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

By Gabrielle Kolencik\*

## 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

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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/>.

Federal government.”<sup>6</sup> Specifically, some of these changes include redefining key terms of the 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

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<sup>6</sup> Id.

<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).

minority communities, our foundation, that will suffer. There is no question that the destruction of the cornerstone will be the destruction of the whole.

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

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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).

environmental impacts of major activities, (2) implements procedures to ensure community involvement in such activities, and (3) forms the CEQ.<sup>13</sup>

*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

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

<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

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 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>

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<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).

<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).

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 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

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

<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).



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 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>

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<sup>38</sup> Id.

<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).

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) 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>

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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.

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, 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

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

<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.

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, 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.

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<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).

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

<sup>61</sup> Dustin Renwick, Five Years On, The Flint Water Crisis is Nowhere Near Over, 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, 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, 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, The New York Times, <https://www.nytimes.com/2021/01/14/us/rick-snyder-flint-water-charges.html> (January 14, 2021).

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>

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

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

<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. Envtl. 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).

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 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

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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.

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 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

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<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.

<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.

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.

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>

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<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).

<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.



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 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

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

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

values as transparency, public participation, due process for affected individuals, and public rationality."<sup>90</sup>

### *C. Broader Discretion to Choose Reports*

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.

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<sup>90</sup> Id.

<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).

#### *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 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>

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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).

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, 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.

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<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).

<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/?sreturn=20201009131942> (September 16, 2020).

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 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.

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

<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).

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>

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

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

<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).

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 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

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<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.

<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/184KaB1g4oZjC6Iv4bnPyuS5vgCqbNONs--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).

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 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

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<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).

<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.reimaginerpe.org/node/962> (1992).



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 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 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>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).

<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).

## **“Rights of Nature: The Evolution of Personhood Rights”**

By: Allison McKenzie

Recently, there has been a growing movement to grant rights to certain aspects of nature among indigenous tribes and their supporting advocates in the United States as well as other places throughout the world.<sup>116</sup> These rights are specifically called “Rights of Nature,” and are essentially a tool being used to grant legal standing to various aspects of nature because of past failures in third-party attempts at representing nature in court.<sup>117</sup> Advocacy for this movement can be seen in case law from as early as the 1970s in *Sierra Club v. Morton*, 405 U.S. 727 (1972),<sup>118</sup> and such rights are being utilized around the world to defend waterways, species, and more from human threats.<sup>119</sup> This is a “growing international movement that recognizes species and ecosystems not simply as resources for humans to use, but as living entities with rights of their own.”<sup>120</sup> The Rights of Nature is a ground-breaking legal development which has altered the way in which we view personhood rights and our surroundings; it is essential that we incorporate the recognition of these rights into our legal system. This article will first offer an explanation of the Rights of Nature and the role that they have played in recent years, discuss the prevalent case law, and will conclude by offering an opinion on why the Rights of Nature should be permanently incorporated into our legal system.

By preserving nature, the grant of these rights has led to increased support of indigenous groups who view nature as a vital organ of their everyday lives.<sup>121</sup> The development of these rights has not only been a furtherance of respect for indigenous groups with whom we live side

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<sup>116</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.1.

<sup>117</sup> Lavang, *supra* n.2.

<sup>118</sup> *Sierra Club v. Morton*, 405 U.S. 277 (1972), n.3.

<sup>119</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.4.

<sup>120</sup> Lavang, *supra* n. 5.

<sup>121</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.6.

by side, but it has also led to increased respect for our natural surroundings. Subsequently, those advocating for this unique worldview have stated that this movement is founded upon “balancing what is good for human beings against what is good for other species, what is good for the planet as a world.”<sup>122</sup> Nature in all life forms indeed has “the right to exist, persist, maintain, and regenerate its vital cycles.”<sup>123</sup> As human beings we have the duty to enforce these rights on behalf of nature.<sup>124</sup>

These rights function in a significantly different manner than the typical environmental laws to which we are generally accustomed in three major ways.<sup>125</sup> First, in establishing rights of nature, communities are working together outside of the regulatory system in order to develop those legal rights, while in other conventional environmental protection movements communities tend to vary in approach.<sup>126</sup> Second, Rights of Nature are enforced differently than other environmental protections since in dealing with Rights of Nature “a community bill of rights is adopted into law, and a guardian is designated to enforce the rights of an ecosystem”; the adoption of a community bill of rights and appointment of a guardian is atypical in the enforcement of other environmental protections.<sup>127</sup> Finally, environmental protection is typically viewed through a lens in which a hierarchy of human beings is placed above and in control of nature, but here there is a sense of reciprocity between human beings and their natural surroundings.<sup>128</sup> This movement is all about the recognition and honoring of the rights sustained by nature<sup>129</sup>; the movement recognizes that ecosystems are entitled to rights just like humans.<sup>130</sup>

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<sup>122</sup> What is Rights of Nature?,” *Global Alliance for the Rights of Nature*, The Rights of Nature, n.7.

<sup>123</sup> Global Alliance, *supra* n.8.

<sup>124</sup> Global Alliance, *supra* n.9.

<sup>125</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.10.

<sup>126</sup> Lavang, *supra* n.11.

<sup>127</sup> Lavang, *supra* n.12.

<sup>128</sup> Lavang, *supra* n.13.

<sup>129</sup> “What is Rights of Nature?,” *Global Alliance for the Rights of Nature*, The Rights of Nature, n.14.

<sup>130</sup> Global Alliance, *supra* n.15.

The enforcement of these rights by United States case law and the recent development of Rights of Nature laws throughout the world demonstrates that this is an international movement which is consistently growing.<sup>131</sup> New Zealand and Ecuador support the movement for the Rights of Nature,<sup>132</sup> and, in the United States, about three dozen communities in Oregon, California, New Mexico, Colorado, Virginia, New York, and New Hampshire have developed laws that provide legal rights to parts of their ecosystems.<sup>133</sup> Additionally, similar work has been occurring in Toledo, Ohio and on a more local scale, in Grant Township, Pennsylvania.<sup>134</sup>

#### United States Case Law Has Expanded Upon the Rights of Nature:

The Rights of Nature are further supported by a few examples of recently developed case law. For instance, the Yurok Tribe has successfully created a resolution which allowed cases to be brought in tribal court on behalf of the Klamath River, on the basis of personhood rights.<sup>135</sup> Also, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), Rights of Nature were provided to “manoomin” (wild rice)<sup>136</sup> because the Supreme Court of the United States sustained a treaty which had granted the Chippewa Indians hunting, fishing, and gathering rights – specifically including the right to gather wild rice.<sup>137</sup> Furthermore, Ohio voters recently passed a law which grants personhood rights to Lake Erie; this has notably been referred to as the “Lake Erie Bill of Rights.”<sup>138</sup> This “Bill of Rights” has declared “irrevocable rights for the Lake Erie Ecosystem to exist, flourish, and naturally evolve,” in order to grant Lake Erie legal

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<sup>131</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.16.

<sup>132</sup> Lavang, *supra* n.17.

<sup>133</sup> Lavang, *supra* n.18.

<sup>134</sup> Lavang, *supra* n.19.

<sup>135</sup> Smith, Anna V. “Some Indigenous Communities Have a New Way to Fight Climate Change: Give Personhood Rights to Nature.” *Mother Jones*, Mother Jones, 29 Sept. 2019, n.20.

<sup>136</sup> Alex Brown, “Cities, Tribes Try a New Environmental Approach: Give Nature Rights,” *Pew Trusts*, Pew Trusts, October 2019, n.21.

<sup>137</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), n.22.

<sup>138</sup> Alex Brown, “Cities, Tribes Try a New Environmental Approach: Give Nature Rights,” *Pew Trusts*, Pew Trusts, October 2019, n.23.

standing.<sup>139</sup> Finally, the Ponca tribe, in 2017, was one of the first tribes in the United States to join in the movement of enacting Rights of Nature law<sup>140</sup> by creating a statute based on an anti-fracking claim<sup>141</sup> which constituted an attempt to prevent earthquakes, cancer, and asthma.<sup>142</sup> Although this is a relatively new movement, support for this cause has been steadily increasing over recent years.<sup>143</sup>

Case law, often originating in tribal court and making its way through the United States Supreme Court, lends substantial support to the Rights of Nature movement.<sup>144</sup> Since the story behind such case law begins in tribal court, it is important to recognize the relevance of tribal courts in the United States justice system.<sup>145</sup> Tribal courts are courts of general jurisdiction, and they are known for their broad criminal jurisdiction.<sup>146</sup> There is a need for these tribal courts because states have no jurisdiction over the activities of Native Americans and Native American tribes that reside in designated Native American reservations.<sup>147</sup> Throughout the United States, there are about four hundred tribal justice systems.<sup>148</sup> Tribal sovereignty is protected by means of either the tribal justice system or by means of traditional United States courts.<sup>149</sup> Finally, it is important to note that most tribes have their own tribal justice system, and for those tribes who

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<sup>139</sup> Brown, *supra* n.24.

<sup>140</sup> Brown, *supra* n.25.

<sup>141</sup> Intercontinental Cry. “Ponca Nation of Oklahoma to Recognize the Rights of Nature to Stop Fracking.” *Intercontinental Cry*, 31 Oct. 2017, n.26.

<sup>142</sup> Alex Brown, “Cities, Tribes Try a New Environmental Approach: Give Nature Rights,” *Pew Trusts*, Pew Trusts, October 2019, n.27.

<sup>143</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.28.

<sup>144</sup> Alex Brown, “Cities, Tribes Try a New Environmental Approach: Give Nature Rights,” *Pew Trusts*, Pew Trusts, October 2019, n.29.

<sup>145</sup> Ncsc. “Tribal Courts Resource Guide.” *NCSC*, National Center for State Courts, 18 Feb. 2016, n.30.

<sup>146</sup> Ncsc., *supra* n.31.

<sup>147</sup> Ncsc., *supra* n.32.

<sup>148</sup> “Tribal Court Systems.” *Indian Affairs*. United States Department of the Interior, n.33.

<sup>149</sup> *Indian Affairs*, *supra* n.34.

do not have their own tribal justice system such services are provided through the Court of Indian Offences.<sup>150</sup>

The first case offering support to the Rights of Nature movement is *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The issue in this case was whether the Chippewa Indians currently maintained the rights that were granted to them through a treaty created in 1837.<sup>151</sup> Under the 1837 Treaty, the Chippewa Indians ceded land in what is now Wisconsin and Minnesota to the federal government.<sup>152</sup> In return, the federal government guaranteed the Chippewa Indians certain hunting, fishing, and gathering (specifically wild rice) rights on the ceded land.<sup>153</sup> It is important to note that while the treaty was essentially removing the Chippewa from their land, the main right that they asked for in return was the ability to continue to hunt, fish, and gather wild rice; this shows just how essential this was in the lives of the Chippewa.<sup>154</sup> In this case, the Chippewa Indians argued that the rights the 1837 Treaty granted to them still exist.<sup>155</sup> Meanwhile, the state of Minnesota argued that three events caused the Chippewa Indians to lose those rights: an Executive Order issued in 1850, an 1855 Treaty, and the admission of Minnesota into the Union in 1858.<sup>156</sup> Ultimately, the Supreme Court reached the decision that despite the historical references asserted by the state of Minnesota, the Chippewa Indians did in fact retain the hunting, fishing, and gathering rights granted in the 1837 Treaty.<sup>157</sup> The Court reached this conclusion by reasoning that there was no subsequent treaty, executive order, or congressional act that ever took away the rights of the Chippewa Indians.<sup>158</sup>

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<sup>150</sup> Indian Affairs, *supra* n.35.

<sup>151</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999), n.36.

<sup>152</sup> *Id.* at 175, n.37.

<sup>153</sup> *Id.* at 175, n.38.

<sup>154</sup> *Id.* at 175, n.39.

<sup>155</sup> *Id.* at 176, n.40.

<sup>156</sup> *Id.* at 176, n.41.

<sup>157</sup> *Id.* at 176, n.42.

<sup>158</sup> *Id.* at 208, n.43.

Another relevant case is *Baley v. United States*, 942 F. 3d 1312 (2019). In that case, the main issue was whether the Bureau of Reclamation had infringed upon the Yurok Tribe's water rights specifically regarding the Klamath River Basin.<sup>159</sup> The Yurok Tribe includes several distinct indigenous groups: the Klamath Tribe, the Moadoc Tribe, and the Yahooskin Band of Snake Indians.<sup>160</sup> Collectively, the Yurok Tribe is a federally recognized tribe that has used the Klamath River Basin for over a thousand years for activities including hunting, fishing, and foraging.<sup>161</sup> Preceding this case, the Bureau of Reclamation temporarily halted water deliveries originating in the Klamath River Basin.<sup>162</sup> The Yurok Tribe thereby alleged that the Bureau's action constituted a taking of water rights without just compensation to the tribe.<sup>163</sup> On appeal, the United States Court of Appeals for the Federal Circuit, in its holding, sustained recognition of the federally reserved water rights of the Yurok Tribe because of the historical essential use of the river on the reservation.

The final case, *Sierra Club v. Morton*, 405 U.S. 727 (1972), demonstrates how other, non-indigenous groups have attempted to bring advocacy claims in federal courts in an effort to preserve nature which is such an essential aspect in lives of individuals including tribes throughout the country.<sup>164</sup> The issue there was whether the Sierra Club had standing to bring a claim against the United States Forest Service even though they had not been directly affected as a result of the actions taken by the Forest Service.<sup>165</sup> In this case, the Forest Service entered into a contract with Walt Disney Enterprises, Inc., which permitted Disney to build a resort in the

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<sup>159</sup> *Baley v. United States*, 942 F. 3d 1312, 1316 (2019), n.44.

<sup>160</sup> *Id.* at 1322, n.45.

<sup>161</sup> *Id.* at 1322, n.46.

<sup>162</sup> *Id.* at 1316, n.47.

<sup>163</sup> *Id.* at 1316, n.48.

<sup>164</sup> *Sierra Club v. Morton*, 405 U.S. 277 (1972), n.49.

<sup>165</sup> *Id.* at 732, n.50.



Mineral King Valley, located in the Sierra Nevada Mountains.<sup>166</sup> The Supreme Court reasoned that “aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”<sup>167</sup> However, the Court went on to state that “a mere ‘interest in a problem’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the Administrative Procedure Act.”<sup>168</sup> In conclusion, the Court held that the Sierra Club lacked standing to maintain this action because even though the Sierra Club had a cognizable interest in the preservation of the Mineral King Valley, the Court explained that the claim ultimately needed to fail because the Sierra Club did not have standing to bring the claim.<sup>169</sup> Although the Sierra Club lacked standing to bring such a claim, preservation of nature is a key aspect for indigenous worldviews; thus by means of this lawsuit the Sierra Club has helped to pave the way for the future advocacy of nature.<sup>170</sup>

#### The Impact on the Evolution of Personhood Rights:

For legal purposes, a driving need behind the Rights of Nature movement has been to grant legal standing or, as an alternative, guardianship to elements of nature so as to avoid the result of *Sierra Club*.<sup>171</sup> In efforts to incorporate the Rights of Nature, there is potential to use either a judicial or legislative approach.<sup>172</sup> Turning to the polls or the courts, there is

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<sup>166</sup> *Id.* at 729, n.51.

<sup>167</sup> *Id.* at 734, n.52.

<sup>168</sup> *Id.* at 739, n.53.

<sup>169</sup> *Id.* at 741, n.54.

<sup>170</sup> Emily Lavang, “Can We Protect Nature by Giving it Legal Rights?,” *MinnPost*, MinnPost, February 2020, n.55.

<sup>171</sup> Meredith N. Healy, “Fluid Standing Incorporating Indigenous Rights of Nature,” *Colorado Natural Resources, Energy and Environmental Law Review*. 340 (2019), n.56.

<sup>172</sup> *Id.* at 341, n.57.

“international precedent” to aid this revolution within the United States as Rights of Nature have been incorporated in other countries throughout the world through several avenues including case law, voting initiatives, and constitutions.<sup>173</sup> If the federal government were to recognize the Rights of Nature it would help to avoid the complications of third-party standing, give recognition to tribal culture, and provide protective safeguards for natural resources in the United States from which we would all benefit.<sup>174</sup> The Rights of Nature has been a growing movement throughout the world by means of court systems, legislation, and grassroots initiatives in various countries and several international organizations such as the European Union and the International Union for the Conservation of Nature; it is about time we jump aboard this sweeping revolution.<sup>175</sup>

While the Rights of Nature may seem like quite a foreign concept, its importance should not be underestimated. Notably, when most citizenship rights were first developed in this country, most of those rights were created through a very narrow lens. Many indigenous groups who live in this country view nature through a broader lens. In those indigenous cultures, nature plays an essential role. Even if we do not view nature in the same way, we should respect the culture of these indigenous groups; that respect should include our acceptance of the idea that nature does in fact deserve certain citizenship rights. This will likely aid the relationship between indigenous groups and the rest of the United States. Given the history of these relationships, the impact that this movement will have is nothing less than monumental.

The development of the Rights of Nature will no doubt lead to an expansion of the conceptual beliefs behind American citizenship rights. Typically, when the American people

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<sup>173</sup> *Id.* at 346, n.58.

<sup>174</sup> *Id.* at 350, n.59.

<sup>175</sup> Kaitlin Sheber, “Legal Rights for Nature: How the Idea of Recognizing Nature as a Legal Entity can Spread and Make a Difference Globally,” *Hastings Environmental Law Journal*. 161 (2020), n.60.

discuss citizenship rights, they refer to defining moments in American legislative history such as the Founding Fathers developing the Bill of Rights, the Civil Rights Movement, or the Women's Suffrage Movement. In everyday life, we do not often consider the significance of the personhood rights that we possess. We especially do not think about designating such rights to nature.

Even though the appeal of the Rights of Nature movement is evident, it is a curious inquiry as to where the line will be drawn as far as the granting of those rights by the judiciary. As previously discussed, such rights have been given to the Klamath River, wild rice, and Lake Erie, to name a few recipients. In the course of this research, there does not seem to be any guidelines as to which aspects of nature should receive these Rights of Nature. Although the case law in this area is relatively new and there is still much to be discovered, these rights must be incorporated into the legal system because we owe such respect to indigenous groups and the nature that surrounds us.

The emergence of this movement will greatly expand the scope of our understanding of personhood rights in the United States. As these new practices develop, courts will need to set distinct guidelines and explain the standard for when such rights should be granted. This is an exciting moment in the legal field, but in an effort to establish durable precedent so that the grant of these rights can be further pursued, the issuance and explanation of such guidelines are crucial.

In conclusion, the Rights of Nature must be recognized by the United States federal government – either through the legislative or judicial branch – to avoid the results of *Sierra Club v. Morton*. Without the Rights of Nature, standing in Federal Courts is nearly impossible to achieve – which makes environmental protection unnecessarily difficult. A flourishing

environment is essential for all cultures in this country to survive, and our current strategies to protect the environment are proving to be insufficient. Thus, recognizing the Rights of Nature is essential. It is time we stop sitting on the sideline, take these few examples of the adoption of such rights and incorporate them into our own legal system.

**CASE NOTE: Renewable Fuels Association v. United States Environmental Protection Agency**

By: Sarah Thomas

I. INTRODUCTION

The Renewable Fuel Standards Program (“RFS Program”) is a program enacted by Congress during the Bush Administration regulating the energy economy. The program was created to increase the use of renewable fuels and promote American energy independence. The program works by establishing yearly targets outlining the required usage of renewable fuels. The RFS Program also includes an exception program, whereby small oil refineries may petition the United States Environmental Protection Agency (“EPA”) for an exemption from compliance with the RFS Program. This case note pertains to a suit brought regarding extensions of this small oil refinery exemption. In *Renewable Fuels Association v. United States Environmental Protection Agency*, three small oil refineries, Cheyenne, Wynnewood, and Woods Crossed, petitioned the EPA for an extension of the small oil refinery exemption. The suit was brought by the Biofuels Coalition, comprised of four organizations including trade industry associations and other stakeholder organizations.

A. *Energy Policy Act of 2005*

The RFS Program was created by the Energy Policy Act of 2005.<sup>176</sup> This legislation sought to reduce the nation’s dependence on fossil fuels.<sup>177</sup> To accomplish this goal, the Energy Policy Act set quotas increasing the required amount of renewable fuels.<sup>178</sup> In summary, this legislation requires gasoline sold or introduced into United States commerce to contain the

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<sup>176</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1215 (10th Cir. 2020).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

designated annual volume of renewable fuel no later than one year after enactment.<sup>179</sup> The legislation also creates a credit program whereby fuel blenders, refiners, or importers could buy or sell compliance credits.<sup>180</sup> Section 1501 of the Energy Policy Act amends Section 211 of the Clean Air Act (42 U.S.C. 7545).<sup>181</sup>

A temporary exception provision is included in Section 1501. Under the temporary exception provision, small oil refineries could be excused from compliance until calendar year 2011.<sup>182</sup> In this context, a small refinery is defined as one for which the average aggregate daily crude oil throughput for a calendar year not exceeding 75,000 barrels.<sup>183</sup> When the Secretary of Energy determines that a small refinery would be subject to a disproportionate economic hardship, which is required to comply with the RFS program, the Administrator shall extend the exemption for the small refinery for a period of not less than 2 additional years.<sup>184</sup> A small refinery may petition at any point for the reason of disproportionate economic hardship.<sup>185</sup>

Applicable volume requirements for years 2006 through 2012 are established in Section 1501. Four billion gallons of renewable fuels were required in 2006.<sup>186</sup> This required volume increases to 7.5 billion gallons by 2012.<sup>187</sup> After 2012, applicable volume determinations were made by the Administrator (the EPA) in coordination with the Secretary of Agriculture and the Secretary of Energy.<sup>188</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1215 (10th Cir. 2020).

<sup>181</sup> Energy Policy Act of 2005, PL 109–58, August 8, 2005, 119 Stat 594.

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

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

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

<sup>186</sup> Energy Policy Act of 2005, PL 109–58, August 8, 2005, 119 Stat 594.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

Under Section 1501 of the Act, renewable fuels may be composed of grain, starch, oilseeds, vegetable, animal, or fish materials including fats, greases, and oils, sugarcane, sugar beets, sugar components, tobacco, potatoes, or other biomass sources.<sup>189</sup> Alternatively, renewable fuels may be natural gas produced from a biogas source, including a landfill, sewage waste treatment plant, feedlot, or other place where decaying organic material is found.<sup>190</sup> Further, renewable fuels are used to replace or reduce the quantity of fossil fuel present in a fuel mixture used to operate a motor vehicle.<sup>191</sup>

#### *B. Energy Independence and Security Act of 2007*

The Energy Independence and Security Act of 2007 (“EISA”) expanded RFS program requirements set forth by the Energy Security Act of 2005. For example, EISA requires 36 billion gallons of renewable fuel volume to be introduced to the United States market by 2022. This figure is a sharp increase from the 7.5 billion gallons required for 2012 by the Energy Policy Act.<sup>192</sup>

Similar to the Energy Policy Act, EISA includes a small oil refinery exemption provision. The definition of “small oil refinery” remains the same, requiring an aggregate daily crude oil output of 75,000 barrels or less a calendar year.<sup>193</sup> Also, similar to the Energy Policy Act, EISA provides for the small oil refinery exemption until 2011.<sup>194</sup> After 2011, the small oil refinery may apply for an extension of the exemption lasting a minimum of two years.<sup>195</sup> Further, the small oil refinery must still meet the disproportionate economic hardship requirement.<sup>196</sup> A determination

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Jason Scott Johnston, *Regulatory Carrots and Sticks in Climate Policy: Some Political Economic Observations*, 6 *Tex. A&M L. Rev.* 107, 122 (2018).

<sup>193</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1217 (10th Cir. 2020).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

of whether the refinery is facing disproportionate economic hardship due to compliance is based on a DOE study which was to be conducted no later than 2008.<sup>197</sup> Under EISA, small oil refineries may still apply for an extension of the hardship exemption at any time.<sup>198</sup>

Additionally, EISA extends the credit program included in the Energy Policy Act.<sup>199</sup> EISA states a credit “shall be valid to show compliance for the 12 months as of the date of generation.”<sup>200</sup> In its current version, credits may be generated for refined, blended, or imported gasoline with greater-than-required quantities of renewable fuel. Credits may also be generated for the use or transfer to another person of such credits. Lastly, credits may be generated for carrying forward a renewable fuel deficit in certain circumstances.<sup>201</sup>

In its current form, EISA includes four categories of renewable fuels obligations.<sup>202</sup> The first category is renewable fuels.<sup>203</sup> Here, renewable fuel is defined as “fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.”<sup>204</sup> This category is targeted to rise from four billion gallons in 2006 to 36 billion gallons in 2022.<sup>205</sup> The second category is advanced biofuel.<sup>206</sup> In this context, advanced biofuel is generally defined as renewable fuel “other than ethanol derived from corn starch” with lifecycle greenhouse gas emissions at least 50 percent less than baseline, and is targeted to rise from 0.6 billion gallons in 2006 to 21 billion gallons in 2022.<sup>207</sup> The third category of renewable fuel obligations under EISA is cellulosic biofuel. For purposes of EISA, cellulosic biofuel is

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

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

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

<sup>202</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1216 (10th Cir. 2020).

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

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*



defined as renewable fuel “derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass.”<sup>208</sup> Cellulosic biofuel requires lifecycle greenhouse gas emissions at least 60 percent less than baseline.<sup>209</sup> The fourth category is biomass-based diesel (“BBD”).<sup>210</sup> BBD defined with certain exceptions as renewable fuel that is “biodiesel” with lifecycle greenhouse gas emissions at least 50 percent less than baseline, was targeted to rise from 0.5 billion gallons in 2009 to one billion gallons in 2012, with volumes in later years to be set by the EPA in consultation with the Department of Energy.<sup>211</sup>

## II. REPORTING

### A. *Renewable Fuel Standards Program Background*

The Renewable Fuel Standard Program (“RFS Program”) is a program designed by Congress to increase the use of renewable fuels in the American energy market and reduce foreign energy dependence.<sup>212</sup> As discussed above, Congress established the RFS program through the Energy Security Act of 2005, and later expanded the program through the Energy Independence and Security Act of 2007.<sup>213</sup> Judicial review of the RFS program is limited to the United States Court of Appeals for the District of Columbia Circuit.<sup>214</sup>

The Renewable Fuel Standards program tasks the EPA with establishing yearly regulations identifying the amount of renewable fuels to be introduced into the American energy market.<sup>215</sup> To increase renewable fuel usage, yearly targets were increased to meet

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1216 (10th Cir. 2020).

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

<sup>214</sup> *Id.* at 1240.

<sup>215</sup> *Id.*

benchmarks.<sup>216</sup> Congress’s benchmarks have been described as “ambitious”<sup>217</sup>, but seek to drastically increase the usage of renewable fuels.

A temporary exception for small oil refineries was created for the Renewable Fuel Standards program. This temporary exception allows for small oil refineries to be exempt from compliance requirements when the refineries meet economic eligibility requirements.<sup>218</sup> To qualify for an exemption, a small oil refinery must face “disproportionate economic hardship”<sup>219</sup> if required to comply with the RFS program. Small refineries are also required to satisfy the definition of “small refinery” as established in Section 80.1401 for the most recent full calendar year prior to seeking an extension.<sup>220</sup> The refinery must also meet the definition of “small refinery” for the year during which they are seeking the exemption.<sup>221</sup> In addition to the temporary exception, the program also includes a “Credit Program”, whereby importers or refiners may buy or sell compliance credits.<sup>222</sup>

### *B. The Three Small Oil Refineries’ Exemption Petitions*

#### *1. Cheyenne*

HollyFrontier Cheyenne Refining LLC (“Cheyenne”) is a Wyoming oil refinery employing approximately 300 people.<sup>223</sup> Cheyenne submitted its small oil refinery exemption petition to the EPA in 2017.<sup>224</sup> The Department of Energy identified Cheyenne as having faced disproportionate economic hardship in a 2011 study.<sup>225</sup> Notably, Cheyenne did not apply for, nor

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1214.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1215.

<sup>220</sup> *Id.*

<sup>221</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1220 (10th Cir. 2020)

<sup>222</sup> *Id.* at 1214.

<sup>223</sup> *Id.* at 1226.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

receive an exemption petition in 2013 or 2014.<sup>226</sup> However, the EPA granted Cheyenne’s exemption petition in full.<sup>227</sup>

In its 2017 petition, Cheyenne expressed it would face “disproportionate economic hardship” if required to comply with the RFS program in 2016.<sup>228</sup> Cheyenne argued compliance would threaten the viability of the refinery, in large part due to its focus on diesel.<sup>229</sup> Purchasing compliance credits and biodiesel blending, Cheyenne argued, were poor economics.<sup>230</sup> Further, Cheyenne stated it did not have the same biodiesel blending capabilities as larger refineries.<sup>231</sup> In reviewing Cheyenne’s supporting financial documents, the Department of Energy concluded Cheyenne would not face disproportionate economic hardship.<sup>232</sup> The EPA also acknowledged it altered its standard methodology in evaluating Cheyenne’s petition.<sup>233</sup> Agency orders granting the Cheyenne petition were not published in the Federal Register.<sup>234</sup>

## 2. Woods Cross

Woods Cross is a Utah-based oil refinery employing 285 employees and 70 full-time contractors, according to its 2017 exemption petition.<sup>235</sup> Woods Cross’s reasoning for submitting a petition includes “resistance” to biofuels in Woods Cross’s market, and that the refinery has no other lines of business.<sup>236</sup> In its petition, Woods Cross did not assert it had been identified as facing disproportionate economic hardship in the Department of Energy’s 2011 study.<sup>237</sup> Nor

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<sup>226</sup> *Id.*

<sup>227</sup> *Renewable Fuels Ass’n v. United States Env’tl. Prot. Agency*, 948 F.3d 1206, 1220 (10th Cir. 2020).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Renewable Fuels Ass’n v. United States Env’tl. Prot. Agency*, 948 F.3d 1206, 1220 (10th Cir. 2020).

<sup>233</sup> Whereas the EPA previously looked to the impact on the small oil refineries’ “viability”, the EPA stated it could also find disproportionate economic hardship in cases where the operations of the refinery were not affected. *Id.*; *Id.* at 1228.

<sup>234</sup> *Id.* at 1241.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

did Woods Cross assert it had previously received an extension of the small oil refinery exemption.<sup>238</sup> In response, the Department of Energy recommended a partial grant, 50%, of Woods Cross’s petition.<sup>239</sup> Instead, the EPA fully granted Woods Cross’s petition.<sup>240</sup> In coming to its decision, the EPA stated that “unfavorable structural factors” contributed to Woods Cross’s full relief.<sup>241</sup> Similar to Cheyenne, the Federal Register did not publish an agency grant of the Woods Cross petition.<sup>242</sup>

### 3. Wynnewood

Wynnewood is an Oklahoma-based oil refinery employing more than 300 employees and 250 full-time contractors, according to its 2018 petition.<sup>243</sup> Wynnewood’s petition stated it had not received economic hardship relief since 2012, but received an extension of the blanket exemption in 2011 and 2012.<sup>244</sup> The refinery cited its 2017 financial performance as its reasoning for the petition.<sup>245</sup> Specifically, Wynnewood expressed it lacked sufficient access to credit, other lines of business, a poor market for blended renewable fuels, proportion of diesel fuels, net refining margins, and the consequence of increased prices for customers.<sup>246</sup> The Department of Energy recommended a partial grant, 50%, of Wynnewood’s petition. The EPA, however, ended up granting Wynnewood’s petition in full and extended the exemption for 2017.<sup>247</sup> Similar to Woods Cross, the EPA cited “unfavorable structural conditions” in its reasoning for granting Wynnewood’s petition in full.<sup>248</sup> Wynnewood’s petition grant was

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<sup>238</sup> *Id.*

<sup>239</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1228 (10th Cir. 2020)

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1241.

<sup>243</sup> *Id.* at 1229.

<sup>244</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1229 (10th Cir. 2020).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

similarly not published in the Federal Register.<sup>249</sup>

#### 4. Biofuels Coalition

As the Refineries challenge the Biofuels Coalition’s standing to sue, it is necessary to identify the members of the Biofuels Coalition. The Biofuels Coalition includes four organizations, first including the Renewable Fuels Association (“RFA”).<sup>250</sup> The RFA is a trade association for the ethanol industry.<sup>251</sup> RFA members include companies that make or sell ethanol, blenders or sellers of gasoline, or ethanol producers’ third-party service providers.<sup>252</sup> The second organization is the American Coalition for Ethanol Producers (“ACE”).<sup>253</sup> Like the RFA, ACE is an advocacy organization for ethanol producers.<sup>254</sup> ACE members primarily include ethanol producers and farmers growing crops used in renewable fuel production, particularly corn.<sup>255</sup> The third organization is the National Farmers Union (“NFU”).<sup>256</sup> NFU is an advocacy group geared toward “family farmers, ranchers, and rural communities.”<sup>257</sup> NFU members include farmers growing crops, such as corn and soybeans, or family farmers.<sup>258</sup> The final organization is the National Corn Growers Association (“NCGA”).<sup>259</sup> The NCGA has more than 40,000 dues-paying corn farmers and 300,000 corn growers who contribute to the NCGA through corn programs.<sup>260</sup>

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<sup>249</sup> *Renewable Fuels Ass’n v. United States Eenvtl. Prot. Agency*, 948 F.3d 1206, 1229 (10th Cir. 2020).

<sup>250</sup> *Id.*

<sup>251</sup> *Renewable Fuels Ass’n v. United States Eenvtl. Prot. Agency*, 948 F.3d 1206, 1229 (10th Cir. 2020).

<sup>252</sup> *Id.* at 1230.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Renewable Fuels Ass’n v. United States Eenvtl. Prot. Agency*, 948 F.3d 1206, 1230 (10th Cir. 2020)

### C. Standing

The first issue is whether the Biofuels Coalition has standing to bring suit.<sup>261</sup> The EPA does not challenge the Biofuels Coalition’s standing to sue, only the refineries do.<sup>262</sup> To bring suit, the Constitution mandates that judicial power only extends to cases and controversies.<sup>263</sup> In satisfying federal court jurisdiction, the plaintiff must have “alleged such a personal stake in the outcome of the controversy so as to warrant *his* invocation of federal-court jurisdiction.”<sup>264</sup> At minimum, the plaintiff must have, “(1) suffered an injury in fact, (2) that is fairly traceable to the conduct of the defendant, and (3) that is likely to be addressed by favorable judicial decision.”<sup>265</sup>

The Refineries do not dispute that the Biofuels Coalition have suffered an injury in fact<sup>266</sup>. For standing purposes, even a small amount of monetary loss is generally an “injury”.<sup>267</sup> The Biofuels Coalition demonstrates their injury through the affidavit of the RFA’s chief economist, Scott Richman.<sup>268</sup> In this affidavit, Richman concludes that the granting of the Cheyenne, Woods Cross, and Wynnewood petitions, “contributed to reduced demand and lower per-gallon prices for ethanol.<sup>269</sup> These factors have resulted in lower revenues received by RFA’s ethanol producing members.”<sup>270</sup> Richman also states his estimates included in the affidavit are “conservative”.<sup>271</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 1231.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1233 (10th Cir. 2020).

<sup>268</sup> *Id.* at 1232.

<sup>269</sup> *Id.*

<sup>270</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1232 (10th Cir. 2020).

<sup>271</sup> *Id.*

Instead, the Refineries dispute whether the Biofuels Coalition’s losses are “fairly traceable” to any individual exemption petition granted to Cheyenne, Woods Cross, or Wynnewood.<sup>272</sup> Namely, the Refineries argue that estimates of RFA’s economist do not detail whether any individual extension caused more or less loss than another.<sup>273</sup> Further, Cheyenne and Woods Cross argue their exempted credits are only a “tiny fraction” of the total RFS responsibility.<sup>274</sup> Concerning redressability, the Refineries argue that the harm faced by the Biofuels Coalition cannot be redressed by this suit because the harm could not be remedied in full.<sup>275</sup> Specifically, the Refineries argue that action would not remedy the Biofuels Coalition now, years after the EPA’s granting of the exemptions.<sup>276</sup>

Concerning standing, the court concludes that the Biofuels Coalition’s losses are “fairly traceable” to the exemption petitions granted to Cheyenne, Woods Cross, and Wynnewood.<sup>277</sup> In its reasoning, the court cites *Massachusetts v. E.P.A.*, where the EPA argued that incremental steps are insignificant, like a “drop in the worldwide bucket”.<sup>278</sup> The court found the EPA’s reasoning to be erroneous, as the outcome would make it nearly impossible to pursue such claims in federal court.<sup>279</sup>

Regarding the case at hand, the court finds the Refineries’ argument similarly erroneous. Though individually the Biofuels Coalition members’ injuries may be small, they are each fairly traceable to the granting of these exemption petitions.<sup>280</sup> When the EPA granted the exemptions,

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<sup>272</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1234 (10th Cir. 2020).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1235 (10th Cir. 2020).

<sup>277</sup> *Id.* at 1234.

<sup>278</sup> *Massachusetts v. EPA*, 549 U.S. 497, 499, 127 S. Ct. 1438, 1442, 167 L. Ed. 2d 248 (2007).

<sup>279</sup> *Id.* at 1243.

<sup>280</sup> *Id.*

Cheyenne, Woods Cross, and Wynnewood were relieved of a large regulatory burden.<sup>281</sup> By nature, the Refineries and the Biofuels Coalition exist in a competitive relationship.<sup>282</sup> When the regulatory burden is removed, so too is the protection of ethanol and ethanol feedstock sales.<sup>283</sup> Granting the exemptions caused a “particularized change” to the Refineries’ and Biofuels Coalition’s competitive relationship.<sup>284</sup> This change to the parties’ competitive relationship is also grounds for standing.<sup>285</sup>

In response to the Refineries’ argument that the Biofuel Coalition’s harm would not be remedied by this action, the court cites *Massachusetts*.<sup>286</sup> In *Massachusetts*, the court held that redressability may be satisfied when the risk of harm is satisfied to “some extent”.<sup>287</sup> Here, though a ruling in favor of the Biofuels Coalition would not remedy their injury in full, it would remedy (1) the nature of the parties’ competitive relationship and (2) reinstate the regulatory burden.<sup>288</sup> A ruling in favor of the Biofuels Coalition would remedy the party’s injury to “some extent”, thus granting standing.<sup>289</sup> Therefore, the Biofuels Coalition has standing to bring suit as the party has suffered an injury that is fairly traceable to the Refineries and satisfies standards of redress.<sup>290</sup>

In conclusion, the Biofuels Coalition had standing as the party suffered injury in-fact that is fairly traceable to the granting of the three small oil refineries’ exemption petitions.<sup>291</sup>

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1234 (10th Cir. 2020).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*



## D. *Jurisdiction*

### 1. Timeliness

Concerning timeliness, the issue is whether the action was brought in a timely manner with respect to the Clean Air Act.<sup>292</sup> According to the Clean Air Act, challenges to final agency actions must generally be filed “within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.”<sup>293</sup> In this case, the Federal Register did not publish the EPA’s granting of the Cheyenne, Woods Cross, or Wynnewood petitions.

Narrowly, the issue may be viewed as whether the statutory clock began for purposes of the Clean Air Act when the Refineries’ exemption grants were not published in the Federal Register.<sup>294</sup> In light of the Clean Air Act’s 60-day deadline, the Court first looks to when the statutory clock may have started.<sup>295</sup> As previously mentioned, the Federal Register did not publish the exemption grants of Cheyenne, Woods Cross, or Wynnewood.<sup>296</sup> As such, no parties had notice of the statutory clock beginning.<sup>297</sup>

In reaching this conclusion, the court looks to the purpose of this statutory window.<sup>298</sup> Similar to the reasoning behind the D.C. Circuit Court-review requirement, the court believes such a requirement implements fairness, or a “race to the courthouse”.<sup>299</sup> The court states it would be “irrational” to eliminate the chance for appeals when parties do not have notice.<sup>300</sup>

In this case, the Biofuels Coalition did not have notice of the exemption grants because the Federal Register did not publish the Cheyenne, Woods Cross, and Wynnewood petition

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<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 1239.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Renewable Fuels Ass'n v. United States Envtl. Prot. Agency*, 948 F.3d 1206, 1241 (10th Cir. 2020).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 1240.

<sup>300</sup> *Id.* at 1241.

agency orders.<sup>301</sup> Therefore, the 60-day deadline in 42 U.S.C. § 7607(b)(1) did not cause the Biofuels Coalition’s petition to be untimely.<sup>302</sup> As such, the Plaintiffs brought this suit in a timely manner as the agency orders granting the three small oil refineries’ exemption petitions were not published by the Federal Register. As a result, the 60-day “statutory clock” as provided by the Clean Air Act did not start.

## 2. Ripeness

The Refineries also argue that the issue is not suitable for judicial review in light of the ripeness doctrine. In relation to administrative agencies, the ripeness doctrine seeks to prevent inefficient use of the courts through abstract, and possibly premature, agency disputes.<sup>303</sup> To determine whether administrative action is “ripe” for review, the court is required to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.”<sup>304</sup>

Ripeness analysis requires a two-step criteria evaluation. The first criteria, “fitness for judicial decision”, may be determined by considering whether the issue is “purely legal”, the finality of the agency decision, whether the court would benefit from further factual development, and whether intervention would interfere with the agency’s future administrative actions.<sup>305</sup> In this case, the court finds EPA does not indicate intent to change their decisions regarding the exemption petitions granted to Cheyenne, Woods Cross, or Wynnewood.<sup>306</sup> As such, the court reasons no further factual development is needed, because the issue rests solely on the granting of these petitions.<sup>307</sup> The Refineries’ statutory interpretation challenges are

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 1241.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

purely legal. Therefore, the first criterion of the ripeness test is satisfied.<sup>308</sup> Next, the court looks to the second criterion—hardship to the parties<sup>309</sup>. In this case, the court finds that the Biofuels Coalition faced increased competition and reducing the value of products the Coalition buys and sells.<sup>310</sup> Granting of the three small oil refineries’ petitions caused the Biofuels Coalition to face hardship economically.<sup>311</sup> As such, the ripeness test’s second criterion is also met.<sup>312</sup>

#### *E. Statutory Construction*

The third issue is whether the EPA exceeded its statutory authority by granting the exemption petitions of Cheyenne, Woods Cross, and Wynnewood.<sup>313</sup> This is a matter of statutory authority:<sup>314</sup> “Plain and unambiguous statutory language must be enforced ‘according to its terms,’ because we assume “the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>315</sup>

To review an agency’s determination, courts generally look to the test found in *Chevron v. Natural Resources Defense Council*.<sup>316</sup> The *Chevron* test has two steps, including (1) asking “whether Congress has directly spoken to the precise question at issue,” and if not, (2) “whether the agency’s answer is based on a permissible construction of the statute.”<sup>317</sup> The court has previously determined *Chevron* does not apply to informal adjudications of petitions to extend the small refinery exemption were not subject to *Chevron* deference.<sup>318</sup>

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Renewable Fuels Ass’n v. United States Env’tl. Prot. Agency*, 948 F.3d 1206, 1242 (10th Cir. 2020).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Renewable Fuels Ass’n v. United States Env’tl. Prot. Agency*, 948 F.3d 1206, 1243 (10th Cir. 2020)

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*; *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>317</sup> *Id.* at 1244.

<sup>318</sup> *Id.*

When *Chevron* is inapplicable, the court may look to the test in *Skidmore v. Swift & Co.*<sup>319</sup> The *Skidmore* test holds that the weight provided to an administrative judgment “will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>320</sup> Under *Skidmore*, an EPA ruling may “claim the merit of its writer’s thoroughness, logic, and expertness” and also, “its fit with prior interpretations, and any other sources of weight.”<sup>321</sup>

The court first looks to the meaning of exemption versus an extension. Notably, the court looks to the plain meaning of this term.<sup>322</sup> “Common sense”, the court states, dictates that an extension may not be granted to something that had not been previously granted.<sup>323</sup> In this case, none of the three small oil refineries had been granted an exemption during the appropriate year.<sup>324</sup> Ultimately, a small oil refinery that has not been granted an exemption previously is not eligible for an extension, as there is nothing to “prolong”, or “add onto”.<sup>325</sup> To interpret the term “extension” otherwise would mean a small oil refinery could apply for a petition to their benefit and against the purpose of the statutory scheme.<sup>326</sup>

The Refineries and EPA also argue a lack of jurisdiction due to the definition of small oil refineries under a 2014 amendment. Regarding the 2014 Small Refinery Rule, the court reasons that the definition of the “small refinery” under the amendment is not up for dispute in this

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<sup>319</sup> *Id.*; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>320</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1244 (10th Cir. 2020).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 1245.

<sup>326</sup> *Id.*

case.<sup>327</sup> As such, this issue is subject to a *Skidmore*, rather than *Chevron* review.<sup>328</sup> Though ambiguity exists as to the definition of “small refinery” under the rule, there is no ambiguity as to the statutory definition of “extension”.<sup>329</sup> As the statutory definition of “extension” is at issue, and not the 2014 Small Refinery Rule, the court disagrees with the reasoning of the EPA and Refineries.<sup>330</sup>

The third statutory construction issue rests in the definition of “disproportionate economic hardship.”<sup>331</sup> The court cites the definition of disproportionate economic hardship in *Sinclair*: “suffering,” “privation,” or “adversity,” i.e., something that “makes one’s life hard or difficult.”<sup>332</sup> As such, the court reasons that a mere “hardship” is not enough; the EPA must find a small oil refinery’s hardship must be disproportionate under the Clean Air Act to grant an extension.<sup>333</sup> Though the EPA altered its metrics in determining hardship, the court reasons that the EPA did not abandon a comparative analysis in deciding whether to grant the petitions.<sup>334</sup>

Concerning hardship from compliance, the Biofuels Coalition argues that the EPA erroneously determined that Refineries’ hardship was directly caused by compliance with the RFS program.<sup>335</sup> The court reasons that the statutory language pertaining to exemptions only related to hardships caused by compliance.<sup>336</sup> Specifically, the statute states an exemption may be sought, “. . . for the reason of disproportionate economic hardship.”<sup>337</sup> Notably, the court

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 1251.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 1252.

<sup>332</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1252 (10th Cir. 2020).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

states the clause, “for the reason of” denotes a causation requirement.<sup>338</sup> This reasoning is supported by the EPA’s own reasoning in granting the Woods Cross and Wynnewood petitions: The EPA cited hardships not possibly caused by compliance; thus, the refineries faced hardships not caused by the reason of compliance.<sup>339</sup> As such, the EPA exceeded its statutory authority in granting petitions to the three small oil refineries for reason of hardship from compliance.<sup>340</sup> Therefore, the EPA exceeded its statutory authority in granting the Cheyenne, Woods Cross, and Wynnewood exemption petitions.<sup>341</sup>

### III. ANALYSIS

#### A. *Ruling as a Check on Statutory Authority*

From a legal perspective, the Tenth Circuit’s decision is a measured check on the EPA’s statutory authority under the RFS program. In its role as administrator of the RFS program, the EPA had greater discretion in granting extension petitions to small oil refineries. Due to the statutory structure of the RFS program, the EPA ultimately decided which small oil refineries could successfully petition the EPA for exemptions under the RFS program. Indeed, the EPA’s decisions regarding small oil refinery exemptions were informed by previously set metrics: the EPA evaluated whether the small oil refinery had experienced a “disproportionate economic hardship”, for example.<sup>342</sup> To evaluate such hardship, the Energy Policy Act required the EPA to reference whether the small oil refinery had been included in a Department of Energy Study identifying which small oil refineries had faced disproportionate economic hardships.

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1220 (10th Cir. 2020).

However, prior to this ruling, the EPA wielded a level of discretion in granting extension petitions. The statutory provisions of the Energy Policy Act of 2005 and the Energy and Independence Act of 2007 which created the RFS program did not grant the EPA the power to grant extensions when no exemption was filed. Instead, the power was limited to the EPA's ability to grant extensions of exemptions only when the refinery met the statutory requisites and had filed an exemption. When the EPA granted the extension petitions of the three small oil refineries, the EPA exceeded its statutory authority. This ruling serves as a "check" on the EPA's statutory authority as established by the RFS program.

#### B. *Policy Implications*

From a legislative perspective, this ruling is consistent with the legislative intentions of the Energy Policy Act of 2005 and the Energy and Independence Security Act of 2007. The purpose of the Energy Policy Act of 2005 was to increase the amount of renewable fuels in the American energy market.<sup>343</sup> The EPA's prior grant of the three small oil refineries' petitions would, by its nature, allow for less renewable fuels to enter the American energy market. Further, the RFS program was created in part to ensure the energy security of the United States. By ensuring greater compliance, the Tenth Circuit's decision is consistent with Congress's intention of ensuring national energy security through the RFS program.

Practically speaking, the Tenth Circuit's ruling in *Renewable Fuels* is a victory for those with a vested interest in a successful renewable fuels market. The general composition of the Biofuels Coalition, including farmers growing crops used in the creation of renewable fuels, energy industry investors, suggest there exists a variety of groups with a vested interest in a

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<sup>343</sup> *Renewable Fuels Ass'n v. United States Env'tl. Prot. Agency*, 948 F.3d 1206, 1215 (10th Cir. 2020).

successful renewable fuels market.<sup>344</sup> Logistically, the renewable fuels market benefits when a greater number of small oil refineries are in compliance with the RFS program.

Oil refineries are likely to be concerned about economic harms resulting from this ruling. Refineries which are required to comply with the RFS program may have difficulties blending renewable fuels into their products. Further, some refineries are situated in markets which are resistant to renewable fuels. Certainly, the Tenth Circuit's ruling in *Renewable Fuels* creates more challenges for small oil refineries seeking exemption from RFS program compliance.

### *C. Appellate Proceedings*

The Supreme Court of the United States has been asked to review the Tenth Circuit's ruling in *Renewable Fuels Association* by the refineries.<sup>345</sup> The EPA "declined to challenge the Tenth Circuit's ruling itself." The refineries argue that the decision will "eventually foreclose" the ability of all small refineries within the Tenth Circuit from receiving an exemption petition.

Small oil refinery compliance with the RFS program is inherently a political issue. If the Supreme Court of the United States were to review the Tenth Circuit's ruling, refineries are likely to argue over the definition of an "extension".<sup>346</sup> The refineries are likely to argue that "extension" does not only "increase a length of time", but holds additional meanings.<sup>347</sup> This argument, if given weight, would alter the interpretation of the small oil refineries' extension petitions under the RFS program.

To avoid review of the "politically fraught" issue of refinery compliance with the RFS program in *Renewable Fuels*, Congress could consider further defining "extension" for purposes

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<sup>344</sup> *Id.* at 1230.

<sup>345</sup> Juan Carlos Rodriguez, "Refiners Ask High Court To Review Biofuel Ruling", *Law 360*. Sept. 8, 2020. <https://www.law360.com/articles/1307908/refiners-ask-high-court-to-review-biofuel-ruling>.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*



of the RFS program. If Congress were to explicitly define the meaning of “extension” in this context, it may alter the weight of the refineries’ argument regarding ambiguity of the meaning of “extension” in this context. Further, clarifying these ambiguities could provide a model for future iterations of the RFS program. If the purpose of the small oil refinery exemption is to target a small demographic of potential refineries, narrowing the definition of “extension” would assist in this goal.

Legislation regulating the energy economy is inherently a political issue. To maintain the legislative intent of such programs, such legislation should be narrowly tailored and be explicitly defined. By including detailed definitions of terms such as “extension”, all parties are more likely to understand whether or not they are in compliance with the program’s requirements. In the case of RFS, a more narrowly tailored and detailed definition of “extension” could help avoid future similar issues. In conclusion, legislation which attempts to regulate the energy economy should elaborate which parties must comply, and fully outline all exceptions, as well as extensions of those exceptions where applicable.

As shown in *Renewable Fuels Association v. United States Environmental Protection Agency*, regulatory programs encouraging the use of renewable fuels are likely to continue into the future. Clearly defining the terms and boundaries of such programs are crucial to their effectiveness. With the RFS program, for example, the following issue could be anticipated: small oil refineries who did not apply for an initial exemption, and later applied for an exemption extension, attempting to avoid RFS compliance. By anticipating such an issue, and providing details of the exemption application process, such issues can be avoided. Further, by anticipating hiccups and challenges to the exemption process, the integrity and mission of renewable energy regulatory programs are preserved.