could not be ascribed to difference in view or product of agency expertise.<sup>26</sup>

To determine whether an EIS will be required – meaning whether the project at hand may be considered a major federal action that significantly affects the quality of the human environment<sup>27</sup> – a federal agency shall draft an Environmental Assessment (EA).<sup>28</sup> If it is found that an EIS will not be necessary<sup>29</sup>, the federal agency may file a Finding of No Significant Impact (“FONSI”).<sup>30</sup>

Whether an agency has met NEPA's procedural requirements is governed by a "rule of reason" standard.<sup>31</sup> That standard requires a reviewing court to determine whether the agency took a "hard look" at the environmental consequences of the proposed action, engaged in reasoned decision making, and whether the agency convincingly documented its ultimate finding

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<sup>20</sup> Id. at §1502.14.

<sup>21</sup> Effects that “are caused by the action and occur at the same time and place.” Id. at § 1508.8(a).

<sup>22</sup> Effects that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Id. at 1508.8(b).

<sup>23</sup> “The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” Id. at § 1508.7.

<sup>24</sup> Id. at § 1502.16.

<sup>25</sup> 5 U.S.C.A. § 706.

<sup>26</sup> Latin Ams. for Soc. and Econ. Devl. v. Fed. Highway Admin., 756 F.3d 447, 464 (6th Cir. 2014).

<sup>27</sup> 42 U.S.C.A. §4332(2)(C).

<sup>28</sup> 40 C.F.R. § 1501.4

<sup>29</sup> See, Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp 234 (1992)(finding that a drafting of an EIS was not necessary when there was a mitigation plan that would make adverse environmental effects minimal).

<sup>30</sup> Mark A. Chertok, Overview Of The National Environmental Policy Act: Environmental Impact Assessments and Alternatives, SY022 ALI-CLE 1143 (2012).

<sup>31</sup> 38 Am. Jur. Proof of Facts 3d 547 (Originally published in 1996).

for the court.<sup>32</sup> While NEPA does not force federal agencies to choose the environmentally-friendly option, judicial decision established that NEPA was passed with the ultimate purpose of eliminating environmental damage; consequentially, such procedures will inevitably lead to agencies making environmentally conscious decisions.<sup>33</sup>

## B. Community Involvement

Additionally, NEPA ensures that the public may provide input on large-scale federal actions.<sup>34</sup> Public involvement expands to include federal, state, and local agencies and Indian tribes who are directly affected by the proposed action.<sup>35</sup> To advance its goal of community participation, NEPA requires federal agencies to: (a) diligently offer opportunities for discourse, which may include “provid[ing] public notice of NEPA–related hearings, public meetings, and other opportunities for public involvement,” and (b) publicize the drafts and final copies of any EIS reports for the opportunity of public review.<sup>36</sup> The environmental information provided to the public by federal agencies must be made available “*before* decisions are made and *before* actions are taken.”<sup>37</sup> By ensuring availability before taking action, NEPA enables the public to be included in decision-making processes *before* an agency will decide on or enact any projects.<sup>38</sup> Fostering such inclusivity requires federal agencies to publicly consider their potential projects

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<sup>32</sup> See, Native Village of Point Hope v. Jewell, 740 F.3d 489, 505 (9th Cir. 2014) (finding that the “hard look” standard was met, and the EIS was not necessary).

<sup>33</sup> See, Dept. of Transp. v. Public Citizen, 541 U.S. 752, 756 (2004). See also, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

<sup>34</sup> Sharon Buccino, NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation, 12 N.Y.U. Envtl. L.J. 50, 51 (2003).

<sup>35</sup> NEPA AND ENVIRONMENTAL JUSTICE, SN044 ALI-ABA 583, 589.

<sup>36</sup> 40 C.F.R. § 1506.6.

<sup>37</sup> Id. at §1500.1(b) (emphasis added).

<sup>38</sup> Id.

before arriving at a conclusion, creating a positive environment to promote community engagement and ensuring that those affected by the changes have a voice in what occurs.<sup>39</sup>

### C. Formation of The Counsel of Environmental Quality

Finally, NEPA also established the CEQ, the organization responsible for enforcing agency compliance with NEPA<sup>40</sup> and Executive Order 12898. In brief, Executive Order 12898 is an order that requires consideration of environmental justice.<sup>41</sup> On a broad scale, the CEQ is responsible for gathering information about the current and prospective conditions of the environment and identifying occurring trends that would adversely affect environmental quality.<sup>42</sup> Specifically, this organization conducts research for federal agencies of ecological systems and environmental quality in and around the community;<sup>43</sup> reviews and appraises Federal Government programs to determine if NEPA goals are being met;<sup>44</sup> and works closely with the President of the United States to provide reports of federal agency activities, and guidance on how the government should move forward in order to continue to meet the expectations of NEPA.<sup>45</sup>

In sum, NEPA is a procedural act that encourages federal agencies to undertake major projects in an environmentally conscious way. Agencies are required to conduct research on the environmental impacts of major actions and encourage community participation in such decisions. In addition to setting forth these standards, NEPA established the CEQ to ensure (a)

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<sup>39</sup> NEPA imposes no substantive requirements and is designed only to force agencies to publicly consider the environmental impacts of their actions before going forward. Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 963 (9th Cir. 2002).

<sup>40</sup> 42 U.S.C.A. § 4344.

<sup>41</sup> Executive Order 12898 was passed by President Bill Clinton to address “environmental justice in minority populations and low-income populations.” 59 FR 7629, Exec. Order No. 12898, 1994 WL 16189208 (Pres.). This will be addressed further in the article.

<sup>42</sup> 42 U.S.C.A. § 4344(2).

<sup>43</sup> Id. at § 4344(5).

<sup>44</sup> Id. at § 4344(4).

<sup>45</sup> Id. at §4344(1), (4), (7)-(8).

continued investigation into how the federal government affects the environment, (b) that NEPA goals are being adequately reached, and (c) that the President of the United States remains advised and informed on current or future environmental issues.

### III. What is Environmental (In)Justice?

The term “environmental justice” has slowly made its way into the lexicon over the last forty-six years. The concept of environmental justice first appeared in the United States in 1982, when North Carolina agreed to the implementation of a waste landfill in Warren County, home to a large African American community.<sup>46</sup> The landfill would contain polychloride biphenyls - a man-made chemical that causes cancer in those who are exposed.<sup>47</sup> Public outcry led to the commencement of the Study, Toxic Waste and Race by the United Church of Christ Commission for Racial Justice (hereinafter “the Study”).<sup>48</sup> The Study revealed that “race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities.”<sup>49</sup> Additionally, the Study determined that “[t]hree out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.”<sup>50</sup>

After these findings, President Bill Clinton executed Executive Order 12898.<sup>51</sup> The purpose of the order was to ensure that each federal agency “[t]o the greatest extent practicable and permitted by law . . . [achieve] environmental justice part of its mission by identifying . . . disproportionately high and adverse human health or environmental effects of its programs,

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<sup>46</sup> Leora Friedman, Recommending Judicial Reconstruction of Title VI to Curb Environmental Racism: A Recklessness-Based Theory of Discriminatory Intent, 32 Geo. Envtl. L. Rev. 421, 422–23 (2020).

<sup>47</sup> Id.

<sup>48</sup> Office of Legacy Management, Environmental Justice History, <https://perma.cc/BD29-YMJ2> (accessed October 20, 2020).

<sup>49</sup> Commission for Racial Justice United Church of Christ, Toxic Waste and Race in the United States <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> (1987).

<sup>50</sup> Id.

<sup>51</sup> 59 FR 7629, Exec. Order No. 12898, 1994 WL 16189208 (Pres.).



policies, and activities on minority populations and low-income populations.”<sup>52</sup> Indeed, one may say that the purpose of environmental justice is to combat the social dilemma of environmental racism, which “occurs when people of color disproportionately bear the burdens and risks of environmental protection policies while the associated benefits are dispersed throughout society.”<sup>53</sup>

It is wishful thinking to believe that environmental justice was served after the passing of Executive Order 12898; environmental racism continues to impact communities of color, as exhibited, for example, by the notorious Flint Water Crisis. Flint, Michigan – a predominantly Black community<sup>54</sup> – had its municipal water supplied by the Detroit Water and Sewer Department until April of 2014, when the city decided to switch its water source to the Flint River.<sup>55</sup> Despite contentions, the city made the switch to the new water system. However, the new system was not yet prepared to safely deliver water, and the results were disastrous.<sup>56</sup>

A few weeks after the switch, residents complained of water smell and coloration; *E. coli*, disinfection byproducts, and lead began to accumulate in the water.<sup>57</sup> Almost three months after the change in the water system, a leaked memo<sup>58</sup> from the Environmental Protection Agency (EPA) expressed concerns about the lead levels in Flint’s water supply.<sup>59</sup> By September of 2014, four percent of children under the age of five in Flint had elevated levels of lead in their blood,

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<sup>52</sup> Id.

<sup>53</sup> Mariaea Ramirez Fisher, On the Road from Environmental Racism to Environmental Justice, 5 Vill. Envtl. L.J. 449, 449–50 (1994).

<sup>54</sup> As of 2016, of those living in Flint, “approximately 57 percent are Black or African American. Poverty is endemic in Flint, with 41.6 percent of the population living below federal poverty thresholds – 2.8 times the national poverty rate.” Jim Shelton, Lead in the Water-the Flint Water Crisis, 83 Def. Couns. J. 520 (2016).

<sup>55</sup> Jamila Garmo, The Rejection of Equal Protection: A Case for Inadvertent Discrimination, 65 Wayne L. Rev. 437, 444 (2020).

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Miguel A. Del Toral, Memorandum: High lead Levels in Flint, Michigan, Environmental Protection Agency, <http://mediad.publicbroadcasting.net/p/michigan/files/201602/Miguels-Memo.pdf> (June 24, 2015).

over three times the amount before the change.<sup>60</sup> Although the water system was changed back to the Detroit water system in October of 2015, the public health damage had already been done; the degree of lead exposure prompted state and federal government to declare states of emergency in Flint in early 2016.<sup>61</sup> Although the exact effects of the lead exposure still have yet to reveal themselves,<sup>62</sup> experts have already seen children of Flint struggle developmentally and suspect it is the result of lead exposure in the water. The neurotoxin in the contaminated water resulted in “detrimental effects on children’s developing brains and nervous systems” and has left many of the children in Flint struggling in school.<sup>63</sup> Ultimately, the actions of these officials during the Flint Water Crisis were, literally, criminal: “prosecutors in Michigan announced 41 counts — 34 felonies and seven misdemeanors — against nine officials” in January of 2021 for the officials’ roles in the incident.<sup>64</sup>

Though some may argue that here, as well as in other examples of environmental racism, current or otherwise, the situation still affects white individuals, that does not negate the existence of environmental racism in Flint, nor anywhere else.

Flint is considered disposable by virtue of being *predominantly* poor and Black. Here, racism is a process that shapes places, and in this case, produces a racially devalued place. Accordingly, the white people who live there, most of whom are poor, are forced to live under circumstances similar to that of Black residents. White people living in a Black space find that their whiteness is of only limited utility in escaping the devaluation associated with poor Black people and places.<sup>65</sup>

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<sup>60</sup> *Id.* at 3.

<sup>61</sup> Dustin Renwick, [Five Years On, The Flint Water Crisis is Nowhere Near Over](https://www.nationalgeographic.com/environment/2019/04/flint-water-crisis-fifth-anniversary-flint-river-pollution/#close), The National Geographic, <https://www.nationalgeographic.com/environment/2019/04/flint-water-crisis-fifth-anniversary-flint-river-pollution/#close> (April 25, 2019).

<sup>62</sup> [The Flint Water Crisis and its Health Consequences](https://www.accessscience.com/content/the-flint-water-crisis-and-its-health-consequences/BR0119171), AccessScience, <https://www.accessscience.com/content/the-flint-water-crisis-and-its-health-consequences/BR0119171> (January 2017).

<sup>63</sup> Erica L. Green, [Flint’s Children Suffer in Class After Years of Drinking the Lead-Poisoned Water](https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html), The New York Times, <https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html> (Nov. 6, 2019).

<sup>64</sup> Kathleen Gray & Julie Bosman, [Nine Michigan Leaders Face Charges in Water Crisis that Roiled Flint](https://www.nytimes.com/2021/01/14/us/rick-snyder-flint-water-charges.html), The New York Times, <https://www.nytimes.com/2021/01/14/us/rick-snyder-flint-water-charges.html> (January 14, 2021).

<sup>65</sup> Laura Polido, [Flint, Environmental Racism, and Racial Capitalism](https://www.tandfonline.com/doi/pdf/10.1080/10455752.2016.1213013), 27:3 Capitalist Nature Socialism, 16 <https://www.tandfonline.com/doi/pdf/10.1080/10455752.2016.1213013>.

Flint, Michigan is just one current example of how communities of color bear the burden of our environmental misgivings. Various communities face disproportionate exposure to environmental contaminants - Native American<sup>66</sup>, Black<sup>67</sup>, LatinX<sup>68</sup>, and Asian American<sup>69</sup> communities all carry the burden of pollution in its various forms far more than their white counterparts. Indeed, environmental racism continues to live on, and thus, policies and acts, such as NEPA, become necessary to rectify the injustices done to not only the environment, but to many communities around the country.

#### IV. NEPA as a Weapon Against Environmental Injustice

Though NEPA is not a perfect tool, it certainly has been a step in the right direction for environmental justice.<sup>70</sup> NEPA has been used to combat environmental injustice by allowing public participation, being used as an educational tool, delaying harmful government actions, and requiring agencies to consider the socioeconomic and health effects of their actions.<sup>71</sup> NEPA's fostering of public participation is unsurprising, given that public participation is a strong pillar of the NEPA.

Naturally, encouraging public participation leads to community education, as NEPA requires federal agencies to disclose “the NEPA documents, any public comments that the agency received on the documents, and any comments that the agency received from other

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<sup>66</sup> Elizabeth Hoover, et. al., Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice, 120:12 Environmental Health Perspectives, 1645 <https://ehp.niehs.nih.gov/doi/pdf/10.1289/ehp.1205422>.

<sup>67</sup> Vann R. Newkirk II, Trump's EPA Concludes Environmental Racism is Real, The Atlantic <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> (2018).

<sup>68</sup> Adrianna Quintero-Somains & Mayra Quirindongo, Environmental Health Threats in the Latino Community, NRDC, [https://www.nrdc.org/sites/default/files/latino\\_en.pdf](https://www.nrdc.org/sites/default/files/latino_en.pdf) (Oct. 2014).

<sup>69</sup> Sara E. Grineski, Asian Americans and Disproportionate Exposure to Carcinogenic Hazardous Air Pollutants: A National Study, 185 Social Science & Medicine, 71 <https://www.sciencedirect.com/science/article/pii/S027795361730343X?via%3Dihub> (2017).

<sup>70</sup> Scholars have argued for changes to NEPA, particularly, for increasing its substantive force in agency action. See Philip Weinberg, It's Time to Put Nepa Back on Course, 3 N.Y.U. Env'tl. L.J. 99 (1994).

<sup>71</sup> Stephen M. Johnson, NEPA AND SEPA'S IN THE QUEST FOR ENVIRONMENTAL JUSTICE, 30 Loy. L.A. L. Rev. 565 (1997).

agencies on the documents.”<sup>72</sup> Nonetheless, public participation is still a piece of the fight in ensuring environmental justice, as it allows individuals in minority and low-income areas to have a voice in government.<sup>73</sup> After all, who better to comment on the total effects agency action may have on a community than the community itself, who are “home grown” experts?<sup>74</sup>

Delay is a more controversial benefit of NEPA. Although the Trump Administration’s changes to NEPA attempt to limit delay<sup>75</sup> in projects, the delay is a good, perhaps even necessary, tool in ensuring environmental protection and combatting environmental racism. Delay allows those that will be directly affected the opportunity to organize and inform the government of the potential harms its actions may cause the community.<sup>76</sup> Additionally, individuals may, themselves, delay potentially harmful government action through litigation; if, for example, an EIS was not developed, but the necessity of the EIS could be argued, individuals may file suit to force government compliance and thereby, at the very least, delay the project.<sup>77</sup>

Delay is the result of taking the necessary time to investigate the full impacts of significant federal projects; the investigation, particularly into the socioeconomic effects, significantly contributes to the fight for environmental justice. Although NEPA requires that socioeconomic effects be accompanied by physical, environmental harms<sup>78</sup>, these issues are still considered by federal agencies before making final determinations on federal projects. Even so, the term “environmental impact” was found to require broad interpretation, so as to include the

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> One goal of the Administration’s changes is to “streamline” projects, and make the NEPA process faster. NEPA Modernization, *supra* note 5.

<sup>76</sup> NEPA AND SEPA’S IN THE QUEST FOR ENVIRONMENTAL JUSTICE, *supra* note 70.

<sup>77</sup> Id.

<sup>78</sup> See, Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976) (finding that NEPA’s first priority is physical, environmental harm, and that socioeconomic factors are secondary); 40 C.F.R. § 1508.14.

health impacts of those living in affected communities.<sup>79</sup> Truly, addressing socioeconomic concerns when federal agencies implement significant projects goes toward the spirit of NEPA and its broad goal to promote good health and welfare.<sup>80</sup>

These benefits of NEPA have consistently been seen in multiple cases, one more recent success being Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers.<sup>81</sup> In River Sioux, the focus was on the installation of the Dakota Access Pipeline, a pipeline that would run through North Dakota, specifically through reservation lands belonging to the Standing Rock Sioux Tribe.<sup>82</sup> The Standing Rock Sioux Tribe has fought against the installation since 2015, citing that the pipeline poses serious risks to the safety and survival of the tribe due to the possibility of an oil spill contaminating its water supply. A federal judge ordered that the operating pipeline be shut down, citing a woefully inadequate EIS filed by the Army Corps of Engineers.<sup>83</sup> In his conclusion, Judge James Boasberg cited to NEPA, writing that, “given the seriousness of the Corps’ NEPA error, the impossibility of a simple fix, the fact that Dakota Access did assume much of its economic risk knowingly, and the potential harm each day the pipeline operates, the Court is forced to conclude that the flow of oil must cease.”<sup>84</sup> The battle over the Dakota Pipeline continues<sup>85</sup>, but nonetheless, it is important to acknowledge that courts have favored upholding NEPA. The work of the Act continues to live in the fight for environmental preservation.

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<sup>79</sup> Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

<sup>80</sup> NEPA AND SEPA’S IN THE QUEST FOR ENVIRONMENTAL JUSTICE, *supra* note 70.

<sup>81</sup> Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers, CV 16-1534 (JEB), 2020 WL 3634426 (D.D.C. July 6, 2020).

<sup>82</sup> Native Knowledge 360, Treaties Still Matter: The Dakota Access Pipeline, Smithsonian National Museum of the American Indian, <https://americanindian.si.edu/nk360/plains-treaties/dapl>.

<sup>83</sup> Cheyenne River Sioux Tribe, CV 16-1534 (JEB), 2020 WL 3634426.

<sup>84</sup> Id.

<sup>85</sup> Laila Kearney, Future of the Dakota Access Pipeline Uncertain as Biden Presidency Looms, West Central Tribune, <https://www.wctrib.com/business/energy-and-mining/6759925-Future-of-Dakota-Access-pipeline-uncertain-as-Biden-presidency-looms> (Nov. 12, 2020).

Although NEPA remains open for more effective changes, it was on the right track to allow victims a voice in government action and to fight against environmental racism. However, the changes the Trump Administration has implemented take away any bite NEPA may have, thereby instituting a national danger to the environment and communities of color alike.

#### V. The Trump Administration's Changes to NEPA

The revised NEPA, enacted by the Trump Administration, includes a variety of changes, such as: imposing page and time limits for agencies to complete EIS reports, expanding agency authority to delegate work involving the EIS report to private entities, and limiting the scope of judicial review for NEPA claims.<sup>86</sup> Although on their face these changes may appear to expedite large projects in a positive way, the speed of the evaluation has less to do with efficiency and more to do with bypassing significant checks that make NEPA a strong tool for environmental preservation.

##### A. Page Limits and Time Limits

First, the changes impose page and time limits for agencies completing EIS reports. According to the new rules, “[t]he text of final environmental impact statements . . . shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer.”<sup>87</sup> EAs must be prepared “within 1 year . . . from the date of decision to prepare an environmental assessment to the publication of a final environmental assessment,” while EIS statements must be issued “within 2 years . . . from the date of the issuance of the notice of intent to the date a record of decision is signed.”<sup>88</sup> Though these changes have been made for the obvious purpose of expediting the NEPA process, “[t]he Trump Administration does not provide any reliable data

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<sup>86</sup> Robert L. Glicksman and Alejandro E. Camacho, Trump Card: Tarnishing Planning, Democracy, and the Environment, 50 ELR 10281, 10283.

<sup>87</sup> 85 FR 1684 §1502.7.

<sup>88</sup> Id. at § 1501.1(b)(1)-(2).

supporting the conclusion that requiring one year for completion of any EA and two years for completion of any EIS is either necessary or practicable.”<sup>89</sup> Thus, these changes are meant to force agencies to work at a faster pace, thereby posing the risk that an agency will fail to conduct a thorough investigation should they be pressed to fight against the clock and arbitrary page limits.

#### B. Inclusion of Private Entities in Reporting and Researching

Next, federal agencies have been given discretion to choose private entities to complete the work of the environmental reports; this would be problematic, as outside parties are not held to the same standards as government entities. NEPA now states that “[a]pplicants and contractors” may “assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency.” Thus, this change would permit third parties to contract into the preparation of environmental documents. Although the information and material prepared by outside parties would be subject to agency supervision, work done by private contractors is not subject to the same standard as government practices; those “basic rules of public law to constrain the government in the name of such public values as transparency, public participation, due process for affected individuals, and public rationality.”<sup>90</sup>

#### C. Broader Discretion to Choose Reports

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<sup>89</sup> The Trump Card: Tarnishing Planning, Democracy, and the Environment, *supra* note 85.

<sup>90</sup> Id.

Additionally, the proposed changes suggest that there will be a significant expansion in the use of Categorical Exclusions<sup>91</sup> (“CE”) and EAs. Agencies are to identify categories of actions in their agency that “normally do not have a significant effect on the environment.”<sup>92</sup> Previously, if an action proved to be an “extraordinary circumstance” that fell outside of the listed categories, then that action would automatically be excluded from being included in a CE.<sup>93</sup> Now, however, a CE may be used for an extraordinary action upon consideration by the agency, where it must determine “whether mitigating circumstances or other conditions are sufficient to avoid significant effects” on the environment.<sup>94</sup> With a broader scope for what may be categorized as a CE, agencies now have considerable discretion in deciding whether or not to fill out an EA or EIS – reports which would detail in full the potential effects a large action would have on the environment. Significantly, actions that are filed as CEs also do not require public participation. Should more CEs be filed in place of EAs and EISs, there will be less public participation in large-scale federal actions that would have, in the past, needed to be presented to the public. Exclusion of the public will inevitably lead to the exclusion of opposing voices, those which drive change and ensure the protection of the community and the environment.

#### D. The End of “Cumulative Effects”

Even if the agency is required to file an EA or an EIS, there now exists broader discretion for the agency to choose the EA rather than an EIS. Despite both types of reports necessitating agencies to evaluate environmental impacts, the EA is much less thorough than the EIS. For example, the EA has no requirement to consider cumulative effects altogether, which curtails the

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<sup>91</sup> 40 C.F.R. §1501.4

<sup>92</sup> 40 C.F.R. 1684 §1501.4 (a).

<sup>93</sup> The Trump Card: Tarnishing Planning, Democracy, and the Environment, *supra* note 85,

<sup>94</sup> 40 C.F.R. §1501.4 (d).



duty to consider an action's indirect effects.<sup>95</sup> Originally, the effects to be considered were “direct, indirect, and cumulative,” but now, agencies need only consider “reasonably foreseeable effects.” Specifically, the change threatens the effects that were once considered “cumulative.” Though there has never been a specific way to address cumulative impacts, the CEQ has recommended analyzing cumulative impacts in accordance with the following eight principles:

1. **Cumulative** [impacts] are caused by the aggregate of past, present, and reasonably foreseeable future actions.
2. **Cumulative** [impacts] are the total effect, including both direct and indirect [impacts], on a given resource, ecosystem, and human community of all actions taken, no matter who (federal, non-federal, or private) has taken the actions.
3. **Cumulative** [impacts] need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.
4. It is not practical to analyze the **cumulative** [impacts] of an action on the universe; the list of environmental [impacts] must focus on those that are truly meaningful.
5. **Cumulative** [impacts] on a given resource, ecosystem, or human community are rarely aligned with political or administrative boundaries.
6. **Cumulative** [impacts] may result from the accumulation of similar [impacts] or the synergistic interaction of different [impacts].
7. **Cumulative** [impacts] may last for many years beyond the life of the action that caused the [impact].
8. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional [impacts], based on its own time and space parameters.<sup>96</sup>

Exactly what effects are “reasonably foreseeable” have yet to be judicially determined<sup>97</sup>; though courts may offer interpretations that favor environmental preservation, there is a stronger likelihood that courts will respect the language of the statute, rather than try to interpret it as the act had been first written. “A ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA” and, thus, effects that are remote in time,

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<sup>95</sup> The Trump Card: Tarnishing Planning, Democracy, and the Environment, *supra* note 85.

<sup>96</sup> Matthew P. Reinhard, Article, The National Environmental Policy Act: What Constitutes an Adequate Cumulative Environmental Impacts Analysis and Should it Require an Analysis of Greenhouse Gas Admissions? 17 U. Balt. J. Envtl. L. 145, 157 (2010).

<sup>97</sup> Seth Jaffe & Aaron Land, Trump’s NEPA is No ‘Nixon in China’ Moment, Law360, <https://www.law360.com/energy/articles/1238518/trump-s-nepa-reform-is-no-nixon-in-china-moment> (Jan. 29, 2020).

geographically remote, or the product of a lengthy causal chain will generally not be considered.<sup>98</sup> Therefore, though the judiciary has curtailed much of the Trump Administration's efforts to ignore climate change, specifically the negative effect of greenhouse gas ("GHG") emissions on this Earth, the federal bench will likely be unable to continue on this path with the NEPA changes. Without a cumulative effects analysis, damage to the environment that is the result of long-term enactment will not be considered by federal agencies – such as climate change. This specifically goes against the heart of NEPA and its purpose to better our environment by considering the effects of federal agencies.

## VI. NEPA Changes and Environmental Injustice

By dissipating requisite considerations of cumulative impacts and restricting community participation in large-scale federal projects, the Trump Administration's changes to NEPA will provoke and exacerbate harm in minority communities across the United States. Specifically, the changes affect the ability of communities to participate in agency decisions; the lack of consideration for cumulative effects will leave minority communities to suffer.

Community participation has fostered pathways to provide affected participants with a voice in federal action. Ultimately, federal agencies "ought to engage the affected public and regulated community in how best to induce agencies into structuring their programs to accomplish continuous monitoring and adaptation in a manner that preserves sufficient regulatory certainty."<sup>99</sup> Although federal agencies are capable of conducting research, analyzing the findings, and coming to conclusions on how to best act, nothing can substitute the knowledge

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<sup>98</sup> Marcella Burke, Nikesh Jindal and I. Cason Hewgley IV, Climate Change Litigation on the Horizon with Trump Environmental Overhaul, TexasLawyer, <https://www.law.com/texaslawyer/2020/09/16/climate-change-litigation-on-the-horizon-with-trump-environmental-overhaul/?slreturn=20201009131942> (September 16, 2020).

<sup>99</sup> Sam Kalen, NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump? 50 ELR 10398, 10421 (2020).

and experience of those who live within the community. The voices of the public are essential, as no one can speak to the needs of the community better than the community itself. Thus, cutting off community involvement will lead to harmful results.

Additionally, by not considering cumulative results, the long-term effects of potentially harmful federal action will be dismissed. Examining cumulative effects is vital for ensuring the well-being of minority communities. We know the facts - communities of color are disproportionately affected by environmental damage. With the construction of highways, for example, scholars have stated that “policymakers embarking on highway development and redevelopment projects should engage in a systematic, comprehensive, and holistic review of how racial and ethnic groups will be impacted by the project,” in order to protect minority groups from significant harm.<sup>100</sup> Limiting the review of NEPA reports, and no longer requiring a hard look at cumulative effects, will prevent federal agencies from engaging in such a comprehensive review; as a result, each unique community of color will face harm as a result of inadequate environmental regulation - even more than what is currently faced.

Beginning with the African American community, just a few of the statistics indicate that:

Sixty-eight percent of African Americans live within 30 miles of a coal-fired power plant. Black children are nearly twice as likely to suffer from asthma, compared to the national average. People of color make up 76 percent of the population living within three miles of the 12 dirtiest coal power plants in the country, and African Americans are more likely to live in environmentally hazardous areas than any other racial demographic.<sup>101</sup>

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<sup>100</sup> Deborah N. Archer, White Men’s Roads through Black Men’s Homes: Advancing Racial Equity through Highway Reconstruction, 73 Vand L. Rev 1259, 1321 (2020).

<sup>101</sup> Climate Reality: The Trump Administration’s NEPA Rollback is Environmental Racism in Action, The Climate Reality Project, <https://climaterealityproject.org/blog/trump-administrations-nepa-rollback-environmental-racism-action> (August 7, 2020).

Thus, just as it stands, people of color bear the burden of decisions that adversely affect the environment. Now, federal agencies will not have to report findings in as much detail as they would have otherwise and will not have to think about the long-term effects of their actions. These changes risk an increase in GHG emissions; the increase in GHG emissions will result in poor air quality; poor air quality will lead to significant health problems in the community, especially in communities that are predominately African American – individuals who are already disproportionately exposed to poor air, and face the detrimental harm resulting therefrom. Again, some may raise the argument that it is socioeconomic status, and not race, that is the divider in access to healthy living conditions. However, the statistics do not support such a claim. For example, a study completed in 2017 revealed that Black Americans making \$50,000-\$60,000 a year were nonetheless more likely to live in polluted areas than those who identified as white, making \$10,000 a year.<sup>102</sup>

Additionally, the changes will affect the Hispanic and LatinX community. The Trump Administration, prior to enacting its NEPA rollbacks, enabled the Department of Homeland Security to waive certain parts of NEPA in order to build Trump's infamous wall at the Southern border.<sup>103</sup> Not only were parts of NEPA waived, but the Department of Homeland Security allowed the circumvention of 26 regulations, including the Clean Air Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act, all for the purpose of expediting the infamous border wall.<sup>104</sup> In bypassing basic regulations protecting those who live along the border, Donald Trump has shown that he does not care if there is clean water to drink or if there is clean

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<sup>102</sup> Peter Beech, What is Environmental Racism?, World Economic Forum, <https://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/> (July 21, 2020).

<sup>103</sup> Patrice Simms & Angelo Logan, Trump Chips Away at the Shield Against Environmental Racism, Earthjustice, <https://earthjustice.org/from-the-experts/2019-april/trump-chips-away-at-the-shield-against-environmental-racism> (April 1, 2019).

<sup>104</sup> 85 FR 29472 as of May 15, 2020.

air to breathe - he does not care whether those at the border have access to the necessities of life. Trump has valued his own political gains over ensuring the health and well-being of the people, American and Mexican citizens, whose lives are spent at the Southern border. This has been more than an act of disregard; it is an act of evil targeted against our Hispanic and LatinX communities.

Further, Native Americans continuously struggle against the government's adverse effects on the environment. As discussed above, pipelines, in particular, have been recent threats to the Native American community.<sup>105</sup> Not only do pipelines damage sacred land, but they threaten to pollute and destroy the water supply for Native Americans.<sup>106</sup> In addition to the Trump Administration's actions in limiting public discourse overall through NEPA, state legislation has been proposed, majorly by Republican lawmakers<sup>107</sup>, targeting protests against the installment of the pipelines.<sup>108</sup> This is evidence of the influence and importance of hearing the voice of the community and reflects the danger of the Trump Administration's efforts to silence those who are in need of being heard.

Asian Americans<sup>109</sup> are also confronted with the devastating results of environmental racism. Environmental advocate Andrea Chu has explained that harmful stereotypes, such as the "model minority" myth, often push Asian Americans out of the discussion of environmental

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<sup>105</sup> Metropolitan Edison, 460 U.S. at 766.

<sup>106</sup> Gabrielle Gurley, Native Americans Hail Oil and Gas Pipeline Decisions, The American Prospect, <https://prospect.org/environment/native-americans-hail-oil-and-gas-pipeline-decisions/> (July 8, 2020).

<sup>107</sup> PROTESTBILLS-INDEX2015-2019,

<https://docs.google.com/spreadsheets/d/184KaB1g4oZjC6Iv4bnPyyS5vgCqbNOnS--cMQdTm29Y/edit#gid=0>

<sup>108</sup> "From 2016 through 2019, state lawmakers introduced ten bills that either made obstructing traffic on highways a misdemeanor or increased penalties for protesting near oil and gas facilities." Naveena Sadasivam, US States have Spent the Past 5 Years Trying to Criminalize Protests, Grist, <https://grist.org/justice/states-criminalize-protest-george-floyd-philando-castile-enbridge-dapl/> (June 4, 2020).

<sup>109</sup> The "Asian American" identity captures a wide array of individuals with unique experiences and needs; unfortunately, there is a lack of data and representation for each of these unique communities, and so I will be grouping Asian American identities together. See, Emily M. Ng, Present and Passionate: A Critical Analysis of Asian American Involvement in the United States Environmental Justice Movement, Pitzer Senior Thesis [https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1116&context=pitzer\\_theses](https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1116&context=pitzer_theses) (May 2020).

racism.<sup>110</sup> However, the reality is that this community faces the disproportionate burden of pollution - particularly, the exposure of harmful toxins in the soil.<sup>111</sup> Chu's work has revealed that "[m]any Asian immigrant families harvest and eat produce from their homelands, but may find that their adopted soil is chemically toxic due to the industrialization of these lower income Asian American communities"; thus leaving these families with harmful toxins in their gardens and, ultimately, food.<sup>112</sup> Additionally, like those in the African American community and LatinX community, "Asians and Pacific Islanders also live near Superfund sites and factories that spew thousands of tons of toxins into the air,"<sup>113</sup> which leaves them vulnerable.

Ultimately, communities of color already face significant harm because those in power, including, but certainly not limited to, the federal government, fail to care for our environment by considering the consequences of their actions and planning with the health of the community and Earth in mind. Time and time again, we see those in minority communities face the harms of contaminated water, air, and soil. These systemic issues lead to unreversible damages to the mind and body. We depend on policies like NEPA to remedy the disproportionate harm caused to the environment surrounding minority communities. Thus, the changes to NEPA will only further endanger communities of color and force them to continue to carry the cross of environmental injustice. We live in a country that guarantees us the right to life, and yet, we allow these harms to continue to infiltrate and do nothing to help those facing the disastrous and dangerous effects—the same effects depriving them the right to life. These communities, the cornerstone of our nation, deserve the right to a clean environment, yet the Trump

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<sup>110</sup> Brooke Zhang, Through the Eyes of a Grassroots Leader: how the Asian American Community Reclaims its Voice in Environmental Justice, EarthJustice, <https://earthjustice.org/blog/2020-may/aapi-heritage-month-tribute-giving-voice-to-asian-american-communities> (May 12, 2020).

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Pam Tau Lee, Environmental Justice for Asians and Pacific Islanders, Reimagine Race, Poverty & the Environment, <https://www.reimaginepe.org/node/962> (1992).

Administration continues to deprive them of this right. Ultimately, these changes must be reversed for the safety, well-being, and survival of African American, Hispanic, LatinX, Asian, and Native American communities across the country.

## VII. Conclusion

For decades, NEPA has proclaimed a two-fold purpose: to work towards a cleaner environment and ensure environmental justice. The changes brought forth by the Trump Administration, however, threaten to destroy all that makes NEPA effective; by loosening guidelines for agencies, the new NEPA closes the door on the community and restricts those affected by major federal projects to have a voice in how those projects should or should not alter the community. In addition, because agencies are no longer forced to examine cumulative effects, the risks of environmental harm have significantly increased. After all, NEPA is meant to require agencies to “look before leaping” – to consider the long-term consequences of their actions. The harmful changes will not only be disastrous to the environment, but they threaten the safety and well-being of minority communities, individuals who already are vulnerable and face the worst effects of unregulated government action.

Although the Trump Administration has moved to effectively gut NEPA, that could all change with the Biden Administration.<sup>114</sup> Indeed, President Joe Biden has promised to move the United States forward as a clean economy. Importantly, Biden has recognized the disparity faced by minority populations as a result of climate change and pollution, stating that “[w]e cannot turn a blind eye to the way in which environmental burdens and benefits have been and

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<sup>114</sup> Reid Frazier, Trump and Biden Differ Sharply on the Environment - and that Means the Election Stakes are High for Pennsylvania, NPR, <https://stateimpact.npr.org/pennsylvania/2020/10/27/trump-and-biden-differ-sharply-on-the-environment-and-that-means-the-election-stakes-are-high-for-pennsylvania/> (Oct. 27, 2020).

will continue to be distributed unevenly along racial and socioeconomic lines.”<sup>115</sup> Although Biden has not specifically stated that he will alter NEPA, it is clear that Biden will take the necessary steps to make us a greener nation, a healthier nation, for all. There is hope that the Trump Administration’s changes will not only be reversed but perhaps Biden’s Administration will even begin to make positive changes to NEPA that would make it a stronger and better tool for environmental justice than ever before. Indeed, it is only by ensuring *all* individuals are afforded the right to a clean world that we can establish true harmony between us and our environment; undoing the harm to NEPA, and advancing the goals of a green economy, are a great start to accomplishing just that.

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<sup>115</sup> The Biden Plan for a Clean Energy Revolution and Environmental Justice, Biden for President, <https://joebiden.com/climate-plan/> (Nov. 10, 2020).