

November 22, 2021

Submitted Electronically via Regulations.gov

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Re: Comments on Proposed NEPA Implementing Regulations Revisions, CEQ-2021-0002, 86 Fed. Reg. 55757

Dear Ms. Mallory:

Thank you for the opportunity to comment on the Council on Environmental Quality's (CEQ's) proposed revisions to its regulations implementing the National Environmental Policy Act (NEPA). We support CEQ's steps to restore NEPA's important protections, especially in light of the disproportionate harms that environmental burdens and risks have inflicted – historically and into the present day – on vulnerable communities and particularly on people of color. However, we also emphasize that the proposed revisions do not go far enough.

In 2020, the last administration removed or weakened numerous provisions of the NEPA regulations, in many respects rendering the statute ineffective or creating gaping loopholes in its application. While CEQ currently proposes to restore a number of those damaged protections, it leaves other concerning aspects of the 2020 rulemaking in effect – meaning that NEPA's operation remains impaired. Although CEQ has indicated that it will take up other aspects of rulemaking at a later stage, this piecemeal restoration is troublesome. The fact that CEQ's current proposal only partially repairs the damage that the last administration inflicted means that agencies and governed entities will remain in a holding pattern, with environmental justice concerns often discounted and expectations unclear, rather than embarking on the critical forward-looking work needed to protect vulnerable communities. We call upon CEQ (and other federal agencies) to immediately and fully restore the 1978 NEPA regulations, and to fully rescind the 2020 regulations put forth by the Trump administration. Further, we call upon this Administration to issue new regulations to *improve and strengthen* NEPA with regard to environmental justice, to ensure that communities of color are adequately protected. As we embark on a new era of infrastructure investments and respond to ongoing environmental threats (such as climate change), such measures will be all the more critical.

Need to Protect Communities of Color from Environmental Burdens

Black, indigenous, and other people of color have historically been subjected to policies and practices that threaten the health, safety and very existence of their communities, including in the environmental and climate context. For instance, the General Accounting Office (now the Government Accountability Office) released a 1983 study finding that three out of four hazardous waste landfills in the Environmental Protection Agency's Southeast Region are located in

majority-Black communities.¹ Other communities of color, too, have faced severe and disproportionate environmental burdens – as with the Navajo Nation, where the U.S. government promoted extensive uranium mining in the 1940s through 1970s, leaving dangerous levels of contamination that remain today in the drinking water and soil.²

The civil rights community has played a vital role in identifying race as the primary determinant of exposure to environmental risks. In 1987, a landmark national report on toxic waste and race documented how “[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant.”³ This assertion was reinforced in the U.S. Commission on Civil Rights 2003 report on EO 12898 and Title VI compliance, stating “race was determined to be the stronger predictor of exposure to environmental hazards.”⁴ That report documented how racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout to properly bargain with polluters when fighting a decision or seeking redress.⁵ Today, it remains true that “the burdens of pollution, toxic waste, and poisoned resourced are not distributed equally across society.”⁶

Throughout our nation’s history, racial inequity was apparent in the siting and design of infrastructure projects throughout the United States, and “environmentally hazardous facilities and infrastructure, including highways, have been intentionally and disproportionately located in low-income communities and communities of color, where residents are exposed to elevated levels of air, water and noise pollution.”⁷ For example, historically, an alarming number of Black communities were decimated by highway construction – Black churches, businesses, and homes completely demolished.⁸ The United States Department of Transportation “estimates that more than 475,000 households and more than a million people were displaced nationwide as a direct result of federal highway building...The neighborhoods destroyed and families displaced were

¹ U.S. GENERAL ACCOUNTING OFFICE, SITING HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), available at <https://www.gao.gov/products/rced-83-168>.

² See, e.g. Arnold, Carrie. “Once Upon a Mine: The Legacy of Uranium on the Navajo Nation.” Environmental Health Perspectives 122.2 (2014): A44-49. Environmental Health Perspectives. U.S. Department of Health and Human Services.

³ UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

⁴ US COMMISSION ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 14 (2003), available at <https://www.usccr.gov/files/pubs/envjust/ej0104.pdf>.

⁵ US COMMISSION ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 4 (2016), available at https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf.

⁶ Aneesh Patnaik, et al., *Racial Disparities and Climate Change*, PSCI (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>.

⁷ Gabriella Velasco, *How Transportation Planners Can Advance Racial Equity and Environmental Justice*, URB. INST. (Aug. 18, 2020), <https://www.urban.org/urban-wire/how-transportation-planners-can-advance-racial-equity-and-environmental-justice>.

⁸ Caitlin Dewey, *Advocates Rally to Tear Down Highways that Bulldozed Black Neighborhoods*, PEW CHARITABLE TRS. (July 28, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/28/advocates-rally-to-tear-down-highways-that-bulldozed-black-neighborhoods>.

overwhelmingly Black and poor.”⁹ Evidence suggests that transportation policy in the 1950’s and 1960’s was in fact intentionally designed to preserve and further entrench racial segregation and discrimination. In fact, Alfred Johnson who served as executive director of the American Association of State Highway Officials during the passage of Interstate Highway Act stated that “some city officials expressed the view in the mid-1950s that the urban Interstates would give them a good opportunity to get rid of” black communities.¹⁰ As just one example, the Hayti District was founded by freedmen in North Carolina following the Civil War and became a center of Black wealth and cultural significance, including a thriving Black Wall Street.¹¹ The construction of the Durham Freeway, mostly funded by the federal government, displaced thousands of families and hundreds of businesses in the name of “urban renewal.”¹² At the same time, the communities most harmed by such projects have often been denied access to their benefits.¹³

As reflected in the current administration’s stated focus on racial equity,¹⁴ it is essential that federal agencies fully ensure the protection of civil and human rights, within environmental policies as elsewhere. This requires acknowledging and responding to the ways that communities of color have often been viewed as a path of least resistance, with siting and design decisions premised not on objective environmental factors, but due to discrimination and a lack of resources to protect disadvantaged families, land, and overall communities.

Alongside our country’s civil rights protections, NEPA has been an important advancement in protecting the human, as well as physical, environment. NEPA and its implementing regulations were adopted to provide for adequate safeguards in assessing the potential environmental, social and economic impacts of proposed actions.¹⁵ NEPA further establishes that the federal governmental must use all practicable means to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” aims to “preserve important historic, cultural and natural aspects of our national heritage,” and “recognizes that each person should enjoy a healthful environment.”¹⁶ Effective implementation calls for federal agencies to examine the full range of environmental effects and

⁹ Deborah N. Archer, “*White Men’s Roads through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1274 (2020).

¹⁰ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 128 (2017) (discussing the history of laws that have created and helped maintain segregated communities in the United States).

¹¹ Frederick E. Ehrsam, *The Downfall of Durham’s Historic Hayti: Propagated or Preempted by Urban Renewal?* (2010) https://sites.duke.edu/djepapers/files/2016/10/Ehrsam-Fred_DJE.pdf; Joel Brown, *Durham’s Hayti Community: A Black Business Mecca Crushed by Empty Promises Reckons with the Part*, ABC (Feb. 22, 2021), <https://abc11.com/durham-hayti-community-freeway-history-black/10362504/>.

¹² Katie Tan, *Forbidden Real Estate and Broken Promises: The History of Housing Inequality in Durham*, DUKE CHRON. (Nov. 8, 2021, 11:19 PM) <https://www.dukechronicle.com/article/2021/11/durham-housing-inequality-affordable-gentrification-civil-war-history-uneven-ground> and *Dismantling Hayti*, Bull City, https://www.bullcity150.org/uneven_ground/dismantling_hayti/.

¹³ See, e.g., Archer, *supra* note 9, at 1275 (“Robert Moses, an influential New York public official who shaped urban development and public works projects both in New York and around the country, was a leader among those who believed infrastructure projects and physical barriers would be effective, semipermanent barriers to access for poor people of color. He took great pains to build New York’s roads and highways in a way that would limit the ability of poor people of color to visit the parks and beaches he built.”).

¹⁴ Exec. Order No. 13985 (Jan. 20, 2021).

¹⁵ 42 U.S.C. 4331 et seq and implementing regulations.

¹⁶ 42 U.S.C. 4331.

to be transparent with impacted communities in decision-making. The steps taken to weaken NEPA's application in 2020 hazard dangerous consequences for vulnerable communities, including those that have experienced discrimination (and relatedly, financial and political disempowerment).

While detailing the impacts of each of the 2020 changes is beyond the scope of this comment letter, we support the analysis and commentary provided in the joint letter filed in this docket by numerous environmental and environmental justice groups (comment letter of Earthjustice et al.). In addition, we highlight below two areas of particular concern: the importance of regulations that provide for meaningful public input; and the need for a full analysis of harms, including cumulative impact analysis (as well as the need for an environmental justice analysis).

Need for Effective and Meaningful Public Participation Requirements

Public participation is important to fully understand the environmental effects and reasonably foreseeable impacts of proposed actions on the "human environment" and to ensure alternatives and potential mitigations have been fully explored.¹⁷ And more specifically, engagement with environmental justice grassroots organizations, racial justice and other civil rights and community organizations is necessary to prevent further governmental and industry action that exacerbates environmental racism, and may lead to further devastation in Black communities and other communities of color across the country. NEPA regulations must therefore clearly articulate that meaningful consultation with impacted individuals and community-based stakeholders is a mandate, and should provide instructions on how to effectively conduct such consultation and ensure that it informs decision-making.

In contrast, the 2020 rulemaking weakened requirements around public participation or served to make the process more burdensome. CEQ should take immediate steps to remedy the damage done by that rulemaking, including by taking the following actions: restoring the required 15 day period between publication of an Environmental Impact Statement (EIS) and date of public hearing on the EIS;¹⁸ restoring the original language on providing comments on EISs to the public;¹⁹ restoring the original language regarding obligation of agencies to respond to comments;²⁰ reinstating provisions providing for public involvement in referrals of proposed actions to CEQ;²¹ and rescinding the burdensome 2020 commenting requirements.²² Beyond these measures, we urge CEQ and other agencies to consult with environmental justice groups and other civil rights groups to develop additional, robust requirements around public participation, such as targeted outreach, appropriate review periods, greater transparency at all stages of decision-making, ongoing input on mitigation measures, and in other respects.

Importance of Cumulative Impacts Analysis and Need for Environmental Justice Analysis

¹⁷ *Id.* at 12; *see also* 40 C.F.R. § 1502.3.

¹⁸ 40 C.F.R. § 1506(c).

¹⁹ 40 C.F.R. § 1506.6(f).

²⁰ 40 C.F.R. § 1503.4.

²¹ 40 C.F.R. §§ 15014.3(e), 1504.3(f).

²² 40 C.F.R. § 1503.3.

We also emphasize the need for CEQ to restore the previous definitions and requirements around NEPA’s effects analysis, including the analysis of cumulative impacts. As described above, communities of color have long shouldered a disproportionate share of environmental harm and risk, including damage to the human environment inflicted by infrastructure projects. The evaluation of a project’s effects should account for such underlying harms and vulnerabilities.

Studies have demonstrated how environmental injustice is directly correlated to historical patterns of housing segregation, racial disparities in access to clean water and air, and their ensuing effect on public health outcomes.²³ For example, the NAACP and Clean Air Task Force reported that Black Americans are exposed to 38 percent more polluted air than white Americans, and 75 percent more likely to live in communities next to a company, industrial or service facility and be directly affected by that facility’s operation, for instance by exposure to chemical emissions.²⁴ Recent studies found that in more than 100 cities, redlining and other policies that further racial segregation in housing have led to disparities in the urban heat environment, resulting in communities of color and low-income communities measured to be 5 to 20 degrees Fahrenheit hotter during the summer than wealthier, whiter parts of the same cities.²⁵ Higher temperatures increase risk of complications breathing, and may impact heart function, which can lead to increased hospitalization for cardiac arrest and respiratory disease; ultimately, life expectancy declines significantly in impacted areas.²⁶ Communities of color were more likely to be targeted for the construction of highways and warehouses, and less likely to have investments in green space, parks and maintaining vegetation, thereby increasing the risk of dangerous levels of heat.²⁷ Concerns around the impact of siting decisions and discriminatory effects are not limited to metropolitan cities, but also widespread in rural communities. For example, a concentration of more than 150 chemical, plastic and aluminum plants have polluted the air across 85-miles of land commonly referred to as “Cancer Alley,” a region encompassing several majority Black communities in Louisiana.²⁸ Agencies must account for underlying vulnerabilities and cumulative harms such as these, in all aspects of their decision-making—including in the analyses required under NEPA.

²³ Casey Berkovitz, *Environmental Racism Has Left Black Communities Especially Vulnerable to COVID-19*, CENTURY FOUND. (May 19, 2020), <https://tcf.org/content/commentary/environmental-racism-left-black-communities-especially-vulnerable-covid-19/?agreed=1>.

²⁴ Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, CLEAN AIR TASK FORCE (Nov. 2017), available at http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf.

²⁵ Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ James Bruggers, *Does Another Plastics Plant in Louisiana’s ‘Cancer Alley’ Make Sense? A New Report Says No*, INSIDE CLIMATE NEWS (Mar. 24, 2021), <https://insideclimatenews.org/news/24032021/formosa-petrochemical-plant-cancer-alley-louisiana-report/>; see also Flozell Daniels Jr., *Black Communities in Louisiana Face Environmental Injustice*, THE ADVOCATE (June 3, 2020 6:00 PM) https://www.theadvocate.com/baton_rouge/opinion/article_a48074e8-a465-11ea-a83f-872be9f42b28.html; see generally David Maraniss & Michael Weisskopf, *The Faces of Pollution: As Cancer, Miscarriages Mount, Louisiana Wonders If It Is a ‘National Sacrifice Zone’*, L.A. TIMES (Jan. 24, 1988, 12:00 AM) <https://www.latimes.com/archives/la-xpm-1988-01-24-mn-37913-story.html>; Jamiles Lartey & Oliver Laughland, *Almost Every Household Has Someone That Has Died from Cancer*, THE GUARDIAN (May 6, 2019, 6:00 PM), <https://www.theguardian.com/us-news/ng-interactive/2019/may/06/cancertown-louisiana-reserve-special-report>.

We also urge CEQ (and other federal agencies implementing NEPA) to require an environmental justice analysis, as an explicit and binding component of the evaluation of harms, alternatives, and mitigations. Currently, NEPA has been interpreted not to require this type of analysis, such that racial equity concerns can too easily be overlooked.²⁹ To allow this interpretation to continue is to ignore the extensively documented history of the environmental impacts of federal projects on communities of color. As the Biden Administration focuses on expanding infrastructure and responding to the climate crisis, it is essential that NEPA be leveraged as a tool not only of environmental protection, but also of racial justice in the context of the environment.³⁰ NEPA analysis should also be tailored to incorporate aspects of regional equity, such as the distribution of health burdens, infrastructure, and amenities; the availability and concentration of affordable housing; and other considerations.

The federal government has acknowledged the need to advance environmental and racial justice, and doing so entails a need for more comprehensive analysis, stronger regulations, and consistent enforcement. In 1994, the Clinton Administration issued Executive Order 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”), directing federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, develop a strategy to implement environmental justice and promote nondiscrimination in federal programs and ensure public participation.³¹ The Biden Administration has directed federal agencies to prioritize racial equity in their policymaking and other activities, through Executive Order 13985 (“Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”).³² It is consistent with these federal priorities – as well as sound and just policymaking – for CEQ to issue requirements that ensure that equity is a formal and serious consideration throughout the structure of NEPA analysis and oversight.

NEPA and Civil Rights Compliance

In addition to strengthening NEPA’s analytical and public participation components to better account for environmental justice, CEQ and other agencies should clarify how civil rights laws intersect with – but impose obligations independent from – the requirements of NEPA and its implementing regulations. First, the Administration should clarify for all actors – including agencies, recipients, and stakeholders (including impacted communities) – that NEPA compliance does not constitute substantive civil rights compliance. That is, even if a regulated entity is in full compliance with NEPA’s procedural requirements (and with the general standards of

²⁹ See, e.g., Archer, *supra* note 9, at 1319-20 (explaining that, “while NEPA requires government agencies to consider the [environmental] impact of their proposed action and reasonable alternatives, it does not mandate that federal agencies take any action to mitigate those identified harms,” therefore allowing government agencies to get a way with negatively impacting racial equity issues).

³⁰ See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws And "Justice"*, 47 AM. U. L. REV. 221, 293 (1997) (“NEPA and its state equivalents thus provide a forum for a community to link the information in the environmental review process to the political considerations associated with the siting decision.”).

³¹ 59 Fed. Reg. 7629 (Feb. 16, 1994).

³² 86 Fed. Reg. 7009 (Jan. 20, 2021).

environmental law), it may still be engaging in discrimination and out of compliance with civil rights requirements. Robust oversight of civil rights laws in the context of infrastructure projects and other actions relating to the environment, as elsewhere, is a critical and independent need. Second, CEQ and other agencies should consider how to more effectively structure NEPA analyses so as to serve as a tool for civil rights compliance. For example, information relevant to compliance with Title VI of the Civil Rights Act, the Fair Housing Act, and other laws should be documented and made public within the NEPA framework.

Damage to NEPA in the Infrastructure Investment and Jobs Act

On a final but important note, we state our concern over the erosions to NEPA protections within the recent Infrastructure Investment and Jobs Act (“the Infrastructure Act”). We urge CEQ to use its fullest authority to ensure that, as NEPA is implemented by CEQ and other agencies, the Infrastructure Act does not result in further environmental injustice. Among our concerns are the Act’s limitations to the required consideration of alternatives, potential harm to public input opportunities, and expansion of “categorical exclusions” of certain types of projects from NEPA review.³³ CEQ’s NEPA rulemakings should assertively provide for protections that advance environmental justice in the context of IJIA-funded projects as elsewhere, for example through strong public input requirements and the consideration of cumulative impacts when defining categorical exclusions.

We thank you for your consideration of our comments on these important issues. We hope that CEQ, and the Administration as a whole, will prioritize racial equity in its NEPA regulations, as elsewhere. Please reach out to Megan Haberle at mhaberle@naacpldf.org or Hamida Labi at hlabi@naacpldf.org for further discussion.

Best regards,

Lisa Cylar Barrett, Director of Policy
Megan Haberle, Senior Policy Counsel
Hamida Labi, Policy Counsel
NAACP Legal Defense & Educational Fund, Inc. (LDF)
Washington, DC

Matthew Currie, Managing Attorney
Advocates for Basic Legal Equality, Inc.
Dayton, OH

Thomas Fox, Senior Policy Advisor
Center for Environmental Health
Oakland, CA

³³ See, e.g., IJAA §§ 11312 and 11301.

Douglas Meiklejohn, Senior Policy Analyst
Conservation Voters New Mexico
Santa Fe, NM

Sofia E. Owen, Staff Attorney & Director
Environmental Justice Legal Services
Alternatives for Community & Environment
Boston, MA

Ruben D. Arvizu, Director General for Latin America
Jean-Michel Cousteau's Ocean Futures Society
Santa Barbara, CA

Dr. Virginia Necochea, Ph.D, Executive Director
New Mexico Environmental Law Center

Philip Tegeler, Executive Director
Poverty & Race Research Action Council
Washington, DC

Leslie G. Fields, National Director, Policy Advocacy and Legal
Sierra Club
Washington DC

Amy Laura Cahn, Visiting Professor and Director
Environmental Justice Clinic
Vermont Law School

Rebecca Bratspies, Professor of Law and Director
CUNY Center for Urban Environmental Reform*
CUNY School of Law
New York, NY

Marc Brenman, Managing Partner
IDARE LLC

Richard Grow, U.S. EPA Retired
Berkeley, CA

Dr. Adrienne Hollis, J.D., Ph.D, Founder and President
Hollis Environmental Consulting

Vincent Martin, Environmental Justice Consultant
Detroit, Michigan

Vernice Miller-Travis, Executive Vice President

Metropolitan Group*

Wyatt G. Sassman, Assistant Professor of Law
University of Denver Sturm College of Law*
Denver, CO

*affiliation is for identification purposes only