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# NEPA AND SEPA'S IN THE QUEST FOR ENVIRONMENTAL JUSTICE

*Stephen M. Johnson\**

## I. INTRODUCTION

Environmental injustice is one of the most pervasive and well-documented environmental crises facing society today.<sup>1</sup> The Environmental Protection Agency (EPA) defines "environmental justice" as "[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental [sic] laws, regulations, and policies."<sup>2</sup> However, many minority and low-income communities have historically been denied fair treatment and meaningful involvement in environmental decision-making. As a result, hazardous waste landfills, treatment facilities, and industries that emit the greatest amount of toxic chemicals are located predominantly in minority or low-income communities.<sup>3</sup> Similarly, air quality in minority and low-

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1. For a brief bibliography of recent law review articles, see Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 6 n.22 (1995); see also Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 *J. ENVTL. L. & LITIG.* 121 (1994) (providing overview of literature on environmental justice). For a cross-disciplinary bibliography, see Michael R. Meuser & Andrew Szasz, *Environmental Inequality Bibliography* (last modified Mar. 23, 1996) <<http://www.cruzio.com/~meuser/ejwww.html>>.

2. U.S. ENVTL. PROTECTION AGENCY, EPA DRAFT ENVIRONMENTAL JUSTICE GUIDANCE ch. 1, § 1.1.1 (visited Oct. 8, 1996) <<http://es.inel.gov/oeca/ofa/chap1.html>> [hereinafter EPA DRAFT NEPA GUIDANCE, CHAPTER 1].

3. See BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 14-15 (1994); UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES

income communities is often worse than in other communities.<sup>4</sup>

The disparate treatment results from the actions of private individuals as well as local, state, and federal government officials. Many environmental injustices occur when the federal government or a state government takes some action, such as issuing a permit for a hazardous waste landfill, and the government fails to consider or ignores the disparate impact that the action will have on minority or low-income communities. In many cases the federal or state government does not consider the disparate impact of its action because the substantive law under which the government is acting does not require it to consider that impact.<sup>5</sup>

However, many state environmental policy acts (SEPAs)<sup>6</sup> require state governments to consider a wide range of health, economic, social, and cultural impacts before taking actions that affect the environment. Some SEPAs even require state governments to avoid those impacts.<sup>7</sup> SEPAs can be valuable tools to achieve environmental justice. While SEPAs are usually modeled after the

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XIII-XI, 41 (1987); U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES app. I at 9 (1983); Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615, 615-16 (1995); see also Michael R. Meuser & Andrew Szasz, *Our Project* (visited Nov. 4, 1996) <<http://www.cruzio.com/~meuser/EI/project.html>> (using data from the *Toxics Release Inventory* to examine the siting of industrial facilities in Santa Clara County). For a summary of 10 recent studies with varied conclusions that all focus on disparate siting of hazardous waste facilities in poor or minority communities, see U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS AND NONHAZARDOUS WASTE: DEMOGRAPHICS OF PEOPLE LIVING NEAR WASTE FACILITIES (1995).

4. See *Envtl. Justice Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 96-97 (1993) (statement of Paul Mohai, Assistant Professor, School of Natural Resources and Environment, Department of Sociology, University of Michigan) (affirming findings by the United Church of Christ study that race is more important than socioeconomic factors in the distribution of environmental hazards); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796-97 n.36 (1993); D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, EPA J., Mar.-Apr. 1992, at 16.

5. See Lazarus, *supra* note 4, at 812-17.

6. SEPA is the generic name that many commentators use to refer to state environmental review laws that are modeled on the National Environmental Policy Act (NEPA). See DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 10.01 (1990 & Supp. 1995). Sixteen states have enacted SEPAs. See *id.* § 10.02 n.4. Several other states have promulgated executive orders that mandate environmental review procedures similar to those in NEPA. See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271, 306 & n.206 (1992).

7. See *infra* notes 135-41 and accompanying text.

National Environmental Policy Act (NEPA),<sup>8</sup> many SEPA's require state governments to consider a broader scope of impacts in a broader range of situations than NEPA requires for the federal government.<sup>9</sup> Ironically, when Congress enacted NEPA, it envisioned NEPA as a model for state environmental review laws,<sup>10</sup> but in the truest sense of cooperative federalism, state laws can now be used as models for changes to NEPA.

NEPA also includes provisions that implicitly require that the government consider the disparate impacts that a proposed action may have on minority or low-income communities.<sup>11</sup> However, the federal government has been exploring the expanded use of NEPA to require consideration of environmental justice issues since President Clinton issued Executive Order No. 12,898 on environmental justice in 1994.<sup>12</sup> With bold leadership from the Council on Environmental Quality (CEQ),<sup>13</sup> NEPA could be

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8. 42 U.S.C. §§ 4321-4370(d) (1994).

9. See Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 230-55 (1992) (reviewing SEPA's from California, Washington, and New York); S. REP. NO. 91-296, at 8 (1969), reprinted in 115 CONG. REC. 19,009, 19,010 (1969) (NEPA provides a model to which state governments may look in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management).

10. See S. REP. NO. 91-296, at 8 (1969), reprinted in 115 CONG. REC. 19,009, 19,010 (1969).

11. See *infra* notes 72-97 and accompanying text.

12. See 3 C.F.R. § 859 (1994). The White House began focusing on the use of NEPA to advance environmental justice when it began drafting Executive Order No. 12,898 in 1993. See *Federal Agencies Would Have to Address Environmental Equity Under Draft Order*, 24 Env't Rep. (BNA) 620 (Aug. 13, 1993). Although Executive Order No. 12,898 did not explicitly address the use of NEPA to advance environmental justice, the White House promised to issue guidance on NEPA and environmental justice by August 1995. See *Advisory Council Criticizes White House for Failure to Issue Guidance on 'Justice'*, 26 Env't Rep. (BNA) 1554 (Dec. 22, 1995). The White House missed that deadline, see *id.*, and the Council on Environmental Quality finally issued draft guidelines in June 1996. COUNCIL ON ENVIRONMENTAL QUALITY, DRAFT GUIDANCE FOR ADDRESSING ENVIRONMENTAL JUSTICE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (May 24, 1996) [hereinafter CEQ DRAFT NEPA GUIDANCE].

13. Section 202 of NEPA created the Council on Environmental Quality "to appraise programs and activities of the Federal Government in the light of the policy set forth in [NEPA]." 42 U.S.C. § 4342 (1994). CEQ administers NEPA and provides guidance to other federal agencies regarding NEPA. See *id.*

The EPA also plays a role in the administration of NEPA. Section 309 of the Clean Air Act requires the EPA to review and comment on the environmental impact of legislation, regulations, and major federal actions of other federal agencies. See *id.* § 7609(a). If the EPA administrator determines that the legislation, regulation, or agency action is "unsatisfactory from the standpoint of public health or wel-

strengthened dramatically through administrative changes. In addition, legislative changes to NEPA based on effective SEPAs could make NEPA a more effective tool to achieve environmental justice.

Both strong SEPAs and a strong NEPA are necessary to effectively address environmental justice concerns on a national scale. Although some states have enacted progressive SEPAs, such as those requiring consideration of environmental justice issues, SEPAs only apply to state or local actions and do not apply to actions that are undertaken by the federal government. However, the federal government takes many actions that can harm human health or the environment and that could have a disparate impact on minority or low-income communities.<sup>14</sup> The federal government must take advantage of the tools that currently exist under NEPA to require consideration of disparate impacts of its actions on minority and low-income communities. The federal government must also make legislative and administrative changes to strengthen NEPA based on progressive SEPAs.

At the same time, SEPAs will continue to play an important role as part of a national environmental justice strategy due to NEPA's limited scope. Just as when NEPA was enacted, "many of the most serious environmental problems the Nation faces are within the scope and, often, within the exclusive jurisdiction of State action and State responsibility."<sup>15</sup> However, NEPA does not apply to a state action unless there is some federal nexus to the state action.<sup>16</sup> In light of the current trend toward devolution of power to the states, it is unlikely that Congress will expand NEPA's jurisdictional reach to include a broader scope of state

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fare or environmental quality," the administrator publishes that determination and the matter is referred to the Council on Environmental Quality. *Id.* § 7609(b).

14. Each year federal agencies prepare approximately 50,000 environmental assessments (EAs) to determine the potential impacts of proposed actions on the environment. See *Use of Mitigation Measures Increasing as Agencies Plan Projects, Attorney Says*, 26 *Env't Rep. (BNA)* 1995 (Feb. 16, 1996). Additionally, in 1994 federal agencies prepared 532 draft or final Environmental Impact Statements (EISs). See Council on Environmental Quality, *Summary of Environmental Impact Statements* (last modified Feb. 1, 1995) <<http://ceq.eh.doe.gov/nepa/eis/eis94a.htm>>. Most of the EISs were prepared for public land management projects, such as timber harvesting or leasing, dredging projects, road construction, dam licensing, and construction of public buildings. See *id.*

15. S. REP. No. 91-296, at 8 (1969), reprinted in 115 CONG. REC. 19,009, 19,010 (1969).

16. See *infra* note 126.

actions.<sup>17</sup> Therefore, strong SEPAs must complement a strengthened NEPA.

This Article explores (1) the manner in which NEPA, in its current form, can be used to advance environmental justice;<sup>18</sup> (2) the limits of NEPA;<sup>19</sup> and (3) legislative or administrative changes that can be made to NEPA, or the regulations implementing NEPA, to make NEPA a more effective tool to achieve environmental justice.<sup>20</sup>

## II. HOW CAN NEPA, IN ITS CURRENT FORM, BE USED TO ACHIEVE ENVIRONMENTAL JUSTICE?

Generally, NEPA requires the federal government to consider the environmental impacts and a variety of health and socioeconomic impacts of proposed actions before it takes those actions.<sup>21</sup> Procedurally, NEPA achieves those goals by requiring the federal government to prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."<sup>22</sup> The EIS must discuss the environmental impacts of the proposed action, any alternatives to the proposed action, and the environmental impacts of those alternatives.<sup>23</sup>

17. See Stephen M. Johnson, *United States v. Lopez: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33 (1996) (discussing devolution of power to the states).

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. Section 101(b) of NEPA provides,

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may - (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.

42 U.S.C. § 4331(b)(1)-(4) (1994).

22. *Id.* § 4332(2)(C). NEPA also requires agencies to prepare an EIS for recommendations or reports on proposals for legislation. See *id.*

23. See *id.* CEQ's regulations suggest that the purpose of an EIS is "to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or

NEPA only requires the federal government to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."<sup>24</sup> However, NEPA requires federal agencies to undertake a similar but streamlined environmental review process for many other federal actions that do not rise to the level of "major Federal actions."<sup>25</sup> Whenever a proposed action can be achieved in one or more ways having different impacts on the physical environment, the federal government must prepare an Environmental Assessment (EA) for the action.<sup>26</sup> The EA must include a brief discussion of the need for the proposed action, any alternatives to the proposed action, and the environmental impacts of the proposed action and its alternatives.<sup>27</sup> In many cases, agencies prepare an EA in order to determine whether the proposed action is a "major Federal action" for which the agency must prepare an EIS.<sup>28</sup> However, an agency may prepare an EA "at any

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minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1 (1995).

24. 42 U.S.C. § 4332(2)(C). CEQ has promulgated regulations which define the terms "major Federal action," "significantly," "affecting," and "human environment." See 40 C.F.R. §§ 1508.3, 1508.14, 1508.18, 1508.27. According to CEQ's regulations, the term

*[m]ajor Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. *Major reinforces but does not have a meaning independent of significantly.* Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

See *id.* § 1508.18 (emphasis added, citation omitted).

25. See 42 U.S.C. § 4332(2)(C).

26. Section 102(2)(E) of NEPA requires "all agencies of the Federal Government" to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.* § 4332(2)(E); see also *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988). Professor William H. Rodgers, Jr. suggests that the "unresolved conflict" language in section 102(2)(E) creates a "mini-threshold" for the EA requirement that "can be satisfied by a showing that an action can be achieved in one or more ways having different impacts on the physical environment." WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.2A, at 165 (Supp. 1996) (citing *Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975)).

27. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. Therefore, even though an agency may not have to prepare an EIS for a proposed action, it may, in many cases, still have to analyze alternatives to the proposed action and analyze the environmental impacts of the proposed action and alternatives. See *Bob Marshall Alliance*, 852 F.2d at 1228-29; *City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 742 (2d Cir. 1983); *Romney*, 523 F.2d at 93; *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123, 1135 (5th Cir. 1974); *California v. Bergland*, 483 F. Supp. 465, 488 (E.D. Cal. 1980), *aff'd in part, rev'd in part sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982).

28. CEQ's regulations require agencies to develop regulations that identify cer-

time in order to assist agency planning and decisionmaking."<sup>29</sup>

In its existing form, NEPA can be used to achieve environmental justice in several ways. NEPA's public participation provisions empower communities by enabling them to provide input into the federal government's decision-making process and to educate the government about the disparate impacts proposed actions may have on the communities.<sup>30</sup> While NEPA's public participation provisions give communities a voice in government decision-making, they also give the communities valuable information about public health and safety and the government's decision-making process. If the government decides to take an action that disparately impacts a minority or low-income community, community leaders can use the information they receive through the NEPA review process to organize the community against the government action.<sup>31</sup>

The NEPA review process can also advance environmental justice by delaying the federal government in taking actions that could disparately impact communities. The delay provides communities more time to organize their opposition to the government actions.<sup>32</sup> The cost of the environmental review process might also derail government projects, including those which could have a disparate impact on communities.<sup>33</sup>

Finally, in many cases, NEPA requires the federal government to consider certain health and socioeconomic impacts of proposed actions before taking the actions.<sup>34</sup> Through this process, the government should be able to identify whether proposed actions will have a disparate impact on minority or low-income communities. The government can then avoid taking those actions. The follow-

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tain types of actions that generally require an EIS and certain types of actions—categorical exclusions—that generally do not require an EIS or an EA. See 40 C.F.R. § 1501.4(a). If an agency proposes to take an action that does not fit within one of those two categories, the agency should prepare an EA to decide whether an EIS is necessary. See *id.* § 1501.4(b).

29. See *id.* § 1501.3(b).

30. See *infra* notes 35-38 and accompanying text.

31. See *infra* notes 62-68 and accompanying text.

32. See *infra* notes 69-71 and accompanying text.

33. For a discussion of the high cost of preparing an EIS, see 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, 342 n.17 (1995). For a discussion of the high cost of preparing an EA, see COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE TWENTY-THIRD ANNUAL REPORT 153 (1993).

34. See *supra* notes 72-97 and accompanying text.

ing sections explore these strengths of NEPA in detail.

### A. Public Participation

In many cases minority and low-income communities are disparately impacted by government actions because the communities do not have a voice in the decision-making process, and the communities lack the influence or political power of special interest groups that may support the government action.<sup>35</sup> Broad and flexible public participation provisions, like those in NEPA, empower communities and provide them with a voice in the decision-making process.

Broad and flexible public participation provisions also improve the government's decision-making process by enabling it to solicit information vital to that process.<sup>36</sup> Without such provisions, the federal government may reach decisions that disparately impact minority and low-income communities because the government fails to obtain input from the impacted communities. Arguably, the communities are the most important group of experts. Local individuals, who will be most directly affected by a government action, can provide unique information about the impacts of the proposed action that the government may be unable to obtain elsewhere.<sup>37</sup> This additional information enables the government to identify additional alternatives to the proposed action. As a result, it is more likely that the government can reach a decision that achieves its goal without disparately impacting minority or low-income communities.<sup>38</sup>

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35. See Reich, *supra* note 6, at 288-89; see also UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DRAFT ENVIRONMENTAL JUSTICE GUIDANCE ch. 4 (visited Oct. 23, 1996) <<http://es.inel.gov/oeca/ofa/chap4.html>> [hereinafter EPA DRAFT NEPA GUIDANCE, CHAPTER 4].

36. See EPA DRAFT NEPA GUIDANCE, CHAPTER 4, *supra* note 35.

37. See Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. 449, 454 (1995) (arguing that those who will be impacted by a proposed project are "home-grown experts" who can "point out serious flaws in the project, suggest alternatives, and educate decision makers and the public"); Tilleman, *supra* note 33, at 343.

38. See Tilleman, *supra* note 33, at 346. In recent guidance the EPA stresses that the goal of identifying and developing alternatives for mitigating disproportionately high and adverse effects is not to distribute the impacts proportionally or divert them to a non-minority or higher-income community. Instead, alternatives should be developed that mitigate or avoid effects to both the population at large and any disproportionately high and adverse effects on minority or low-income communities. . . . Generally, the types of alternatives that may potentially lead to avoidance or reduction of effects include: a) the identification of alternate locations or sites where impacts to

When an agency prepares an EIS, NEPA provides opportunities for broad and flexible public participation. Before the agency begins to prepare an EIS, it must provide notice to the public that it plans to prepare an EIS,<sup>39</sup> and it must solicit input from the public regarding the scope of issues and alternatives to be considered in the EIS.<sup>40</sup> At a minimum, the agency must invite "affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)" to participate in the scoping process.<sup>41</sup> An agency may, but is generally not required to, hold public hearings to determine the scope of issues and alternatives to be considered in the EIS.<sup>42</sup> After the scoping process is completed, the agency prepares a draft EIS and makes it available for public comment.<sup>43</sup> The agency may,

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susceptible populations or environments will be avoided; b) altering the timing of planned activities or periodic emissions to account for seasonal dependencies on natural resources; c) the adoption of pollution prevention practices and policies to reduce or mitigate emissions and/or impacts; and d) reducing the size or intensity of an action.

U.S. ENVIRONMENTAL PROTECTION AGENCY, DRAFT ENVIRONMENTAL JUSTICE GUIDANCE ch. 3, § 3.2.5 (visited Oct. 23, 1996) <<http://es.inel.gov/oeca/ofa/chap3.html>> [hereinafter EPA DRAFT NEPA GUIDANCE, CHAPTER 3].

39. See 40 C.F.R. § 1501.7 (1995). However, CEQ's regulations only require that the notice be published in the *Federal Register*. See *id.*

40. See *id.* § 1503.1(a)(4). To determine the scope of an EIS, agencies must consider direct, indirect, and cumulative impacts of a proposed action and alternatives to the proposed action, including "no action," other reasonable courses of action, or mitigation measures for the proposed action. See *id.* §§ 1508.8, 1508.25. The agency must also consider (1) closely related actions that should be considered in the same EIS, "connected actions"; (2) actions which when viewed with other proposed actions have cumulatively significant impacts and should, therefore, be discussed in the same EIS, "cumulative actions"; and (3) actions which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their consequences together, such as common timing or geography, "similar actions." See *id.* § 1508.25.

41. *Id.* § 1501.7(a)(1).

42. Although CEQ regulations do not require public hearings for the scoping process, the agency's own NEPA regulations may require hearings, or the agency may decide to hold a hearing pursuant to the general public involvement provisions of CEQ's regulations. See *id.* § 1506.6.

43. See *id.* § 1502.9(a). Agencies must circulate the draft EIS to any federal agency that has jurisdiction by law or special expertise, to the applicant, if any, and to any person, organization, or agency requesting the EIS. See *id.* § 1502.19. They must also provide public notice that the draft EIS is available for comment. See *id.* § 1506.6(b). CEQ's regulations require the agency to affirmatively solicit comments on the draft EIS from various persons, agencies, or organizations. See *id.* § 1503.1. The EPA plays an important role in the review process because it is required by section 309 of the Clean Air Act to "review and comment in writing on the environmental impact of any matter relating to duties and responsibilities . . . of the author-

but is generally not required to, hold public hearings on the draft EIS.<sup>44</sup> The agency then prepares and circulates a final EIS.<sup>45</sup> The agency must respond to all of the comments that it receives on the draft EIS when it prepares the final EIS.<sup>46</sup> In addition, when the agency makes a decision regarding an action requiring an EIS, the agency must prepare a "concise" record of decision (ROD).<sup>47</sup> Among other things, the ROD details "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>48</sup> The EIS process enables citizens to get involved in the decision-making process at an early stage and provides citizens with several opportunities to provide input prior to the ultimate decision. To the extent that communities are aware that an agency is conducting an EIS, the process provides communities with broad opportunities for public participation.

CEQ's public involvement regulations under NEPA are an important component of the NEPA public participation process. These regulations include several provisions that can be used to advance environmental justice by requiring federal agencies to take affirmative steps to involve communities in the NEPA decision-making process. Specifically, the regulations require agencies to provide public notice of "NEPA-related hearings, public meetings, and the availability of environmental documents [such as EAs or draft or final EISs] so as to inform those persons and agencies who may be interested or affected."<sup>49</sup> When a proposed action will have local impacts, the regulations suggest that an agency could use several types of notice to reach interested parties, including notice through local media, publication in newsletters that may be expected to reach interested persons, notice to community organizations, notice to state or area-wide clearinghouses, direct mailing to owners or occupants of nearby or affected prop-

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ity of the [EPA]." 42 U.S.C. § 7609(a).

44. However, the agency's own NEPA regulations or CEQ's general public involvement regulations, 40 C.F.R. § 1506.6, may require the agency to hold a public hearing on certain draft EISs.

45. See 40 C.F.R. §§ 1502.9, 1502.19. The agency must provide public notice that the final EIS is available for review, see *id.* § 1506.6(b), and must file the final EIS with the EPA. See *id.* § 1506.9. The EPA then publishes a notice in the *Federal Register* that it has received the final EIS. See *id.* § 1506.10.

46. See *id.* §§ 1502.9(b), 1503.4(a).

47. See *id.* § 1505.2.

48. *Id.* § 1505.2(c).

49. *Id.* § 1506.6(b).

erty, or posting of notice on- and off-site in the area where the action is located.<sup>50</sup> CEQ has also prepared draft guidance to implement Executive Order No. 12,898 that suggests that agencies should develop a strategy for effective public involvement of minority or low-income populations in the NEPA review of actions impacting those populations.<sup>51</sup> The guidance suggests that agencies could establish outreach through religious organizations, minority business associations, environmental justice organizations, legal aid providers, homeowner and neighborhood watch groups, rural cooperatives, business and trade organizations, community and social service organizations, universities and colleges, labor organizations, civil rights organizations, local schools and libraries, senior citizens' groups, American Indian communities, and public health agencies and clinics.<sup>52</sup> These notification methods are much more likely to reach potentially impacted communities than traditional *Federal Register* notice or notice in the legal section of a local newspaper.<sup>53</sup>

In addition, CEQ's public involvement regulations under NEPA require agencies to hold or sponsor public hearings or public meetings when there is substantial environmental controversy concerning the proposed action or when there exists a substantial interest in holding a hearing.<sup>54</sup> Thus, although CEQ's regulations do not generally require public hearings on a draft EIS, an agency may be compelled to hold a public hearing on a draft EIS if there is sufficient community interest or concern.

Although NEPA provides for broad and flexible public participation when an EIS is required, it provides few opportunities for public participation when an EIS is not required.<sup>55</sup> This is an important distinction because approximately ninety-nine percent of the actions reviewed by agencies under NEPA each year are reviewed in the context of an EA, rather than an EIS.<sup>56</sup> Further-

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50. *See id.*

51. *See* EPA DRAFT NEPA GUIDANCE, CHAPTER 4, *supra* note 35, § 4.2.

52. *See* CEQ DRAFT NEPA GUIDANCE, *supra* note 12, at 8-9.

53. The regulations do not specifically *require* agencies to use any of those non-traditional notice methods. 40 C.F.R. § 1506.6. However, the regulations require agencies to provide notice "so as to inform those persons and agencies who may be interested or affected." *Id.* § 1506.6(b). Notice in the *Federal Register* or notice in the legal section of the local newspaper arguably might not inform interested or affected persons as required by the regulations.

54. *See id.* § 1506.6(c)(1).

55. EPA DRAFT NEPA GUIDANCE, CH. 4, *supra* note 35; 40 C.F.R. § 1506.6(f).

56. *See supra* note 14.

more, agencies are increasingly attempting to mitigate the impacts of their actions in the planning stages so that they will not have to prepare an EIS.<sup>57</sup> CEQ's regulations generally do not require agencies to (1) notify the public that the agency is preparing an EA, (2) prepare a draft EA for public comment, or (3) solicit public comment on an EA.<sup>58</sup> In fact, under CEQ's regulations, agencies must only notify the public when the agency has completed the EA and has decided to prepare an EIS<sup>59</sup> or when the agency has found that the proposed action will not have a significant impact on the human environment and that it is not necessary to prepare an EIS.<sup>60</sup> When the agency determines, based upon an EA, that it is not necessary to prepare an EIS, citizens and communities are effectively foreclosed from participating in the decision-making process.<sup>61</sup>

### *B. NEPA as an Information-Gathering, Educational, and Organizational Tool*

In addition to providing citizens with an opportunity to participate in the government's environmental decision-making process, the NEPA review process provides several other benefits to

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57. See *Use of Mitigation Measures Increasing as Agencies Plan Projects*, Attorney Says, 26 Env't Rep. (BNA) 1995 (Feb. 16, 1996); see also COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 33, at 153 (noting that agencies increasingly integrate NEPA into their planning stages, resulting in incorporation of mitigation measures into project design).

58. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.2A, at 153 (Supp. 1996); Melany Earnhardt, *Using the National Environmental Policy Act to Address Environmental Justice Issues*, 29 CLEARINGHOUSE REV. 436, 439 (1995). However, an agency's NEPA regulations could require the agency to provide such opportunities for public participation. Furthermore, one might read the requirement in CEQ's regulations that agencies "[s]olicit appropriate information from the public," 40 C.F.R. § 1506.6(d), as a requirement that agencies solicit public input on EAs before they are complete. CEQ's regulations also vaguely require that agencies "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments [that are required to determine whether to prepare an EIS]." 40 C.R.R. § 1501.4(b) (emphasis added).

59. See 40 C.F.R. § 1501.7.

60. See *id.* § 1501.4(e). The agency's determination is generally referred to as a finding of no significant impact (FONSI). See *id.* If, however, the proposed agency action is, or is closely similar to, one that normally requires an EIS or the nature of the proposed action is without precedent, and the agency intends to make a FONSI, it may have to provide public notice of its intent to make the FONSI and provide the public with an opportunity to review the decision *before* it becomes final. See *id.* § 1501.4(e)(2).

61. See *id.* § 1501.4(e) (requiring that the agency only notify the public *after* it determines an EIS is not available).

communities that may be disparately impacted by government actions. First, regardless of whether an agency prepares an EIS or an EA, CEQ regulations require that the agency make available to the public the NEPA documents, any public comments that the agency received on the documents, and any comments that the agency received from other agencies on the documents.<sup>62</sup> NEPA does not require agencies to implement the least environmentally harmful alternative identified in an EIS or EA.<sup>63</sup> However, the EIS or EA may identify mitigation measures or alternatives that are less environmentally harmful than the government's proposed action.<sup>64</sup> If the community receives NEPA documents, agency or public comments, or other information before the agency has completed its NEPA review, the community may be alerted that the government has failed to recognize the significance of certain facts in its review. For example, the government may have failed to recognize the cumulative impact of the proposed action and other related actions or the unusual susceptibility of the community to particular health risks. The community can then use the NEPA public participation procedures to provide the government with additional information prior to the government's final decision. On the other hand, if the government decides to take an action that disparately impacts the community, and subsequently the community learns that less harmful alternatives were identified in the EIS or EA or that the EPA or another agency raised concerns about the impacts of the proposed action, the community may be able to use that information in political fora or other fora to prevent the government from going forward with the proposed action.

The NEPA environmental review process is also an educational tool for the government and for communities that may be disparately impacted by government action. On the one hand, the government has the opportunity to explain to the public, in understandable terms, the proposed action and potential alternatives, their impacts, and the reasons why it might decide to take a particular action. The process allows the government to demonstrate

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62. *See id.* § 1506.6(f). The agency cannot withhold from the public comments from federal agencies concerning the environmental impact of the proposed action on the ground that the comments represent interagency documents exempt from disclosure under the Freedom of Information Act. *See id.* The regulations further provide that "[m]aterials to be made available to the public shall be provided to the public without charge to the extent practicable." *See id.*

63. *See id.* § 1505.2.

64. *See id.* § 1502.14.

that it is responding to public concerns by choosing an alternative that has a less adverse impact on the community or by incorporating mitigating features into the proposed plan.<sup>65</sup> On the other hand, the community has the opportunity to convey to the government the level of public opposition to, concern over, or support for a proposed action before the government commits itself to that action.<sup>66</sup> As experts, the community also educates the government on the proposed actions' real impacts on the community.<sup>67</sup> Finally, the NEPA environmental review process provides a focal point around which communities can organize to oppose a project that disparately impacts the community.<sup>68</sup>

### C. Delay

NEPA can also advance environmental justice by delaying government actions that may disparately impact minority or low-income communities. The NEPA environmental review process is time-consuming,<sup>69</sup> and citizens can delay it through litigation if the government does not fully comply. For instance, if the government attempts to take an action that disparately impacts a minority or low-income community without preparing an EIS or an EA, and NEPA requires the government to prepare one of those documents, representatives of the community can sue the government to force compliance.<sup>70</sup> Similarly, if the government prepares

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65. In recent guidance, the EPA explained that

EPA-anticipated impacts and community perceptions of those impacts (and their fairness) can be very different, so both must be considered. When perceptions are the concern, an effort to involve and inform the community can go a long way toward building confidence that EPA's analyses and actions are well-intended and balanced.

EPA DRAFT NEPA GUIDANCE, CHAPTER 4, *supra* note 35, § 4.2.

66. *See Cole, supra* note 37, at 454-55.

67. *See id.* at 455.

68. *See id.*

69. *See Tilleman, supra* note 33, at 342 n.17.

70. Although NEPA does not include a judicial review provision, the Administrative Procedure Act creates a right of review for final agency actions under NEPA. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989). The general federal question jurisdictional statute enables federal district courts to hear those challenges. 28 U.S.C. § 1331 (1994). The district court will review the agency's decision to proceed without preparing an EIS or EA under the "hard look" arbitrary and capricious standard. *See Marsh*, 490 U.S. at 376; *see also* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 562 n.52 (1990) (noting Justice Stevens' opinion in *Marsh* that courts should apply the arbitrary and capricious standard when determining whether an EIS was required). As part of that analysis, the court will determine whether the

an inadequate EA or EIS, representatives of the community can file suit to challenge the document.<sup>71</sup>

Since NEPA can delay the federal government from taking actions that may disparately impact communities, the law can provide communities with valuable time to organize and to provide information to the government concerning a proposed action's potentially adverse impacts. The delay may also provide communities additional time to explore alternative ways to prevent the proposed action.

#### *D. Consideration of Socioeconomic and Health Effects*

The clearest way that NEPA advances environmental justice is by requiring the federal government to consider a variety of health and socioeconomic impacts that may be caused by proposed actions before taking those actions. NEPA clearly requires the government to consider such impacts when it prepares an EIS.<sup>72</sup> NEPA may also require the government to consider those impacts when it prepares an EA.<sup>73</sup> In a memorandum that accompanied

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agency looked at all of the relevant factors before it decided to proceed without preparing an EIS or EA. *Marsh*, 490 U.S. at 378 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

71. The suit would be brought in federal district court pursuant to 28 U.S.C. § 1331, and would be reviewed under the "hard look" arbitrary and capricious standard of 5 U.S.C. § 706(2)(A) (1994). See *Marsh*, 490 U.S. at 376. While litigation is generally not a preferred approach in environmental justice disputes, see Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM. URB. L.J. 523, 541 (1994), the mere threat of litigation by a community may be sufficient to delay the government's action.

72. See *infra* notes 75-89 and accompanying text. If an agency does not consider those impacts in the context of an EIS, its decision could be invalidated on several grounds. See Administrative Procedure Act, 5 U.S.C. § 706(2). First, when the agency fails to consider those impacts, it fails to consider "all of the relevant factors" in preparing the EIS, and a court could invalidate the EIS under "hard look" review as an arbitrary and capricious agency action. See *id.* § 706(2)(A). Similarly, when the agency fails to consider those impacts, it acts beyond its statutory authority and a court could strike down its action as ultra vires. See *id.* § 706(2)(C). In order to build a strong case on either ground, though, community members should alert the agency to those impacts during the public participation periods for the EIS and build a strong administrative record for review.

73. See *infra* notes 90-97 and accompanying text. However, neither the EPA nor CEQ have interpreted NEPA to require agencies to consider socioeconomic impacts in an EA. In a recent draft guidance, CEQ encouraged, but did not require, agencies to consider those impacts in an EA. See CEQ DRAFT NEPA GUIDANCE, *supra* note 12, at 5. Similarly, in its recent draft NEPA guidance, the EPA stated that the agency, as a matter of practice, considers interrelated socioeconomic impacts in EAs, where relevant. See EPA DRAFT NEPA GUIDANCE, CHAPTER 3, *supra* note 38. The draft guidance applies only to actions taken by the EPA and does not apply to the

Executive Order No. 12,898, President Clinton reminded federal agencies that NEPA requires them to consider the socioeconomic impacts of proposed actions in many cases.<sup>74</sup> However, neither NEPA nor the Executive Order clarify *to what extent* agencies must consider those impacts.

NEPA, on its face, only requires the government to review *environmental* impacts of proposed actions and alternatives when preparing an EIS.<sup>75</sup> However, in *Metropolitan Edison Co. v. People Against Nuclear Energy*,<sup>76</sup> the United States Supreme Court interpreted the term "environmental impact" broadly and suggested that the government must consider certain *health* effects when it prepares an EIS because NEPA's broad goals include protection of health and welfare.<sup>77</sup> The *Metropolitan Edison* Court stressed, though, that NEPA does not require the government to consider "every impact or effect of its proposed action."<sup>78</sup> Instead, the Court suggested that the government must only consider the health effects of a proposed government action in an EIS if the action causes a change in the physical environment and there is a reasonably close causal connection between the change in the physical environment and the health effects.<sup>79</sup> For purposes of this

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EPA's review of other agencies' actions under section 309 of the Clean Air Act. See EPA DRAFT NEPA GUIDANCE, CHAPTER 1, *supra* note 2.

74. See Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279-80 (Feb. 11, 1994). The White House memorandum regarding implementation of the Executive Order requires agencies to "analyze the environmental effects, including the human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities" when a NEPA analysis is required. *Id.* at 280. The memo also requires agencies to include mitigation measures in NEPA documents specifically designed to address significant and adverse environmental effects of proposed actions on minority communities and low-income communities. See *id.* Similarly, section 3-302(a) of the Executive Order provides that "each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income." 3 C.F.R. §§ 859, 861 (1994).

75. See 42 U.S.C. § 4332(2)(C) (1994).

76. 460 U.S. 766 (1983).

77. See *id.* at 772-73.

78. *Id.* at 772.

79. See *id.* at 772-73. The Court recognized that the broadest definition of "adverse environmental effects" could "embrace virtually any consequence of a governmental action that someone thought 'adverse.'" *Id.* at 772. Instead of adopting the broadest definition, the Court noted that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment." *Id.* at 773 (emphasis omitted). Accordingly, while the Court acknowledged that NEPA could require the government to consider health impacts in an EIS, the Court counseled

Article, the health effects caused by the change in the physical environment will be referred to as “secondary” health effects.

Although *Metropolitan Edison* only addressed secondary health effects, there are many reasons why NEPA should be interpreted to require the government, when it prepares an EIS, to consider the *socioeconomic* impacts—“secondary socioeconomic impacts”—that are caused by changes to the physical environment resulting from the government’s proposed action.<sup>80</sup>

First, it would be consistent with the Court’s reasoning in *Metropolitan Edison* to interpret “environmental impacts” under NEPA to include secondary socioeconomic impacts. The *Metropolitan Edison* Court interpreted the term “environmental impacts” broadly to include secondary health impacts because that interpretation of the term was consistent with the statute’s purpose of protecting human welfare.<sup>81</sup> The Court’s decision is a good example of the “legal process” theory of statutory interpretation.<sup>82</sup> A court that applies legal process theory identifies the purpose of a statute and then interprets the statute in a manner that is consistent with that purpose.<sup>83</sup>

In the same way that the *Metropolitan Edison* Court adopted a legal process approach to conclude that environmental impacts

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that “[t]o determine whether § 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.” *Id.* The Court held that “the terms ‘environmental effect’ and ‘environmental impact’ in § 102 [should] be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.” *Id.* at 774. Although the majority opinion and Justice Brennan’s concurring opinion recognized that NEPA could require the government to consider the psychological impacts of a proposed government action in an EIS, *see id.* at 771, 779, the Court ultimately determined that there was no reasonably close causal connection between the change in the physical environment caused by the government decision to allow a company to restart a nuclear reactor at Three Mile Island and the psychological harm suffered by the plaintiffs. *See id.* at 775-77.

80. *See* CEQ DRAFT NEPA GUIDANCE, *supra* note 12, at 5; EPA DRAFT NEPA GUIDANCE, CHAPTER 3, *supra* note 38.

81. *See Metropolitan Edison Co.*, 460 U.S. at 772-73. Lower courts have also interpreted “environmental impacts” broadly to include aesthetic effects. *See Maryland Nat’l Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973).

82. *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994), for a good discussion of “legal process” theory.

83. *See id.* at 1149-71; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892) (stating that “another guide to the meaning of a statute is found in the evil which it is designed to remedy”).

include secondary health effects, courts should adopt that approach to interpret environmental impacts to include secondary socioeconomic impacts because that interpretation of the term would be consistent with the statute's purpose of protecting economic, social, and cultural values while also protecting the physical environment.<sup>84</sup>

Courts should also interpret NEPA to require the government to consider secondary socioeconomic impacts in an EIS because CEQ has interpreted the statute, by regulation, in that manner.<sup>85</sup> CEQ regulations provide that "effects" and "impacts" are synonymous under NEPA and define "effects" to include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, his-

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84. The text and legislative history of NEPA clearly illustrate that the statute's purposes include the protection of social, economic, and cultural values. See 42 U.S.C. § 4331(a). Section 101(a) of NEPA provides that it is the policy of the federal government "to use all practicable means and measures . . . 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." *Id.* (emphasis added). Section 101(b) provides that it is the duty of the federal government

to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (2) assure for all Americans *safe, healthful, productive and esthetically and culturally pleasing surroundings*; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) *preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.*

*Id.* § 4331(b) (emphasis added). Senator Jackson, the sponsor of NEPA, suggested that the statute was necessary to address "haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being; . . . inconsistent and often, incoherent rural and urban land-use policies; . . . poor architectural design and ugliness in public and private structures." 115 CONG. REC. S40,417 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson).

The text and legislative history of NEPA also indicate that Congress was concerned with the disparate impact that pollution may have on communities. In order to ensure that every citizen shares in the benefits of a clean environment, NEPA includes section 101(c), which provides that "each person should enjoy a healthful environment." 42 U.S.C. § 4331(c). During congressional debate on the legislation in 1969, the section-by-section analysis of the legislation stated that all individuals should be assured of "safe, healthful and productive surroundings in which to live and work and should be afforded the maximum possible opportunit[ies] to derive physical, esthetic, and cultural satisfaction" from their immediate surroundings and from the environment they share with the rest of humanity. 115 CONG. REC. S40,419 (1969).

85. See 40 C.F.R. § 1508.8(b) (1995).

toric, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>86</sup> Courts generally defer to an agency’s regulatory interpretation of a statute when the statute is administered by the agency.<sup>87</sup>

Finally, courts should interpret NEPA as requiring the government to consider secondary socioeconomic impacts in an EIS because section 102(2)(A) of NEPA requires agencies to use “a systemic, interdisciplinary approach which will insure the integrated use of the natural and social sciences . . . in planning and in decisionmaking which may have an impact on man’s environment.”<sup>88</sup> That provision of NEPA suggests that the government

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86. *Id.*

87. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). NEPA does not explicitly delegate to CEQ the authority to promulgate regulations. However, “a consensus has arisen that such regulations are necessary if the NEPA process is to work efficiently,” and “[t]he Supreme Court has . . . never questioned CEQ’s authority to issue them.” Shilton, *supra* note 70, at 559 n.35 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989), *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989), and *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)).

88. 42 U.S.C. § 4332(2)(A). In support of this provision, the section-by-section analysis stated that

Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view and all relevant values in the planning and conduct of Federal activities. Using an interdisciplinary approach that brings together the skills of [the] landscape architect, the engineer, the ecologist, the economist, the sociologist and other relevant disciplines would result in better planning, better projects, and a better environment. Too often in the past planning has been the exclusive province of the engineer and cost analyst. And, as a consequence, too often the humanistic point of view . . . has been overlooked or purposely ignored.

115 CONG. REC. 40,419-20 (1969). The *Metropolitan Edison* decision includes language which, at first blush, seems to contradict section 102(2)(A). When the Court determined that the Nuclear Regulatory Commission (NRC) did not have to examine, in a supplemental EIS (SEIS), the psychological impacts that the risk of a nuclear accident resulting from the restart of Three Mile Island would have on the plaintiffs, the Court suggested that

[i]f contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.

*Metropolitan Edison Co.*, 460 U.S. at 776. If this language is read broadly, it suggests that agencies do not need to consider psychological impacts of proposed actions in an EIS because they lack psychological expertise. However, section 102(2)(A) of NEPA clearly requires agencies to use interdisciplinary planning that considers health and social impacts of proposed actions. Therefore, the language in *Metropolitan Edison* should be read narrowly to suggest that the NRC did not have to consider

should consider the socioeconomic impacts of proposed actions, regardless of whether the government is preparing an EIS or an EA under NEPA.<sup>89</sup> For all of these reasons, NEPA should be interpreted to require the government to consider secondary health and socioeconomic impacts when it prepares an EIS.

The more contentious yet important question is whether NEPA requires the government to consider the secondary health and socioeconomic impacts of proposed actions when it prepares an EA. This is an important question because ninety-nine percent of the government actions that are reviewed under NEPA are reviewed in the context of an EA, rather than an EIS.<sup>90</sup>

Arguably, the Supreme Court implicitly answered this question in the affirmative in *Metropolitan Edison*, when it held that the environmental impacts an agency must consider when preparing an EIS include the health impacts caused by changes to the physical environment resulting from the proposed government action.<sup>91</sup> If this reading of *Metropolitan Edison* is correct, it is hard to imagine why NEPA would not require the government to consider secondary health effects as environmental impacts at the EA stage. The EA stage is the point at which it is decided whether the proposed action significantly affects the human environment, such that the agency must prepare an EIS. Similarly, if secondary socioeconomic impacts are environmental impacts that must be considered in an EIS, they should also be considered in determining whether to prepare an EIS in the first place.<sup>92</sup>

Furthermore, section 102(2)(C) of NEPA specifies that the government must prepare an EIS for actions significantly affecting

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the psychological impacts at issue in the case in a SEIS because the impacts were too attenuated from the impact on the physical environment.

89. Section 102(2)(A) of NEPA applies to all government actions, and is not limited to planning in the context of an EIS. See 42 U.S.C. § 4332(2)(A).

90. See *supra* note 14.

91. *Metropolitan Edison*, 460 U.S. at 772-73.

92. In its recent draft NEPA guidance, the EPA stressed that

In certain instances, factors related to environmental justice may influence a determination of significance. CEQ regulations . . . require that significance of actions be analyzed in several "contexts," including "society as a whole, the affected region, the affected interests, and the locality." Significance thus depends on the setting of the action. Incorporating environmental justice concerns into an impact assessment is entirely consistent with this basic NEPA concept. . . . [F]ocusing the analysis may show that potential impacts are particularly disproportionate or particularly severe on minority and/or low-income communities, and this should be considered in evaluating "context" and thus should affect the significance determination.

EPA DRAFT NEPA GUIDANCE, CHAPTER 3, *supra* note 38, §3.2.2.

the *human* environment, as opposed to the *physical* environment.<sup>93</sup> If Congress wanted agencies to determine whether the impact of a proposed action is significant based solely on physical environmental impacts, Congress could have required agencies to prepare an EIS for major federal actions that “significantly affect the *environment*” or “significantly affect the *physical environment*.” By using the term *human environment*, Congress expressed its intent that the government consider a wide range of socioeconomic, cultural, and health impacts when determining whether it is necessary to prepare an EIS for a proposed action.<sup>94</sup>

Furthermore, although section 102(2)(E) only requires agencies to consider alternatives to a proposed action in an EA without explicitly requiring agencies to consider the environmental impacts of proposed actions, CEQ’s regulations clarify that NEPA requires agencies to discuss the environmental impacts of a proposed action and its alternatives in an EA.<sup>95</sup> As the Supreme Court suggested in *Metropolitan Edison*, the term “environmental impacts” in NEPA includes secondary health impacts.<sup>96</sup> For the reasons discussed above, environmental impacts should also include secondary socioeconomic impacts.<sup>97</sup>

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93. See 42 U.S.C. § 4332(2)(C).

94. CEQ’s regulations recognize Congress’ intent and specify that “human environment” includes “the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. The regulations are somewhat confusing in that they provide that “economic or social effects are not intended by themselves to require preparation of an environmental impact statement.” *Id.* § 1508.14 (emphasis added). However, consistent with the Supreme Court’s holding in *Metropolitan Edison*, this simply means that agencies will not be required to prepare an EIS unless a proposed action has impacts on the physical environment as well as economic and social impacts. Although economic or social effects may not, by themselves, require preparation of an EIS, economic or social effects, combined with, and caused by, changes in the physical environment may require preparation of an EIS.

95. See 40 C.F.R. § 1508.9.

96. See *supra* note 77 and accompanying text.

97. While agencies should consider the same types of impacts of proposed actions in both an EIS and an EA, an EA must only “briefly” address those impacts and alternatives. See 40 C.F.R. § 1508.9. In a memorandum to federal agencies regarding the “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations,” CEQ has indicated that

[s]ince the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted.

Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (1981).

Although NEPA can, and should, be interpreted to require agencies to consider secondary socioeconomic and health impacts in EAs and EISs, CEQ's regulations do not provide sufficient guidance to agencies regarding the extent to which those issues must be addressed in EAs or EISs. For several years, CEQ has promised to provide additional guidance regarding environmental justice and NEPA reviews, but the guidance is still forthcoming.<sup>98</sup> In order to promote the use of NEPA as a tool to achieve environmental justice, CEQ should amend its regulations to specifically address this important environmental justice issue.<sup>99</sup> Specifically, CEQ's regulations should provide that whenever an agency prepares an EIS or EA, it should (1) identify, to the extent practicable, the communities that will be impacted by the proposed federal action and its alternatives;<sup>100</sup> (2) collect demographic data regarding the racial and socioeconomic background of the potentially impacted communities;<sup>101</sup> and (3) collect available

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98. See *Use of Mitigation Measures Increasing as Agencies Plan Projects*, Attorney Says, 26 Env't Rep. (BNA) 1995 (Feb. 16, 1996).

99. Regulations, unlike guidance, would be binding on federal agencies and could be enforced by citizens.

100. The EPA has suggested in its draft NEPA guidance that the agency should screen all of its actions subject to NEPA to determine whether they impact minority or low-income communities and whether those communities are likely to experience adverse environmental or human health effects as a result of the proposed action. See EPA DRAFT NEPA GUIDANCE, CHAPTER 1, *supra* note 2.

101. There are several justifications for requiring agencies to collect this data in order to analyze the secondary health and socioeconomic impacts of a proposed action or its alternatives. First, regarding the economic data, CEQ's regulations currently define "effects" to include direct and indirect economic impacts of a proposed action. See 40 C.F.R. § 1508.8. In order to determine how a proposed action will impact the economic development or stability of a community, agency decision-makers must identify the current economic demographics of the community as a baseline.

CEQ's regulations also define "effects" to include direct and indirect cultural and social impacts of a proposed action. See *id.* The disparate impact that the federal government's action may have on a community composed predominantly of members of racial minority groups is a "direct or indirect cultural or social impact." See *id.* In order to determine whether a proposed action will have a disparate impact on a community composed predominantly of members of racial minority groups, the agency must determine the racial demographic composition of the community. EPA DRAFT NEPA GUIDANCE, CHAPTER 3, *supra* note 38, § 3.2.1.

Even if NEPA did not require agencies to collect racial demographic data, in many cases, the agencies would have to collect the data in order to comply with Title VI of the Civil Rights Act, which provides, in part, that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Plaintiffs in a Title VI case

health data and other information to determine whether the potentially impacted communities are likely to experience particular health effects because of multiple or cumulative exposure to or increased susceptibility to a pollutant released into the communities as a result of the proposed action or its alternatives.<sup>102</sup>

While CEQ can issue such regulations under its existing authority, it would be much easier to defend the regulations if Congress amended NEPA to clearly describe the extent to which agencies must consider the secondary socioeconomic or health impacts of their actions. Congress could revitalize the law by defining "human environment" broadly, as CEQ has done, and as many states have done in their SEPAs.<sup>103</sup> Congress could also explicitly

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may be able to show that the federal government's action discriminates against the plaintiffs based on race solely on a showing that the federal government's action disparately impacts the plaintiffs. See *Lazarus, supra* note 4, at 834. Therefore, the government should collect data regarding the racial demographics of persons impacted by actions that are subject to Title VI in order to ensure that the government is complying with Title VI.

102. CEQ's regulations and the *Metropolitan Edison* case clearly suggest that agencies should consider secondary health effects in their NEPA reviews. See *supra* notes 75-87 and accompanying text. Additionally, CEQ's regulations clearly define "effects" to include "cumulative impact," which is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §§ 1508.7, 1508.8(b). "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7. As the court noted in *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972),

Although the existing environment of the area which is the site of a major federal action constitutes one criterion to be considered, it must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence the absolute, as well as comparative, effects of a major federal action must be considered.

*Id.* at 831.

In order to accurately determine the potential health effects of a proposed action on a community, agencies must review available existing health data regarding the community. They must gather information that discloses whether the community has been subjected to higher levels of exposure to pollutants that will be released into the community as a result of the proposed action than the agency might otherwise predict. Thus, the agency should collect historical information regarding the community and past actions that have caused, or potentially could have caused, health, economic, aesthetic, cultural, or historic impacts in combination with the proposed action. The agency should also consider any evidence that the community is more susceptible to particular health impacts of the proposed action or alternatives than the agency might otherwise predict.

103. The New York State Environmental Quality Review Act (SEQRA) defines "environment" to include "the physical conditions which will be affected by a pro-

require agencies to consider the socioeconomic and health impacts caused by changes to the physical environment resulting from federal government actions, regardless of whether the government is preparing an EIS or an EA.

### III. LIMITS ON NEPA'S EFFECTIVENESS AS A TOOL TO ACHIEVE ENVIRONMENTAL JUSTICE

While NEPA includes many provisions that can be used to achieve environmental justice, there are also some important limits to its effectiveness. First, many of the federal government's actions that disparately impact minority and low-income communities are not subject to NEPA's review procedures.<sup>104</sup> Second, NEPA merely requires the federal government to analyze the impacts of its proposed actions and alternatives. It does not impose any substantive requirement on the federal government to avoid actions that have adverse environmental impacts.<sup>105</sup> Finally, in some cases, NEPA's public participation procedures do not ensure that all members of the public will have an opportunity to participate in the environmental review process in an informed and meaningful manner.<sup>106</sup> Many of those limitations could be removed by making administrative changes or legislative changes to NEPA based on successful SEPA's.

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posed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration*, distribution, or growth, and *existing community or neighborhood character*." N.Y. ENVTL. CONSERVATION LAW § 8-0105(6) (McKinney 1984) (emphasis added). In *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986), the New York Court of Appeals held that construction of a luxury condominium that would displace low-income residents and alter the traditional Asian-American character of a community would significantly affect the environment under SEQRA. *See id.* at 180-81. For additional cases interpreting SEQRA consistently with the *Chinese Staff & Workers Ass'n* decision, see Reich, *supra* note 6, at 312 n.245.

Although the California Environmental Quality Act (CEQA) has a more limited definition of "environment," California courts have interpreted the term broadly to require consideration of socioeconomic impacts. In *Citizens for Quality Growth v. City of Mt. Shasta*, 198 Cal. App. 3d 433, 446, 243 Cal. Rptr. 727, 734 (1988), a California appellate court required local government officials to prepare an environmental impact report for a proposed rezoning of a tract of land because the rezoning could cause the closure of businesses and the physical decline of a downtown business district. For additional cases interpreting CEQA consistently with the *Citizens for Quality Growth* decision, see Reich, *supra* note 6, at 312 n.247.

104. *See infra* notes 108-27 and accompanying text.

105. *See infra* notes 131-34 and accompanying text.

106. *See infra* notes 145-60 and accompanying text.

### A. Scope of NEPA

While communities may often be able to use the NEPA environmental review process to force the federal government to consider the disparate impacts of a proposed action,<sup>107</sup> many of the federal actions that are most frequently cited as having disparate impacts on minority or low-income communities may be exempt from the NEPA review process.

For instance, many studies have illustrated that hazardous waste facilities are disproportionately sited in minority and low-income communities.<sup>108</sup> However, EPA regulations explicitly provide that the agency does not have to prepare an EIS when it issues or approves a hazardous waste permit, regardless of the impact the permitted facility will have on the environment.<sup>109</sup> The Eleventh Circuit upheld the EPA's regulations in *Alabama ex rel. Siegelman v. EPA*<sup>110</sup> on the basis that the process used by the agency to issue the hazardous waste permit was the "functional equivalent" of the NEPA EIS process.<sup>111</sup> For several reasons,

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107. For instance, NEPA can be used to force the federal government to consider the environmental justice implications of military base closures or realignments, surface and underground mining, oil and gas exploration, and the siting of transportation facilities. See Melany Earnhardt, *Using the National Environmental Policy Act to Address Environmental Justice Issues*, 29 CLEARINGHOUSE REV. 436, 436 (1995). In 1994 the Air Force prepared 10 Final EISs for reuse of bases, and the Navy prepared nine Final EISs for base realignment. See Council on Environmental Quality, *Summary of Environmental Impact Statements* (last modified Feb. 1, 1995) <<http://ceq.eh.doe.gov/nepa/eis/eis94a.htm>>.

In *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976), the court did not exempt military base closure or reuse from the NEPA process. The *Breckinridge* court held that the Army did not have to prepare an EIS to address the loss of jobs and economic dislocation that would be caused by the closure of the Lexington-Bluegrass Army Depot. *Id.* at 865. The court's holding turned on the fact that the base closure would not have an impact on the physical environment. See *id.* at 866. The court recognized that "[a]lthough factors other than the physical environment have been considered [in EISs in other cases], this has been done only when there existed a primary impact on the physical environment." *Id.* When the government prepares a plan for reuse of a military base, it is likely that the plan will involve re-development of the base and cleanup of environmental contamination on the base. Since the plan will, therefore, involve changes to the physical environment, NEPA will require the government to consider secondary socioeconomic and health impacts caused by those changes to the physical environment in the context of an EIS.

108. See *supra* note 3.

109. See 40 C.F.R. § 124.9(b)(6) (1995).

110. 911 F.2d 499 (11th Cir. 1990).

111. See *id.* at 504-06. The court concluded that the EPA did not have to prepare an EIS when it issued a permit to Chemical Waste Management authorizing it to operate the nation's largest hazardous waste landfill. See *id.* at 501. Although the court acknowledged that the EPA's action in issuing the permit was a "major Federal ac-

*Siegelman* is a poorly reasoned decision. The process that the EPA uses when it issues a hazardous waste permit under the Resource Conservation and Recovery Act (RCRA) is not the functional equivalent of the NEPA process because (1) RCRA does not require the government to consider the socioeconomic impacts of issuing a permit;<sup>112</sup> (2) RCRA does not require the government to consider alternatives to issuing a permit;<sup>113</sup> and (3) RCRA requires less public participation in the decision-making process than NEPA.<sup>114</sup> In addition, the *Siegelman* court misapplied basic prin-

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tion," it concluded that the RCRA permit issuance process was the functional equivalent of the NEPA environmental review process and that the permit issuance was, therefore, exempt from the NEPA EIS requirement. *See id.* at 504-05. The court suggested that "most circuits have already recognized . . . that an agency need not comply with NEPA where the agency is engaged primarily in an examination of environmental questions and where 'the agency's organic legislation mandate[s] specific procedures for considering the environment that [are] functional equivalents of the impact statement process.'" *Id.* at 504 (quoting *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 207 (5th Cir. 1978)).

112. NEPA requires the government to consider various socioeconomic and health impacts of proposed actions. *See supra* notes 72-97 and accompanying text. CEQ's NEPA regulations specifically require the government to consider indirect and cumulative impacts of a proposal. *See* 40 C.F.R. § 1508.8(b). RCRA, on the other hand, does not require the government to collect or consider information about the socioeconomic impacts of its actions or the indirect effects of those actions. The EPA can deny a permit under RCRA only if the proposed facility does not comply with the statutory or regulatory requirements of RCRA or the facility may harm human health or the environment. *See* 42 U.S.C. §§ 6925(c)(1)-(c)(3) (1994). "[T]here is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community." *In re Chemical Waste Management of Indiana, Inc.*, 1995 RCRA LEXIS 16, \*16 (E.P.A. June 29, 1995). Since the agency does not have to consider the social or economic impacts of its permitting decision, it does not collect information about those impacts as part of the permitting process.

113. During the EIS process, agencies must consider alternatives to the proposed action and mitigation measures. *See* 42 U.S.C. § 4332(2)(C). CEQ's regulations further specify that agencies, when drafting an EIS, must consider "[u]rban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures." 40 C.F.R. § 1502.16(g). In addition, the Record of Decision accompanying a final EIS shall, among other things, "[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." *Id.* § 1505.2(c). RCRA does not require the government to identify alternatives to issuing a hazardous waste permit, or to consider mitigation measures to address the social and economic impacts that will be caused if the agency issues the permit.

114. CEQ's regulations require that EISs "shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. RCRA, on the other hand, does not have the same requirement. *See* 40 C.F.R. §§ 9, 124, 270.

In addition, CEQ's regulations require agencies to integrate the NEPA re-

ciples of statutory interpretation when it determined that the EPA does not have to prepare an EIS when it issues a hazardous waste permit under RCRA.<sup>115</sup> Nevertheless, the EPA does not prepare

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view into the agency's decision-making process "at the earliest possible time." 40 C.F.R. § 1501.2. Agencies must notify the public that they are planning to prepare an EIS and must invite the public to participate in the planning process before the agency prepares a draft EIS. *See id.* §§ 1501.4(b), (e)(2) (stating that the agency shall involve the public in preparing required assessments and shall make a finding of "no significant impact" available for public review). Thus, the public can get involved in the decision-making process before commitments are made and the agency becomes wedded to a particular approach.

When the *Siegelman* court concluded that the RCRA process was the functional equivalent of the NEPA EIS process, the RCRA did not allow the public to participate in the agency's decision-making process until the agency completed a draft permit for a proposed hazardous waste facility or tentatively decided to deny the permit for the facility. *See id.* § 124.10(a)(1)(i)-(ii). By that time, the agency will have committed tremendous amounts of time, money, and resources to the decision-making process and will be reluctant to make major revisions to its proposed decision. Subsequent to the *Siegelman* decision, the EPA amended its RCRA regulations to require hazardous waste permit applicants to provide public notice and hold a public meeting before the applicant files a permit application. *See id.* § 124.31. The regulations do not require the permitting agency to attend that meeting. *Id.* Instead, the regulations merely require the applicant to send to the permitting agency copies of comments or *written* materials that it receives at the meeting. *See id.* The amendments also require the permitting agency to provide public notice when it receives a permit application and require the agency, in some cases, to establish an information repository for the permit application. *See id.* § 124.32-124.33.

The *Siegelman* court acknowledged that one of the major purposes of NEPA's EIS requirement is to ensure that "relevant environmental information is made available to the members of the public, who can then play a role in the agency's decisionmaking process and implementation of that decision." *Siegelman*, 911 F.2d at 503. However, the court seems to have ignored that purpose when it concluded that the RCRA process is the functional equivalent of the NEPA EIS process. *See id.* at 505.

115. The court based its decision, in part, on the principle of statutory interpretation that specific statutory provisions take precedence over general statutory provisions. The court noted that "NEPA is the general statute . . . [and] RCRA is the later and more specific statute directly governing EPA's process for issuing permits to hazardous waste management facilities. As such, RCRA is an exception to NEPA and controls here." *Id.*

However, the statutory interpretation rule that the court used in *Siegelman* only applies when there is a conflict between two statutes. *See* OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS 606 (2d ed. Michie 1993). In a case cited by the *Siegelman* court, the Fifth Circuit acknowledged that implied exceptions to the NEPA environmental review process should be limited to situations where "[t]he conflict between the agency's organic statute and NEPA [is] both fundamental and irreconcilable." *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 206 (5th Cir. 1978) (citing *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976)). Similarly, the Ninth Circuit recently held that "NEPA applies unless 'the existing law applicable to [an] agency's operations expressly prohibits or makes full compliance with one of the directives [of NEPA] impossible.'" *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995) (citing H.R. CONF. REP. NO. 91-765, at 3

an EIS when it issues or approves a permit for a hazardous waste facility.

Similarly, environmental justice advocates often assert that

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(1969), reprinted in 1969 U.S.C.A.N. 2767, 2770), cert. denied, 116 S. Ct. 698 (1996); see also *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1435-36 (10th Cir. 1996) (compliance with NEPA is excused only when there is a statutory conflict with the agency's authorizing legislation that prohibits or renders compliance with NEPA impossible); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (finding that since the obligations under 25 U.S.C. § 415 are not mutually exclusive with NEPA, the specific requirements of the Act will remain in force).

There is no conflict between RCRA and NEPA regarding preparation of an EIS. Although RCRA does not *require* the EPA to prepare an EIS when it issues a hazardous waste permit, neither does it *prohibit* the agency from preparing an EIS in that case. *Siegelman*, 911 F.2d at 502-03. While RCRA does not authorize the EPA to deny a permit based on socioeconomic factors, it does not prohibit the agency from receiving information about those effects during the permitting process. See 40 C.F.R. §§ 9, 124, 270. Furthermore, although RCRA does not *require* the EPA to use the same public participation procedures as NEPA, it does not *prohibit* the agency from providing those additional procedures. See *id.* Thus, it is possible for the EPA to comply with both NEPA and RCRA when it issues a hazardous waste permit, and RCRA is not, as the court suggests, "an exception to NEPA [which] controls here." *Siegelman*, 911 F.2d at 504. NEPA is a general law that applies to federal agencies in the same way that the Administrative Procedures Act is a general law. It is a default. Substantive laws can impose additional requirements on agencies, but the agencies must still comply with the underlying law—NEPA or the APA, as the case may be—unless the substantive law supplants it.

Since there was no conflict between RCRA and NEPA, it was inappropriate for the court to hold that RCRA supplants NEPA. Instead, the court had a duty to ensure that the EPA complied with both laws.

There are other flaws in the court's statutory interpretation as well. For instance, when Congress decided to exempt the EPA's issuance of permits under the Clean Water Act from the NEPA EIS requirements, it did so explicitly. See, e.g., 33 U.S.C. § 1371(c)(2)(B) (1994). Since Congress enacted RCRA subsequent to the Clean Water Act, it could have included similar language in RCRA if it intended to exempt hazardous waste permits from the NEPA EIS process. The fact that Congress did not include such language suggests it did not intend to exempt those permits from the EIS process.

Finally, the *Siegelman* court cited several appellate court decisions holding that various EPA actions were the functional equivalent of an EIS and were, therefore, exempt from the EIS requirement. See *Siegelman*, 911 F.2d at 505 n.12. The court suggested that when Congress failed to overturn those decisions legislatively, it implicitly agreed with the decisions. See *id.* However, there are many meanings that one can attribute to congressional inaction other than congressional assent. In addition, none of the decisions that the *Siegelman* court cited held that actions under RCRA were the functional equivalent of NEPA or that any procedures under RCRA satisfied the requirements of NEPA. At most, Congress, through inaction, may have affirmed that an agency's compliance with procedures under other environmental laws that are the functional equivalent of NEPA could satisfy the agency's NEPA obligations. However, as noted above, the RCRA procedures that apply when the EPA issues a hazardous waste permit are not the functional equivalent of the NEPA EIS process.

the EPA and other government agencies establish environmental standards that disparately impact minority or low-income communities because the government bases its standards on exposure modeling and assumptions that do not consider the disparate level of exposure of the communities, unique routes of exposure for the communities, or unique susceptibilities of the communities to the regulated pollutant or contaminants.<sup>116</sup> The government usually sets those environmental standards through notice and comment rulemaking. In many cases, the EPA and other government agencies do not prepare an EIS for regulations because they have determined that the regulatory development process is the functional equivalent of the NEPA EIS process.<sup>117</sup>

Once again, though, the government's approach is misguided. If the substantive law authorizing the agency to develop environmental standards does not require the agency to consider the health or socioeconomic impacts of those standards, or the indirect or cumulative impacts of those standards, the regulatory development process for those standards under the substantive law is not the functional equivalent of the NEPA EIS process. Likewise, to the extent that the regulatory development process under the substantive law deprives the public of the full participation in the decision-making process guaranteed by NEPA, the regulatory process should not be held to be the functional equivalent of the NEPA EIS process. Some states have addressed this drawback in

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116. See Lazarus, *supra* note 4, at 846 n.276; see also Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103 (1996) (discussing disparate impact on low-income communities).

117. See EPA DRAFT NEPA GUIDANCE, CHAPTER 1, *supra* note 2. Federal courts have, on occasion, upheld the EPA's decision to not prepare an EIS when the administrative process the agency used to make its decision was the functional equivalent of the NEPA EIS process. See *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (EPA order canceling the registration of DDT under FIFRA held to be the functional equivalent of the EIS process); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973) (EPA's process for issuing a new source performance standard under the Clean Air Act held to be the functional equivalent of the EIS process). However, the courts have stressed that the exemptions in those cases are "narrow exemption[s]," *Portland Cement Ass'n*, 486 F.2d at 387, and that there is no "broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies." *Environmental Defense Fund*, 489 F.2d at 1257.

Thus, agency regulations are not generally exempt from the NEPA EIS process. In fact, CEQ's regulations define major federal action to potentially include agency rules and provide that "[f]or informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule." 40 C.F.R. §§ 1502.5(d), 1508.18(a).

their SEPA's by explicitly providing that state agency regulations must comply with the state's environmental review processes.<sup>118</sup>

NEPA also fails to provide minority or low-income communities any protection from discriminatory enforcement of environmental laws. While academics and journalists have conducted studies that identify disparate patterns of enforcement of environmental laws,<sup>119</sup> neither the government's failure to bring an enforcement action in a minority or low-income community, nor the government's pattern of discriminatory enforcement of environmental laws, is reviewable under NEPA.<sup>120</sup>

NEPA also does not apply to the siting of many industrial facilities that emit enormous amounts of toxic or hazardous pollutants into a community. Most of those facilities will likely have to obtain a permit under the Clean Water Act,<sup>121</sup> the Clean Air Act,<sup>122</sup> or RCRA before they begin operating, and NEPA may require the federal government to prepare an EIS for those facilities *if the EPA or another federal government agency issues the permit*.<sup>123</sup>

118. New York's State Environmental Quality Review Act, for example, defines agency "actions" to include "policy, regulations, and procedure-making." N.Y. ENVTL. CONSERV. LAW § 8-0105(4)(ii) (McKinney 1984).

119. See UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L. L.J., Sept. 21, 1992, at S1, S1-12; Rae Zimmerman, *Social Equity and Environmental Risk*, 13 RISK ANALYSIS 649, 663 (1983).

120. According to CEQ's regulations, "[a]ctions do not include bringing judicial or administrative civil or criminal enforcement actions." 40 C.F.R. § 1508.18(a).

121. 33 U.S.C. §§ 1251-1387.

122. 42 U.S.C. §§ 7401-7671g.

123. If the federal government issues a permit for the activity, it may be a "Federal action" for purposes of NEPA, subject to the EIS requirement if it is a major federal action, or subject to the EA requirement if it has a less significant impact on the human environment. 40 C.F.R. § 1508.18. CEQ's regulations define "major Federal actions" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." *Id.* "Actions include . . . projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. . . ." *Id.* § 1508.18(a). Federal actions include "[a]pproval of specific projects. . . . Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." *Id.* § 1508.18(b). Several courts have held that an EIS can be required when the federal government issues a permit. See, e.g., *Public Serv. Co. of N.H. v. United States Nuclear Regulatory Comm'n*, 582 F.2d 77 (1st Cir. 1978); *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd on other grounds*, 427 U.S. 390 (1976); *Dardar v. Lafourche Realty Co.*, 639 F. Supp. 1525 (E.D. La. 1986).

In many cases, though, agencies will only have to prepare an EA, instead of an EIS, when issuing a permit. For instance, the regulations of the U.S. Army Corps of Engineers suggest that "[m]ost permits will normally require only an EA." 33

However, in many cases, states issue permits under those laws pursuant to delegated programs in lieu of the EPA.<sup>124</sup> When the state issues the permit, the state will not have to prepare an EIS under NEPA,<sup>125</sup> and it is unlikely that the EPA will have to prepare an EIS.<sup>126</sup>

The fact that NEPA cannot address the disparate siting of heavily polluting industries also highlights a further limitation of NEPA's scope. NEPA does not apply to private actions unless there is a sufficient federal nexus.<sup>127</sup> Several states, through their SEPAs, have extended the reach of the environmental planning requirement beyond state agencies to local governments.<sup>128</sup> The European Economic Community's Environmental Impact Directive goes even further and requires planning for all public or private projects likely to have a significant effect on the environment.<sup>129</sup>

NEPA could be a much more powerful tool in the battle for environmental justice if CEQ clarified, through regulation, that the EIS or EA requirements of the Act apply to many of the federal actions that disparately impact minority or low-income communities that are currently "exempt" from NEPA review.<sup>130</sup> First,

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C.F.R. § 230.7(a) (1995). The EPA's regulations also explicitly state that an EIS is not required for certain Clean Air Act permits. *See* 40 C.F.R. § 124.9(b)(6).

124. *See* U.S. GENERAL ACCOUNTING OFFICE, EPA AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 2 (1995) [hereinafter EPA AND THE STATES]; *see, e.g.*, 33 U.S.C. § 1342(b); 42 U.S.C. §§ 6926(b), 7661a(d).

125. The state may, however, have to prepare an EIS under a SEPA.

126. NEPA's EIS requirement is limited to major *federal* actions. When a state agency issues a permit under a delegated RCRA, Clean Water Act, or Clean Air Act program, that action is probably not a federal action for NEPA purposes. 40 C.F.R. § 1508.18. CEQ's regulations define "Federal action" broadly, though, to include projects "approved by Federal agencies." *Id.* § 1508.18(b). Although RCRA, the Clean Water Act, and the Clean Air Act usually allow the EPA to review permits issued by states under delegated programs and to revoke or impose conditions on those permits, if the EPA does not impose any conditions on the permit or revoke the permit, it might be difficult to convince a court that the EPA has engaged in a federal action that triggers NEPA.

127. *See supra* note 126.

128. *See, e.g.* California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21003(a) (West 1996); New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0105.3, 8-0107, 8-0111.3 (McKinney 1984 & Supp. 1996). In addition, state courts have generally set "low thresholds" for preparation of an EIS under SEPAs. *See SELMI & MANASTER, supra* note 6, § 10.03(1)(b).

129. *See Tilleman, supra* note 33, at 373.

130. The issuance of such regulations would be well within CEQ's mandate under NEPA. NEPA requires CEQ

CEQ should issue regulations that clarify the circumstances under which a government decision-making process is the functional equivalent of the NEPA process. Specifically, the regulations should provide that a government decision-making process is not the "functional equivalent" of the NEPA process unless it (1) considers the same factors as the NEPA process, including socio-economic impacts, mitigation, and alternatives and (2) provides opportunities for public participation that are substantially similar to those required by NEPA.

In addition, CEQ should issue regulations that require federal agencies to ensure that state agencies that operate delegated environmental programs provide for environmental impact review to the same extent that the federal government would have to provide for that review if it were administering the program. The regulations should specify that federal agencies should not delegate authority to a state to administer a program under the federal environmental laws unless the state program requires the state to consider the same factors as NEPA, including socioeconomic impacts, mitigation, and alternatives. The regulations should further provide the same opportunities for public participation as the federal government would be required to provide under NEPA if the federal government were administering the program.

As a result, many of the actions that fall outside of the NEPA process today, and which may disparately impact minority or low-income communities, would be subject to NEPA's EIS or EA requirements.

### *B. Lack of Substantive Requirements*

NEPA would also be a more effective tool to achieve environmental justice if it imposed some substantive requirements on the federal government in addition to the procedural require-

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to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in [NEPA] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.

42 U.S.C. § 4344(3). In addition, NEPA provides that federal agencies must "identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." *Id.* § 4332(2)(B). CEQ's regulations require agencies to develop regulations to implement NEPA and to consult with CEQ when developing those regulations. *See* 40 C.F.R. § 1507.3(a).

ments. NEPA only requires the federal government to *consider* the effects of its actions; it does not prohibit the government from taking actions that will have adverse health, socioeconomic, or environmental impacts.<sup>131</sup> NEPA requires the government to consider alternatives to proposed actions and to consider measures that will mitigate the impacts of the action, but it does not require the government to implement those alternatives or mitigation measures.<sup>132</sup>

Communities can use the procedural requirements of NEPA as a tool to achieve environmental justice, as previously discussed.<sup>133</sup> However, as Professor William Rodgers has noted, "Process, without more, is fundamentally a toothless exercise, committed only to the perfection of forms."<sup>134</sup>

Many SEPA's have addressed this limitation of NEPA by imposing some substantive requirements on state or local government decision-makers.<sup>135</sup> The California Environmental Quality

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131. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (an agency must apply a rule of reason and prepare a supplemental impact statement if there is a major federal action); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983) (holding that the court's only task is to determine if the agency considered relevant factors and articulated a rational connection between the factors found and the choice made).

[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'

*Strycker's Bay*, 444 U.S. at 227-28 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

132. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). "NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.* at 350-51.

133. See *supra* notes 30-34 and accompanying text. "Process makes it possible to say 'no' without saying 'no.' The project thus can be unacceptable not because of its abominable environmental effects, but because alternatives were inadequately considered, or inadequately discussed if they were considered, or inadequately researched if they were discussed." William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 494 (1990).

134. Rodgers, *supra* note 133, at 494.

135. See, e.g., CAL. PUB. RES. CODE § 21002.1(b) (West 1996); N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1984); WASH. CODE ANN. § 43.21C.060 (West 1983 & Supp. 1996); see also Jeffrey L. Carmichael, *The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute*, 70 IND. L.J. 613, 623 (1995) ("many states have attempted to incorporate the substantive element lacking in NEPA"); Tilleman, *supra* note 33, at 367-68 (discussing the substantive power

Act (CEQA), for example, provides that “[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”<sup>136</sup> The law does not absolutely prohibit government agencies from taking actions that have significant effects on the environment. Instead, it provides that “[i]f economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.”<sup>137</sup> Similarly, the New York State Environmental Quality Review Act (SEQRA) requires government agencies, “to the maximum extent practicable,” to minimize or avoid environmental impacts, taking into consideration social, economic, and other considerations.<sup>138</sup> These substantive limitations are similar to the limitations imposed on the EPA and the U.S. Army Corps of Engineers when those agencies review applications for permits to develop wetlands under the Clean Water Act.<sup>139</sup>

Minnesota’s environmental review law goes even further and provides that

[n]o 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

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states have granted to agencies or local governments).

136. CAL. PUB. RES. CODE § 21002.1(b). For a list of cases in which courts have struck down project approvals under CEQA because the government agency failed to mitigate environmental impacts, see Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99, 111 n.77 (1994).

137. CAL. PUB. RES. CODE § 21002.1(c).

138. See N.Y. ENVTL. CONSERV. LAW § 8-0109(1). For a listing of cases in which courts have held that the New York SEQRA requires agencies to mitigate environmental harm, see Weinberg, *supra* note 136, at 111-12 nn. 85-87.

139. Section 404(b)(1) of the Clean Water Act, 33 U.S.C. § 1344(b)(1) (1994), requires the EPA to develop guidelines to be used by the U.S. Army Corps of Engineers when it decides whether to issue a permit under the Act. See *id.* The guidelines preclude the Corps from issuing a permit if there is a “practicable alternative” to the wetlands development proposal that would have a less adverse impact on the ecosystem. See 40 C.F.R. § 230.10(a)(3). In addition, the guidelines prohibit wetlands development projects “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” See *id.* § 230.10(d).

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.<sup>140</sup>

Washington takes a more moderate approach. The Washington State Environmental Protection Act broadly allows, but does not require, government agencies to deny or condition the approval of a project based on the environmental impacts of the project.<sup>141</sup>

Congress could craft changes to NEPA based on the provisions of those SEPA's, and the wetland permitting provisions of the Clean Water Act, that would make NEPA a more effective tool to achieve environmental justice. Specifically, Congress could prohibit the federal government from taking an action that "significantly affects the human environment" if there is a practicable alternative that has less adverse impacts on the "human environment." In addition, regardless of whether a proposed action requires an EIS or an EA, Congress could require the federal government to minimize the impacts of its actions on the human environment to the extent practicable. Congress could also clarify that the federal government should consider the secondary health and socioeconomic impacts of its actions and alternatives, as well as their impacts on the physical environment, when it determines whether an alternative will have a less adverse impact on the human environment or whether proposed changes to the action minimize its impact on the human environment. Some NEPA scholars claim that the law should already be read to impose substantive limits on the federal government or that CEQ could im-

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140. MINN. STAT. ANN. § 116D.04(6) (West 1987).

141. See WASH. REV. CODE ANN. § 43.21C.060 (West Supp. 1996). However, the bases upon which a government agency can condition or deny a permit or project approval under the law are limited. Specifically, the law provides:

Any governmental action may be conditioned or denied pursuant to this chapter: *Provided*, [t]hat such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency . . . as possible bases for the exercise of authority pursuant to this chapter. . . . Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact.

*Id.*

pose such limits administratively.<sup>142</sup> However, federal courts have generally refused to find such limits in NEPA,<sup>143</sup> and it is likely that NEPA will have to be amended before courts will find that the law imposes substantive limits on the federal government.<sup>144</sup>

### C. Public Participation Procedures

Legislative or regulatory changes may also be necessary to strengthen NEPA's public participation provisions. Although those provisions are generally strong, there are impediments in the environmental review process that prevent some members of the public from having an opportunity to participate in the process in an informed and meaningful manner.

One of the major impediments to informed and meaningful public participation in the NEPA environmental review process is the highly technical nature of environmental review documents.<sup>145</sup> The documents often contain complex scientific or technical data and are not written in plain language.<sup>146</sup> It is often necessary, therefore, to hire technical consultants and lawyers merely to translate the documents.<sup>147</sup> While NEPA does not explicitly re-

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142. See, e.g., Weinberg, *supra* note 136, at 105-06; see also Ferester, *supra* note 9, at 222-23 (stating that nothing in NEPA's legislative history, purpose, and policy statements supports interpretation that NEPA contains no substantive provisions).

143. See *supra* notes 131-32 and accompanying text.

144. NEPA critics have taken opposing positions on the question of whether NEPA's substantive provisions provide sufficient "law to apply" to enable CEQ to promulgate and enforce regulations that impose substantive limits on federal agencies. Compare Ferester, *supra* note 9, at 213 (arguing that NEPA's substantive provisions do not provide meaningful standards for courts and that challenges to an agency's failure to comply with those provisions would be exempt from judicial review under the APA) with Weinberg, *supra* note 136, at 112-14 (arguing that NEPA provides CEQ with sufficient authority to impose substantive limits on federal agencies through regulation, and the regulations could not be invalidated based on an unconstitutional delegation of legislative authority to CEQ). Nevertheless, if CEQ adopted regulations under the existing NEPA that impose substantive limits on government decision-makers, courts would likely strike down those limits because they were beyond CEQ's authority under the statute, 5 U.S.C. § 706(2)(C) (1994), rather than because they were promulgated pursuant to an unconstitutional delegation of legislative power. See Weinberg *supra* note 136, at 113-16.

145. See Cole, *supra* note 37, at 454; see also Tilleman, *supra* note 33, at 359 ("EIAs are complicated and the need for better education and informed and varied responses will enable participants to enlighten the decisionmaker before approvals are granted").

146. See Tilleman, *supra* note 33, at 358; see also Reich, *supra* note 6, at 277-78 (citing Paul Mohai, *Black Environmentalism*, 71 Soc. Sci. Q. 744, 762 (1990)) (examining the barrier created by the technical nature of discussions).

147. See Cole, *supra* note 37, at 454.

quire the federal government to prepare NEPA documents in plain language, CEQ's NEPA regulations require that EISs must be written in "plain language . . . so that decision-makers and the public can readily understand them,"<sup>148</sup> and the regulations require that the information in an EIS must be "concise, clear, and to the point."<sup>149</sup> In many cases, federal courts have relied on those regulations to require agencies to prepare EISs that the average citizen can understand.<sup>150</sup> However, those regulations only address EISs and not EAs.<sup>151</sup> CEQ should amend its regulations to require agencies to prepare EAs in "plain language so that decision-makers and the public can readily understand them." Furthermore, Congress could affirmatively ratify CEQ's regulations by amending NEPA to explicitly require all environmental documents prepared under NEPA to be written in "plain language so that decision-makers and the public can readily understand them." Congress could also empower communities to participate more fully in the environmental review process by amending NEPA to provide technical assistance grants to communities to enable the communities to review and comment on EISs.<sup>152</sup>

Even a document written in plain English, though, may be inaccessible to a community impacted by the action addressed in the document if the impacted community does not speak English.<sup>153</sup> Non-English speaking members of the public are denied the opportunity to participate in the environmental review process under

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148. 40 C.F.R. § 1502.8.

149. *Id.* § 1502.1.

150. In *Oregon Envtl. Council v. Kunzman*, 614 F. Supp. 657, 665 (D. Or. 1985), a federal district court invalidated the "worst case analysis" that the government included in an EIS to support the use of various pesticides in a gypsy moth eradication program on the grounds that the analysis was not written in plain language that was understandable to the public, as required by CEQ's regulations. *See id.* The court noted that "[a]n EIS must translate technical data into terms that render it an effective disclosure of the environmental impacts of a proposed project to *all* of its intended readership." *Id.* (citing *Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459, 487 n.149 (D.C. Cir. 1982), *rev'd on other grounds sub nom.* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983)); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1343 n.215 (S.D. Tex. 1973), *rev'd on other grounds sub nom.* *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1982) (federal agencies must screen EIS for words not understandable to average person).

151. 40 C.F.R. § 1502.1.

152. *See* EPA DRAFT NEPA GUIDANCE, CHAPTER 1, *supra* note 2. The grant program could be modeled on the Superfund technical assistance grant program. *See* 42 U.S.C. § 9617(e) (1994).

153. *See* Reich, *supra* note 6, at 277.

NEPA if the environmental review documents are provided only in English. In at least one case, a state court interpreted a SEPA to require that decision-makers translate environmental documents and provide translators at public hearings if a proposed action would impact a community in which a significant percentage of the members do not speak English.<sup>154</sup> On some occasions, federal agencies have provided non-English translations of environmental documents.<sup>155</sup> However, NEPA does not require federal agencies to provide translated documents or translators at any time. Similarly, CEQ's draft guidance regarding Executive Order No. 12,298 suggests, but does not require, that agencies provide translated documents in some instances.<sup>156</sup> In order to ensure that non-English speaking communities are afforded an opportunity to participate in the NEPA decision-making process, CEQ should require, by regulation, that agencies provide translated NEPA documents whenever a proposed action will impact a community that has a significant percentage of members that do not speak English.<sup>157</sup> The regulation could be modeled on "equitable public

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154. See, e.g., *El Pueblo para el Aire y Agua Limpio v. County of Kings*, No. 366045 (Cal. Super. Ct. Dec. 30, 1991). However, the government's failure to translate an environmental impact report into Spanish when 40% of the members of the community impacted by the proposed siting of a hazardous waste incinerator did not speak English was only one of several reasons why the court invalidated the permit. *Id.*

155. See Reich, *supra* note 6, at 297-98. A very small percentage of government documents, environmental or otherwise, are translated into other languages. In fact, the Government Accounting Office reports that of 400,000 official government information brochures printed between 1990 and 1995, only 265 were printed in a language other than English. See Maria Puente, *Defining the One-Nation, One-Language Principle*, USA TODAY, March 26, 1996, at 7A.

156. CEQ DRAFT NEPA GUIDANCE, *supra* note 12, at 10.

157. CEQ could base the regulatory requirement on NEPA's guarantee that each person should enjoy a healthful environment and on NEPA's recognition that public participation is an essential part of the NEPA decision-making process. See 42 U.S.C. §§ 4331(a), (c), 4332(2)(G) (1994).

Administrative changes are necessary because it is unlikely that the current Congress would amend NEPA to explicitly require federal agencies to provide non-English translations of government documents. In fact, bills have been introduced in the 104th Congress that take the opposite approach on a broader scale and designate English as the official language for federal government actions and documents. See, e.g., S. 356, 104th Cong. (1995); H.R. 123, 104th Cong. (1995); H.R.J. Res. 109, 104th Cong. (1995) (suggesting a constitutional amendment to designate English as the official language). Those bills are based on similar laws, which have been enacted by 23 states. See Puente, *supra* note 155, at 7A. Many of the state laws prohibit the government from providing documents in languages other than English. See *id.* at 7A.

participation” language that the EPA included in a proposed regulation that addressed permitting of hazardous waste combustors.<sup>158</sup>

Finally, the traditional manner in which the federal government schedules and conducts public meetings and hearings and disseminates information about the NEPA review process can effectively exclude members of the public from meaningful public participation. Meetings that are held during normal work hours may exclude community members who cannot financially afford to take time off from work to attend the meeting.<sup>159</sup> Similarly, meetings that are held at locations that are inaccessible to community members via public transportation may exclude community members who do not have private transportation.<sup>160</sup> Finally, the traditional sign-up procedures for public hearings and rigid time limits on speakers can exclude some community members from the environmental review process.

CEQ has prepared draft guidance to implement Executive Order No. 12,298, which addresses many of these issues. The guidance recognizes that “[p]articipation of low-income or minority populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making process of Federal agencies under customary NEPA procedures.”<sup>161</sup> To overcome those barriers, the guidance suggests that agencies explore

opportunities for . . . public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to cap-

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158. The proposed regulation provided that the permit applicant and the director of the permit program shall make all reasonable efforts when conducting public information activities, such as public briefings, meetings, hearings, and dissemination of notices and fact sheets, to ensure that all segments of the population have an equal opportunity to participate in the permitting process. Reasonable efforts include disseminating multilingual public notices and fact sheets, and providing an interpreter at public meetings and hearings, where the affected community contains a significant non-English speaking population. See RCRA Expanded Public Participation, 59 Fed. Reg. 28,680, 28,686 (1994) (to be codified at 40 C.F.R. §§ 124, 270). The language was deleted on final rulemaking when the EPA indicated that it planned to address equitable public participation through guidance, rather than a regulation. See RCRA Expanded Public Participation, 60 Fed. Reg. 63417, 63420 (1995) (to be codified at 40 C.F.R. §§ 9, 124, 270).

159. See EPA DRAFT NEPA GUIDANCE, CHAPTER 4, *supra* note 35, Exhibit 7.

160. See *id.*

161. CEQ DRAFT NEPA GUIDANCE, *supra* note 12, at 10.

ture non-written comments; use of periodic newsletters or summaries to provide updates on the NEPA process[;] . . . [v]ariations in the size or format of meetings, or the type and number of media used, so that communications are tailored to the particular community or population; . . . [u]se of locations and facilities that are local, convenient, and accessible to the disabled, low-income and minority communities; [and] [a]ssistance for hearing- or sight-impaired individuals.<sup>162</sup>

CEQ should incorporate the language of the draft guidance into regulations. The regulations would not mandate the use of particular innovations on the traditional public meeting or hearing processes but could identify the range of innovations and could require agencies to administer public meetings or hearings "in a manner that ensures that all segments of the affected community have an equal and effective opportunity to participate in public meetings or hearings."<sup>163</sup>

While NEPA's public participation provisions are generally strong, the foregoing administrative and legislative amendments could provide even greater opportunities to include all community members in the NEPA decision-making process in an informed and meaningful manner.

#### IV. CONCLUSION

The public participation provisions of NEPA and the requirement in NEPA that agencies must consider various socioeconomic impacts of proposed actions could be useful tools in the quest for environmental justice. While NEPA has not been used very extensively to advance environmental justice, many communities are turning to strong SEPAs to prevent further inequitable distribution of pollution. CEQ could make several changes to its NEPA regulations based on existing NEPA authority to accomplish the same results as those strong SEPAs.

Specifically, NEPA could amend its public participation regulations under existing NEPA authority (1) to require that all NEPA documents be written in plain English; (2) to require agencies to provide translated documents and translators at hearings

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162. *Id.* at 10-11.

163. The language could be modeled on the "equitable public participation" language that the EPA proposed to include in the hazardous waste combustor permitting regulations. See *supra* note 158.

when a significant percentage of the community that will be impacted by a proposed action does not speak English; (3) to require agencies to use alternative communication strategies, such as notification through community organizations, in addition to the *Federal Register*, to ensure that the affected community receives notification of, and an opportunity to participate in, the NEPA process; (4) to require agencies to hold public hearings and meetings at times, in places, and in a manner that ensures that all members of the affected community have equal access to the meeting or hearing; and (5) to require more public participation in the EA process.

Similarly, CEQ could amend its regulations under existing NEPA authority to require agencies, when conducting an EA or an EIS, (1) to collect data regarding the socioeconomic background of communities that will be affected by proposed actions; (2) to collect available health data regarding those communities; (3) to determine, based on that information and other available information, whether the affected communities suffer a disproportionately high or adverse impact from the proposed action, due to cumulative exposure, unusual susceptibility to pollutants or contaminants, or other reasons; and (4) to consider the fact that a proposed action will have a disproportionately high or adverse impact on a community as a factor when the agency determines whether alternatives to the proposed action have a less adverse impact on the human environment.

CEQ could also amend its regulations under existing NEPA authority to clarify that an agency decision-making process is not the functional equivalent of NEPA unless the agency considers the same factors in that decision-making process as it would under NEPA and the agency provides similar opportunities for public participation in that process as it would under NEPA.

Congress could also strengthen NEPA as a tool for environmental justice by explicitly requiring agencies to consider socioeconomic impacts of proposed actions and to minimize the impacts of proposed actions on the human environment. Congress could also provide funding for technical assistance grants to facilitate meaningful community participation in the NEPA decision-making process. Regardless of whether Congress takes any action, though, CEQ could strengthen NEPA considerably as a tool to achieve environmental justice by making the administrative changes that are outlined above.

