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NEPA AND ENVIRONMENTAL JUSTICE: INTEGRATION, IMPLEMENTATION, AND JUDICIAL REVIEW

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Abstract: The purpose of the National Environmental Policy Act (NEPA) is to assure “for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” a goal that is essential to environmental justice. Although NEPA provides the structure for federal environmental decisionmaking, is it effective as a tool for addressing environmental justice concerns? This Essay addresses NEPA’s limitations and potential for this purpose, and assesses the role of case law and judicial review in shaping this integrative process. To do so, it considers the environmental justice implications of NEPA’s structural gaps—including exemptions, categorical exclusions, and so-called “functional equivalents”—and evaluates judicial review of agencies’ environmental justice analyses to date.

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INTRODUCTION

Environmental justice¹ formally entered the federal lexicon in 1994 when President Clinton signed an Executive Order addressing “Environmental Justice in Minority and Low-Income Populations.”² The Order was an acknowledgment that exposure to environmental hazards is related to race and income levels.³ It mandated federal agencies to develop strategies for “identifying and addressing . . . [the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations”⁴ As a result, federal

¹ There is no fixed definition of environmental justice. According to the Environmental Protection Agency (EPA):

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

EPA, Environmental Justice, <http://www.epa.gov/compliance/environmentaljustice> (last visited Apr. 11, 2006). For alternative formulations of the term, see Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, 10,681 (2000); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 96 (2003); Mariá Ramirez Fisher, Book Note, *On the Road from Environmental Racism to Environmental Justice*, 4 VILL. ENVTL. L.J. 449, 449–52 (1994); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839–40 (1992).

² Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), *amended by* Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995). For a thorough discussion of the Order, see generally Bradford C. Mank, *Executive Order 12,898*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 103, 103 (Michael B. Gerrard ed., 1999) [hereinafter *LAW OF ENVIRONMENTAL JUSTICE*].

The development of the environmental justice movement that prompted President Clinton’s Executive Order has been well documented. See Bunyan Bryant, *History and Issues of the Environmental Justice Movement*, in *OUR BACKYARD: A QUEST FOR ENVIRONMENTAL JUSTICE* 3, 3 (Gerald R. Visgilio & Diana M. Whitelaw eds., 2003); Robert D. Bullard, *Environmental Justice for All*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* 3, 3 (Robert D. Bullard ed., 1994); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 213–22 (1994). See generally LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001).

³ See Mank, *supra* note 2, at 103.

⁴ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7629. (requiring “each Federal agency [to] make achieving environmental justice part of its mission by identifying and addressing, as ap-

agencies took up the task of integrating the concern for environmental justice into their decisionmaking procedures, though the Order did not provide a private cause of action to enforce its mandates.⁵ An obvious place to inject this new consideration was into agencies' preexisting analytic frameworks for implementing the National Environmental Policy Act of 1969 (NEPA).⁶ NEPA has long required federal agencies to assess the environmental impacts of proposed major federal actions and their alternatives as part of its goal of encouraging "productive and enjoyable harmony" between human activities and the environment.⁷ In 1997, the Council on Environmental Quality (CEQ) issued guidance to assist the integration of environmental justice into NEPA analyses.⁸ Other agencies, such as the Environmental Protection Agency (EPA), developed their own tailored guidance documents, building upon the CEQ foundation.⁹

A review of the years following these developments raises the question: How effective is NEPA as a tool for addressing environmental justice concerns? This Essay considers NEPA's limitations and potential for this purpose, and assesses the role of case law and judicial review in shaping this integrative process. Part I provides a brief overview of NEPA and the environmental justice guidance issued by

propriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations").

⁵ See *id.*; Mank, *supra* note 2, at 107–23. The Order is clear in its language:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7632–33.

⁶ 42 U.S.C. §§ 4321–4347 (2000).

⁷ *Id.* §§ 4321, 4332.

⁸ COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 1 (1997), available at <http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf>. The CEQ is a cabinet-level council created by NEPA, housed in the Executive Office of the President, and responsible for promulgating NEPA's implementing regulations. 42 U.S.C. §§ 4342–4344. The regulations specifically state that the CEQ "may provide further guidance concerning NEPA and its procedures . . . which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations." 40 C.F.R. § 1506.7 (2005).

⁹ EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES § 1.0 (Apr. 1998), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf [hereinafter EPA GUIDANCE].

CEQ and EPA. Part II addresses the environmental justice implications of NEPA's structural gaps, including exemptions, categorical exclusions, and so-called functional equivalents. Part III evaluates judicial review of agencies' environmental justice analyses to date.

I. NEPA AND THE GUIDANCE

Under NEPA, federal agencies must prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."¹⁰ The definition of "major Federal actions" includes: federal activities, such as establishing government policies and regulations; undertaking or authorizing federal projects, issuing federal permits, activities "which are potentially subject to Federal control and responsibility," for example, through the dispensation of federal funds; and an agency's "failure to act" when such omission is reviewable by courts.¹¹ NEPA regulations provide for a preliminary Environmental Assessment (EA) where the significance of the environmental impact of a given action is unclear.¹² By preparing an EA, an agency should be able to determine whether the potential for significant environmental impact warrants a full-scale EIS or whether it can safely declare a Finding of No Significant Impact (FONSI) and conduct no further environmental review.¹³ The significance of an action's impacts will depend upon intensity as well as context—there must be "'a reasonably close causal relationship' between the environmental effect and the alleged cause."¹⁴ NEPA requires that these inquiries be conducted "at the earliest possible time" in an agency's planning process to ensure that the impacts and alternatives considered can truly inform decisionmaking.¹⁵

When an EIS is necessary, NEPA regulations direct agencies to consider "all reasonable alternatives" to the proposed action, includ-

¹⁰ 42 U.S.C. § 4332(C) (2000).

¹¹ 40 C.F.R. § 1508.18 (2005). However, funding received solely as general revenue sharing funds does not supply the requisite control necessary to trigger NEPA. *Id.* For an argument that courts should interpret major federal action more broadly or that NEPA should be revised to expand its reach, see Browne C. Lewis, *What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 327, 361–68 (2005).

¹² 40 C.F.R. § 1501.3.

¹³ *Id.* § 1501.4.

¹⁴ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); see 40 C.F.R. § 1508.27.

¹⁵ 40 C.F.R. § 1501.2.

ing the alternative of “no action,” and explore possible mitigation strategies.¹⁶ The scope of the analysis must extend to direct, indirect, and cumulative impacts on health, as well as ecological, aesthetic, historical, cultural, economic, and social resources.¹⁷ However, economic and social effects can only trigger an EIS to the extent that they are interrelated with the physical environmental effects of an action.¹⁸ When a draft EIS is completed, the agency must solicit and respond to comments from the public—specifically and affirmatively from “those persons or organizations who may be interested or affected”—and other relevant federal, state, or local agencies.¹⁹ In addition, agencies must “make diligent efforts to involve the public” by way of notification, public disclosure of comments and underlying documents, and public hearings or meetings.²⁰ The final EIS must include the agency’s responses to comments and is followed by a record of decision selecting one of the alternatives.²¹ Importantly, NEPA contains no substantive requirement that agencies select the most environmentally sensitive alternative among those considered.²² Thus, NEPA is “essentially procedural,” its goal is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment,” without requiring them to do so.²³ This is the fundamental limitation of NEPA as a tool for environmental justice and other forms of environmental protection.²⁴ However, NEPA is widely regarded as an invaluable, if indirect, protective measure because it makes environmental considerations a central part of federal decisionmaking and opens the process to public dialogue and scrutiny.²⁵

¹⁶ *Id.* § 1502.14.

¹⁷ *Id.* §§ 1508.25, 1508.14, 1508.8. For the definition of direct and indirect effects, see *id.* § 1508.8. Impacts and effects are used synonymously. *Id.* Cumulative impacts refer to the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

¹⁸ *Id.* § 1508.14.

¹⁹ *Id.* § 1503.1.

²⁰ *Id.* § 1506.6. EPA regulations require at least one public meeting on all draft EISs. *Id.* § 6.400(c).

²¹ 40 C.F.R. §§ 1502.9, 1505.2.

²² *See id.* § 1505.2.

²³ *Id.* § 1500.1(c); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *see* COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 10.

²⁴ *See* COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 10.

²⁵ *See* 40 C.F.R. §§ 1500.1(c), 1506.6.

The Council on Environmental Policy (CEQ) Guidance “interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898.”²⁶ 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, and aesthetically and culturally pleasing surroundings.”²⁷ Environmental justice provides the practical and conceptual specificity needed to lend content to this otherwise abstract ideal.²⁸ To this end, the CEQ Guidance sets forth several core principles that should supplement agencies’ existing NEPA analyses: (1) consideration of the demographic composition of the affected area; (2) review of health data addressing multiple or cumulative exposure to environmental hazards; (3) recognition of social, economic and other “factors that may amplify the . . . environmental effects of the proposed agency action”; (4) development of strategies for overcoming “barriers to meaningful participation”; and (5) inclusion of “diverse constituencies” from affected communities into the NEPA process.²⁹ Nevertheless, the CEQ Guidelines remind agencies that under NEPA, identifying a disproportionate or adverse impact will “not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory.”³⁰

The EPA Guidance is significantly more detailed, providing definitions for key terms—such as “minority population”—and a long list of demographic, economic, historical, and other factors for analysts to make part of their NEPA considerations.³¹ It identifies “three vantage points” from which to approach an environmental justice analysis: “1) whether there exists a potential for disproportionate risk; 2) whether communities have been sufficiently involved in the decisionmaking process; and 3) whether communities currently suffer, or have historically suffered, from environmental and health risks or hazards.”³² This focus on disparate impact, along with the section describing “methods and tools for identifying and assessing disproportionately high and adverse effects,” sets the EPA Guidance apart from

²⁶ COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 21.

²⁷ *Id.* at 7 (emphasis added) (quoting 42 U.S.C. § 4331(b)(2) (1994)).

²⁸ *See id.* at 8–10.

²⁹ *Id.* at 8–9.

³⁰ *Id.* at 10.

³¹ *See* EPA GUIDANCE, *supra* note 9, §§ 2.0–2.3.

³² *Id.* § 2.3.

CEQ Guidance.³³ The EPA Guidance specifically calls for environmental justice concerns to be identified and addressed in both EA and EIS documents.³⁴

To the extent that the NEPA process leads to better federal decisionmaking, raising and investigating environmental justice issues is a positive development.³⁵ Against the backdrop of NEPA's inherent limitation in being procedural rather than substantive, a desirable benefit is that analysts and decisionmakers will recognize and reject proposals that will result in disproportionate adverse impacts in low-income and minority areas.³⁶ The political scrutiny that agencies can expect whenever a project touches on environmental justice will inevitably serve a similar protective function.³⁷ Through increased efforts and improved strategies for public outreach, investigation of environmental justice issues will facilitate political scrutiny at the local level.³⁸ NEPA does not remedy past injustices, but rather has the potential to help agencies avoid existing patterns of inequality.³⁹ By addressing environmental justice concerns, federal agencies better serve NEPA's "twin aims" of ensuring that agencies "consider every significant aspect of the environmental impact of a proposed action" and "inform the public that it has indeed considered environmental concerns in its decisionmaking process."⁴⁰

³³ *Id.* § 5.0.

³⁴ *Id.* § 3.1.

³⁵ Cheryl A. Calloway & Karen L. Ferguson, *The "Human Environment" Requirements of the National Environmental Policy Act: Implications for Environmental Justice*, 1997 DETROIT C.L. MICH. ST. U. L. REV. 1147, 1174 ("Consideration of environmental justice issues will help ensure that all Americans will have the opportunity to live in sustainable communities . . ."). *But see* Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995 (1992) (expressing skepticism about the usefulness of the NEPA process overall, given that agencies frequently proceed with plans despite adverse impacts).

³⁶ *See* Calloway & Ferguson, *supra* note 35, at 1173.

³⁷ *See id.* at 1174.

³⁸ *See* COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 13; EPA GUIDANCE, *supra* note 9, §§ 4.0–4.2; Sheila Foster, *Impact Assessment*, in *LAW OF ENVIRONMENTAL JUSTICE*, *supra* note 2, at 256, 285; *see also* Stephen M. Johnson, *NEPA and SEPA'S in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 567–68 (1997).

³⁹ *See* 40 C.F.R. §§ 1501.1–.2 (2005).

⁴⁰ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)).

II. GAPS IN NEPA

Even if it is assumed that agencies will fully integrate environmental justice into NEPA, its usefulness is limited by express and judicially recognized exceptions to NEPA's requirements, as well as structural gaps within the statutory and regulatory framework.⁴¹

A. Public Participation

At its best, public participation can improve government decisionmaking by increasing government accountability, educating officials about the local impacts of their decisions, bringing the full range of stakeholder viewpoints into dialogue, and shaping end results to better serve the public interest.⁴² Unfortunately, the timing and structure of public participation under NEPA raise doubts about whether environmental justice concerns will be brought to bear on agencies' substantive decisionmaking.⁴³ This is problematic because public participation is important to agencies' understanding of environmental justice issues, and because CEQ and EPA guidance rely heavily on it as a method for addressing inequity.⁴⁴

I. Environmental Assessments

Determining whether NEPA requires an EIS for a proposed action may be the most crucial step in the NEPA process.⁴⁵ Through the EA, an agency decides whether or not the action will significantly affect the environment; the agency will go forward with an EIS or issue a FONSI.⁴⁶ NEPA's implementation underscores the importance of the EA.⁴⁷ As Professor Stephen M. Johnson notes, "approximately ninety-nine percent of the actions reviewed by agencies under NEPA each year are reviewed in the context of an EA, rather than an EIS."⁴⁸ Although NEPA regulations call on agencies to involve the public in preparing EAs, public participation is only required by NEPA *after* the

⁴¹ See *Anchorage v. United States*, 980 F.2d 1320, 1328 (9th Cir. 1992); *Webb v. Gorsuch*, 699 F.2d 157, 159-60 (4th Cir. 1983).

⁴² See generally Sheila Foster, *Public Participation*, in *LAW OF ENVIRONMENTAL JUSTICE*, *supra* note 2, at 185, 185-229.

⁴³ See *id.* at 197.

⁴⁴ See COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 13; EPA GUIDANCE, *supra* note 9, §§ 4.0-4.2; Foster, *supra* note 42, at 185.

⁴⁵ See Foster, *supra* note 42, at 196-97.

⁴⁶ *Id.* at 196.

⁴⁷ *Id.*

⁴⁸ Johnson, *supra* note 38, at 575; see also Foster, *supra* note 38, at 292 n.35.

EA is completed, through the notice and comment provisions for an EIS.⁴⁹ Thus, fixed opportunities for public involvement become available only if an EA reveals a potentially significant impact on the environment and the agency proceeds to scope and draft an EIS.⁵⁰ However, the EPA Guidance acknowledges that in practice, “there has been limited public involvement before and during EA preparation by EPA unless there is a question of significance . . . or some particular public interest.”⁵¹ From an environmental justice perspective, this is troubling, because if the agency issues a FONSI without public involvement in its EA process, no meaningful opportunity remains.⁵² FONSIs are made public once complete, but no public decisionmaking occurs thereafter.⁵³ As was clear in *Society Hill Towers Owners’ Ass’n v. Rendell*, this fact is not lost on the public.⁵⁴ In *Rendell*, residents of a Philadelphia neighborhood, the proposed site of a city-sponsored hotel and parking garage construction project, claimed that the public hearings in which they were allowed to review the FONSI “were little more than a charade.”⁵⁵ It was clear to the residents that “the project was a ‘done deal’ before public hearing was held.”⁵⁶

2. Notice and Comment

After an agency decides to prepare an EIS, CEQ regulations require that a notice of intent be published in the Federal Register before the agency begins “scoping” the issues it plans to address.⁵⁷ Once it has completed a draft EIS, the agency must solicit comments from the public, “affirmatively soliciting comments from those persons or

⁴⁹ See 40 C.F.R. § 1506.6(a) (2005).

⁵⁰ Foster, *supra* note 42, at 196.

⁵¹ EPA GUIDANCE, *supra* note 9, § 4.1; see also *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 174 (3d Cir. 2000) (noting that “public hearings may or may not be required during an EA”).

⁵² See Foster, *supra* note 42, at 196.

⁵³ See *id.*

⁵⁴ 210 F.3d at 180.

⁵⁵ *Id.* at 179.

⁵⁶ *Id.* The residents cited statements by the Executive Director of the City Planning Committee and the Vice President of the Philadelphia Industrial Development Corporation, each referring to the project as “a done deal.” *Id.* However, the court, after stating that “we understand why the Residents might feel that their opposition fell upon deaf ears even though they were finally able to voice it,” decided that the “decision to forego an EIS was [not] ‘arbitrary and capricious’ or ‘without observance of procedure required by law’ under the [Administrative Procedures Act].” *Id.* at 180.

⁵⁷ 40 C.F.R. § 1501.7 (2005).

organizations who may be interested or affected.”⁵⁸ However, given the limited amount of public participation that takes place at the EA stage, these opportunities come late in the decisionmaking process.⁵⁹ Notice and comment offers an opportunity for the public to learn and express opinions about a proposed project, and for the agency to see which alternatives are politically sensitive; there is only a negligible chance that an agency will choose the no action alternative at this stage.⁶⁰ Naturally, an agency will not be inclined to let the time, effort, and expense that went into a draft EIS go to waste because the investment and institutional momentum are powerful forces behind the project.⁶¹ As one commentator has observed, “the agency usually ends up defending its plan instead of taking citizens’ comments and actually formulating a plan based on the citizen concerns. . . . [T]here is no way for the agency and the public to develop any sort of meaningful discourse.”⁶²

Therefore, the value of public involvement in NEPA is significantly limited by the structure and timing of its public participation provisions.⁶³ The minimal outreach at the crucial EA stage, combined with a project’s momentum by the notice and comment stage, creates an impression that the public is appeased rather than an actual part of the decisionmaking process.⁶⁴ This is particularly limiting in the environmental justice context, in which agency expertise and familiarity have historically lacked depth and mistrust of government is common.⁶⁵ The CEQ Guidance documents recognize the inadequacy of typical government outreach methods and recommend a range of new approaches that, if used, will be a step in the right direc-

⁵⁸ *Id.* § 1503.1(a)(4).

⁵⁹ EPA GUIDANCE, *supra* note 9, § 4.1; Foster, *supra* note 42, at 196.

⁶⁰ See Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENVTL. L. & LITIG. 207, 213 (2002).

⁶¹ *See id.*

⁶² *Id.* at 213–14 (citations omitted).

⁶³ See Foster, *supra* note 42, at 196–97 (noting that public participation is only mandatory during the scoping of the EIS, after the EA has been prepared).

⁶⁴ See, e.g., *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 183 (3d Cir. 2000) (discussing that the City of Philadelphia dismissed the residents’ concerns for nonlegitimate reasons, such as costliness).

⁶⁵ See Foster, *supra* note 42, at 189. See generally Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002).

tion.⁶⁶ Nevertheless, it is important to understand the limitations of the overall structure in which these approaches will be applied.⁶⁷

B. State Programs Implementing Federal Environmental Statutes

NEPA's reach is limited under environmental statutes that states may elect to administer with EPA approval, such as the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA),⁶⁸ Resource Conservation and Recovery Act (RCRA),⁶⁹ or the Clean Air Act (CAA).⁷⁰ In effect, these statutes allow delegations of federal authority to the states; however, as Johnson notes, when a state agency issues a permit under such a program, "that action is probably not a federal action for NEPA purposes."⁷¹ Likewise, even where EPA may be authorized to review state permitting decisions under such programs, the simple act of review does not indicate the degree of federal control or responsibility likely to trigger NEPA.⁷²

Sixteen states have adopted their own versions of NEPA—commonly referred to as SEPA—and many have incorporated environmental justice within those frameworks.⁷³ There is no similar parallel for any of the remaining thirty-four states that administer federal environmental requirements.⁷⁴ This does not imply that states without SEPA have done nothing to address environmental injustice in decisionmaking, though their initiatives are inevitably fragmented.⁷⁵ One key benefit of NEPA or a state equivalent is that it applies to the full spectrum of government agencies—notwithstanding how their missions may vary—whenever their activities significantly affect the environ-

⁶⁶ See COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 13; EPA GUIDANCE, *supra* note 9, §§ 4.0–2.

⁶⁷ See Foster, *supra* note 42, at 196.

⁶⁸ 33 U.S.C. §§ 1251–1387 (2000).

⁶⁹ 42 U.S.C. §§ 6901–6992k (2000).

⁷⁰ 42 U.S.C. §§ 7401–7671q (2000).

⁷¹ Johnson, *supra* note 38, at 595 n.126.

⁷² *Id.*

⁷³ See Rechtschaffen, *supra* note 1, at 120; see also Johnson, *supra* note 38, at 566–67 (commenting that a number of SEPA are stronger than NEPA and that NEPA would benefit from emulating the states' innovations).

⁷⁴ See Rechtschaffen, *supra* note 1, at 120; see also Johnson, *supra* note 38, at 597–99 nn.135–41.

⁷⁵ See generally ABA SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES ET AL., ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY-STATE SURVEY OF LEGISLATION, POLICIES, AND INITIATIVES (Steven Bonorris ed., 2004) (documenting state efforts to integrate environmental justice into policymaking).

ment.⁷⁶ Where neither NEPA nor an equivalent state environmental review applies, it is less likely that environmental justice will consistently be a part of official decisionmaking.⁷⁷

C. Statutory Exemptions

The CWA and the CAA explicitly exempt EPA from NEPA compliance when acting under the authority of those laws.⁷⁸ Section 511 of the CWA provides that “no action of the [EPA] Administrator taken pursuant to [the Act] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”⁷⁹ Similarly, the Energy Supply and Environmental Coordination Act of 1974 provides that “[n]o action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”⁸⁰

With respect to § 511 of the CWA, there has been some debate as to whether the section achieves a complete exemption from NEPA’s requirements or a partial exemption excusing only the preparation of an EIS, while retaining the consideration of alternatives.⁸¹ In the words of the Ninth Circuit Court of Appeals in *Anchorage v. United States*:

[D]etermining the precise scope of section 511’s exemption places this panel squarely on the horns of a dilemma. A complete exemption from NEPA requirements would enable EPA to act more expeditiously in fulfilling its purpose of protecting the environment. . . . However, “it cannot be assumed that EPA will always be the good guy.” Indeed, some have

⁷⁶ See Johnson, *supra* note 38, at 570.

⁷⁷ See *id.* at 568–69.

⁷⁸ EPA GUIDANCE, *supra* note 9, § 1.2.1. Section 309 of the CAA requires EPA to “review and comment in writing on the environmental impact of any matter relating to duties and responsibilities” arising from a range of federal sources, such as legislation, proposed regulations, and certain federal projects. Clean Air Act § 309, 42 U.S.C. § 7609(a) (2000). The Executive Order specifically directed EPA to use § 309 review to ensure that agencies analyze environmental justice issues; however, the EPA Environmental Justice Guidance expressly does not apply to that review. EPA GUIDANCE, *supra* note 9, § 1.2.2.

⁷⁹ Federal Water Pollution Control Act § 511, 33 U.S.C. § 1371(c) (2000).

⁸⁰ 15 U.S.C. § 793(c)(1) (2000) (internal citation omitted).

⁸¹ See *Anchorage v. United States*, 980 F.2d 1320, 1328 (9th Cir. 1992) (refusing to decide the question as a matter of law); *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983) (suggesting that EPA is excused from considering alternative actions when it is not required to prepare an EIS).

suggested that a complete exemption from NEPA requirements for EPA will result in no one policing the police.⁸²

Under either approach, the exemption may eliminate the environmental justice review that NEPA might otherwise compel.⁸³ Neither the CWA nor the CAA matches NEPA's full spectrum of considerations or emphasis on public participation.⁸⁴ This need not imply that environmental justice will be ignored in both the CWA and the CAA contexts; but, by comparison, its integration into permitting and application review will be haphazard and less reliable.⁸⁵

D. "Functional Equivalents": Judicial Exemptions

Courts have long held that if a statute contains the "functional equivalent" of NEPA's review process, a NEPA review would be redundant and unnecessary.⁸⁶ The first case to recognize this concept was *Environmental Defense Fund, Inc. v. EPA*.⁸⁷ In that case, the D.C. Circuit Court of Appeals held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) contained review provisions functionally equivalent to NEPA, thereby relieving EPA of dual responsibilities under both statutes.⁸⁸ Similarly, the Eighth Circuit Court of Appeals held that no EA or EIS was required before EPA declared a three thousand acre aq-

⁸² 980 F.2d at 1328 (quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973)). Here, the court read § 511 broadly to exempt a memorandum of agreement between EPA and the Army Corps of Engineers, finding that participation of an agency other than EPA did not affect the scope of the exemption. *Id.* Such memoranda could apply to a wide range of water-dependent projects with environmental impacts that raise environmental justice concerns. *See id.* (discussing the broadness of § 511's exemption). Exemptions have been justified in much the same way as functional equivalents as a means of avoiding duplication of effort. *See id.* at 1329; *infra* Part II.D. As the *Anchorage* court noted, § 404 of the CWA required EPA "to consider many of the same things that NEPA would require . . ." 980 F.2d at 1329. In that case, the court also supported its conclusion by noting that "the Corps must perform an EIS and comply with the other requirements of NEPA when issuing a permit pursuant to the guidelines" even if EPA did not. *Id.*

⁸³ *See Anchorage*, 980 F.2d at 1328.

⁸⁴ *See* EPA GUIDANCE, *supra* note 9, § 1.2.1.

⁸⁵ *See id.*

⁸⁶ *See* *Env'tl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973).

⁸⁷ *Id.* at 1257; *see also* *Merrell v. Thomas*, 807 F.2d 776, 778-79 (9th Cir. 1986) (holding NEPA inapplicable where Federal Insecticide, Fungicide, and Rodenticide Act provided more specific pesticide registration requirements). *But see* *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 & n.7 (3d Cir. 1989) (rejecting Nuclear Regulatory Commission's assertion that a finding of "adequate protection of public health and safety" precluded the need for further consideration under NEPA).

⁸⁸ *Env'tl. Def. Fund*, 489 F.2d at 1254-57.

uifer exempt from the Safe Drinking Water Act (SWDA) standards because SWDA procedures and analysis “covered the core NEPA concerns.”⁸⁹

Although EPA has considered environmental justice issues when acting under the authority of these statutes, the NEPA review approach outlined in the CEQ Guidance will not apply.⁹⁰ In addition, while the analytical components of environmental impact assessment under other statutes may be similar, not all “functionally equivalent” statutes require consideration of key NEPA factors relevant to environmental justice.⁹¹ For example, environmental justice advocates doubt the purported functional equivalence between NEPA and RCRA, under which EPA issues operating permits to hazardous waste facilities.⁹² In *Alabama ex rel. Siegelman v. EPA*, the state of Alabama and environmental organizations challenged EPA for issuing a permit for “the nation’s largest commercial hazardous waste management facility” without complying with NEPA.⁹³ The Eleventh Circuit Court of Appeals held that although “RCRA does not require EPA to consider every point the agency would have to consider in preparing a formal EIS under NEPA,” RCRA was functionally equivalent and the “more specific counterpart of NEPA.”⁹⁴ The court explained that the rationale for “limiting the sweep of NEPA stems, in part, from the traditional view that specific statutes prevail over general statutes dealing with the same basic subjects.”⁹⁵ However, as with the statutory exemptions for the CAA and the CWA, there are key differences between RCRA’s permitting procedures and NEPA.⁹⁶ For example, unlike NEPA, RCRA does not require consideration of socioeconomic impacts or indirect effects of its actions, “even when related to physical environmental impacts.”⁹⁷ Furthermore, RCRA does

⁸⁹ *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 868–69, 872 (8th Cir. 1991) (affirming EPA’s approval of the exemption which was “sought to permit injection-process mining of uranium ore deposits located in the aquifer”).

⁹⁰ See COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 16–17; Foster, *supra* note 38, at 278–81 (discussing impact assessment under RCRA and SWDA).

⁹¹ See *Envntl. Def. Fund*, 489 F.2d at 1256; Foster, *supra* note 38, at 278–79; Johnson, *supra* note 38, at 589–90.

⁹² See Johnson, *supra* note 38, at 589–93.

⁹³ 911 F.2d 499, 504 (11th Cir. 1990).

⁹⁴ *Id.* at 504–05. However, the fact that “some overlap” exists between the considerations required under NEPA and another statute is not enough to support functional equivalency. *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n*, 869 F.2d 719, 730 (3d Cir. 1989).

⁹⁵ *Siegelman*, 911 F.2d at 504.

⁹⁶ See Foster, *supra* note 38, at 278.

⁹⁷ See *id.*; Johnson, *supra* note 38, at 589–90 (criticizing *Siegelman* as “a poorly reasoned decision”).

not require consideration of alternatives and its public participation provisions are weaker than NEPA's.⁹⁸

Since most states now administer RCRA, the more significant limit to NEPA with regard to waste facility permitting is that these actions are not "major *federal* actions."⁹⁹ However, the comparison demonstrates the potential weakness of the functional equivalency doctrine when applied to statutes that may appear similar to NEPA, but have substantive differences with environmental justice implications.¹⁰⁰ Professor Johnson advocates revising NEPA regulations to improve upon case law, claiming that to be functionally equivalent, the alternative decision-making process must consider the same factors as NEPA, "including socioeconomic impacts, mitigation, and alternatives. The regulations should further provide . . . opportunities for public participation that are substantially similar to those required by NEPA."¹⁰¹

E. *Categorical Exclusions*

The CEQ regulations authorize each federal agency to define categories of actions within its jurisdiction "which do not individually or cumulatively have a significant effect on the human environment" to be wholly excluded from the requirements of NEPA.¹⁰² The efficiency value of this provision is obvious—generally, actions taken within a categorical exclusion will not warrant the time and expense of environmental analyses.¹⁰³ Although these technical gaps in NEPA are unlikely to harm the environment or implicate environmental justice, the possibility should not be ruled out. For example, it may be appropriate for the Secretary of the Treasury to create a categorical exclusion for the clarification of tax rules, though expansion of a tax credit for use of gasoline-ethanol blends was challenged under NEPA in *Florida Audubon Society v. Bentsen*.¹⁰⁴ Florida Audubon Society argued that an EIS should have been prepared because an incentive to increase ethanol production would lead to increased agricultural use

⁹⁸ See Foster, *supra* note 38, at 278–79.

⁹⁹ Johnson, *supra* note 38, at 595 n.126; see Foster, *supra* note 38, at 279.

¹⁰⁰ See Johnson, *supra* note 38, at 596.

¹⁰¹ *Id.*

¹⁰² 40 C.F.R. §§ 1500.4(p), 1508.4 (2005); see *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1504 (D.C. Cir. 1994) (construing 40 C.F.R. § 1508.4).

¹⁰³ See 40 C.F.R. §§ 1500.4(p), 1508.4.

¹⁰⁴ 94 F.3d 658, 662 (D.C. Cir. 1996); see Calloway & Ferguson, *supra* note 35, at 1163.

of forest lands.¹⁰⁵ In *Friends of Pioneer Street Bridge Corp. v. Federal Highway Administration*, residents of Montpelier, Vermont unsuccessfully challenged the Federal Highway Administration's categorical NEPA exclusion of a bridge replacement project.¹⁰⁶ The proposed action involved removing a historic bridge from the site, moving it to a new location, and replacing it with a new bridge, which the residents claimed would increase traffic, alter development patterns, and raise environmental justice concerns.¹⁰⁷

Although these cases are rare, if a categorical exclusion applies to a proposed federal action, it may be difficult for environmental advocates to convince a court to require environmental review of potential impacts. Courts afford "substantial deference" to agency decisions to categorically exclude projects from NEPA's requirements.¹⁰⁸

F. Statutory and Other Legal Conflicts

When there is "clear and unavoidable conflict" between NEPA and other statutory authority, it is NEPA that gives way because "NEPA was not intended to repeal by implication any other statute."¹⁰⁹ Therefore, agencies are excused from compliance with NEPA under such circumstances.¹¹⁰ To the extent that the agency in question has not adopted environmental justice guidelines or regulations, any environmental justice review that might have been performed under NEPA is eliminated.¹¹¹

Courts have been hesitant to recognize such conflicts, however. For example, in *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, the Third Circuit Court of Appeals held that the Atomic Energy Act could not be read to "preclude application of NEPA by implication."¹¹² Rather, the court was clear that "compliance with NEPA is required unless specifically excluded by statute or existing law makes

¹⁰⁵ See *Bentsen*, 94 F.3d at 662. The merits of this claim were never considered because the court ruled that plaintiffs lacked standing. *Id.* at 665–69 (explaining the determination of "standing in an EIS matter").

¹⁰⁶ 150 F. Supp. 2d 637, 651 (D. Vt. 2001).

¹⁰⁷ *Id.* at 651–53.

¹⁰⁸ *City of New York v. Interstate Commerce Comm'n*, 4 F.3d 181, 186 (2d Cir. 1993).

¹⁰⁹ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) (quoting *United States v. SCRAP*, 412 U.S. 669, 694 (1973)).

¹¹⁰ See *id.* at 791.

¹¹¹ See *Johnson*, *supra* note 38, at 593.

¹¹² 869 F.2d 719, 729 (3d Cir. 1989).

compliance impossible.”¹¹³ Only where statutory provisions “necessarily collide with NEPA” will an agency implementing the competing statute be relieved of the NEPA duty to assess environmental impacts.¹¹⁴ Similarly, in *Davis v. Morton*, the Tenth Circuit Court of Appeals declined to find a statutory conflict between NEPA and 25 U.S.C. § 415—a statute regulating leases on Indian lands—holding that “unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force.”¹¹⁵

NEPA has given way to other statutes and will likely do so again in the future, with the probable result of limiting review of environmental justice concerns.¹¹⁶ For example, in *Flint Ridge Development Co. v. Scenic Rivers Ass’n*, the U.S. Supreme Court found a conflict between NEPA and the Interstate Land Sales Full Disclosure Act, which required the Secretary of Housing and Urban Development to allow statements of record to take effect within thirty days of being filed.¹¹⁷ Because it would be impossible for an EIS to be completed in such a short period of time, the Disclosure Act superceded NEPA’s requirements.¹¹⁸

In addition, other legal conflicts may relieve an agency of NEPA compliance if the conflict would render NEPA review meaningless.¹¹⁹ In *Department of Transportation v. Public Citizen*, the Court held that NEPA did not compel the Federal Motor Carrier Safety Administration (FMCSA) to consider the environmental effects of its rules for lifting a moratorium on certain cross-border Mexican trucking operations.¹²⁰ The Court reasoned that because the President ordered the moratorium lifted pursuant to the North American Free Trade Agreement (NAFTA), FMCSA had no authority “categorically to ex-

¹¹³ *Id.* (finding that “[t]he directive to agencies to minimize all unnecessary adverse environmental impact obtains except when specifically excluded by statute or when existing law makes compliance with NEPA impossible” (citing *Pub. Serv. Co. v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978))).

¹¹⁴ *Id.* at 730 (quoting *Pub. Serv. Co.*, 582 F.2d at 81).

¹¹⁵ 469 F.2d 593, 598 (10th Cir. 1972); *see also* *Catron County Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996) (holding that the Endangered Species Act’s critical habitat designation provision does not conflict with NEPA); *cf.* *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 841 (6th Cir. 1981) (holding that NEPA conflicts with the Endangered Species Act provisions for listing species as threatened or endangered).

¹¹⁶ *See* *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 791–92 (1976); *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504–05 (11th Cir. 1990).

¹¹⁷ 426 U.S. at 788–92.

¹¹⁸ *See id.* at 790.

¹¹⁹ *See* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 766 (2004).

¹²⁰ *Id.* at 773.

clude Mexican motor carriers from operating within the United States.”¹²¹ Thus, even if FMCSA were to comply fully with NEPA, other statutory obligations would be violated if it were to refuse to authorize the increased cross-border activity based on environmental impacts discerned in an EIS: “FMCSA simply lacks the power to act on whatever information might be contained in the EIS.”¹²² According to the Court, “[i]t would not . . . satisfy NEPA’s ‘rule of reason’ to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform.”¹²³ In other words, FMCSA’s action was not “the legally relevant cause of the entry of the Mexican trucks”; rather, it was “the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA’s discretion.”¹²⁴

Whatever the effects of a federal action may be, “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA”¹²⁵ This case is important from an environmental justice perspective, since no one questioned that air quality degradation would result from increased cross-border activity of highly polluting Mexican trucks, especially in impoverished border communities.¹²⁶ Because of statutory and separation-of-powers conflicts, environmental review under NEPA gave way to economic and foreign policy considerations at the heart of the President’s NAFTA decision.¹²⁷ The decision was made without analyzing alternatives, mitigation possibilities, cumulative impacts on border communities, or health effects of degraded air quality, all of which would have been central to NEPA review.¹²⁸

III. JUDICIAL REVIEW

This Part focuses on how well NEPA functions in the hands of environmental justice advocates. Unlike many of the major environmental statutes, NEPA does not contain a citizen suit provision for

¹²¹ *Id.* at 766.

¹²² *Id.* at 768.

¹²³ *Id.* at 769.

¹²⁴ *Id.* Actions of the President, such as international treaties like NAFTA, are not “major federal action” subject to NEPA because they are not “reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 C.F.R. § 1508.18 (2005).

¹²⁵ *Dept. of Transp.*, 541 U.S. at 767.

¹²⁶ *See generally id.*

¹²⁷ *See id.* at 766.

¹²⁸ *See id.* at 764–70.

private enforcement.¹²⁹ Instead, NEPA challenges must be advanced under the Administrative Procedures Act (APA), which provides a general private right of action to seek judicial review of final agency actions.¹³⁰ The APA authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] without observance of procedure required by law”¹³¹ This standard is deferential to agency decisions, leaving the burden of convincing a court that a decision should be disturbed upon the plaintiff.¹³² The role of the court is not to interject itself into the agency’s “‘area of discretion . . . as to the choice of the action to be taken,’” but simply to “insure that the agency has taken a ‘hard look’ at environmental consequences.”¹³³ Thus, courts will uphold administrative action if the agency “has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”¹³⁴

NEPA challenges typically attack one or more of the following issues: the appropriateness of a FONSI, procedural compliance, or the adequacy of EIS analyses.¹³⁵ To challenge a FONSI, a plaintiff must show that it was arbitrary and capricious for the agency to conclude that the proposed project would have no significant impact on the environment.¹³⁶ Environmental justice may be relevant to whether an agency’s estimation of “significance” is accurate, though such challenges may only succeed if they raise environmental justice concerns that are closely related to the physical harm of a natural resource.¹³⁷

Process challenges enforce compliance with NEPA’s procedural requirements and ensure that an EA or EIS occurs early enough in the process to be instructive to decisionmakers, rather than a post-hoc

¹²⁹ See 5 U.S.C. §§ 702, 704 (2000).

¹³⁰ *Id.*

¹³¹ *Id.* § 706.

¹³² See *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

¹³³ *Kleppe*, 427 U.S. at 410 n.21 (quoting *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

¹³⁴ *Balt. Gas*, 462 U.S. at 105 (citations omitted).

¹³⁵ See Foster, *supra* note 42, at 196.

¹³⁶ *Dept. of Transp.*, 541 U.S. at 763.

¹³⁷ EPA GUIDANCE, *supra* note 9, § 3.2.

rationalization or a meaningless bureaucratic exercise.¹³⁸ In this category, environmental justice concerns are most likely to bear on the adequacy of public participation in the NEPA process.¹³⁹

To challenge the adequacy of analysis under NEPA, cases have focused on the scope of assessment, the agency's analytical methods of choice, the range of alternatives considered, or whether the agency properly considered cumulative or indirect impacts.¹⁴⁰ Environmental justice should inform the notion of analytical "adequacy" in a number of ways.¹⁴¹ For example, the "affected environment" the agency must investigate will determine the geographic scope of impact analysis; how broadly or narrowly it is defined determines whether disproportionate risks or burdens can be identified.¹⁴² Environmental justice may clarify which alternatives should be selected for indepth consideration or weigh in favor of certain impact assessment tools.¹⁴³ In addition, it should enrich cumulative impact evaluations by increasing awareness of how such impacts are experienced and by whom.

The foregoing categories of NEPA challenges were available before Executive Order 12,898 and the CEQ and EPA Guidance documents explicitly recognized environmental injustice as a problem.¹⁴⁴ Indeed, many environmental justice actions were brought under

¹³⁸ CEQ regulations require agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . ." 40 C.F.R. § 1501.2 (2005).

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . [and] shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.

• 40 C.F.R. § 1502.5.

¹³⁹ See 40 C.F.R. §§ 1501.2, 1502.5.

¹⁴⁰ See *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998); *Warren County v. North Carolina*, 528 F. Supp. 276, 291, 296 (E.D.N.C. 1981).

¹⁴¹ See *Morongo Band of Mission Indians*, 161 F.3d at 575; *Warren County*, 528 F. Supp. at 291, 296.

¹⁴² See COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 14; see also EPA GUIDANCE, *supra* note 9, § 1.2.

¹⁴³ See *Morongo Band of Mission Indians*, 161 F.3d at 575 (noting that, "[a]n agency . . . is 'entitled to identify some parameters and criteria . . . for generating alternatives to which it would devote serious consideration.'" (quoting *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993))).

¹⁴⁴ See COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 14; EPA GUIDANCE, *supra* note 9, § 1.2.

NEPA without framing their claims in those terms.¹⁴⁵ Although the Order, EPA Guidance, and CEQ Guidance were significant statements of policy, none created a private right of action to compel environmental justice review under NEPA.¹⁴⁶ The Order explicitly states that it “shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.”¹⁴⁷ Likewise, the CEQ Guidance “interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898,” but “does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court”¹⁴⁸ The EPA Guidance is also clear: “Compliance with this guidance will not be justiciable in any proceeding for judicial review of agency action.”¹⁴⁹ In light of these disclaimers, a key question is what, if anything, these new mandates add to judicial review in NEPA challenges.

After the Executive Order went into effect—and despite the provision precluding judicial review—numerous parties sought unsuccessfully to enforce its mandate in court.¹⁵⁰ In *Morongo Band of Mission Indians v. FAA*, the tribe challenged a FONSI for a new airport landing route directly over their reservation for failing to sufficiently consider alternative pathways.¹⁵¹ The tribe charged FAA with violating NEPA, as well as the Department of Transportation’s Environmental Justice

¹⁴⁵ For example, in *Warren County*, the county challenged a PCB landfill siting decision by seeking judicial review of the adequacy of the State’s EIS for the project. 528 F. Supp. at 280. Though unsuccessful, many regard this case as the one that launched the environmental justice movement. See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35–38 (1990). For a more recent case, see *Tex. Comm. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586 (N.D. Tex. 2002) (discussing challenge of an Army Corps of Engineers’ EIS for the Dallas Floodway Extension project by environmental groups).

¹⁴⁶ See generally *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629–33 (Feb. 11, 1994), amended by Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995); COUNCIL ON ENVTL. QUALITY, *supra* note 8; EPA GUIDANCE, *supra* note 9.

¹⁴⁷ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. at 7633.

¹⁴⁸ COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 21.

¹⁴⁹ EPA GUIDANCE, *supra* note 9.

¹⁵⁰ See, e.g., *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678 (D.C. Cir. 2004); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Senville v. Peters*, 327 F. Supp. 2d 335 (D. Vt. 2004); *Coliseum Square Ass’n, v. HUD*, No. Civ.A. 02-2207, 2003 WL 1873094 (E.D. La. Apr. 11, 2003); *Friends of Pioneer St. Bridge Corp. v. Federal Highway Administration*, 150 F. Supp. 2d 637 (D. Vt. 2001).

¹⁵¹ 161 F.3d 569, 575 (9th Cir. 1998).

Order and Executive Order 12,898.¹⁵² The Ninth Circuit Court of Appeals reviewed the NEPA claim because NEPA's regulations require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives."¹⁵³ However, it disregarded the Department of Transportation and Executive Orders out of hand, noting that each specifically stated that "they do not create any right to judicial review for alleged noncompliance."¹⁵⁴ This has been the common judicial response to such attempts, although some courts have claimed jurisdiction under the APA if an agency has included environmental justice in a NEPA document.¹⁵⁵

In *Communities Against Runway Expansion, Inc. v. FAA*, the D.C. Circuit Court of Appeals paraphrased the language of the Executive Order to explain that "an 'environmental justice' analysis [is] intended to evaluate whether the project would have disproportionately high and adverse human health or environmental effects on low-income or minority populations."¹⁵⁶ It reasoned that "FAA exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to 'arbitrary and capricious' review under the APA."¹⁵⁷ The federal district court in Vermont followed suit in *Senville v. Peters*, noting that a private cause of action was not necessary because the court had "jurisdiction over [Plaintiffs'] claim pursuant to its ability under the APA to review environmental documents for compliance with NEPA."¹⁵⁸ Because "[d]efendants chose to include an environmental justice analysis in their evaluation . . . [the] analysis is therefore subject to review . . . under the APA."¹⁵⁹ Other courts have merely reviewed environmental justice analyses included by agencies in their EISs without addressing the source of review authority.¹⁶⁰ In *Mid States Coalition for Progress v. Surface Transportation Board*, the Eighth Circuit Court of Appeals understood that "[t]he purpose of an environmental justice analysis [in

¹⁵² *Id.*

¹⁵³ *Id.* (alteration in original) (quoting 40 C.F.R. § 1502.14(a) (1994)).

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *Sur Contra La Contaminación v. EPA*, 202 F.3d 443, 449 (1st Cir. 2000); *Air Transp. Ass'n of America v. FAA*, 169 F.3d 1, 8–9 (D.C. Cir. 1999); *One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1064, 1071 (S.D. Iowa 2002); *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999).

¹⁵⁶ 355 F.3d 678, 688 (D.C. Cir. 2004).

¹⁵⁷ *Id.* at 689.

¹⁵⁸ 327 F. Supp. 2d 335 (D. Vt. 2004).

¹⁵⁹ *Id.*

¹⁶⁰ See *infra* notes 161–63.

the NEPA context] is to determine whether a project will have a disproportionately adverse effect on minority and low income populations. To accomplish this, an agency must compare the demographics of an affected population with demographics of a more general character”¹⁶¹ The court in *Friends of Pioneer Street Bridge Corp. v. Federal Highway Administration* did not hesitate to evaluate the Federal Highway Administration’s (FHWA) consideration of environmental justice, but was careful not to say that it was required.¹⁶² The courts that have reviewed NEPA challenges based upon environmental justice have readily deferred to agencies’ assessments as adequate.¹⁶³

Though these courts have uniformly focused on agencies’ discretion to consider environmental justice under NEPA, judicial review should be available whether or not an agency voluntarily included such analysis.¹⁶⁴ One need not look beyond existing NEPA regulations to see that environmental justice inquiries are amply supported in the regulations’ focus on “the natural and physical environment and the relationship of people with that environment,” including economic and social impacts stemming from environmental harm.¹⁶⁵ What the federal government now knows about environmental injustice and how to assess such impacts project-by-project gives content to this regulatory language. Although the CEQ Guidance is a weak substitute for expressly adding environmental justice considerations to NEPA regulations—in

¹⁶¹ 345 F.3d 520, 541 (8th Cir. 2003).

¹⁶² 150 F. Supp. 2d 637, 652 (D. Vt. 2001) (holding that “the government defendants adequately addressed environmental justice issues to the extent that they were required to in making the [categorical exclusion] determination”); see also *Spiller v. Walker*, No. A-98-CA-255-SS, 2002 WL 1609722, at *19 (W.D. Tex. Jul. 19, 2002) (“An environmental justice analysis determines whether there are any disproportionately high adverse human health or environmental effects on minority or low-income populations.”).

¹⁶³ See, e.g., *Cmtys. Against Runway Expansion*, 355 F.3d 678, 689 (D.C. Cir. 2004) (deferring to the agency’s choice of methodology for defining the area potentially affected by new airport runway, finding it reasonably and adequately explained); *Mid States Coal. for Progress*, 345 F.3d at 554 (deferring to agency’s method for analyzing demographic impacts of rail line extension project); *Coliseum Square Ass’n v. HUD*, No. Civ.A. 02-2207, 2003 WL 1873094, at *4 n.7 (E.D. La. Apr. 11, 2003) (holding that a HUD consultant’s finding that “net positive effect on the minority and low-income population” was satisfactory to show that environmental justice was adequately considered for NEPA purposes); *Friends of Pioneer St. Bridge Corp.* 150 F. Supp. 2d at 652 (finding it sufficient that, after plaintiffs raised the environmental justice concerns with FHWA in a letter, the project manager attached an analysis to the CE reevaluation stating “that the properties did not constitute a ‘low-income neighborhood’”).

¹⁶⁴ See *Cmtys. Against Runway Expansion, Inc.*, 355 F. Supp. at 688–89; *Mid States Coal. for Progress*, 345 F.3d at 554; *Coliseum Square Ass’n*, 2003 WL 1873094, at *4 n.7; *Friends of Pioneer St. Bridge Corp.*, 150 F. Supp. 2d at 652.

¹⁶⁵ 40 C.F.R. § 1508.14 (2005).

which case all courts would review agency compliance according to the same standards—courts should recognize that environmental justice is an inherent aspect of “the relationship of people with th[e] environment.”¹⁶⁶

Whether a proposal will “significantly” affect the environment has long involved consideration of context and cumulative impacts.¹⁶⁷ The concept should not have to be outlined in the regulations in order to inform judicial review of the adequacy of FONSI, public outreach, scoping, or analysis and alternatives in an EIS, especially now that there is institutional awareness of the importance of these issues.¹⁶⁸ Both the EPA Guidance and CEQ Guidance documents add substantial depth to the federal government’s understanding of environmental justice and demonstrate significant comprehension of what is necessary to fully integrate these concerns into the NEPA process.¹⁶⁹ Thus, despite CEQ’s assertion that the Executive Order did “not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law,” judicial evaluation of an agency’s environmental justice analysis ensures that judicial review keeps pace with agency understandings of socioeconomic impacts.¹⁷⁰ At least with respect to alternatives, the U.S. Supreme Court has suggested the concept of adequacy to be “an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.”¹⁷¹

Under the APA standard—“arbitrary, capricious, [or] abuse of discretion”—a strong case may be made that to neglect to investigate a project’s impacts from an environmental justice perspective *would* be an abuse of discretion and a capricious choice.¹⁷² Agencies may not be required by law to consider environmental justice under NEPA, but they *are* obliged to fully consider and analyze direct, indirect, and cumulative effects on the “human environment.”¹⁷³ Without question, that obligation is enforceable by a reviewing court. Wherever it cannot be adequately performed absent an environmental jus-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 1508.27.

¹⁶⁸ *Id.*

¹⁶⁹ See generally COUNCIL ON ENVTL. QUALITY, *supra* note 8; EPA GUIDANCE, *supra* note 9.

¹⁷⁰ COUNCIL ON ENVTL. QUALITY, *supra* note 8, at 10.

¹⁷¹ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 552–53 (1978); see Mank, *supra* note 2, at 125.

¹⁷² See Administrative Procedure Act, 5 U.S.C. § 706 (2000).

¹⁷³ 40 C.F.R. § 1508.14.

tice analysis, that analysis should be required as a component of this most basic NEPA mandate.

CONCLUSION

The promise of NEPA as a tool for environmental justice depends on how seriously federal agencies use it for that end. Judicial review under NEPA has shaped agencies' approach to compliance not by forcing particular results on a case, but by keeping agencies honest and clarifying their NEPA obligations. If courts begin to include environmental justice in their NEPA review with less apprehension, the depth of agencies' treatment of the issue will likely improve incrementally, just as it has in other areas reflected in the vast body of NEPA case law.

This Essay highlights the limits of NEPA's reach and how integrating environmental justice into NEPA does not ensure that it will be addressed consistently for all federal activities. At the same time, there is hope that environmental justice will continue to grow as a federal and state concern so that it finds its way into all government decisionmaking, regardless of whether NEPA applies to structure the process. As one commentator has observed, "environmental justice principles . . . increasingly are becoming part of the environmental decisionmaking fabric" and "hold the promise of making environmental law more ethical."¹⁷⁴ Environmental justice teaches the true racial and socioeconomic character of NEPA's "human environment." Through judicial review, courts can assist agencies to better serve NEPA's core goals and help ensure that those facing environmental injustice will have a voice in NEPA decisionmaking.

¹⁷⁴ Clifford Rechtschaffen, *supra* note 1, at 125.

