

# In Pursuit of Equity Under NEPA: Apalachicola’s Invisibility in the Tristate Water Wars

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## *Abstract*

*In the presence of significant environmental impacts, the National Environmental Policy Act (“NEPA”) requires agencies to take a hard look at community effects. However, analysis of human impacts under NEPA is generally cursory. While executive orders requiring consideration of environmental justice have raised awareness of community impacts in some instances, agency approach is inconsistent, and courts largely view such analysis as a box to be checked. Such cursory consideration of human impacts leaves historically underserved communities in a legal blind spot that perpetuates environmental and procedural inequity. Using the U.S. Army Corps of Engineers’ management of the Apalachicola, Chattahoochee, and Flint River Basin as a case study, this Article argues that NEPA regulations and practices must be revised to standardize rigorous agency consideration of community and environmental justice impacts.*

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## I. INTRODUCTION

The National Environmental Policy Act (“NEPA” or “the Act”) was envisioned as the people’s environmental law, an environmental Magna Carta<sup>1</sup> designed “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>2</sup> A sweeping bill that mandates public participation and consideration, the statute not only reflects Congress’s recognition of the disastrous impact of industrialization on natural resources,<sup>3</sup> but the

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1. DANIEL R. MANDELKER ET AL., *NEPA LAW AND LITIGATION*, § 1:1 (2d ed. 2023); see also Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL’Y 293, 293 (2010) (“[NEPA], the Magna Carta of environmental law, requires all federal agencies to evaluate the environmental impacts of their actions . . . .”). NEPA was being described as an environmental law “Magna Carta” as early as 1972. See generally Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963 (1972). The statute has inspired similar statutes abroad. See, e.g., William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States, and the European Community*, 33 COLUM. J. TRANSNAT’L L. 337, 361 (1995) (“It is not without significance or coincidence that many countries, including Canada and the [European Community], have patterned environmental impact laws and policies after NEPA.”).

2. 42 U.S.C. § 4331(a).

3. *Id.* § 4331(b)(1), (3). It recognizes the federal government’s continuing duty to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and

human environment as well.<sup>4</sup> As a result, regulations require that agencies consider the social, economic, and cultural impacts of their actions when significant environmental impacts are present.<sup>5</sup> However, nearly fifty-five years after NEPA's creation, agencies consistently treat these non-environmental impacts as an afterthought.<sup>6</sup> The statute therefore fails to protect the people most at risk from harms created by environmental degradation. Instead, agency application of NEPA compounds preexisting social, economic, and environmental vulnerabilities and exacerbates injustice. In this way, NEPA only protects some humans' environments.

However, NEPA is changing. In the spring of 2023, the statute was significantly revised for the first time since 1982,<sup>7</sup> and the Counsel for Environmental Quality ("CEQ") is in the process of completing regulatory overhauls in response to statutory changes and President Biden's executive orders that demand greater federal consideration of

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unintended consequences." *Id.* This recognition was totally emblematic of environmental movement at that time, which was wholly focused on protection for human use. *Id.*

4. *Id.* § 4332(2)(C).

5. COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 9 (1997) [hereinafter EJ GUIDANCE], <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>; 40 C.F.R. § 1502.16 (2020); 40 C.F.R. § 1508.1(g)(1), (m) (2022); Nat'l Ass'n of Gov't Emps. v. Rumsfeld, 418 F. Supp. 1302, 1306 (E.D. Pa. 1976) ("[W]hen a federal action does have a significant environmental impact, social and economic impacts must also be considered . . .").

6. See generally Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109 (2013); Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T. AFFS. L. REV. 601 (2006); COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 35 (1997) [hereinafter CEQ, A STUDY], <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf> (concluding "NEPA is critical to meeting the environmental, social, and economic goals this Nation has set for itself," and "[s]ubstantial opportunities exist to improve the effectiveness and efficiency of the NEPA process").

7. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-46.

environmental justice.<sup>8</sup> I do not suggest that these actions are without merit, only that they do not go far enough. President Biden's steps toward the integration of environmental justice throughout the federal government is a monumental shift in policy that suggests more change is possible. As outlined herein, changes with the power to profoundly improve NEPA's consideration of marginalized communities are possible within the confines of existing law.

This Article explores agency failure to implement NEPA to its fullest extent through an environmental justice lens, which considers the disparate impact of policies on the environments of marginalized people. Increasingly, scholars are moving away from the term "environmental justice," which refers to the movement's goal, and toward "environmental *injustice*," which better describes the current situation. Throughout this Article, I adopt this approach. The definition of environment used in environmental injustice literature mimics NEPA's definition of "human environment": it not only includes that traditionally thought of as non-human nature or natural resources (air, water, land) but also includes built and social environments.<sup>9</sup> In this way, environmental justice theory considers a person's entire lived experience.

Importantly, the environmental justice movement is driven by community experience and community-defined needs, which puts those disenfranchised by existing laws and practices at the center of calls for change. Thus, I illustrate how agencies' failure to successfully implement NEPA perpetuates environmental injustice using the experiences of residents of the Apalachicola Region of Florida. These residents (collectively, "community members") were represented as *amici* in *In re ACF Basin Water Litigation*, a case brought by Earthjustice against the U.S. Army Corps of Engineers ("Corps")—a

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8. Revitalizing Our Nation's Commitment to Environmental Justice for All, Exec. Order No. 14,096, 88 Fed. Reg. 25251 (Apr. 26, 2023) [hereinafter Exec. Order No. 14,096]; Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7619, § 202 (Jan. 27, 2021) [hereinafter Exec. Order No. 14,008].

9. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 54–55 (2001); *Principles of Environmental Justice*, UNITED CHURCH OF CHRIST, [https://www.ucc.org/what-we-do/justice-local-church-ministries/justice/faithful-action-ministries/environmental-justice/principles\\_of\\_environmental\\_justice/](https://www.ucc.org/what-we-do/justice-local-church-ministries/justice/faithful-action-ministries/environmental-justice/principles_of_environmental_justice/) (last visited Jan. 24, 2024).

federal agency responsible for federal dam projects—in 2021.<sup>10</sup> The case arose from the Tri-State Water Wars, a decades-long disagreement over apportionment of the Apalachicola, Chattahoochee, Flint River basin (“ACF River Basin”) among Georgia, Alabama, and Florida.<sup>11</sup> The Corps—which has managed the basin through exclusive control of dammed aquifers since the 1940s—still has significant power over apportionment. Community members joined the case in support of Earthjustice’s claim that the Corps’ 2016 Final Environmental Impact Statement for a new water-management plan was inadequate under NEPA.<sup>12</sup>

Community members represent ten industries and have deep personal knowledge of changes to Florida’s Corps-controlled Apalachicola River watershed. Families who have lived in and subsisted on the Apalachicola Region for generations<sup>13</sup> are represented, including oyster harvesters, shrimpers, crabbers, seafood processors,

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10. *In re* ACF Water Basin Litig., 554 F. Supp. 3d 1282, 1287 (N.D. Ga. 2021).

11. *See In re* MDL-1824 Tri-State Water Rts. Litig., 644 F.3d 1160, 1186–92 (11th Cir. 2011); *Florida v. Georgia*, 141 S. Ct. 1175, 1179 (2021). *See also* Anna Goldberg, *Murky Apalachicola Basin Waters Call for Clearer Equitable Apportionment Standards*, 49 *ECOLOGY* L.Q. 551 (2022) (discussing the history of conflict in the region); C.A. Craig et al., *Water Crisis, Drought, and Climate Change in the Southeast United States*, 88 *LAND USE POL’Y* 1 (2019) (same); Alyssa S. Lathrop, *A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin*, 36 *FLA. ST. U. L. REV.* 865 (2009) (same).

12. *See* discussion *infra* Section III.C (discussing the case against the Corps); *see generally* U.S. ARMY CORPS OF ENG’RS, FINAL ENVIRONMENTAL IMPACT STATEMENT UPDATE OF THE WATER CONTROL MANUAL FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN IN ALABAMA, FLORIDA, AND GEORGIA AND A WATER STORAGE ASSESSMENT (2016) [hereinafter FEIS].

13. *See, e.g.*, Brief for Trip Aukeman et al. as Amici Curiae Supporting Plaintiffs at A25, A32, A38, *In re* ACF Basin Water Litig., 467 F. Supp. 3d 1323 (N.D. Ga. 2020) (No. 1:18-MI-43-TWT), 2021 U.S. Dist. Ct. Motions LEXIS 649211 [hereinafter Trip Aukeman et al.]. Kevin Begos, Mayor of the City of Apalachicola, Florida, sent a letter to the Honorable Chief Justice Thomas W. Thrash, Jr. of the U.S. District Court of the Northern Districts of Georgia regarding this issue. *Id.* at A1 (“Working people, businesses, the environment, and local culture have all been seriously harmed by the significant reductions of freshwater from the ACF River systems that flow into our bay.”).

and beekeepers.<sup>14</sup> Over the last several decades, freshwater down the Apalachicola has dwindled due to drought, upstream overuse, and federal mismanagement. As described by an Apalachicola resident, these changes have decimated local economies and communities:

We've lost the soul of Apalachicola and Eastpoint with the demise of oystering and shrimping fisheries, . . . and the character of the area . . . . In summary, the Bay [provided dignity, food, and a livelihood] . . . . Oystermen are a proud people and suddenly they can't provide for their family through no fault of their own. It is wrong and patently obscene that we as a society have allowed this to happen.<sup>15</sup>

Community members' deeply rooted ecological knowledge, economic struggle, and cultural loss is reflected in their statements, and their stories are emblematic of the harm suffered by marginalized communities whose experiences are not adequately considered under NEPA. Community members' stories not only highlight legal inequities but also give voice to those silenced through misapplication and misinterpretation of NEPA's requirements.

The Article proceeds in three sections. Part II examines community narratives to tell the story of the Apalachicola region, its people, and its struggle for water. Part III explores NEPA's non-environmental impacts requirements in relation to the Corps' assessment of the ACF. Part IV suggests changes needed to environmental injustice assessment that could be implemented by the Council for Environmental Quality's new Office for Environmental Justice Oversight.

## II. THE PEOPLE OF THE APALACHICOLA REGION AND THEIR FIGHT FOR

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14. See Aukeman et al., *supra* note 13, at A7, A15; Kelly Watson, *Alternative Economies of the Forest: Honey Production and Public Land Management in Northwest Florida*, 30 SOC'Y & NAT. RES. 331, 334–35 (2017).

15. Aukeman et al., *supra* note 13, at A8–A9. Mr. Bickel is a photojournalist who has lived in Apalachicola, Florida for twenty-five years and has photographed and interviewed hundreds of families in the seafood industry. *Id.* at A5–A6.

## EQUITABLE APPORTIONMENT

Georgia, Alabama, and Florida all rely on fresh water provided by the ACF.<sup>16</sup> Claims on the ACF's water are complex. The ACF River System originates in Georgia, where politically and economically powerful users demand a significant share. There, the ACF provides Atlanta residents with drinking water, feeds profitable soybean and peanut crops, and fills lakes bordered by expensive homes whose residents use the waters for recreation.<sup>17</sup> The ACF ends in Florida, where the Apalachicola Region receives 80% of its water from the Chattahoochee and Flint Rivers.<sup>18</sup> The river meets the Gulf of Mexico at Apalachicola Bay, between the Florida towns of Apalachicola and Eastpoint.

Figure 1



16. See Fig.1. Amber Ignatius & Jon Anthony Stallins, *Assessing Spatial Hydrological Data Integration to Characterize Geographic Trends in Small Reservoirs in the Apalachicola-Chattahoochee-Flint River Basin*, 51 SE. GEOGRAPHER 371, 371 (2011).

17. See FEIS, *supra* note 12, at 4-15, 7-7.

18. H. LEE EDMISTON, APALACHICOLA NAT'L ESTUARINE RSCH. RSRV., A RIVER MEETS THE BAY 6, 9 (H. Lee Edmiston ed., 2008), [https://coast.noaa.gov/data/docs/nerrs/Reserves\\_APA\\_SiteProfile.pdf](https://coast.noaa.gov/data/docs/nerrs/Reserves_APA_SiteProfile.pdf).

There, most residents have relied on the river to support thriving seafood, logging, honey, and tourism industries for generations.<sup>19</sup> Between 20% and 44% of the Apalachicola region's residents live below the poverty line and many lack the formal education needed for employment outside river-created economies.<sup>20</sup> Even if individuals had more diversified skills, Apalachicola has a single-sector economy that is almost entirely reliant on the seafood industry.<sup>21</sup>

As a result of increased drought, upstream use, and Corps mismanagement, water levels throughout the Apalachicola River have declined significantly over the last fifty years.<sup>22</sup> In a modern illustration of Hardin's *Tragedy of the Commons*,<sup>23</sup> upstream water

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19. See *supra* notes 13–14 and accompanying text (depicting residents who rely on the river to support thriving seafood for generations); Trip Aukeman et al., *supra* note 13, at A29–A30, A32–A33 (depicting residents who rely on the river to support thriving logging for generations); *Id.* at A10, A32–A33 (depicting a resident who relies on the river to support thriving honey for generations).

20. See *EJScreen EPA's Environmental Justice Screening and Mapping Tool (Version 2.2)*, ENV'T PROT. AGENCY, <https://ejscreen.epa.gov/mapper/> (last visited Apr. 2, 2024) [hereinafter *EJScreen*] (search in search bar for “Apalachicola, Florida”; then choose “Socioeconomic Indicators” from dropdown; then choose “Less Than High School Education”; repeat for “Eastpoint, Florida” and “Wewahitchka, Florida”) (showcasing 16% to 20% of each community has less than a high school education).

21. *Apalachicola NERR*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. ENV'T COOP. SCI. CTR. (2017), <https://ecsc.famu.edu/t-apalachicola-nerr.html> (last visited Apr. 23, 2024).

22. See HELEN M. LIGHT ET AL., U.S. GEOLOGICAL SURV., 2006-173, WATER-LEVEL DECLINE IN THE APALACHICOLA RIVER, FLORIDA, FROM 1954 TO 2004, AND EFFECTS ON FLOODPLAIN HABITATS 1, 6 (2006), <https://pubs.usgs.gov/sir/2006/5173/pdf/sir2006-5173.pdf>; MELANIE R. DARST & HELEN M. LIGHT, U.S. GEOLOGICAL SURV., 2008-5062, DRIER FOREST COMPOSITION ASSOCIATED WITH HYDROLOGIC CHANGE IN THE APALACHICOLA RIVER FLOODPLAIN, FLORIDA 1, 54 (2008), [https://pubs.usgs.gov/sir/2008/5062/pdf/sir2008-5062\\_low-rez.pdf](https://pubs.usgs.gov/sir/2008/5062/pdf/sir2008-5062_low-rez.pdf).

23. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243 (1968) (proposing “[t]he population problem has no technical solution; it requires a fundamental extension in morality”); Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, 284 SCI. 278, 278 (1999).



demands continue to grow<sup>24</sup> despite persistent seasonal droughts<sup>25</sup> and downstream hardship. While upstream overuse is exacerbated by Georgia's agricultural demands and population growth in and around Atlanta,<sup>26</sup> inequitable distribution throughout the entire ACF region is ultimately facilitated by the Corps' water management practices. The agency has prioritized Georgia's claims for decades. This section uses downstream community members' stories to illustrate the hardships water shortages have created, describe the Corps' management of the ACF, and highlight Apalachicola's ongoing fight for equitable apportionment.

### A. The Apalachicola Region and People

The Apalachicola watershed includes the river, a 144,000-acre floodplain swamp and forest—"a shallow lake system of sloughs [and] tributaries that are regularly flooded by the Apalachicola River"<sup>27</sup>—and the Apalachicola Bay.<sup>28</sup> This section describes the Apalachicola Region before water shortages devastated local ecosystems and livelihoods. Section II.B describes the system's current state.

While the watershed experiences natural periods of high and low flow, months of moderate levels have historically filled the system each year.<sup>29</sup> This natural rhythm not only supports the health of the ACF River System but also feeds local economies and culture. As described by long term Apalachicola resident Richard Bickel, "[w]ater is the center of everyone's life down here. The Creek Indians held these waters sacred, as do those who reside here today."<sup>30</sup> Many

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24. See Jim Skinner, *Regional Snapshot: 2023 Population Estimates Ticking Up in 11-County ARC Region*, ATLANTA REG'L COMM'N (Sept. 15, 2023), <https://33n.atlantaregional.com/regional-snapshot/regional-snapshot-2023-population-estimates-ticking-up-in-11-county-arc-region>.

25. DARST & LIGHT, *supra* note 22, at 7; Laura E. Petes et al., *Impacts of Upstream Drought and Water Withdrawals on the Health and Survival of Downstream Estuarine Oyster Populations*, 2 ECOLOGY & EVOLUTION 1712, 1712 (2012).

26. LIGHT ET AL., *supra* note 22, at 43; see generally FEIS, *supra* note 12, at app. C.

27. Aukeman et al., *supra* note 13, at A2.

28. EDMISTON, *supra* note 18, at 49, 56.

29. DARST & LIGHT, *supra* note 22, at 4.

30. Aukeman et al., *supra* note 13, at A6.

oystermen also practice a traditional harvesting method passed down through forebearers:

Oystermen in Eastpoint practiced a very old and traditional form of oyster harvesting called tonging . . . . Tongs are basically two ten-foot rakes riveted together and work like salad tongs. They are heavy, up to [forty] pounds when laden with oysters. It is brutal work, heaving the tongs hour after hour. Because our estuary is murky and you typically [cannot] see the bottom, oystermen have an uncanny ability to understand what their tongs are touching based on feel alone.<sup>31</sup>

Local oystermen also reflect deep connections to the land: “Asking if oystermen like what they do is like asking if a seal gets tired of water. Local oystermen live for the Bay. After long and extremely difficult days harvesting, [fishermen] would head back to the water to sport fish on weekends. These waters are in their blood.”<sup>32</sup> Not only is most of the community reliant on the seafood industry for income, but for many, it is all they have ever known.

During high season, water runs beyond the riverbanks to vast wetland forests where the Ogeechee Tupelo tree blooms and provides the only source of nectar used to make Tupelo honey.<sup>33</sup> Ogeechee Tupelo need total inundation nearly year round to thrive and flowing water to propagate.<sup>34</sup> The land surrounding the Apalachicola River was once populated by over 144,000 acres of forests full of Tupelo trees.<sup>35</sup> Found only in South Georgia and North Florida, Ogeechee Tupelo once

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31. *Id.* at A7.

32. *Id.* at A6.

33. J. Anthony Stallins et al., *Biogeomorphic Characterization of Floodplain Forest Change in Response to Reduced Flows Along the Apalachicola River, Florida*, 26 RIVER RSCH. & APPLICATIONS 242, 256 (2009); see generally Justin T. Maxwell & Paul A. Knapp, *Reconstructed Tupelo-Honey Yield in Northwest Florida Inferred from Nyssa Ogeche Tree-Ring Data: 1850–2009*, 149 AGRIC., ECOSYSTEMS & ENV'T 100 (2012).

34. See DARST & LIGHT, *supra* note 22, at 2 (“During floods, floodwaters are contained within floodplains and, when waters subside, floodplain soils retain moisture, ameliorating the effects of both floods and droughts . . . .”); Trip Aukeman et al., *supra* note 13, at A12.

35. See EDMISTON, *supra* note 18, at 56; Watson, *supra* note 14, at 334–35.

supported the Region's \$2.4 million Tupelo-honey industry and supported a thriving tourist trade.<sup>36</sup>

Ten years ago, the Ogeechee's two-week blooming season provided a single apiary enough nectar for 100,000 pounds of Tupelo honey.<sup>37</sup> For beekeepers like community member Albert Bryant, two-thirds of a year's income historically came from Tupelo season.<sup>38</sup> Because these trees need total inundation nearly year round to thrive, the floodplains have supported this level of abundance in the Tupelo honey industry for generations.<sup>39</sup> As Mr. Bryant explains, Apalachicola beekeepers take great pride in learning and practicing traditional beekeeping and honey-making practices:

I started bee keeping while I was in high school. I was mentored by one of the old[-]time Tupelo beekeepers, Mr. Warren Johnson . . . . He mentored me and taught me how to make pure Tupelo the right way . . . . After high school[,] I bought some hives from retired beekeepers and, after some time, established Bryant Apiaries in Bristol, Florida. I currently operate between 1,000 [to] 1,500 hives. That was about [twenty] years ago now. It was a good living for a long time, I was not getting rich but could pay our bills and work for myself.<sup>40</sup>

The Tupelo-honey trade is also woven into local culture: apiaries once sponsored youth sports teams, hosted the popular Tupelo Honey Festival in Wewahitchka, Florida, and served as a lynchpin for local farmers markets.<sup>41</sup>

Water coming from the floodplain also provides the system with nutrients year-round, feeding seafood species throughout the Bay and

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36. Watson, *supra* note 14, at 334–35; Maxwell & Knapp, *supra* note 33, at 100; Trip Aukeman et al., *supra* note 13, at A12. See generally ANN. TUPELO HONEY FESTIVAL, <http://www.tupelohoneyfestival.com> (last visited Jan. 12, 2024).

37. Watson, *supra* note 14, at 334; Trip Aukeman et al., *supra* note 13, at A12.

38. Aukeman et al., *supra* note 13, at A12.

39. DARST & LIGHT, *supra* note 22, at 1–2, 53; Stallins et al., *supra* note 33, at 256.

40. Aukeman et al., *supra* note 13, at A11.

41. *Id.* at A12. See also ANN. TUPELO HONEY FESTIVAL, *supra* note 36.

Gulf of Mexico.<sup>42</sup> As one of the most productive estuaries in the United States, the Apalachicola Bay historically supported a prolific seafood industry.<sup>43</sup> The Bay also provided thick freshwater grasses in soft-bottomed marshes used as habitat and hatcheries by many species.<sup>44</sup> Danial Taunton, longtime resident of Wewahitchka—an upstream town that abuts the Apalachicola River—explains how the system feeds itself:

The swamps . . . provide necessary nutrients and organisms vital to marine life in the river and Apalachicola Bay. Normally, in the spring or late winter[,] [we will] get a period of high water from the river that flushes out the swamps. As the water levels fall, the water will become really swift inside the swamps' banks and carry out the organic material from rotting leaves and trees in the swamp and deposit it in the river channel. Those deposits from the swamp feed species that we rely on—like oysters, shrimp[,] and fish—downstream in the Apalachicola Bay. [That is] the normal cycle.<sup>45</sup>

The seafood industry is synonymous with family in the Region.<sup>46</sup> Many working in the industry come from a multi-generational seafood

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42. Steven L. Morey et al., *Connectivity of the Apalachicola River Flow Variability and the Physical and Bio-optical Oceanic Properties of the Northern West Florida Shelf*, 29 *CONT'L SHELF RSCH.* 1264, 1264 (2009), [https://www.coaps.fsu.edu/~ddmitry/MyPapers/Morey\\_Apalachicola\\_connect\\_2009.pdf](https://www.coaps.fsu.edu/~ddmitry/MyPapers/Morey_Apalachicola_connect_2009.pdf) (“The Apalachicola River is a major nutrient source for the northeastern [Gulf of Mexico] . . . . Th[e] nitrogen input enhances primary productivity in the near-shore waters.”); HAROLD C. MATTRAW & JOHN F. ELDER, U.S. GEOLOGICAL SURV., 2196-C, *NUTRIENT AND DETRITUS TRANSPORT IN THE APALACHICOLA RIVER, FLORIDA C1, C57* (1984), <https://pubs.usgs.gov/wsp/2196c/report.pdf>; ROBERT J. LIVINGSTON, U.S. GEOLOGICAL SURV., *FWS/OBS/-82/05, THE ECOLOGY OF THE APALACHICOLA BAY SYSTEM: AN ESTUARINE PROFILE 1*, 9 (1984) [hereinafter *LIVINGSTON I*], <http://npshistory.com/publications/usfws/biological-reports/82-05.pdf>.

43. Apalachicola NERR, *supra* note 21; Petes et al., *supra* note 25, at 1714.

44. FEIS, *supra* note 12, at 2-217.

45. Aukeman et al., *supra* note 13, at A35–A36, A22–A23.

46. *See id.* at A1.

family<sup>47</sup> and were taught their trade by parents and grandparents.<sup>48</sup> As one community member described family legacy in the seafood industry, “I am a third-generation oyster dealer, but [that is] not unusual around here: I know fourth[-] and fifth-generation oystermen whose families have been oystering since the Civil War.”<sup>49</sup> As Shannon Hartsfield, a fourth-generation oysterman from Eastpoint, explained, “[h]ad the Apalachicola Bay oysters survived, my son would have been the fifth generation of Hartsfield oystermen.”<sup>50</sup>

The Bay not only provides income but also an important food source that has historically sustained low-income communities:

When he was a kid, September 1 was oyster day. [They would] open up the day for harvesting[,] and my family would go down and harvest enough for us all to eat. I was one of [eight] kids, so we could get a lot of oysters to feed everyone. That was a big deal for me and local families because we [could not] afford to pay [five] dollars a sack for oysters.<sup>51</sup>

Small towns of Franklin County, including Apalachicola and Eastpoint, share in the Bay’s productivity and rely heavily on the seafood industry.<sup>52</sup> Approximately 80% of Franklin County Florida’s workforce used to be employed by the seafood industry, and until recently, oysters accounted for nearly half of the county’s income.<sup>53</sup> These numbers are not confined to those who harvest in the Bay but include seafood dealers, shuckers, truckers, and those employed by tourism.<sup>54</sup> Community member Lynn C. Martina’s family “ha[s] made a living off Apalachicola Bay for generations” from the same plot of land in Eastpoint, where her grandparents sold bait and tackle, her parents processed oysters, and now she and her son run a wholesale

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47. *Id.* at A10, A15, A20, A25, A38–A39.

48. *See id.* at A1, A7, A15, A20, A25, A38–A39.

49. *Id.* at A38; *see also id.* at A15.

50. *Id.* at A15; *see also id.* at A7, A38–A39.

51. *Id.* at A30; *see also id.* at A8, A18, A30, A32.

52. FEIS, *supra* note 12, at 2-215.

53. Apalachicola NERR, *supra* note 21; Petes et al., *supra* note 25, at 1714.

54. Aukeman et al., *supra* note 13, at A8, A18. *See generally* FLA. SEAFOOD FESTIVAL, <https://www.floridaseafoodfestival.com/> (last visited Jan. 12, 2024).

seafood business.<sup>55</sup> Commercial fisherman Kevin Martina is from a typical Apalachicola family:

I was born and raised in Apalachicola, where my family has lived for three generations. All three generations were Bay shrimpers. My grandad was a shrimper and my father, Bill Martina, is a retired shrimper and crabber. All [I have] ever done for a living is commercial fishing, too.<sup>56</sup>

The Apalachicola region is made up of disproportionately low-income communities—more than 20% of residents in counties, including Franklin County, abutting the river lives below the poverty line.<sup>57</sup> In the cities of Apalachicola and Eastpoint—where economies rely on the seafood trade—low-income residents make up 36% and 44% of the population, respectively.<sup>58</sup> Compared to the general populations of Florida and the United States—of which 12.7% and 14.1% are below the poverty line, respectively—the Apalachicola Region is disproportionately impoverished.<sup>59</sup> Apalachicola communities are also disproportionately low-income compared to upstream counties in Georgia whose water needs have been prioritized by the Corps.<sup>60</sup> Because communities in the Apalachicola Region rely on river-based industries, many also lack the formal education needed for employment in other fields.<sup>61</sup>

Despite widespread poverty, residents of the Apalachicola Region have long made a living from the area's abundant natural

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55. Aukeman et al., *supra* note 13, at A25.

56. *Id.* at A20.

57. See *2014–2018 Poverty Rate in the United States by County*, U.S. CENSUS BUREAU (Dec. 19., 2019) [hereinafter U.S. CENSUS BUREAU], <https://www.census.gov/library/visualizations/interactive/2014-2018-poverty-rate-by-county.html> (search in search bar for “Franklin County, Florida”).

58. *EJScreen*, *supra* note 20 (search in search bar for “Apalachicola, Florida”; then choose “Socioeconomic Indicators” from dropdown; then choose “Low Income”; repeat for “Eastpoint, Florida”).

59. U.S. CENSUS BUREAU, *supra* note 57.

60. *Id.*

61. See *supra* note 20 and accompanying text (showcasing 16% to 20% of each community has less than a high school education).

resources. By all accounts of the community members, the Apalachicola watershed was once “a little part of heaven.”<sup>62</sup> But Corps mismanagement and federal oversight regarding statutory enforcement have led to the ACF System’s decline, further compounding the Apalachicola residents’ economic difficulties.

### *B. The Corps’ Management and the System’s Decline*

The Corps is responsible for a staggering amount of the country’s interstate waterways, including oversight of 740 dams<sup>63</sup> and multi-purpose reservoirs in twenty-six states that have 11.1 million acre-feet of storage space for municipal and industrial water supply.<sup>64</sup> The Corps manages waterways using water control manuals or binding<sup>65</sup> operating plans that are influenced by a combination of federal law, state water law, and user need.<sup>66</sup> Importantly, federal delegation of watershed control is often coupled with a major infrastructure project—like dam construction—and includes congressionally mandated purposes and water-use priorities.<sup>67</sup> Pursuant to Corps regulation, water management plans must be updated every ten years, “developed in concert with all basin interests which are or could be impacted by or have an influence on project regulation,” and are subject to “public involvement and public meeting”

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62. Aukeman et al., *supra* note 13, at A39.

63. HQ USACE, *Dam Safety Program*, U.S. ARMY CORPS OF ENGINEERS, (Dec. 16, 2021) <https://www.usace.army.mil/> (choose “Civil Works” from “Missions” dropdown; then choose “Dam Safety Program”); *see also* William L. Graf, *Dam Nation: A Geographic Census of American Dams and Their Large-Scale Hydrologic Impacts*, 35 WATER RES. RSCH. 1305, 1306 (1999).

64. CYNTHIA BROUGHNER & NICOLE T. CARTER, CONG. RSCH. SERV., R42805, REALLOCATION OF WATER STORAGE AT FEDERAL WATER PROJECTS FOR MUNICIPAL AND INDUSTRIAL WATER SUPPLY 3 (2012).

65. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003).

66. *See generally* Reed D. Benson, *Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?*, 42 COLUM. J. ENV’T L. 353 (2017); *see also* A. Dan Tarlock, *A First Look at a Modern Legal Regime for a “Post-Modern” United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1299–1307 (2004) (summarizing the Corps’ historical evolution as a water resources development and management agency).

67. Tarlock, *supra* note 66, at 1299–1307 (summarizing the Corps’ historical evolution as a water resources development and management agency).

requirements.<sup>68</sup> Updates to water management plans generally require a detailed NEPA analysis.<sup>69</sup>

The Corps has exclusive control over five dams on the ACF, which provides 80% of the Apalachicola River's freshwater.<sup>70</sup> The Corps was delegated responsibility for the dams based on the 1946 River and Harbors Act<sup>71</sup> and a 1947 House Committee Report,<sup>72</sup> which require that the Corps manage the ACF in a way that facilitates navigation, hydropower, flood control, "afford[s] recreational opportunities, benefit[s] fish and wildlife conservation[,] and make available an adequate water supply for the Atlanta area."<sup>73</sup> For more than 80 years, the Corps has managed freshwater flow throughout the system and—from 1956 to 2001—used dredging to widen the ACF for navigational purposes.<sup>74</sup>

The Corps has only formally updated its ACF Water Control Manual twice, in 1958 and 2016,<sup>75</sup> but proposed major revisions in 1989. These formal updates never underwent NEPA review.<sup>76</sup> The updates allocated more water to Georgia and were met with significant pushback from Alabama and Florida.<sup>77</sup> Decades of litigation and

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68. Water Control Management, 33 C.F.R. § 222.5(f)(9), (g)(2)(A) (2024).

69. *See id.*

70. EDMISTON, *supra* note 18, at 9; *see also Project Background*, U.S. ARMY CORPS OF ENG'RS, <https://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-Project-Background/> (last visited Apr. 5, 2024).

71. River and Harbors Act of 1946, Pub. L. No. 79-525, § 1, 60 Stat. 634 (1946).

72. H.R. Doc. No. 80-300 (1947) [hereinafter Newman Report].

73. *In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160, 1186–92 (11th Cir. 2011) (addressing the Corps' authority to operate the Buford Dam and Lake Lanier for water supply purposes).

74. LIGHT ET AL., *supra* note 22, at 6 ("Dredging in the deepest part of the channel . . . [was] conducted annually from 1956 to 2001.").

75. *See generally* FEIS, *supra* note 12, at 2-215, 2-216 (updating the ACF Water Control Manual in 2016).

76. *In re Tri-State Water Rts. Litig.*, 639 F. Supp. 2d 1308, 1322–23 (M.D. Fla. 2009), *rev'd and vacated sub nom. In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160 (11th Cir. 2011).

77. *See, e.g., id.* (remanding to the U.S. Army Corps of Engineers consolidated cases brought by the States of Alabama and Florida against the U.S. State of Georgia and the Army Corps).



negotiation over apportionment between the states and Corps ensued.<sup>78</sup> All the while, the ACF was managed under the draft 1989 Water Control Manual.<sup>79</sup>

During this time, the Apalachicola River System struggled due to decreased freshwater flow. Once a naturally fluctuating system, the Apalachicola now suffers more frequent dry spells and shorter flood seasons.<sup>80</sup> These changes are reflected by community members, who have observed that “the swamp [floodplain] is drying up . . . [and] the River basically runs dry in the summer.”<sup>81</sup> These conditions are linked to changing weather patterns, the Corps’ dredging practices, and its inequitable water apportionment.

The Corps not only fails to send Apalachicola Region enough water, but its control of flow also fails to mimic natural flow patterns.<sup>82</sup> As a result of these practices, the system experiences unnatural lows and highs.<sup>83</sup> Oystermen Shannon Hartsfield describes this phenomenon and its devastating results:

The Corps also controls the health of the Apalachicola ecosystem with the rhythm of its releases. When it fails to release water in a natural pattern, animals downstream suffer. For example, in the past[,] the water would slowly get here and then slowly leave. Now[,] the Corps cuts water off abruptly in March[,] and the shock kills the oysters. When the water is abruptly cut off it also stops natural flow of dirt and sand into the Bay, which clams and other bottom[-]dwelling seafood need[] to survive.<sup>84</sup>

His observations reflect the experiences of other community members, who feel that “[t]he Corps sends too little or too much, so the River

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78. See, e.g., *id.*; Florida v. Georgia, 141 S. Ct. 1175, 1179 (2021). See generally Goldberg, *supra* note 11 (discussing the history of conflict in the region); Craig, *supra* note 11 (same).

79. See City of Apalachicola v. U.S. Army Corps of Eng’rs, No. 3:2008cv00233 (M.D. Fla. Nov. 23, 2009), ECF No. 25.

80. LIGHT ET AL., *supra* note 22, at 48.

81. Aukeman et al., *supra* note 13, at A12; see also *id.* at A17, A35, A26.

82. *Id.* at A35.

83. See LIGHT ET AL., *supra* note 22, at 4.

84. Aukeman et al., *supra* note 13, at A17.

swings between flooded and dry and dusty while the Bay is either a flood of fresh or all salt.”<sup>85</sup> Longtime Wewahitchka, Florida resident Daniel Taunton explains how the Corps’ practices also threaten local populations: “Flooding caused by the Corps’ water management also hurts the town of Wewahitchka. [It is] a low[-]lying town[] and has been substantially flooded dozens of times in my life.”<sup>86</sup> This flooding practice also runs counter to recommendations of other federal agencies: the Fish and Wildlife Service and the Environmental Protection Agency have both suggested that even minimal return to natural flow patterns would greatly benefit the ACF System.<sup>87</sup> Rainfall fluctuation and increasing droughts compound these Corps-created problems.<sup>88</sup> As a result, the Apalachicola Region’s water needs are not only competing against upstream “agricultural irrigation, municipal water use, flow regulation, and reservoir evaporation” but also an ever-drying climate.<sup>89</sup>

Physical changes to the River System created by Corps practices have made it harder for water to reach the floodplain forest.<sup>90</sup> Until 2001, the Corps dredged sand from the riverbed to make a channel deep and straight enough for large barges.<sup>91</sup> The sand was redistributed on the riverbanks, blocking access to the floodplain.<sup>92</sup> As explained by community member Daniel Taunton:

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85. *Id.* at A22.

86. *Id.* at A35.

87. Env’t Prot. Agency of the U.S., Comment Letter on Final Environmental Impact Statement for the Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin; Alabama, Florida and Georgia (Feb. 14, 2017), <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=223530>; *see generally* FEIS, *supra* note 12, at app. C; *see also* Brief of Appellants at 41–42, *Alabama v. U.S. Army Corps of Eng’rs*, No. 21-13104 (11th Cir. Dec. 2, 2022); 42 U.S.C. § 4332(2)(C) (requiring response to expert agency comments on NEPA process documents).

88. DARST & LIGHT, *supra* note 22, at 7; LIGHT ET AL., *supra* note 22, at 1.

89. DARST & LIGHT, *supra* note 22, at 7; *see also* Stallins et al., *supra* note 33, at 244, 246; Maxwell & Knapp, *supra* note 33, at 100–01; Apalachicola NERR, *supra* note 21; FEIS, *supra* note 12, at 2-215–2-216.

90. DARST & LIGHT, *supra* note 22, at 1.

91. LIGHT ET AL., *supra* note 22, at 1, 6 (“Dredging in the deepest part of the channel . . . [was] conducted annually from 1956 to 2001.”).

92. LIGHT ET AL., *supra* note 22, at 30; *see* Aukeman et al., *supra* note 13, at A33.

[Twenty] years ago, the swamps and sloughs around our house were deep enough to dive into, at least [eight] feet and full of fish, frogs, and crawfish. It was usually deep enough to run a motor boat from the house to the river year round . . . . [W]e used to need about [eight] feet of water in the River to fill up the swamp near my house. Now[,] you need [ten to twelve] feet to get water back to the swamps because the sand along the Rivers' banks is so high in some places.<sup>93</sup>

Former Gulf Country Commissioner Carmen McLemore worries that structural damage to the riverbed will prevent meaningful floodplain restoration:

The Corps' dredging has ruined the [R]iver. [They have] been moving sand around for most of my life to make way for barges and tugboats . . . . Even if the Corps sent more water, I worry that it would still have a hard time getting to the swamp unless some of that sand is dug out.<sup>94</sup>

Lack of freshwater in the Bay has adversely impacted seafood species and destroyed marsh habitat on which they rely.<sup>95</sup> Increased salinity also invites more saltwater predators into the Bay, which seafood dealer and former community leader Thomas Ward has observed directly: "What a lot of people [do not] understand is that when the salinity level went so high . . . predators—Oyster Drills, Southern Conch—annihilate[d] all the oyster beds."<sup>96</sup> Low flow has also decreased the nutrients delivered to the Bay from up river.<sup>97</sup> Traditionally, the River

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93. Aukeman et al., *supra* note 13, at A34, A30.

94. *Id.*

95. See Petes et al., *supra* note 25, at 1714, 1721; ROBERT J. LIVINGSTON, IMPORTANCE OF RIVER FLOW TO THE APALACHICOLA RIVER-BAY SYSTEM, REPORT TO THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION 7, 12 (2008) [hereinafter LIVINGSTON II].

96. Aukeman et al., *supra* note 13, at A40; see also *id.* at A21; LIVINGSTON II, *supra* note 95, at 12, 64.

97. See LIVINGSTON I, *supra* note 42, at 13.

supports seafood species in the Bay and Gulf of Mexico when nutrient-filled water from the floodplains moves downstream.<sup>98</sup> A steady-flow regime into Apalachicola's floodplains is required to support this effect.<sup>99</sup> As explained by Coastal Conservation Association's Director of Advocacy Trip Aukeman, "[t]he [R]iver feeds nutrients from Apalachicola all the way to Tampa Bay. If we do not have water flow[,] we lose the water quality[,] and then [lose] the [natural] resources that rely on the water and the nutrients in it."<sup>100</sup>

As a result of the Corps' actions and other factors, the Apalachicola Bay's oyster population crashed in 2013,<sup>101</sup> which was incredibly hard on Franklin County communities. In the early 2000s, 300 to 500 boats harvesting oysters filled the Bay daily,<sup>102</sup> and over a dozen Eastpoint processing plants employed a dozen shuckers each.<sup>103</sup> During that time, oystermen "could go out in the morning and bring in enough to make \$200 by lunch time."<sup>104</sup> In the years after the crash, you would "maybe see four boats out there bringing in a few bags a day[.]"<sup>105</sup> and only one Eastpoint processing plant remains open.<sup>106</sup> Seafood processors Lynn C. Martina and Thomas Ward lost their oyster processing businesses, while fourth generation oystermen Shannon Hartsfield lost 90% of his income.<sup>107</sup> In the wake of the 2012 crash,

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98. Morey et al., *supra* note 42, at 1264 ("The Apalachicola River is a major nutrient source for the northeastern [Gulf of Mexico] . . . . Th[e] nitrogen input enhances primary productivity in the near-shore waters.").

99. *Id.* at 1264–65; *see also* MATTRAW & ELDER, *supra* note 42, at C4.

100. Aukeman et al., *supra* note 13, at A4.

101. *Commerce Secretary Pritzker Declares Fisheries Disaster for Florida Oyster Fishery*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. U.S. DEP'T OF COM. (Aug. 12, 2013), <https://www.noaa.gov/commerce-secretary-pritzker-declares-fisheries-disaster-florida-oyster-fishery>; Aukeman et al., *supra* note 13, at A17–A18, A40–A41.

102. Aukeman et al., *supra* note 13, at A26; *see id.* at A7, A18.

103. *Id.* at A8.

104. *Id.* at A26.

105. *Id.* at A18.

106. *Id.*; *see id.* at A8.

107. *Id.* at A27 ("After 2010, we [could not] get enough oysters to fill our trucks . . . ."); *id.* at A18–A19, A40–A41 ("Oysters were 99% of [our] business before the crash, and our oyster business has lost 80[%] [to] 90% of our customer base since then . . . . In the years since the oysters crashed, [I have] taken over a shrimp house . . . ."); *id.* at A18–A19, A15 ("I have made my living off the River . . . [until the drought] I made about 90% of my income off oysters.").

some community members have adapted by opening new businesses or cobbling together part time jobs, but none recouped the living that oysters provided.<sup>108</sup> For Apalachicola residents working in the seafood trade, thriving feels no longer possible: survival is the goal.<sup>109</sup>

In a last-ditch effort to save the industry, the State of Florida made the controversial decision in 2020 to close the Bay to all wild-oyster harvesting for up to five years, through 2025.<sup>110</sup> While this may save the wild oyster population in the long term, it has harmed the most vulnerable in the Region:<sup>111</sup>

With the Bay closed for five years now, [there is] little hope for our fishers. What are they going to do? Most [are not] comfortable working at the dollar store or at any pursuit that requires a time clock. Oystermen are a proud people and suddenly they [cannot] provide for their family through no fault of their own. It is wrong and patently obscene that we as a society have allowed this to happen.<sup>112</sup>

Because the oyster moratorium includes recreational harvesting, the closure also represents the loss of a vital food source.<sup>113</sup> The closure of Florida's fisheries decimated the employment in Apalachicola and East Point; it left many local producers and their employees out of work.<sup>114</sup> Assuming the closure helps the oysters rebound, community

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108. *Id.* at A27 (“I thought about giving it up, but my son had the idea for making a raw bar. So in 2023, we stopped the oyster wholesale business and opened up a raw bar.”); *id.* at A18–A19 (“[O]ysters [will not] support Apalachicola and East Point like it used to.”); *id.* at A40–A41 (“Even with all [we have] done to adapt to the changes in the Bay, [I am] not sure [my business] will survive.”).

109. *Id.* at A19, A27, A40–A41.

110. *Oysters*, FLA. FISH & WILDLIFE CONSERVATION COMM’N, <https://myfwc.com/fishing/saltwater/commercial/oysters/> (last visited Jan. 12, 2024).

111. Aukeman et al., *supra* note 13, at A8, A23; *but see id.* at A41.

112. *Id.* at A9.

113. *Id.* at A18 (“We ate the seafood we caught all the time.”); *id.* at A30 (“My family also relied on the [R]iver for food, as many in Gulf County do.”); *id.* at A41 (“When you have 200 oystermen harvesting they buy gas, food, gloves, whatever they need on the water. None of that is happening now.”).

114. Debbie Elliott, *Florida Closes Iconic Apalachicola Oyster Fishery*, NPR, (July 22, 2020, 5:03 AM), <https://www.npr.org/2020/07/22/894074674/floridas->

members worry that “[w]ithout more water from the Corps, the oysters will crash again the next time we have a dry year.”<sup>115</sup> Thomas Ward sees the current closure as a temporary solution that will ultimately be unable to restore Apalachicola’s seafood-driven identity:

The oysters [have not] been able to recover from the 2012 crash, and [I am] worried that the industry will be gone for good. Now that the Bay is finally shut, it still needs fresh water to recover. I [have not] harvested oysters from my beds in years and have seen no real improvement. If we do not have more freshwater from upstream for the oyster population to recover, we will lose not only our ability to make a living, but we will lose our way of life. Shame [what has] happened here . . . . [I have] hated to see the Bay fall on my watch. [That is] a bad thing to pass down to your children.<sup>116</sup>

The last few decades have also decimated the Ogeechee Tupelo and its honey.<sup>117</sup> As a result of dredging and low flow, the floodplain is drying out. There were 4.3 million (17%) fewer floodplain trees in 2004 than 1976, and Ogeechee has declined by at least 44%.<sup>118</sup> Beekeeper Al Bryant has witnessed these declines and says that instead of new growth typical of a floodplain forest “[n]ow the swamp is just full of old, dry Tupelo [trees].”<sup>119</sup> He explains the impact on local business and culture:

Because the Tupelo trees [do not] have what they need to germinate and propagate, the industry is dying. The

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oyster-beds-devastated-by-years-of-drought-other-pressures; *About the Industry*, ONLINE RES. GUIDE FOR FLA. SHELLFISH AGRICULTURE, <https://shellfish.ifas.ufl.edu/industry/> (last visited Jan. 15, 2024).

115. Aukeman et al., *supra* note 13, at A18; *see also id.* at A30 (“[I am] fighting the Bay closure.”); *id.* at A41 (“In the years since the crash, the Apalachicola Bay Oyster Dealers Association tried to help. We advocated closing parts of the Bay to oyster harvesting each year so that the oysters could recover.”).

116. *Id.* at A41–A42.

117. DARST & LIGHT, *supra* note 22, at 1–2.

118. *Id.* at 1.

119. Aukeman et al., *supra* note 13, at A13.

traditional way we make Tupelo honey is dying too. The older generation were purists, so if you bought Tupelo [honey] down here it was guaranteed Tupelo. [I am] one of the only ones left who was taught by the old timers, and I take pride in the quality and integrity of the Tupelo honey business. Now that the market is collapsing, you have beekeepers who [were not] trained in the traditional trade marketing impure honey as Tupelo because [it is] all [they have] got.<sup>120</sup>

This trend has devastated the Tupelo-honey industry, resulting in a 30% decrease in production between the years 1990 and 2009 and further reductions since then.<sup>121</sup>

In 2016, the Corps issued a new water control manual that was ostensibly fully vetted pursuant to NEPA's requirements to consider impacts to the human environment.<sup>122</sup> Importantly, the agency's analysis was based on a comparison between its 2016 plans and conditions under the draft 1989 water control manual.<sup>123</sup> Based on this, the Corps found only "slight" environmental impact in the ACF Region and did not meaningfully consider social, economic, or community impacts.<sup>124</sup> The Corps used its failure to apply NEPA in 1989 to its advantage in 2016: by comparing the system's current state to the degraded state the Corps' created by avoiding its legal obligations under NEPA back in 1989, the agency constructed a myth that its new practices do not harm the system. In truth, the 2016 water control manual represents a perpetuation and exacerbation of previously unapproved practices that have demolished the Apalachicola Region. While courts have recognized the Corps' "utter failure to conduct any sort of environmental analysis whatsoever on the plan by which it has

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120. *Id.* at A13–A14.

121. Maxwell & Knapp, *supra* note 33, at 100; *see also* Aukeman et al., *supra* note 13, at A12; Regan McCarthy, *Decreased Water Flow in the Apalachicola River Could Threaten the Future of Tupelo Honey*, WFSU PUB. MEDIA (Oct. 16, 2020, 11:01 PM), <https://news.wfsu.org/wfsu-local-news/2020-10-16/decreased-water-flow-in-the-apalachicola-river-could-threaten-the-future-of-tupelo-honey>.

122. *See generally* FEIS, *supra* note 12.

123. *See generally id.*

124. *See generally id.*

operated the ACF basin for more than [twenty] years,” thus far, the 2016 water control manual has withstood legal challenge.<sup>125</sup>

Ultimately, those in the Apalachicola Region just want to be counted:

If I could ask the Corps anything, it would be to put us into the equation somewhere. The Corps needs to look south past Lake Seminole to understand that sending so little water down is killing our way of life. It seems that richer people living [in Georgia] on Lakes Lanier and Seminole and Atlanta have the Corps’ attention, but we deserve it too. [It is] only fair to take us into consideration and try and find a way to send us a little more.<sup>126</sup>

This is ultimately a plea for equity, which aligns with substantial water-law scholarship that calls for the consideration of equity as part of any water-sharing plan or agreement.<sup>127</sup> In a departure from legal precedents that interprets the “equitable apportionment” doctrine as largely ignoring issues of fairness,<sup>128</sup> Professor Duane Rudolph

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125. *In re Tri-State Water Rts. Litig.*, No. 3:07-md-01, 2010 U.S. Dist. LEXIS 108931, at \*37 (M.D. Fla. July 21, 2010). *See* discussion *infra* Section III.C (detailing the Corps’ 2016 NEPA assessment).

126. Aukeman et al., *supra* note 13, at A19.

127. *See, e.g.*, Patrick J. Friend, *Opening the Underground Floodgates: Mississippi v. Tennessee and the Doctrine of Equitable Apportionment*, 7 OIL & GAS, NAT. RES., & ENERGY J. 947, 948 (2022); Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENVER WATER L. REV. 348, 349 (2015); David L. Feldman & Michelle Whitman, *As if Equity Mattered—Common Themes and Enduring Issues in the Symposium*, 50 NAT. RES. J. 291, 294–300 (2010); Thomas Clay Arnold, *The San Luis Valley and the Moral Economy of Water*, in WATER, PLACE, AND EQUITY 37, 38 (John M. Whiteley et al. eds., 2008); Paul W. Hirt, *Developing a Plentiful Resource: Transboundary Rivers in the Pacific Northwest*, in WATER, PLACE, AND EQUITY 147, 162 (John M. Whiteley et al. eds., 2008); Maria Carmen Lemos, *Whose Water Is It Anyway? Water Management, Knowledge, and Equity in Northeast Brazil*, in WATER, PLACE, AND EQUITY 249, 250 (John M. Whiteley et al. eds., 2008); Helen Ingram et al., *Water and Equity in a Changing Climate*, in WATER, PLACE, AND EQUITY 271, 271 (John M. Whiteley et al. eds., 2008).

128. Equitable apportionment is a term of art in water law cases. *See, e.g.*, *Arizona v. California*, 283 U.S. 423 (1931); *Arizona v. California*, 292 U.S. 341 (1934); *Arizona v. California*, 298 U.S. 558 (1936); *Arizona v. California*, 373 U.S.



suggests that “equity can include notions of participatory justice attentive to the multiple values attributed to water in a given place[.]” and “[e]quity can imply environmental justice concerns, equal political access, and sensitivity to the effects of water-related decisions on disfavored communities.”<sup>129</sup> As demonstrated *supra* in Section II, procedural equity based on Professor Rudolph’s definition is reflected in NEPA’s purpose and encouraged by NEPA regulations.

### III. NEPA’S PROMISE OF COMMUNITY CONSIDERATION

In 1969, Congress enacted NEPA in response to an onslaught of human-created environmental disasters. CEQ was directed to issue regulations for the Act shortly thereafter.<sup>130</sup> On its face, the statute is astonishingly ambitious and is considered “a major innovation in requirements for agency decision-making that, for the first time, made

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546 (1963); *Arizona v. California*, 376 U.S. 340 (1963); *Arizona v. California*, 383 U.S. 268 (1966); *Arizona v. California*, 439 U.S. 419 (1979); *Arizona v. California*, 460 U.S. 605 (1983); *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California*, 530 U.S. 392 (2000). Its legal definition is somewhat contradictory to the plain meaning of the terms: “Currently, a state may only win an equitable apportionment case if it can demonstrate water misuse by the defendant.” Goldberg, *supra* note 11, at 551 (citing *Colorado v. New Mexico*, 467 U.S. 310, 312 (1984)). As explained by Irit Samet, “[c]onscience, so the argument goes, ‘is too amorphous a concept to be susceptible to analysis by abstraction’, [sic] and is therefore of no use to a court of law.” Irit Samet, *What Conscience Can Do for Equity*, 3 JURIS. 13, 15 (2012) (quoting Jesse Wilson, *The Institutional and Doctrinal Roles of “Conscience” in the Law of Contract*, 11 AUCKLAND U. L. REV. 1, 4 (2005)). This attitude is reflected in federal water law precedence.

129. Rudolph, *supra* note 127, at 352 (citing Thomas Clay Arnold, *The San Luis Valley and the Moral Economy of Water*, in WATER, PLACE, AND EQUITY 37, 38 (John M. Whiteley et al. eds., 2008)); *id.* (citing Sheldon Kamieniecki & Amy Below, *Ethical Issues in Storm Water Policy Implementation: Disparities in Financial Burdens and Overall Benefits*, in WATER, PLACE, AND EQUITY 69, 78–79 (John M. Whiteley et al. eds., 2008)).

130. Protection and Enhancement of Environmental Quality, Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970), *reprinted as amended* in 42 Fed. Reg. 26967 (May 25, 1977) [hereinafter Exec. Order No. 11,514]; *see also* Relating to Protection and Enhancement of Environmental Quality, Exec. Order No. 11,991, 42 Fed. Reg. 26967 (May 25, 1977) [hereinafter Exec. Order No. 11,991] (making CEQ regulations legally binding on agencies).

environmental values a part of every decision-making process.”<sup>131</sup> The statute is forward looking and was designed to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>132</sup> While NEPA has become synonymous with consideration of ecological impacts—including harm to wildlife, habitat, and natural spaces—the statute actually requires a broader analysis of the human environment, defined as “the natural and physical environment *and the relationship of people with that environment.*”<sup>133</sup> As a result, every time a proposed federal action results in significant environmental impacts,<sup>134</sup> NEPA requires consideration of the reasonably foreseeable<sup>135</sup> impacts of major federal actions<sup>136</sup> on local communities, their cultures, and economies.<sup>137</sup> President Biden’s 2023 Executive Order 14,096 broadens these requirements and explicitly mandates consideration of environmental injustice arising from the direct, indirect, and cumulative impact of federal actions on marginalized communities.<sup>138</sup>

NEPA not only requires balance between environmental and economic need<sup>139</sup> but also encourages agencies to “promote efforts which will prevent or eliminate damage to the environment.”<sup>140</sup> Time

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131. Robert L. Glicksman, *In Praise of Dan Mandelker’s NEPA Wisdom*, 52 URB. LAW. 258, 261 (2023).

132. 42 U.S.C. § 4331(b)(1).

133. 40 C.F.R. § 1508.14 (2010) (emphasis added).

134. 42 U.S.C. § 4331(a). Note that all states have their own versions of NEPA, which generally mirror the federal standards. *See, e.g.*, California Environmental Quality Act, CAL. PUB. RES. CODE § 21002.

135. *See* *Hammond v. Norton*, 370 F. Supp. 2d 226, 245 (D.D.C. 2005) (quoting *Potomac All. v. U.S. Nuclear Regul. Comm’n*, 682 F.2d 1030, 1035 (D.C. Cir. 1982)) (explaining the reasonably foreseeable requirement under NEPA); *see also* *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (defining foreseeability under NEPA); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (defining interrelatedness under NEPA).

136. 40 C.F.R. § 1508.18 (2010).

137. *Id.* § 1502.16.

138. *See* Exec. Order No. 14,096, *supra* note 8. Executive Order 14,096 defines *environmental justice* to mean the “just treatment and meaningful involvement of all people” in agency decision-making and actions “regardless of income, race, color, national origin, Tribal affiliation, or disability.” *Id.*

139. 42 U.S.C. § 4321 (emphasis added) (stating that a goal of NEPA is to “encourage productive and enjoyable *harmony* between man and his environment”).

140. *Id.*

and time again, however, the statute's call for balance has been disregarded in favor of project goals and agencies' preferred methods.<sup>141</sup> CEQ has observed that agency application of NEPA's requirements sometimes reduces the Act to an administrative hurdle that is treated as a burden rather than an opportunity to minimize harm.<sup>142</sup> While the NEPA process is undoubtedly burdensome in some circumstances, its reputation as a federal logjam is overstated.<sup>143</sup> The mischaracterization<sup>144</sup> of NEPA as a bureaucratic hassle has turned it into a political posterchild: the Act's opponents hold it up as an example of government ineptitude and overreach while its victors trumpet its potential to improve government decision-making.<sup>145</sup> NEPA's politicization is evident in regulatory shifts seen with each

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141. See generally Fromherz, *supra* note 6; CEQ, A STUDY, *supra* note 6, at 35 (concluding that “NEPA is critical to meeting the environmental, social, and economic goals this Nation has set for itself,” and that “[s]ubstantial opportunities exist to improve the effectiveness and efficiency of the NEPA process”).

142. CEQ, A STUDY, *supra* note 6, at ix.

143. John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 NAT. RES. & ENV'T 14, 15 (2020).

144. *Id.* (explaining that NEPA works more effectively than critics maintain); John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479, 492 (2020) (discussing the mischaracterization that NEPA is unduly burdensome); John C. Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENV'T L. 39, 50 (2016) [hereinafter Ruple & Capone I] (“NEPA compliance does appear to produce final decisions that are substantially less impactful on the environment when compared to initially proposed projects.”). See generally John Ruple & Mark Capone, *NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West*, 46 ENV'T L. 953 (2016) [hereinafter Ruple & Capone II] (highlighting NEPA's impact reduction on the environment).

145. Compare H.R. 1705, 118th Cong. (2023) (proposing measures that would expand NEPA's approach to environmental justice), and S. 919, 118th Cong. (2023) (proposing measures that would expand NEPA's approach to environmental justice), with Preventing Executive Climate Overreach Act, H.R. 3256, 118th Cong. (2023) (limiting environmental justice review), and S. 1449, 118th Cong. (2023) (limiting a plaintiff's ability to challenge NEPA findings in court).

new administration<sup>146</sup> as well as recent amendments to the Act.<sup>147</sup> Ultimately, the potential of NEPA to protect the human environment is stymied by perfunctory implementation, shifting regulatory framework, and fragmented agency approach. These failures betray the Act's purpose.

As illustrated by the experiences of those in the Apalachicola Region, NEPA's lofty promises are unfulfilled when agencies fail to meaningfully consider community impacts.<sup>148</sup> In this way, NEPA's implementation falls short of its statutory mandate and exacerbates environmental injustice.<sup>149</sup> After summarizing the NEPA process and

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146. See Harvard L. Sch., *Regulatory Tracker NEPA Environmental Review Requirements*, ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2018/08/nepa-environmental-review-requirements/> (last visited Jan. 13, 2024) [hereinafter Harvard Regulatory Tracker] (demonstrating the shift in NEPA regulations in relation to each presidential administration).

147. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38–46.

148. See discussion *supra* Section II (discussing the impact on the Apalachicola Region). See also discussion *infra* Section III.D (discussing the Corps' disregard for Apalachicola's community agricultural practices). As CEQ has found, "NEPA's implementation at times has fallen short of its goals" as a result of factors that include "agencies sometimes engag[ing] in consultation only after a decision has—for all practical purposes—been made." CEQ, A STUDY, *supra* note 6, at iii. Further, agencies "sometimes confuse the purpose of NEPA" and "act as if the detailed statement called for in the statute is an end in itself, rather than a tool to enhance and improve decision-making." *Id.* As a result, "the exercise can be one of producing a document to no specific end." *Id.*; see also Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENV'T L. 533 (1990) (discussing the U.S. Supreme Court's undoing of NEPA); Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENV'T L. & POL'Y F. 113, 115, 118–19 (2010) (discussing NEPA's purpose, history, and reduction to a procedural requirement); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND, RES., & ENV'T L. 245, 249 (2000) ("The framers of NEPA intended to substantively redirect the goals and policy decisions generated within federal agencies so that, collectively, the nation would recognize the importance of environmental assets along with other national interests.").

149. See Fromherz, *supra* note 6, at 194 (arguing for NEPA to require consent from communities "where the decision will have a significant impact and there is a profound demographical disconnect between costs and benefits" required); Outka, *supra* note 6, at 413–14 (discussing NEPA's limitations and impact on environmental justice); CEQ, A STUDY, *supra* note 6, at 35 ("NEPA is critical to meeting the environmental, social, and economic goals this Nation has set for itself.

common misconceptions about the statute, this section examines the adequacy of NEPA's community consideration requirements and discusses the breadth of President Biden's recent actions on environmental justice. Finally, this section uses the Corps' 2016 FEIS assessing the impact of its new water control manual to illustrate ways in which agencies can still ignore meaningful community consideration under the Act.

### A. NEPA Processes, NEPA Politics, and NEPA Myths

While NEPA is not outcome determinative—the Supreme Court has repeatedly held that the Act imposes only procedural requirements<sup>150</sup>—the text of the statute instructs agencies to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”<sup>151</sup> The Act is triggered by “*major federal actions*,”

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Substantial opportunities exist to improve the effectiveness and efficiency of the NEPA process.”).

150. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (internal citations omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 349 (1989)) (“NEPA itself does not mandate particular results.’ Instead, NEPA imposes only procedural requirements to ‘ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.’”); see also *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004); cf. *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to [e]nsure that the agency has considered the environmental consequences”); David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3, 22, 24 (2018) [hereinafter Adelman & Glicksman I] (“The existing literature reveals that while thousands of federal actions are potentially subject to NEPA procedures, the vast majority are either exempted under [categorical exclusions] or reviewed under streamlined [environmental assessments].”); Yost, *supra* note 148, at 534 (“[T]he Supreme Court’s minimization and near obliteration of substantive review flies in the face of the drafters’ intent, the statute’s language, and the Council on Environmental Quality’s regulations.”); Kalen, *supra* note 148, at 115, 118–19; (discussing NEPA’s purpose, history, and reduction to a procedural requirement); Lindstrom, *supra* note 148, at 249 (“The framers of NEPA intended to substantively redirect the goals and policy decisions generated within federal agencies so that, collectively, the nation would recognize the importance of environmental assets along with other national interests.”).

151. 42 U.S.C. § 4331(b)(3).

which historically included any actions “which are potentially subject to Federal control and responsibility.”<sup>152</sup> As a result, the statute reaches not only government-led projects, permitting, policy, and regulatory implementation but also federally funded actions.

The statute provides several pathways for assessing possible environmental impacts that promote informed agency decision-making.<sup>153</sup> First, if a major federal action is not likely to result in significant environmental impacts and falls under an agency-defined categorical exclusion (“CE”), no further NEPA analysis is required.<sup>154</sup> CEs are agency-created or congressionally created<sup>155</sup> loopholes for federal actions that do not “individually or cumulatively have a significant impact on the human environment.”<sup>156</sup> If an action falls under a CE, it can proceed without an impact assessment unless “extraordinary circumstances” exist that warrant the CE’s suspension.<sup>157</sup>

If the extent of a project’s environmental impact is unclear, then decision-makers must perform an Environmental Assessment (“EA”).<sup>158</sup> An EA includes a high-level description of the proposed action, possible alternatives, and environmental impacts.<sup>159</sup> Depending on the EA’s findings, agencies will either make a “finding of no significant impact”<sup>160</sup> or embark on a more comprehensive study, called an Environmental Impact Statement (“EIS”).<sup>161</sup> An EIS must

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152. 40 C.F.R. § 1508.18 (2010).

153. *Id.* § 1500.1(c) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

154. 40 C.F.R. § 1508.1(d) (2024).

155. Congress has created statutory CEs for certain types of oil and natural gas development. *See, e.g.*, 42 U.S.C. § 15942 (2005). *See* Eric V. Hull, *Crude Injustice in the Gulf: Why Categorical Exclusions for Deepwater Drilling in the Gulf of Mexico Are Inconsistent with U.S. and International Ocean Law and Policy*, 29 UCLA J. ENV’T L. & POL’Y 1, 2 (2011) (discussing of the risk of these CEs); *see generally* Abigail E. André, *A Canary in a Coal Mine: What We Haven’t Learned from Deepwater Horizon and How Courts Can Help*, 33 GEO. ENV’T L. REV. 1 (2020).

156. Ruple & Tanana, *supra* note 143, at 15.

157. 40 C.F.R. § 1508.4 (2010).

158. *Id.* § 1501.3.

159. 40 C.F.R. § 1501.5(c)(2) (2024).

160. 40 C.F.R. § 1501.4(e) (2010).

161. *Id.* § 1502.1–1502.25.

contain significant analysis of the project's potential direct, indirect, and cumulative environmental impacts as well as descriptions of the project's scope, schedule, and detailed alternatives.<sup>162</sup> During this process, agencies must take a hard look<sup>163</sup> at the reasonably foreseeable<sup>164</sup> impacts of their actions, including cumulative,<sup>165</sup> direct, and indirect environmental impacts as well as social, cultural, and economic impacts.<sup>166</sup> The median EIS takes 3.6 years to complete.<sup>167</sup> Generally speaking, one agency is designated as lead during the NEPA review process, though the statute requires interagency, state, local, and tribal consultation and opportunity for comment in some cases.<sup>168</sup>

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162. *Id.* § 1505.2(c) (requiring an agency to “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not”). COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA 16 (2007), [https://ceq.doe.gov/docs/get-involved/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf) (“The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the heart of the NEPA analysis.”); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1243 (10th Cir. 2011); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991).

163. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see generally* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).

164. 40 C.F.R. § 1508.1 (2024); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (defining foreseeability under NEPA).

165. Cumulative impacts are defined as the “result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.1(g)(3) (2024).

166. 40 C.F.R. § 1508.8 (2010).

167. COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2017), at 1 (2018), [https://ceq.doe.gov/docs/nepa-practice/CEQ\\_EIS\\_Timelines\\_Report\\_2018-12-14.pdf](https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timelines_Report_2018-12-14.pdf).

168. 42 U.S.C. § 4332(2)(C) (2023) (“Prior to making any detailed statement, the head of the lead agency shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”). NEPA includes both federal and state agencies within this directive, and probably should be interpreted to also include tribal agencies. 40 C.F.R. § 1503.1(a) (2010) (instructing lead agencies to “[o]btain the comments of any Federal agency which has jurisdiction by law or special expertise,” as well as request comments from state and local agencies, Indian tribes, and the public). *See*

Importantly, NEPA's requirements are strictly procedural and do not mandate an environmentally friendly method.<sup>169</sup>

Public participation is required under many NEPA processes,<sup>170</sup> and the amount of legally mandated public participation increases with the intensity of the environmental study required under the Act. For example, the development of an EA calls for public involvement to the extent practicable,<sup>171</sup> whereas agencies preparing an EIS must publish notices, provide reliance materials and drafts, and must also accept and respond to comments at multiple points during the project's development.<sup>172</sup> Every NEPA-related decision an agency makes—including the initial categorization of impacts as significant, as well as

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also Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENV'T L. REV. 277, 306 (1990) (“Lead agencies must confront and usually resolve comments from environmental agencies or run a considerable risk of court injunction,” but “projects that do not engender expert agency opposition are unlikely candidates for NEPA violations.”); Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5, 7 (2012).

169. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) (“NEPA does not work by mandating that agencies achieve particular substantive environmental results.”); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978) (internal citation omitted) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)) (explaining that NEPA decisions should only be set aside “for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached”); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to [e]nsure that the agency has considered the environmental consequences.”); COUNCIL ON ENV’T QUALITY, EXEC. OFF. OF THE PRESIDENT, A CITIZEN’S GUIDE TO NEPA 4 (2021), <https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf>. *See* discussion *infra* Section IV (discussing this limitation).

170. 42 U.S.C. § 4331(a). Note that all states have their own versions of NEPA, which generally mirror the federal standards. *See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE § 21002.*

171. 40 C.F.R. § 1501.5(e) (2024).

172. *See id.* §1502.



the sufficiency of scoping, analysis, choice of alternatives,<sup>173</sup> and public participation opportunities<sup>174</sup>—can be challenged as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>175</sup> In cases where an agency fails to take a hard look at “non-environmental” impacts during the FEIS process, the adequacy of the FEIS must be challenged.<sup>176</sup>

In the spring of 2023, the Fiscal Responsibility Act (“FRA”)<sup>177</sup> adopted the most significant amendments to NEPA since 1982.<sup>178</sup> While the amendments may in some cases promote consideration of community impacts, they are primarily intended to<sup>179</sup> expedite the NEPA process. Driven by a largely<sup>180</sup> partisan admonishment of the

173. *Id.* § 1505.2(c) (requiring agency records of decision to discuss “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not”).

174. *See, e.g.*, *Ctr. for Cmty. Action & Env’t Just. v. Fed. Aviation Admin.*, 18 F.4th 592, 597–98 (9th Cir. 2021) (challenging FAA’s decision to forgo an EIS before constructing large air cargo facility); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (challenging agency’s failure to discuss opposing views in EIS); *Nat’l Wildlife Fed’n v. Andrus*, 440 F. Supp. 1245, 1253 (D.D.C. 1977) (finding cursory admission of impacts insufficient); *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 411 (6th Cir. 2013) (finding that past actions and impacts must be considered); No. 2-6007-00251/00001, 2000 WL 1299571 (N.Y. Dep’t Env’tl. Conserv., Aug. 25, 2000) (requiring an EIS for permitting a solid waste transfer program).

175. NEPA provides no independent right of action; these suits are brought under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (2004).

176. *See* discussion *infra* Section III.B.

177. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38–46.

178. H. FIN. SERVS. COMM., THE FISCAL RESPONSIBILITY ACT SECTION-BY-SECTION 1–4 (2023), [https://financialservices.house.gov/uploadedfiles/fra\\_section\\_by\\_section.pdf](https://financialservices.house.gov/uploadedfiles/fra_section_by_section.pdf).

179. The impact of these changes is not yet clear and, as argued by Professor Dan Farber, the amendments introduced significant vagueness that is likely to muddy the NEPA process and promote litigation in the coming years. *See* Dan Farber, *The Drafting Puzzles of NEPA 2.0*, LEGALPLANET (June 15, 2023), <https://legal-planet.org/2023/06/15/the-drafting-puzzles-of-nepa-2-0/>.

180. NEPA is one of many procedural hurdles that slows green infrastructure projects, which have led scholars to call for alternative processes for these types of projects. *See* discussion *infra* Section IV; J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 696–97 (2020); *see also* Eric Orts, *The Green New Deal: What It Can Do, and What It Can’t*, KNOWLEDGE AT WHARTON PODCAST (Feb. 19, 2019),

NEPA process as unnecessary “red tape,”<sup>181</sup> the FRA imposes strict time and length limits for environmental review processes, expands the use of categorical exclusions, limits agency review of alternatives, and curtails public comments in some cases.<sup>182</sup> Importantly, the FRA’s “streamlining” of NEPA seemingly<sup>183</sup> removes important safeguards the statute previously guaranteed by narrowing the definition of “major federal actions” that trigger the Act’s review requirements<sup>184</sup> and abandons environmental documentation previously required during the CE process.<sup>185</sup>

The FRA is only the latest example of many recent changes to the NEPA process. Significant changes to the statute’s implementing regulations were made during the Obama, Trump, and Biden administrations.<sup>186</sup> In many cases, these changes reflect a partisan tug-

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<https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/the-green-new-deal-explained/> (expressing skepticism at the Green New Deal’s ability to accomplish its goals).

181. *Capito: CEQ’s Proposed NEPA Regulations Add Red Tape Back into Infrastructure Projects*, U.S. SENATE COMM. ON ENV’T & PUB. WORKS (Oct. 6, 2021), <https://www.epw.senate.gov/public/index.cfm/2021/10/capito-ceq-s-proposed-nepa-regulations-add-red-tape-back-to-infrastructure-projects>.

182. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38–46; CONG. RSCH. SERV., IF12417, ENVIRONMENTAL REVIEWS AND THE 118TH CONGRESS (2023), <https://sgp.fas.org/crs/misc/IF12417.pdf>.

183. *See supra* text accompanying note 179.

184. 42 U.S.C. § 4336e(10)(A) (2024). This amendment changes the scope of actions covered by NEPA review to those “subject to *substantial* federal control and responsibility.” *Id.* (emphasis added).

185. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1026–33 (9th Cir. 2007). The court of appeals found the Forest Service violated the Administrative Procedure Act when its application of a CE “(1) collected data only to justify, rather than assess, the appropriateness of a [CE]; (2) failed to explain why the cumulative effect of each project would not have significant environmental effects; and (3) failed to specify criteria for each project that would ensure they had no significant environmental effects.” CONG. RSCH. SERV., R47205, JUDICIAL REVIEW AND THE NATIONAL ENVIRONMENTAL POLICY OF 1969, at 12 (2022) (summarizing *Sierra Club v. Bosworth*).

186. Harvard Regulatory Tracker, *supra* note 146 (demonstrating the shift in NEPA regulations in relation to each presidential administration); *see* Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 487–506 (2020) (detailing Bush and Obama era EPA definitions); *see generally* Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393 (2019) (reviewing Trump’s EJ policy).

of-war over the reach of NEPA: President Trump rolled back the ways in which President Obama broadened regulatory obligations, and the Biden administration has spent the last three years unraveling the Trump administration's restrictions.<sup>187</sup> Constant changes have added confusion to the already complex NEPA process. While CEQ regulations and guidance mandate a government-wide baseline,<sup>188</sup> NEPA implementation is siloed within the individual federal agencies, which are free to interpret and implement CEQ requirements and regulate large swaths of the statute individually<sup>189</sup> and self-police compliance of the Act's requirements.<sup>190</sup> This fragmented approach to the statute's implementation results in inconsistent application and lack of centralized oversight.<sup>191</sup>

Contrary to popular descriptions of NEPA—including as an unduly burdensome drag on the economy and substantial source of litigation<sup>192</sup>—studies suggest that the statute has been unfairly maligned. A Government Accountability Office (“GAO”) study breaks down the frequency with which each NEPA procedure is used throughout the federal government: roughly 95% of federal actions fall under a CE, EAs account for about 5% of NEPA decisions, and EISs

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187. See generally Harvard Regulatory Tracker, *supra* note 146 (demonstrating the shift in NEPA regulations in relation to each presidential administration).

188. President Carter ordered CEQ to develop regulations to implement NEPA in 1970. Exec. Order No. 11,514, *supra* note 130.

189. 40 C.F.R. § 1507.3 (2010) (directing federal agencies to develop their own NEPA procedures tailored to typical classes of actions undertaken).

190. *Id.* § 1500.6 (directing federal agencies to review their “policies, procedures, and regulations . . . to [e]nsure full compliance” with the intent of NEPA).

191. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 32–33 (2004); Susan L. Cutter, *Governance Structures for Recovery and Resilience*, in *THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY* 62–64 (John Travis Marshall et al. eds., 2022).

192. Ruple & Tanana, *supra* note 143, at 14; see, e.g., David E. Adelman, *Permitting Reform's False Choice*, *ECOLOGY L.Q.* (forthcoming 2024) (manuscript at 8) (on file with author) (summarizing studies and providing new data); but see JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* 255 (1st ed. 2004) (“[I]nterested parties have filed thousands of NEPA lawsuits. Indeed, NEPA’s seemingly innocuous EIS requirement has led to more lawsuits than any other environmental statute.”); Ruhl & Salzman, *supra* note 180, at 696–97 (identifying the NEPA process as an impediment to important environmental policy implementation).

occur less than 1% of the time.<sup>193</sup> Based on CEQ data, about one in 450 NEPA decisions (0.22%) result in litigation.<sup>194</sup> Separate studies have found that NEPA designations actually hasten environmental review<sup>195</sup> and facilitate better environmental decision-making without harm to economic outcomes.<sup>196</sup> Professors John Ruple and Heather Tanana suggest that the perception of NEPA as the primary source of federal logjam is also inaccurate: “[T]he multiyear review process [required for EAs and EISs] is often attributable to factors outside of the lead agency’s control, such as lack of funding, project complexity, higher agency priorities, changes in scope of the project, engineering requirements, and delays in obtaining nonfederal approvals.”<sup>197</sup> Put simply, amendments to NEPA to rectify these overstated deficiencies may well be more political than practical.

NEPA’s mischaracterization as a waste of time diminishes the importance of required assessments. As highlighted by the next section, NEPA’s consideration of non-environmental impacts are intended to provide a voice for communities like those in the Apalachicola region. Without it, those most at risk of harm from federal actions can be rendered invisible by the NEPA process.

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193. U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT LITTLE INFORMATION EXISTS ON NEPA ANALYSIS (2014) [hereinafter GAO-14-370], <https://www.gao.gov/assets/gao-14-370.pdf>; see also Ruple & Tanana, *supra* note 143, at 15; Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing the Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 908 (2002).

194. Ruple & Race, *supra* note 144, at 483; see also Adelman & Glicksman I, *supra* note 150, at 22; David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 416 (2020).

195. John C. Ruple et al., *Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules*, 46 ECOLOGY L.Q. 829, 862 (2019).

196. Ruple & Capone I, *supra* note 144, at 51; Ruple & Tanana, *supra* note 143, at 16 (finding that “[o]verall, reductions in environmental impact were achieved without a corresponding reduction in economic benefit”).

197. Ruple & Tanana, *supra* note 143, at 15 (citing GAO-14-370, *supra* note 193, at 15, 19); see also John C. Ruple et al., *Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation*, 46 COLUM. J. ENV’T L. 273, 280 (2022).

*B. Consideration of Community, Economic, and Social Impacts*

Because NEPA requires consideration of impacts on the “human environment,” agencies must take a hard look at the *total* impacts of their actions, including economic, social, and cultural impacts.<sup>198</sup> CEQ regulation on this point is unequivocal: “When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment.”<sup>199</sup> In this context, CEQ has defined “effects” to include foreseeable and interrelated cultural, economic, and social impacts,<sup>200</sup> and “human environment” refers not only to the physical world but also to Americans’ relationship with it.<sup>201</sup>

Courts have interpreted the scope of non-environmental impacts broadly and require agencies to consider how their projects may impact a community’s “quality of life.”<sup>202</sup> Courts have defined cultural effects to include impacts on culturally significant wildlife<sup>203</sup> and harm to the

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198. 40 C.F.R. § 1502.16 (2024); *Am. Rivers & Ala. Rivers All. v. Fed. Energy Regul. Comm’n*, 895 F.3d 32, 49 (D.C. Cir. 2018) (internal citations omitted) (NEPA “compel[s] federal agencies to take a hard and honest look at the environmental consequences of their decisions”); *Nat’l Ass’n of Gov’t Emps. v. Rumsfeld*, 418 F. Supp. 1302, 1306 (E.D. Pa. 1976) (citations omitted) (“[W]hen a federal action does have a significant environmental impact, social and economic impacts must also be considered . . . .”); *Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1028 (9th Cir. 2005) (citations omitted) (holding EIS must “catalogue . . . past, present, and future projects”).

198. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629, at § 1–101 (Feb. 16, 1994) [hereinafter Exec. Order No. 12,898]; Guidance, *supra* note 5, at 14.

199. 40 C.F.R. § 1508.14 (2010).

200. 40 C.F.R. § 1508.1(g)(4) (2024).

201. *Id.*; see also *id.* § 1508.1(m).

202. *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

203. See, e.g., *Protect Our Cmty’s Found. v. Lacounte*, 939 F.3d 1029, 1040–41 (9th Cir. 2019) (noting that the agency recognized the presence of culturally significant wildlife and assessed the threat its actions posed to it).

“character of the community.”<sup>204</sup> Economic impacts include job loss<sup>205</sup> and the “probable degenerative effects” of an agency’s action on communities.<sup>206</sup> Lastly, social harm includes an analysis of how lost revenue may detract from a place’s vibrancy.<sup>207</sup>

As a threshold matter, non-environmental impacts must be foreseeable and related to a physical environmental impact to be considered.<sup>208</sup> The foreseeability requirement includes consideration of direct and indirect effects, which include those “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”<sup>209</sup> Discussing “interrelatedness,” courts have concluded that “[w]hether an impact on the ‘human environment’ must be addressed depends on ‘the closeness of the relationship between the change in the environment and the “effect” at issue.’”<sup>210</sup> However, agencies cannot avoid analysis of these impacts by improperly

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204. *Pyramid Co. of Watertown v. Plan. Bd. of Town of Watertown*, 807 N.Y.S.2d 243, 246 (N.Y. App. Div. 2005) (stating that EIS was inadequate for failing to “include supporting data to respond to concerns raised during the public comment phase with respect to cultural, historic or archeological resources,” including how project would impact “character of the community”).

205. 40 C.F.R. § 1508.1(g) (2024) (defining effects).

206. *Barrie v. Kitsap Cnty.*, 613 P.2d 1148, 1157 (Wash. 1980) (stating that agency must consider “real possibility” of lost jobs and “resultant decline” in city center); *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976).

207. *Barrie*, 613 P.2d at 1157.

208. 40 C.F.R. § 1502.16 (2024); *see also* 40 C.F.R. § 1508.14 (2010) (“*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment” (emphasis in original)); *Maiden Creek Assocs., L.P. v. U.S. Dep’t of Transp.*, 123 F. Supp. 3d 638, 654 (E.D. Pa. 2015) (holding “NEPA was not intended to resolve these sorts of design-based disputes” regarding “roundabouts instead of traffic signals along Route 222”).

209. *See, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992); *see also Izaak Walton League v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) (citations omitted) (“Detailed analysis is required only where impacts are likely.”), *cert. denied*, 454 U.S. 1092 (1981).

210. *Hammond v. Norton*, 370 F. Supp. 2d 226, 243 (D.D.C. 2005) (first quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771–72 (1983); then citing *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1186 (9th Cir. 1997)); *see also Nat’l Ass’n of Gov’t Emps. v. Rumsfeld*, 418 F. Supp. 1302, 1306 (E.D. Pa. 1976).

narrowing the scope of an EIS,<sup>211</sup> failing to substantively respond to comments,<sup>212</sup> claiming lack of authority,<sup>213</sup> or providing “mere cursory examination.”<sup>214</sup> The cumulative impacts of a proposed action in conjunction with preexisting factors must also be considered.<sup>215</sup>

A split exists among courts’ approach when considering the adequacy of an agency’s non-environmental impact assessment.<sup>216</sup>

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211. See, e.g., *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003) (requiring impact on neighboring forest must be considered); see also *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (opining agencies cannot ignore large-aspect problems created by a project).

212. 40 C.F.R. § 1502.9(c) (2024) (requiring agencies to discuss “responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised”); *California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) (quoting *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (“[T]here must be good faith, reasoned analysis in response [to comments].”).

213. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (opining agencies must consider impacts when “there is a reasonably close causal relationship between such impacts” and the agency actions, even when actions occur outside the project’s area); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 26 (D.D.C. 2007); see also *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Mar. 23, 1981) [hereinafter *CEQ, Questions*], <https://www.energy.gov/nepa/articles/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act> (explaining “an alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable”); *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 831 (D.C. Cir. 1972).

214. See, e.g., *Pyramid Co. of Watertown v. Plan. Bd. of Town of Watertown*, 807 N.Y.S.2d 243, 246 (N.Y. App. Div. 2005) (citations omitted).

215. But see discussion *infra* Section III.C. Under traditional cumulative impact analysis, agencies were required to consider the addition of its project to the “aggregate effects of past actions” in the same area. Memorandum from James L. Connaughton, Chairman, Council on Env’t Quality, Exec. Off. of the Pres., on *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis*, to Heads of Federal Agencies (June 24, 2005) [hereinafter *CEQ, Consideration of Past Actions*], <https://www.energy.gov/nepa/articles/guidance-consideration-past-actions-cumulative-effects-analysis-ceq-2005>.

216. For a summary of courts’ approach to non-environmental impacts under NEPA see Sara A. Colangelo & Abigail E. André, *Environmental Justice in U.S. Courts*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE 57, 60–66 (Giovanni Antonelli et al. eds., 2023); Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 223 (2005); see generally Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights*

While some courts deem NEPA processes insufficient based on paltry non-environmental impacts assessments,<sup>217</sup> many avoid this approach lest they “substitute [their] judgment for that of the agency.”<sup>218</sup> This directive is habitually cited as a cautionary reminder that courts are prohibited from directing agency values or goals because NEPA “prohibits uninformed—rather than unwise—agency action.”<sup>219</sup> However, this promotes a cursory “box-checking”<sup>220</sup> approach to non-environmental analysis whereby courts deem an agency’s consideration sufficient based on the barest mention of social, economic, or cultural impacts.<sup>221</sup> Such was the case in *In re ACF Basin Water Litigation*, where the district court was unpersuaded by arguments that the Corps’ abbreviated consideration of non-environmental impacts in the Apalachicola region was inadequate under NEPA.<sup>222</sup> As explored in the next section, environmental

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*Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281 (2019).

217. *Pyramid*, 807 N.Y.S.2d at 246 (finding an EIS was inadequate because it “failed to include supporting data to respond to concerns raised during the public comment phase with respect to cultural, historic or archeological resources,” including how project would impact “character of the community”); *Barrie v. Kitsap Cnty.*, 613 P.2d 1148, 1157 (Wash. 1980) (agency must consider “real possibility” of lost jobs and “resultant decline” in city center); *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973 (2d Cir. 1976).

218. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

219. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

220. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020) (“[E]nvironmental justice is not merely a box to be checked . . . .”); see also Clifford J. Villa, *No “Box to Be Checked”: Environmental Justice in Modern Legal Practice*, 30 N.Y.U. ENV’T L.J. 157, 163 (2022).

221. See, e.g., *Hausrath v U.S. Dep’t of the Air Force*, 491 F. Supp. 3d 770 (D. Idaho 2020); *California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020); *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689–90 (D.C. Cir. 2004) (upholding the sufficiency of agency’s demographic analysis even though the size of the area considered diluted potential impacts on communities of color closest to the project); Order on Rehearing and Stay, *In re Annova LNG Common Infrastructure, LLC*, 170 FERC ¶ 61140 (Feb. 21, 2020), 2020 WL 865088, at \*61999 (upholding facility’s citing where “all project-affected populations are minority or low-income populations, or both” over challenge under NEPA).

222. *In re ACF Basin Water Litig.*, 554 F. Supp. 3d 1282, 1307–08 (N.D. Ga. 2021) (denying “the Plaintiff National Wildlife Federation, Florida Wildlife Federation, and Apalachicola Bay and River Keeper’s Motion for Summary Judgment” and granting “the Defendant U.S. Army Corps of Engineers’ Cross-



injustice impacts overlap significantly with the non-environmental harms an agency must consider, but the movement increasingly seems to be a stronger tool to ensure adequate social, economic, and cultural consideration.

### C. Consideration of Environmental Injustice

A web of long-standing societal and governmental practices gave rise to the inequitable distribution of environmental burdens that make low-income and non-white communities more susceptible to the types of “non-environmental” impacts agencies must consider.<sup>223</sup> A significant body of scholarship details these roots.<sup>224</sup> The disparate impact of “major federal actions”—including citing decisions, permitting, and natural-resource allocation—on low-income and non-white communities are emblematic of environmental injustice.<sup>225</sup> The law requires consideration of impacts on communities with environmental justice concerns in addition to the non-environmental harm analysis described above. Therefore, agencies must take care to identify the risk of disproportionate impacts on these communities and address them throughout the FEIS process.<sup>226</sup> This section describes these requirements.

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Motions for Summary Judgment . . . the Defendant State of Georgia’s Cross-Motions for Summary Judgment . . . and . . . the Defendant Georgia Water Supply Providers’ Cross-Motions for Summary Judgment”).

223. See, e.g., *Friends of Buckingham*, 947 F.3d at 88 (recognizing that “minority” populations are at greater risk of asthma and lung cancer).

224. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (1st ed. 2017) (summarizing the complex factors contributing to environmental injustice); Sheila Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J.L. & URB. POL’Y 1, 10 (2004).

225. COLE & FOSTER, *supra* note 9, at 54–55.

226. See *Friends of Buckingham*, 947 F.3d at 92 (“[E]nvironmental justice is not merely a box to be checked . . .”).

In addition to NEPA's requirements, Executive Orders 12,898<sup>227</sup> and 14,096<sup>228</sup> heighten agency obligation to consider social impacts. In 1994, President Bill Clinton issued Executive Order ("EO") 12,898 which strengthened NEPA's "human environment" inquiry when communities of color or impoverished communities may be disproportionately impacted by an agency's action.<sup>229</sup> EO 12,898 directed each federal agency to incorporate environmental justice into its mission and consider the impact of its "programs, policies, and activities on minority populations and low-income populations."<sup>230</sup> Pursuant to EO 12,898, agencies must also identify and address the impact of its actions on "minority populations and low-income populations."<sup>231</sup> In this context, impacts include "interrelated cultural, social, occupational, historical, or economic factors that may amplify" the environmental effect of an agency's action.<sup>232</sup> To comply with this Order, agencies have historically used demographic data to identify

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227. Exec. Order No. 12,898, *supra* note 198, at § 1-101; *see also* Exec. Order No. 14,008, *supra* note 8, at 7629–30 (amending E.O. 12,898 to create a "White House Environmental Justice Interagency Council"); EJ Guidance, *supra* note 5, at 14.

228. *See generally* Exec. Order No. 14,008, *supra* note 8. This is just the latest in a string of environmental justice-oriented actions taken by the Biden Administration. *See, e.g.*, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021). *See Justice40: A Whole-of-Government Initiative*, THE WHITE HOUSE, <https://www.whitehouse.gov/environmentaljustice/justice40/> (last visited Apr. 10, 2024). The Bipartisan Infrastructure Law and the Inflation Reduction Act have also generated significant funding opportunities that may have environmental justice benefits, including programs to "replace lead service lines, create clean energy jobs in energy communities, increase equitable access to trees and green spaces, install air monitors to screen for pollution, [and] purchase zero-emissions school buses." *FACT SHEET: President Biden Signs Executive Order to Revitalize Our Nation's Commitment to Environmental Justice for All*, THE WHITE HOUSE (Apr. 21, 2023) [hereinafter *FACT SHEET, Executive Order*], <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/21/fact-sheet-president-biden-signs-executive-order-to-revitalize-our-nations-commitment-to-environmental-justice-for-all/>.

229. *See generally* Exec. Order No. 12,898, *supra* note 198; *see also* Exec. Order No. 14,008, *supra* note 8, at 7629–30 (amending EO 12,898 to create a "White House Environmental Justice Interagency Council").

230. Exec. Order No. 12,898, *supra* note 198, at § 1-101; *see also* Villa, *supra* note 220, at 163.

231. *See* Exec. Order No. 12,898, *supra* note 198, at § 1-101.

232. EJ Guidance, *supra* note 5, at 9.

low-income or non-white populations and analyze whether proposed actions may disproportionately impact them.<sup>233</sup> If it is determined these impacts are present, EO 12,898 requires “heighten[ed] agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.”<sup>234</sup>

EO 12,898 does not confer an independent basis for judicial review, but courts have held it reviewable under the Administrative Procedure Act when an agency’s NEPA analysis includes environmental justice.<sup>235</sup> These courts recognize why such review is essential: negative impacts of government action often occur in the “poor area of town, not through the area where the politically powerful people live.”<sup>236</sup> Reflective of deference common in the NEPA process, courts have historically deferred to agency conclusions regarding the extent of environmental justice impacts.<sup>237</sup> As discussed above, the

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233. *Id.* at 9, 14; *see, e.g., Climate and Economic Justice Screening Tool*, COUNCIL ON ENV’T QUALITY, <https://screeningtool.geoplatform.gov/en/> (Nov. 22, 2022).

234. EJ Guidance, *supra* note 5, at 10; *see also* *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock II)*, 440 F. Supp. 3d 1, 26 (D.D.C. 2020) (finding agency’s EIS analysis too narrow).

235. Exec. Order No. 12,898, *supra* note 198, at § 6-609; Administrative Procedure Act, 5 U.S.C. § 706(2) (2004) (instructing courts must “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”); *see, e.g., Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (reviewing adequacy of environmental justice analysis within the context NEPA); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock I)*, 255 F. Supp. 3d 101, 140 (D.C. Cir. 2017) (finding the failure of the Army Corps of Engineers to take a hard look at the environmental justice implications of the project arbitrary and capricious).

236. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (quoting *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 195 (4th Cir. 1999)) (reviewing similar provisions in Virginia state law); *see also Mid States Coal.*, 345 F.3d at 541 (reviewing adequacy of environmental justice analysis within the context NEPA).

237. *See, e.g., Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689–90 (D.C. Cir. 2004) (upholding the sufficiency of agency’s demographic analysis even though the size of the area considered diluted potential impacts on communities of color closest to the project); *Order on Rehearing and Stay, In re Annova LNG Common Infrastructure, LLC*, 170 FERC ¶ 61140 (Feb. 21, 2020), 2020 WL 865088, at \*61999 (upholding facility’s citing where “all project-

courts' acceptance of the Corps' cursory analysis of "non-environmental" impacts on the Apalachicola illustrates this deference.<sup>238</sup> However, Professor Clifford Villa recently observed that—as environmental injustice gains political strength and public recognition—there are signs that courts are taking a closer look at the adequacy of agencies' approach.<sup>239</sup>

In the spring of 2023, the Biden administration issued EO 14,096, "Revitalizing Our Nation's Commitment to Environmental Justice for All."<sup>240</sup> The Order supplements, rather than overrules,<sup>241</sup> Clinton's 1994 EO 12,898 and explicitly weaves environmental injustice analysis into the NEPA process. In many ways, however, Biden's new Order appears to expand agency obligations beyond the requirements of NEPA. First, EO 14,096 expands the definition of environmental justice beyond consideration of "minority" and "low-income communities:"<sup>242</sup> "the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment."<sup>243</sup> The new Executive Order also mandates agency consideration of "the legacy of racism or other structural or systemic barriers" as well as the *risk* created by "federal activities," and an assessment of climate change and the cumulative impact of "environmental and *other burdens*."<sup>244</sup> For the first time, the federal government will be required to explicitly account for the lasting impact of systemic prejudice in its environmental decision-making.

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affected populations are minority or low-income populations, or both" over challenge under NEPA).

238. See discussion *supra* Section II.B.

239. Villa, *supra* note 220, at 163; see also *Hausrath v U.S. Dep't of the Air Force*, 491 F. Supp. 3d 770, 795 (D. Idaho 2020) (concluding agency's consideration of environmental justice impacts "too cursory"); *Buckingham*, 947 F.3d at 92 (emphasis added)("[E]nvironmental justice is not merely a box to be checked . . .").

240. Exec. Order No. 14,096, *supra* note 9.

241. *Id.* Supplementation rather than replacement is an important strategic distinction.

242. Compare Exec. Order No. 14,096, *supra* note 9 (focusing on environmental justice for *all*), with Exec. Order No. 12,898, *supra* note 198 (focusing on environmental justice for *minority and low-income populations*).

243. See Exec. Order No. 14,096, *supra* note 9, at § 2(b).

244. *Id.* at § 2(b)(i) (emphasis added).

Importantly, EO 14,096 defines the type of “federal activity” that requires an environmental justice analysis broadly to include “any agency rulemaking, guidance, policy, program, practice, or action that affects or has the potential to affect human health and the environment, including an agency action related to climate change.”<sup>245</sup> Not only is the scope of this definition broader than a “major federal action” under NEPA, it is wide enough to require an environmental justice analysis at nearly every level of federal agency decision-making.<sup>246</sup> Agencies must also integrate environmental justice into their missions, develop Environmental Justice Strategic Plans,<sup>247</sup> and designate Environmental Justice Officers.<sup>248</sup> Finally, the EO confers new responsibilities to the CEQ, including oversight of an agency’s creation of Environmental Justice Strategic Plans as well as the creation of a White House Office of Environmental Justice.<sup>249</sup> These requirements also reflect lessons learned through the implementation of EO 14,008, which required the creation of an environmental justice scorecard system to measure the efficacy of agency environmental justice policies.<sup>250</sup>

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245. *Id.* at § 2(c).

246. *Id.* (requiring environmental injustice review for “any agency rulemaking, guidance, policy, program, practice, or action that affects or has the potential to affect human health and the environment, including an agency action related to climate change”).

247. *Id.* at § 4; *see also* *A New Environmental Justice Playbook for Federal Agencies*, THE WHITE HOUSE (Nov. 3, 2023), <https://www.whitehouse.gov/ceq/news-updates/2023/11/03/a-new-environmental-justice-playbook-for-federal-agencies/>; *see, e.g.*, COUNCIL ON ENV’T QUALITY, EXEC. OFF. OF THE PRESIDENT, STRATEGIC PLANNING TO ADVANCE ENVIRONMENTAL JUSTICE UNDER EXECUTIVE ORDER 14096: REVITALIZING OUR NATION’S COMMITMENT TO ENVIRONMENTAL JUSTICE FOR ALL (2023) [hereinafter CEQ, STRATEGIC PLANNING], [https://www.whitehouse.gov/wp-content/uploads/2023/11/Strategic-Planning-to-Advance-Environmental-Justice\\_final-Oct.-2023.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/11/Strategic-Planning-to-Advance-Environmental-Justice_final-Oct.-2023.pdf) (providing a template for the Strategic Plans).

248. Exec. Order No. 14,096, *supra* note 9, at § 8.

249. *Id.*

250. Exec. Order No. 14,008, *supra* note 9 at 7629–30 (amending EO 12,898 to create a “White House Environmental Justice Interagency Council”); *see also* Exec. Order No. 14,096, *supra* note 9, at § 4(f). *The Environmental Justice Scorecard*, ENV’T JUST. SCORECARD, <https://ejscorecard.geoplatform.gov/scorecard/> (last visited Apr. 10, 2024). *See* discussion *infra* Section IV.B (proposing these scorecards can be used to guide future NEPA practices).

In the summer of 2023, CEQ proposed regulations to implement 14,096.<sup>251</sup> These changes represent a second wave of NEPA regulatory reform under the Biden Administration (“Phase Two”)<sup>252</sup> and mark a significant step in formalizing the President’s call for a “government-wide” consideration of environmental injustice.<sup>253</sup> Importantly, these changes reflect significant public input CEQ received in response to NEPA rule makings in 2020 and 2021 and over sixty public meetings held during the development of Phase Two rules.<sup>254</sup> The proposed Phase Two rules adopt the EO 14,096’s definition of environmental justice, include environmental injustice as a factor that triggers “significance” under the Act,<sup>255</sup> and expand the definitions of effects that must be considered to include disproportionate and adverse effects on communities with environmental justice concerns.<sup>256</sup> They also require agencies to “rigorously explore” alternatives,<sup>257</sup> include those

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251. National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924 (proposed July 31, 2023) [hereinafter NEPA Phase 2] (to be codified at 40 C.F.R. pts. 1500–1508).

252. Pursuant to EO 13,990, Phase I regulatory changes were primarily focused on rolling back Trump-era policies deemed inconsistent with NEPA’s purpose and administration policies. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021). Phase II changes continue this process. NEPA Phase 2, *supra* note 251. See *Fact Sheet: List of Agency Actions for Review*, The White House (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

253. NEPA Phase 2, *supra* note 251, at 49926; see also *Justice40*, *supra* note 228 (“[T]he Federal government has made it a goal that 40[%] of the overall benefits of certain Federal . . . investments flow to disadvantaged communities that are marginalized by underinvestment and overburdened by pollution.”).

254. NEPA Phase 2, *supra* note 251, at 49928–29 (July 31, 2023) (explaining that CEQ “hosted or participated in over [sixty] meetings with external parties, such as environmental organizations, business and industry organizations (including timber, energy, air, grazing, mining, and transportation organizations), Tribal Nations, State governments, environmental justice organizations, academics, and labor organizations”).

255. 40 C.F.R. § 1501.3 (2024).

256. See 40 C.F.R. § 1508.1(k); 40 C.F.R. § 1500.2(e) (2010) (“Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.”).

257. 40 C.F.R. § 1502.14(a) (2010).

outside lead agencies' jurisdiction,<sup>258</sup> more actively<sup>259</sup> and equitably engage with potentially impacted communities,<sup>260</sup> and direct agencies to commit to binding mitigation measures to ameliorate adverse impacts on communities with environmental justice concerns.<sup>261</sup> In a step toward promotion of the environmental balance mandated by NEPA,<sup>262</sup> the proposed Phase Two rules also require agencies to identify the “environmentally preferable alternative” that “maximiz[es] environmental benefits, such as addressing climate[-]change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historical, cultural, Tribal, and natural resources, including rights of Tribal Nations . . . or causing the least damage to the biological and physical environment.”<sup>263</sup>

While this amendment falls short of mandating that agencies minimize impacts, it is an important step toward regulations that better reflect NEPA's statutory purpose.<sup>264</sup> While CEQ's new regulations

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258. 40 C.F.R. § 1502.11 (2024).

259. *Id.* § 1501.9.

260. 40 C.F.R. § 1500.2(d) (2010) (instructing federal agencies to, at “the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment”); 40 C.F.R. § 1501.9(d) (2024).

261. *See* 40 C.F.R. § 1505.3 (2024); *see also id.* § 1505.3(c) (“Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.”); *Id.* § 1501.6(c) (“The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions.”).

262. 42 U.S.C. § 4321 (stating that a goal of NEPA is to “encourage productive and enjoyable *harmony* between man and his environment” (emphasis added)).

263. 40 C.F.R. § 1502.14(f).

264. *See* 40 C.F.R. § 1500.2 (2010).

CEQ is proposing to remove the language that describes NEPA as a purely procedural statute because, while correct, CEQ considers that language to be an inappropriately narrow view of NEPA's purpose that minimizes some of the broader goals of NEPA . . . . While CEQ agrees that a NEPA analysis does not dictate a particular outcome by the decision maker, Congress established the NEPA process to provide for better informed Federal decision making and improve environmental outcomes, and those goals are not fulfilled if the NEPA analysis is treated merely as a check-the-box exercise.

mark a significant step toward a more equitable NEPA process, EO 14,096 should be harnessed for more radical procedural change.<sup>265</sup>

Community stories from the Apalachicola Region illustrate the importance of these changes, the ways in which agencies have been permitted to turn a blind eye to “non-environmental” impacts, and the harm such inattention causes. The next section uses the Corps’ cursory analysis of impacts in Apalachicola and the courts’ subsequent approval of these practices to demonstrate the need for CEQ’s changes. This Article recommends a more uniform and centralized approach to environmental injustice analysis under NEPA.

*D. Illustrating NEPA’s Limits: The Corps’ Disregard for the  
Apalachicola Region*

Despite NEPA’s requirements, the Corps’ 2016 FEIS failed to take a hard look at the disproportionate impacts of its water control practices on low-income communities throughout the Apalachicola Region.<sup>266</sup> Their cursory analysis not only contravened NEPA but also violated Clinton’s EO 12,898 and attendant regulations. As described in this section, the Corps treated the non-environmental impacts of its ACF management with conclusory afterthoughts, silence, or by entirely disclaiming responsibility.

The Corps’ consideration of impacts on low-income communities epitomizes the box-checking environmental justice analysis discouraged by some courts.<sup>267</sup> In its analysis of the ACF Region, the agency identified their presence but performed little more

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NEPA Phase 2, *supra* note 251; *see also* Yost, *supra* note 148 (identifying the ways in which the Supreme Court has limited the extent of NEPA’s impact).

265. *See* discussion *supra* Section IV.

266. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see generally* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).

267. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020); *Del. Riverkeeper Network v. Fed. Energy Regul. Comm’n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014); *City of N. Miami v. Fed. Aviation Admin.*, 47 F.4th 1257, 1266 (11th Cir. 2022) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (analyzing when to find an agency action is arbitrary and capricious). *See also supra* note 220 and accompanying text.



environmental injustice analysis: “For Florida, the percentage of low-income persons is higher in the basin (20.9[%]) than in the state as a whole (15.6[%]), and the state rate is higher than the nationwide poverty rate of 12.8[%].”<sup>268</sup> The Corps also failed to perform explicit requirements under NEPA, including analysis of interrelated economic, cultural, or social impacts and gave no heightened consideration to alternatives or mitigation that may lessen these impacts.<sup>269</sup>

The Corps also relied on conclusory statements to dismiss environmental justice concerns. For example, the agency concluded that the 2016 water control manual would not have an adverse effect on low-income populations unless it “change[d] conditions in the river and bay to the extent that populations of commercially harvested species would be adversely affected.”<sup>270</sup> However, the FEIS disclaimed responsibility to take the next step to quantify impacts on seafood species because “[m]etrics to quantify potential impacts to eastern oysters, white shrimp, and other species have not been developed to date.”<sup>271</sup> While the agency did recognize Apalachicola’s oyster decline,<sup>272</sup> it did not consider what non-environmental harms—including economic and social impacts on the community—may flow from this decline or assess how “aggregate effects of past actions” may have caused it.<sup>273</sup> In fact, the FEIS largely ignored how the Corps’ past water-management practices—including water allocation and dredging—contributed to the Region’s ecological and economic

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268. FEIS, *supra* note 13, at 2-254.

269. EJ Guidance, *supra* note 6, at 9–10; *see* ); Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (*Standing Rock I*), 255 F. Supp. 3d 101, 136–38 (D.C. Cir. 2017) (citing Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629) (finding the scope of the Corps’ assessment too narrow).

270. FEIS, *supra* note 13, at 6-376.

271. *Id.* at 6-325; *but see id.* at 6-313 tbl.6.4-1 (illustrating, however, a long-term decrease in spawning).

272. *Id.* at 2-244 (“The National Agricultural Statistical Service reported sales revenue of oysters in Franklin County of \$302,000 in its 2012 survey. This is down from over \$600,000 in its 2007 survey.”).

273. CEQ, Consideration of Past Actions, *supra* note 215, at 1–2.

decline.<sup>274</sup> Finally, while the agency acknowledged that low flow caused tree loss throughout the floodplain, it did not question whether the losses would have economic consequences on the Tupelo honey industry.<sup>275</sup> NEPA regulations required the Corps to ask these questions.<sup>276</sup>

The Corps also failed to adequately respond to public comments about impacts on low-income communities in the Bay.<sup>277</sup> For example, one commenter expressed concern that area residents may go hungry because of the Corps' continued refusal to increase flow to Florida: "This increasingly low-income, often multi-generational population of resource users also relies on subsistence to supplement their diets. The oystermen are facing suicide, homelessness, drug addiction, and other social ills related to resource disaster in the Apalachicola Bay."<sup>278</sup> In response, the Corps directed the commenter to its "environmental justice discussion" summarized above,<sup>279</sup> but that discussion contained nothing more than unsupported and conclusory statements that assumed lack of impact and deflected responsibility.<sup>280</sup>

The Corps attempted to avoid the foreseeability requirement by disclaiming responsibility for the harm it has caused. In response to public comment expressing concern for the Bay, the Corps states that

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274. *League of Wilderness Defs. v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005)) (requiring the consideration of past projects).

275. *Nat'l Ass'n of Gov't Emps. v. Rumsfeld*, 418 F. Supp. 1302, 1305 (E.D. Pa. 1976).

276. 40 C.F.R. §§ 1500.2(d), 1508.7 (2010); *Am. Rivers & Ala. Rivers All. v. Fed. Energy Regul. Comm'n*, 895 F.3d 32, 49 (D.C. Cir. 2018).

277. *See, e.g., FEIS, supra* note 13, at C-226, C-258–C-259, C-400, C-729, C-957.

278. *FEIS, supra* note 13, at C-259.

279. *Id.*

280. 40 C.F.R. § 1502.9(c) (2024) ("Final environmental impact statements shall address comments as required in part 1503 of this chapter."); *id.* § 1502.3 (2024) (prescribing the manner of response); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (requiring agencies to "disclose and discuss the responsible opposing views in the final impact statement"); *California v. Block*, 690 F.2d 753, 773 (*Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)) ("[T]here must be good faith, reasoned analysis in response [to comments]."); *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245, 1253 (D.D.C. 1977) (finding "mere admission" of impacts insufficient).

“Apalachicola Bay is not a part of the ACF system and [] the authorized purposes of the ACF system do not include a specific directive to provide freshwater inflows to Apalachicola Bay to sustain the resources of the [B]ay.”<sup>281</sup> This flies in the face of previous court rulings, which have said that agencies cannot avoid consideration of foreseeable impacts by narrowly defining the geographic scope of its responsibility.<sup>282</sup> These omissions violate NEPA’s requirement that agencies identify the total impacts of their actions and deprived the public of a forthright account of potential harms.<sup>283</sup>

Unfortunately, community members’ objections to the Corps’ NEPA process have gone unheeded by courts.<sup>284</sup> This could reflect court error, the insufficiency of regulations in effect at the time of the Corps’ 2016 FEIS, or both. The Corps’ failure to consider Apalachicola impacts highlights the importance of CEQ’s expanded approach to NEPA analysis and the pitfalls inherent in allowing agencies too much independence in environmental injustice assessments.

NEPA processes are complex and time consuming, but with good reason: the statute was designed to protect the environment and communities from unnecessary environmental degradation. The Act’s non-environmental harm requirements, bolstered by recent Executive

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281. FEIS, *supra* note 13, at C-830.

282. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003) (requiring the impact on neighboring forest to be considered); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (requiring agencies to consider impacts with close relationship to its actions); *see also Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (opining agencies cannot ignore large aspects problems created by project).

283. *State Farm*, 463 U.S. at 43 (holding agency action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock I)*, 255 F. Supp. 3d 101, 113 (D.C. Cir. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock II)*, 440 F. Supp. 3d 1, 8 (D.D.C. 2020); *Am. Rivers & Ala. Rivers All. v. Fed. Energy Regul. Comm’n*, 895 F.3d 32, 49 (D.C. Cir. 2018).

284. *See In re ACF Basin Water Litigation*, 554 F. Supp. 3d 1282, 1307–08 (N.D. Ga. 2021) (denying “the Plaintiff National Wildlife Federation, Florida Wildlife Federation, and Apalachicola Bay and River Keeper’s Motion for Summary Judgment” and granting “the Defendant U.S. Army Corps of Engineers’ Cross-Motions for Summary Judgment . . . the Defendant State of Georgia’s Cross-Motions for Summary Judgment . . . and . . . the Defendant Georgia Water Supply Providers’ Cross-Motions for Summary Judgment”).

Orders, mandate agency consideration of social, cultural, and economic impacts. And yet, agencies successfully skirt these requirements with cursory review. The next section proposes changes to CEQ practices to ensure better protection for communities with environmental injustice concerns and guarantee a rigorous government-wide approach to environmental justice analysis under NEPA.

#### IV. AN EQUITABLE NEPA

It is an exciting time for NEPA. For the first time, the government seems poised to fulfill NEPA's promise to protect *every* human's environment, "encourage productive and enjoyable harmony between man and his environment," and "promote efforts which will prevent or eliminate damage to the environment."<sup>285</sup> New Executive Orders and proposed regulations are geared toward a government-wide embrace of environmental justice analysis throughout the NEPA process. These strides represent significant progress toward a guarantee of equitable consideration of non-environmental impacts. However, more can be done.

NEPA continues to be demonized by those who see it as a bureaucratic overreach. Its politicization is reflected in the slew of partisan bills pending in Congress that aim to either expand or curtail the law.<sup>286</sup> Courts are a poor avenue for pursuit of expanded NEPA processes because they are generally suspicious of arguments expanding administrative authority,<sup>287</sup> and the Supreme Court has repeatedly dismissed textual arguments that interpret NEPA as a substantive statute that promotes the minimization of environmental harm.<sup>288</sup> Therefore, this section focuses on how the CEQ can harness the power granted by Biden's EO 14,096 to provide consistent and equitable application of environmental injustice assessment under NEPA. To meet this goal, further policy and regulatory changes are

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285. 42 U.S.C. § 4321.

286. *See supra* notes 145 and accompanying text.

287. *See, e.g.,* Sara A. Colangelo, *Bridging Silos: Environmental and Reproductive Justice in the Climate Crisis*, 112 CAL. L. REV. 101 (forthcoming 2024) (manuscript at 159–62) (on file with author) (discussing how recent Supreme Court doctrinal changes are likely to chill progressive federal environmental justice action).

288. Yost, *supra* note 148, at 534.

necessary to consolidate environmental justice assessment under those with sufficient expertise and experience to perform it well.

The Biden administration has specifically recognized that “[c]ommunities with environmental[-]justice concerns have long experienced exclusion and other significant barriers to having a voice in federal decision-making.”<sup>289</sup> While CEQ regulations and guidance inform agency NEPA review of community and environmental injustice impacts, these assessments are governed by individual sets of agency-specific practices.<sup>290</sup> As a result, review of non-environmental impacts under NEPA varies widely, with some agencies approaching environmental injustice assessment as a box to be checked.<sup>291</sup> While EO 14,096 and Phase Two regulations address this by imposing new requirements, agencies maintain significant independence. CEQ’s expertise, power, and commitment to NEPA’s purpose make it an excellent vehicle for standardized environmental injustice analysis. Further, CEQ’s newly formed Office of Environmental Justice—which is tasked with the implementation of environmental justice policy across federal government<sup>292</sup>—could elevate community voices through a streamlined application of rigorous environmental injustice assessment procedures.

#### *A. CEQ’s Purpose, Expertise, and Untapped Potential*

Created by NEPA,<sup>293</sup> the CEQ is a small policy arm of the Executive Office of the President that plays a significant role in environmental policy creation and implementation. Pursuant to the Act, CEQ must “review and appraise the various programs and activities of the Federal Government in the light of the policy set forth

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289. *FACT SHEET, Executive Order*, *supra* note 228.

290. CONG. RSCH. SERV., RL33152, *THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION* (2011).

291. *See Villa, supra* note 220, at 163. *The Environmental Justice Scorecard*, *supra* note 250.

292. Exec. Order No. 14,096, *supra* note 8, at § 8(b).

293. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4341–4347 (1982). NEPA created CEQ to “review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I” to determine if the programs and activities are contributing to the achievement of the policy and to report their findings to the President. *Id.* § 4344(3).

in subchapter I [of NEPA]” to determine if agencies are acting in accordance with NEPA’s purpose.<sup>294</sup> CEQ enjoys significant power over NEPA implementation: it drafts regulations<sup>295</sup> that are binding on federal decision-making processes,<sup>296</sup> issues guidance interpreting those regulations and NEPA itself, and receives “substantial deference” from courts on these matters as it is an executive agency.<sup>297</sup> The Council’s power is limited, however: CEQ does not have the power to regulate agency violations of NEPA’s requirements.<sup>298</sup> The Council has also historically been seen as a relatively apolitical force capable of the “delicate role of balancing environmental concerns with the many Federal actions dealing with other national concerns, such as energy development and economic growth.”<sup>299</sup>

CEQ has historically “attempted to stress the linkage between the [Act’s] procedures and the policy throughout its regulations.”<sup>300</sup> For example, CEQ regulations require agencies to defend decisions that harm the environment in records of decision, including discussing “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”<sup>301</sup> This requirement is emblematic not only of CEQ’s rigorous procedural approach to enforcing NEPA but also the weight the Council gives NEPA’s promotion of government actions that “will prevent or eliminate damage to the environment.”<sup>302</sup> In this way, CEQ

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294. *Id.*

295. Exec. Order No. 11,514, *supra* note 130 (instructing CEQ to draft regulations to implement NEPA more uniformly across the federal government).

296. Exec. Order No. 11,991, *supra* note 130 (making CEQ regulations legally binding on agencies).

297. Edward A. Boling, *Back to the Future with the National Environmental Policy Act: History, Purposes and Current Direction of NEPA*, SL063 A.L.I.-A.B.A. 217, 223 (2006).

298. Yost, *supra* note 148, at 537–38.

299. COMPTROLLER GEN. OF THE U.S., U.S. GEN. ACCT. OFF., *THE COUNCIL ON ENVIRONMENTAL QUALITY: A TOOL IN SHAPING NATIONAL POLICY* iii (1981); *but see* Yost, *supra* note 148, at 537–38.

300. Yost, *supra* note 148, at 538; *see also* 40 C.F.R. § 1505.1 (2024) (directing agencies “to ensure that decisions are made in accordance with the policies and purposes of the Act”).

301. 40 C.F.R. § 1505.2(c) (2024); *see also id.* § 1505.3.

302. 42 U.S.C. § 4321.

embodies the bridge between procedure and impact minimization that NEPA’s plain language endorses.<sup>303</sup>

The Council has also served at the forefront of non-environmental impact assessment, including environmental injustice.<sup>304</sup> In 1997, President Clinton’s EO 12,898 charged CEQ with integrating environmental justice into federal NEPA processes. Through a series of regulations and guidance,<sup>305</sup> CEQ became the primary driver of the federal government’s shift toward environmental equity. As discussed above, Biden’s EO 14,096 strengthened CEQ’s ability to integrate environmental injustice assessment into the NEPA process.<sup>306</sup> In addition to strengthening CEQ’s mandate for uniform federal approach to environmental justice, the EO established the White House Office of Environmental Justice (“WHOEJ”), a newly formed CEQ component that “shall advance environmental justice initiatives, including by coordinating the development of policies, programs, and partnerships to achieve the policies set forth in [EO 14,096].”<sup>307</sup> Taken together with NEPA’s mandate that CEQ must “review and appraise” the consistency of government activities with the Act’s purpose, EO 14,096 positions the WHOEJ to not only identify insufficiencies in agency’s NEPA analysis but direct and implement environmental injustice assessment.

### *B. Streamlining Environmental Injustice Assessment*

The WHOEJ’s review, appraisal, and advancement obligations are not defined by NEPA or EO 14,096, but the broad, plain meaning of the terms leaves the Office substantial leeway for creative policy making. With discrete structural changes—increased budget and staff—CEQ could promote rigorous and uniform environmental justice assessment government-wide through the in-house review of and, in some circumstances, the performance of environmental injustice assessments. As a preliminary matter, increased agency uniformity

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303. See Yost, *supra* note 148, at 539–46 (discussing how the Supreme Court has muddied the waters of NEPA’s environmental impact minimization goals).

304. Exec. Order No. 12,898, *supra* note 198; see also 40 C.F.R. § 1508.1(m) (2024) (defining human environment).

305. See generally EJ Guidance, *supra* note 5.

306. See discussion *supra* Section III.C.

307. Exec. Order No. 14,096, *supra* note 8, at § 8(b).

necessitates greater regulatory detail and guidance.<sup>308</sup> CEQ's Phase Two regulations are a good start, but more detail on required considerations, methods, and reporting standards is needed. The review function itself could be built several ways,<sup>309</sup> but efficiency and respect for agency autonomy dictates a two-stream approach: oversight and reallocation. The oversight function would require agency submission of environmental injustice assessments to WHOEJ through a standardized online portal. This could occur at the CE, EA, and/or EIS phase of NEPA,<sup>310</sup> with the intensity of WHOEJ's review increasing with the risk for harm to communities with environmental justice concerns.

The second stream would reallocate environmental injustice assessments to CEQ based on agency's Environmental Justice Scorecards<sup>311</sup> or some similar metric. Pursuant to Biden's EO 14,008, the Scorecards rank all agency's environmental justice efforts,

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308. Some of the detail needed to define the process has already been made publicly available through reports from the Interagency Working Group on Environmental Justice and strategic plan development. *See generally* FED. INTERAGENCY WORKING GRP. ON ENV'T JUST. & NEPA COMM., PROMISING PRACTICES FOR EJ METHODOLOGIES IN NEPA REVIEWS (2016), [https://www.epa.gov/sites/default/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf). However, this guidance is not binding on agencies. *Id.*; *see also* CEQ, STRATEGIC PLANNING, *supra* note 247 (providing a template for the Strategic Plans).

309. *See, e.g.,* Samuel X. Frank, *Is NEPA Still the Best Model for Environmental Protection? A Case for the NEPC*, THE GEO. ENV'T L. REV. (Nov. 8, 2020), <https://www.law.georgetown.edu/environmental-law-review/blog/is-nepa-still-the-best-model-for-environmental-protection-a-case-for-the-nepc/> (calling for the creation of a regulatory commission for NEPA review); Wyatt G. Sassman, *Community Empowerment in Decarbonization: NEPA's Role*, 96 WASH. L. REV. 1511, 1566 (2021).

310. While NEPA does not require non-environmental impact assessment unless significant environmental impacts are found, EO 14,096 arguably goes further and requires that agencies consider the EJ impacts of any decision. *Compare* 42 U.S.C. §§ 4341–4347, *with* Exec. Order No. 14,096, *supra* note 8. EO 14,096 defines the type of “federal activity” that requires environmental injustice analysis broadly to include “any agency rulemaking, guidance, policy, program, practice, or action that affects or has the potential to affect human health and the environment, including an agency action related to climate change.” Exec. Order No. 14,096, *supra* note 8, at § 2(c).

311. Exec. Order No. 14,008, *supra* note 8 (creating the Environmental Justice Scorecard at the direction of President Biden).



including agency implementation of President Biden’s “Justice40” initiative, NEPA practices in general, community engagement, and agency programs intended to integrate environmental justice considerations into decision-making.<sup>312</sup> The Scorecards were intended to create a benchmark from which agency action could improve, but CEQ could also use them to identify agencies most ill-equipped to perform environmental injustice assessment based on the sufficiency of previous NEPA reviews. Additional metrics that track NEPA litigation and public comments on environmental injustice shortcomings could be added to future Scorecards for a more detailed assessment and honest appraisal of insufficiencies.

There are embedded environmental justice experts within agencies,<sup>313</sup> and increasingly, individual agencies are investing in environmental justice offices that could perform this function.<sup>314</sup> However, these actors are still part of agency culture, influenced by competing organizational goals and workstreams, and subject to organizational politics and pressures.<sup>315</sup> Therefore, in cases where an

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312. See *Scorecard U.S. Army Corps of Engineers*, ENV’T JUST. SCORECARD, <https://ejscorecard.geoplatform.gov/scorecard/u.s.-army-corps-of-engineers/> (last visited Apr. 12, 2024).

313. EO 14,096 requires the appointment of an Environmental Justice Officer within each agency tasked “with the responsibility for leading agency planning and implementation of the agency’s Environmental Justice Strategic Plan, coordinating with CEQ and other agencies, and performing such other duties related to advancing environmental justice as the head of the agency deems appropriate.” Exec. Order No. 14,096, *supra* note 8, at § 7(c).

314. See, e.g., *About the Office of Environmental Justice and External Civil Rights*, U.S. ENV’T PROT. AGENCY (July 16, 2024), <https://www.epa.gov/aboutepa/about-office-environmental-justice-and-external-civil-rights>.

315. See generally David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014) (discussing the complex matrixes of agency responsibilities and threats to agency performance); Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578 (2010) (discussing the complex matrixes of agency responsibilities and threats to agency performance); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing the complex matrixes of agency responsibilities and threats to agency performance); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T.

agency's prior behavior or Scorecard reveals disregard of environmental justice analysis, agency employees may not be best suited for the work. In all other cases, CEQ can serve as a check against agency bias, agency capture, and otherwise insufficient environmental injustice analysis.

Admittedly, moving environmental injustice assessment to CEQ adds time, money, staff, and work to a process that many already view as unduly burdensome. Even though studies have repeatedly refuted these claims,<sup>316</sup> the political reality is that adding anything extra to the NEPA process will likely result in some amount of backlash. On the other hand, the heightened requirements of Biden's EO 14,096 and Phase Two regulations increase agency legal obligations and, therefore, exposure to litigation. This will be particularly true in the next several years, as litigants turn to courts to interpret these new requirements. A pre-finalization check on agency NEPA analysis, conducted by CEQ, may actually minimize litigation risk by increasing the uniformity and rigor of environmental injustice analysis. As the authors of applicable regulations, CEQ's explicit approval of an agency's work may also help inoculate them against claims of inadequacy.

While NEPA is not the singular logjam it is portrayed to be, it is undeniable that it is one among many federal processes that slow down a variety of environmentally important actions.<sup>317</sup> For example, Professors J.B. Ruhl James Salzman recently argued that the urgency of climate change and the enormity of infrastructure overhaul required to address it necessitates a process outside NEPA for renewable energy permitting.<sup>318</sup> In an honest assessment of the costs and benefits of their suggestion, they suggest that the risks posed by the climate crisis require prioritization of speed over other valid policy goals.<sup>319</sup> While these arguments have great merit, and the urgency of climate change is inescapable, equity cannot be left by the wayside. The processes this

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L. REV. 1 (2009) (discussing the complex matrixes of agency responsibilities and threats to agency performance).

316. See discussion *supra* Section III.A.

317. Ruhl & Salzman, *supra* note 180, at 696–97.

318. J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1, 6 (“While financing, technological, and political obstacles serve to slow down infrastructure, another major constraint comes from, ironically, environmental law.”).

319. *Id.* at 70–79; see generally Sassman, *supra* note 309.

Article proposes could also be folded into non-NEPA decision-making processes to ensure environmental injustice is not forgotten in our rush to address other pressing environmental priorities. Professors Ruhl and Salzman suggest several tools to streamline renewable transition decisions<sup>320</sup> that I employ here, including streamlining and centralization of environmental injustice analysis by moving it under one roof. This approach will strike a balance between efficiency and equity; it will not only improve government decision-making but do so in the most efficient way possible.<sup>321</sup>

No approach to federal decision-making is perfect: efficiency, cost, and effectiveness must be balanced against policy goals. Because agencies' approach to environmental injustice assessment fails to maintain this balance, a departure from the status quo is needed. The Biden administration has declared that "environmental justice is central to the implementation of our bedrock civil rights and environmental laws." To make progress toward environmental equity government wide, NEPA assessments of non-environmental impacts cannot be left to the whim of individual agencies: an expert, rigorous, and streamlined approach is needed to ensure that communities like those in the Apalachicola Region are not left behind.

## V. Conclusion

The people of the Apalachicola Region not only deserved consideration under NEPA, they were entitled to it. The Corps' blindness to the ways in which their water-management practices harmed downstream communities not only violated the law and perpetuated environmental inequity but also destroyed a way of life. Community member Daniel Taunton explains how this decimation occurred: "The Corps' mismanagement of water down the Apalachicola River is taking away the way of life for all the people who live in this area, many of which regard it as a part of who they are in a way I can only describe as spiritual."<sup>322</sup> The CEQ is positioned to minimize this type of harm in the future and give voice to those historically left voiceless in the federal decision-making process.

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320. Ruhl & Salzman, *supra* note 180, at 716–21.

321. *Id.*

322. Aukeman et al., *supra* note 13, at A36–A37.

