March 27, 2025

Submitted via https://www.regulations.gov
Docket No. CEQ-2025-0002

Katherine R. Scarlett, Chief of Staff
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Dear Chief of Staff Scarlett,

We, the undersigned Tribal Nations, organizations, and individuals, submit the following comments on the Council on Environmental Quality's (CEQ's) Interim Final Rule, "Removal of National Environmental Policy Act Implementing Regulations" ("Interim Final Rule," or "Rule"), CEQ-2025-0002, which unilaterally withdrew the CEQ's regulations implementing the National Environmental Policy Act (NEPA). As discussed below, CEQ's Interim Final Rule is designed to enable the Administration to improperly regulate via guidance in a manner inconsistent with statute and judicial precedent. This departure from the law is designed to suppress consideration of environmental justice and cumulative impacts in NEPA analyses. The undersigned submit these comments to emphasize the relevance—in some cases, the centrality—of environmental justice considerations to fulfilling NEPA's statutory mandates, and to urge withdrawal of the arbitrary and unlawful Interim Final Rule.[1] The comments also urge withdrawal of the Administration's February 19, 2025 Memorandum for Heads of Federal Departments and Agencies ("Memorandum"), which directs agencies through guidance to ignore environmental justice in their NEPA analyses.[2]

CEQ's Memorandum tells federal agencies that current and future NEPA documents "should not include an environmental justice analysis" in light of President Trump's rescission of Executive Orders 12898 and 14096.[3] The Memorandum also suggests that agencies should not consider "cumulative effects," despite decades of judicial precedent upholding this requirement under CEQ's 1978 regulations as a legitimate and necessary interpretation of NEPA's plain language. Finally, the Memorandum discourages agencies from seeking public comment unless explicitly required to do so. Together, these policy mandates contradict the purpose and text of NEPA and judicial precedent and undermine the statute's democratic mandate. Moreover,

[1] *See* Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025) ("Interim Rule").
[2] *See* Memorandum from CEQ to Heads of Federal Dep'ts and Agencies, Implementation of the National Environmental Policy Act 5 (Feb. 19, 2025), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.
[3] *Id.* at 5.

through the Memorandum, CEQ is attempting to achieve its policy objectives by circumventing the accountability required by the Administrative Procedure Act's public notice and comment rules.

In the discussion below, we focus on the numerous fatal legal flaws in the substance of the Interim Final Rule and CEQ's decision to circumvent required public process in its promulgation, as well as the Memorandum's instructions to disregard environmental justice analysis. We emphasize that the reversals in the Rule and Memorandum, taken together, contradict longstanding legal interpretations and will undermine protections for communities that have long borne the brunt of environmental degradation.

ARGUMENT

1. CEQ's Rulemaking Process Deprives the Public of Meaningful Participation in Violation of the Administrative Procedure Act.

CEQ's true aims—providing the Administration with unfettered discretion to regulate via guidance, without being subject to public notice and comment—are apparent in the agency's claimed basis for removing its NEPA regulations. CEQ points to President Trump's rescission of Executive Order 11991, issued by President Jimmy Carter in May 1977, which authorized CEQ to issue regulations binding on other agencies and third parties. It argues that the Supreme Court has never expressly held that Congress delegated such authority to CEQ. This argument is inapposite. There is a "well-established understanding of all three Branches that CEQ has 'authority to issue regulations interpreting' the National Environmental Policy Act." [4] The Administration falsely asserts that other agencies have adequate "implementing procedures that conform to CEQ's," when in fact agency rules implementing NEPA are often decades old and contradict the statute as amended.[5] To bridge this substantial gap, the Trump Administration issued the Memorandum six days prior to the Interim Final Rule urging agencies to apply their outdated rules "with any adjustments needed."[6]

At the end of the day, the Interim Final Rule will create significant uncertainty and litigation risk, and will inevitably delay major projects, while contributing to the marginalization of communities of color in environmental decision making.[7] CEQ's Interim Final Rule, while couched as an effort to streamline NEPA reviews, is a pretext to allow federal agencies to amend

[4] Corrected Response of Federal Respondents to Petitioners' Petition for Rehearing, *Marin Audubon Soc'y, et al. v. Fed. Aviation Admin., et al.*, 2025 WL 655062 at 2, No. 23-1067 (D.C. Cir. Mar. 13, 2023).
[5] *See NEPA Overview*, HARV. ENV'T & ENERGY L. PROG. (Feb. 24, 2025), https://eelp.law.harvard.edu/nepa-overview/.
[6] *Supra* note 2, at 4.
[7] Jennifer Jeffers et al., *The CEQ Has No Clothes: The End of CEQ's NEPA Regulations and the Future of NEPA Practice*, NAT'L L. REV. (Feb. 21, 2025), https://natlawreview.com/article/ceq-has-no-clothes-end-ceqs-nepa-regulations-and-future-nepa-practice ("In a twist of irony, the rescission of CEQ's NEPA regulations could lead to greater delays in environmental reviews and permitting (including for fossil fuel production and mining projects favored by Executive Order 14,514), at least in the near term. . . Without uniform regulations, each individual agency might now impose its own requirements on the NEPA process. This could result in greater challenges coordinating environmental reviews and permitting among multiple agencies.").

their rules without public notice or comment and unlawfully circumvent Congress's mandates and federal court decisions interpreting NEPA and the Administrative Procedure Act (APA).

a. CEQ's failure to comply with the APA's notice and comment requirements in its Interim Final Rule is unlawful.

The APA's public notice requirements[8] exist to ensure that federal agencies remain accountable to the public as they implement federal laws.[9] This Administration is not exempt from compliance with the APA. In fact, its efforts to write the public out of decision making emphasize why public participation in the rulemaking process is essential.

The APA requires that federal agencies provide the public both notice and "an opportunity to participate in rulemaking through the submission of written data, views, or arguments…."[10] These are not empty procedural requirements: they exist to ensure that the public has the ability to influence binding regulations that impact all people.[11] The agency must respond to significant comments received from the public and ensure that public feedback is considered in promulgation of a final rule.[12] This is required when an agency promulgates "legislative rules" (as opposed to interpretive rules) that carry the "force and effect of law."[13]

Here, CEQ provided a 30-day comment period for its Removal of National Environmental Policy Act Implementing Regulations Interim Final Rule. Yet, it has already assigned the rule an effective date of only two weeks after the close of public comments.[14] These actions violate 5 U.S.C. § 553(c) and (d). In particular, 5 U.S.C. § 553(d) requires publication of a substantive rule at least 30 days prior to the rule's effective date, and the final rule must account for comments submitted on the proposed rule per section 553(c). CEQ unlawfully skips these steps via its Interim Final Rule. CEQ's proposed timeline indicates that it does not intend to seriously consider any public input that it receives. If carried out, it will rob the public of its

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[8] 5 U.S.C. § 553.
[9] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 16 (2020).
[10] 5 U.S.C. § 553(b), (c).
[11] *See Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3d Cir. 2011) ("Among the purposes of the APA's notice and comment requirements are '(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.'" (citation omitted)); *accord Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process.").
[12] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).
[13] *Id.*
[14] Interim Rule, 90 Fed. Reg. at 10614–15. While CEQ took pains to "accommodate [the] possibility" that the public "may inform" its statutory interpretation, it has "determined that notice and comment procedures are not required." *Id.* at 10615.

statutorily protected opportunity to meaningfully influence important decisions regarding over 50 years of rulemaking and judicial precedent.

CEQ's decision to remove its NEPA implementing regulations does not, as CEQ suggests, qualify for an exception from APA's notice and publication requirements.[15] CEQ asserts that its Interim Final Rule qualifies as an "interpretive" rule and that it has "good cause" to circumvent APA requirements because they are "impracticable, unnecessary, or contrary to the public interest" in this instance.[16] Neither ground applies to the Interim Final Rule.

NEPA regulations are not subject to the interpretive rule exception.[17] Legislative, or "substantive" rules, differ from interpretive rules in that they, *inter alia*, effect a change in law or policy, impose obligations, or create new duties or obligations.[18] The distinction between legislative and interpretive rules is "one of degree depending upon whether the effect of the proposed rule is sufficiently grave as to warrant the safeguards of the APA."[19] NEPA analyses are intended to ensure that "environmental concerns are [] interwoven into the fabric of agency planning . . . ."[20] Should the regulations implementing these "action-forcing" characteristics[21] be removed, the result will be to substantially modify existing legal requirements for federal agencies.[22] CEQ's NEPA regulations were duly promulgated through notice and comment rulemaking and carry the force and effect of law. They cannot be removed with anything less than the same procedure.[23]

CEQ's reliance on the interpretive rule exception is also logically inconsistent with its underlying rationale for vacating the NEPA regulations, and therefore arbitrary and capricious. While CEQ argues that it does not have delegated authority to interpret the statute, it relies on its own interpretation of the statute as grounds for circumventing APA requirements. CEQ cannot have it both ways. And neither argument supports jettisoning APA requirements.

CEQ's claim that this Interim Final Rule is subject to the APA's "good cause" exception[24] is also unfounded. CEQ's proffered reason for why public consultation is "impracticable, unnecessary, or contrary to the public interest" is that "comments [can] not alter the President's decision" to revoke an Executive Order.[25] But issuance of Executive Orders is a

[15] Interim Rule at 10614–15, 5 U.S.C. § 553 (b)(A), (B).
[16] Interim Rule at 10614–15.
[17] *See Perez*, 575 U.S. at 96 (2015) (explaining the difference between substantive and interpretive rules).
[18] *See, e.g.*, *American Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 407 (D.C. Cir. 2013); *Cnty. of Clark v. LB Props., Inc.*, 315 P.3d 294, 296 (Nev. 2013).
[19] *Time Warner Cable Inc. v. F.C.C.,* 729 F.3d 137 (2d Cir. 2013) (citing *Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec*., 653 F.3d 1, 5–6 (D.C. Cir. 2011)).
[20] *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979).
[21] *Id.*
[22] *Stupp Corporation v. U.S.*, 5 F.4th 1341, 1353 (Fed. Cir. 2021).
[23] *Perez*, 575 U.S. at 101 (2015).
[24] 5 U.S.C. § 553(b)(B).
[25] Interim Final Rule at 10615 (citing Exec. Order No. 14154, sec. 5(a)–(b)).

common occurrence that does not confer a special exception from public process under the law. Meeting deadlines to gut NEPA regulations in a hortatory Executive Order cannot logically constitute good cause: otherwise, a President could at any time manufacture good cause simply by setting forth deadlines for their Administration's policy objectives in an Executive Order.

Moreover, CEQ's actions do not "avoid[ ] confusion"—they create it. The North Dakota district court's vacatur of the 2024 NEPA regulations left in place prior NEPA regulations; it did not purport to rescind prior NEPA regulations altogether, as CEQ's Interim Final Rule does.[26] The conflict between CEQ's actions here and prior court decisions breeds confusion. Circumventing notice and comment requirements under the APA does nothing to address this confusion or render compliance with the APA unnecessary.

To make matters worse, CEQ encourages other agencies to circumvent the APA as well. In the Memorandum accompanying the Interim Final Rule, CEQ directs agencies to fill the regulatory vacuum created by the Interim Final Rule by creating their own NEPA regulations, which it wrongly suggests would not require notice and comment under the APA.[27] CEQ further instructs agencies that "NEPA documents should not include an environmental justice analysis,"[28] ignoring that NEPA requires agencies to analyze what we now refer to as "environmental justice" concerns according to both the language of the statute and decades of jurisprudence.[29] This end-run around both public participation in rulemaking and judicial scrutiny is the definition of arbitrary and capricious decision making.

b. The Interim Final Rule itself is legally flawed.

An agency's decision to change its regulatory approach requires "a more detailed justification than what would suffice for a new policy created on a blank slate," including "good reasons" for the new policy.[30] CEQ failed to do so in this instance, instead offering an array of arbitrary justifications for the Interim Final Rule. CEQ's claims that it *may* lack a statutory basis for NEPA regulations[31] are far from convincing when that issue remains unresolved. CEQ's argument that there is no reliance interest in its NEPA regulations[32] is also absurd. Regulated industries, agencies, the courts, and the general public rely on CEQ's NEPA regulations.

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[26] *Iowa v. Council on Envtl. Quality*, No. 1:24-cv-00089, 2025 U.S. Dist. LEXIS 36732, at *67 (D.N.D. Feb. 3, 2025) (invalidating the 2024 Rule and reinstating the previous rule, stating: "[V]acating a rule does not mean the Court decides the appropriate replacement. . . . ").
[27] *Supra* note 2, at 7 (Feb. 19, 2025), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf.
[28] *Id.* at 5.
[29] *See infra* sec. 2.
[30] *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009).
[31] Interim Rule at 10613.
[32] Interim Rule at 10613–14.

Native American Tribes also rely on NEPA regulations to assure that federal agencies satisfy their duties to engage with Tribes on a government-to-government basis during NEPA reviews and decisions and fully consider potential impacts to Tribal rights and resources. For instance, while the 2023 amendments to NEPA codified a Tribe's right to designation as a lead or cooperating agency,[33] NEPA regulations go further by defining a cooperating agency's necessary "special expertise with respect to any environmental issue" to "include Indigenous Knowledge."[34] NEPA regulations also direct government-to-government consultation and early engagement with Tribal governments and mandate consideration of potential adverse effects on Tribal resources and reserved rights via NEPA review.[35] These and other NEPA regulations recognize the sovereignty of Native American Tribes, their historical and ongoing exclusion from federal (and state and local) government processes and decision making, and the particular expertise and unique rights and interests of Tribal Nations. Doing away with the regulations once again trammels on the sovereign status of Tribes, undercuts protection of Tribal resources, compromises federal agencies' fulfillment of their duties to Tribes imposed by statute or treaty, and disparages the essential role of Indigenous Knowledge in agency decision making.[36] It also raises the very real possibility that federal agencies in implementing NEPA will fail to satisfy statutory, treaty, and constitutional obligations to Tribes, which will result in more agency decisions set aside at significant burden to Tribes.

In sum, allowing agencies to adopt their own regulations under NEPA will likely multiply NEPA litigation, compromise the integrity of decision making under the law, and invite chaos. This may in fact be the Administration's intention: to render participation in government decision making so confusing and unpredictable as to silence the public and erase their concerns. Regardless of CEQ's intent, public participation remains an indispensable requirement of both NEPA and the APA. CEQ's legally flawed attempt to rescind this pillar of sound decision making only serves to highlight its vital role in good governance.

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[33] *See* 42 U.S.C. § 4336a(a)(1)(B); 42 U.S.C. § 4336a(a)(3).
[34] 40 C.F.R. § 1501.8(a).
[35] *See, e.g.*, 40 C.F.R. § 1508.1(i)(4) (defining "[e]ffects" for purposes of NEPA reviews to include "effects on Tribal resources"); 40 C.F.R. § 1501.3(d) (requiring that federal agencies consider in making NEPA significance determinations whether the action may adversely affect "cultural resources" and "Tribal sacred sites," violate Tribal laws or policies, or adversely affect the rights of Tribal nations reserved by treaties, statutes, or Executive Orders); 40 C.F.R. § 1502.14(f) (defining "environmentally preferable alternative" as one that, inter alia, protects, preserves, and enhances Tribal resources and Tribal reserved rights); 40 C.F.R. § 1501.10(d)(9) (requiring lead agencies to consider the "[t]ime necessary to conduct government-to-government Tribal consultation" in setting deadlines and schedule for the NEPA process); 40 C.F.R. § 1501.2(4)(ii) (requiring early consultation with Tribal governments in NEPA process); 40 C.F.R. § 1501.9 (setting forth procedures to ensure early engagement of Tribal governments as cooperating agencies); 40 C.F.R. § 1503.1(a)(2)(i)–(ii) (requiring specific solicitation of comments from Tribal agencies authorized to develop and enforce environmental standards and Tribal governments that may be affected by a proposed action).
[36] *See, e.g.*, *supra* note 35 and accompanying text.

2. Consideration of Environmental Justice, Including Core Consideration of Public Health, Is Consistent with the Statute and Affirmed by Courts.

The Memorandum that accompanied CEQ's Interim Final Rule states that "NEPA documents should not include an environmental justice analysis." This arbitrarily reverses decades of CEQ policy and agency practice instructing that, consistent with NEPA's statutory language, agencies should consider environmental justice in NEPA reviews. Notably, the Interim Final Rule itself undercuts consideration of environmental justice by vacating regulatory provisions that clarify NEPA requirements for considering environmental justice in NEPA reviews.[37] In contrast, NEPA imposes a requirement that agencies take a "'hard look' at environmental consequences" of proposed actions, consider alternatives, and publicly disseminate such information before taking final action.[38] Specifically, where a major federal action is determined to significantly affect the quality of the human environment, an agency must prepare a detailed Environmental Impact Statement (EIS) that thoroughly examines potential consequences and relevant factors that contribute to them before providing a reasonable explanation for its actions.[39] This "hard look" should include consideration of environmental justice consequences.[40]

The purpose of NEPA, as described by Congress, is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare" of people.[41] NEPA further establishes "the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations" to "assure for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings"; to "preserve important historic, cultural, and natural

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[37] *See, e.g.*, 40 CFR § 1500.2 (direction to federal agencies to encourage and facilitate meaningful engagement with communities such as those with environmental justice concerns and to identify and assess reasonable alternatives that will address health and environmental effects that disproportionately affect communities with environmental justice concerns); 40 CFR § 1508.1(m) (definition of "environmental justice"); 40 CFR § 1501.3(d)(2)(vii) (significance determination includes consideration of degree to which an action may adversely affect communities with environmental justice concerns); 40 CFR § 1505.3(b) (lead or cooperating agency directed to incorporate significant human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns where relevant and appropriate into mitigation measures); 40 CFR § 1502.14(f) (alternatives analysis includes consideration of disproportionate and adverse effects on communities with environmental justice concerns); and 40 CFR § 1502.16(a)(13) (environmental consequences analysis includes consideration of disproportionate and adverse human health and environmental effects on communities with environmental justice concerns).

[38] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989)*; Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[39] *Sierra Club*, 867 F.3d at 1367 (D.C. Cir. 2017); *see also City of Los Angeles v. Fed. Aviation Admin*., 63 F.4th 835, 848–49 (9th Cir. 2023).

[40] *See City of Los Angeles*, 63 F.4th at 849 n.7 (remanding for failure to adequately analyze and consider environmental justice and cumulative impacts of a project premised on inadequate study of noise impacts); *California v. Bernhardt*, 472 F. Supp. 3d 573, 619 (N.D. Cal. 2020) (NEPA does not allow the agency to abdicate its obligation to conduct sufficient analysis of the environmental impacts of a proposed action, "especially where increased harm on certain populations … is acknowledged").

[41] 42 U.S.C. § 4321.

aspects of our national heritage"; and to "recognize[ ] that *each person* should enjoy a healthful environment."[42] Included in this policy is a directive to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[43] Indeed, the Senate Committee report from which section 102 arose states that NEPA will "provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the *ongoing activities* of the regular Federal agencies."[44] Not even considering whether certain communities will suffer disproportionate exposure to harmful environmental and public health impacts of a proposed action is contrary to the national policy envisaged by Congress. As noted by Barry Hill, attorney and Director of EPA's Office of Environmental Justice under the George W. Bush Administration, "Congress could not have been clearer when it stated that federal agencies are required to 'assure for all Americans'" a safe and healthful environment; "[t]he environmental justice movement works to see that this assurance becomes reality."[45] Central to this movement is both meaningful engagement and the principle that all people should be protected from environmental harm and risk, regardless of race, color, national origin, economic status, Tribal affiliation or disability.[46]

Congress charged CEQ with ensuring that NEPA's legislative policies are carried out through implementation of the statute. It is CEQ's duty and responsibility "to review and appraise the various programs and activities of the Federal Government in the light of the policy"

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[42] 42 U.S.C. §§ 4331(a), (b)(2), (b)(4), (c) (emphasis added).
[43] 42 USC § 4331(b)(3).
[44] S. Rep. 91-296, 91st Cong., 1st Sess. 14 (1969) (emphasis added). *See* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 252–53 as quoted in *Env't Defense Fund v. Tennessee Vall. Auth.*, 468 F.2d 1164, 1175 (6th Cir. 1972).
[45] Barry E. Hill, *Environmental Justice: Legal Theory and Practice*, 45 ENV'T L. REP. NEWS & ANALYSIS 10236, 10243 (2015).
[46] *See generally* IWG on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (March 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf; *see also* Letter from NEJAC to Andrew Wheeler, Administrator of the EPA at 3 (August 14, 2019), https://www.epa.gov/sites/default/files/2019-10/documents/nejac_letter_nepa.pdf (emphasizing that environmental justice analysis is based on "the connection between healthy environments, healthy people, a vibrant economy, and a vigorous community" and the intention of NEPA to identify health impacts on residents of communities with environmental justice concerns). For decades, the Environmental Protection Agency (EPA) defined environmental justice as "[t]he 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." *See* EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (April, 1996) at 2, https://www.epa.gov/sites/default/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf. This definition has also been incorporated into state law and policy. *See, e.g.*, New York Department of Environmental Conservation, *Environmental Justice*, https://dec.ny.gov/environmental-protection/environmental-justice (last accessed Mar. 25, 2025). More recently, Executive Order 14096 provided defined environmental justice, in part, as "the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment. . . ." Exec. Order No. 14096 (April 21, 2023), https://www.federalregister.gov/documents/2023/04/26/2023-08955/revitalizing-our-nations-commitment-to-environmental-justice-for-all.

laid out in section 4331 "for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto."[47] CEQ is further charged "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;" and "to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes."[48]

Decades before Executive Orders 12898 and 14096 were issued, it was well established that NEPA encompassed issues at the heart of environmental justice (for instance, disparities in pollution levels and localized impacts, as well as the meaningful involvement of affected communities and Tribes in the decision making process) and created obligations to assess these impacts and engage affected communities.[49] The obligation to fulfill the "social, economic, and other requirements" of present and future generations speaks broadly to the goals of environmental justice.[50] In the years following NEPA's enactment, it was considered "without question" that NEPA "must be construed to include protection of the quality of life for city residents," as NEPA "contains no exhaustive list of so-called 'environmental considerations,' but without question its aims extend beyond sewage and garbage and even beyond water and air pollution."[51] As the Second Circuit recognized in *Hanly*, "[n]oise, traffic, overburdened mass transportation systems . . . all affect the urban 'environment' and are surely results of the 'profound influences of . . . high density urbanization [and] industrial expansion.'"[52] CEQ regulations further made clear that environmental review under NEPA should include economic and social impacts stemming from environmental harm.[53]

The Administration misunderstands the history of NEPA and its relationship to environmental justice. Calls by impacted communities and prior Administrations to consider environmental justice in NEPA reviews were embraced by Executive Order 12898, which was premised on pre-existing authority under NEPA. The February 11, 1994 Memorandum for the Heads of All Departments and Agencies that accompanied Executive Order 12898 explicitly

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[47] 42 U.S.C. § 4344(3).
[48] 42 U.S.C. § 4344(4), (6).
[49] *See Guidance for Incorporating Environmental Justice Concerns in EPA's Compliance Analysis*, *supra* note 46; *see also Revitalizing Our Nation's Commitment to Environmental Justice for All*, *supra* note 46.
[50] *See* Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T AFF. L. REV. 601, 605 (2006) ("Environmental justice is consistent with – and even implicit in – the stated goals of NEPA, most notably the goal of assuring 'for *all* Americans safe, healthful, productive, aesthetically and culturally pleasing surroundings.'").
[51] *Hanly v. Mitchell*, 460 F.2d 640, 647 (2nd Cir. 1972).
[52] *Id.*; *see also Nucleus of Chicago Homeowners Ass'n v. Lynn,* 524 F.2d 225, 229 (7th Cir. 1975) (stating that the environmental policy created by NEPA was "'as broad as the mind can conceive' and necessarily includes concern for the quality of urban life").
[53] 40 C.F.R. § 1508.14(i).

relied on Title VI of the Civil Rights Act of 1964 and NEPA as existing statutory authority to advance environmental justice:

> The purpose of this separate memorandum is to underscore certain provision of *existing law* that can help ensure that all communities and persons across this Nation live in a safe and healthful environment. Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities. Application of these existing statutory provisions is an important part of this Administration's efforts to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects.[54]

The 1994 Memorandum's directive to consider environmental justice pursuant to Executive Order 12898 was grounded in NEPA and other federal laws, not the other way around.

In 2001, EPA Administrator Christine Todd Whitman reiterated the position that consideration of environmental justice is not dependent on executive orders. She stated that "environmental statutes provide many opportunities to address environmental risks and hazards in minority communities and/or low income communities," and applying "existing statutory provisions is an important part of this agency's effort to prevent those communities from being subject to disproportionately high and adverse impacts and environmental effects."[55] Administrator Whitman specifically highlighted NEPA as one such statute, noting that "Congress could not have been any clearer when it stated that it shall be the continuing responsibility of the Federal government to assure for all Americans a safe, healthful, productive and aesthetically and culturally pleasing surroundings."[56]

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[54] Memorandum from The White House to the Heads of All Dep'ts and Agencies, Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1993), https://www.epa.gov/sites/default/files/2015-02/documents/clinton_memo_12898.pdf (emphasis added).

[55] Christine Todd Whitman, *EPA's Commitment to Environmental Justice* (Aug. 9, 2001), https://mde.maryland.gov/programs/Crossmedia/EnvironmentalJustice/Documents/www.mde.state.md.us/assets/document/environmental_justice/ejreport01/ej_2001_Annual_Report_partE.pdf; *see also* EPA, *Legal Tools to Advance Environmental Justice*, 154–56 (May 2022), https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf.

[56] Christine Todd Whitman, *EPA's Commitment to Environmental Justice* 48 (Aug. 9, 2001), https://mde.maryland.gov/programs/Crossmedia/EnvironmentalJustice/Documents/www.mde.state.md.us/assets/document/environmental_justice/ejreport01/ej_2001_Annual_Report_partE.pdf; *see also The EPA's Environmental Justice Strategy*, EPA (Apr. 3, 1995), https://www.epa.gov/sites/default/files/2015-02/documents/ej_strategy_1995.pdf ("Under the authority of NEPA and Sec. 309 of the [Clean Air Act], EPA will, consistent with regulations and guidelines issued by the President's Council on Environmental Quality, routinely review the environmental effects of major Federal actions significantly affecting the quality of the human environment. For such actions, EPA reviewers will focus on the spatial distribution of human health, social, and economic effects to ensure that agency decisionmakers are aware of the extent to which those impacts fall disproportionately on covered communities."); *Environmental Justice Fact Sheet: EPA's Commitment to*

Further, the Nuclear Regulatory Commission, an independent agency that is not bound by CEQ regulations, concluded that NEPA itself, not Executive Order 12898, was the basis for addressing environmental justice, stating that the agency would "make an effort to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community."[57]

Courts have repeatedly reviewed agency environmental justice analyses under NEPA and the APA, and recognized agency environmental justice responsibilities under NEPA. These responsibilities have been affirmed in numerous instances, including *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017), *aff'd in part, rev'd in part*, 985 F.3d 1032 (D.C. Cir. 2021); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003); *Sierra Club*, 867 F.3d at 1368 (D.C. Cir. 2017); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006); *Trenton Threatened Skies, Inc., v. Fed. Aviation Admin.*, 90 F.4th 122, 138 (3d Cir. 2024); *City of Port Isabel v. FERC*, 111 F.4th 1198, 1204 (D.C. Cir. 2024); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021).

Although Executive Order 12898 does not give rise to a judicially enforceable right, courts have reviewed environmental justice analyses conducted by agencies pursuant to NEPA under the APA.[58] In accordance with the APA, courts consider whether agency decisions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[59] The D.C. Circuit explained the standard of review: "The analysis must be 'reasonable and adequately explained,' but the agency's 'choice among reasonable analytical methodologies is entitled to deference….'"[60] Under NEPA, "an agency is not required to select the course of action that best

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Environmental Justice, EPA (Jan. 2006), https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ABGX.PDF?Dockey=P100ABGX.PDF (describing EPA Administrator Stephen L. Johnson's memorandum "reaffirming EPA's commitment to environmental justice for all people" and "recognizing that minority and/or low-income communities frequently may be exposed disproportionately to environmental harms and risks."); *Fiscal Year 2014-2018 EPA Strategic Plan*, EPA 1, 44 (Apr. 10, 2014), https://www.epa.gov/sites/default/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf (describing cross-agency strategy, including its "focus on urban, rural, and economically disadvantaged communities" as fulfilling "'the social, economic, and other requirements of present and future generations,' as established in the National Environmental Policy Act").

[57] PFS (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153-55 (2002); *see also* PFS, CLI-04-09, 59 NRC 120 (2004).

[58] *Vecinos*, 6 F.4th at 1330 (Executive Order 12898 did not create a private right to judicial review but "a petitioner may challenge an agency's environmental justice analysis as arbitrary and capricious under NEPA and the APA"); *see also Trenton*, 90 F.4th at 138 (citing *Communities Against Runway Expansion, Inc. (CARE) v. F.A.A.*, 355 F.3d 678, 688 (D.C. Cir. 2004)); *Coliseum Square Ass'n, Inc.*, 465 F.3d at 232 (5th Cir. 2006)); *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014).

[59] 5 U.S.C. § 706(2); *see, e.g.*, *Sierra Club*, 867 F.3d at 1368 ("Like the other components of an EIS, an environmental justice analysis is measured against the arbitrary-and-capricious standard" (relying on *Cmtys. Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004))).

[60] *Sierra Club*, 867 F.3d at 1368.

serves environmental justice."[61] However, it is required "to take a 'hard look' at environmental justice issues."[62]

In reviewing environmental justice analyses under NEPA, courts "ask whether the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'"[63] In turn, a court may hold the decision, for example, not to issue a supplemental Environmental Impact Statement (EIS), arbitrary and capricious, where, as in *City of Port Isabel*, expanded demographic and environmental data underlying an environmental justice analysis would constitute a "seriously different picture of the environmental landscape" than originally considered.[64] The D.C. Circuit has further made clear that "[e]ffects on environmental justice communities are certainly 'impacts' that are 'relevant to environmental concerns.'"[65] Moreover, failure to consider environmental justice effects can result in prejudicial error, limiting the public's ability to comment on relevant data and analysis.[66]

In *Vecinos*, the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC)'s decision to analyze the impacts of projects involving the construction and operation of liquified natural gas (LNG) export terminals and pipelines carrying LNG only in census blocks within two miles of the project sites was arbitrary, in part given FERC's determination that environmental effects would extend beyond two miles.[67] Similarly, in *Standing Rock Sioux Tribe*, the D.C. District Court rejected the use of a 0.5 mile radius to identify the geographic area where impacts may occur in conducting an environmental justice analysis.[68] The Army Corps of Engineers had failed to account for the risks of a spill, and their failure to address "the distinct cultural practices of the Tribe and the social and economic factors that might amplify its experience of the environmental effects of an oil spill" violated the mandates of NEPA.[69]

The effects of a major federal action on communities with environmental justice concerns has long been recognized by the courts as "impacts" under NEPA. The Administration has provided no basis for willfully ignoring particular impacts on subpopulations, particularly those that are already the most environmentally overburdened.

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[61] *Id.*
[62] *Id.* (internal citations omitted).
[63] *City of Port Isabel*, 111 F.4th at 1206 (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Indeed, even prior to NEPA, courts had held that agencies were required to review "the totality of a project's immediate and long-range effects." *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965).
[64] *City of Port Isabel*, 111 F.4th at 1207, 1209 ("[E]nvironmental justice analyses and impacts can be sufficiently meaningful to require a supplement on their own." (internal citations omitted)).
[65] *Id.* at 1209 (citing 40 C.F.R. § 1508.1(g) (2022)).
[66] *Id.* at 1210–11.
[67] 6 F.4th at 1330.
[68] 255 F. Supp. 3d at 140.
[69] *Id.* at 137–38, 140.

3. Black, Latinx, and Indigenous Communities are Disproportionately Impacted by Environmental Injustice.

Systems of oppression built on racial inequality, such as residential segregation, redlining, urban and rural poverty, and mass incarceration, worsen environmental injustices.[70] Environmental injustices have also been linked to "escalating food insecurity, limited access to healthcare, and lower school attendance rates," which contribute to "significant disparities in health and education outcomes, physical and financial healthcare resources, and overall well-being."[71]

From its inception, NEPA aimed to serve all communities through its incorporation of socioeconomic concerns. Its purpose is to "promote the general welfare, 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."[72] Moreover, the Act aims to "preserve important historic, cultural, and natural aspects of our national heritage."[73] And because Black, Latinx, and Indigenous communities viewed this umbrella statute as an important mechanism for inclusion of historically marginalized communities in the decision making process, NEPA began, over time, to ensure that planning and development projects reflected public values. This holistic perspective, which prioritizes cultural, socioeconomic, and environmental factors in tandem, began to reach the concerns of the environmental justice movement.

In practice, realizing NEPA's vision for environmental justice is an ongoing project. Despite the promise of environmental protections for all in the early 1970s, following the passage of NEPA and the first official Earth Day, Black, Latinx, and Indigenous communities have continued to fight for inclusion in environmental decision making. In fact, Black, Latinx, and Indigenous communities continue to face the brunt of environmental hazards and the climate crisis.

Black and Latinx communities are still more likely than white populations to live in areas exposed to hazardous waste and high concentrations of air pollution and work in industries most

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[70] *See* Camila H. Alvarez, *Structural Racism as an Environmental Justice Issue: A Multilevel Analysis of the State Racism Index and Environmental Health Risk from Air Toxics*, 10 J. RACIAL ETHNIC HEALTH DISPARITIES 244 (2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC9810559/; *see also* Raymond Zhong & Nadja Popovich, *How Air Pollution Across America Reflects Racist Policy From the 1930s*, N.Y. TIMES (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/climate/redlining-racism-air-pollution.html; Lawrence Kaleb Pittman, *History of Redlining and the Environmental Legacy Inherited*, ABA HUM. RTS. MAG. (Oct. 30, 2024), https://www.americanbar.org/groups/crsj/resources/human-rights/2024-october/history-redlining-environmental-legacy/.

[71] Sara Strayer & Stephen W. Stoeffler, *The Intersection of Racism and Poverty in the Environment: A Systematic Review for Social Work*, 46 SOC. DEV. ISSUES 81, 82 (2024), https://journals.publishing.umich.edu/sdi/article/id/6769/ (internal quotations and citations omitted).

[72] NEPA § 101(a), 42 U.S.C. § 4331(a); *see also* Heather E. Ross, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY ENV'T L. & POL'Y REV. 353, 356–57 (1994), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1348&context=wmelpr.

[73] *Id*. at 358 (citing NEPA § 101(b), 42 U.S.C. § 4331(b)).

impacted by climate change.[74] In 2018, the Environmental Protection Agency found that non-white communities faced a 28% higher health burden as compared with the general population.[75] While 7% of white children suffer from asthma, 13.4% of Black children are diagnosed with asthma.[76] Black Americans are 75% more likely than white Americans to live in "fence-line" communities, which traditionally are near facilities that produce emissions that directly impact the population.[77] And this is not new information. Since at least the 1980s, national reports have highlighted that Black and Latinx communities are more likely to live near landfills and environmental hazards.[78]

Similar disproportionate effects of pollution and adverse effects of development activities exist for Tribal Nations and Indigenous communities. For instance, a study published in the American Journal of Public Health on nationwide trends in particulate matter (PM 2.5 and PM10) pollution found that while levels of particulate matter pollution were lower in 2000 in counties with significant American Indian populations than in counties without significant American Indian populations, the gap has decreased steadily over time such that by 2015 and consistently since, particulate matter pollution has been significantly worse in American Indian-populated counties.[79] The study findings "suggest that socioeconomically disadvantaged communities experience disproportionate burdens of environmental hazards, such as ambient air pollution, contributing to adverse downstream health effects" and pointed to the particular need to address disparate adverse health effects on American Indian communities, which "are likely underrepresented when the EPA is considering national ambient air quality standards" and when federal agencies are considering project approvals.[80] Adverse environmental and related health impacts from mining and other resource extraction activities, water storage and export projects, fossil fuel projects, and other development projects subject to NEPA are also particularly pronounced in Indigenous communities.[81]

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[74] Aneesh Patnaik et al., *Racial Disparities and Climate Change,* PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change; *New Study: Climate Change is Having a Profound Financial Impact on Workers Earning Low and Moderate Incomes*, BUS. WIRE (Oct. 11, 2023 10:28 AM), https://www.businesswire.com/news/home/20231010666227/en/New-Study-Climate-Change-is-Having-a-Profound-Financial-Impact-on-Workers-Earning-Low-and-Moderate-Incomes.

[75] Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status,* 108 AM. J. PUB. HEALTH 480, 480–85, https://doi.org/10.2105/AJPH.2017.304297.

[76] Patnaik, *supra* note 74.

[77] *Id.*

[78] BENJAMIN F. CHAVIS JR. & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (Comm'n for Racial Just. United Church of Christ 1987), https://www.nrc.gov/docs/ML1310/ML13109A339.pdf.

[79] Maggie Li et al., *Air Pollution in American Indian Versus Non-American Indian Communities, 2000-2018*, 112 AM. J. PUB. HEALTH 615, 615–23 (Apr 1, 2022), https://doi.org/10.2105/AJPH.2021.306650.

[80] *Id.* at 622.

[81] *See generally* CLEAN AIR TASK FORCE, *TRIBAL COMMUNITIES AT RISK:* THE DISPROPORTIONATE IMPACTS OF OIL AND GAS AIR POLLUTION ON TRIBAL AIR QUALITY (Clean Air Task Force, May 7, 2018), https://www.catf.us/wp-

Climate change is already profoundly deepening existing inequities, a trend that will further accelerate as the climate crisis does. As storms increasing in strength and frequency continue to devastate the United States and its territories, Black Americans are 40% more likely to live in areas with projected increases in mortality rates as a direct result of climate-driven changes in extreme temperatures.[82] Moreover, Black communities are more likely to experience flooding than any other community due to global warming.[83] Not only do these vulnerable communities face the direct effects of a hurricane or other natural disaster, but the federal government's subsequent response and recovery efforts also historically fall short compared to its efforts in white communities. Black Americans receive less federal aid than their white counterparts and face longer wait times for recovery due to systemic segregation and devaluation of property.[84] Latinx populations are also left behind. When Hurricanes Irma and Maria ripped through Puerto Rico in 2017, for example, residents went months to over one year without power, debilitating communities and millions of people[85] whose similarly situated counterparts would not face the same treatment. Tribes are also particularly threatened by climate change.[86] Having lost 99% of their historical territory, Tribal Nations in the United States are now experiencing a new wave of land loss and forced relocation as sea level rise, drought, wildfires, extreme weather events, and other impacts of climate change make much of remaining Tribal

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content/uploads/2018/05/Tribal_Communities_At_Risk.pdf; *see also* Gabriella Y. Meltzer, et al., *A Systematic Review of Environmental Health Outcomes in Selected American Indian and Alaska Native Populations*, 7 J. RACIAL AND ETHNIC HEALTH DISPARITIES 698, 733 (2020), https://doi.org/10.1007/s40615-020-00700-2 (concluding that "prospective studies controlling for [socioeconomic and behavioral] risk factors demonstrate that the persistent health disparities faced by [American Indians and Alaska Natives] could very well be a function of geographic inequity in exposure to environmental contaminants, in which reservations and villages become ecological sacrifice zones" and that the "fundamental causes of these diseases are rooted in the legacy of settler colonialism's disenfranchisement and impoverishment of [I]ndigenous communities, largely accomplished through control and destruction of the natural environment").

[82] EPA, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 6 (EPA, Sept. 2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf; *see also* Christopher Flavelle & Kalen Goodluck, *Dispossessed, Again: Climate Change Hits Native Americans Especially Hard*, N.Y. TIMES (June 27, 2021), https://www.nytimes.com/2021/06/27/climate/climate-Native-Americans.html.

[83] A.K. JAY ET AL., FIFTH NATIONAL CLIMATE ASSESSMENT 1–19 (A.R. Crimmins et al. eds., 2023), https://doi.org/10.7930/NCA5.2023.CH1.

[84] Matt Plaus, *Racial Disparity in Disaster Response in the United States: A Case Study of Aid Under FEMA*, HARV. KENNEDY SCH. STUDENT POL'Y REV. (Feb. 9, 2024), https://studentreview.hks.harvard.edu/racial-disparity-in-disaster-response-in-the-united-states-a-case-study-of-aid-under-fema/#:~:text=Black%20Americans%20receive%20less%20Federal,to%20areas%20with%20fewer%20disasters.

[85] Frances Robles et al., *Facing Months in the Dark, Ordinary Life in Puerto Rico Is 'Beyond Reach'*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/us/hurricane-maria-puerto-rico-power.html; GAO, *Hurricane Recovery Can Take Years–But for Puerto Rico, 5 Years Show Its Unique Challenges*, WATCHBLOG, (Nov. 14, 2022), https://www.gao.gov/blog/hurricane-recovery-can-take-years-puerto-rico-5-years-show-its-unique-challenges#:~:text=Specifically%2C%20the%20hurricanes%20severely%20damaged,agencies%20provided%20about%20%243.9%20billion.

[86] Flavelle & Goodluck, *supra* note 82; Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE 578 (2021), https://www.science.org/doi/10.1126/science.abe4943 (concluding that "near-total land reduction and forced migration lead to contemporary conditions in which tribal lands experience increased exposure to climate risks and hazards and diminished economic value").

lands uninhabitable, diminish their economic value, and subject Indigenous people to disproportionate health and safety hazards.[87]

"Environmental justice" only became a term of art, providing additional clarity[88] to the statutory intent of NEPA in 1994, with President Clinton's issuance of Executive Order 12898.[89] Subsequent guidance and regulations up until 2023 deepened and reinforced the federal government's mandate to meaningfully address environmental justice in its environmental protection efforts.[90] This progress would not have occurred absent sustained efforts by communities of color and frontline communities to build grassroots and political power, after recognizing why their neighborhoods were disproportionately chosen as the dumping grounds for environmental waste.

Executive Order 12898, which the Trump administration recently revoked,[91] was a seminal effort to incorporate environmental justice concerns into official environmental policy. The Clinton Administration originally issued the Executive Order in the context of decades-long effort by economically and racially excluded communities who organized to bring environmental justice concerns front and center into the federal government's regulatory scheme.[92] To communities that feel the immediate effects of pollution and toxic waste, the environment includes the human habitat—neighborhoods, schools, air quality, drinking water systems, etc.—in addition to those natural phenomena centered in the traditional environmental protection movement.[93] While communities of color began organizing around this conception of the

[87] Christopher Flavelle, *Forced Relocation Left Native Americans More Exposed to Climate Threats, Data Show*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/28/climate/native-americans-climate-change-effects.html; Farrell et al., *supra* note 86; *see also Climate Change and the Health of Indigenous Populations*, EPA, https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations (last visited Mar. 27, 2025) (concluding that Indigenous communities are "more vulnerable to the health impacts of climate change than the general population"); *see generally* CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS (Julie Koppel Maldonado et al. eds., 2013), https://link.springer.com/content/pdf/10.1007/978-3-319-05266-3.pdf.

[88] EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 7 (1998), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_epa0498.pdf ("Because analyzing and addressing environmental justice may assist in determining the distributional effects of environmental impacts on certain populations, it is entirely consistent with the NEPA process.").

[89] Exec. Order No. 12898 (Feb. 11, 1994), https://www.epa.gov/sites/default/files/2015-02/documents/exec_order_12898.pdf; *see also supra* note 54.

[90] *See, e.g.*, Exec. Order No. 14096 (Apr. 21, 2023), https://www.federalregister.gov/documents/2023/04/26/2023-08955/revitalizing-our-nations-commitment-to-environmental-justice-for-all.

[91] Exec. Order No. 14173 (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[92] Anita Desikan, *How Environmental Justice Became a Matter of Governance*, UNION OF CONCERNED SCIENTISTS (Jan. 29, 2020, 10:02 AM), https://blog.ucs.org/anita-desikan/how-environmental-justice-became-a-matter-of-governance/.

[93] Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 818 (2018), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6338&context=faculty_scholarship.

environment long before NEPA was originally passed, a community response in Warren County, North Carolina galvanized the national environmental justice movement in 1982.[94]

The focal point of the Warren County movement was a town called Afton, which in 1978 had been chosen as the future site of a toxic landfill.[95] At that time, 84% of Afton's residents (and 64% of Warren County's) were Black, and Warren County's poverty rate was among the highest in the state and its geography fairly rural.[96] Recognizing that the County was picked precisely for these factors—it was not, in fact, the most scientifically suitable site for the landfill[97]—and supported by the local NAACP branch and national NAACP office, residents of Warren County created an organization to protest a polychlorinated biphenyl disposal site in a local town. After a federal court denied an injunction they had sought to halt the landfill's completion, residents of Warren County led massive protests over the span of a month to halt the project.[98] Law enforcement arrested 523 Warren County residents who had put their bodies on the line—lying in the road to block dump trucks—drawing national attention.[99] While ultimately unsuccessful in stopping the project, the 1982 Warren County protests drew the support of national civil rights groups.[100] These actions represented one of the era's most pivotal "popular mobilization[s] aris[ing] outside the arrangements of official decision making,"[101] and the protests are considered to have catalyzed the gradual inclusion of environmental justice themes in the mainstream movement thereafter.

In a more recent example, the Atlantic Coast Pipeline was cancelled after the Chesapeake Bay Foundation and Southern Environmental Law Center sued the Federal Energy Regulatory Commission under NEPA for failing to consider the climate impacts of its plan for a natural gas pipeline.[102] The companies involved had planned to build the pipeline through predominantly

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[94] FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE 31 (David M. Konisky ed., 2015); *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL, https://www.nrdc.org/stories/environmental-justice-movement (last visited March 27, 2025).
[95] *We Birthed the Movement: The Warren County PCB Landfill Protests, 1978-1982: Introduction*, UNC UNIV. LIBRARIES (Sept. 1, 2022), https://exhibits.lib.unc.edu/exhibits/show/we-birthed/introduction.
[96] U.S. Commission on Civil Rights, *What is Environmental Justice?*, *in* NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (Oct. 2003), https://www.usccr.gov/files/pubs/envjust/ch2.htm.
[97] *Id.* (citing ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 36–37 (1990)).
[98] *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL, https://www.nrdc.org/stories/environmental-justice-movement (last visited March 27, 2025).
[99] Jenny LaBalme, *From the Archives: Dumping on Warren County*, FACING SOUTH (Sept. 30, 2022), https://www.facingsouth.org/2022/09/archives-dumping-warren-county.
[100] FAILED PROMISES, *supra* note 94 at 31.
[101] Purdy, *supra* note 93 at 820.
[102] *SELC's Pipeline Team Reflects on the Path to Victory,* SELC (July 9, 2020), https://www.selc.org/news/selcs-pipeline-team-reflects-on-the-path-to-victory/; Elizabeth Endara, *Three Times NEPA Has Protected Communities of Color*, OXFAM (July 25, 2022), https://www.oxfamamerica.org/explore/stories/three-times-nepa-has-protected-communities-of-color/.

Black communities.[103] NEPA provided respite for a community threatened by environmental injustice.

Through the mid-to-late 20th century, communities' efforts across the country to spotlight the inequities of waste management, facility siting, and pollution succeeded in putting environmental justice on the federal government's agenda.[104] NEPA's original promise to protect all communities was realized only through their efforts, and their hard-fought victories continue to shape environmental policy today. Removing environmental justice considerations from NEPA processes will undermine decades of progress driven by grassroots mobilization as well as agency action.

CONCLUSION

For the reasons above, the signatories strongly urge the Administration to withdraw the Interim Final Rule and Memorandum. Together, the Interim Final Rule and Memorandum contradict the purpose and text of NEPA, judicial precedent, and undermine the statute's democratic mandate. They are also a blatant attempt to circumvent the public accountability required by the APA and to perpetuate the marginalization of communities of color in environmental decision making. They cannot withstand this Nation's core democratic commitments and will not withstand judicial scrutiny. They should be speedily withdrawn and the long tradition of sound environmental governance under CEQ's 50-year-old NEPA implementing regulations restored.

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[103] Endara, *supra* note 102.
[104] Dolores Greenberg, *Reconstructing Race and Protest: Environmental Justice in New York City*, 5 ENV'T HIST. 223, 225, 238 (2000). Various administrations have prioritized environmental justice. For example, George H.W. Bush's administration established the first Office of Environmental Equity. Tracy J Wholf, *EPA Eliminating Environmental Justice Jobs*, CBS NEWS, (March 12, 2025), https://www.cbsnews.com/news/epa-eliminating-environmental-justice-jobs-dei/.

On Behalf of:

African American Society #024
Alternatives for Community and Environment (ACE)
CalWild
Center for Environmental Health
Center for Urban Environmental Reform
Chesapeake Bay Foundation
Concerned Citizens for Nuclear Safety
Conservation Law Foundation
Earthjustice
Great Rivers Environmental Law Center
GreenRoots
IDARE, LLC
LatinoJustice PRLDEF
L.I.G.H.T. Foundation
Little Manila Rising
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NAACP
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New York Civil Liberties Union
Omega and Brenda Wilson, Co-Founders, WERA
Poverty & Race Research Action Council (PRRAC)
Public Interest Law Center
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Save California Salmon
Sierra Club
Socially Responsible Agriculture Project
Sugar Law Center for Economic & Social Justice
Union of Concerned Scientists
Unitarian Universalist Mass Action
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WE ACT for Environmental Justice
Winnemem Wintu Tribe