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

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Abstract: This article aims to show how the changes to NEPA by the Trump Administration are an act of environmental racism, defined as "[i]ntentional or unintentional racial discrimination in environmental policy- making, enforcement of regulations and laws, and targeting of communities for the disposal of toxic waste and siting of polluting industries."

In 1970, Congress passed the National Environmental Policy Act ("NEPA") for the purpose of requiring federal agencies to engage in "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."

[1]For over 50 years, NEPA promoted this goal by requiring federal agencies to: (1) take into consideration consequential environmental effects inflicted from large scale projects, (2) foster community engagement and participation in the development of the same, and (3) establish a Council on Environmental Quality (CEQ).[2] In totality, actions under NEPA sought to protect our planet and establish "harmony between man and his environment."[3]

On September 14, 2020, CEQ changes intended to modernize NEPA took effect. The Trump Administration claimed that the changes would "streamline the development of infrastructure projects and promote better decision making by the Federal government."[4] However, environmentalists fear that these changes threaten the heart of NEPA's mission. Though NEPA was not free from criticism prior to the Administration's changes, the Act nonetheless succeeded in its goal to require federal agencies to reflect on their environmental impacts while engaging with the community in the process. Now, the degree to which federal agencies will be required to consider their effects on the environment is more limited, with efforts toward "efficiency" and "modernization" likely resulting in federal agencies bypassing important steps.[5] This is especially worrisome because poor environmental quality often disproportionally affects minority communities, exposing individuals within those communities to more harmful levels of pollution. Should the Trump Administration's changes to NEPA remain in effect, minority communities will suffer.

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The goal of this article is to describe the changes the Trump Administration developed for NEPA and illuminate the consequences. Specifically, these changes eliminate important protections, otherwise guaranteed by NEPA, necessary to ensure the safety of communities affected by large-scale, federal projects. Because communities of color are disproportionally affected by damage to the environment, the changes to NEPA will work to perpetuate the suffering of those communities and reinforce environmental racism. Ultimately, the Trump Administration's changes to NEPA are an act of environmental injustice, and the long-term results of these changes will lead to harmful impacts on minority communities around the country.

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

I. What Is NEPA?

NEPA is legislation that works "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[6] NEPA is procedural in nature; it does not compel federal agencies to make substantive changes to their projects.[7] Nonetheless, enforcing a procedural process that federal agencies must follow to enact major action affects the agency's substantive decisions and guides agencies to make more environmentally-friendly decisions.[8] To fulfill its mission, NEPA: (1) requires federal agencies to consider environmental impacts of major activities, (2) implements procedures to ensure community involvement in such activities, and (3) forms the CEQ.[9]

First, NEPA requires dual action from federal agencies: to consider the long-term environmental impacts of major federal actions before proceeding (a "look before you leap" philosophy), and to act with transparency to the public for such projects before they occur.[10] Examples of major federal actions include establishing government policies or regulations, undertaking federal projects, or issuing federal permits and funds. A "failure to act" also may constitute a major federal action.[11] To ensure transparency, agencies that plan large scale actions are required to draft an Environmental Impact Statement (EIS), which includes information detailing the environmental impact of the proposed action, and the benefits of the plan in relation to unavoidable harm.[12] The information provided must contain an "accurate, scientific analysis, expert agency comments, and public scrutiny."[13] Upon completion of the EIS, agencies will have a comprehensive understanding of the totality of the environmental impacts the proposed project will likely incur.[14] To further ensure the protection of the surrounding environment, agencies must analyze reasonable alternatives[15] to the proposed action, including taking no action.[16] Direct effects,[17] indirect effects,[18] and cumulative impacts[19] to the environment must all be considered.[20] The adequacy of the final EIS is subject to judicial review based on an "arbitrary and capricious" standard.[21] Agency action is "arbitrary or capricious" if an agency has "relied on information that Congress has not intended[,] ... entirely failed to consider [an] important aspect of [the] problem, offered explanation for its decision that runs counter to evidence ... or is so implausible that it could not be ascribed to ... agency expertise."[22] To determine whether an EIS will be required,[23] a federal agency shall draft an Environmental Assessment (EA).[24] If it is found that an EIS will not be necessary[25], the federal agency may file a "Finding of No Significant Impact" (FONSI).[26]

Additionally, NEPA ensures that the public may provide input on large-scale federal actions.[27] To advance its goal of community participation, NEPA requires federal agencies to: (a) diligently offer opportunities for discourse, which may include "provid[ing] public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement," and (b) publicize the drafts and final copies of any EIS reports for the opportunity of public review.[28] The environmental information provided to the public by federal agencies must be made available "*before* decisions are made and *before* actions are taken."[29] By ensuring availability before taking action, NEPA enables the public to be included in decision-making processes before an agency will decide on or enact any projects.[30]

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Fostering such inclusivity requires federal agencies to publicly consider their potential projects before arriving at a conclusion, creating a positive environment to promote community engagement and facilitating the opportunity for those affected by proposed changes to have a voice.[31]

Finally, NEPA also established the CEQ, the organization responsible for enforcing agency compliance with NEPA[32] and Executive Order 12898, which requires consideration of environmental justice.[33] On a broad scale, the CEQ is responsible for gathering information about the current and prospective conditions of the environment and identifying trends that would adversely affect environmental quality.[34] Specifically, this organization conducts research for federal agencies of ecological systems and environmental quality in and around the community;[35] reviews and appraises Federal Government programs to determine if NEPA goals are being met;[36] and works closely with the President to provide reports of federal agency activities, and guidance on how the government should move forward in order to continue to meet the expectations of NEPA.[37]

II. NEPA and Environmental (In)Justice

The concept of environmental justice first appeared in the United States in 1982, when North Carolina agreed to the implementation of a waste landfill in Warren County, home to a large African American community.[38] The landfill would contain polychloride biphenyls, a man-made chemical that causes cancer in those who are exposed.[39] Public outcry led to the commencement of the "Toxic Waste and Race" Study by the United Church of Christ Commission for Racial Justice (hereinafter "the Study").[40] The Study revealed that "race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities."[41] Additionally, the Study determined that "[t]hree out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites."[42]

After these findings, President Bill Clinton executed Executive Order 12898.[43] The purpose of the order was to ensure that each federal agency "[t]o the greatest extent practicable and permitted by law … [achieve] environmental justice as part of its mission by identifying … disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[44] The purpose of environmental justice is to combat the social problem of environmental racism, defined as "[i]ntentional or unintentional racial discrimination in environmental policy-making, enforcement of regulations and laws, and targeting of communities for the disposal of toxic waste and siting of polluting industries."[45] It is wishful thinking to believe that environmental justice was served after the passing of Executive Order 12898; environmental racism continues to impact communities of color, as exhibited, for example, by the notorious Flint Water Crisis.[46] However, this is just one current example of how communities of color bear the burden of our environmental shortcomings. Various communities face disproportionate exposure to environmental contaminants; Native American,[47] Black,[48] LatinX,[49] and Asian American[50] communities all carry the burden of pollution in its various forms far more than their white counterparts. NEPA has been used to combat environmental injustice by allowing public participation to educate, to delay harmful government actions, and to require agencies to consider the socioeconomic and health effects of their actions.[51]

Encouraging public participation helps facilitate community education, as NEPA requires federal agencies to disclose "the NEPA documents, any public comments that the agency received on the documents, and any comments that the agency received from other agencies on the documents."[52] Public participation also allows individuals in minority and low-income areas to have a voice in government,[53] offering their unique insights on the effects agency action may have on their communities.[54]

Delaying government action is more controversial. Although the Trump Administration's changes to NEPA (discussed below) attempt to limit delay[55] in projects, sometimes delay can be important, such as when it is a tool to ensure environmental protection and combat environmental racism. Here, delay is the result of taking time to complete adequate work. The necessary time taken by agencies for due diligence under NEPA allows those that will be directly affected the opportunity to organize and inform the government of the potential harms its actions may cause the community.[56] These benefits of NEPA have consistently been seen in multiple cases, including recently. In *Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*,[57] the focus was on the installation of the Dakota Access Pipeline, a pipeline that would run through North Dakota, specifically through reservation lands belonging to the Standing Rock Sioux Tribe.[58] The Standing Rock Sioux Tribe has fought against the installation since 2015, arguing that the pipeline poses serious risks to the safety and survival of the tribe due to the possibility of an oil spill contaminating its water supply. A federal judge ordered that the operating pipeline be shut down, citing an inad-

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equate EIS filed by the Army Corps of Engineers.[59] In his ruling, Judge James Boasberg cited NEPA, writing that, "given the seriousness of the Corps' NEPA error, the impossibility of a simple fix, the fact that Dakota Access did assume much of its economic risk knowingly, and the potential harm each day the pipeline operates, the Court is forced to conclude that the flow of oil must cease."[60] The battle over the Dakota Pipeline continues,[61] but it is important to acknowledge that courts have favored upholding NEPA.

Although there is room for improvement, NEPA was on the right track to allow affected parties a voice in government action and to fight against environmental racism. However, the changes the Trump Administration implemented limit NEPA's bite, creating a national danger to the environment and communities of color alike.

III. The Trump Administration's Changes to NEPA

The NEPA revisions enacted by the Trump Administration include a variety of changes, such as: imposing page and time limits for agencies to complete EIS reports, expanding agency authority to delegate work to private entities, and limiting the scope of judicial review for NEPA claims.[62] Although these changes may appear positive, ultimately the speed of the evaluation has less to do with efficiency and more to do with bypassing significant checks that make NEPA a strong tool for environmental preservation.

First, the changes impose page and time limits for agencies completing EIS reports. According to the new rules, "[t]he text of final environmental impact statements … shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer."[63] EAs must be prepared "within 1 year … from the date of decision to prepare an environmental assessment to the publication of a final environmental assessment," while EIS statements must be issued "within 2 years … from the date of the issuance of the notice of intent to the date a record of decision is signed."[64] Though these changes have been made for the obvious purpose of expediting the NEPA process, "[t]he Trump Administration does not provide any reliable data supporting the conclusion that requiring one year for completion of any EA and two years for completion of any EIS is either necessary or practicable."[65] Thus, these changes risk that an agency will fail to conduct a thorough investigation should it be pressed to fight against the clock and page limits. Although some delays may extend for an unreasonable period, it is difficult to set a one-size-fits-all approach in legislation. The focus instead should be on quality and comprehensiveness, while moving analysis along efficiently and reasonably. Ultimately, to establish limits in the reviews simply encourages sloppy and incomplete work. Instead of limiting the NEPA investigations, if the Trump Administration actually wanted to expedite work, it would have ensured resources necessary to accomplish that goal were properly allocated to its agencies.

Additionally, the changes suggest that there will be a significant expansion in the use of Categorical Exclusions[66] ("CE") and EAs. Agencies are to identify categories of actions in their agency that "normally do not have a significant effect on the environment."[67] Previously, if an action proved to be an "extraordinary circumstance" that fell outside of the listed categories, then that action would automatically be excluded from being included in a CE.[68] Now, however, a CE may be used for an extraordinary action upon consideration by the agency, where it must determine "whether mitigating circumstances or other conditions are sufficient to avoid significant effects" on the environment.[69] With a broader scope for what may be categorized as a CE, agencies now have considerable discretion in deciding whether or not to fill out an EA or EIS. Significantly, actions filed as CEs do not require public participation. Should more CEs be filed in place of EAs and EISs, there will be less public participation in large-scale federal actions that would have, in the past, needed to be presented to the public. Exclusion of the public will lead to the exclusion of opposing voices, those which may drive change and ensure the protection of the community and the environment.

Even if the agency is required to file an EA or an EIS, there now exists broader discretion for the agency to choose the EA rather than an EIS. Despite both types of reports necessitating agencies to evaluate environmental impacts, the EA is much less thorough than the EIS. For example, the EA has no requirement to consider cumulative effects, which curtails the duty to consider an action's indirect effects.[70] Originally, the effects to be considered were "direct, indirect, and cumulative," but now, agencies need only consider "reasonably foreseeable effects." Specifically, the change threatens the effects that were once considered "cumulative." Though there has never been a specific way to address cumulative impacts, the CEQ has recommended analyzing cumulative impacts in accordance with the following eight principles:

1. **Cumulative** [impacts] are caused by the aggregate of past, present, and reasonably foreseeable future actions.
2. **Cumulative** [impacts] are the total effect, including both direct and indirect [impacts], on a given resource, ecosystem, and human community of all

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actions taken, no matter who (federal, non-federal, or private) has taken the actions.
3. **Cumulative** [impacts] need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.
4. It is not practical to analyze the **cumulative** [impacts] of an action on the universe; the list of environmental [impacts] must focus on those that are truly meaningful.
5. **Cumulative** [impacts] on a given resource, ecosystem, or human community are rarely aligned with political or administrative boundaries.
6. **Cumulative** [impacts] may result from the accumulation of similar [impacts] or the synergistic interaction of different [impacts].
7. **Cumulative** [impacts] may last for many years beyond the life of the action that caused the [impact].
8. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional [impacts], based on its own time and space parameters.[71]

Exactly what effects are "reasonably foreseeable" have yet to be judicially determined.[72] Though courts may offer interpretations that favor environmental preservation, there is a stronger likelihood that courts will respect the language of the statute as amended, rather than try to interpret it as the Act had been first written. "A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA" and, thus, effects that are remote in time, geographically remote, or the product of a lengthy causal chain will generally not be considered.[73] Therefore, though the judiciary has curtailed much of the Trump Administration's efforts to ignore climate change, the federal bench will likely be unable to continue on this path without a cumulative effects analysis, as long-term impact will not be considered by federal agencies.

IV. NEPA Changes and Environmental Injustice

By restricting community participation in large-scale federal projects and dissipating requisite considerations of cumulative impacts, the Trump Administration's changes to NEPA will provoke and exacerbate harm in minority communities across the United States.

Community participation has fostered pathways to provide affected individuals and groups with a voice in federal action. Federal agencies "ought to engage the affected public and regulated community in how best to induce agencies into structuring their programs to accomplish continuous monitoring and adaptation in a manner that preserves sufficient regulatory certainty."[74] Although federal agencies are capable of conducting research, analyzing the findings, and coming to conclusions on how to best act, nothing can substitute the knowledge and experience of those who live within the community. The voices of the public are essential, as no one can speak to the needs of the community better than the community itself. Thus, cutting off community involvement will lead to harmful results.

Rather than making public participation more difficult, then, federal policy should do more to assist communities of color in efforts to address environmental injustice. To begin, the minimum public comment period time should be raised from 45 days to 90 days to allow the public a better opportunity to plan and attend hearings. Additionally, there should be meetings held both in-person and virtually to foster greater participation; when meetings are to be held virtually, it should be required that advertisements for these hearings direct individuals to locations that allow for free access to computers and WIFI, such as a local library. Third, public hearings should be held at a variety of times to ensure that all have a fair chance to participate regardless of one's work schedule, family obligations, etc.

Beyond supporting public participation, which may be especially challenging for marginalized communities to engage in, judicial review of agency decisions should prioritize consideration of environmental justice. NEPA should clarify that review of environmental justice *must* be included in NEPA reviews, and that such analysis is reviewable under the Administrative Procedure Act. Further, evidence to be reviewed by the judiciary should challenges be brought should include how much public participation occurred (time spent, how many individuals commented, etc.), and what information on the project was disclosed to the public during these gatherings and time for comment, and whether the information that was disclosed adequately reflects the consequences of the project. Courts having the authority to engage in such reviews will help ensure agency accountability, and bolster the effectiveness of public comment.

After all, how can communities that have experienced extensive racism, generational traumas, poverty, violence, and abuse at the hands of the white establishment be expected to solve systemic issues of environmental injustice without additional resources? Consider the words of Father Paul Abernathy,[75] who, in discussing community development, posed the question: "[A]fter we [people of color] have suffered so much, are we healthy enough to sustain opportu-

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nity in our community?"[76] Beyond supporting public participation, which may be especially challenging for marginalized communities to engage in, judicial review of agency decisions should prioritize consideration of environmental justice. This need not necessarily be adverse to government projects. Indeed, so long as environmental well-being may be adequately preserved, proposed projects could provide significant, economic benefit for communities of color.

NEPA's changes will also affect the Hispanic and LatinX community. The Trump Administration, prior to enacting its NEPA rollbacks, enabled the Department of Homeland Security to waive certain parts of NEPA in order to build the wall at the Southern border,[79] in addition to the circumvention of 26 regulations, including the Clean Air Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act.[80] In bypassing regulations protecting those who live along the border, the Administration showed disregard to whether those at the border have access to the necessities of life, valuing political gains over ensuring the health and well-being of American and Mexican citizens and others. This has been more than an act of disregard; it is an act of callousness targeted against Hispanic and LatinX communities.

We depend on policies like those historically advanced by NEPA to remedy the disproportionate harm caused to the environment surrounding minority communities. Thus, the changes to NEPA will only further endanger communities of color and force them to continue to carry the burden of environmental injustice. Ultimately, these changes must be reversed for the safety, well-being, and survival of communities across the country.

Additionally, by not considering cumulative results, the long-term effects of potentially harmful federal action will be dismissed. Examining cumulative effects is vital for ensuring the well-being of minority communities. We know that communities of color are disproportionately affected by environmental damage. For example, the statistics regarding Black Americans are staggering:

> Sixty-eight percent of African Americans live within 30 miles of a coal-fired power plant. Black children are nearly twice as likely to suffer from asthma, compared to the national average. People of color make up 76 percent of the population living within three miles of the 12 dirtiest coal power plants in the country, and African Americans are more likely to live in environmentally hazardous areas than any other racial demographic.[77]

In addition, scholars have argued that "policymakers embarking on highway development and redevelopment projects should engage in a systematic, comprehensive, and holistic review of how racial and ethnic groups will be impacted by the project," in order to protect minority groups from significant harm.[78] Limiting the review of NEPA reports, and no longer requiring a hard look at cumulative effects, will prevent federal agencies from engaging in such a comprehensive review, leading communities of color to face even greater harms as a result of inadequate environmental regulation.

Further, Native Americans continuously struggle against the government's adverse effects on the environment. As discussed above, pipelines, in particular, have been recent threats to the Native American community.[81] Not only do pipelines damage sacred land, they threaten to pollute and destroy the water supply for Native Americans.[82] In addition to the Trump Administration's actions in limiting public discourse overall through NEPA, state legislation has been proposed, typically by Republican lawmakers[83], targeting protests against the installment of the pipelines.[84] This is evidence of the influence and importance of hearing the voice of the community and reflects the danger of the Trump Administration's efforts to silence those who are in need of being heard.

Asian Americans[85] are also confronted with the devastating results of environmental racism. Environmental advocate Andrea Chu has explained that harmful stereotypes, such as the "model minority" myth, often push Asian Americans out of the discussion of environmental racism.[86] However, the reality is that this community faces a disproportionate burden of pollution, too — particularly, exposure to harmful toxins in the soil.[87] Chu's work has revealed that "[m]any Asian immigrant families harvest and eat produce

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from their homelands, but may find that their adopted soil is chemically toxic due to the industrialization of these lower income Asian American communities," leaving these families with harmful toxins in their gardens and, ultimately, food.[88] Additionally, like those in the African American and LatinX communities, "Asians and Pacific Islanders also live near Superfund sites and factories that spew thousands of tons of toxins into the air,"[89] which leaves them vulnerable.

Ultimately, communities of color already face significant harm because those in power, including the federal government, fail to care for our environment by considering the consequences of their actions and planning with the health of the community and Earth in mind. These systemic issues lead to irreversible damages to the mind and body. We depend on policies like those historically advanced by NEPA to remedy the disproportionate harm caused to the environment surrounding minority communities. Thus, the changes to NEPA will only further endanger communities of color and force them to continue to carry the burden of environmental injustice. Ultimately, these changes must be reversed for the safety, well-being, and survival of communities across the country.

V. NEPA's Future

For decades, NEPA has proclaimed a two-fold purpose: to work towards a cleaner environment and ensure environmental justice. The changes brought forth by the Trump Administration, however, threaten to destroy key elements of what makes NEPA effective. By loosening guidelines for agencies, the new NEPA closes the door on the community and restricts those affected by major federal projects from having a voice in how those projects should or should not alter the community. Looking forward, President Biden has already taken some remedial steps by revoking Executive Order 13807, which imposed 2-year deadlines on EIS reports,[90] and Executive Order 13783,[91] which eliminated CEQ's guidance on greenhouse gas emissions and directed federal agencies to rescind parts of their review that impeded energy production, as well as implementing Executive Order 13990, which states:

> In light of the alleged legal deficiencies underlying the program, including the inadequacy of the environmental review required by the National Environmental Policy Act, the Secretary of the Interior shall, as appropriate and consistent with applicable law, place a temporary moratorium on all activities of the Federal Government relating to the implementation of the Coastal Plain Oil and Gas Leasing Program … The Secretary shall review the program and … conduct a new, comprehensive analysis of the potential environmental impacts of the oil and gas program.[92]

Additionally, President Biden has continued to promote environmental justice efforts in his Infrastructure Plan[93] through the establishment of Justice40, which promises that 40 percent of the overall benefits from Federal investments in climate and clean energy will be directed to disadvantaged communities.[94] Only time will tell what the effects of the Infrastructure Plan will have on environmental justice, but environmentalists[95] seem hopeful that these are positive steps to ensuring a clean environment, getting us all the closer to establishing true harmony between us and our environment.

Note

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