

**Overburdened and Unlikely to Change: The Immediate Importance of Efficacious
Environmental Justice Initiatives**

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For decades, the most vulnerable communities in the United States have carried the burden of new highways, hazardous waste sites, industrial warehouses, oil refineries, chemical manufacturers, and landfills. Although mentions of “environmental justice” have made their way into countless government policies over the last several years, the holistic framework addressing these concerns continues to suffer from calamitous flaws. The possibility of extensive infrastructure development in the near future presents a unique opportunity to make meaningful progress in advancing environmental justice. This Article explores the steps necessary to see that desired change.

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INTRODUCTION

Although environmental justice has been discussed at length since the 1980s, pollution continues to take a heavy toll on the most marginalized communities in the United States.¹ In

¹ *History of Environmental Justice*, SIERRA CLUB, <https://www.sierraclub.org/environmental-justice/history-environmental-justice#:~:text=The%20environmental%20justice%20movement%20emerged,minority%20and%20low%2Dincome%20communities>. (last visited Nov. 16, 2023); Robert D. Bullard, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 1 (2d ed. 1994) (“An abundance of documentation shows blacks, lower-income groups, and working-class persons are subjected to a disproportionately large amount of pollution and other environmental stressors in their neighborhoods as well as in their workplaces.”); Tracey Fernandez Rysavy & Andre Floyd, *People*

fact, the problem has intensified in the wake of these discussions, resulting in more people of color living in fenceline communities today than thirty years ago.² While majority-White and wealthier communities have historically experienced strict enforcement of environmental laws,³ low-income and communities of color have been repeatedly and deliberately targeted for toxic facilities.⁴ Additionally, while middle- and upper-class Whites have been involved in the U.S. environmental movement since its emergence, the individuals exposed to a disproportionately large amount of pollution and other environmental stressors have only been marginally involved.⁵

of Color Are on the Front Lines of the Climate Crisis, GREEN AMERICA, <https://www.greenamerica.org/climate-justice-all/people-color-are-front-lines-climate-crisis> (last visited Nov. 16, 2023) (explaining that communities of color breathe in forty percent more polluted air than White communities and are more likely to live near toxic sites).

² Manann Donoghoe et al., *The US Can't Achieve Environmental Justice Through One-Size-Fits-All Climate Policy*, BROOKINGS (June 1, 2023), <https://www.brookings.edu/articles/the-us-cant-achieve-environmental-justice-through-one-size-fits-all-climate-policy/#:~:text=Air%20pollution%20is%20between%2010,they%20did%2030%20years%20ago>. “Fenceline communities” are neighborhoods located immediately adjacent to high-polluting facilities, such as fossil fuel infrastructure. *Frontline and Fenceline Communities*, THE CLIMATE REALITY PROJECT, <https://www.climatealityproject.org/frontline-fenceline-communities> (last visited Nov. 16, 2023).

³ Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATURAL RESOURCES DEFENSE COUNCIL (Aug. 22, 2023), <https://www.nrdc.org/stories/environmental-justice-movement#:~:text=For%20example%2C%20to%20this%20day,accountable%20or%20kept%20away%20entirely>.

⁴ Stacy M. Brown, *Environmental Racism Killing People of Color*, THE GREENLINING INSTITUTE (Jan. 17, 2019), <https://greenlining.org/2019/environmental-racism-killing-people-of-color/>.

⁵ Bullard, *supra* note 1.

Over the years, questions have emerged about which came first: the people or the pollution.⁶ A study conducted by Paul Mohai and Robin Saha finally answered this question in 2015.⁷ Mohai and Saha used a national database of hazardous waste facilities from 1966 to 1995 to conduct a longitudinal study determining whether disparate siting or post-siting demographic change led to present-day disparities in the location of polluting facilities.⁸ The evidence was conclusive: “neighborhood transition serves to attract noxious facilities rather than the facilities themselves attracting people of color and low income populations.”⁹

This Article suggests that there are three prominent drivers of the type of discriminatory decisionmaking revealed by Mohai and Saha’s study – project developers seeking the path of least resistance, communities lacking political leverage, and cheap land that has resulted from a history of redlining practices.¹⁰ Importantly, many vulnerable communities experience more than one.¹¹ Without an adequate understanding of these drivers, it is difficult to develop a meaningful solution to our nation’s environmental justice problem.

Recent events affecting our energy system make developing environmental justice solutions more important now than ever. By 2029, the United States is expected to reduce its coal

⁶ Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENV’T RES. LETTERS, Nov. 18, 2015, at 1, <https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See supra* Part II.

¹¹ *Id.*

generation capacity by approximately twenty-three percent.¹² This will contribute to our already-increasing reliance on natural gas.¹³ Not only will it create a need for more natural gas and pipeline infrastructure development, it will also cause harm to overburdened communities if effective environmental justice solutions are not established.¹⁴ Additionally, the anticipated transition to clean energy in the more distant future will inevitably be accompanied by a need for new infrastructure.¹⁵ Although renewable energy projects are not characterized by pollution in the same way as traditional energy infrastructure, these projects can nevertheless thwart

¹² *Nearly a Quarter of the Operating U.S. Coal-Fired Fleet Scheduled to Retire by 2029*, U.S. ENERGY INFORMATION ADMINISTRATION (Nov. 7, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=54559#:~:text=Between%202012%20and%202021%2C%20an.to%20us%20proceed%20as%20scheduled.>

¹³ Robert Rapier, *U.S. Natural Gas Production Sets New Record High*, FORBES (Aug. 30, 2023), <https://www.forbes.com/sites/rpapier/2023/08/30/us-natural-gas-production-sets-new-record-high/?sh=4b9a8e8719a2> (explaining the increase in U.S. consumption of natural gas over the last 20 years).

¹⁴ *See U.S. Needs More Pipeline Capacity for Reliable Gas Supply*, REUTERS (Nov. 13, 2023), [https://www.reuters.com/business/energy/us-needs-more-pipeline-capacity-reliable-gas-supply-trade-group-2023-11-13/#:~:text=%22The%20United%20States%20needs%20more,fuel%2C%22%20the%20INGAA%20said;Claudia Kemfert et al., The Expansion of Natural Gas Infrastructure Puts Energy Transitions at Risk, NATURE ENERGY \(July 4, 2022\), file:///Users/hannah/Downloads/s41560-022-01060-3.pdf.](https://www.reuters.com/business/energy/us-needs-more-pipeline-capacity-reliable-gas-supply-trade-group-2023-11-13/#:~:text=%22The%20United%20States%20needs%20more,fuel%2C%22%20the%20INGAA%20said;Claudia Kemfert et al., The Expansion of Natural Gas Infrastructure Puts Energy Transitions at Risk, NATURE ENERGY (July 4, 2022), file:///Users/hannah/Downloads/s41560-022-01060-3.pdf)

¹⁵ *See Selin Oguz, Breaking Down the \$110 Trillion Cost of the Clean Energy Transition*, Decarbonization Channel (Oct. 11, 2023), <https://decarbonization.visualcapitalist.com/breaking-down-the-cost-of-clean-energy-transition/> (explaining the infrastructure investments required for the clean energy transition).

environmental justice goals if they are sited in the same communities as other pre-existing infrastructure.¹⁶

As defined by the United States Environmental Protection Agency, environmental justice is the “fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”¹⁷ Fair treatment means no singular group carries a disproportionate burden.¹⁸ Therefore, even a wind farm, which produces no pollution but can be noisy and aesthetically unpleasing, can raise environmental justice concerns if it is sited in an overburdened and underserved community.¹⁹

This Article proceeds in four parts. Part I provides a brief overview of our environmental justice problem in the United States, examining the pattern of recurrent winners and losers that has persisted over time. Part II discusses the three reasons project developers and decisionmakers have intentionally selected minority and low-income communities as sites for their undesirable

¹⁶ *Renewable Energy – Powering a Safer Future*, UNITED NATIONS, <https://www.un.org/en/climatechange/raising-ambition/renewable-energy#:~:text=Renewable%20energy%20sources%20%E2%80%93%20which%20are,or%20pollutants%20into%20the%20air> (last visited Dec. 12, 2023) (explaining that renewable sources of energy emit little to no pollutants).

¹⁷ *Learn About Environmental Justice*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (Aug. 16, 2023).

¹⁸ *Id.*

¹⁹ *Facts about Wind Energy and Noise*, AMERICAN WIND ENERGY ASSOCIATION, https://www.maine.gov/dacf/lupc/projects/windpower/redington/redingtonrevised/Documents/Section05_Sound/AW_EA_Turbine_Noise_FAQ.pdf (last visited Dec. 12, 2023); see *Renewable Energy – Powering a Safer Future*, *supra* note 16.

land uses throughout history. Part III explores and critiques the legal tools currently available for pursuing environmental justice claims, highlighting the ways in which our legal system has failed environmental justice communities. Finally, Part IV proposes a new three-part solution addressing the siting of new infrastructure and ways to mitigate the effects of existing and decommissioned facilities. This Article argues that states should pass statutes banning all new infrastructure in overburdened communities unless the entity proposing the project can prove a benefit to the community that outweighs any harm. Additionally, the Article encourages federal agencies and state governments to revise onerous grant program requirements, allowing more funding to flow into environmental justice communities with burdensome infrastructure currently in use. Finally, this Article supports an expansion of two statutes dealing with harmful waste to promote more expansive remediation efforts in communities with decommissioned facilities.

I. RECURRENT WINNERS AND LOSERS – OUR ENVIRONMENTAL JUSTICE PROBLEM

For decades, the most marginalized communities in the United States have disproportionately carried the burden of new highways, hazardous waste sites, industrial warehouses, oil refineries, chemical manufacturing plants, and landfills.²⁰ Members of these communities have suffered adverse health effects ranging from respiratory ailments and stress-related disorders to cancer,

²⁰ Skelton & Miller, *supra* note 3; *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, Michigan News (Jan. 19, 2016), <https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/> (“Hazardous waste sites, polluting industrial facilities and other locally unwanted land uses are disproportionately located in nonwhite and poor communities.”)

and even death.²¹ In contrast, wealthy and predominantly White communities have experienced stricter enforcement of environmental laws and the ability to hold polluters accountable or keep them away from their neighborhoods entirely.²² This Part of the Article will explore the nationwide movement that arose from this harrowing pattern of inequity and how environmental justice became a critical topic of conversation inside and outside of the White House.

Houston, Texas played a pivotal role in the early stages of the environmental justice movement. In the late 1970s, Southwestern Waste Management Corporation proposed the siting of a new solid waste facility in the Northwood Manor neighborhood in Harris County, Texas.²³ The neighborhood was comprised of predominantly Black residents and one of the poorest suburban school districts in the greater Houston area.²⁴ When residents discovered that the new construction in their neighborhood was tied to a landfill instead of a shopping center or homes, they organized a community action group and filed a lawsuit, alleging racial discrimination in the siting process.²⁵ Residents were particularly concerned about the landfill being located within 1,500 feet of a high school that relied on fresh air from open windows to fight the Houston heat

²¹ ENERGY DEMOCRACY: ADVANCING EQUITY IN CLEAN ENERGY SOLUTIONS 9 (Denise Fairchild & Al Weinrub eds., 2017).

²² Skelton & Miller, *supra* note 3; Bullard, *supra* note 1, at 37 (“White communities... have been more successful than black communities in defending against unwanted industrial encroachment and outside penetration.”).

²³ *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 675 (1979).

²⁴ Eunice Beck, *The History of Environmental Justice*, Euny and Burke (Feb. 27, 2021),

[²⁵ Bullard, *supra* note 1, at 43–44.](https://www.eunyandburke.com/blog/history-of-environmental-justice#:~:text=In%20the%20late%201970s%2C%20the,lawsuit%20against%20Southwestern%20Waste%20Management; Bullard, <i>supra</i> note 1, at 43.</p></div><div data-bbox=)

and humidity.²⁶ The lawsuit, *Bean v. Southwestern Waste Management, Inc.*, went to trial in 1984 and was the first in the United States to use the Civil Rights Act of 1964 to claim environmental discrimination.²⁷ However, the judge ultimately ruled against the residents, finding that they had not met their burden of proving intentional discrimination, so construction of the landfill continued.²⁸

In September 1982, African American residents of another U.S. neighborhood mobilized to protest environmental injustice in their community.²⁹ Protests occurred after North Carolina Governor James Hunt chose to bury 32,000 cubic yards of soil that had been contaminated with highly toxic polychlorinated biphenyls in the predominantly Black community of Warren County.³⁰ Warren County was also one of the poorest counties in North Carolina.³¹ Ironically, the siting decision made little environmental sense, as the toxic chemicals would almost certainly leak into the groundwater, affecting a water table located at the site of the landfill that provided drinking water to nearby residents.³² The nonviolent sit-in protest of this landfill was also

²⁶ *Id.*, at 44. The landfill was sited within two miles of six different schools – each without air conditioning, which caused them to rely on open windows while school was in session. *Id.*; *Environmental Justice Timeline*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (June 27, 2023).

²⁷ Bullard, *supra* note 1, at 44; *Environmental Justice Timeline*, *supra* note 26.

²⁸ Bullard, *supra* note 1, at 44; *Environmental Justice Timeline*, *supra* note 26; Amal Ahmed, *Robert Bullard Isn't Done Yet*, TEXAS OBSERVER (May 3, 2021), <https://www.texasobserver.org/robert-bullard-isnt-done-yet/>.

²⁹ See *Environmental Justice Timeline*, *supra* note 26.

³⁰ Bullard, *supra* note 1, at 29–30; *Environmental Justice Timeline*, *supra* note 26.

³¹ Bullard, *supra* note 1, at 30.

³² *Id.*, at 30–31.

unsuccessful in stopping construction;³³ however, it paved the way for a national environmental justice movement.³⁴

Houston and Warren County were only two examples of a nationwide pattern of discriminatory siting, and several studies conducted during the 1980s supported these accounts of environmental racism.³⁵ Between 1979 and 1983, Dr. Robert Bullard, a sociologist at Texas Southern University and the recognized “father of environmental justice,” conducted a study in connection with the *Bean v. Southwestern Waste Management, Inc.* lawsuit.³⁶ The study documented the location of each solid waste facility in the Houston area,³⁷ and the results were alarming. Bullard determined that all five municipal solid waste disposal facilities, 80% of municipal garbage incinerators, and 75% of privately-owned garbage dumps in Houston were sited in predominantly Black neighborhoods, at a time when African Americans comprised only 25% of Houston’s overall population.³⁸ Importantly, many of these sites were unlikely locations

³³ *Id.*, at 32; *Environmental Justice Timeline*, *supra* note 26.

³⁴ Bullard, *supra* note 1, at 32; *Environmental Justice Timeline*, *supra* note 26.

³⁵ See *Environmental Justice Timeline*, *supra* note 26.

³⁶ Bullard, *supra* note 1, at xiii; Osha Davidson, *A Conversation with Robert Bullard, ‘Father of Environmental Justice,’* YALE CLIMATE CONNECTIONS (Feb. 6, 2023), <https://yaleclimateconnections.org/2023/02/a-conversation-with-robert-bullard-father-of-environmental-justice/#:~:text=Robert%20Bullard%20is%20often%20called.and%20civil%20rights%20with%20environmentalism>

³⁷ Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 Q. J. OF THE INT’L SOCIO. HONOR SOC’Y 273 (1983).

³⁸ *Environmental Justice Timeline*, *supra* note 26.

for landfills in all aspects other than the racial profile of the community.³⁹ This study was significant because it demonstrated that the siting of these undesirable facilities was not random⁴⁰ – race was a top indicator of where these facilities could be found.⁴¹

In 1987, the United Church of Christ Commission for Racial Justice published another groundbreaking report demonstrating the nation’s growing environmental justice problem.⁴² This time, the research was conducted on a national scale, comparing the location of hazardous facilities to the racial and socioeconomic composition of the host community.⁴³ The study found that socioeconomic status played a role in the siting of hazardous waste facilities; however, race was the single most significant factor.⁴⁴ Further, the study concluded that the placement of waste sites was the intentional result of governmental land use practices.⁴⁵

³⁹ See Bullard, *supra* note 1, at xiv.

⁴⁰ See Bullard, *supra* note 37, at 273.

⁴¹ See Bullard, *supra* note 1, at xiv–xv; Bullard, *supra* note 37, at 273. Robert Bullard’s research shows that poor African American communities are not the exclusive victims of siting disparities. Middle-income African Americans are also frequently confronted with many of the same issues, ruling out poverty as the sole driving factor. Bullard, *supra* note 1, at xv (“Increased income has enabled few African Americans to escape the threat of unwanted land uses and potentially harmful environmental pollutants.”).

⁴² *Environmental Justice Timeline*, *supra* note 26.

⁴³ *Id.*

⁴⁴ *Id.*; *How Black Activists Brought Us Environmental Justice – And Changed the Conversation about Racial Equity*, HAZARDOUS WASTE MANAGEMENT PROGRAM, <https://kingcountyhazwastewa.gov/en/news-articles/black-history-month-2023#:~:text=Chavis%20got%20that%20proof%20in,the%20most%20significant%20among%20variables> (last visited Dec. 1, 2023) (explaining the study’s conclusion that it is virtually impossible for the racial patterns in siting to have resulted from chance).

⁴⁵ Skelton & Miller, *supra* note 3.

In the 1990s, the environmental justice movement shifted from an emphasis on community-level activism to governmental collaboration.⁴⁶ Activists worked with mainstream environmental organizations to make environmental protection a civil rights and social justice issue.⁴⁷ Organizations began to publish environmental justice initiatives and commit to considering environmental justice in their decisionmaking.⁴⁸ Ultimately, the topic worked its way into the White House during the Clinton administration.⁴⁹ President Clinton signed Executive Order 12898 in 1994, signifying the first time federal agencies were explicitly instructed to identify and address the environmental decisions that have disproportionately impacted minority and low-income populations.⁵⁰ Since this order, the topic of environmental justice has been widely discussed by federal agencies; however, the solutions that these agencies have implemented to rectify discriminatory practices have large holes that have allowed problematic environmental decisions to persist.⁵¹

⁴⁶ *Id.*

⁴⁷ *Id.*; Bullard, *supra* note 1, at xvi (explaining that during this time, groups like the National Association for the Advancement of Colored People, Lawyers' Committee for Civil Rights Under Law, Natural Resources Defense Council, Sierra Club Legal Defense Fund, American Civil Liberties Union, and Legal Aid Society began discussing environmental issues that disproportionately affected low income and minority populations).

⁴⁸ Skelton & Miller, *supra* note 3.

⁴⁹ *Id.*

⁵⁰ *Id.*; Sandra George O'Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, ENVIRONMENTAL HEALTH PERSPECTIVES (Apr. 5, 2007), <https://ehp.niehs.nih.gov/doi/full/10.1289/ehp.9903>.

⁵¹ *See infra* Part III.

II. HISTORICAL DRIVERS OF DISCRIMINATORY DECISION-MAKING

Throughout history, entities proposing undesirable or environmentally harmful projects have intentionally sought out minority and low-income communities for siting.⁵² Although there has been some evidence of post-siting changes to communities, statistical data supports the conclusion that these facilities are disparately sited in vulnerable locations with pre-established characteristics.⁵³ This Part of the Article suggests that there are three reasons why decisionmakers have historically selected specific communities for siting time and time again: they are looking for the path of least resistance, they see an opportunity to take advantage of groups with limited resources and political clout, and discriminatory lending practices have made this land cheap.⁵⁴ Without an adequate understanding of each of these drivers, our environmental justice communities may continue to experience a disproportionate share of negative outcomes. Understanding the patterns of disparate siting is also important for developing meaningful solutions to our environmental justice problem.

a. The Path of Least Resistance

Historically, siting decisions involving undesirable land uses have purposefully followed the “path of least resistance,” resulting in Black and poor communities experiencing a disproportionately large number of these types of externalities.⁵⁵ Previous Not In My Back Yard (“NIMBY”) victories in White communities have led to decisionmakers avoiding these areas

⁵² Mohai & Saha, *supra* note 6.

⁵³ *Id.*

⁵⁴ *See infra* Part II.

⁵⁵ Bullard, *supra* note 1, at 3.

when looking to site projects that are likely to raise community backlash.⁵⁶ For example, waste disposal facilities have traditionally been one of the largest targets of NIMBY, which has pushed these facilities toward more vulnerable groups.⁵⁷

One illustrative example of decisionmakers opting for the path of least resistance involves the Byhalia Connection Pipeline, which was proposed to be sited through Southwest Memphis, Tennessee.⁵⁸ The project arose in 2019 and involved a 45-mile connection between two existing crude oil pipelines.⁵⁹ Instead of taking a direct path, the pipeline would have snaked through predominantly Black neighborhoods that are already burdened with high levels of pollution.⁶⁰ Valero, one of the owners of the project, currently operates an oil refinery in the same county as many of the communities that would have been affected by the pipeline project.⁶¹ This refinery is one of the largest sources of toxic air in the area, with most of the pollution flowing directly to

⁵⁶ *Id.*, at 37–38, 83 (“NIMBY, like white racism, creates and perpetuates privileges for white at the expense of people of color.”).

⁵⁷ Michael B. Gerrard, *The Victims of Nimby*, 21 *FORDHAM URB. L. J.* 495, 496 (1994).

⁵⁸ Eric Hilt, *How the Byhalia Pipeline Would Have Impacted Memphis*, SOUTHERN ENVIRONMENTAL LAW CENTER (Mar. 10, 2021), <https://www.southernenvironment.org/news/byhalia-pipeline-basics/>.

⁵⁹ Daniel Connolly, *Byhalia Pipeline: Environmental Groups Demand TN Agency Withdraw Construction Permit*, COMMERCIAL APPEAL, <https://www.commercialappeal.com/story/news/2021/04/30/byhalia-pipeline-memphis-environmental-groups-ask-state-revoke-permit/7398615002/> (May 1, 2021).

⁶⁰ Lynn Norment, *Byhalia Pipeline Endangers Minority Neighborhoods and Memphis Drinking Water*, COMMERCIAL APPEAL, <https://www.commercialappeal.com/story/opinion/2021/05/05/byhalia-pipeline-puts-racial-equality-quality-life-risk/4955948001/> (May 5, 2021).

⁶¹ Norment, *supra* note 60; *Memphis Refinery*, VALERO, <https://www.valero.com/about/locations/memphis-refinery> (last visited Dec. 5, 2023).

Southwest Memphis.⁶² Valero was also responsible for an 800 gallon crude oil spill near the terminus of the proposed pipeline in 2020, posing risks to an aquifer that supplies drinking water to residents of the city.⁶³ Aside from the oil refinery, the area is also home to coal-fired power plants, a wastewater treatment facility, and gas-fired power plants – each contributing to the area’s cancer rate being four times the national average.⁶⁴

One neighborhood that the pipeline was sited to run through is Boxtown, a Black community founded by emancipated slaves who used scraps of wood and metal from train cars to construct their homes.⁶⁵ Interestingly, as demonstrated in Figure 1, the route of the pipeline seems to intentionally avoid affluent neighborhoods such as Olive Branch, Mississippi, which is a majority White community that was recently named one of Fortune 50’s “Best Places to Live for

⁶² Norment, *supra* note 60.

⁶³ *Id.*; *Valero Crude Oil Leak Heightens Concerns Over Proposed Pipeline*, SOUTHERN ENVIRONMENTAL LAW CENTER (Mar. 8, 2021), <https://www.southernenvironment.org/news/valero-crude-oil-leak-heightens-concerns-over-proposed-pipeline/> (“The Memphis Sand Aquifer supplies clean, reliable drinking water to Memphis and Shelby County—the largest metropolitan area in the United States that relies exclusively on groundwater for its municipal water supply.”).

⁶⁴ *Valero Crude Oil Leak Heightens Concerns Over Proposed Pipeline*, *supra* note 63.

⁶⁵ Hilt, *supra* note 58.

Families.”⁶⁶ When asked about the route of the pipeline, a project representative explicitly described the path as a “point of least resistance.”⁶⁷

*Figure 1: The Byhalia Connection Pipeline*⁶⁸



Although plans for the pipeline project were ultimately called off in July 2021, the Byhalia Connection Pipeline demonstrates a common theme.⁶⁹ Companies looking to site undesirable

⁶⁶ Olive Branch, *Mississippi Population 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/us-cities/olive-branch-ms-population> (last visited Dec. 5, 2023); Corey Davis, *Byhalia Connection Pipeline Officials Tout Economic Impact, Opposition Voices Concerns*, MEMPHIS BUSINESS JOURNAL (Sept. 16, 2020), <https://www.bizjournals.com/memphis/news/2020/09/16/byhalia-connection-pipeline-easements.html>; *Best Places to Live for Families*, FORTUNE, <https://fortune.com/well/ranking/best-places-families/2023/olive-branch/> (last visited Dec. 5, 2023).

⁶⁷ Hilt, *supra* note 58.

⁶⁸ Corey Davis, *supra* note 66.

⁶⁹ Daniel Connolly et al., *Company Drops Plans for Byhalia Pipeline; Activists Rejoice: ‘Sometimes the Good Guys Win,’* COMMERCIAL APPEAL, <https://www.commercialappeal.com/story/news/2021/07/02/plains-all-american-abandons-plan-byhalia-connection-oil-pipeline-memphis/7848508002/> (July 2, 2021).

infrastructure turn to the most vulnerable communities first.⁷⁰ Additionally, neighborhoods that have successfully defended themselves against these intrusions have ultimately intensified the environmental disparities faced by the underserved.⁷¹

b. Lack of Political Resources and Leverage

Low-income and minority communities have historically had few political advocates and lobbyists supporting them in environmental movements.⁷² This disconnect has made these communities especially vulnerable to intrusion by companies looking to site unwanted infrastructure.

“Cancer Alley,” Louisiana is one example of an area lacking political resources and experiencing massive amounts of pollution as a result.⁷³ Cancer Alley lies along an 85-mile stretch of the Mississippi River between Baton Rouge and New Orleans, Louisiana.⁷⁴ The area is home to over 150 petrochemical plants and refineries, comprising approximately one quarter of

⁷⁰ See Bullard, *supra* note 1, at 37–38.

⁷¹ *Id.*, at 37–38.

⁷² *Id.*, at 3.

⁷³ Nicole Greenfield, *Advocates are Sparking a Revolution in Louisiana’s “Cancer Alley,”* NATURAL RESOURCES DEFENSE COUNCIL (Nov. 10, 2022), <https://www.nrdc.org/stories/advocates-are-sparking-revolution-louisianas-cancer-alley>; Bullard, *supra* note 1, at 55 (“This area . . . has been dubbed the ‘cancer corridor’ because the air, ground, and water are full of carcinogens, mutagens, and embryotoxins.”).

⁷⁴ Greenfield, *supra* note 73; Donna Christiano Campisano, *What is Cancer Alley?*, VERYWELL HEALTH, <https://www.verywellhealth.com/cancer-alley-5097197> (Aug. 20, 2023).

the total petrochemical production in the United States.⁷⁵ Companies use these plants to refine crude oil into products such as plastic.⁷⁶ In addition to the petrochemical presence, several pipelines and oil refineries also contribute to the environmental harm in the area.⁷⁷ And, as is the case in many of the most polluted regions of the United States, the harm affects predominantly Black communities.⁷⁸

One important characteristic of Cancer Alley is the prevalence of unincorporated communities founded by former slaves.⁷⁹ Unincorporated towns are unlike other municipalities because they lack governance power over their own matters.⁸⁰ Instead of members of the community making important decisions, these towns are controlled by governing bodies of the parish in which they are located.⁸¹ The political disconnect between members of the community and decisionmakers creates an environment where the interests of the community can be easily ignored. For example, these unincorporated towns can be re-zoned by parish officials at any

⁷⁵ Greenfield, *supra* note 73; Courtney Keehan, *Lessons from Cancer Alley: How the Clean Air Act Has Failed to Protect Public Health in Southern Louisiana*, 29 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 341, 341 (2018); Idna G. Castellon, *Cancer Alley and the Fight Against Environmental Racism*, 32 VILL. ENVTL. L.J. 15, 15 (2021).

⁷⁶ Castellon, *supra* note 75.

⁷⁷ Greenfield, *supra* note 73.

⁷⁸ *Id.*; Bullard, *supra* note 1.

⁷⁹ Castellon, *supra* note 75, at 19.

⁸⁰ *Id.*, at 22.

⁸¹ *Id.*, at 22–23 (“The parishes where the unincorporated towns are located have the jurisdictional authority to establish governance rules instead of the unincorporated towns themselves.”). A “parish” in Louisiana is analogous to a county in another state. *Louisiana Parishes*, STATE OF LOUISIANA, <https://www.louisiana.gov/local-louisiana/#:~:text=Louisiana%20Parishes.learn%20more%20about%20each%20parish> (last visited Dec. 2, 2023).

time.⁸² Re-zoning can permit an area that was previously zoned strictly for residential use to become the home of a new petrochemical plant in very little time.⁸³ In Cancer Alley, parish officials have routinely used this tool to allow petrochemical companies to construct infrastructure near poor African American neighborhoods.⁸⁴ For example, a majority White council in St. John the Baptist Parish rezoned a residential area in the majority African American town of Wallace to allow Formosa Petrochemical Corporation to construct a new petrochemical plant.⁸⁵

Cancer Alley demonstrates the impact of a lack of political resources when opposing siting decisions. It is much easier for decisionmakers to ignore the concerns and interests of community members when they are removed from the outcome of their decision. Because land use decisions involving African Americans are commonly made by parties external to the community, these individuals have been burdened by disproportionate levels of environmental harm across the United States.⁸⁶

c. Cheap Land – As a Result of Discriminatory Lending Practices

Although project developers often use “cheap land” as a seemingly un-biased explanation for their siting decisions in minority and low-income communities,⁸⁷ the historical practice of

⁸² Castellon, *supra* note 75, at 23.

⁸³ *See id.*, at 23.

⁸⁴ *Id.*, at 23.

⁸⁵ *Id.*, at 23.

⁸⁶ Bullard, *supra* note 1, at 1, 39.

⁸⁷ *See* Sharon Nunn, *Many Factors Contribute to Trend of Landfills in Low-Income Areas*, WRAL NEWS, <https://www.wral.com/story/many-factors-contribute-to-trend-of-landfills-in-low-income->

redlining resulted in zoning decisions that not only produced cheap land, but also excessive levels of pollution that continue to burden these populations today.⁸⁸ Redlining arose from a 1930s housing shortage, wherein the government decided to prioritize providing suburban housing to White, middle-class families over people of color.⁸⁹ The Federal Housing Administration refused to insure mortgages in and around Black neighborhoods, while subsidizing the construction of new subdivisions for Whites.⁹⁰ This pushed African Americans into urban housing projects.⁹¹ The practice of drawing red circles on maps to designate these Black neighborhoods as “risky investments” quickly steered any beneficial investment away from these areas.⁹² After these neighborhoods experienced significant degradation and a resulting reduction in property values, city government officials proposed a new use for them – serving as homes for undesirable facilities, such as landfills and chemical plants.⁹³

[areas/16709240/#:~:text=Absent%20any%20malignant%20intent%2C%20the,in%20areas%20with%20lower%20incomes](#) (Jul. 13, 2018) (explaining that, “absent any malignant intent,” project developers will always look for the cheapest land for their undesirable land uses).

⁸⁸ See Ammara Mohsin Mukhi, *Examining the Effects of Environmental Inequity in Houston*, UNDERSTANDING HOUSTON (Apr. 22, 2021), <https://www.understandinghouston.org/blog/examining-the-effects-of-environmental-racism-in-houston>.

⁸⁹ Terry Gross, *A “Forgotten History” of How The U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

⁹⁰ *Id.*

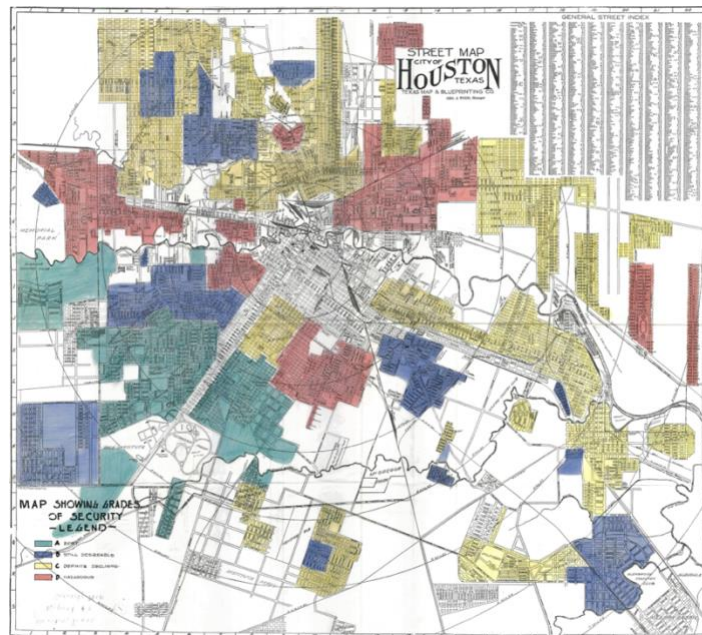
⁹¹ *Id.*

⁹² Mukhi, *supra* note 88.

⁹³ *Id.*

Houston, Texas represents a prime example of the long-term effects of redlining.⁹⁴ Discriminatory lending practices in the city led to the isolation and deterioration of minority and low-income neighborhoods.⁹⁵ Decades later, industrial and toxic-waste facilities in Houston can be found in the same neighborhoods that were once circled in red and labeled as “declining” and “hazardous,” largely due to their racial compositions.⁹⁶

Figure 2: 1930s Redlined Map of Houston⁹⁷



⁹⁴ See *id.*

⁹⁵ *Exploring the Legacy of Redlining in Houston*, UNDERSTANDING HOUSTON (Feb. 10, 2021), <https://www.understandinghouston.org/blog/legacy-of-redlining-in-houston>.

⁹⁶ Mukhi, *supra* note 88.

⁹⁷ Susan Rogers, *The Maps and Loans Behind Houston Segregation*, HOUSTON CHRONICLE (Oct. 14, 2016), <https://www.houstonchronicle.com/local/gray-matters/article/Redlining-Houston-9970251.php>.

Because the city does not have traditional Euclidean zoning, the effects of past redlining are even more apparent.⁹⁸ Houston has neighborhoods less than fifteen miles apart with average life expectancies differing by over twenty years.⁹⁹ Unsurprisingly, the individuals with the lowest life expectancy in the city are those living in the areas most burdened with undesirable land uses.¹⁰⁰ “Cheap land” may be a factor in siting decisions, but we must not ignore the decades of discrimination that made that land cheap.

III. THE INADEQUACY OF CURRENT LAWS ADDRESSING ENVIRONMENTAL JUSTICE

Although there are currently a plethora of laws and government actions promoting environmental justice, these laws, in their current form, are inadequate to ensure our overburdened and underserved communities will not continue to bear a disproportionate share of the negative environmental consequences of our industrial and governmental operations and policies. Traditional civil rights laws, the National Environmental Policy Act, executive orders, Congressional legislation, and state laws, offices, and commissions all intend to curtail the locational patterns of environmental harm, but they each have flaws that lessen their effectiveness at achieving equitable outcomes. To support and revitalize these communities, our

⁹⁸ Max Masuda-Farkas, *How Land Use Reform Led to More Housing in Houston*, THE REGULATORY REVIEW (Nov. 25, 2020), <https://www.theregreview.org/2020/11/25/masuda-farkas-land-use-reform-more-housing-houston/#:~:text=Before%20it%20passed%20the%201998,in%20Village%20of%20Euclid%20v> (describing Houston as “the only large municipality that does not follow a system of Euclidean zoning”).

⁹⁹ *Exploring the Legacy of Redlining in Houston*, *supra* note 95.

¹⁰⁰ *Id.* (explaining that “[r]edlined communities on the east side of Houston overwhelmingly have lower average life expectancies than those on the west side,” which were given “A” ratings and denoted as “best” areas for investment in the 1930s.).

laws must move away from a “one-size-fits-all” approach and implement more substantive requirements that mitigate or eliminate undesirable impacts in specific environmental justice communities. Additionally, our laws need to not only remedy existing harms, but also take a preventative approach, making environmental justice a consideration at the beginning of the decision-making process for new infrastructure, so individuals who lack resources are not consistently faced with the burden of challenging decisions that have already been made.

a. Traditional Civil Rights Laws

Civil rights laws have been used to pursue environmental justice claims since the beginning of the environmental justice movement;¹⁰¹ however, these tools have had little success and are much too burdensome to be considered an effective method of furthering environmental justice goals.¹⁰² One cause of action with the potential to challenge decisions motivated by intentional racial bias is Title VI of the Civil Rights Act of 1964.¹⁰³ Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from

¹⁰¹ In *Bean v. Southwestern Waste Management Corp.* the plaintiffs brought a civil rights action challenging the site selected for a solid waste facility in Houston, arguing that the decision was racially discriminatory. *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 673 (1979). This lawsuit was the first of its kind in the United States and is considered one of the first events in the environmental justice movement. *Environmental Justice Timeline*, *supra* note 26.

¹⁰² *See Bean*, 482 F. Supp.at 681 (holding that the plaintiffs did not establish a substantial likelihood of proving purposeful discrimination).

¹⁰³ Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 Vand. L. Rev. 1259, 1305 (2020); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2012).

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰⁴ The Supreme Court has established “an implied private right of action” under Title VI, making it “beyond dispute that private individuals may sue” to seek damages for claims of intentional discrimination.¹⁰⁵ This may seem like a promising mechanism for challenging discriminatory decisions, but the way courts have interpreted the law has removed much of its force and practicality.

First, courts have interpreted Title VI of the Civil Rights Act of 1964 to only apply to allegations of *intentional* discrimination.¹⁰⁶ Title VI provides no private right of action to address disparate impact allegations.¹⁰⁷ This not only narrows the scope of claims that can be brought under the Act, but it also makes these cases much more challenging for plaintiffs to prove. Many courts have denied findings of intentional discrimination, even when significant evidence exists.¹⁰⁸

¹⁰⁴ 42 U.S.C. §2000d.

¹⁰⁵ *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)); *Section IX- Private Right of Action & Individual Relief Through Agency Action*; U.S. Department of Justice – Civil Rights Division, <https://www.justice.gov/crt/fcs/T6Manual9> (last visited Nov. 23, 2023).

¹⁰⁶ *Sandoval*, 532 U.S. at 284–85; *Archer*, *supra* note 103, at 1306; *Section IX- Private Right of Action & Individual Relief Through Agency Action*, *supra* note 105.

¹⁰⁷ *Sandoval*, 532 U.S. at 284–85 (explaining that the private right of action under Title VI exists only under Section 601 of the Act, not Section 602, which discusses discriminatory effects regulations); *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265, 283–85 (1978); *Archer*, *supra* note 103, at 1306 (“[Title VI] provides no private right of action to enforce disparate impact regulations.”).

¹⁰⁸ *See, e.g.*, *Franks v. Ross*, 293 F. Supp. 2d 599, 607–08 (E.D.N.C. 2003) (denying evidence of intent to discriminate in a challenge to a proposed landfill in an African American neighborhood); *Nashville I-40 Steering*

Title VI is also extremely burdensome for individuals because it places the responsibility of enforcement on those who frequently lack the knowledge and resources to pursue this type of a claim.¹⁰⁹ Victims of environmental injustice are especially likely to be vulnerable to this problem because decisionmakers routinely and intentionally consider the path of least resistance and political influence when deciding where to site undesirable infrastructure.¹¹⁰ Communities burdened with the highest levels of pollution and other environmental harm are chosen *because* they are unlikely to challenge these decisions.¹¹¹ Therefore, making enforcement the responsibility of individual victims of injustice is a great flaw.

A third weakness of Title VI for pursuing environmental justice claims is it only applies to decisions that have already been made.¹¹² Thus, there is a very small window of opportunity for members of a community to challenge discriminatory decisions before the beginning of the construction of a harmful facility. Environmental justice impacts should not be an afterthought – they must be a consideration from the beginning of the decision-making process if we want to see meaningful change in our overburdened and underserved communities.

Comm. v. Ellington, 387 F.2d 179, 185 (6th Cir. 1968) (rejecting an intentional discrimination allegation involving the routing of highways).

¹⁰⁹ Archer, *supra* note 103.

¹¹⁰ See *supra* Part II.

¹¹¹ *Id.*

¹¹² Archer, *supra* note 103.

b. National Environmental Policy Act

The National Environmental Policy Act (NEPA), which was signed into law by President Nixon on January 1, 1970, instructs federal agencies to assess the environmental impacts of their proposed actions – including environmental justice concerns.¹¹³ NEPA is a procedural and disclosure rule – its two major purposes are: (1) to ensure agencies consider the environmental consequences of their proposed actions and (2) to inform members of the public about their decision-making.¹¹⁴ The requirements established under NEPA apply to all federal agency decisions on proposed actions when the agency has discretion to choose among one or more methods of accomplishing a particular goal.¹¹⁵ Permitting decisions, project approvals, and legislative proposals are three examples of agency actions that may be subject to the requirements of NEPA.¹¹⁶

¹¹³ *What is the National Environmental Policy Act?*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, [https://www.epa.gov/nepa/what-national-environmental-policy-act#:~:text=The%20National%20Environmental%20Policy%20Act%20\(NEPA\)%20was%20signed%20into%20law,actions%20prior%20to%20making%20decisions](https://www.epa.gov/nepa/what-national-environmental-policy-act#:~:text=The%20National%20Environmental%20Policy%20Act%20(NEPA)%20was%20signed%20into%20law,actions%20prior%20to%20making%20decisions). (Oct. 5, 2023); *A Citizen's Guide to NEPA: Having Your Voice Heard*, COUNCIL ON ENVIRONMENTAL QUALITY – EXECUTIVE OFFICE OF THE PRESIDENT, <https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf> (last visited Nov. 18, 2023); *Environmental Justice and National Environmental Policy Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> (Mar. 27, 2023) (explaining that federal agencies must consider environmental justice in their activities under NEPA).

¹¹⁴ *A Citizen's Guide to NEPA: Having Your Voice Heard*, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The NEPA process is somewhat complex, for not all agency actions require the same level of environmental review.¹¹⁷ There are three “paths” in the NEPA process, and the path that an agency is required to take is entirely dependent on whether the agency determines the environmental effects of a proposed action are likely to be significant.¹¹⁸ If significant environmental effects are likely to occur, the agency is required to prepare an Environmental Impact Statement (EIS).¹¹⁹ If an agency has previously concluded that an action does not normally have a significant effect on the human environment, the action is included in a Categorical Exclusion (CE) and no further action is required.¹²⁰ Finally, if an agency is uncertain about the environmental effects or if no CE applies to a proposed action with no foreseeable significant environmental impact, the agency must prepare an Environmental Assessment (EA). If, in the process of preparing an EA, an agency identifies significant environmental effects, an EIS may then be required.¹²¹

An EA is a concise planning and disclosure document that generally includes a brief discussion of the purpose of a proposed action, the environment where the action is intended to take place, potential alternatives to implementing the proposed action, and the environmental

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*; *National Environmental Policy Act Review Process*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (Oct. 3, 2023).

¹²¹ *A Citizen’s Guide to NEPA: Having Your Voice Heard*, *supra* note 113.

impacts of the proposal and each alternative.¹²² However, each federal agency has adopted its own requirements governing the EA process.¹²³ The EA process concludes in one of two ways: either with a Finding of No Significant Impact (FONSI) if the agency determines that the action will not have a significant environmental impact, or a determination that an EIS is required.¹²⁴

The procedural requirements for an EIS are much more intricate and burdensome than the requirements for an EA.¹²⁵ The EIS process consists of four main phases.¹²⁶ First, the agency publishes a Notice of Intent in the Federal Register, informing the public of the forthcoming environmental review and beginning the “scoping process,” which identifies the span of topics and concerns to be addressed in the EIS.¹²⁷ Second, the agency publishes a draft EIS for a minimum public review and comment period of 45 days.¹²⁸ Third, the agency considers the substantive comments it has received during the comment period and publishes a final EIS with

¹²² *Id.*; *Anatomy of an Environmental Assessment*, FEDERAL EMERGENCY MANAGEMENT AGENCY, <https://www.fema.gov/emergency-managers/practitioners/environmental-historic/assessments/anatomy> (June 25, 2020); *National Environmental Policy Act Review Process*, *supra* note 120.

¹²³ *National Environmental Policy Act Review Process*, *supra* note 120.

¹²⁴ *A Citizen’s Guide to NEPA: Having Your Voice Heard*, *supra* note 113; *National Environmental Policy Act Review Process*, *supra* note 120.

¹²⁵ *National Environmental Policy Act Review Process*, *supra* note 120.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

responses to those comments.¹²⁹ Finally, after a 30-day “wait period,” the EIS process concludes when the agency issues a Record of Decision.¹³⁰

NEPA has been considered America’s “most influential” environmental law.¹³¹ In many ways, NEPA has empowered citizens to voice concerns and has demanded government transparency and accountability.¹³² However, NEPA has four significant flaws that prevent it from serving as a useful venue for addressing environmental justice concerns.

Arguably NEPA’s greatest flaw is it lacks a substantive mandate for adverse environmental effects to be addressed.¹³³ NEPA does not require the agency to choose the environmentally preferable alternative or prohibit injurious environmental effects at all.¹³⁴ The Act only requires decision-makers to be informed of the environmental consequences of their decisions.¹³⁵ This renders even the most rigorous level of NEPA review – the environmental impact statement – as

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Richard Frank, *Commemorating the National Environmental Policy Act’s 50th Anniversary*, LEGALPLANET (Jan. 1, 2020), <https://legal-planet.org/2020/01/01/commemorating-the-national-environmental-policy-acts-50th-anniversary/#:~:text=Here%20in%20the%20United%20States,state%20and%20local%20government%20agencies>.

¹³² Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NATURAL RESOURCES DEFENSE COUNCIL (Feb. 1, 2015), <https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories>; *NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government*, ENVIRONMENTAL LAW INSTITUTE (Aug. 2010), https://ceq.doe.gov/docs/get-involved/NEPA_Success_Stories.pdf.

¹³³ *A Citizen’s Guide to NEPA: Having Your Voice Heard*, *supra* note 113.

¹³⁴ *Id.*

¹³⁵ *Id.*

merely a disclosure statement.¹³⁶ Even if significant impacts to environmental justice communities are identified during the NEPA process, an agency has little incentive to take steps to advance the goals of NEPA, or to pursue remedial actions necessary to address the decades of past harm these communities have often faced.¹³⁷

A second flaw of NEPA is its ineffectiveness at truly achieving meaningful public involvement in the decision-making process. Although public comments “may be the most important contribution from citizens,”¹³⁸ the length of the comment period is unreasonably short. Citizens are required to draft thoughtful responses to complex reports in as little as 45 days.¹³⁹ By contrast, agencies have one full year to draft a concise EA, which seemingly requires a similar level of thoughtfulness and analysis.¹⁴⁰ The Council on Environmental Quality encourages public commenters to provide “solution-oriented” responses with “specific examples” that “contribute to developing alternatives that address the purpose and need for the action.”¹⁴¹ Not only does this sound very similar to what is included in an EA, meeting this standard likely requires an expert opinion.

Additionally, although there are strict procedural requirements for public involvement during an agency’s preparation of an EIS, an agency has discretion as to the level of public involvement

¹³⁶ Archer, *supra* note 103, at 1320; *Town of Henrietta v. Dep’t of Env’t Conservation of New York*, 430 N.Y.S.2d 440, 446 (1980).

¹³⁷ Archer, *supra* note 136.

¹³⁸ *A Citizen’s Guide to NEPA: Having Your Voice Heard*, *supra* note 113.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

for actions requiring an EA, and there is no public involvement for CEs.¹⁴² Regulations provided by the Council on Environmental Quality explain that the agency must involve the public only “to the extent practicable” during the EA process.¹⁴³ Sometimes, public involvement is limited to an agency simply making an EA available to interested members of the public.¹⁴⁴ The magnitude of this procedural technicality is even more evident when considered in light of the fact that only one percent of NEPA reviews require preparation of an EIS.¹⁴⁵ Apparently, in ninety-nine percent of cases, public comments are not all that important.

A third flaw of NEPA is its allowance for CEs, which waive environmental review entirely. Although these exclusions inevitably save time and resources, they do not align with the goals of the Act.¹⁴⁶ One example demonstrating how these CEs hinder environmental justice initiatives involves the Federal Highway Administration. This agency alone lists more than fifty types of CEs, which exclude between ninety and ninety-nine percent of their state transportation decisions from NEPA environmental review.¹⁴⁷ Because the United States highway system

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Nicola Ulibarri et al., *Barriers and Opportunities to Incorporating Environmental Justice in the National Environmental Policy Act*, ENVIRONMENTAL IMPACT ASSESSMENT REVIEW (Aug. 2, 2022), <https://www.sciencedirect.com/science/article/pii/S0195925522001469>.

¹⁴⁶ See Diana Katz, *National Environmental Policy Act is a Half-Century Old – And Long Outlived Its Usefulness*, THE HERITAGE FOUNDATION (Mar. 28, 2018), <https://www.heritage.org/environment/commentary/national-environmental-policy-act-half-century-old-and-long-outlived-its> (“NEPA is rendered largely pointless by the number of categorical exclusions that agencies grant to waive environmental review.”).

¹⁴⁷ Katz, *supra* note 146.

greatly contributed to racially segregated cities and communities of color facing disproportionately large amounts of pollution,¹⁴⁸ it is alarming for these actions to be exempted from NEPA review.

Finally, the remedies under NEPA – or lack thereof – make this Act a poor tool for pursuing environmental justice claims. NEPA does not provide for judicial review of agency compliance with the Act; however, federal courts have permitted challenges to the Act using the Administrative Procedure Act (APA).¹⁴⁹ Still, a number of factors constrict judicial review, such as a requirement that the disputed action be “final.”¹⁵⁰ Additionally, plaintiffs cannot seek damages in APA proceedings,¹⁵¹ so a court generally remands the case to the agency for further proceedings in the event that it violated the APA.¹⁵² The larger effect of a remand is contingent on the court’s decision to order equitable relief, such as vacating the agency action or issuing an injunction – neither of which is automatic or required in NEPA cases.¹⁵³ Absent equitable relief, an agency may be able to implement a project before the additional NEPA procedures ordered by the court are complete.¹⁵⁴ This could mean more harm for an already overburdened community.

¹⁴⁸ Archer, *supra* note 136, at 1267–68; Bullard, *supra* note 1.

¹⁴⁹ Nina M. Hart & Linda Tsang, *National Environmental Policy Act: Judicial Review and Remedies*, CONGRESSIONAL RESEARCH SERVICE (Sept. 22, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11932>.

¹⁵⁰ *Id.*

¹⁵¹ 42 CFR § 137.309

¹⁵² Hart & Tsang, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

c. Other Federal Actions

The executive and legislative branches of the United States government have both taken steps to address environmental justice. The executive actions have mainly consisted of a series of executive orders over the last several decades. As mentioned previously, Executive Order 12898, which was issued by President Clinton in 1994, was the first official executive effort to focus federal attention on the health and environmental outcomes suffered by minority and low-income populations at the hand of the federal government.¹⁵⁵ Executive Order 12898 specifically directed federal agencies to mitigate the disproportionate effects “[t]o the greatest extent practicable and permitted by law.”¹⁵⁶ This reasonable effort standard does not provide clear guidance to the federal agencies tasked with identifying and addressing environmental justice concerns. Executive Order 12898 also encouraged federal agencies to promote access to public information and develop a strategy for implementing environmental justice.¹⁵⁷ Again, these mandates are too vague to lead to meaningful results. Although President Clinton acknowledged the problem of environmental inequality, the effectiveness of the Order has been limited. The language of the Order explicitly prevents plaintiffs from seeking environmental justice relief in

¹⁵⁵ *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (July 3, 2023).

¹⁵⁶ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 32 (Feb. 16, 1994).

¹⁵⁷ *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, *supra* note 155.

federal courts and does little to force federal agencies to effectively consider their environmental justice repercussions.¹⁵⁸

President Biden has recently issued two orders related to environmental justice: Executive Order 14008 and Executive Order 14096. Executive Order 14008, titled “Tackling the Climate Crisis at Home and Abroad,” was issued in 2021 and most notably created the Justice40 Initiative.¹⁵⁹ Justice40 intends to transform federal programs across government agencies to ensure that forty percent of the overall benefits of these programs flow to disadvantaged communities.¹⁶⁰ Federal agencies have been asked to identify and implement reforms to programs that fall within the bounds of this initiative according to a geospatial Climate and Economic Justice Screening Tool.¹⁶¹ Although the program is beneficial in the sense that it allows cities, which are uniquely positioned to improve the health and wellbeing of their residents, to apply for funding, cities lacking resources and staff capacity have already reported

¹⁵⁸ 59 Fed. Reg. 32 (“This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.”); see Sam Brower, *Environmental [in]Justice: Why Executive Order 12898 Falls Short of Creating Environmental Equity for Vulnerable Communities*, MINN. J. OF L. AND INEQ: INEQUALITY INQUIRY BLOG (May 18, 2021), https://lawandinequality.org/wp-content/uploads/2021/04/Brower_final.pdf.

¹⁵⁹ Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 19 (Feb. 1, 2021).

¹⁶⁰ *Justice40*, THE WHITE HOUSE, <https://www.whitehouse.gov/environmentaljustice/justice40/> (last visited Dec. 11, 2023).

¹⁶¹ *Id.*

challenges with finding and applying for federal funding opportunities.¹⁶² These kinds of hurdles essentially prevent the Justice40 Initiative from reaching the disadvantaged communities that the program is explicitly designed to protect. Another potential drawback of the program is related to the Biden Administration’s decision to purposely omit race from the screening tool that calculates who benefits from the program.¹⁶³ This is an interesting and potentially problematic decision when considered in light of the fact that race has been proven to be a top indicator of environmental harm.¹⁶⁴ It is also unclear how Justice40 will be enforced. Without proper enforcement mechanisms, states that do not view environmental justice as a “priority issue” could potentially interfere with the distribution of funds, thwarting the overarching goals of the program.¹⁶⁵

¹⁶² Carla Walker et al., *How Prepared are U.S. Cities to Implement the Justice40 Initiative?*, WORLD RESOURCES INSTITUTE (Aug. 4, 2022), <https://www.wri.org/technical-perspectives/how-prepared-are-us-cities-implement-justice40-initiative>.

¹⁶³ Bob Dean, *The Problems with the Justice40 Screening Tool, and Some Ideas for How to Improve It*, CENTER FOR NEIGHBORHOOD TECHNOLOGY (May 3, 2022), <https://cnt.org/blog/the-problems-with-the-justice40-screening-tool-and-some-ideas-for-how-to-improve-it> (explaining that race is a “powerful predictor of environmental burdens”); Drew Costley, *Exclusion of Race in Federal Climate Justice Screening Tool Could Worsen Disparities, Analysis Says*, THE ASSOCIATED PRESS (July 20, 2023), <https://apnews.com/article/environment-climate-pollution-biden-justice40-air-633392b2f4f50bbaaff8880746783966>.

¹⁶⁴ Bryce Covert, *Race Best Predicts Whether You Live Near Pollution*, THE NATION (Feb. 18, 2016), <https://www.thenation.com/article/archive/race-best-predicts-whether-you-live-near-pollution/>.

¹⁶⁵ Kristoffer Tigue, *Red States Still Pose a Major Threat to Biden’s Justice40 Initiative, Activists Warn*, INSIDE CLIMATE NEWS (June 5, 2022), <https://insideclimatenews.org/news/05062022/red-states-still-pose-a-major-threat-to-bidens-justice40-initiative-activists-warn/>; Jean Chemnick, *How States Could Topple Biden’s Justice40 Goals*, CLIMATEWIRE (Feb. 4, 2022), <https://www.eenews.net/articles/how-states-could-topple-bidens-justice40-goals/>.

President Biden’s Executive Order 14096, titled “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” was issued in April of 2023.¹⁶⁶ In this Order, Biden recognizes the continuing importance of addressing the needs of communities that have been consistently left behind.¹⁶⁷ He recalls Executive Order 12898 and imposes more precise requirements to accomplish President Clinton’s goals, such as mandating Environmental Justice Strategic Plans and creating various committees and councils to provide additional agency oversight.¹⁶⁸ Because this Order was issued so recently, there is little evidence as to its overall effectiveness. In general, however, it is important to note the risks associated with executive orders. Congress has the power to overturn these orders by passing legislation invalidating them.¹⁶⁹ Congress can also deny necessary funding, rendering an order ineffectual.¹⁷⁰

The legislative actions targeting environmental equity have mainly provided for increased funding.¹⁷¹ For example, the Inflation Reduction Act promotes clean energy through tax credits,

¹⁶⁶ Revitalizing Our Nation’s Commitment to Environmental Justice for All, 88 Fed. Reg. 80 (Apr. 21, 2023).

¹⁶⁷ 88 Fed. Reg. 80.

¹⁶⁸ *Id.*

¹⁶⁹ *Executive Orders*, AMERICAN BAR ASSOCIATION (Nov. 28, 2021),

https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.

¹⁷⁰ *Id.*

¹⁷¹ *See State and Federal Environmental Justice Efforts*, NATIONAL CONFERENCE OF STATE LEGISLATURES,

<https://www.ncsl.org/environment-and-natural-resources/state-and-federal-environmental-justice-efforts#:~:text=State%20legislatures%20and%20the%20federal.access%20to%20a%20healthy%20environment>

(May 26, 2023).

grants, and loan guarantees.¹⁷² Additionally, the Infrastructure Investment in Jobs Act supplies funding for environmental remediation efforts, such as cleaning up Superfund and brownfield sites.¹⁷³ Although these efforts certainly incentivize beneficial environmental practices, sweeping pieces of legislation with a “one size fits all” approach often fall short of ensuring justice for overburdened and underserved communities specifically. For example, legislation promoting an overall reduction in emissions fails to consider the disproportionate concentration of vulnerability in specific areas. Similarly, tax breaks and subsidies are problematic when the benefits do not flow equally to individuals at different income levels. In order for legislation to be maximally effective, racial equity and patterns of disparity must be a consideration.

d. State Actions

At the state level, government officials have confronted environmental justice problems in a number of ways, including by establishing offices and commissions, passing statutes governing land use and siting, and using state “little NEPA” statutes to encourage environmental assessments.¹⁷⁴ Although some of these approaches have produced meaningful results, others lack genuine enforcement power.¹⁷⁵ Additionally, a lack of consistency amongst states has left large holes in the broader environmental justice framework.

¹⁷² *Id.*

¹⁷³ *State and Federal Environmental Justice Efforts*, *supra* note 172.

¹⁷⁴ *See infra* Section III.d; Patrick Marchman, “Little NEPAs”: State Equivalents to the National Environmental Policy Act in Indiana, Minnesota and Wisconsin, DUKE UNIVERSITY LIBRARIES (Oct. 8, 2012), <https://dukespace.lib.duke.edu/server/api/core/bitstreams/8da30384-3c4f-4816-a262-5e89b1e43c56/content>.

¹⁷⁵ *See infra* Section III.d.

At least fourteen states have established task forces focusing on environmental justice.¹⁷⁶ These bodies have different responsibilities in each state but are generally tasked with advising the governor on environmental justice concerns, engaging with impacted communities, and recommending strategies that will further environmental justice efforts in the state.¹⁷⁷ Although offices and commissions can be useful for identifying and understanding environmental justice issues, they are not an effective remedy on their own because they typically lack definitive requirements to produce measurable results. For example, the Virginia act establishing the Virginia Council on Environmental Justice states that the “advisory council” only has the power to advise and provide recommendations to the Governor, submit an annual report to the Governor and General Assembly describing the work of the Council, and apply for funds to enable the Council to better carry out its objectives.¹⁷⁸ None of these powers guarantee positive outcomes for communities experiencing environmental harm.

Several state policymakers have begun to propose statutes regulating where certain facilities can be located within the state.¹⁷⁹ This is one of the most effective methods of protecting overburdened communities; however, the statutes are commonly narrow in scope, with restrictions reaching only certain types of harmful land uses.¹⁸⁰ For example, Rhode Island originally only prohibited the construction of new high-heat medical waste facilities in

¹⁷⁶ *State and Federal Environmental Justice Efforts*, *supra* note 172 (explaining that California, Colorado, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Washington have all established state-level environmental justice bodies).

¹⁷⁷ *Id.*

¹⁷⁸ VA. CODE ANN. §26-2.2-2699.12 (2020).

¹⁷⁹ *State and Federal Environmental Justice Efforts*, *supra* note 172.

¹⁸⁰ *Id.*

environmental justice communities until enough backlash led to a later Environmental Justice Act covering a more expansive list of harmful activities, such as electric generating facilities, landfills, asphalt plants, scrap metal facilities, and petroleum storage facilities.¹⁸¹ State statutes placing restrictions on the siting of *all* forms of harmful development would be the best protection against added risk to overburdened communities.

Although many states have enacted environmental policy acts modeled after NEPA, the creation of such acts is not required by federal law.¹⁸² These “little NEPAs” vary in terms of their requirements; however, almost all of them suffer from the same flaws as the federal NEPA.¹⁸³ Most notably, many “little NEPAs” lack substantive requirements to take action after discovering adverse environmental impacts to disadvantaged communities.¹⁸⁴ At least four states, however, have mandatory requirements following specific environmental findings, either prescribed by the statutes themselves or judicial rulings.¹⁸⁵ The California Environmental Quality Act, for example, requires an agency to avoid or mitigate a project’s identified negative environmental

¹⁸¹ High-Heat Medical Waste Facility Act of 2021, R.I. GEN. LAWS §§39-26-2, 39-26-5 (2021); Environmental Justice Act, R.I. GEN. LAWS §42-17.11 (2023).

¹⁸² *States and Local Jurisdictions with NEPA-Like Environmental Planning Requirements*, NATIONAL ENVIRONMENTAL POLICY ACT, <https://ceq.doe.gov/laws-regulations/states.html> (last visited Dec. 11, 2023); *Chapter 5: How does MEPA Compare with Other State Environmental Policy Acts?*, MONTANA LEGISLATURE, https://leg.mt.gov/content/publications/Environmental/2000mepa_report/chapter5.pdf (last visited Dec. 11, 2023).

¹⁸³ *See Chapter 5: How does MEPA Compare with Other State Environmental Policy Acts?*, *supra* note 182.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* California, the District of Columbia, Minnesota, and New York all have some “action-forcing” requirement. *Id.*

consequences when it is feasible to do so.¹⁸⁶ Minnesota has similar language in the Minnesota Environmental Policy Act, prohibiting environmental impacts causing damage when there is a feasible alternative.¹⁸⁷ The District of Columbia Environmental Policy Act has a more stringent requirement, stating that state agencies *must* avoid or mitigate harm to the environment or the proposed action will be denied.¹⁸⁸ Feasibility is not a consideration.¹⁸⁹ Judicial decisions in New York have interpreted the New York Environmental Quality Review Act to require agencies consider and impose practicable mitigation measures before an action is approved.¹⁹⁰ Although

¹⁸⁶ See CAL. CODE REGS. tit. 14, § 15064 (2016) (“If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment but the lead agency determines that revisions in the project plans or proposals made by, or agreed to by, the applicant would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur and there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment then a mitigated negative declaration shall be prepared.”)

¹⁸⁷ MINN. STAT. § 116D.04 (2023) (“No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.”).

¹⁸⁸ D.C. CODE § 8-36 (1989) (“If the EIS identifies an adverse effect from a proposed major action and contains a finding that the public health, safety, or welfare is imminently and substantially endangered by the action, the Mayor, board, commission, or authority of the District government shall disapprove the action, unless the applicant proposes mitigating measures or substitutes a reasonable alternative to avoid the danger.”).

¹⁸⁹ See *id.*

¹⁹⁰ Chapter 5: *How does MEPA Compare with Other State Environmental Policy Acts?*, *supra* note 182.

these four states have overcome the federal Act's most significant flaw, they are the exception rather than the rule when it comes to state "little NEPA" statutes and states without environmental protection laws at all. In order to effectively solve our environmental justice problem, we need these substantive mitigation measures to be much more far-reaching.

IV. RECOMMENDATIONS

Although there are a multitude of laws and initiatives addressing environmental justice concerns at both the state and federal level, the current framework is inadequate. Some laws and programs are too burdensome to be effective, such as the Civil Rights Act of 1964 and state programs conditioning grant funding on the satisfaction of extensive or ambiguous criteria.¹⁹¹ Other laws lack enforcement power, such as federal and state environmental protection laws with no substantive requirement to mitigate or avoid harmful environmental effects.¹⁹² Thus, the United States is in need of a more robust solution. This Part of the Article will advocate for a three-prong solution, addressing the forthcoming wave of new infrastructure as well as existing facilities that will either remain in use or be decommissioned in the near future.

¹⁹¹ See *supra* Part III.a; *infra* Part IV.b.

¹⁹² See *supra* Part III.b; *supra* Part III.d.

a. *State Statutes Prohibiting Harmful New Infrastructure in Environmental Justice Communities*

Members of environmental justice communities often lack the resources necessary to effectively combat the siting of unwanted facilities in their neighborhoods.¹⁹³ This may be related to financial constraints, a lack of expertise, or no strong or viable legal claim using tools such as NEPA and the Civil Rights Act of 1964.¹⁹⁴ Regardless of the reason, it is ineffective and unfair to place this burden on individuals. A better solution is for states to adopt statutes banning all new infrastructure in environmental justice communities unless the group proposing the project can prove a benefit to the community that outweighs any harm.

This solution would be effective for a number of reasons. First, states typically have zoning and permitting authority over the siting and construction of large energy projects.¹⁹⁵ Even in cases where the local government controls the approval of projects, a state statute would have preemptive authority.¹⁹⁶ Second, it shifts the burden from the individual or community to a party with more labor resources, money, and expertise. Additionally, although the burden on the project developer is significant, it does not serve as a complete ban. This framework leaves open

¹⁹³ See Bullard, *supra* note 1, at 42 (describing environmental justice communities in Houston struggling to combat land-use regulations and fend off industrial encroachment).

¹⁹⁴ See *surpa* Part III (discussing the ineffectiveness of current laws addressing environmental justice).

¹⁹⁵ *Siting of Large-Scale Renewable Energy Projects*, UNITED STATES DEPARTMENT OF ENERGY: OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/siting-large-scale-renewable-energy-projects#:~:text=State%2C%20local%2C%20and%20Tribal%20governments&text=In%20some%20cases%2C%20the%20state,the%20state's%20public%20utility%20commission> (last visited Dec. 12, 2023).

¹⁹⁶ *State Preemption Laws*, THE POLICY SURVEILLANCE PROGRAM, <https://lawatlas.org/datasets/preemption-project> (Nov. 1, 2022).

the possibility for beneficial projects that will uplift communities that have historically been overburdened. For example, renewable energy projects stemming from the energy transition may bring jobs and economic prosperity to a community, without the pollution that accompanies traditional energy infrastructure. It is important for environmental justice solutions not to discourage these kinds of investments.

The most efficient way to implement this kind of statutory framework would be to utilize state “little NEPA” statutes that already contain a substantive requirement to avoid or mitigate environmental harm. States with this structure in place are likely most amenable to a statutory ban and can accomplish it with relatively minor changes to their current law. States with “little NEPA” statutes more closely resembling the federal Act, or with no environmental protection statute at all, will admittedly be much more difficult to persuade. An entirely new statute would need to be proposed and approved, which will be especially difficult in states that openly do not see environmental justice as a top priority. In these jurisdictions, environmental justice communities and advocates will need to use their voices to influence policymakers. Although certainly not an easy path forward, it is not out of the realm of possibility, for the entire environmental justice movement began with community activism.

b. Revised Funding Mechanisms for Environmental Justice Communities with Existing Burdens

The definition of environmental justice explicitly protects against groups bearing a disproportionate share of negative environmental consequences.¹⁹⁷ However, this fantasy does

¹⁹⁷ *Learn About Environmental Justice*, *supra* note 17 (“Environmental justice ... is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the

not exist in the United States today.¹⁹⁸ Therefore, we must compensate the communities bearing the excess stress of our undesirable land uses. Even with the forthcoming energy transition, it is unreasonable to assume that natural gas compressor stations, coal-fired power plants, and other harmful facilities will disappear from environmental justice communities overnight. To combat the effects of this existing infrastructure, the government should increase its financial investment into these communities by evaluating existing grant programs and eliminating burdensome requirements that serve as barriers to funding for vulnerable communities.

Several states, as well as the federal government, have recently implemented funding programs with the goal of redressing past inequities.¹⁹⁹ The problem is that these programs are often burdensome to communities lacking labor resources or expertise.²⁰⁰ Although the programs are specifically designed to benefit disadvantaged communities, complex application

development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”).

¹⁹⁸ See *supra* Part I.

¹⁹⁹ Environmental Justice Grants, Funding and Technical Assistance, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-grants-funding-and-technical-assistance> (Oct. 24, 2023). For example, some state grant programs include the Massachusetts Municipal Vulnerability Preparedness Program, the Maine Community Resilience Partnership Program, the California Transformative Climate Communities Program, and the New York Environmental Justice Community Impact Grant Program. Mary Buchanan & Joanna Wozniak-Brown, *Barriers to Equity Within Environmental Justice and Climate Justice Grant Programs*, J. of Climate Resilience & Climate Just. (Sept. 5, 2023), https://direct.mit.edu/crcj/article/doi/10.1162/crcj_a_00001/117392/Barriers-to-Equity-Within-Environmental-Justice.

²⁰⁰ Buchanan & Wozniak-Brown, *supra* note 199.

requirements and reimbursement-based funding frameworks often prevent them from reaching the communities they are designed to support.²⁰¹ In order to combat this unintended effect, governments should re-evaluate their grant programs and consider a more streamlined process when certain pre-determined criteria are satisfied. These criteria should be selected to reach the most vulnerable communities. For example, if an applicant resides in the community affected by the grant proposal, this may provide enough evidence of public participation and benefit to the community so as to eliminate the need for other lengthy application requirements seeking this information. An alternative might be to implement the use of geospatial mapping tools and social science data to pre-select areas that are known to be overburdened with negative environmental consequences and provide a more streamlined application process for proposals benefiting these areas. Ultimately, grant programs should focus on equitable outcomes, not equality in the application process. The best way to assist communities currently battling the effects of harmful infrastructure is to recognize their specific needs and implement solutions that can genuinely reach them.

c. More Expansive Decommissioning Requirements

Adopting a more stringent and comprehensive framework governing the decommissioning of environmentally hazardous sites would advance the goal of rebuilding the nation's overburdened and underserved communities. According to the United States Office of Environmental Management, decommissioning is the process of providing protection from contaminated

²⁰¹ *Id.* (listing several potential barriers to equity in grant program processes, such as reimbursement-based funding structures, overly long applications, failures to specify decision timelines, ambiguous language, and long waiting periods).

facilities at the end of a facility's life, often involving the removal of hazardous materials and other tasks that are necessary to place the facility in a stable condition.²⁰² Especially during the forthcoming energy transition, we can expect the retirement of a substantial amount of old energy infrastructure,²⁰³ creating an even more pressing need to adopt requirements and procedures that ensure consistency and effectiveness in this process.

Proper decommissioning has been rather inconsistent.²⁰⁴ Even with a plethora of requirements from various agencies, the lasting climate impacts of decommissioned facilities are suggestive of a large problem.²⁰⁵ For example, although oil and gas companies are required to

²⁰² Deactivation & Decommissioning (D&D), UNITED STATES OFFICE OF ENVIRONMENTAL MANAGEMENT, <https://www.energy.gov/em/deactivation-decommissioning-dd#:~:text=Decommissioning%20is%20the%20final%20process,isolation%20from%20the%20human%20environm ent> (last visited Dec. 11, 2023).

²⁰³ Tristan Partridge et al., *Decommissioning: Another Critical Challenge for Energy Transitions*, GLOB. SOC. CHALLENGES J., May 29, 2023, at 1, https://bristoluniversitypressdigital.com/gsc/view/journals/gscj/aop/article-10.1332-NNBM7966/article-10.1332-NNBM7966.xml?tab_body=contributor%20notes.

²⁰⁴ *See Closure and Post-Closure Care Requirements for Hazardous Waste Treatment, Storage and Disposal Facilities*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/hwpermitting/closure-and-post-closure-care-requirements-hazardous-waste-treatment-storage-and> (Aug. 17, 2023); *Plugging and Abandonment of Oil and Gas Wells*, NAT'L PETROLEUM COUNCIL (Sept. 15, 2011), https://www.npc.org/Prudent_Development-Topic_Papers/2-25_Well_Plugging_and_Abandonment_Paper.pdf; *Backgrounder on Decommissioning Nuclear Power Plants*, UNITED STATES NUCLEAR REGUL. COMM'N, <https://www.nrc.gov/docs/ML0403/ML040340625.pdf> (last visited Dec. 13, 2023).

²⁰⁵ *See Closure and Post-Closure Care Requirements for Hazardous Waste Treatment, Storage and Disposal Facilities*, *supra* note 204; *Plugging and Abandonment of Oil and Gas Wells*, NAT'L PETROLEUM COUNCIL (Sept. 15, 2011), https://www.npc.org/Prudent_Development-Topic_Papers/2-

decommission offshore infrastructure, the Gulf of Mexico alone has over 14,000 abandoned and unplugged wells, many of which are actively leaking methane and oil into the surrounding water.²⁰⁶ Onshore oil and gas wells that have not been properly decommissioned also leak methane, which has led to large concentrations of pollution in low-income and communities of color.²⁰⁷ It is clear that the current regulatory framework is not doing enough to incentivize proper decommissioning and protect the environmental justice communities that have already carried the burden of these harmful facilities for years.

There are currently two main statutes that exist to prevent this kind of environmental harm during the decommissioning process, however both have significant drawbacks that render them largely ineffective. First, the Resource Conservation and Recovery Act (RCRA), which was enacted in 1976, provides the Environmental Protection Agency authority to regulate the entire life of hazardous waste, including the generation, transportation, storage, and disposal.²⁰⁸ The Act is intended to be proactive in nature, regulating how waste should be handled to *avoid*

[25 Well Plugging and Abandonment Paper.pdf](#); *Backgrounder on Decommissioning Nuclear Power Plants*, UNITED STATES NUCLEAR REGUL. COMM'N, <https://www.nrc.gov/docs/ML0403/ML040340625.pdf> (last visited Dec. 13, 2023).

²⁰⁶ Rebecca Loomis & Rebecca Ramirez, *Study Shows 14,000 Unplugged Oil and Gas Wells in Gulf of Mexico*, NATURAL RESOURCES DEFENSE COUNCIL (May 23, 2023), <https://www.nrdc.org/bio/rebecca-loomis/study-shows-14000-unplugged-oil-and-gas-wells-gulf-mexico>.

²⁰⁷ Partridge et al., *supra* note 203.

²⁰⁸ *Summary of the Resource Conservation and Recovery Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> (Sept. 6, 2023).

environmental threats.²⁰⁹ The Act's narrow scope, however, results in the monitoring of only approximately five percent of the total hazardous waste in the United States.²¹⁰ The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 and only comes into play when substantial harm to the environment has already occurred.²¹¹ CERCLA created broad authority for the federal government to respond to environmental threats caused by hazardous substances, so it would seemingly be a useful tool to reduce the dangers faced by many environmental justice communities.²¹² However, the Act has a large petroleum exception that arose from extensive lobbying by the oil and gas industry before the Act was passed.²¹³ This exception essentially removes CERCLA jurisdiction over hazardous chemicals when they are encompassed in petroleum or crude oil.²¹⁴ Despite the industry's use of toxic materials like benzene, xylene, and ethylbenzene, it remains untouched by CERCLA's

²⁰⁹ CERCLA – *The Hazardous Waste Cleanup Program*, NORTHERN ARIZONA UNIVERSITY, https://www7.nau.edu/itep/main/HazSubMap/docs/CERCLA/EPA_CERCLA.pdf (last visited Dec. 12, 2023).

²¹⁰ Margaret Cunningham, *Waste Legislation: Resource Conservation and Recovery Act vs. the Superfund Act*, <https://study.com/academy/lesson/waste-legislation-resource-conservation-and-recovery-act-vs-the-superfund-act.html> (last visited Dec. 10, 2023).

²¹¹ CERCLA – *The Hazardous Waste Cleanup Program*, *supra* note 209.

²¹² *Superfund: CERCLA Overview*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/superfund/superfund-cercla-overview> (Oct. 30, 2023).

²¹³ Erin Kelly, *CERCLA and the Exemption of the Oil and Gas Industry*, KLEINMAN CENTER FOR ENERGY POLICY (July 6, 2021), <https://kleinmanenergy.upenn.edu/news-insights/cercla-and-the-exemption-of-the-oil-and-gas-industry/>.

²¹⁴ *Id.* (“The neglect of the oil and gas industry from a major environmental statute aimed at protecting environmental and public health hinders comprehensive climate action.”).

regulatory oversight.²¹⁵ This is extremely problematic when millions of tons of substances like methane, which is a common byproduct of the oil and gas industry, are leaked into the air of vulnerable communities each year.²¹⁶ CERCLA has been rendered even more ineffective by a lack of federal funding.²¹⁷ Progress has been so slow that many sites included on a 1983 list for cleanup remain on that list today.²¹⁸

The decommissioning process can be significantly improved by amending RCRA and CERCLA. Broadening the scope of both Acts to include more types of hazardous waste is a crucial step in promoting remediation efforts in our overburdened and underserved communities. Eliminating CERCLA's petroleum exception, for example, would force cleanup of these sites and have direct impacts on the minority and low-income communities suffering adverse health consequences from abandoned oil and gas infrastructure. Additionally, more federal funding is necessary to increase the effectiveness of these processes. A strong regulatory framework is useless without the budget necessary to achieve its stated objectives.

CONCLUSION

Even with our undeniable awareness of environmental justice problems, the current legal and regulatory framework attempting to address these inequalities does not effectively eliminate the

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Matthew Beyer, *CERCLA and the DOD Dilemma: Challenges and Opportunities*, ENVIRONMENTAL LAW INSTITUTE (Feb. 11, 2019), <https://www.eli.org/vibrant-environment-blog/cercla-and-dod-dilemma-challenges-and-opportunities> (explaining that the budget for the CERCLA program was nearly cut in half between 1999 and 2013).

²¹⁸ Beyer, *supra* note 217.

risk of repeating past mistakes. The incoming demand for new infrastructure presents a unique opportunity to make significant progress in advancing environmental justice. However, there is an urgent need to implement efficacious solutions to ensure no one is left behind.