NOTES

A NEW NEPA TO TAKE A BITE OUT OF ENVIRONMENTAL INJUSTICE

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I. INTRODUCTION

Low-income populations and people of color in the United States suffer from a disproportionately large amount of environmental burdens. These groups have "have higher exposure to pollution, lower overall environmental quality and amenities, and abnormally high rates of environmentally-driven disease

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compared to other racial, ethnic, or socioeconomic groups."[1] The problem can be rectified through environmental law reform.

In a 2011 study on the Clean Air Act's impact across communities in the United States, researchers found an uneven distribution of air quality.[2] The study compared air pollution exposure and access to air quality information with communities' race, age, and poverty demographics.[3] The results suggested that a substantial amount of low-income communities and communities of color lacked monitoring data and the available data showed that these communities "tend to experience higher ambient pollution levels."[4]

This recent study does not evidence a new development, but rather confirms the persistence of an ongoing problem.[5] In 1987, the United Church of Christ's Commission for Racial Justice conducted an influential study and reported that "three out of every five blacks and Latinos, and approximately half of all Asians and American Indians, live in communities with uncontrolled toxic waste sites."[6] In 1994, an update to the study discovered an increase in the concentrations of racial minorities living in the vicinity of toxic waste sites.[7] Studies of lead poisoning in children show that "children from poor families are eight times more likely to be poisoned than those from higher income families, and African-American children are five times more likely to be poisoned than white children."[8] A study in southern California found that "people of color had a consistently higher cancer risk due to air toxics than did whites, with Latinos having the highest risk."[9]

Environmental justice advocates agree that environmental hazards are distributed unevenly,[10] and there is a disproportionately large distribution of environmental burdens on low-income persons and people of color in this country.[11]

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[1] Marie Lynn Miranda et al., *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 INT'L J. ENVTL. & RES. PUB. HEALTH 1755, 1757 (2011).

[2] *Id.* at 1755.

[3] *Id.*

[4] *Id.*

[5] Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 212 (2005) (discussing race and income disparities in exposure to pollution since 1987).

[6] *Id.* (citation omitted).

[7] *Id.*

[8] Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 114 (2003) (citations omitted).

[9] Outka, *Environmental Injustice*, *supra* note 5, at 213 (citation omitted).

[10] *See* Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121, 125–26 (1997) (discussing the debate of whether disparity in communities' exposure to environmental hazards are the result of intentional racism).

[11] Valerie J. Phillips, *Have Low Income, Minorities Been Left Out of the Environmental Cleanup?*, 38 ADVOCATE 16, 16 (1995) (citing Luke W. Cole, *Empowerment as the Key to*

According to Professor Daniel Faber, low-income communities and people of color "face a 'quadruple exposure effect' to toxics and other environmental hazards."[12] The environmental justice movement works toward addressing this problem.[13] The United States Environmental Protection Agency ("EPA") describes the goal of the environmental justice movement as achieving "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[14] In the past decade, the federal government committed to a host of new environmental justice strategies.[15] Although the government may have good intentions towards improving environmental injustices in our country, its efforts have shown little success.[16] There is an important need for reform within the sphere of environmental law.[17]

The National Environmental Policy Act ("NEPA") can assist the movement in significant ways.[18] NEPA established a national policy for federal agencies to properly consider the environmental impacts of their actions.[19] NEPA's environmental impact statement ("EIS") procedures spread knowledge of environmental impacts and provide communities opportunities for public comment.[20] President Clinton's 1994 Executive Order works together with NEPA and calls for agencies to pay more attention to environmental justice issues.[21]

Despite NEPA's call for the consideration of environmental justice issues, a

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Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L. Q. 619 (1992)).

[12] Outka, *Environmental Injustice*, *supra* note 5, at 211 (citing DANIEL FABER, *Introduction* to THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES 6 (Daniel Faber ed., 1998)).

[13] Jeannette De Guire, *The Cincinnati Environmental Justice Ordinance: Proposing a New Model for Environmental Justice Regulations by the States*, 60 CLEV. ST. L. REV. 223, 224 (2012) (citation omitted).

[14] *Environmental Justice: Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/environmentaljustice/basics/ejbackground.html (last visited Nov. 11, 2012).

[15] *See* Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 OHIO N.U. L. REV. 1227, 1230 (1996) (discussing President Clinton's 1994 executive order instructing agencies to take environmental justice into consideration when making decisions).

[16] *See, e.g.*, Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 219 (2012) (discussing lack of efficacy of federal efforts to regulate and correct environmental injustice).

[17] *See, e.g.*, Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526 (1994) (listing hierarchy of strategies to increase success in environmental justice litigation).

[18] 42 U.S.C. § 4321 et seq. (2012).

[19] 42 U.S.C. § 4321.

[20] 42 U.S.C. § 4332.

[21] Federal Actions to Address Environmental Justice in Minority Populations and Low-

number of factors limit NEPA's effectiveness.[22] For example, many argue that NEPA is purely procedural and has no substantive power to reject harmful projects.[23] Yet, even if one were to concede that NEPA lacks substantive bite, it still has significant power to affect agency decisions through procedural regulations that require agencies to consider environmental impacts.[24] Overall, though, the current form of NEPA does not compel agencies to prioritize their actions' impact on environmental justice.[25] Because of this state of affairs, immediate reform is necessary. Section II of this Note discusses the background of environmental justice and NEPA's current lack of assistance to the environmental justice movement. In Section III, this Note suggests reforms that will give NEPA more substantive force and would be helpful to the movement. In the absence of substantive reforms, NEPA can also benefit from procedural reforms that will force agencies to consider their projects' impacts on environmental justice. Ultimately, this Note will argue that NEPA is an appropriate and effective avenue for reform and that some small changes would go a long way.

II. THE ENVIRONMENTAL JUSTICE MOVEMENT AND THE LAW

A. *Environmental Injustice in the United States*

In order to better understand the environmental justice movement, it is helpful to recount the movement's historical origin, its theoretical underpinnings, and its disappointing progress to date. The environmental justice movement began as a response to the uneven distribution of environmental hazards in the United States. One example comes from Warren County, North Carolina during 1978, where African Americans comprised eighty-four percent of the Afton community and ninety percent of them lived below the poverty line.[26] After considering ninety-three different sites, North Carolina chose the Afton community to site a landfill to bury 60,000 tons of Polychlorinated Biphenyls con-

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Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) [hereinafter Executive Order].

[22] Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 607 (2006).

[23] Mason Baker, *What Does It Mean to Comply with NEPA?: An Investigation into Whether NEPA Should Have Procedural or Substantive Force*, 31 UTAH ENVTL. L. REV. 241, 250 (2011).

[24] *See e.g.*, Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 7 (2006) (citations omitted) (discussing persons and agencies who believe NEPA plays a substantive role).

[25] Outka, *NEPA supra* note 22, at 624.

[26] Anhthu Hoang, *Warren County's Legacy for Federal and State Environmental Impact Assessment Laws*, 1 GOLDEN GATE U. ENVTL. L.J. 91, 91 (2007) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, B-211461, App. I, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, at 7 (1983)).

taminated soil.[27] The State approved the facility in this location despite the fact that the community "lacked the basic social and medical services necessary to respond to the health risks associated with such a facility."[28] Beginning in September 1982, protestors laid in front of trucks and non-violently protested for six weeks to follow.[29] "The protestors believed the location was selected based on the high percentage of African-American residents, and their poor economic status."[30] During this protest, police arrested more than 500 people, marking the first time in history that arrests occurred in relation to the siting of a landfill and the first time environmental protests by persons of color received national attention.[31] Although Warren County's litigation was ultimately unsuccessful, their story of fighting against injustice marked the beginning of a national movement.[32]

The 1982 Warren County landfill siting protests marked the first time the nation recognized the existence of "environmental racism."[33] The protestors' frustrations were confirmed when the United States General Accounting Office's 1983 study found a strong correlation between race and the siting of toxic waste facilities in Warren County.[34] "The study found three of the four toxic waste sites surveyed in southeastern United States were located in predominantly African-American communities."[35] "In all four of the communities surveyed, at least 26% of the residents' incomes were below the poverty level."[36] In the 1987 United Church of Christ's Commission for Racial Justice's study, researchers found "that race—more than any other factor considered—correlated with the location of hazardous waste sites, and that communities with the highest proportion of ethnic and racial minorities also had the highest number of commercial hazardous waste facilities."[37] Since the time of the Warren

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[27] *Id.* at 92.

[28] *Id.* at 93 (citation omitted).

[29] Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT'L RES. DEF. COUNCIL (Oct. 12, 2006), *available at* http://www.nrdc.org/ej/history/hej.asp.

[30] Kathleen Bonner, *Toxins Targeted at Minorities: The Racist Undertones of "Environmentally-Friendly" Initiatives*, 23 VILL. ENVTL. L.J. 89, 96 (2012) (citation omitted).

[31] Skelton & Miller, *supra* note 29.

[32] *See id.*

[33] Amanda K. Franzen, *The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN ST. ENVTL. L. REV. 379, 381 (2009) (citing JULIAN AGYEMAN, SUSTAINABLE COMMUNITIES AND THE CHALLENGE OF ENVIRONMENTAL JUSTICE 14 (2005)).

[34] Dominique R. Shelton, *The Prevalent Exposure of Low-income and Minority Communities to Hazardous Materials: The Problem and How to Fix It*, 32 BEVERLY HILLS B. ASS'N J. 1, 6 (1997) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, B-211461, App. I, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, at 3 (1983)).

[35] Bonner, *supra* note 30, at 97 (citations omitted).

[36] *Id.* at 97.

[37] Geisinger, *supra* note 16, at 209 (citation omitted).

County protests, a number of studies have confirmed the unequal distribution of environmental protection.[38]

Scholars later discarded the term "environmental racism" as too restrictive and replaced it with the expanded term "environmental justice," which incorporates other groups who experience disadvantages as a result of environmental decision-making.[39] An extensive demographic record justifies the widespread claims of environmental injustice.[40] Environmental justice advocates argue that "members of low-income and minority communities should have (1) the right to participate in the regulatory process, and (2) the right to live free from pollution."[41]

The environmental justice movement derives its goals from both the environmental and civil rights movements. Both those movements achieved great successes when federal statutes provided plaintiffs with causes of action. Accordingly, in the early 1990s, two legislative efforts aimed to address environmental justice by regulating the distribution of new facilities in order to prevent individual communities from suffering from disproportionately high pollution levels. In 1992, Representative John Lewis and Senator Al Gore introduced the "Environmental Justice Act of 1992." This statute sought "to help those people who face the greatest risk of exposure to toxic substances and pollution" by identifying "environmental high impact areas." It also imposed a moratorium on siting or permitting any new facility in a high impact area. However, the legislation died in committee hearings. Just the next year, another congressional environmental justice statute met the same fate.[42]

Many theories attempt to explain the causes of environmental injustice.[43] Most environmental justice advocates argue that professionals intentionally target communities of color but "advocates also frequently support a second meaning of the term 'environmental racism' and contend that intentional bias is not necessary for such racism to exist."[44] "Some scholars argue that the main

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[38] *See* Luke W. Cole, *Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 621–34 (1992) (discussing disproportionate impact of hazardous environmental conditions).

[39] April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L.J. 769, 775 (2012) (citing LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 15-16 (2001)).

[40] *See* Phillips, *supra* note 11, at 16 (discussing over-representation of low-income and minority populations in polluted areas).

[41] Browne C. Lewis, *What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 327, 333 (2005) (citing ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES: RACE, CLASS AND THE ENVIRONMENT 35, 37 (David E. Camacho ed., 1998)).

[42] De Guire, *supra* note 13, at 227–28 (citations omitted).

[43] *See* Geisinger, *supra* note 16, at 210.

[44] Kevin, *supra* note 10, at 125–26.

cause of environmental injustice is pure and simple racism."[45] Others blame communities' of color "lack of economic and political power" to fight locally unwanted land uses.[46] Still others claim that market forces contribute to why low-income communities and communities of color bear the disproportionate amount of environmental harms.[47] Polluting industries may strategically displace costs on poor communities and communities of color because it costs "much less to displace environmental health problems onto people who lack health insurance, possess lower incomes and property values, and as unskilled or semiskilled laborers are more easily replaced if they become sick or die."[48]

The environmental justice movement has been only "marginally successful."[49] Some members of Congress have tried and failed to establish a national Environmental Justice Act.[50] The plaintiff in an environmental justice case will usually claim that "a government agency discriminated on the basis of race in the agency's decision-making process for granting permits to hazardous waste landfill operators, nuclear power plants, or other potentially harmful facilities in an area where a large number of minority populations reside."[51]

To date, individuals claiming environmental inequities have exhausted most, if not all, remedial measures to cure alleged environmental injustices. Claimants have attempted to secure relief through various legal theories, including claims based on the equal protection doctrine, Title VI of The Civil Rights Act of 1964, private enforcement of Executive Order 12,898, and environmental laws that focus on procedure or public participation.[52]

Overall, little success has come from efforts to decrease the disproportionate risk of environmental harm in low-income communities and communities of color.[53] Critics argue that environmental justice regulation "lack[s] regulatory will" and that legal remedies are unhelpful to environmental justice plaintiffs because they require proof of intentional discrimination.[54] Clearly something

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[45] Geisinger, *supra* note 16, at 210 (citations omitted).

[46] *Id.*

[47] *Id.*

[48] Outka, *Environmental Injustice*, *supra* note 5, at 215 (quoting DANIEL FABER, THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES 5 (Daniel Faber ed., 1998)).

[49] Lewis, *supra* note 41, at 334.

[50] *E.g.*, Environmental Justice Act of 1993, S. 1161, 103d Cong. (1993); Environmental Equal Rights Act of 1995, H.R. 2845, 104th Cong. (1996); Environmental Justice Act of 1998, H.R. 4584, 105th Cong. (1998).

[51] Nicholas C. Christiansen, *Environmental Justice: Deciphering the Maze of A Private Right of Action*, 81 MISS. L.J. 843, 845 (2012) (citing Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 3, 6 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008)).

[52] *Id.* at 846–47 (citation omitted).

[53] Geisinger, *supra* note 16, at 219.

[54] *Id.*

will need to change in order to successfully combat the pervasive problem of environmental injustice.

B. *The Force of the National Environmental Policy Act*

Environmental justice advocates should find that existing law has the potential to benefit their movement. In the Warren County case, part of the County's challenge rested on the failure to comply with NEPA.[55] Congress enacted NEPA in 1969.[56] NEPA "contains the most comprehensive and far reaching national policy statements regarding environmental issues of any environmental statute."[57] The statute aligns with the goals of environmental justice because it advocates for the right to live in a healthy environment and the responsibility of all people to minimize harm to the human environment whilst balancing other interests.[58] Although NEPA's requirements would seem to further the goals of environmental justice, the statute has proven insufficient to actually accomplish the movement's objectives.[59]

NEPA declares it a national policy to harmonize man and the environment.[60] To accomplish these goals, NEPA establishes procedural requirements for all federal agencies and major federal actions to consider environmental issues.[61] A major federal action is a broad term and is understood to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility."[62] A non-federal project qualifies under NEPA if it is subject to federal agency discretion.[63]

NEPA also created the Council on Environmental Quality ("CEQ") with the goal of keeping the President informed about environmental issues.[64] The CEQ develops and gives implementation plans for national environmental policies and monitors federal agency compliance with NEPA.[65] The regulations produced by the CEQ "instruct agencies to consider factors such as impact on

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[55] Warren County v. North Carolina, 528 F. Supp. 276, 283 (E.D.N.C. 1981).

[56] 42 U.S.C.A. § 4321 et seq. (West 2013).

[57] Cheryl A. Calloway & Karen L. Ferguson, *The "Human Environment" Requirements of the National Environmental Policy Act: Implications for Environmental Justice*, 1997 DET. C.L. MICH. ST. U. L. REV. 1147, 1151-52 (1997).

[58] *Id.* at 1154.

[59] *See* Outka, *NEPA*, *supra* note 22, at 605 (citation omitted) (discussing NEPA's limitations).

[60] 42 U.S.C.A. § 4321 (West 2013).

[61] 42 U.S.C.A. § 4332 (West 2013).

[62] CEQ Protection of Environment Rule, 40 C.F.R. § 1508.18 (2013).

[63] N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 418 (3d Cir. 1994) (citation omitted).

[64] 42 U.S.C.A. § 4342 (West 2013).

[65] Lauren G. Wishnie, *NEPA for A New Century: Climate Change & the Reform of the National Environmental Policy Act*, 16 N.Y.U. ENVTL. L.J. 628, 633 (2008) (citing 42 U.S.C. § 4344(3)-(4) (2000)).

public health, unique features of the geographic area, the precedential effect of the action, and whether the action is highly controversial."[66] The Supreme Court has held that the CEQ's guidelines have binding effect.[67]

The major force of NEPA comes from its environmental impact statement requirement.[68] In the absence of a categorical exclusion, an agency may prepare a brief environmental analysis known as an Environmental Assessment ("EA").[69] Based on the evidence presented in the EA, an agency must either do further environmental analysis or issue a finding of no significant impact (FONSI).[70] Upon determination that a major federal action will significantly affect the environment, NEPA requires that the federal agency prepare a detailed statement, known as an environmental impact statement ("EIS"), on the action's environmental impacts.[71] An EIS must include:

> (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.[72]

The statute commands a cumulative analysis and federal agencies must consider each environmental impact in addition to "other past, present, and reasonably foreseeable future actions."[73] The statement's analysis of each of the environmental impacts "shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues."[74] In *Natural Resources Defense Council, Inc. v. Morton*, the court held that a "rule of reason" dictates the determination of which alternatives must be discussed in the EIS.[75] The detail given to each alternative depends on the probability that the alternative will be implemented; extremely implausible alternatives do not require any discussion at all.[76]

The statute commands that environmental impact information obtained in an analysis under NEPA must be made available to states, counties, municipali-

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[66] DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 35 (8th ed. 2010).

[67] Wishnie, *supra* note 65, at 633–34 (citing Andrus v. Sierra Club, 442 U.S. 347, 357 (1979)).

[68] 42 U.S.C.A. § 4332(C) (West 2013).

[69] 40 C.F.R. §§ 1501.3, 1501.4 (2014).

[70] 40 C.F.R. §§ 1501.4, 1508.9 (2014).

[71] 42 U.S.C.A. § 4332(C) (West 2013).

[72] 42 U.S.C.A. § 4332(C) (West 2013).

[73] 40 C.F.R. § 1508.7 (2014).

[74] 40 C.F.R. § 1502.2(b) (2014).

[75] Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

[76] *Id.* at 838.

ties, institutions, and individuals.[77] CEQ regulations further instruct that environmental information must be presented to the public in the decision making process.[78] Informing the public includes requirements to "(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures; (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected."[79] An EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."[80]

Essentially, NEPA "requires the agency to prepare a detailed explanation of the environmental consequences of its actions and to make that report available to higher-level agency officials, other agencies, and the public."[81] NEPA does not expressly provide a private right of action, and NEPA claims are brought under the Administrative Procedures Act ("APA").[82] Under the applicable APA standard of review, courts may override an agency decision under NEPA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[83] Under the arbitrary and capricious standard of review, courts evaluate whether an agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[84] Courts may be deferential to agencies but "[w]hile the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action."[85] Courts find that NEPA requires federal agencies to take a "hard look" at the environmental effects of their proposed actions.[86]

NEPA is a theoretically useful tool in addressing certain aspects of environmental justice.[87] NEPA's stated purpose, to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" is

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[77] 42 U.S.C.A. § 4332 (West 2013).

[78] 40 C.F.R. § 1500.1 (2014).

[79] 40 C.F.R. § 1506.6 (2014).

[80] 40 C.F.R. § 1502.14 (2014).

[81] FARBER, *supra* note 66, at 30.

[82] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 872 (1990).

[83] 5 U.S.C. § 706(2)(A) (2012); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376 (1989).

[84] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

[85] *Id.* at 30.

[86] *E.g.*, Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 100 (1983).

[87] Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 571 (1997).

essential to the environmental justice movement.[88] NEPA's spirit of expanding awareness of environmental concerns aligns with environmental justice:

> The concept that all peoples should have their voices heard on matters that affect their wellbeing is at the core of environmental justice (EJ). The inability of some people of small towns, rural areas, minority, and low-income communities, to become involved in environmental decisions is sometimes due to a lack of information.[89]

NEPA's emphasis on public participation "empower[s] communities by enabling them to provide input into the federal government's decision-making process and to educate the government about the disparate impacts proposed actions may have on the communities."[90] In order to successfully oppose projects that may disproportionately burden low-income communities and communities of color, these communities need to be informed.[91]

Outside of lawsuits, the public participation provisions of NEPA can also be useful to low-income communities and communities of color.[92]

By providing opportunities for public participation, environmental statutes create opportunities for community action that is not centered on the need for a lawyer. Public hearings in connection with the preparation of environmental impact reports present opportunities for a community to educate itself on an issue, with the help of lawyers or other technical consultants.[93]

A lack of information could cost low-income communities and communities of color the battle against environmental discrimination.[94]

The NEPA process may also have the effect of delaying projects that may unfairly burden certain communities, which affords them more time to form an opposition plan.[95] The cost of the NEPA process can also be a deterrent factor for projects, some of which may be unwanted by communities.[96] "Because NEPA, through the EIS process, mandates taking into account the significant environmental effects of a proposed project, including its cumulative impact, and requires public participation as part of its process, it is a procedural device for considering environmental justice when making a siting decision."[97]

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[88] 42 U.S.C. § 4331 (2012); Outka, *NEPA*, *supra* note 22, at 605.

[89] Joanna Burger et al., *Ecological Information Needs for Environmental Justice*, 30 RISK ANALYSIS 893, 893 (2010).

[90] Johnson, *supra* note 87, at 571.

[91] Lewis, *supra* note 41, at 330.

[92] Dora Acherman, *Discrimination by Any Other Name: Alternatives to Proving Deliberate Intent in Environmental Racism Cases*, 4 FIU L. REV. 255, 271 (2008).

[93] *Id.* at 271–72 (citation omitted).

[94] Lewis, *supra* note 41, at 372.

[95] *Id.* at 330.

[96] *Id.*

[97] Heather E. Ross, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 355 (1994).

C. *President Clinton's Executive Order*

NEPA's connection to environmental justice began to expand when President Clinton issued an Executive Order in 1994.[98] That Executive Order required each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[99] Although encouraging for environmental justice advocates, the Executive Order does not appear to beneficially effect NEPA for the environmental justice movement.

The White House memorandum implementing the Executive Order directed that federal agencies "analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities" when NEPA requires such analysis.[100] The memorandum further directs that when feasible, mitigation analysis "should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities."[101]

The CEQ's Guidance on the implementation of the Executive Order states that it "does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law."[102] However, the Guidance sets forth the principles for considering Environmental Justice under NEPA.[103] It explains that "the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe . . . should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population."[104]

With the new Executive Order, more challenges were initiated based on inadequate analyses of environmental justice impacts in a federal action's EIS or FONSI decision.[105] However, because of the absence of an express right of action in the Executive Order, some courts have refused to evaluate an environ-

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[98] Johnson, *supra* note 87, at 567.

[99] Executive Order, *supra* note 21.

[100] White House Memorandum for the Heads of All Departments and Agencies on the Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), http://www.epa.gov/environmentaljustice/resources/policy/clinton_memo_12898.pdf.

[101] *Id.*

[102] COUNCIL ON ENVTL. QUALITY, ENVTL. JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 10 (1997), *available at* http://www.epa.gov/compliance/ej/resources/policy/ej_guidance_nepa_ceq1297.pdf [hereinafter CEQ, EJ GUIDANCE].

[103] *Id.*

[104] *Id.*

[105] Outka, *Environmental Injustice*, *supra* note 5, at 238.

mental justice analysis.[106] For example, in *Citizens Concerned About Jet Noise, Inc. v. Dalton*, the court found that "NEPA does not require an environmental justice analysis."[107] The court cited to the following language in Clinton's Executive Order and explained that it lacked jurisdiction to review the environmental justice portion of an EIS: "This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."[108]

Other courts have reviewed environmental justice without specifying the source of authority.[109] However, some courts have reviewed compliance with the Executive Order by evaluating whether there is an environmental justice analysis in an agency's NEPA evaluation.[110]

Overall, although the Executive Order's objectives "aim to mitigate the adverse impact of environmental policies on minorities, it is unclear whether it has been successful."[111]

III. NEPA'S OBSTACLES IN THE FIGHT FOR ENVIRONMENTAL JUSTICE

Although NEPA has potential to be an effective weapon in the battle against environmental justice, the current form of NEPA is actually largely ineffective for the movement.[112] Based on its statement of purposes, one might think that NEPA could effectively prevent environmental harms.[113] However, scholars often critique the statute as being purely procedural and having no substantive influence.[114] Still, many argue that even without substantive force to directly command a certain outcome, NEPA's procedural nature still has potential to affect decision-making.[115] Yet, in NEPA's current state, the procedural requirements do not help the environmental justice movement.[116]

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[106] *E.g.*, Sur Contra La Contaminacion v. EPA, 202 F.3d 443, 449 (1st Cir. 2000).

[107] Citizens Concerned About Jet Noise, Inc. v. Dalton, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999) *aff'd*, 217 F.3d 838 (4th Cir. 2000).

[108] *Id.*

[109] *See, e.g.*, Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 534 (8th Cir. 2003).

[110] *E.g.*, Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678 (D.C. Cir. 2004).

[111] Bonner, *supra* note 30, at 100.

[112] Outka, *NEPA*, *supra* note 22, at 605 (citation omitted).

[113] Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 223 (1992) (citing Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 372 (1989)).

[114] *Id.*

[115] Lewis, *supra* note 41, at 368.

[116] Linda Rose et al., *Environmental Justice Analysis: How Has it Been Implemented in Draft Environmental Impact Statements*, 7 ENVTL. PRAC. 235, 244 (2005).

A. *NEPA's Lack of Substantive Force Is an Obstacle in the Fight for Environmental Justice*

Conventional wisdom maintains that NEPA is a purely procedural statute without substantive force, and this perception hinders using NEPA in the fight for environmental justice.[117] On the one hand, those that argue that NEPA does have substantive force focus on the policy goals of section 4331 of the Act:[118]

> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;[119]

On the other hand, those who argue that NEPA is purely procedural focus on a different goal found in section 4332[120] that requires agencies to: "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."[121] They also point to the required factors to be considered in an EIS.[122] Since both sides of the argument can find support in the statutory language, the statute is not very helpful in deciding whether NEPA has substantive force.[123] However, the legislative history and case law strongly suggest that NEPA carries only procedural weight.[124] Most courts take the view that NEPA is purely procedural and informs agency decision-making, but "does not dictate that an agency choose the environmentally preferable action."[125]

Some early lower court decisions gave agencies less freedom to neglect NEPA's substantive goals.[126] In *Calvert Cliffs' Coordinating Committee v.*

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[117] Outka, *NEPA*, *supra* note 22, at 605 (citation omitted).

[118] Baker, *supra* note 23, at 248.

[119] 42 U.S.C. § 4331 (2012).

[120] Baker, *supra* note 23, at 248.

[121] 42 U.S.C. § 4332 (2012).

[122] Baker, *supra* note 23, at 248.

[123] *Id.* at 247–48.

[124] *Id.* at 250.

[125] *Id.* (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Tillamook Cnty. v. U.S. Army Corps of Eng'rs, 288 F.3d. 1140, 1142 (9th Cir. 2002)).

[126] Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the Na-*

United States Atomic Energy Commission, the court emphasized "the framers' desire that compliance with NEPA's procedures be done within the context of NEPA's environmental goals and values."[127] However, the court also noted that "[t]he reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[128] The *Calvert Cliffs'* court found that the agency had violated NEPA, and although the decision was focused on procedural violations, it "is still one of the most inclusive or holistic court readings of NEPA to this day."[129] The decision "is one of a small number of NEPA cases that reinforce the Act's substantive measures by way of NEPA's procedural requirements."[130]

However, over time the courts (particularly the Supreme Court) have developed a tendency to "'domesticate' NEPA by integrating it into the fabric of administrative law, and declaring it to have only a procedural effect."[131] Circuit Courts are split on the issue of whether NEPA has substantive limits, but no court of appeals has actually overturned an agency decision for violating NEPA's substantive limits.[132] The one exception was *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[133] when the Supreme Court rejected the court of appeals' emphasis on substantive considerations.[134] The Court declared that when an agency has complied with NEPA's procedural requirements, "the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"[135] In *Robertson v. Methow Valley Citizens Council*, the Supreme Court solidified its view that "NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than

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tional Environmental Policy Act's Substantive Law, 20 J. LAND RESOURCES & ENVTL. L. 245, 256 (2000).

[127] *Id.* at 257 (citing Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114–15 (D.C. Cir. 1971)).

[128] Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[129] Lindstrom, *supra* note 126, at 258.

[130] *Id.* ("Other lower courts followed the Calvert Cliffs decision and reversed agency proposals and projects if they were not adequately researched or if environmental information was not adequately incorporated into the EIS.").

[131] RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, ADMINISTRATIVE LAW: CASES AND MATERIALS 567 (6th ed. 2011).

[132] FARBER, *supra* note 66, at 52.

[133] *Id.*

[134] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410, n.21 (1976)).

[135] *Id.*

unwise—agency action."[136]

Many commentators have observed that "the absence of any meaningful substantive review by the courts allows affected agencies to 'jump through the hoops' of NEPA's procedural requirements without giving any real weight to environmental consequences."[137] Agencies retain unconstrained discretion to pursue projects despite their potential environmental costs because courts "enforce only NEPA's process while allowing agencies to ignore its underlying values."[138] Due to the procedural posture of NEPA, "it is hardly surprising that many agencies have tailored their decision-making to meet only NEPA's procedural steps in spite of its substantive obligations."[139] A 1997 CEQ study confirmed this observation and noted that agencies sometimes are confused about the purpose of NEPA.[140] The study "concluded that agencies often act 'as if the detailed statement called for in the statute is an end in itself, rather than a tool to enhance and improve decision-making.'"[141]

NEPA's lack of substantive force would inevitably impede substantive goals, especially using environmental justice considerations as deterrents for certain agency decisions. "Because NEPA does not impose any substantive requirements regardless of the existence of adverse impacts of government action, its ability to reduce disparate impacts is limited."[142] According to environmental law scholar Uma Outka, NEPA's purely procedural force is the "fundamental limitation of NEPA as a tool for environmental justice."[143] The CEQ guidance that implements Clinton's Executive Order states that "[u]nder NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory."[144] Outka contends that "[e]ven if it is assumed that agencies will fully integrate environmental justice into NEPA, its usefulness is limited by express and judicially recognized exceptions to NEPA's requirements, as well

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[136] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989).

[137] Ferester, *supra* note 113, at 223 (citing Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 372 (1989)).

[138] *Id.* at 224.

[139] Lindstrom, *supra* note 126, at 262.

[140] *Id.* (citing Kathleen A. McGinty, *Preface to* COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS iii (1997)).

[141] *Id.* at 262–63.

[142] Acherman, *supra* note 92, at 269–70.

[143] Outka, *NEPA*, *supra* note 22, at 605 (citation omitted).

[144] CEQ, EJ GUIDANCE, *supra* note 102.

as structural gaps within the statutory and regulatory framework."[145] Environmental justice advocates may find NEPA's purely procedural posture discouraging.

B. *Even as a Procedural Statute, NEPA Still Has Potential to Be a Useful Tool to Help Accomplish Environmental Justice Goals*

Even if NEPA's substantive force remains difficult to pinpoint, many argue that its procedures are still somewhat useful.[146] The procedures can have a deterrent effect, and as a result, they may sometimes indirectly produce substantive results. Therefore, the procedural requirements have potential to assist environmental justice advocates in their fight for proportionate distribution of environmental burdens.

NEPA, like most federal agencies, does not receive permanent injunctions but NEPA litigation does create substantial delays in a large number of projects that may produce comparable results to injunctions.[147] Delays give opposition groups a chance to organize and can make a project more costly.[148] Sometimes projects terminate during NEPA litigation, "most often because either a local agency or a federal agency decides to withdraw from the project."[149] Additionally, agencies have modified numerous projects in order to decrease their environmental impact.[150] However, it is uncertain how frequently abandoned projects can be attributable to the NEPA litigation delays.[151] It is also uncertain how often agencies "have avoided controversial actions because they feared the expense and delay of NEPA litigation."[152] It is safe to say, though, that "[a]t least some environmentally unjustifiable projects surely have either been abandoned or never begun because of NEPA."[153]

Although NEPA may not effect changes in decisions after agencies are already committed to courses of action, it does force decision-makers to consider relevant environmental information before they commit to an action.[154] "[C]ourts have suggested that NEPA's procedures should promote substantive changes in decision-making."[155] In other words, the procedural process impacts the substantive process. A 1976 study interviewed NEPA liaisons and others

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[145] Outka, *NEPA*, *supra* note 22, at 607 (citing Anchorage v. United States, 980 F.2d 1320, 1328 (9th Cir. 1992); Webb v. Gorsuch, 699 F.2d 157, 159–60 (4th Cir. 1983)).

[146] *E.g.*, Aliza M. Cohen, *NEPA in the Hot Seat: A Proposal for an Office of Environmental Analysis*, 44 U. MICH. J.L. REFORM 169, 195 (2010).

[147] FARBER, *supra* note 66, at 55.

[148] 11 BUS. & COM. LITIG. FED. CTS. § 127:32 (Robert L. Haig, ed., West 3d ed. 2012).

[149] FARBER, *supra* note 66, at 55.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Czarnezki, *supra* note 24, at 7 (citations omitted).

[155] *Id.* (citing Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989)).

involved in NEPA implementation with the goal of identifying "internal agency characteristics and external forces associated with different rates and kinds of implementation activity."[156] The study's data revealed that "the implementation of policies across the administrative process is a complex phenomenon in which procedural and substantive change are highly interrelated."[157]

Although the Supreme Court in *Robertson* expressed its view on NEPA's non-substantive nature, the Court also articulated the important procedural powers of NEPA that effectuate its policy goals.[158] NEPA's procedural nature ensures that an agency making a decision "will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision."[159] "Moreover, the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies 'to respond to the needs of environmental quality.'"[160] NEPA's policy goals are realized through "action-forcing" procedures that force agencies to examine and publicize environmental information.[161] Furthermore, "public participation can improve government decisionmaking by increasing government accountability, educating officials about the local impacts of their decisions, bringing the full range of stakeholder viewpoints into dialogue, and shaping end results to better serve the public interest."[162] Ultimately, as stated in *Robertson*, although NEPA has no direct substantive force, "procedures are almost certain to affect the agency's substantive decision."[163]

With procedures, NEPA also provides an opportunity for opponents of a poor agency decision to pinpoint flaws in the agency's rationale and challenge those flaws directly.[164] While the APA standard of review is highly deferential and courts are unlikely to overturn an agency's final decision,[165] courts effectively do have authority to force agencies to write a better explanation of their results.[166]

Agencies often engage in slipshod cost-benefit analysis of their proposals,

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[156] Allan F. Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 265 (1976).

[157] *Id.* at 296.

[158] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–50 (1989).

[159] *Id.* at 349.

[160] *Id.* (quoting 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie)).

[161] *Id.* at 350 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410, n.21 (1976)).

[162] Outka, *NEPA*, *supra* note 22, at 607 (citation omitted).

[163] *Robertson*, 490 U.S. at 350.

[164] *Id.* at 349.

[165] *E.g.*, Cohen, *supra* note 146, at 169.

[166] FARBER, *supra* note 66, at 51.

frequently biasing their results in favor of their projected course of action. Courts have proved capable on a number of occasions of perceiving the unreliability of the agency's analysis and have not hesitated to require the agency to redo its work.[167]

NEPA essentially empowers courts, at the demand of community groups, to prohibit uniformed agency action.[168] In general, "even the strictly procedural requirements of NEPA can be useful for communities attempting to prevent the siting of hazardous facilities or other major projects that may unfairly increase environmental risks for a community."[169] NEPA has the capacity to be a "significant instrument" for individuals battling environmental injustices.[170] However, as it currently stands, NEPA does not reach this capacity.

C. *NEPA's Existing Environmental Justice Procedural Requirements Do Not Help the Environmental Justice Movement and There Is an Important Need for NEPA Reform*

Although NEPA could help the environmental justice movement even without substantive bite, it currently lacks procedural requirements that would be helpful to the movement. NEPA is not specifically tailored to require agencies to consider environmental justice concerns in their environmental impacts analyses. Therefore, NEPA needs reform in order to combat environmental injustice.

NEPA analysis currently does not provide environmental justice because the structure of the regulations makes disparate social impacts secondary to other concerns. NEPA regulations stipulate that environmental impact analysis involves the natural and physical environment, and economic or social effects cannot by themselves trigger the requirement of an EIS.[171] This lack of triggering effect is why some courts do not require consideration of environmental justice in their evaluation of an agency's process under NEPA.[172] Some courts refuse to evaluate an environmental justice analysis because of the absence of an express right of action in Clinton's Executive Order.[173] "When courts do evaluate the extent to which an EIS considered environmental justice implications of a project, the cases show that they are requiring little on the part of agencies before deferring to their decisions."[174] For example, in *Communities*

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[167] *Id.*

[168] *Robertson*, 490 U.S. at 351.

[169] Acherman, *supra* note 92, at 270.

[170] Lewis, *supra* note 41, at 368.

[171] CEQ Protection of Environment Rule, 40 C.F.R. § 1508.14 (2013).

[172] Outka, *Environmental Injustice*, *supra* note 5, at 238–39 ("As one district court judge put it, 'the concept of "environmental justice" is not a fundamental right, and does not alone give rise to judicial review by this or any other court.'" (quoting One Thousand Friends of Iowa v. Mineta, 250 F. Supp. 2d 1064, 1084 (S.D. Iowa 2002))).

[173] *E.g.*, Sur Contra La Contaminación v. EPA, 202 F.3d 443, 449 (1st Cir. 2000).

[174] Outka, *Environmental Injustice*, *supra* note 5, at 239.

Against Runway Expansion, Inc. v. Federal Aviation Administration, the City of Boston argued that the environmental justice analysis for a siting of a new runway at Logan Airport was arbitrary and capricious.[175] The City "argued that the . . . definition of 'potentially affected area' was too large, including all of Suffolk County, and did not properly consider the disparate impact of the project."[176] However, "[t]he court held that the environmental justice analysis was discretionary, and regardless, the inquiry was satisfactory for NEPA purposes because the FAA's methodology 'was reasonable and adequately explained.'"[177] Overall, federal agencies can easily take a superficial look at environmental justice issues and still have their decision upheld.[178]

Despite NEPA's emphasis on public participation, not all communities receive the same opportunity to participate.[179] Some scholars note that "environmental justice has highlighted how selectively this promised transparency and participation is achieved, and how much environmental inequality exists across a wide swath of regulatory decision making."[180] "The timing and structure" of NEPA's public participation provisions "raise doubts about whether environmental justice concerns will be brought to bear on agencies' substantive decision making."[181] Opportunities for public participation are available only if an agency is required to prepare an EIS because of a significant environmental impact.[182] It is already late in the agency's decision-making process when it has completed a draft EIS and must solicit public comment.[183]

Critics of NEPA further argue that the EIS process actually discourages proper environmental analyses.[184] Agencies have often used NEPA's procedural requirements to justify their decisions and protect themselves from "judicial scrutiny rather than to undertake a full and proper review of a project's environmental consequences."[185] By this reasoning, if an agency included an environmental justice analysis in its EIS, it might have done so merely as a protection from liability, which would not require much attention to detail.

A study conducted in 2005 examined all 2,062 of the draft EISs prepared

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[175] Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 681 (D.C. Cir. 2004).

[176] Outka, *Environmental Injustice*, *supra* note 5, at 239.

[177] *Id.* (citing *Communities Against Runway Expansion*, 355 F.3d at, 688–89).

[178] Outka, *Environmental Injustice*, *supra* note 5, at 239.

[179] Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225, 276 (2012).

[180] *Id.* (citations omitted).

[181] Outka, *NEPA*, *supra* note 22, at 607–08 (citation omitted).

[182] *Id.* at 608 (citation omitted).

[183] *Id.* at 609 (citation omitted).

[184] James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547, 556 (1994).

[185] *Id.*

since the implementation of the Executive Order.[186] Approximately 994 of those documents included some type of environmental justice consideration, and this study evaluated their methodologies.[187] Ninety-three percent of the documents found no potential impact on communities of color or low-income communities.[188] Not a single one of the draft EISs rated a project environmentally unsatisfactory because of environmental justice considerations.[189] The authors found less reliance on empirical data sources than they anticipated.[190] The authors concluded that many EISs do not include environmental justice analyses, and even when they do, "it may be difficult for affected community members to find the analyses because there is not a requirement to place them in a standard section of the document."[191] Clearly, the problem of environmental justice is far from solved, and the movement's attack methods through NEPA need improvement.[192]

Compared to other remedial routes, NEPA reform is a good strategy for the environmental justice movement. Although civil rights remedies are available in cases of environmental injustice, and, in fact, environmental laws are less prevalent in environmental justice literature than civil rights laws,[193] civil rights remedies are largely inadequate.[194] Plaintiffs of color have tended to prefer the civil rights route, but almost all of their suits have failed.[195] The Equal Protection Clauses of the Fifth and Fourteenth amendments of the Constitution and Title VI of the Civil Rights Act require a high burden of proving intent.[196] The civil rights doctrines have not been hospitable to environmental justice claims, and therefore the problem of environmental justice should be attacked using environmental laws.[197] Generally, a facility permit is more easily prevented using environmental laws than civil rights laws.[198] "Judges are familiar with such challenges and understand them; the law is fairly clear and generally supports credible challenges to improperly permitted facilities."[199]

Environmental justice is not the only environmental movement that could

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[186] Rose et al., *supra* note 116, at 235.

[187] *Id.*

[188] *Id.* at 244.

[189] *Id.* at 237.

[190] *Id.* at 242.

[191] *Id.* at 244.

[192] *Id.*

[193] Outka, *Environmental Injustice*, *supra* note 5, at 231.

[194] Acherman, *supra* note 92, at 257.

[195] Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 828 (1993).

[196] Acherman, *supra* note 92, at 257–65.

[197] Cole, *Environmental Justice Litigation*, *supra* note 17, at 526; Lazarus, *supra* note 195, at 828.

[198] Cole, *Environmental Justice Litigation*, *supra* note 17, at 526.

[199] *Id.*

benefit from NEPA reform, and environmental justice advocates could benefit from studying other advocates' strategies, particularly commentators' proposed changes to NEPA to combat growing concerns regarding climate change.[200] Similar to NEPA's environmental justice shortcomings, NEPA is insufficiently tailored to climate change considerations.[201] Environmental justice advocates could examine NEPA's climate change reform proposals for guidance on how to encourage agencies to analyze disproportionate environmental impacts on low-income populations and people of color.

Environmental justice advocates should learn that NEPA has potential to greatly benefit their movement, however, the current form has proven incapable to actually accomplish the movement's objectives.[202] Clinton's Executive Order brings environmental justice into the conversation but does not appear to have an effect on NEPA that would benefit the environmental justice movement. The obstacles for NEPA's usefulness to the movement include a lack of substantive force and any procedural requirements that are tailored to environmental justice. Environmental justice advocates must seek NEPA reform.

IV. SUGGESTED NEPA REFORM

This Note argues that environmental justice advocates should seek NEPA substantive reform in order to further their movement's goals. In the alternative, procedural reforms to NEPA could help the environmental justice movement. However, for both substantive and procedural reforms, certain proposals will be more effective and some will be more practical than others.

A. *Reforming NEPA to Give it Substantive Bite*

Environmental justice advocates should seek NEPA substantive reform that is directed at combatting the disproportionate environmental burdens on low-income communities and communities of color. With substantive force, NEPA could actually "rule out federal projects" that threaten significant harm to the environment.[203] Incorporating environmental justice to the substantive reform would create a tool for the environmental justice movement. NEPA reform can result in substantive force in a number of ways, but some suggestions are better than others. Strengthening policy language to more directly command that agencies consider disproportionate environmental impacts would support environmental justice goals; however, this reform strategy is unlikely to have actual substantive effect. More definitive requirements demanding that agencies shall

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[200] COUNCIL ON ENVTL. QUALITY, DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS 1 (2010), *available at* http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf [hereinafter CEQ, DRAFT CLIMATE CHANGE GUIDANCE].

[201] *See id.*

[202] Outka, *NEPA*, *supra* note 22, at 605 (citation omitted).

[203] CASS, ET AL., *supra* note 131, at 567.

consider the distribution of environmental harms and shall not approve projects when the environmental harms outweigh the benefits will be more useful to the movement. However, these suggestions may not be very practical. Ultimately, environmental justice advocates should seek the strongest reforms but alternatively consider the weaker suggestions.

A first method to add substantive force is to amend NEPA to include stronger language that explicitly clarifies Congress's intent to command substantive goals for environmental protection.[204] An amendment could "declare that each person has a fundamental and inalienable right to a healthful environment."[205] This language creates an explicit substantive goal for NEPA. NEPA's substantive force comes from environmental goals, which are currently stated obscurely. This amendment also strongly supports that environmental hazards should be more evenly distributed throughout the country regardless of race or income. With this language, environmental quality is framed as an issue of human rights and is therefore more favorable to environmental justice concerns.

The second possible amendment could establish "a governmental obligation to administer the laws and policies in ways that avoid unnecessary damage to the environment, its species and ecosystems."[206] Again, this amendment benefits people concerned about environmental impacts. This amendment could be tailored to environmental justice concerns by specifying that analysis of damage to the environment must include consideration of unfair distribution of environmental burdens. Although it loses some weight due to the ambiguity associated with the word "unnecessary," more people would likely be willing to accept this alternative amendment. Also, the amendment could be accompanied by further instruction to interpret "unnecessary" liberally, perhaps through CEQ guidance or an Executive Order.

Although these suggestions for amending NEPA include stronger policy goals that more directly support a need for environmental justice, they may not have any actual substantive effect. NEPA's current goal oriented language theoretically has substantive force but has failed to directly produce changes in agency determinations. Agencies can easily ignore the policy goals of the statute and conduct the procedural checklist, and thus, a Congressional strengthening of policy goals is not the best method of reforming NEPA to create substantive bite.

In order to promote the substantive force of NEPA, reform should explicitly link environmental justice oriented substance to procedure.[207] One author pro-

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[204] Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 291 (1997).

[205] *Id.*

[206] *Id.* (quoting Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y FORUM 1, 3 (1991)).

[207] *Id.* at 292.

poses that NEPA expressly establish substantive mandates for agency decisions.[208] "As statutory mandates, these provisions would be enforceable in court should administrators ignore them."[209] His proposed amendment states:

(a) When considering and implementing proposed projects, agencies shall implement feasible mitigation measures to lessen the project's significant environmental effects, unless specific economic, social, or other essential considerations of national policy make such mitigating measures infeasible.
(b) When considering proposed projects which are the subject of an environmental impact statement prepared under section 102(2)(C), agencies shall select project alternatives which minimize or avoid significant environmental effects, unless specific economic, social, or other essential considerations of national policy make the proposed alternatives infeasible.
(c) Should an agency find that specific economic, social, or other essential considerations of national policy make either the proposed alternatives to the project or mitigating measures infeasible, the agency shall prepare a statement of findings to clearly explain such infeasibility.[210]

Environmental justice advocates would want to adapt this proposal to fit the needs of their movement. The mandate should identify that agencies, when selecting project alternatives that minimize or avoid significant environmental effects, must include environmental justice concerns in their analysis of significant environmental effects.

The proposed substantive mandates would prevent agencies from viewing NEPA as a procedural checklist. An important benefit to this proposal is that it encourages agencies to conduct a balancing of countervailing considerations and make choices based on that balancing. However, there remains an "escape hatch" to avoid the substantive mandates if the agency can fully explain its reasons.[211] Therefore, although such mandates have potential to further the goals of environmental justice, they still may not be strong enough to have any substantive effect. Agencies would likely look to the escape hatch whenever they deem it desirable. Moreover, courts would likely continue to be very deferential to agency decision making under the arbitrary and capricious standard as long as the agency gives an explanation.

In order to create an amendment that effectively represents the need to fight for environmental justice, Congress should amend NEPA to require that federal agencies consider the distribution of environmental harms and not approve projects when the environmental harms clearly outweigh the other benefits or when the environmental harms are inequitable. NEPA could have substantive

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[208] Ferester, *supra* note 113, at 258.
[209] *Id.*
[210] *Id.* at 258–59.
[211] *Id.* at 259–60.

influence on agency decision making "by making plain that some courses of action would be arbitrary and capricious by virtue of their environmental consequences."[212] These consequences would explicitly include a disproportionate distribution of environmental burdens on low-income populations and people of color. Furthermore, the statute should specify that environmental costs and benefits are included in judicial review under section 706 of the Administrative Procedure Act.

This suggested amendment is directly responsive to the needs of environmental justice advocates and would likely have the desired effect. The amendment leaves much less room for agency discretion, and agencies must partly base their decisions on the costs of disproportionate environmental burdens on low-income people and people of color. Importantly, the amendment is enforceable on judicial review, which will create substantive force.

The more extreme reform suggestion is likely to be the most useful to the environmental justice movement. However, it may be unlikely to gain wide support or to pass Congress. A risk for these amendments is overburdening agencies, and the environmental justice requirements may be too demanding of agencies or might even be economically unfeasible. Opponents would likely emphasize the possibility that the amendments would prevent too many federal actions that would be beneficial to society.

Ultimately, environmental justice advocates should seek the most extreme substantive NEPA reform suggestion but if they are unsuccessful, should look to the weaker forms as alternatives. The weakest method of reforming NEPA is adding stronger policy goals that may not actually have any more force than the current ones. A slightly stronger reform requires agencies to balance costs and benefits, but it includes an escape hatch for agencies to explain their environmental injustices. The strongest suggestion for substantive reform is an amendment that orders agencies to reject inequitable projects when the environmental harms (including environmental injustices) clearly outweigh the other benefits. Environmental justice advocates should aim for this final suggestion if possible.

B. *Reforming NEPA Procedurally*

In the absence of substantive reform, certain reforms of NEPA's procedural requirements would help in the fight for environmental justice. Again, some suggestions for procedural amendments will be more effective and realistic than others. This note proposes multiple ways that NEPA and its guidance documents should include specific instructions on how agencies must analyze environmental justice impacts in their EIS's. Environmental justice advocates can also mimic NEPA reform proposals aimed at combatting climate change. The strongest suggestion for procedural reform is an unbiased external office to review agency decision making in regard to environmental justice concerns,

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[212] CASS, ET AL., *supra* note 131, at 567.

although the practicality of this suggestion is questionable. Overall, many of the suggested procedural reforms would greatly benefit the environmental justice movement.

Procedural reform would be beneficial for environmental justice concerns because the heart of the problem is that the disproportionate environmental burdens on the poor and people of color often go unnoticed. Procedural reforms force attention towards these burdens. Furthermore, on the flip side, sometimes the group that bears the burden would actually prefer that burden to the alternative. Perhaps a waste facility that will harm the community's health will also provide jobs for the community. In that case, a good avenue for reforming the law to better address environmental justice is through a more informed decision making process. The solution to environmental justice could focus on information gathering and information spreading. Thus, reforming NEPA's procedural requirements may have the potential to be a far reaching and convenient solution to many environmental injustices.

Currently, NEPA's potential to enlighten the public on environmental injustices is not properly utilized. In order for information to reach the public, the existence of environmental injustice will first need to be recognized in EISs. If NEPA is more specific about what needs to be considered in an EIS's environmental justice analysis, there will be less room for the courts to defer to agency determinations. The authors of the 2005 EIS study concluded that environmental justice considerations were underappreciated because the EIS methodologies were not sophisticated enough and also difficult for a reader to notice within the EIS.[213] NEPA should command that environmental justice be a clearly labeled category in the EIS table of contents in order to ensure that affected communities will be able to notice and access the information. If NEPA included more specific instructions with respect to formatting environmental justice analysis in an EIS, agencies would be compelled not to hide or minimize environmental justice concerns.

To have more advanced methodologies, environmental justice examiners should utilize standardization and "empirical measures involving spatial or locational analysis."[214] Furthermore, more advanced analysis in the EIS could include "an index or scale to guide analysts by working with the academic community that studies urban regional planning and environmental policy and management."[215] More attention should be focused on standardizing environmental justice analysis.[216] Agencies should examine information on environmental justice communities that includes "demographics, consumptive and nonconsumptive uses of their regional environment (for example, maintenance and cosmetic, medicinal/religious/cultural uses), eco-dependency webs, and

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[213] Rose et al., *supra* note 116, at 244.

[214] *Id.*

[215] *Id.*

[216] Burger et al., *supra* note 89, at 893.

eco-cultural attributes."[217] Creating a defined methodology would force agencies to take particular steps to examine environmental burdens on low-income communities and communities of color. A fixed methodology would also allow agencies to address environmental justice concerns in an efficient manner.

Additionally, NEPA reform could include new Council on Environmental Quality ("CEQ") guidelines that provide a greater emphasis on environmental justice data analysis in EISs. The current CEQ guidance that implements Clinton's Executive Order explicitly states that there is a lack of specificity in the requirements of environmental justice analysis: "Neither the Executive Order nor this guidance prescribes any specific format for examining environmental justice, such as designating a specific chapter or section in an EIS or Environmental Assessment on environmental justice issues."[218] Instead, the CEQ guidance instructs agencies to "integrate analyses of environmental justice concerns in an appropriate manner so as to be clear, concise, and comprehensible within the general format suggested by 40 C.F.R. § 1502.10."[219] Environmental justice advocates should seek greater specificity in CEQ guidance regarding procedures for analyzing disproportionate environmental burdens in low-income areas and communities of color.

Environmental justice advocates should look to some NEPA reform proposals aimed at combatting growing concerns of climate change, specifically their triggering and proportionality requirements, for direction in the environmental justice context. CEQ should create clearer environmental justice guidance similar to its draft guidance on incorporating greenhouse gas emissions and climate change analysis into NEPA compliance.[220] The draft climate change guidance "provides all parties with a written explanation on how federal agencies should analyze climate change impacts under NEPA and the CEQ regulations."[221] It instructs that if a project is reasonably anticipated to emit 25,000 metric tons of GHGs on an annual basis, the agency should conduct a quantitative analysis of climate change impacts.[222] A threshold for triggering environmental justice analysis would create certainty and promote efficient researching. Concerning the level of detail an agency should give to climate change impacts in an EIS, the draft climate change guidance states that using NEPA's "rule of reason," agencies should keep it proportional to the significance.[223] Environmental justice guidance should explicitly instruct that the environmental justice analyses be given attention proportional to its significance. Environmental justice analysis should be given particular attention when a project will affect areas where

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[217] *Id.*

[218] CEQ, EJ GUIDANCE, *supra* note 102, at 10.

[219] *Id.*

[220] CEQ, DRAFT CLIMATE CHANGE GUIDANCE, *supra* note 200.

[221] Robert Reiley, *The Evolution of NEPA in the Fight Against Climate Change*, 5 PITT. J. ENVTL. L. & PUB. HEALTH L. 1, 46 (2011).

[222] CEQ, DRAFT CLIMATE CHANGE GUIDANCE, *supra* note 200.

[223] *Id.*

low-income populations and populations of color are at the greatest risk.[224]

Procedural reform must be careful not to go too far in overburdening agencies. A CEQ guideline instructs that "[e]nvironmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations."[225] It is important to consider the question of whether the benefits attained by NEPA "are sufficient to justify the expense and delay created in all those instances in which the project ultimately proceeds."[226] The climate change guidance is careful not to go too far in creating overburdensome procedural requirements. The climate change guidance explicitly rejects speculative analysis and instructs that an agency only provide information that is useful and relevant to a decision.[227] Similarly, the environmental justice guidance should contain limits so that agencies would not be forced to waste time and resources.

Another proposed climate change related NEPA reform that environmental justice advocates could consider is an external office. In the context of NEPA's weaknesses regarding climate change, one author proposes an external office to provide "a higher level of scientific review for agency analyses under NEPA."[228] The office would function as an "independent regulatory or Congressional agency."[229] The unbiased office would monitor the integrity of federal agencies' NEPA review.[230] "External agency review is necessary because courts lack the expertise and individual agencies lack the objectivity necessary to ensure that self-interest and inaccuracy do not pervade the NEPA process."[231] Judicial "deference is applied to NEPA lawsuits without acknowledging the special pressures that agencies face while assessing the environmental impacts of their own projects."[232] The external office would further the substantive goals of NEPA by preserving "(1) active public participation in agency review through the public comment process and disclosure of environmental impacts, and (2) establishing an ongoing agency responsibility to perpetuate NEPA's environmental policy."[233] Under judicial review of agency decisions, courts would defer to the conclusions of the unbiased external office.[234]

An external office that reviews EISs could be extremely useful to the environmental justice movement and is perhaps the best option for procedural NEPA reform. The office would be more likely to honor the substantive policy

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[224] Bonner, *supra* note 30, at 113.

[225] 40 C.F.R. § 1502.2(c) (2013).

[226] FARBER, *supra* note 66, at 55.

[227] CEQ, DRAFT CLIMATE CHANGE GUIDANCE, *supra* note 200.

[228] Cohen, *supra* note 146, at 169.

[229] *Id.* at 215.

[230] *Id.* at 208.

[231] *Id.* at 210.

[232] *Id.* at 170.

[233] *Id.* at 215 (emphasis omitted).

[234] *Id.* at 216.

goals of NEPA than federal agencies that have other, conflicting goals. The office speaks to the heart of the environmental justice problem because agencies have plenty of incentive to overlook the issue of environmental justice, and an unbiased office could make sure that they properly address it. However, one concern is the practicality of an external office, and it is uncertain whether Congress would fund the creation of such an office.

In sum, environmental advocates should seek procedural NEPA reform that directs agencies to consider environmental justice impacts in their EIS's. The procedures should specify methods for analyzing disproportionate impacts on low-income populations and populations of color. Climate change proposals provide useful examples of how to strengthen NEPA's procedural requirements in favor of an environmental movement. Environmental justice advocates should draw from many of these suggestions when proposing procedural NEPA reform.

V. CONCLUSION

The prevalence of environmental injustices in the United States creates hardships for low-income communities and communities of color.[235] Environmental law reforms could work towards eliminating this sad story.[236] NEPA launched the "environmental decade of the 1970's" and is "one of the nation's most important environmental laws."[237] Many argue that NEPA is a purely procedural statute that lacks substantive bite.[238] However, even without direct substantive force, NEPA's procedural requirements impact the outcomes of agency decision making. Although it has potential to help environmental justice advocates, the current state of NEPA is not an effective tool for the movement.

Substantive reform would give environmental justice advocates the ability to prevent certain federal actions with unfair burdens on communities of color and low-income communities. NEPA amendments with greater emphasis on substantive policy goals favoring environmental justice could encourage agencies to change decisions but are unlikely to necessitate substantive effect. Environmental justice advocates should seek substantive reform that commands agencies to consider the distribution of environmental harms and reject projects when the environmental harms outweigh the benefits.

Even if NEPA remains purely procedural, it may still be helpful to environmental justice efforts.[239] NEPA should be more specific in instructing agencies

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[235] *E.g.*, Rechtschaffen, *supra* note 8, at 114 (citations omitted).

[236] Cole, *Environmental Justice Litigation*, *supra* note 17, at 526; Lazarus, *supra* note 195, at 828.

[237] Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002) (citations omitted).

[238] *E.g.*, Outka, *NEPA*, *supra* note 22, at 605 (citation omitted).

[239] *E.g.*, Cohen, *supra* note 146, at 195.

on how to conduct an analysis of environmental justice so that they cannot bypass the issue. More defined CEQ guidance would be the most practical method of adding strength to NEPA's procedures. An unbiased external office that monitors the integrity of federal agencies' NEPA review would be an extremely useful weapon in the fight against environmental justice, although it may not be practical.

Of course, many environmental injustices are state and local issues. Thus, a shortcoming to the aforementioned solutions is that they only apply to major federal actions. Nonetheless, environmental justice advocates could build on the proposed solutions by similarly incorporating considerations of environmental justice into state and local zoning laws. Many states have statutes modeled after NEPA, which could include versions of the above reforms.