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# Community Empowerment in Decarbonization: NEPA's Role

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# COMMUNITY EMPOWERMENT IN DECARBONIZATION: NEPA'S ROLE

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*Abstract:* This Article addresses a potential tension between two ambitions for the transition to clean energy: reducing regulatory red-tape to quickly build out renewable energy, and leveraging that build-out to empower low-income communities and communities of color. Each ambition carries a different view of communities' role in decarbonization. To those focused on rapid build-out of renewable energy infrastructure, communities are a potential threat who could slow or derail renewable energy projects through opposition during the regulatory process. To those focused on leveraging the transition to clean energy to advance racial and economic justice, communities are necessary partners in the key decisions of the transition—including the development of renewable energy projects. The Biden Administration has committed to both ambitions, but there is a gap regarding what role communities will play in policies designed to implement decarbonization.

This Article articulates this "participatory gap" in decarbonization policy and proposes changes to the regulations implementing the National Environmental Policy Act of 1969 (NEPA) that start bridging these ambitions. The Article offers proposals that would leverage NEPA's unique structure to empower communities in decarbonization. Specifically, it argues that NEPA's regulations should be reformed to require meaningful community engagement and enforce that commitment through a revitalized executive enforcement structure. Contrary to views that more community engagement will slow decarbonization, this Article argues that these reforms would support the rapid transition to renewable energy while also empowering communities and elevating justice as a central value in environmental policy.



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## INTRODUCTION

In the bright green grass of Archer, Florida, rows of black and white yard signs read "NO to GRU Solar!"[1] Archer, a rural town near Gainesville, has come together to oppose a large renewable energy development called the Sand Bluff project.[2] Proposed by Origis Energy in July 2020, the Sand Bluff project will erect solar panels over 600 acres of agricultural land near Archer.[3] The project will sell electricity to the Gainesville Regional Utilities, where it will advance Gainesville's commitment to 100% renewable energy.[4] Archer's residents argue that the huge project will change their community's residential character and could cause environmental damage.[5] Moreover, they say that they will not

1. Camille Syed, *Activist Groups Speak out Against Archer Solar Array Project, Alachua County Plan Board Approves*, WCJB (Apr. 26, 2021, 3:32 PM) (emphasis in original), https://www.wcjb.com/2021/04/26/activist-groups-speak-out-against-archer-solar-array-project-alachua-county-plan-board-approves/ [https://perma.cc/4WLC-CM27].

2. *See generally* Kristi E. Swartz, *Fla. Solar Plans Stoke Fight over 'Environmental Racism'*, E&E NEWS (June 3, 2021, 6:08 AM), https://www.eenews.net/energywire/stories/1063733977 [https://perma.cc/ER6C-W2EC] (giving an overview of Archer's opposition to the project).

3. *Id.*; *see also* Press Release, Origis Energy, First Gainesville, Fla., Large-Scale Solar and Storage Project Announced by Gainesville Regional Utilities and Origis Energy (July 17, 2020), https://origisenergy.com/first-gainesville-fla-large-scale-solar-and-storage-project-announced-by-gainesville-regional-utilities-and-origis-energy/ [https://perma.cc/JP6H-YEF7].

4. *See* Swartz, *supra* note 2 (describing Gainesville's "100% renewable energy goal"); *see also* Andrew Caplan, *City Commits to 100 Percent Renewable Energy*, GAINESVILLE SUN (Oct. 18, 2018, 7:07 PM), https://www.gainesville.com/news/20181018/city-commits-to-100-percent-renewable-energy [https://perma.cc/43JB-LSW7] (noting that in 2018 the Gainesville City Commission "unanimously passed a resolution committing to providing 100 percent of its energy entirely from renewable resources by 2045").

5. Emily Mavrakis, *Alachua County Plan Board Approves Sand Bluff Solar Project Near Archer*,

even benefit from the project—all of the electricity gets sent to Gainesville, not to their local utility, which is still heavily reliant on fossil fuels.[6]

These arguments resonate with those made by local communities across the United States opposing large renewable energy developments needed to avoid the most catastrophic impacts of climate change.[7] Such opposition has prompted criticism from environmentalists and other advocates who cast these communities as short-sighted and selfish "NIMBYs"—a derogatory phrase familiar in land use and environmental disputes that stands for "not in my backyard."[8]

But Archer's history as an African American community sets it apart.[9] Archer includes "some of the nation's earliest Black landowners."[10] Some residents can "trace their lineage back six generations."[11] "Sharecroppers and slaves bought this property and it's been in their families for over 100

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GAINESVILLE SUN (Apr. 22, 2021, 2:24 PM), https://www.gainesville.com/story/business/energy-resource/2021/04/22/alachua-county-plan-board-oks-sand-bluff-solar-array-near-archer/7283751002/ [https://perma.cc/YP3Y-CTFF] (noting concerns that the land "would be better used for residential development, in keeping with its surroundings" and quoting residents who believe the project will negatively affect their familial homes); *see also id.* ("Residents also said they're concerned about the environmental impact — protected gopher tortoises have been found on the site, and they worry about potential water contamination if panels are damaged in a storm and chemicals leak into wells.").

6. *See* Swartz, *supra* note 2 ("Among the arguments from Archer residents is that they would not get the solar electricity from either project. Archer is powered by the Clay Electric Cooperative, which gets its electricity from the larger Seminole Electric Cooperative Inc., based in Tampa. Seminole relies heavily on fossil fuels, including coal.").

7. *See id.* ("People who live in rural areas often do not want their land to be disturbed by what they consider to be industrial infrastructure. Some simply do not want to look at the shiny panels or are worried about property values."); *see also infra* section I.B (discussing local opposition to renewable energy projects).

8. *See infra* section I.B (discussing "NIMBYism"). Indeed, six out of nine board members of the local Sierra Club chapter resigned in protest after the environmental group issued a letter in support of Archer's opposition to the Sand Bluff project. The Gainesville Sun Editorial Board, *Solar Power Should Be Encouraged*, GAINESVILLE SUN (Nov. 30, 2020, 7:48 AM), https://www.gainesville.com/story/opinion/2020/11/29/editorial-solar-power-should-encouraged/6406877002/ [https://perma.cc/93RQ-S37T]. One board member described the Sierra Club's opposition to any solar project, whenever it is located, as "indefensible" in the face of climate change. *Id.* ("After a Sierra Club Florida official asked the County Commission not to move forward with the project, the local Suwannee-St. Johns chapter of the Sierra Club had six of its nine executive committee members resign. 'The idea that the Sierra Club would come out against solar is indefensible,' Scott Camil, one of the former committee members, said in an email to The Sun. 'Anything that we can do to limit fossil fuels and switch to renewables helps the whole planet.'").

9. *See* Swartz, *supra* note 2 (noting that "in Archer, which is in Alachua County just outside Gainesville, the concerns run deeper" than other communities opposing renewable energy developments).

10. *Id.*

11. *Id.*

years," the president of the local NAACP chapter explained.[12] "[T]he land has history."[13] By asking the community to shoulder burdens for others' benefit, Sand Bluff represents not a new threat but another example in a history of exploitation. "History keeps repeating itself," a commenter noted, "when it comes to energy companies using these rural Black communities specifically as a dumping ground for their solar farms."[14] Residents' opposition to the project is rooted in "Archer's history" and a demand for "respect" as much as it is about the placement of the solar panels.[15] Archer's residents had little to no say in the plans to locate the project in their community, both because of the limited role for communities in the current planning and development processes for renewable energy projects and because the developer plans to locate the project just outside of Archer's city limits.[16] It's for this reason that, just below "NO to GRU Solar," the signs read "*Black Communities Matter*" and "Dumping GRU Solar in Archer is Inequitable and Racist."[17] The local county commission ultimately voted to not allow the project, with several commissioner's citing concerns that the developer had not sufficiently involved nearby communities.[18] Origis, for its part, did not abandon the project but instead has asked regulators for more time to talk with Archer's African American community.[19]

Archer's opposition to the Sand Bluff project highlights a looming

12. Syed, *supra* note 1 ("The Alachua County NAACP President, Evelyn Foxx, said the facility will negatively impact the African-American community. . . . Foxx agrees the development is not fair to neighbors, as the land has history.").

13. *Id.*

14. Valeriya Antonshchuk, *Black Communities Concerned About Pending Alachua County Commission Decision on New Archer Solar Farm*, WUFT (Mar. 1, 2021), https://www.wuft.org/news/2021/03/01/communities-remain-concerned-about-alachua-county-commissioners-decision-on-new-archer-solar-farm/ [https://perma.cc/JQ2P-2X74].

15. Swartz, *supra* note 2.

16. *See id.*; *see also* Emily Mavrakis, *'You Picked the Wrong Neighborhood': County Denies Sand Bluff Solar Project Outside Archer*, GAINESVILLE SUN (July 8, 2021, 10:58 AM), https://www.gainesville.com/story/news/local/2021/07/07/commissioners-deny-sand-bluff-solar-project-application-outside-archer/7868226002/ [https://perma.cc/9E4S-UP2F] (noting that the project is proposed "just outside Archer city limits").

17. Syed, *supra* note 1 (emphasis in original).

18. Mavrakis, *supra* note 16 ("One of the reasons Commissioners Marihelen Wheeler, Anna Prizzia and Chuck Chestnut voted against the project is because, after hearing testimony from many neighborhood residents, they felt that not enough community outreach had been done to fully inform them about the project.").

19. John Henderson, *Origis to Delay Challenge of Rejected Solar Project Plan to Talk with Protesters*, GAINESVILLE SUN (Aug. 17, 2021, 10:12 PM), https://www.gainesville.com/story/news/2021/08/17/origis-appeal-alachau-countys-rejected-sand-bluff-solar-project-archer-delayed/8153796002/ [https://perma.cc/KXW8-UURV] (noting delay and that "Origis Energy says it first wants time to talk with residents of an historic African-American community who live near the site and have voiced opposition to the proposed Sand Bluff project").

conflict between two ambitions of the United States' transition to clean energy. The first ambition is a rapid and massive deployment of renewable energy infrastructure. Meeting the United States' carbon emissions reduction targets will require building huge amounts of wind and solar power at rates and scales never before seen in the country.[20] To achieve this, legal scholars and policy advocates have proposed reforming much of the environmental permitting and regulatory schemes that have historically slowed both public and private renewable energy developments in the United States.[21] From this perspective, communities that oppose renewable energy developments are a threat to decarbonization, and the tools they use to slow renewable energy projects should be tightly constrained—if not dismantled altogether.[22]

The second ambition is to leverage decarbonization to advance racial, economic, and environmental justice.[23] The transition to clean energy will be a transformative, generation-defining infrastructure project comparable in ambition and social impact to the New Deal.[24] By remaking a fundamental aspect of American life—the generation and moving of electricity—the transition offers an opportunity to also remake structures of power and inequality tied to that system.[25] To achieve this ambition, legal scholars and policy advocates argue for elevating the voices of communities of color and low-income communities—communities that have borne the heaviest burdens of our fossil fuel energy system—in the central decisions of decarbonization, including where and how renewable energy projects are developed.[26] From this perspective, communities should lead the transition to clean energy, and legal reforms should empower communities in this process.[27]

Between these two ambitions is an open question: what role will communities play in the transition to clean energy? The question has important implications for the wide range of legal reforms planned to enable rapid decarbonization.[28] Some areas targeted for reform, such as

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20. *See infra* section I.A (describing decarbonization's renewable energy goals).

21. *See id.* (discussing the scale of renewable energy deployment need to meet goals).

22. *See infra* section I.B (discussing NIMBYism and local opposition to renewables).

23. *See infra* notes 77–87, 177–187 and accompanying text.

24. Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307, 323–24 (2019); *see also infra* notes 71–72 and accompanying text.

25. *See infra* notes 77–87 and accompanying text.

26. *See infra* notes 177–188 and accompanying text.

27. *See infra* notes 77–87 and accompanying text.

28. *See generally* LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES: SUMMARY AND KEY RECOMMENDATIONS (Michael B. Gerrard & John C. Dernbach eds., 2018) (detailing expansive reforms across energy law, environmental law, and other legal fields to enable decarbonization).

environmental law, have long traditions of public participation and oversight.[29] Other areas, such as energy law, are building in new tools for public participation.[30] While the challenge of decarbonization has provided a unifying goal for reforms in these areas, the lack of a coherent vision for communities' role in decarbonization has created important gaps as well, particularly regarding how to approach these public participation requirements.[31] Upcoming changes to the regulations implementing the National Environmental Policy Act of 1969 (NEPA)[32] will be one of the first opportunities to confront this question and start filling these gaps.

NEPA is the United States' first modern environmental law—the Magna Carta of environmental protection.[33] Initially intended to mandate sustainable decision-making across the federal government, NEPA is now primarily known for its procedural requirement that agencies study and disclose the environmental impacts of their decisions.[34] Over time, this procedural requirement overshadowed all other aspects of the statute.[35] The assessment process has become increasingly complex, with some federal agencies taking years to complete the necessary documents.[36] The

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29. *See, e.g.*, William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENV'T L. 1, 26 (2010) (describing public participation as one of the values enshrined by early environmental statutes and "a shining beacon of environmental law").

30. *See* Press Release, Fed. Energy Regul. Comm'n, FERC Establishes Office of Public Participation (June 24, 2021), https://www.ferc.gov/news-events/news/ferc-establishes-office-public-participation [https://perma.cc/94UK-3QJB] (describing FERC's recent efforts to comply with a statutory mandate over forty years old to incorporate a participatory feature into its energy regulatory process).

31. *See infra* notes 89–90 and accompanying text.

32. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4347).

33. *See* DANIEL R. MANDELKER, ROBERT L. GLICKSMAN, ARIANNE M. AUGHEY, DONALD MCGILLIVRAY & MEINHARD DOELLE, NEPA LAW AND LITIGATION § 1:1 (2d ed. 2021) (describing NEPA as "an environmental Magna Carta"); Oliver A. Houck, *Is That All? A Review of* The National Environmental Policy Act, an Agenda for the Future, *by Lynton Keith Caldwell*, 11 DUKE ENV'T L. & POL'Y F. 173, 173 (2000) (book review) (describing NEPA's international influence).

34. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) ("NEPA imposes only procedural requirements to 'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989))).

35. *See* Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENV'T L. & POL'Y F. 113, 115, 118–19 (2010) [hereinafter Kalen, *Lost Mandate*] (discussing NEPA's purpose, history, and reduction to a procedural requirement); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND, RES., & ENV'T L. 245, 249 (2000) (same); Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENV'T L. 275, 281–82 (1997) (same); *see also infra* Part II.

36. *See* John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of*

public also plays an important role, with affected communities submitting comments during the NEPA process and seeking judicial review if the agency fails to complete the process correctly.[37] NEPA's lengthy assessment requirements and public oversight provisions have been criticized for delaying or derailing important infrastructure projects by stalling and slowing federal decision-making.[38] NEPA even has a specific reputation as a tool for "NIMBY" opposition to projects.[39]

NEPA has long been a target for reform because of this idiosyncratic development. NEPA settled into its character as a purely procedural statute through a complex interplay of politics, early judicial decisions, and federal regulations.[40] Over time, this shift in focus to NEPA's procedures changed perceptions of NEPA's purposes, which are now frequently articulated as generating environmental information and providing opportunities for public participation.[41] These modern purposes bear little to no relationship to NEPA's statutory structure or congressional intent.[42] As a result, many early reform proposals sought to return NEPA to its original statutory purposes.[43] Other proposals sought to better conform NEPA to its new purposes, such as using its process to modernize federal environmental decision-making or advance environmental justice through stronger and more meaningful public

*1,499 Federal Court Cases*, 50 ENV'T L. 479, 496 (2020) (noting that agencies can take "a median of 3.6 years and an average (mean) of 4.5 years" from the start of the NEPA process to its conclusion with the most complex projects).

37. *See* Ruple & Race, *supra* note 36, at 484, 487 (discussing the role of public comments and judicial review of final agency decisions under the Administrative Procedure Act).

38. *See, e.g.*, John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 NAT. RES. & ENV'T 14, 14 (2020) ("Conventional wisdom is that NEPA compliance is unduly burdensome; NEPA litigation is an overused cudgel for environmentalists; and NEPA unreasonably delays much-needed projects, thereby hurting the economy."); Lindstrom, *supra* note 35, at 264 (arguing that "NEPA could also use revitalization and sharper 'teeth' compelling ecological justifications").

39. *See* Denis Binder, *NEPA at 50: Standing Tall*, 23 CHAP. L. REV. 1, 45 (2020) ("NEPA has become a tool of the NIMBY movement.").

40. *See infra* Part II (discussing the NEPA's development).

41. *See, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) ("The NEPA EIS requirement serves two purposes. First, '[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' Second, it 'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989))).

42. *See infra* notes 126–138 and accompanying text.

43. *See, e.g.*, Kalen, *Lost Mandate*, *supra* note 35, at 115 (noting Lynton Caldwell, one of the chief framers of NEPA, warned that NEPA's purpose was being threatened by overemphasis on its procedures and proposing reforms).

participation.[44] Many simply sought to get NEPA out of the way, arguing that its assessment process should be cut back and streamlined.[45] But these reform projects had limited success; some resulted in incremental changes or improvements, but the basic structure of NEPA's process and purposes has generally remained the same since the late 1970s.[46]

Then, as with many areas of American life, 2020 changed everything for NEPA's regulatory landscape. The Trump Administration promulgated wide-ranging reforms to NEPA's implementing regulations.[47] These reforms were intended to streamline NEPA's process by narrowing its application, limiting the public's role, and confining judicial review.[48] The looming threat of climate change created divisions within the environmental community over these reforms. While the broader environmental community criticized them, some renewable-energy advocates praised them for easing the way for renewable energy development.[49] Advocates of a rapid transition away from fossil fuels therefore struck a middle ground: supporting some reconsideration of the Trump rules but arguing against a return to the status quo that had defined the NEPA process since the 1970s.[50] Environmental justice and community advocates also argued that a return to the status quo is not

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44. *See, e.g.*, COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS, at iii (1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf [https://perma.cc/LF44-FN6N] (discussing NEPA's potential as a tool for adaptive management); Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T AFFS. L. REV. 601, 601 (2006) [hereinafter Outka, *NEPA and Environmental Justice*] (reviewing NEPA's history with environmental justice); *see also infra* section III.B.

45. *See* Ruple & Tanana, *supra* note 38, at 14.

46. *See* Houck, *supra* note 33, at 184.

47. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. §§ 1500–1508, 1515–1518) (final rule amending NEPA's implementing regulations).

48. *Id.*

49. *See* Devin Hartman, *Stimulating Clean Infrastructure Through NEPA Reform*, REAL CLEAR ENERGY (Apr. 22, 2020), https://www.realclearenergy.org/articles/2020/04/22/stimulating_clean_infrastructure_through_nepa_reform_489766.html [https://perma.cc/X736-H8RB] ("[T]he clean energy industry generally views the direction of the Trump Administration's proposal as on-point. Those involved with solar project permitting call the Administration's proposed changes 'welcome and necessary.' The American Wind Energy Association went so far to say that modernizing the process 'would both strengthen our economy and enhance environmental stewardship.'").

50. *See* CHRISTY GOLDFUSS, TIM PROFETA, KRISTINA COSTA & JEREMY SYMONS, EXEC. OFF. OF THE PRESIDENT, CLIMATE 21 PROJECT TRANSITION MEMO 12 [hereinafter CLIMATE 21 TRANSITION MEMO], https://climate21.org/documents/C21_EOP.pdf [https://perma.cc/66SY-A8FU] ("Merely restoring NEPA to its traditional form will not enable the federal government to effectively permit the clean energy infrastructure—including generation, transmission, and sequestration infrastructure—needed to meet an ambitious goal like achieving 100 percent clean electricity by 2035.").

feasible, but for different reasons.[51] These advocates and organizers criticize limitations in the public participation and oversight provisions that have been part of NEPA's process since the 1970s, and emphasize importance of strengthening and deepening communities' role in the NEPA process as part of any reforms.[52] So while the Biden Administration entered office with a commitment to reconsider the Trump Administration's reforms and advance an ambitious climate agenda, advocates staked out competing visions of communities' role in a reformed NEPA process.[53] Both acknowledge that communities should play some role in the transition, but there is no clarity on what that should look like.[54]

Upcoming reform of NEPA's implementing regulations therefore offers an early and important opportunity to start addressing the participatory gap in decarbonization policy. This Article offers three contributions targeted at doing so. First, it describes the nature of this participatory gap in decarbonization policy. The Article argues that this gap is rooted in a NIMBYism narrative that skews legal scholarship and policy advocacy around reforms intended to advance decarbonization. Naming and explaining this gap is the first key contribution of the Article, and this explanation informs the Article's approach to NEPA. Empirical research on community engagement in renewable energy development discredits this NIMBYism narrative and suggests that deeper, more meaningful public engagement in renewable energy developments is aligned with the goals of rapid decarbonization. This alignment provides a path for NEPA reform that both supports community empowerment and rapid decarbonization.

The Article's second contribution is a structural perspective on

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51. *See* Kelsey Brugger, *Biden CEQ Pick Signals NEPA Changes*, E&E NEWS (Dec. 21, 2020, 1:30 PM), https://www.eenews.net/articles/biden-ceq-pick-signals-nepa-changes/ [https://perma.cc/5N42-7YRE] (quoting several environmental justice advocates on the need to improve NEPA's procedures to better engage communities).

52. *See id.* As environmental justice advocate Peggy Shepard put it, "[t]here shouldn't be public comment—there should be public engagement" under an improved NEPA. *Id.*

53. *See* Heather Richards & Kelsey Brugger, *How Biden's NEPA Plan Hits Energy*, E&E NEWS (Feb. 19, 2021, 7:29 AM) (noting that the Biden Administration's early actions signal its "intentions to put NEPA in the center of its climate framework"); *see also* CLIMATE 21 TRANSITION MEMO, *supra* note 50, at 12 (arguing for a "Day One" priority "to evolve NEPA into a creative, flexible, environmentally sustainable, and efficient tool for infrastructure design, siting, and permitting").

54. For example, a recent report on how to achieve Biden's decarbonization goals argued that a "balance" must be "struck between the imperative to expedite environmental review for renewable energy projects and adequate community engagement" without elaborating. LEAH C. STOKES, SAM RICKETTS, OLIVIA QUINN, NARAYAN SUBRAMANIAN & BRACKEN HENDRICKS, A ROADMAP TO 100% CLEAN ELECTRICITY BY 2035, at 48 (2021) [hereinafter EVERGREEN ROADMAP], https://www.filesforprogress.org/memos/evergreen-ces-report.pdf [https://perma.cc/4GYJ-GFR5].

reforming NEPA to empower communities. Despite an overall record of failures, NEPA's statutory structure makes it well suited to advance community empowerment and environmental justice across the federal government. Reviving an overlooked aspect of NEPA's statutory structure—its executive-enforcement scheme—and harmonizing that enforcement structure with NEPA's modern role as a tool for public participation can tap into this structural potential. This perspective advances the literature on NEPA reform by linking NEPA's executive-enforcement structure with the literature on NEPA and environmental justice.

Third, the Article proposes regulatory reforms. Because of its idiosyncratic development, structural change to NEPA's process and role can be achieved by reforming its implementing regulations. The Article therefore proposes regulatory reforms to better fit NEPA's participatory function with the statute's underutilized executive-oversight structure. By leveraging NEPA to elevate community empowerment as a central value within federal environmental policy, the reforms would help pursue the dual ambitions of rapid decarbonization and advancing racial, economic, and environmental justice.

The Article makes these contributions in three parts. Part I identifies the participatory gap in decarbonization policy, highlighting the influence that local opposition to renewable energy development and NIMBYism has played in debates regarding NEPA reforms. Part II briefly offers some history on NEPA's intended structure of executive oversight, with an emphasis on that structure's failure and the rise of public participation and judicial oversight as the primary methods of ensuring NEPA compliance. Part II then discusses NEPA's potential as a tool for community empowerment and the statute's history with environmental justice, laying the groundwork for my proposed reforms. Part III offers proposals to mandate meaningful community engagement and revive executive oversight. Part III first lays out the regulatory details of the proposals and then articulates the benefits of the proposal along three lines: empowering communities, supporting rapid decarbonization, and centering justice in federal environmental policy.

## I. DECARBONIZATION'S PARTICIPATORY GAP

This section highlights the lack of any positive vision for public participation in decarbonization, using NEPA reform as an example. Section I.A articulates the stakes and scale of decarbonizing electricity generation in the United States, emphasizing the transformative goal of leveraging the transition away from fossil fuels to address racial and economic inequality. Section I.B then turns to the participatory gap in

NEPA reform, noting that communities' participation in renewable energy developments is a contested issue. Many reform proposals are influenced by a view that local communities are a potential threat to rapid development. The tension between the transformative goals of decarbonization and view of local communities as a potential threat reveals the need for a positive vision of community participation expressly directed towards community empowerment.

### *A. Decarbonization's Transformative Potential*

Climate change is an urgent and existential threat to life as we know it. Without dramatic changes, the world will likely experience an increase in overall global temperatures of three degrees Celsius or more—an outcome that would result in catastrophic loss of life and disruption across the world.[55] After decades of inaction, our ability to avoid serious warming and its expected harms is now limited; in other words, a substantial amount of global warming is already "baked in," although just how much is widely debated.[56] The international community has focused on limiting warming to between one-and-a-half degrees and two degrees Celsius, which they see as a feasible target that carries a wide range of harms but a lower likelihood of catastrophe.[57] Limiting warming to one-and-a-half degrees will likely require, at a minimum, reducing global greenhouse gas

55. While predictions of likely warming are contested, there is some agreement that the current path is, at least, headed towards catastrophe. *See* Zeke Hausfather & Glen P. Peters, *Emissions—The 'Business as Usual' Story Is Misleading*, NATURE (Jan. 29, 2020), https://www.nature.com/articles/d41586-020-00177-3 [https://perma.cc/8GN8-TYEX] ("Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century—still a catastrophic outcome, but a long way from 5 °C.").

56. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON GLOBAL WARMING OF 1.5°C, at 66 (2019) [hereinafter SPECIAL REPORT ON WARMING OF 1.5°C], https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [https://perma.cc/4L9U-B2FD] ("Expert judgement based on the available evidence (including model simulations, radiative forcing and climate sensitivity) suggests that if all anthropogenic emissions were reduced to zero immediately, any further warming beyond the 1°C already experienced would *likely* be less than 0.5°C over the next two to three decades, and also *likely* less than 0.5°C on a century time scale." (emphasis in original)); *see also* Chen Zhou, Mark D. Zelinka, Andrew E. Dessler & Minghuai Wang, *Greater Committed Warming After Accounting for the Pattern Effect*, 11 NATURE CLIMATE CHANGE 132 (2021) (finding that historic emissions will result in over 2°C degrees of warming).

57. SPECIAL REPORT ON WARMING OF 1.5°C, *supra* note 56, at 5 ("Climate-related risks for natural and human systems are higher for global warming of 1.5°C than at present, but lower than at 2°C (*high confidence*)." (emphasis in original)); *see also* Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104 (agreeing to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change").

emissions by 45% by 2030 and achieving net-zero global greenhouse gas emissions by 2050.[58] Many nations have adopted some form of this target.[59] Under the Biden Administration, the United States has committed to achieving net-zero emissions by 2050.[60]

Achieving these goals is a "herculean" task.[61] The primary sources of global greenhouse gas emissions are industrialized economies that are heavily dependent on the extraction and burning of fossil fuels to generate electricity, transport people and things, and support industry.[62] For the United States, both the timeline of the Biden Administration's commitment and the scale of this necessary shift away from fossil fuels means fundamentally restructuring our economy on a timeline of roughly ten to twenty years.

An initial priority for decarbonization is to shift electricity generation away from fossil fuels towards zero-carbon sources. Decarbonizing electricity generation is an important first step in meeting emissions targets for two reasons. First, it reduces emissions from a major fossil fuel dependent sector. And second, it opens the door to further shifts away from fossil fuels through electrification of other high-emission sectors, such as transportation.[63] The Biden Administration's plans reflect this

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58. SPECIAL REPORT ON WARMING OF 1.5°C, *supra* note 56; *see also* J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 702 (2020) ("To contain climate change to a 2°C warming scenario, recent studies strongly support the necessity of reducing greenhouse gas emissions at least 50% by 2030, and to move to net zero, if not net *negative*, by 2050." (emphasis in original)); *id.* at 703–04 (discussing tipping points).

59. *See Chapter XXVII Environment, 7.d Paris Agreement*, UNITED NATIONS TREATY COLLECTION (Nov. 17, 2021, 7:15 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en [https://perma.cc/59B4-6NXU] (listing the signatories to the Paris Agreement).

60. *See Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government*, THE WHITE HOUSE (Jan. 27, 2021) [hereinafter *Fact Sheet on Biden Climate Plan*], https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/ [https://perma.cc/4FH2-W8W2] (noting commitment to "a carbon pollution-free power sector by 2035" and "a net-zero economy by 2050").

61. *See* Jeff Tollefson, *IPCC Says Limiting Global Warming to 1.5°C Will Require Drastic Action*, NATURE (Oct. 8, 2018), https://www.nature.com/articles/d41586-018-06876-2 [https://perma.cc/2Z4E-QW6A] ("Limiting global warming to 1.5 °C above pre-industrial levels would be a herculean task, involving rapid, dramatic changes in how governments, industries and societies function . . . .").

62. *See Global Greenhouse Gas Emissions Data*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data [https://perma.cc/K697-VTBA] (noting that a majority of emissions come from fossil-fuel sources and industrialized nations such as the United States, China, and those in the EU).

63. *See* JAMES H. WILLIAMS, BENJAMIN HALEY & RYAN JONES, POLICY IMPLICATIONS OF DEEP DECARBONIZATION IN THE UNITED STATES 70–72 (2015), https://ddpinitiative.org/ddpp-united-states/ [https://perma.cc/7ZRG-R74H] (detailing principal steps in decarbonization).

strategy, committing to decarbonizing electricity generation in the United States by 2035 to support shifts in other high-emissions sectors, such as transportation and residential heating.[64]

A recent report from the National Academies of Sciences, Engineering, and Medicine suggests that this transition is currently feasible but only barely so, in part because of the massive infrastructure challenge presented by decarbonizing electricity generation.[65] Electricity in the United States has historically been generated at large, centralized sources (such as a fossil-fueled power plant) and distributed to people through a complex, multi-jurisdictional system of transmission lines.[66] Decarbonizing electricity generation presents several challenges to this system. Replacing fossil fuels as a primary source of electricity will likely require, among other steps, an unprecedented build-out of wind turbines and solar panels at scales and rates never before seen in the United States.[67] Generating electricity from solar and wind typically requires more geographic space than generating electricity from fossil-fueled sources.[68] And optimum geographic locations for wind and solar projects

64. *See Fact Sheet on Biden Climate Plan*, *supra* note 60 (noting goal of a "carbon pollution-free power sector by 2035"); *see also* Michael Gerrard, *How Biden Can Put the U.S. on a Path to Carbon-Free Electricity*, YALE ENV'T 360 (Dec. 3, 2020), https://e360.yale.edu/features/how-biden-can-launch-the-u-s-on-a-path-to-carbon-free-electricity [https://perma.cc/7EUR-YVLA] (noting that the 2050 goal "will eventually require all new passenger cars to be electric, all new buildings to have electric heat and hot water, and many other economic activities to switch from oil, natural gas, or coal to electricity").

65. *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., ACCELERATING DECARBONIZATION OF THE U.S. ENERGY SYSTEM 32 (2021) [hereinafter NATIONAL ACADEMIES REPORT], https://www.nap.edu/catalog/25932/accelerating-decarbonization-of-the-us-energy-system [https://perma.cc/6CL9-VAV9] (click "Download Free PDF" hyperlink; then click "Download as Guest" hyperlink; then enter email address; click the "Yes, I accept the terms of use" box; and click the "Continue" hyperlink; then click the "Download PDF (Full Book)" hyperlink) (describing decarbonization as "on the edge of feasibility").

66. *See* Alexandra B. Klass, *Expanding the U.S. Electric Transmission and Distribution Grid to Meet Deep Decarbonization Goals*, 47 ENV'T L. REP. 10749, 10749–51 (2017) (describing the grid).

67. *See, e.g.*, NATIONAL ACADEMIES REPORT, *supra* note 65, at 8 ("During the 2020s, the nation would need to roughly double the share of electricity generated by non-carbon-emitting sources to roughly 75 percent by 2030. Until 2025, this would require an average pace of wind and solar installation that each year matches or exceeds the record historical yearly deployment of these technologies and accelerates to an even faster pace from 2025 to 2030."); Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591, 10592 (2017) (noting the massive increase in renewable generation "required to replace most fossil fuel generation and to help furnish the added electricity that will be needed as many uses currently employing fossil fuels (especially passenger transportation and space and water heating) are electrified").

68. *See* SAMANTHA GROSS, BROOKINGS INST., RENEWABLES, LAND USE, AND LOCAL OPPOSITION IN THE UNITED STATES 3, 8 (2020), https://www.brookings.edu/wp-content/uploads/2020/01/FP_20200113_renewables_land_use_local_opposition_gross.pdf

are not necessarily near existing energy infrastructure, such as transmission lines.[69] Solar and wind sources also generate power intermittently when the sun is shining and wind is blowing, unlike fossil-fueled power plants that burn non-stop or on demand, requiring updates and other changes to our system of delivering electricity.[70]

Collectively, these complications mean that decarbonizing electricity generation will likely require more land for wind turbines and solar panels, more land for power lines, and replacing or updating other existing infrastructure.[71] This amounts to one of the most ambitious infrastructure programs ever contemplated in the United States—reworking one of the most legally, technologically, and socially complex systems in American life on a short deadline.[72]

The stakes and scale of decarbonizing electricity generation have many implications, two of which are important here. First, the Biden Administration's election and commitment to decarbonization has spurred long-standing efforts to reform environmental law and enable massive, rapid renewable energy development.[73] Legal commenters have long identified ways that environmental law institutionalizes the fossil fuel energy system and erects barriers to renewable energy projects.[74] This counterintuitive effect can stem from competing mandates across environmental laws that highlight the field's outdated character in the

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[https://perma.cc/79LF-AKG3] ("The power density of renewable power is one to two orders of magnitude lower than that for fossil fuel power, meaning that renewable power requires at least ten times more land area per unit of power produced," although "a real zero-carbon power system will not take up nearly as much land as its power density might suggest.").

69. *See id.* at 9.

70. *See id.* at 3 (noting the intermittency of renewable power generation).

71. *See, e.g.*, Ruhl & Salzman, *supra* note 58, at 711–13 (summarizing potential land impacts of transitioning to renewable energy); Klass, *supra* note 66, at 10753 (describing updates to the transmission system for renewables).

72. *See* Ruhl & Salzman, *supra* note 58, at 712 ("This will be, to say the least, the most ambitious infrastructure project in our nation's history.").

73. *See, e.g.*, CLIMATE 21 TRANSITION MEMO, *supra* note 50, at 12 (identifying reforms to NEPA to streamline renewable energy development as a "Day One" priority for the Biden Administration).

74. *See* Uma Outka, *Environmental Law and Fossil Fuels: Barriers to Renewable Energy*, 65 VAND. L. REV. 1679, 1682 (2012) (arguing that "an implicit support structure for fossil energy is written into law in a range of areas, including environmental law, and that statutory and regulatory concessions to fossil energy inevitably distort how the costs of bringing new energy technologies," such as renewable energy, "to scale are perceived"); *see also* John Copeland Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59, 88 (2013) (detailing, among other things, challenges to renewable energy projects under environmental laws); *cf.* Amy J. Wildermuth, *Is Environmental Law a Barrier to Emerging Alternative Energy Sources?*, 46 IDAHO L. REV. 509, 537 (2010) ("Although environmental law does not pose a barrier, it also does not affirmatively encourage the development of alternative energy.").

complex and uncertain era of climate change.[75] As an early priority for reducing carbon emissions, legal and policy commenters have called for major reforms to environmental law to speed the transition to renewable energy.[76]

Second, the immense stakes and scale of decarbonization emphasize its transformative potential. In remaking one of the central building blocks of modern American life, decarbonization also offers an opportunity to transform systems of power and inequality in the United States.[77] The Green New Deal, for example, reflects this opportunity: a framework that successfully elevated the transformative potential of decarbonization to address issues of racial and economic inequality in American political discourse.[78] The Biden Administration has largely endorsed, albeit without the name, this transformative approach.[79]

As Professor Shalanda Baker—now the Deputy Director of Energy Justice at the U.S. Department of Energy—explained, harnessing this transformative potential requires expressly elevating historically disempowered communities to participate in the central decisions of the transition.[80] Like many systems of power in the United States, the development and persistence of the fossil fuel energy system reflects and replicates our national legacy of racial and economic inequality.[81] Along the entire lifecycle of fossil fuels—from extraction, to refining, to combustion—pollution and other negative impacts of fossil fuel reliance

75. J.B. Ruhl has called these "green versus green" conflicts. J.B. Ruhl, *Harmonizing Commercial Wind Power and the Endangered Species Act Through Administrative Reform*, 65 VAND. L. REV. 1769, 1773 (2012) [hereinafter Ruhl, *Harmonizing Wind Power*].

76. *See generally* LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES, *supra* note 28 (detailing expansive reforms across energy law, environmental law, and other legal fields to enable decarbonization).

77. *See, e.g.*, NATIONAL ACADEMIES REPORT, *supra* note 65, at 39 ("The transition to net zero provides a unique opportunity to build an energy system that is fair to all Americans and to help redress past discrimination and build a more just society.").

78. H.R. Res. 109, 116th Cong. (2019); *see also* Wyatt G. Sassman & Danielle C. Jefferis, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV'T L. 161, 170–80 (2021) (discussing the Green New Deal's framework and foundations).

79. *See* Julian Brave NoiseCat, *Joe Biden Has Endorsed the Green New Deal in All but Name*, GUARDIAN (July 20, 2020, 6:07 AM), https://www.theguardian.com/commentisfree/2020/jul/20/joe-biden-has-endorsed-the-green-new-deal-in-all-but-name [https://perma.cc/BJ35-3VTK] ("On Tuesday, Joe Biden did something unprecedented for a Democratic candidate assured of nomination: he moved left."); *see also* Marianne Lavelle, *House Democrats' Climate Plan Embraces Much of Green New Deal, but Not a Ban on Fracking*, INSIDE CLIMATE NEWS (July 1, 2020), https://insideclimatenews.org/news/30062020/house-democrats-climate-plan-green-new-deal-not-ban-fracking [https://perma.cc/7JEM-MBLL].

80. *See* Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 38–47 (2019).

81. *Id.* at 9–21.

have disproportionately harmed communities of color and low-income communities.[82] This disproportionate harm, in turn, has disempowered communities of color and low-income communities through economic dependence and marginalized political power.[83] Leveraging decarbonization to address these legacies requires, among other things, implementing the transition to renewable energy using expressly anti-racist and anti-oppressive policies.[84] These policies should elevate these communities' voices in decision-making and recognize that "historically disadvantaged groups should get additional assistance, rather than 'equal' assistance" to "level a historically uneven playing field."[85] Baker warns that approaches to the transition that emphasize "urgent action" and "at any cost"—a view she calls "[c]limate [c]hange [f]undamentalism"—risk crowding out necessary focus on community empowerment to achieve decarbonization's transformative potential.[86] Failing to center low-income communities and communities of color in the transition risks repeating the exclusionary legacy of the early environmental movement and leaving disempowered communities vulnerable to a new set of threats from the transition.[87]

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82. *Id.* at 10–15 (noting that "Black and brown bodies have always borne the burden of the United States' energy system" and discussing evidence); *see also* TIM DONAGHY & CHARLIE JIANG, GREENPEACE, FOSSIL FUEL RACISM: HOW PHASING OUT OIL, GAS, AND COAL CAN PROTECT COMMUNITIES 2 (2021), https://www.greenpeace.org/usa/wp-content/uploads/2021/04/Fossil-Fuel-Racism.pdf [https://perma.cc/F9S3-VK3Y] (finding that "[b]urning fossil fuels" and "[o]il and gas extraction" disproportionately harm "Black, Brown, Indigenous, and poor communities").

83. Baker, *supra* note 80, at 9–21 (describing "an energy system that, as many have documented, has systematically isolated people of color and low-income people in communities with compromised air quality, dirty water, and little hope of economic empowerment" and the "extractive relationship" between the fossil fuel industry and communities of color and low-income communities that "yields the same benefits and results that traditional colonies afforded the colonizer: a colony stripped of political power and voice; a privileged class within the colony that facilitates the work of the colonizer; and an outside world willfully blind to the harm enacted on the colony because it benefits from the goods and services extracted from the colony").

84. *Id.* at 38–47.

85. *Id.* at 42–43.

86. *Id.* at 15–17; *see also* Eileen Gauna, *Environmental Law, Civil Rights and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENV'T & SUSTAINABILITY L. 34, 56 (2012) [hereinafter Gauna, *Three Frameworks*] (noting a "new inequity of imperative"); *id.* ("We take the imperative of climate change, and the unquestionable need to do something fast, and use that to justify the siting of carbon-friendly, but still troublesome facilities in those communities that historically have been at the end of the path of least resistance.").

87. Baker, *supra* note 80, at 16–18. Regarding the new threats from the clean energy transition, see Welton & Eisen, *supra* note 24 for a survey of a wide range of justice issues raised by the transition to clean energy; Felix Mormann, *Clean Energy Equity*, 2019 UTAH L. REV. 335, 354–76 discussing the same; Uma Outka, *Fairness in the Low-Carbon Shift: Learning from Environmental Justice*, 82 BROOK. L. REV. 789, 804–18 (2017) [hereinafter Outka, *Fairness in the Low-Carbon Shift*], discussing issues of fairness in distributed solar policy and the Obama-era Clean Power Plan; and

### *B. Community Opposition, "NIMBYism," and NEPA Reform*

These two paths for reform—streamlining environmental law's procedures while empowering communities in the transition—converge in the Administration's upcoming rewrite of the regulations implementing NEPA.[88] But most academic and other proposals for reforming NEPA do not offer a coherent vision for communities' role in the transition, particularly in the development of renewable energy projects.[89] For example, many proposed reforms would indirectly limit public input or otherwise undermine public confidence in NEPA's process.[90] Those reformers that do acknowledge a role for communities in a reformed

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Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1088–96 (2014), for a survey on impacts from various low-carbon energy sources.

88. On October 10, 2021, the Council on Environmental Quality proposed "Phase I" of its revisions to NEPA's implementing regulations, focusing on a "discrete" set of changes where the Council believes it "make[s] sense to revert" to the pre-2020 regulatory approach. National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,759 (proposed Oct. 7, 2021) (to be codified at 40 C.F.R. §§ 1502, 1507–1508). The Council plans a forthcoming "Phase 2" rulemaking that will "more broadly revisit the 2020 NEPA regulations" to ensure, among other things, that NEPA meets "environmental justice objectives." *Id.* at 55,759.

89. *See, e.g.*, Gerrard, *supra* note 67, at 10603–05 (discussing proposed reforms to NEPA); Jeffrey Thaler, *Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENV'T L. 1101, 1141–55 (2012) (proposing reforms to NEPA and other laws to enable development of renewable energy); *see also* James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 295 (2019) (arguing for a wide range of reforms, including to NEPA, to better enable energy transport infrastructure); Trevor Salter, *NEPA and Renewable Energy: Realizing the Most Environmental Benefit in the Quickest Time*, 34 ENVIRONS: ENV'T L. & POL'Y J. 173, 182–84 (2011).

90. For example, several propose greater use of environmental assessments, mitigated findings of no significant impacts (mitigated FONSIs), and programmatic assessments. *See, e.g.*, Gerrard, *supra* note 67, at 10604–05. But there is no requirement to involve the public in developing the assessment or mitigation leading up to a mitigated FONSI. 40 C.F.R. § 1501.5(e) (2020). Current regulations require public involvement in the development of an assessment only to the extent "practicable." *Id.* They do not require public involvement in the development of mitigation measures, and only require that an agency consult the public before issuing a FONSI when the action "is, or is closely similar to, one which normally requires the preparation of an environmental impact statement," or "is one without precedent." *Id.* § 1501.6(a)(2). Likewise, programmatic approaches have been criticized as a "shell game," where agencies can use a "tiering" method to exclude certain stakeholders or issues from different levels of review. Beth C. Bryant, *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, 30 HARV. ENV'T L. REV. 441, 453 (2006) ("Critics charge that issues vaguely described at the programmatic level may never be adequately addressed in subsequent tiered documents, resulting in a 'shell game' of when and where deferred issues will be addressed."). These problems are exacerbated by other flaws with these forms of review that reduce public confidence, such as the lack of any requirement that an agency follow through with mitigation or monitor the actual impacts of a project. *See* Daniel A. Farber, *Adaptation Planning and Climate Impact Assessments: Learning from NEPA's Flaws*, 39 ENV'T L. REP. 10605, 10610 (2009).

NEPA process do not offer details about what that should look like.[91] Why? What is so complicated about involving communities in the decision-making regarding projects that affect them?

At least part of the answer stems from the history of local communities using NEPA to oppose renewable energy projects. Community opposition to renewable energy projects shares two counterintuitive features. First, local opposition to renewable energy projects seems surprising in light of widespread and consistent public support for renewable energy.[92] This feature makes community opposition to renewable energy projects susceptible to "not in my back yard" or "NIMBY" framing—that communities want renewable energy, but do not want the necessary infrastructure near them.[93]

However, studies on community views of renewable energy have shown that local opposition to projects is substantially more complex than the NIMBY framing.[94] The NIMBY label therefore has important rhetorical effects that both oversimplify and discredit the communities'

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91. *See, e.g.*, Jason Bordoff, Opinion, *Will Clean Energy Projects Face Troubles That Have Bedeviled Pipelines?*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/07/20/opinion/pipelines-clean-energy.html?auth=login-email&login=email [https://perma.cc/5P96-8J3M] (noting that "communities near these projects should be included to address concerns, develop solutions and defuse opposition" but not elaborating further); EVERGREEN ROADMAP, *supra* note 54, at 48 (arguing for a "balance" between "expedite[d] environmental review for renewable energy projects and adequate community engagement," but not elaborating further); Irma S. Russell, *Streamlining NEPA to Combat Global Climate Change: Heresy or Necessity?*, 39 ENV'T L. 1049, 1072 (2009) (noting that community input is "indispens[a]ble" but not discussing it further within proposals to streamline NEPA); *see also* Warigia M. Bowman, *Dust in the Wind: Regulation as an Essential Component of a Sustainable and Robust Wind Program*, 69 KAN. L. REV. 45, 99–101 (2020) (encouraging better community involvement in wind energy siting, but recommending that states look to NEPA as a model for procedural requirements that allow public input).

92. One commenter, for example, refers to this as "a paradoxical quality" of local opposition to renewable energy. Ori Sharon, *Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism*, 49 ENV'T L. REP. 10264, 10267 (2019) (quoting Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REGUL. 241, 249 (1994)).

93. *See, e.g.*, *id.* at 12067 (noting a "social gap"); K.K. DuVivier & Thomas Witt, *NIMBY to NOPE—or YESS?*, 38 CARDOZO L. REV. 1453, 1462 (2017) (defining NIMBYs along these lines); Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENV'T L. REV. 427, 428–29 (2010) (same); Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1051–52 (2009) (same).

94. *See* Sharon, *supra* note 92, at 10267 (noting that "a growing volume of studies suggests that the concept of NIMBY fails to adequately characterize the drivers of local opposition"); Joseph Rand & Ben Hoen, *Thirty Years of North American Wind Energy Acceptance Research: What Have We Learned?*, 29 ENERGY RSCH. & SOC. SCI. 135, 138 (2017) (noting that "many researchers now agree that the NIMBY framework is overly simplistic and unable to explain the complex motivations, concerns, and perceptions that can lead to opposition and negative attitudes").

concerns with a proposed project.[95] For example, NIMBY opposition is characterized as selfish and short-sighted.[96] And NIMBY opposition is typically characterized as opposition from white and wealthy communities.[97] Because of these connotations, labeling community opposition as NIMBY opposition can erase diverse perspectives within communities, especially perspectives of low-income people or people of color, while collectively trivializing community concerns.[98]

For these reasons, the NIMBY narrative has been "widely discredited" in social science literature "as simplistic, pejorative, politically inappropriate, and unhelpful as a framework to explain public attitudes" towards renewable energy development.[99] Rather, studies show the importance of contextualized and meaningful community engagement—and particularly the value of building trust and giving communities influence over key decisions in the project—as better guides for community support.[100] Nevertheless, NIMBY opposition persists in legal

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95. *See* Rand & Hoen, *supra* note 94, at 138 (noting that NIMBY "is generally used pejoratively" and is "politically inappropriate[,] and can often lead to misunderstanding, adding little value to the decision-making process").

96. *See, e.g.*, Kate Burningham, Julie Barnett & Gordon Walker, *An Array of Deficits: Unpacking NIMBY Discourses in Wind Energy Developers' Conceptualizations of Their Local Opponents*, 28 SOC'Y & NAT. RES. 246, 247 (2015) (NIMBY "is a pejorative shorthand to denote irrational, selfish, and obstructive individuals who fear change and stand in the way of essential developments. NIMBYs are considered parochial individuals who place the protection of their individual interests above the common good").

97. *See* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 281 n.297 (1997) [hereinafter Kaswan, *Bridging the Gap*] ("The 'NIMBY' responses of wealthy and powerful communities are considered one of the causes of the disproportionate distribution of undesirable facilities in poor and minority areas."); Warren L. Ratliff, *The De-Evolution of Environmental Organization*, 17 J. LAND RES. & ENV'T L. 45, 69 (1997) (noting that "NIMBY groups are a predominantly suburban phenomenon," as distinct from low-income communities or communities of color).

98. *See* Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 522 (1994) [hereinafter Gerrard, *Victims of NIMBY*] ("All forms of local opposition are often lumped together under the pejorative and trivializing label NIMBY.").

99. Rand & Hoen, *supra* note 94, at 143.

100. *See id.* (noting, among other lessons, that a "planning process that is perceived as 'fair' can lead to greater toleration of the outcome, even if it does not fully satisfy all stakeholders" and that "[m]ore participatory processes may increase trust and support"); PATRICK DEVINE WRIGHT, HANNAH DEVINE WRIGHT & RICHARD COWELL, WHAT DO WE KNOW ABOUT OVERCOMING BARRIERS TO SITING ENERGY INFRASTRUCTURE IN LOCAL AREAS? 5 (2016), https://orca.cf.ac.uk/93905/1/DECC_Infrastructure_PlacewiseLtd.pdf [https://perma.cc/MQP4-WF8V] (noting that "[s]uccessful [project] placement is associated with legitimacy and trust, which can be fostered by early dialogue and engagement" with communities, that demonstrating how community "input changed infrastructure proposals can increase trust and social acceptance," and projects work better "if developers site and design them in ways that work with, rather than against, local identities"). For a legal scholar arguing for greater sensitivity to community concerns in renewable energy siting disputes, see Alexa Burt Engelman, *Against the Wind: Conflict over Wind Energy Siting*, 41 ENV'T L. REP. 10549, 10561 (2011).

scholarship as the dominant characterization of community opposition to renewable energy development.[101]

This NIMBY narrative feeds into the second counterintuitive feature of local opposition to renewable energy projects: that environmental laws can serve as a barrier to renewable energy projects. Renewable energy projects carry important environmental benefits but also environmental impacts to local communities and wildlife that can generate conflicts between competing environmental values.[102] These "green versus green" conflicts highlight competing mandates in environmental law and the outdated nature of the relevant statutory schemes in an increasingly complex era of environmental harm and climate change.[103]

A classic example of this effect are conflicts between rigid legal protections for endangered species and renewable energy development.[104] Transitioning away from fossil fuels and mitigating the worst effects of climate change would broadly benefit endangered species.[105] But renewable energy developments can cause localized harms, such as the impacts that wind turbines can have on endangered bats and birds, that trigger legal protections which hinder or outright prohibit renewable energy development.[106] While these conflicts are not irresolvable, they can result in delays and uncertainty.[107] These conflicts within environmental law can add to the "opportunistic" characterization of local opposition to renewable energy projects—community claims appear to

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101. Michael B. Gerrard, *The Role of Lawyers in Decarbonizing Society*, 72 STAN. L. REV. ONLINE 112, 120 (2020) ("Objections by local stakeholders, commonly referred to as 'NIMBY' (Not in My Backyard) opposition, has become a significant obstacle."); *see also* DuVivier & Witt, *supra* note 93, at 1462 (noting NIMBY challenges to renewable energy); Lorde Martin, *supra* note 93, at 446–62 (same); Salkin & Ostrow, *supra* note 93, at 1067–72 (same).

102. *See, e.g.*, Zokovitch Paben, *supra* note 87, at 1088–96 (noting potential environmental justice impacts of wind, solar, and biomass energy and biofuels); Nagle, *supra* note 74, at 61–73 (noting biodiversity, scenic, water, noise, cultural, and other harms of "green" projects); Ruhl, *Harmonizing Wind Power*, *supra* note 75, at 1771 (noting wildlife impacts of wind power); Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENV'T L.J. 241, 247–54 (2011) (discussing land impacts of renewable energy development).

103. *See* Ruhl, *Harmonizing Wind Power*, *supra* note 75, at 1773 (articulating a "green versus green" conflict between wildlife protection and renewable energy).

104. *See id.* (using "commercial utility-scale land-based wind power generation as the case study" to examine conflicts between renewable energy and endangered species law).

105. *See id.* at 1788–89, 1798 (briefly noting the "the holistic benefits wind power offers to all species," and later arguing "the ameliorative benefits of wind power should be recognized within" endangered species regulation).

106. *See id.* at 1799 ("The overall environmental benefits of wind power, however, are of little direct and immediate value to an endangered bird struck by a wind turbine. If anything, therefore, the color blindness of the [Endangered Species Act] is what defines the statute.").

107. *Id.* at 1776–88 (detailing regulatory advances to address conflicts between endangered species laws and renewable energy development, but also noting litigation and other project delays).

leverage the letter of environmental law against its spirit.[108]

NEPA is particularly susceptible to this critique, as its procedures have long been criticized as both unnecessarily burdensome to renewable energy projects and a principal tool for NIMBY opposition.[109] The confluence of these features in NEPA reform debates creates a dominant narrative that presents NEPA's public-participation requirements as a vehicle for opportunistic attempts by mostly white, wealthy communities to delay and obstruct renewable energy development in a time of national urgency.[110] It is this narrative that complicates the role of communities in a reformed NEPA.

Cape Wind, an infamous offshore wind energy project, offers a good example of this narrative in action. Initially proposed in 2001, Cape Wind would have been the first utility-scale offshore wind development in the United States.[111] The project would have located 130 wind turbines in the Nantucket Sound off the coast of Massachusetts.[112] The project faced local opposition from a wide range of parties including Native American tribes, the local fishing industry, coastal municipalities, and wealthy and politically powerful landowners such as Ed Kennedy and Bill Koch.[113] Despite this opposition, the project generally succeeded in receiving the necessary regulatory approvals and in defending those approvals in court.[114] But the novelty of the project and community opposition made the regulatory process especially lengthy and arduous.[115] In 2015, two utilities backed out of their agreements to purchase electricity from the project, throwing the project's future in doubt.[116] Federal regulators

108. *See id.* at 1788 ("We know that wind power is going to be a key player in the quest for renewable energy, and that renewable energy will be a key player in the quest to reduce greenhouse gas emissions, so shouldn't [the U.S. Fish & Wildlife Service] get the [Endangered Species Act] out of the way of saving the planet?"); *see also* Kaswan, *Bridging the Gap*, *supra* note 97, at 271 (noting that environmental laws are "frequently used to accomplish" NIMBY opposition).

109. *See* Binder, *supra* note 39, at 45 ("NEPA has become a tool of the NIMBY movement.").

110. *See infra* notes 117–119.

111. *See* Kenneth Kimmell & Dawn Stolfi Stalenhoef, *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENV'T L.J. 197, 198 (2011).

112. *Id.* at 199–200.

113. *See id.* at 201–02 (highlighting the opposition of the Kennedys and Kochs).

114. *See, e.g.*, Pub. Emps. for Env't Resp. v. Hopper, 827 F.3d 1077, 1090 (D.C. Cir. 2016) (rejecting challenges to Cape Wind's permits and approvals).

115. For example, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.), shifted the lead agency that was responsible for NEPA compliance in the Cape Wind project, effectively restarting the process several years in. *See* Kimmell & Stalenhoef, *supra* note 111, at 205–06.

116. Jim O'Sullivan, *Two Utilities Opt out of Cape Wind*, BOS. GLOBE (Jan. 6, 2015, 7:31 PM), https://www.bostonglobe.com/metro/2015/01/06/major-setback-for-cape-wind-project/kggnYeAXRj03PyfIUn2iIM/story.html (last visited Oct. 17, 2021).

finalized all approvals in 2017, but the developer announced it would abandon the project later that year.[117]

Cape Wind's failure defies any one explanation. Delays in the project were a result of many different issues, including diverse and wide-ranging community concerns and a lack of regulatory structure for offshore wind.[118] Nevertheless, Cape Wind is characterized as the "poster child" of "[l]ocal NIMBY opposition."[119] Its failure is frequently oversimplified as white, wealthy landowners (particularly Bill Koch) opportunistically using environmental laws (including NEPA) to advance their own goals.[120] Some opposition to Cape Wind did undeniably match the NIMBY narrative. Bill Koch was candid about and his intent to fund groups that would use environmental laws to delay the project, as well as his motivation to protect his expensive property's coastal views.[121] But focusing *only* on this kind of opposition to explain Cape Wind's failure shows how the NIMBY narrative can obscure complexity and diversity in community concerns with a project, as well as the potential value that

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117. *Cape Wind*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/renewable-energy/studies/cape-wind [https://perma.cc/A64Q-4BGJ] (noting that Cape Wind's development announced it would relinquish its lease in December 2017, and did so in May 2018).

118. *See, e.g.*, Allison M. Dussias, *Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects*, 38 AM. INDIAN L. REV. 333, 336–72 (2014) (detailing the involvement of the Wampanoag Nation, and specifically the Aquinnah and Mashpee Wampanoag tribes, in the Cape Wind project, and how, for example, the tribes' advocacy led the federal Advisory Council for Historic Preservation to recommend that the lead federal agency not approve the Cape Wind).

119. *See* Ruhl & Salzman, *supra* note 58, at 713 (calling Cape Wind the "poster child" for "[l]ocal NIMBY opposition").

120. *See, e.g.*, Kimmell & Stalenhoef, *supra* note 111, at 198–202 (concluding that Cape Wind "was held captive by the permitting process for nearly a decade" because "of disproportionally rigorous regulatory scrutiny and the dogged political pressure applied by a few wealthy homeowners with ocean views in the direction of the proposed wind farm"). For a particularly impassioned argument that the "true reason" for opposition to Cape Wind is NIMBYism, see M.W. Marinakos, *A Mighty Wind: The Turbulent Times of America's First Offshore Wind Farm and the Inverse of Environmental Justice*, 2 BARRY U. EARTH L. & ENV'T JUST. J. 82, 85–86 (2012).

121. *See* Ros Davidson, *Cape Wind: Requiem for a Dream*, WINDPOWER MONTHLY (May 1, 2018), https://www.windpowermonthly.com/article/1462962/cape-wind-requiem-dream [https://perma.cc/QJ28-F7T8] ("Cape Wind had the particular misfortune to draw the ire of oil billionaire Bill Koch, who in 2013 had spent $19.5 million buying the waterfront estate of heiress Bunny Mellon, another opponent of the wind project. Koch soon wanted to combat what he called the project's 'visual pollution.' Indeed, Koch was the main financier behind—and president of—the Alliance to Protect Nantucket Sound (APNS), a non-profit organisation specifically founded to oppose Cape Wind that raised $40 million. In a 2013 interview with Massachusetts' CommonWealth Magazine, Koch described his strategy on Cape Wind as: 'Delay, delay, delay.' The alliance was legally savvy, at one point even hiring a renowned constitutional scholar and attorney, Larry Tribe."); *see also id*. ("In all fairness, the relentless opposition to the project included lawsuits filed by local Native American tribes, ordinary fishermen and residents, and tourism-related interests, albeit often backed by APNS.").

community engagement requirements can offer in addressing those concerns. As a common example in proposals to reform NEPA, Cape Wind helps show how this dominant NIMBY narrative has limited the scope of NEPA reform debates.[122]

To be clear, express calls to limit public participation in NEPA's process because of local opposition to renewable energy projects are rare.[123] Rather, the central problem is that reformers do not match proposals to improve NEPA's process for renewable energy projects with a vision of how to incorporate communities into this improved process.[124] Here, the dominance of the NIMBY narrative in NEPA reform debates offers an explanation. By oversimplifying communities as potential threats to rapid decarbonization, the narrative complicates their role in reform proposals. For example, some decarbonization advocates argue that public participation must be "balance[d]" against the urgency of the task.[125] This dynamic renders the reform debate susceptible to tradeoffs between community empowerment and urgency—susceptible to the climate change fundamentalism that Professor Baker warned of.[126]

## II. NEPA'S POTENTIAL AS A TOOL FOR COMMUNITY EMPOWERMENT

The central goal of this Article is to offer a vision for communities' role in a reformed NEPA process that enables rapid decarbonization. This vision seeks to use this moment of reform to revitalize NEPA as a tool for empowering communities in decarbonization and enforcing that commitment across federal agencies. Understanding how NEPA's participatory and enforcement structures can be linked to support one another requires a bit of history and context, as does understanding

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122. *See, e.g.*, Gerrard, *supra* note 67, at 10600 (noting "the tortuous path followed by the Cape Wind project," and listing citizen opposition to the project); Thaler, *supra* note 89, at 1135 (arguing that the "NEPA process imposes a significant time and financial burden, as demonstrated by the Cape Wind project" and that "citizen groups opposing the project initiated numerous court challenges based on alleged NEPA violations and other grounds, further augmenting an already time-consuming and costly process").

123. *See, e.g.*, Ruhl & Salzman, *supra* note 58, at 719–20 (arguing that a highly democratized and participatory transition to renewable is incompatible with emissions-reduction timelines because it would replicate "the Cape Wind story many times over").

124. *See supra* notes 89–90 and accompanying text.

125. *See, e.g.*, EVERGREEN ROADMAP, *supra* note 54, at 48 ("As CEQ under a Biden Administration seeks to reverse Trump Administration rollbacks to the environmental review process under the *National Environmental Policy Act*, it should ensure that a balance is struck between the imperative to expedite environmental review for renewable energy projects and adequate community engagement." (emphasis in original)).

126. Baker, *supra* note 80, at 15–20 (describing "climate change fundamentalism").

NEPA's past and future potential as a tool for advancing environmental justice and community empowerment. This Part therefore briefly offers this background. Section II.A discusses the misfit between NEPA's intended structure and current form. Section II.B then discusses NEPA's potential as a tool for community empowerment, drawing on the statute's history as a tool for advancing environmental justice.

### *A. NEPA's Structural Misfit*

Although public participation and citizen-led judicial review are now essential characteristics of NEPA's process, neither is reflected in the statute's structure nor was intended by NEPA's drafters.[127] Rather, NEPA's principal purpose was to redirect federal agency decisions in accordance with NEPA's newly announced national environmental policy.[128] The key problem NEPA's drafters were trying to solve was that the federal bureaucracy was making a huge range of decisions affecting the environment without guiding principles or coordination.[129] Congress

127. *See* Lynton K. Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENV'T L. REP. 50001, 50001 (1979) (noting, as one of NEPA's primary drafters, that "NEPA is not *primarily* (a) a full disclosure law; (b) a vehicle for citizen involvement; or (c) a regulation of agency procedures. The Act contributes importantly to each of these objectives, but they are incidental to its main purpose and none were primary reasons for its enactment" (emphasis in original)). NEPA's original purpose and transformation into its current form has been extensively covered elsewhere. Sam Kalen's work, in particular, provides an excellent overview of NEPA's intended purposes and transition to a procedural statute. *See* Kalen, *Lost Mandate*, *supra* note 35 (discussing NEPA's intended purposes); *see also* Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENV'T L. & POL'Y REV. 483 (2009) [hereinafter Kalen, *Devolution of NEPA*] (contextualizing judicial interpretation of NEPA as a procedural statute); Houck, *supra* note 33 (offering a candidly pessimistic view of NEPA's intended purposes).

128. *See, e.g.*, Kalen, *Lost Mandate*¸ *supra* note 35, at 118–19 ("Congress did not intend that NEPA would serve only an information disclosure function. Rather, Congress more significantly intended to embrace and employ ecology—however it understood the concept—and expected that its policy statement and declaration would serve as a substantive mandate for federal agencies. Congress further expected that CEQ would perform a proactive role in both environmental management and coordination of federal decisionmaking."); Lindstrom, *supra* note 35, at 249 ("The framers of NEPA intended to substantively redirect the goals and policy decisions generated within federal agencies so that, collectively, the nation would recognize the importance of environmental assets along with other national interests. The framers' intention was also to challenge the gridlock and fragmentation of environmental policy-making."); Weiland, *supra* note 35, at 281–82 ("The legislative history of NEPA provides a clear indication of the framers' intent when they drafted the Act" to "provide federal decisionmakers with a statutory referent when they are confronted with a situation in which they must balance competing economic, environmental, political, and social concerns.").

129. *See* Kalen, *Lost Mandate*¸ *supra* note 35, at 133 n.85 (noting that Bill Van Ness, a central player in NEPA's drafting, said "controversies over the Central Arizona Project and the Colorado River during the Johnson administration had convinced Jackson that the nation sorely needed comprehensive legislation to establish national priorities on the environment and to coordinate the activities of the federal government" (quoting ROBERT G. KAUFMAN, HENRY M. JACKSON: A LIFE IN

therefore announced guiding principles—a national environmental policy—and included "action-forcing" requirements that it hoped would induce agencies to follow those principles.[130] But Congress also expected agency resistance, and designed NEPA to bring recalcitrant agencies in line through high-level oversight within the executive branch facilitated by the Council on Environmental Quality (CEQ), an agency created by NEPA within the Executive Office of the President.[131]

NEPA's structure and central features reflect this executive-oversight system. The requirement that agencies prepare an "environmental report" that eventually became the centerpiece of NEPA's process, for example, was intended not only to force the relevant agency to assess the impact of its decisions but also as a tool that would allow overseers higher within the executive branch to assess the agency's action for compliance with Congress's policy.[132] And CEQ's unique structure as a legislatively created agency within the Executive Office of the President reflected Congress's desire to create a durable and independent advisor to help the President implement NEPA's principles.[133] Congress expressly rejected, for example, proposals from the Nixon Administration for a council of agency heads to implement NEPA, believing that an independent advisor would be an important counter to resistance within the federal

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POLITICS 202 (2000))); *see also* Daniel F. Luecke, *The National Environmental Policy Act, the Path to Two Forks, and Beyond*, 22 U. DENVER WATER L. REV. 467, 470 (2019) (explaining that Jackson "saw agency plans and projects as conflicted with one another (the Everglades being an example that pitted the Corps of Engineers against the National Park Service)").

130. *See* Caldwell, *supra* note 127, at 50001–02 (describing NEPA as "*a policy act*. Its purpose was to state for the first time and in a single place, a comprehensive *national commitment to protection of the environment* and to back up that commitment with a corresponding reorientation of specific policies and programs of the administrative agencies of the United States government" (emphasis in original)).

131. 42 U.S.C. §§ 4342–4347 (creating the Council on Environmental Quality); *see also* William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 222 (1989) (discussing NEPA's executive oversight structure and noting that NEPA's framers "fully anticipated high-level executive branch oversight").

132. *Hearing on S. 1075, S. 257 and S. 1752 Before the Comm. on Interior & Insular Affs.*, 91st Cong. 116 (1969) (statement of Lynton K. Caldwell, Professor of Government, University of Indiana) (noting that the requirement for agencies to evaluate and document that evaluation was to allow executive overseers to "scrutinize" proposed agency actions for compliance with Congress's policy).

133. John Hart, *The National Environmental Policy Act and the Battle for Control of Environmental Policy*, 31 J. POL'Y HIST. 464, 471, 475–82 (2019) (collecting views on the independence of CEQ, noting that: "[i]n essence, it was meant to focus primarily on providing policy advice to the president, but it was also given a brief to oversee environmental policy across the departments and agencies"); *see also id.* at 478 (noting the view of one of NEPA's key framers that CEQ was an "institutional device through which the president would share environmental policymaking with the Congress").

bureaucracy.[134] Given expected agency resistance to NEPA's mandate, the bill's framers joked in committee that serving on CEQ would make you so unpopular in Washington as to end your career.[135]

There are also signals that Congress expressly rejected a role for the public in enforcing NEPA's requirements.[136] For example, an initial version of the law included a provision that recognized each person's right to a healthy environment.[137] This provision was removed out of concern that it would authorize individual people to enforce NEPA's requirements in court.[138] Sam Kalen has argued that this was a proto-citizen-suit provision, a model for citizen enforcement of environmental laws that was included in later environmental laws such as the Clean Air Act.[139] In NEPA, however, this approach was set aside in favor of the executive-oversight model.

Nevertheless, NEPA's executive oversight structure quickly failed. While the Nixon Administration initially supported NEPA and CEQ, it soured on both shortly after NEPA became law.[140] Without White House support, CEQ folded under immense resistance to NEPA's objectives from the federal bureaucracy.[141] As Oliver Houck explained, "it is hard to

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134. *Id.* at 475–78 (explaining that Jackson was "absolutely clear" on the need for CEQ and that his views "directly countered" the Nixon Administration's proposal); *see also* Andreen, *supra* note 131, at 217 ("Senator Jackson agreed and stressed the importance of locating such a council in the Executive Office of the President in order to provide an effective counterpoint to the more parochial views of the established agencies.").

135. *Hearing on S. 1075, S. 257 and S. 1752 Before the Comm. on Interior & Insular Affs.*, *supra* note 132 (statement of Lynton K. Caldwell, Professor of Government, University of Indiana).

136. *See* Kalen, *Lost Mandate*, *supra* note 35, at 141–42.

137. *Id.*

138. *Id.* at 145–46, 153–56.

139. *Id.* at 145 n.139.

140. *See* Kalen, *Devolution of NEPA*, *supra* note 127, at 503 (noting that the "Nixon administration arguably became hostile to" NEPA and used the 1970s energy crisis as "cover" to undercut environmental programs); *see also* Hart, *supra* note 133, at 467 (noting that, while CEQ "got off to an impressive start," Nixon's "enthusiasm for the council was not sustained for very long"). Nixon's relationship with environmental issues is complex, but one common explanation is that Nixon viewed his administration's support for environmental issues instrumentally and lost interest in them when he no longer believed there were politically advantageous. *See generally* Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, SCI. HIST. INST. (June 2, 2017), https://www.sciencehistory.org/distillations/richard-nixon-and-the-rise-of-american-environmentalism [https://perma.cc/6NCV-DSV7] (detailing Nixon's approach to environmental issues and noting that at "a 1970 White House meeting with leading environmentalists, [Nixon] began by lecturing them: 'All politics is a fad. Your fad is going right now. Get what you can, and here's what I can get you'").

141. *See* Kalen, *Devolution of NEPA*, *supra* note 127, at 502–03 (noting the "backlash against" NEPA that "surfaced in some of the Federal agencies" that lead the White House to turn "hostile to" the statute); Weiland, *supra* note 35, at 285 ("The ability of the CEQ to play a prominent role in national policymaking has been hampered by the existence of an often hostile political environment within the EOP.").

appreciate the degree of opposition and hostility NEPA faced within the government, even to the clearly required impact statement process."[142] For example, one agency division chief chastised its staff for using the word "disturbed" in NEPA statements to describe land damaged by coal mining.[143] "These are the words used by the Sierra Club, Friends of the Earth, environmentalists, homosexuals, ecologists and other ideological eunuchs opposed to developing mineral resources," the division chief explained, and went on to prohibit the division's staff from using such "inflammatory words."[144]

CEQ's collapse in the face of such resistance was rapid and public. Within a year of NEPA's passage, senators were publicly pressuring CEQ to force agencies to submit the statements required by NEPA and to enforce the Act's mandate against agencies that submitted inadequate statements.[145] CEQ responded that it was "not satisfied" with its own performance but simply could not do what the senators asked.[146] CEQ's collapse permeated all aspects of the government, even the courts. In 1973, for example, Justice Douglas published a dissent highlighting CEQ's role as "expert ombudsman" and bemoaning "the current practice of federal agencies to undermine the policy announced by Congress in NEPA."[147]

The general failure of NEPA's executive oversight structure had two important consequences for our purposes here. First, dissatisfaction with CEQ prompted Congress to reassign primary responsibility for policing compliance with NEPA from CEQ to the newly created U.S. Environmental Protection Agency (EPA). Senator Edmund Muskie, a prominent competitor within the Senate to NEPA's lead sponsor, led a legislative push that culminated in the transfer of authority to EPA under Section 309 of the Clean Air Act of 1970.[148] In contrast with CEQ's "passive" oversight, Muskie wanted EPA to take initiative.[149]

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142. Houck, *supra* note 33, at 185 n.48.

143. *Id.*

144. *Id.*

145. E.W. Kenworthy, *Hart Prods Nixon on Environment Act*, N.Y. TIMES, Nov. 19, 1970, at 16, https://www.nytimes.com/1970/11/19/archives/hart-prods-nixon-on-environment-act.html [https://perma.cc/9Q8P-X68C].

146. *Id.*

147. United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 713–14 (1973) (Douglas, J., dissenting in part).

148. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q); Andreen, *supra* note 131, at 223–30; *see also* 42 U.S.C. § 7609.

149. Andreen, *supra* note 131, at 228, 230 ("Section 309, according to Senator Muskie, made EPA 'a self-starter, whenever you, unilaterally, see an environmental risk. You are given the responsibility to raise the red flag.'").

EPA's responsibility for reviewing agency actions under section 309 is obligatory and far-reaching, extending to any matter relevant to EPA's broad environmental-protection mission.[150] EPA can self-start a review even if an agency believes that its action does not trigger NEPA's requirements.[151] And EPA's review is "substantive" in the sense that it is not limited to the agency's compliance with the procedural requirement of preparing an environmental statement.[152] EPA can comment on any aspect of the environmental and public health repercussions of an agency's decision and can refer anything it finds unsatisfactory to CEQ.[153] As one commenter summarized, section 309 "was designed to create an advocate within the executive branch that would blow the whistle on harmful environmental actions and press the case against such actions all the way to the Executive Office of the President."[154]

But EPA's oversight responsibility under section 309 has been hindered by regulatory design. Current regulations only allow EPA to refer disputes *prior to* an agency's ultimate decision.[155] As a result, the few disputes that are referred to CEQ tend to focus on preparation of the environmental impact statement, despite EPA's much broader mandate under section 309.[156] All told, EPA and CEQ currently have limited ability under the current regime to influence the ultimate outcome of any agency decision.

The second consequence of agency resistance was early emphasis on enforcing NEPA's procedural requirements. Even as NEPA was moving through Congress, early environmental litigators were brainstorming ways to leverage judicial power to protect the environment.[157] Agency refusal to comply with NEPA's requirements provided these early litigators with strong test cases. Turning to the Administrative Procedure

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150. *Id.* at 226 (noting that section 309 "ordered EPA to comment in writing on all federal actions relating to EPA's duties and responsibilities"); *see also* WILLIAM H. RODGERS, JR. & ELIZABETH BURLESON, RODGERS ENVIRONMENTAL LAW § 7:14 (2d ed. 2021).

151. Andreen, *supra* note 131, at 228–29; *see also* RODGERS & BURLESON, *supra* note 150.

152. RODGERS & BURLESON, *supra* note 150.

153. 42 U.S.C. § 7609.

154. Andreen, *supra* note 131, at 229.

155. *See* 40 C.F.R. § 1504 (2020) (providing for "pre-decision" referrals to CEQ); *see also* Andreen, *supra* note 131, at 257 (noting that CEQ "has in effect prohibited" post-decision referrals).

156. Andreen, *supra* note 131, at 241, 256 ("The referral system, as established by CEQ, is largely geared to the production of better environmental information documents rather than better decisions," and as a result, "[t]he full potential of section 309, however, has yet to be realized"); *see also* RODGERS & BURLESON, *supra* note 150, § 7:15 (concluding that "[i]n recent years, section 309 has achieved an equilibrium of mostly talk," that "[r]eferrals do not happen," and that issues raised by EPA "occasionally are mentioned in court decisions but without serious consequence").

157. *See* Kalen, *Lost Mandate*, *supra* note 35, at 123–24, 133–34 (discussing the Airlie Conference and early environmental litigators' role).

Act's cause of action, these litigators sought to enforce NEPA's procedural requirements against agencies—chief among them the statutory requirement to prepare an environmental impact statement.[158] These procedural requirements put the litigators on stronger legal ground, while also pushing the courts towards NEPA's larger policy goals.

CEQ's early focus on environmental impact statements, including the introduction of public comments, supported this legal strategy. The beleaguered agency initially focused its efforts on the environmental impact statement, largely in response to an order from President Nixon to help clarify the process.[159] One innovation of this period was to introduce public comment during the preparation of the statement, a subtle change that would come to define much of NEPA's process.[160] But by the time CEQ issued formal regulations in 1978, it had come to regret this early emphasis. CEQ admitted that its early focus on procedures had misled many into believing that preparing the environmental statement was "an end in itself, rather than a means to making better decisions" that reflect NEPA's policy mandate.[161] This attempted course correction turned out to be too little too late.

The litigators' reliance on NEPA's procedural requirements ultimately proved their undoing in the courts. The litigators won early successes, advancing important features of NEPA's process through judicial decisions.[162] Some of these successes were dramatic, promising an important role for judicial oversight of NEPA's policy beyond simply its procedures.[163] Judge Skelly Wright's famous decision in *Calvert Cliffs'*

158. Kalen, *Devolution of NEPA*, *supra* note 127, at 489, 501–45 (explaining that "Congress most likely intended that its newly adopted national policy for the environment would not create a private cause of action against individual polluters," and extensively detailing NEPA litigation under the APA); *see also*, *e.g.*, Lindstrom, *supra* note 35, at 255–62 (reviewing NEPA's litigation proceeded under the APA).

159. Exec. Order No. 11,514, § 3(h), 3 C.F.R § 904 (1966–1970) (requiring CEQ to issue regulations "for the implementation of the procedural provisions" of NEPA, and specifically about the "environmental impact statement process"); *see also* Andreen, *supra* note 131, at 230 ("Consistent with the executive order, the guidelines primarily addressed the development of the impact statement process."); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENV'T L. 533, 538 n.24 (1990) (former general counsel of CEQ asserting that the Executive Order 11,514 restricted "the scope of the earlier CEQ guidelines" to section 102(2)(C)).

160. *See* Statements on Proposed Actions Affecting the Environment, 36 Fed. Reg. 7724, 7726 (Apr. 23, 1971) (providing at § 10(b) for public comment on draft environmental impact statements); *id.* (providing at § 10(e) for public hearings).

161. National Environmental Policy Act Regulations, 43 Fed. Reg. 55,978, 55,978 (July 30, 1979).

162. *See* Kalen, *Devolution of NEPA*, *supra* note 127, at 501–10 (noting NEPA's development under a "common-law case-by-case approach" and focusing on administrative law developments).

163. *Id.* at 501–09 (discussing Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1117 (D.C. Cir. 1971), and the early role for courts in enforcing NEPA);

*Coordinating Committee v. U.S. Atomic Energy Commission*,[164] for example, noted that Congress did not intend NEPA to be "a paper tiger" and that the statute's requirements "must be rigorously enforced by the reviewing courts."[165] Many saw *Calvert Cliffs* and decisions like it as staking out an important role for the judiciary in environmental protection.[166]

But the litigators' reliance on NEPA's procedures ultimately permitted the Supreme Court to nip this ambition in the bud. As Richard Lazarus has documented, then-Justice Rehnquist almost single-handedly limited NEPA's potential through deft maneuvering within the Supreme Court.[167] Rehnquist successfully prevented the Court from adopting expansive views of the judicial role in enforcing NEPA exemplified by *Calvert Cliffs*, and ultimately set up the Court's holding that NEPA was "essentially procedural."[168] The Court held that, so long as an agency complies with NEPA's specific procedures, there was no judicial role in questioning the agency's ultimate decision.[169]

In the midst of Rehnquist's campaign within the Court against NEPA, CEQ published its canonical 1978 NEPA regulations.[170] Issued at the

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Houck, *supra* note 33, at 184 (noting that the 1978 CEQ regulations "milked every possible obligation out of NEPA and its accompanying—and by that time, somewhat conflicting—case law").

164. 449 F.2d 1109 (D.C. Cir. 1971).

165. *Id.* at 1114.

166. *See* Kalen, *Devolution of NEPA*, *supra* note 127, at 509 ("Judge Wright's interpretation of NEPA [in *Calvert Cliffs*] offered considerable latitude for future courts to address the scope of the new Act."); Houck, *supra* note 33, at 181–82 (describing *Calvert Cliffs* as one of "two great coincidences" that gave NEPA relevance); *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 520 (1974) (a classic early article on judicial authority in environmental cases discussing the "importance of the ruling in *Calvert Cliffs*'").

167. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1577–85 (2012) (noting Justice Rehnquist's "clear, consistent vision" that NEPA imposed no substantive influence on agency decisions and that "he skillfully and persistently promoted that vision in authoring opinions and in commenting on the opinions authored by others on the Court").

168. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); Lazarus, *supra* note 167, at 1577–84 (describing Rehnquist's influence, including in the *Vermont Yankee* opinion, and noting that "[t]he 'essentially procedural' point also appears to have been one of Rehnquist's own making. It has no clear derivation in any of the written briefs submitted or oral arguments presented by the parties").

169. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) ("[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.'" (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976))).

170. 40 C.F.R. § 1500–1518 (1978).

order of President Carter, these regulations largely codified the judicial successes won by early environmental litigators.[171] They included a variety of procedural requirements that citizens could use to criticize agency environmental decision-making before the courts, and therefore influence environmental decision-making during the administrative process through threats of litigation.[172] It was in these regulations that CEQ expressed its regret for relying too heavily on NEPA's procedures, and sought to elevate NEPA's guiding principles in the regulatory requirements.[173] These regulations ultimately "became" NEPA for practitioners.[174]

Tension between the 1978 regulations and Supreme Court precedent put NEPA in a kind of limbo. Despite CEQ's attempt to reinvigorate NEPA through the 1978 regulations, the Supreme Court's ruling that, so long as the agency followed the rules, its ultimate decision was unassailable before the courts cabined the regulations' influence. The result was a kind of empty procedure—an obligation for agencies to follow the rules but not the spirit of NEPA. An obligation to study the environmental impacts of its decisions, but no obligation to make the most environmentally beneficial decision. An obligation to take comments from the affected communities, but no obligation to act on the communities' input when making its decision.[175] Indeed, many defended NEPA for its innovations bringing the public into environmental decision-making. But views on the effect of these public participation provisions range from them being "virtually meaningless" to having "some effect" based largely on the agency's desire not to be perceived as ignoring the public.[176] This result has made NEPA a poor fit for achieving either its

171. Lazarus, *supra* note 167, at 1545 ("[T]hose regulations, prepared by CEQ during the Carter Administration, reflected NEPA's high water mark. They in effect codified and extended some of the most expansive judicial precedent environmentalists had championed during the 1970s.").

172. *Id.*

173. National Environmental Policy Act Regulations, 43 Fed. Reg. 55,978, 55,978 (July 30, 1979) (explaining that "the environmental impact statement has tended to become an end in itself, rather than a means to making better decisions" by failing "to establish the link between what is learned through the NEPA process and how the information can contribute to decisions which further national environmental policies and goals" and promulgating new requirements by regulation to "correct these problems").

174. Houck, *supra* note 33, at 184.

175. *See* Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1128 (2003) ("But, NEPA does not impose a duty on the decision-maker to consider the views of the community, much less the environmental impacts identified in the environmental review process. So long as the public is allowed to participate, the decision-maker is free to decide where and how to locate a facility, without regard to the sentiments expressed in the public participation process." (footnote omitted)).

176. *Id.* at 1130; *see id.* nn.459–60 (summarizing views and collecting sources).

intended purpose of shifting the outcomes of federal decisions, or its unintended purpose of enabling public involvement in environmental decision-making.

Understanding this history highlights the stakes of the current moment of NEPA reform. While decarbonization advocates have recognized NEPA's importance, the content of their reforms double down on NEPA's procedural character. An alternative vision of NEPA that seeks to leverage both its public-participation and executive-oversight structures to empower communities in decarbonization offers a chance to revitalize NEPA by harmonizing its statutory structure with its modern role. As the next Part explains, NEPA's relatively long and disappointing history as a tool for advancing environmental justice helps guide this vision.

### *B. NEPA's Potential*

This section provides the theoretical framework and historic context for reforms intended to leverage NEPA as a tool for community empowerment. The section first highlights the role of community empowerment and self-determination in claims to environmental, energy, and climate justice, drawing out the important but limited role that public participation processes can play in supporting broader movements for justice. The section then briefly highlights NEPA's disappointing history as a tool for environmental justice, drawing out two lines of reform that guide the proposals laid out in Part IV.

#### *1. Community Empowerment*

This section discusses the value and limits of public participation requirements in empowering communities and advancing movements for racial and economic justice. At the outset, it is important to recognize that concepts of justice in environmental, climate, and energy policy arise out of vibrant and dynamic social movements, and are therefore dynamic themselves.[177] The policy landscape of decarbonization is also developing

177. *See, e.g.*, Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENV'T L. REV. 459, 461 n.9 (2002) [hereinafter Foster, *Devolved Collaboration*] (noting the environmental justice movement "synthesiz[es] aspirations for distributional and procedural equity, political accountability, and social justice into an untidy theoretical framework"); Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENV'T AFFS. L. REV. 143, 160 (2002) ("Because it is a term that has described the goals of environmental justice activists, attempting to study an abstract meaning runs the risk of changing the concept into one divorced from what these activists intended it to capture and what they hoped to achieve. It should be apparent that a conception of 'environmental justice' that is different from that of the movement will be significantly less useful, or of no use, in

in ways that complicate traditional frameworks of justice in these areas.[178] Here, I focus on a central theme of the environmental justice movement: community empowerment and self-determination.[179] I use this framework to draw two specific lessons relevant to public participation in decarbonization: the necessary role of community voice in environmental decision-making, and the importance of leveraging public participation requirements to build capacity and support broader movements for racial and economic justice.

Issues of justice in environmental, energy, and climate policy are frequently articulated through distributive or procedural justice frameworks.[180] These frameworks reflect the origins of the environmental justice movement highlighting that industry and regulators subjected communities of color and low-income communities to more dangerous, more polluted land uses such as waste dumps and toxic industries than

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understanding the difficulties of integrating the movement's concerns into the existing environmental regulatory framework."); *see also* Welton & Eisen, *supra* note 24, at 314 (noting in the specific context of the clean energy transition "the perils of losing or transforming the voices of affected communities as we channel their concerns into academic, analytical frames").

178. For example, the transition to clean energy implicates new issues in rural communities. *See* Welton & Eisen, *supra* note 24, at 360–62 (noting impacts from renewable energy to rural communities); *see also* Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 280–85 (2019) (discussing impacts of the clean energy transition); Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 149 (2013) (same). The role of distributed electricity generation also presents novel issues of justice. *See* Outka, *Fairness in the Low-Carbon Shift*, *supra* note 87, at 805.

179. *See, e.g.*, Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL'Y 265, 280 (2006) ("One of the central tenets of the Environmental Justice movement is that communities should speak for themselves—that is, when decisions are being made, those affected by the decisions should have a prominent place at the table."); Foster, *Devolved Collaboration*, *supra* note 177, at 461–62 ("Environmental justice advocates have thus challenged environmental decision-makers to account for the distribution of environmental benefits and burdens in environmentally vulnerable (i.e., disproportionately impacted and disenfranchised) populations by empowering populations with a meaningful role in assessing and managing environmental benefits and burdens in their communities."); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 654 (1992) (arguing for "community-based lawyering and the practice of empowerment" based on poverty law practice); *see also* FIRST NAT'L PEOPLE OF COLOR ENV'T LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), https://www.ejnet.org/ej/principles.pdf [https://perma.cc/HT8C-UDJF] ("Environmental Justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.").

180. *See* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10683–93 (2000) (discussing frameworks of distributive and procedural justice). Kuehn defines distributive justice as "the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given" and procedural justice as "the right to treatment as an equal. [This] is the right, not to an equal distribution of some good or opportunity, but [the right] to equal concern and respect in the political decision about how these goods and opportunities are to be distributed." *Id.* at 10683, 10688 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977)). For an example of these frameworks in issues of clean energy, see Welton & Eisen, *supra* note 24, at 342–43, which distinguishes between the substantive and procedural justice aspects of the transition to clean energy.

white and wealthier communities.[181] Responses to the environmental justice movement sought to resolve this unfair distribution of environmental harms and benefits, in part, by ensuring that communities were involved in government decision-making procedures that affected them.[182]

But overemphasizing these frameworks can obscure the structural role of racism and inequality in disempowering communities.[183] Environmental injustice both stems from and supports broader legacies of racial and economic disempowerment in the United States.[184] Environmental injustice in cities and urban areas, for example, has roots in redlining—the practice of segregating people of color within communities by limiting access to essential services or credit for home loans—and other racist city planning practices that undercut the political and economic power of communities of color.[185] Likewise, environmental injustice in Native American communities is linked to our national history

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181. Decades of social science research has confirmed this disparity, principally on the basis of race, across the United States. *See, e.g.*, Paul Mohai, David Pellow, & J. Timmons Roberts, *Environmental Justice*, 34 ANN. REV. ENV'T RES. 405, 408–18, 425 (2009) (noting that "[h]undreds of studies have now documented unequal exposures by race, ethnicity, and economic class"); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 787–88 (1998) [hereinafter Foster, *Justice from the Ground Up*] (noting how "many studies document" that "commercial waste facilities are disproportionately located in poor communities of color. This disparate impact and its empirical basis have provided substance to claims of environmental racism and environmental injustice").

182. *See* Foster, *Devolved Collaboration*, *supra* note 177, at 462–63 (noting government efforts to involve communities in decision-making but critiquing those efforts as not addressing structural barriers to meaningful participation by communities of color and low-income communities).

183. *See* Foster, *Justice from the Ground Up*, *supra* note 181, at 778–79 (explaining how traditional distributive frameworks of environmental justice overlook structural barriers to community involvement stemming from the "set of ongoing social processes which structure the political economy of poor communities of color").

184. *See, e.g.*, *id.* at 799–800 (explaining that "segregation has intense political and economic consequences, particularly for poor African Americans and Latinos living in inner-cities," including geographic, cultural, and social isolation that, "in turn, leads to economic and political marginalization. Accordingly, the political process rarely takes the concerns of such communities seriously, and decision-makers often ignore them altogether"). *See generally* Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 745 (1994) ("The spaces in which we live affect our spirit and actions. Oppressive physical surroundings perpetuate and reinforce their residents' oppression. The processes by which our habitat is planned and built keeps people isolated, disempowered and depressed.").

185. *See* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 737 (1993) ("Environmental racism can be said to be a manifestation of the effects of discriminatory housing and real estate policies and practices, residential segregation and limited residential choices influenced by such discrimination, discriminatory zoning regulations and ineffective land use polices, racial disparities in the availability of jobs and municipal services, imbalances in political access and power, and 'white flight' from cities that has created racially homogenous suburbs and impoverished cities.").

of colonialism and resource extraction that has similarly disempowered these communities.[186] Legacies of pollution, contamination and other environmental injustices therefore weave together with other manifestations of structural inequality, such as lack of access to adequate healthcare, to further deepen inequality and political marginalization of these communities.[187] Without confronting systems of economic and racial disempowerment more broadly, a "fair" process or "fair" result in a specific instance can replicate broader injustices.[188] Put another way, offering communities a seat at the table is not an effective means of advancing justice if, for example, the community does not have the resources, expertise, or power to effectively influence the ultimate decision.

The central claims of the environmental justice movement therefore extend beyond fair distribution and fair process to the active empowerment of communities of color and low-income communities.[189] A justice-based approach to reform that focuses only on distributive outcomes or procedural fairness is incomplete. Rather, justice-based reforms should seek a fair outcome, a fair process, and to affirmatively empower the affected community to overcome systemic barriers to racial and economic justice.

For this reason, community empowerment is key to the transformative

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186. *See* Foster, *Justice from the Ground Up*, *supra* note 181, at 806 ("Environmental racism manifests itself quite differently in the case of Native Americans, reflecting a particular racial ideology rather than measurable acts of discrimination. When tribal sovereignty is not respected, Native-American groups often find themselves fighting racial paternalism and cultural imperialism.").

187. These cycles of injustices replicate abroad as well. *See* Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J.L. & POL. ECON. 109, 111 (2020) ("From Cancer Alley in Louisiana to the Pacific islands threatened by rising sea levels, carbon capitalism creates sacrifice zones populated by racialized communities whose plight is a harbinger of the harm that will eventually befall the vast majority of the world's population as the planet is rendered increasingly uninhabitable. Although greenhouse gases do not respect national borders, national elites deploy racialized systems of border control to perpetuate the illusion that persons who are classified as white can somehow escape the economic and ecological ravages of carbon capitalism by erecting walls and fortresses.").

188. Foster, *Justice from the Ground Up*, *supra* note 181, at 778 (noting how a siting process that does not address systemic barriers to participation for low-income communities and communities of color "relies upon, and replicates, structural inequalities").

189. Foster, *Devolved Collaboration*, *supra* note 177, at 462 (noting the goals of "empowering populations with a meaningful role in assessing and managing environmental benefits and burdens in their communities" and increasing "the influence of vulnerable communities in decision-making processes by involving them at the beginning and providing them with technical and other resources comparable to those used by risk producers"); *see also* Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 573, 585 (2008) ("Environmental justice is about power.").

potential of decarbonization.[190] Because the transition to renewable energy will fundamentally remake an element of American life that has historically disempowered communities of color and low-income communities, decarbonization offers the potential to reorient this system away from oppression and towards empowerment.[191] Such a transformation requires guaranteeing fair outcomes, fair process, *and more*—prioritizing and elevating communities of color and low-income communities in the key decisions and benefits of decarbonization.[192] Open questions such as what counts as "renewable" energy, who benefits from economic changes decarbonization will bring, and where the necessary renewable energy infrastructure will be sited all emphasize decarbonization's transformative potential.[193] Historically, communities of color and low-income communities have been excluded from these types of questions by the hierarchical structures of environmental and energy policy.[194] Continued focus on expert, disconnected decision-making risks perpetuating these mistakes.[195]

Legal requirements that government decision-makers engage with communities affected by their decisions can therefore play an important

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190. *See* Baker, *supra* note 80, at 24 (arguing to use "energy policy as an equity-based tool of empowerment and system transformation"); *see also* Outka, *Fairness in the Low-Carbon Shift*, *supra* note 87, at 792, 805 (noting that environmental justice "principles include the right to a clean and safe environment, antidiscrimination, self-determination, equal participation in decision making, and equal access to resources," and that "justice demands climate change action to reduce environmental harms, create new energy and environmental benefits, and 'close the [environmental justice] gap' in climate impacts"); Alice Kaswan, *Greening the Grid and Climate Justice*, 39 ENV'T L. 1143, 1160 (2009) [hereinafter Kaswan, *Greening the Grid*] ("Climate justice is not only about achieving certain environmental or economic justice *results*. It is also about democratic participation—the involvement of disadvantaged groups in developing the policies that will affect their well being." (emphasis in original)).

191. Baker, *supra* note 80, at 6 ("Energy policy, at this particular moment of transition, could restructure society by redistributing power along lines of race and class.").

192. *See id.* at 42–43 (arguing for "an anti-oppression approach to energy policy" that "advances these notions of [procedural and substantive] justice, but goes further, taking into account the historical injustice perpetuated within the structure of the system. In this way, equity—the notion that historically disadvantaged groups should get additional assistance, rather than 'equal' assistance, in order to level a historically uneven playing field—becomes a part of the fabric of anti-resilience").

193. *See, e.g.*, Welton & Eisen, *supra* note 24, at 330–42, 357–62 (discussing issues with who benefits from the transition and where infrastructure is sited); Uma Outka, *Environmental Justice Issues in Sustainable Development: Environmental Justice in the Renewable Energy Transition*, 19 J. ENV'T & SUSTAINABILITY L. 60, 86–91 (2012) [hereinafter Outka, *Justice in the Renewable Energy Transition*] (discussing how different conceptions of "renewable energy" can have different justice impacts).

194. *See* Baker, *supra* note 80, at 43–44 (noting how communities historically been excluded from policy and siting decisions).

195. *Id.* at 15 (noting that approaches "blind to distributive impacts" of the clean energy transition "run the risk of masking pre-existing inequality in communities particularly vulnerable to climate change and making it harder to confront that inequality").

role in empowering communities if designed with broader social context in mind.[196] While environmental law is somewhat exemplary in its use of public participation and oversight requirements, attempts to leverage these tools to address racial and economic inequality have been undermined by a failure to address structural barriers to meaningful community influence over government decisions.[197] This experience has led to specific calls for reform in NEPA, as discussed in the next section. But before turning to those calls for reform, two general lessons from this work on environmental justice and community empowerment are worth noting here.

The first is the irreplaceable nature of community voice in revealing and combating structural barriers to meaningful community power. This lesson takes on specific importance in light of proposals to use mapping tools that try identify environmental inequality by aggregating and visualizing demographic and environmental data to implement federal commitments to justice in decarbonization.[198] The deeply embedded nature of inequality means such barriers are hard for experts or distant regulators to recognize without grassroots input.[199] Communities are uniquely positioned to identify these barriers and guide solutions most helpful to empowering them.[200] For this reason, expertise-based methods of identifying inequality, such as mapping, can be helpful tools but not

196. *Id.* at 43–44 (using the example of the siting of the Dakota Access Pipeline to illustrate how stronger community role in siting decisions can help "upend[] the hierarchy hardwired into the energy system").

197. *See, e.g.*, Foster, *Justice from the Ground Up*, *supra* note 181, at 831–34 (noting public participation requirements "promise to include the public in the decision-making process" but frequently replicate injustice by failing to address barriers to meaningful participation by racially and economically disadvantaged communities); *see also* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENV'T L.J. 3, 51 (1998) [hereinafter Gauna, *The Environmental Justice Misfit*] (explaining how claims to environmental justice do not fit dominant models of public participation in agency decision-making).

198. See Pamela King, *This EPA Mapping Tool Could Reshape Environmental Justice*, E&E NEWS (Feb. 26, 2021, 1:29 PM), https://www.eenews.net/greenwire/2021/02/26/stories/1063726157?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Agreenwire (last visited Nov. 1, 2021) (discussing the Biden Administration's plan to use mapping tools).

199. *See* Foster, *Justice from the Ground Up*, *supra* note 181, at 807–08 ("Grassroots struggles are a window into the social relations and processes underlying distributive outcomes. To be sure, they are not the only window into this process. Importantly, however, grassroots accounts tell a crucial narrative that 'reveals the particular experiences of those in social locations, experiences that cannot be shared by those situated differently but that they must understand in order to do justice to the others.'" (quoting Iris M. Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE 120, 131 (Seyla Benhabib ed., 1996))).

200. *See id.* at 808 ("[G]rassroots struggles can help policy-makers understand the way in which individuals in disaffected communities experience the very social and structural constraints upon which the siting process relies."); *see also* Baker, *supra* note 80, at 43 (noting that communities, "particularly the most vulnerable, are best positioned to create frameworks that unburden them").

replacements for community voice.[201] Rather, meaningful community engagement is a necessary supplement to these kinds of expertise-based tools.[202] They must be matched with case-by-case, context-specific methods of community engagement that properly designed public participation requirements can provide.

The second lesson is that public participation requirements alone are insufficient to empower communities.[203] Rather, participation requirements should be designed and implemented with a focus on leveraging the participatory process to support broader social movements for community empowerment.[204] The environmental justice movement's experience showed that even well-intended participatory structures will frequently fail to give communities meaningful influence over decisions affecting them.[205] As a result, advocates argued that participatory processes should be designed and used to shift power to communities by, for example, leveraging participatory provisions to build community resources and organize political power.[206] Public participation requirements can, for example, provide communities with information,

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201. The federal government's primary tool for mapping environmental inequality is called EJSCREEN. *See What Is EJSCREEN?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ejscreen/what-ejscreen [https://perma.cc/6L6T-VTTR] ("EJSCREEN is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators."). Part of the Biden Administration's environmental justice policies expressly identified "building off" EJSCREEN to create "a Climate and Environmental Justice Screening Tool." *See Fact Sheet on Biden Climate Plan*, *supra* note 60.

202. *See* Gauna, *The Environmental Justice Misfit*, *supra* note 197, at 51 (noting that environmental justice activism raises political questions and is therefore "inconsistent with an expertise-oriented approach").

203. *See* Outka, *Fairness in the Low-Carbon Shift*, *supra* note 87, at 823 (noting that "[e]ven with progressive reforms, law is a limited tool for advancing energy and environmental justice," and quoting environmental justice advocates that "public laws and policies constitute a '*necessary* but *insufficient* condition for ensuring . . . equitable solutions'" (quoting Caroline Farrell, *Just Transition: Lessons from the Environmental Justice Movement*, 4 DUKE F.L. & SOC. CHANGE 45, 55 (2012) (emphasis in original))).

204. *See* Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 236 (2005) [hereinafter Outka, *The Problem of the Law*] ("Luke Cole argues that the strategic use of public participation provisions can serve both to protect vulnerable communities from environmental harms, as in *El Pueblo*, and also to bring 'those communities together to realize and exercise their collective power.'" (quoting Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENV'T L.J. 687, 689 (1995) [hereinafter Cole, *Models of Environmental Advocacy*]); Foster, *Justice from the Ground Up*, *supra* note 181, at 808 (explaining that "grassroots struggles are a crucial arena of restructuring social relations in systems of localized environmental decision-making").

205. *See generally* Luke W. Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733 (1999) [hereinafter Cole, *Theory and Reality*] (noting failures of public participation provisions intended to improve community involvement).

206. *See* Cole, *Models of Environmental Advocacy*, *supra* note 204, at 703.

experience, expertise, and opportunities to organize that can help advance movements for justice beyond a specific project.[207] In this sense, public participation provisions can play an important role in building broader community capacity during the early stages of decarbonization.

### *2. Environmental Justice and NEPA's Structural Limits*

NEPA took on an early and central role in federal attempts to advance environmental justice.[208] In 1994, well after NEPA had settled into its current structure, President Clinton issued an executive order directing federal agencies to incorporate issues of environmental justice into their decision-making procedures under NEPA.[209] Looking to NEPA made sense, as commitments to justice are consistent with NEPA's statutory policy.[210] NEPA's process could also generate information that would help regulators better understand disparate impacts of their decisions and better disseminate information regarding a decision to affected communities.[211] President Clinton expressly identified NEPA's public participation requirements and EPA's section 309 oversight as important tools for advancing justice and holding agencies accountable to that demand.[212]

Agencies generally set out to incorporate these goals through discretionary guidance documents, rather than legally-binding

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207. *See id.* at 705–06.

208. NEPA's disappointing history with the pursuit of justice has been extensively documented elsewhere. *See* Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENV'T L. REV. 149, 153–57 (2013) [hereinafter Kaswan, *Environmental Justice and Environmental Law*] (reviewing briefly NEPA's history as a tool for advancing environmental justice to draw out two central reforms proposed by environmental justice advocates). *See generally* Outka, *NEPA and Environmental Justice*, *supra* note 44 (describing NEPA's limitations and "structural gaps" as a tool for advancing environmental justice).

209. Exec. Order No. 12,898, 3 C.F.R. § 859 (1994).

210. COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 7 (1997) [hereinafter CEQ ENVIRONMENTAL JUSTICE GUIDANCE], https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf [https://perma.cc/2XQ3-9DXE] (noting that "attainment of environmental justice is wholly consistent with the purposes and policies of NEPA"); Outka, *NEPA and Environmental Justice*, *supra* note 44, at 605 ("Environmental justice is consistent with—and even implicit in—the stated goals of NEPA, most notably the goal of assuring 'for *all* Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.' Environmental justice provides the practical and conceptual specificity needed to lend content to this otherwise abstract ideal." (emphasis in original) (quoting CEQ ENVIRONMENTAL JUSTICE GUIDANCE, *supra*)).

211. *See* Kaswan, *Bridging the Gap*, *supra* note 97, at 289 (noting that NEPA "establishes an environmental review process that can provide useful information to a community questioning the wisdom and fairness of a siting decision").

212. Memorandum on Environmental Justice, 1 PUB. PAPERS 241 (Feb. 11, 1994).

regulations.[213] For example, guidance from the Council on Environmental Quality encouraged all agencies to meaningfully involve communities early in the NEPA process, support community participation through "adaptive" and "innovative" approaches, and extend these commitments beyond NEPA's procedural requirements to all agency actions affecting communities of color and low-income communities.[214] EPA similarly issued a guidance document to incorporate environmental justice into its section 309 review.[215]

But these ambitions largely foundered on NEPA's structural limitations.[216] By opting to work through guidance documents rather than changes in NEPA's regulatory structure, efforts to advance issues of justice through the NEPA process were undermined by the limits of that process.[217] For example, agencies would undermine attempts to better engage communities by taking public comment too late to have any influence on the agency's decision.[218] Other good-faith efforts, such as providing documents in multiple languages, would fail to reach structural barriers of racial and economic inequality that prevented meaningful community input, such as a community members' lack of expertise, resources, or time.[219]

These failures within the NEPA process were exacerbated by the limits

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213. *See* Outka, *NEPA and Environmental Justice*, *supra* note 44, at 605–07 (detailing agency efforts).

214. *See* CEQ ENVIRONMENTAL JUSTICE GUIDANCE, *supra* note 210, at 9, 13, 15–17.

215. U.S. ENV'T PROT. AGENCY, FINAL GUIDANCE FOR CONSIDERATION OF ENVIRONMENTAL JUSTICE IN CLEAN AIR ACT 309 REVIEWS (1999), https://www.epa.gov/sites/production/files/2014-08/documents/enviro_justice_309review.pdf [https://perma.cc/BY8Y-AWHC].

216. Outka, *NEPA and Environmental Justice*, *supra* note 44, at 608 (noting how "structural gaps within the statutory and regulatory framework" hindered NEPA's ability to serve environmental justice).

217. *Cf.* CEQ ENVIRONMENTAL JUSTICE GUIDANCE, *supra* note 210, at 21 ("The guidance interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898. It does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person.").

218. *See* Outka, *NEPA and Environmental Justice*, *supra* note 44, at 610 (noting that "there is only a negligible chance that an agency will choose the no action alternative at this stage" where the public is involved); *see also* Letter from Richard Moore, Chair, Nat'l Env't Just. Advisory Council, to Andrew Wheeler, Administrator, U.S. Env't Prot. Agency (Aug. 14, 2019) [hereinafter NEJAC Letter], https://www.epa.gov/sites/production/files/2019-10/documents/nejac_letter_nepa.pdf [https://perma.cc/LKA8-TDRL] ("[M]ost disconcerting is that while NEPA intends for an examination of reasonable alternatives, analysts often go into their work with a predetermined preferred alternative.").

219. *See, e.g.*, Foster, *Devolved Collaboration*, *supra* note 177, at 463 (criticizing one agency approach as, "[l]ike its predecessor approaches, . . . indifferent to (or innocent about) the social, structural, and institutional conditions necessary to realize its own promises, including its aspiration of more equitable decisions").

of NEPA's oversight structure. NEPA's "essentially procedural" nature made agency commitments to environmental justice largely unenforceable by communities affected by the agency's decision.[220] And the lack of any credible means of executive oversight meant there was no coordinated way to shift agency decision-making away from abstract issues of environmental planning towards contextualized and individualized understanding of racial and economic inequality within a community.[221] Without that kind of centralized change in how federal agencies approached environmental decision-making, pursuing environmental justice through NEPA was self-limiting. As such, the pursuit of justice has been relegated to "a small and underemphasized part of the NEPA process."[222]

Recognizing these limitations, environmental justice scholars and advocates broadly identified two proposals for reforming NEPA.[223] The first is to affirmatively require that agencies address structural barriers to meaningful community participation by engaging communities of color and low-income communities and, where necessary, providing these communities with expertise and resources.[224] The second line of reform is

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220. *See* Outka, *NEPA and Environmental Justice*, *supra* note 44, at 605 (noting that NEPA's "essentially procedural" nature "is the fundamental limitation of NEPA as a tool for environmental justice and other forms of environmental protection"); Outka, *The Problem of the Law*, *supra* note 204, at 238 (explaining that courts "do not enforce [the Executive Order's] mandates" and discussing general judicial failure to require environmental justice analyses).

221. *See* Gauna, *Three Frameworks*, *supra* note 86, at 49–51; *see also* Foster, *Devolved Collaboration*, *supra* note 177, at 467.

222. NEJAC Letter, *supra* note 218; *see also* Kaswan, *Environmental Justice and Environmental Law*, *supra* note 208, at 155 (noting that environmental justice reforms "have, no doubt, exposed distributional impacts in ways that have empowered disadvantaged communities and improved outcomes, but they have not placed distributional outcomes or participatory control at the center of environmental decision-making").

223. Additional reforms to address other elements of NEPA, such as its timing and scope, have been proposed. *See, e.g.*, Outka, *NEPA and Environmental Justice*, *supra* note 44, at 610–18 (surveying reforms).

224. *See, e.g.*, Foster, *Devolved Collaboration*, *supra* note 177, at 463 (warning that participatory reforms can "add renewed legitimacy to racial and class distributional inequities, further entrenching them in the landscape of environmental decisions" without attention to the "social, structural, and institutional conditions necessary to realize its own promises . . . particularly the existence of social capital within communities seeking to form collaborative structures"); Outka, *Justice in the Renewable Energy Transition*, *supra* note 193, at 108 (noting that, in land use permitting contexts, the "burden on project opponents to hire an attorney and produce expert testimony in support of objections to a permit application or approval is often insurmountable for environmental justice advocates"); *see also* Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENV'T L. REV. 151, 223–24 (2010) ("If we believe in the underlying purpose of public participation, we must equip citizens with the agents and experts they need to make their participation authentic and effective."); Stephanie Tai, *Three Asymmetries of Informed Environmental*

to build expertise on issues of racial and economic justice among environmental agencies.[225] Scholars argue that voluntary efforts to address environmental justice, even those in good faith, failed in part because of a tension between agencies' institutional competence and the demands of racial and economic justice.[226] Resolving this tension requires more than "fixing" the regulatory process; it requires centering environmental regulation around a new set of normative values regarding race and inequality.[227] Recent years have seen continued advocacy on these fronts, but with frustratingly little success.[228]

These proposals resonate with calls to revitalize NEPA's executive-oversight structure. The reforms identified by environmental justice advocates reflect a lack of meaningful accountability within NEPA's structure—a commitment to public engagement without the structural tools or oversight features to effectively accomplish that commitment. This character stems in large part from the failure of NEPA's executive-oversight function and subsequent misfit between NEPA's intended structure and ultimate purposes, including its participatory function.[229] This misfit is at the root of NEPA's procedural character, which has in turn stymied NEPA's ability to advance environmental justice. Reforms targeted at harmonizing NEPA's structure with its participatory function

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*Decisionmaking*, 78 TEMP. L. REV. 659, 688 (2005) (noting that affected communities "may possess direct experiential knowledge about potential flaws in a project" yet are unable to effectively provide that input in agency processes without expertise and resources); Gerrard, *Victims of NIMBY*, *supra* note 98, at 522 ("Minority communities should be given the technical and legal resources they need to participate in crucial siting decisions.").

225. *See, e.g.*, Foster, *Devolved Collaboration*, *supra* note 177, at 497–98 (arguing for an adoption of a core set of normative goals); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-77, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION 31 (2011), http://www.gao.gov/assets/590/585654.pdf [https://perma.cc/UHM2-FS77] (arguing that, despite years of efforts to implement an environmental justice plan within the agency, the "EPA cannot assure itself, its stakeholders, and the public that it has established a framework to effectively guide and assess its efforts to integrate environmental justice into the fabric of the agency").

226. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1, 27–29 (2002).

227. *Id.* at 26–27 ("The question of how to address environmental protection and discrimination concerns is not simply a legal or technical regulatory question. The legal and regulatory approaches embodied within environmental and civil rights law and policy are premised not only on technical assessments of the problems that are to be solved but also on fundamental value judgments. To the extent that conflicting technical regulatory and legal doctrinal approaches evince fundamental value conflicts, we are forced to make some difficult choices between them. These tensions emphasize that the demands for 'environmental justice' implicate issues much more far-reaching than simply 'fixing' environmental regulations.").

228. *See* Outka, *Fairness in the Low-Carbon Shift*, *supra* note 87, at 820 (noting failed attempts at reform as part of the Obama-era Clean Power Plan).

229. *See supra* section II.A.

therefore offer a shared path towards both empowering communities and revitalizing NEPA.

## III. HARMONIZING NEPA TO EMPOWER COMMUNITIES IN DECARBONIZATION

This Part offers proposals for revitalizing NEPA as a tool for community empowerment in decarbonization. Section III.A articulates the proposals for regulatory changes that would leverage NEPA's process to empower communities in decarbonization and strengthen executive oversight. These proposals draw on prior scholarship, aligning well-recognized reforms in a novel way to achieve a timely goal. Section III.B offers three arguments in support of these proposals. This section articulates how the proposals align with the goals of empowering communities and centering justice in environmental policy. It also articulates how these proposals would support decarbonization by incorporating best practices drawn from empirical research on community engagement in renewable energy development.[230]

### *A. Proposals*

This section offers two general proposals. Section III.A.1 articulates reforms intended to focus NEPA's process on empowering communities through four regulatory changes. This first part discusses the central proposal that regulations include a qualitative requirement that agencies meaningfully engage with communities affected by the proposed action, and highlights several additional regulatory changes intended to support this requirement. Section III.A.2 then details several reforms intended to strengthen NEPA's executive oversight structure as a credible means of enforcing the prior section's commitments, including the requirement for meaningful community engagement.

230. These proposals assume good-faith effort to reform NEPA in two senses. For example, they assume that decarbonization reforms will not simply exempt major decarbonization initiatives, such as renewable energy infrastructure, from NEPA and other environmental laws. This assumption is in line with general proposals of decarbonization advocates. *See supra* notes 89–90 and accompanying text. If it turns out the other way, there is simply no need to discuss NEPA reform. In addition, it assumes that other reforms will occur, such as some streamlining reforms and consideration of cumulative and indirect impacts. Such reforms are extensively documented, and indeed the Biden CEQ has already proposed returning consideration of cumulative and indirect impacts to the NEPA process. *See* National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,766–67 (proposed Oct. 7, 2021) (describing proposed changes to regulations regarding indirect and cumulative impacts). Nevertheless, it is important to emphasize that this Article does not address all reforms with a potential impact on justice, but rather seeks to contribute specific proposals with transformative implications.

*1. Require Meaningful Community Engagement*

The goal of proposals in this section is to support the transformative potential of decarbonization by leveraging NEPA's process to empower communities. To achieve this goal, this section offers four regulatory reforms.

To start, NEPA's regulations should be reformed to include an express, qualitative requirement that agencies meaningfully engage with communities affected by the project, including low-income communities and communities of color. Currently, NEPA regulations require that agencies solicit and consider public comments.[231] While guidance documents and agency policies have encouraged more meaningful community engagement, these encouragements are discretionary and unenforceable.[232] This proposal would address this gap by adding a qualitative requirement that obligates agencies to meaningfully engage with affected communities.

This qualitative requirement reflects the dynamic but essential role of community input. As Professor Foster has explained, "meaningful" engagement requires some level of community influence over the direction and outcomes of a decision-making process.[233] Meeting this qualitative standard would necessarily look different in different contexts. The goal is to put the burden on the relevant agency to create an egalitarian, deliberative framework that incorporates affected communities into a process designed to encourage their influence over a proposed action.[234]

A few contrasts can help illustrate the difference between meaningful community engagement and other approaches. Currently, federal regulations require that agencies solicit and accept public comments during the NEPA process.[235] The agency generally has to consider these comments, but it need not follow them.[236] As noted above, many agencies have been criticized for taking public comments too late in the process to substantially influence the outcome.[237] Call this "public input"—

231. *See* 40 C.F.R. § 1503.1(a)(2)(v) (2020).

232. *See* Outka, *The Problem of the Law*, *supra* note 204, at 238–39.

233. *See* Foster, *Devolved Collaboration*, *supra* note 177, at 471 ("A better approach would be one that provides 'meaningful' public participation, a requirement defined to mean a deliberative process whereby stakeholders engage in an egalitarian discourse about what outcome best serves the common good of the affected community.").

234. *Id.*

235. 40 C.F.R. § 1503.1(a)(2)(v) (2020).

236. *Id.* § 1503.4 (explaining that agencies shall consider substantive comments but need not respond to all of them or take action in response).

237. *See* NEJAC Letter, *supra* note 218.

providing an opportunity for public comment without any guarantee of influence.[238] Alternatively, agencies may engage affected communities in addition to the public comment process. An agency might hold public hearings or information sessions in the affected community, actively reach out to community leaders or groups, make documents available in the community's language, or take other steps not expressly required by regulations.[239] These efforts promote community participation, but they typically don't address barriers stemming from systemic disempowerment.[240] Call this "community engagement"—taking active steps to facilitate community participation, but failing to match these with interventions targeted at addressing systemic barriers to participation.[241]

Building on the work of Professor Foster and others, requiring "meaningful community engagement" as proposed by this Article envisions the agency taking an active role in structuring the participatory process to ensure some community influence over the outcome.[242] Currently, regulations require public input.[243] Agencies are encouraged through guidance documents or other policies to pursue community engagement, but there is no obligation to do so.[244] The proposal here is reform NEPA's regulations to require community engagement *and more*—to match an active approach to community involvement with additional requirements targeted at addressing the barriers to communities' influence over the outcome of the process.

Specifically, this Article proposes three additional reforms. First, the regulations should ensure that this overall requirement for meaningful community engagement applies to early stages of the NEPA process, such as environmental assessments, and any other relevant NEPA actions

238. Agencies and other groups have created "spectra" of public participation to help illustrate differences between approaches to public participation. What I call "public input" in the text would be understood as "informing" and "consulting" on these tools. *See* FACILITATING POWER, THE SPECTRUM OF COMMUNITY ENGAGEMENT TO OWNERSHIP 2, https://d3n8a8pro7vhmx.cloudfront.net/facilitatingpower/pages/53/attachments/original/1596746165/CE2O_SPECTRUM_2020.pdf?1596746165 [https://perma.cc/9NS5-RFZ8]; COUNCIL ON ENV'T QUALITY, COLLABORATION IN NEPA: A HANDBOOK FOR NEPA PRACTITIONERS 11 (2007) [hereinafter CEQ, COLLABORATION IN NEPA], https://www.energy.gov/sites/prod/files/CEQ_Collaboration_in_NEPA_10-2007.pdf [https://perma.cc/9V85-EJ6J].

239. *See* CEQ ENVIRONMENTAL JUSTICE GUIDANCE, *supra* note 210, at 10–13 (describing these methods).

240. *See supra* section II.A.

241. On the spectra referenced above, this would be understood as "involving" communities. FACILITATING POWER, *supra* note 238, at 3; CEQ, COLLABORATION IN NEPA, *supra* note 238, at 11.

242. This would be understood as "collaborating" or "deferring to" on the spectra. FACILITATING POWER, *supra* note 238, at 3; CEQ, COLLABORATION IN NEPA, *supra* note 238, at 11.

243. *See* 40 C.F.R. § 1503 (2020) (requiring public comment).

244. *See* CEQ ENVIRONMENTAL JUSTICE GUIDANCE, *supra* note 210, at 10–13.

developed as part of decarbonization reforms. An important gap in reform proposals is that they encourage alternative methods for complying with NEPA's procedural requirements without extending public participation requirements to those alternative methods. For example, many decarbonization advocates propose greater reliance on environmental assessments in renewable energy projects.[245] While the NEPA process is generally focused on the environmental impact statement, regulations also allow agencies to rely on shorter documents called "environmental assessments" to satisfy NEPA's procedural requirements in particular contexts.[246] Among other differences, regulations do not require the same public participation process for environmental assessments that are required for environmental impact statements.[247] Decarbonization advocates argue for greater use of these shorter documents to speed up the NEPA process for renewable energy projects, but do not match those proposals with extensions of the public participation requirements.[248] Reforms intended to advance decarbonization through increased use of environmental assessments or other alternative methods should therefore also extend participation requirements.[249]

Second, the regulations should include requirements to specifically elevate the voices of communities of color and low-income communities in the engagement process. Acknowledging and confronting the legacies of disempowerment carried by these communities is a prerequisite to a regulatory system that empowers their voices. As such, reforms should include at least two specific requirements. To start, regulations should require that agencies identify and solicit the participation of communities of color and low-income communities potentially affected by the decision, with particular sensitivity to how best to engage with communities and

245. *See, e.g.*, Gerrard, *supra* note 67, at 10,605 (proposing that "[a]nother way to reduce the number of EIS is to allow more projects to obtain approvals with a lower degree of environmental review," such as environmental assessments).

246. *See* 40 C.F.R. § 1501.5 (2020).

247. *Id.* § 1501.5(e) (noting that agencies need only involve the public "to the extent practicable").

248. *See, e.g.*, Gerrard, *supra* note 67, at 10605 (proposing greater use of environmental assessments and mitigated FONSIs, but not extensions to public participation in the process). Nevertheless, a wide range of commenters have encouraged extending public involvement to these methods, including the environmental assessment. *See* Nicholas C. Yost, *CEQ's "Forty Questions:" The Key to Understanding NEPA*, NAT. RES. & ENV'T, Spring 2009, at 8, 10 (lead author of 1978 regulations); *see also* Ron Deverman, P.E. Hudson, Karen Johnson, Ronald E. Lamb, Daniel R. Mandelker, Stephen Pyle & Dr. Robert Senner, *Environmental Assessments: Guidance on Best Practice Principles*, 45 ENV'T L. REP. 10142, 10156 (2015) (noting broad support for public participation in the development of mitigated FONSIs).

249. And specifically, regulations should ensure community engagement in the development of any other relevant NEPA actions developed in the reforms, such as supplemental NEPA documents, monitoring, or mitigation updates.

support their influence over the process and outcomes. While agency guidance encourages this kind active approach to community engagement, reframing it as a necessary feature of NEPA's process would both empower communities and limit NEPA's role in replicating systemic inequalities through processes that appear fair but functionally exclude these communities. Regulations should also require that agencies provide affected communities with the access, resources, and expertise necessary to meaningfully contribute to the decision-making process.[250] As discussed in the next paragraph, there are many ways to do so, and it is essential that agencies maintain flexibility in meeting this requirement that allows communities to lead. Communities are in the best position to determine what they need to make their participation meaningful.[251]

Third, regulations should require that agencies take a contextualized, case-by-case approach to community engagement. Methods of community engagement is one place where flexibility and context-sensitivity are more important than predictability and specificity.[252] While this increases a level of uncertainty in what the process looks like, it enables a greater sensitivity to the social and ecological contexts of a particular decision. There are a wide range of proposed models for agencies to achieve this outcome—such as community advisory groups with access to agency expertise and funding—and communities should be able to leverage multiple models depending on their needs and context.[253] However, clear requirements that agencies engage and support the input of affected communities would empower communities rather than simply involve them.

EPA and the Council on Environmental Quality's oversight play an essential supporting role for these changes. To start, CEQ has substantial influence over agency regulations. In concert with CEQ, the White House can order agencies to reform their own agency-specific regulations to

250. *See supra* note 218.

251. Baker, *supra* note 80, at 43–44 (noting that communities "particularly the most vulnerable, are best positioned to create frameworks that unburden them").

252. *See* Cole, *Theory and Reality*, supra note 205, at 755 (noting downsides to informal participation procedures).

253. *See, e.g.*, Tai, *supra* note 224, at 709–14 (reviewing proposals to empower communities with teaching and other support); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENV'T L.J. 74, 92 (2003) (discussing "complex, large-scale planning initiatives which have been incorporating similar kinds of 'stakeholder committees' at early stages of project planning and environmental review, involving stakeholders in the NEPA scoping and EIS review processes well before a specific proposed or preferred plan of action is selected" (footnote omitted)); Cole, *The Theory and Reality*, *supra* note 205, at 735 (reviewing models of the participation of affected communities using examples from California); Gauna, *The Environmental Justice Misfit*, *supra* note 197, at 57 (discussing advisory councils, notice and comment, informal public participation, and agency self-reflection models).

meet the requirements of NEPA's implementing regulations. Moreover, EPA and CEQ oversight extends to both regulatory review and individual actions, and this oversight can evaluate agency actions under criteria beyond the agency's own regulations. This is the start to answering difficult questions with qualitative proposals like those articulated above. What's to prevent an agency from defining "meaningful community engagement" to mean taking public comments? How will a court adjudicate a dispute of whether a community's input was "meaningful," or whether the agency provided sufficient resources to support a community's input? This Article's answer, at least partially, is in a stronger, more public executive oversight structure.

### *2. Strengthen Executive Oversight*

As discussed in Part II, NEPA's executive oversight structure has been underutilized and hindered by poor regulatory design. The central goal of this proposal is to reform this executive oversight structure and leverage it as the primary enforcement mechanism for the proposals in the prior paragraph. Moreover, and consistent with NEPA's structure, a more robust executive oversight structure would provide a credible tool for centering justice across federal environmental policy. To accomplish these goals, I propose three reforms.

First, the regulations should extend EPA and CEQ review to include the agency's final decision.[254] EPA's section 309 review has historically been limited to commenting on the agency's NEPA process rather than the agency's ultimate decision.[255] This commenting process can have important effects when fully utilized and elevated to CEQ.[256] But it is nevertheless limited in its ability to influence the agency's ultimate decision. Commenters have therefore proposed reforming NEPA's regulations to permit EPA referrals of agency decisions, giving EPA greater ability to review the substance of the outcome rather than the process itself.[257] EPA should retain its ability to comment and consult with agencies during the NEPA process. But extending review would provide, for example, necessary perspective to determine whether communities were able to influence the outcome of the process.

This change would help shift EPA and CEQ's role from a "lobbyist"

254. *See* Andreen, *supra* note 131, at 259.

255. *Id.* at 257 ("Nevertheless, CEQ has in effect prohibited the filing of such referrals.").

256. *See id.* at 238–41 (discussing some positive examples of referral outcomes).

257. *See id.* at 258 ("The implementation of this comprehensive structural reform still awaits administrative action. CEQ thus should amend its NEPA regulations to require agencies to provide EPA with copies of all RODs.").

within other agencies to a more effective regulatory model.[258] Eric Biber reviewed different models within the federal bureaucracy for how best to get an agency to incorporate new values into their mission.[259] NEPA is an example of this problem—it sought to get agencies that historically did not value environmental sustainability to do so. Its current method for accomplishing this goal is for EPA to "lobby" other agencies through comments during the NEPA process for better consideration of environmental values.[260] Biber contrasted this approach with the Office of Information and Regulatory Affairs' (OIRA's) "effective" veto over agency regulations that did not meet certain economic standards.[261] Importantly, OIRA's power also stemmed from informal executive branch oversight pressure—as does EPA and CEQ's power under NEPA. But OIRA's informal veto power proved more effective in promoting OIRA's values across other agencies.[262] The idea here is to shift EPA and CEQ's oversight to a model similar to OIRA's by shifting review to an agency's decision, rather than seeking to only influence the agency's process.

Second, regulations should prohibit agencies from moving forward until EPA and CEQ's review of the agency action is complete.[263] In addition to simply allowing EPA and CEQ to review the final decision, this change would amplify EPA and CEQ's "veto" power.[264]

Third, the regulations should ensure that both EPA and CEQ's review of the agency's final action are public. While EPA's review of the agency's NEPA process is made public, there is no requirement to create a record or otherwise document the outcome of any referral to CEQ.[265] Making public both EPA's review of a final agency decision as well as

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258. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 43 (2009).

259. *Id.*

260. *Id.* at 47–51.

261. *Id.* at 47–49.

262. *Id.* at 47–51.

263. Andreen, *supra* note 131, at 258 ("During this review period, agencies should be prohibited from taking any action, such as licensing or construction activities which would compromise an agency's ability to alter its decision.").

264. This change would also complement a recent shift in OIRA's regulatory focus to issues of racial justice. *See* Exec. Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

265. CEQ has made the results of referrals public in the past. *See* Council on Env't Quality, Dep't of the Army, Dep't of the Interior, Resolution of the December 6, 2016, Department of Interior Referral to the Council on Environmental Quality of the Environmental Impact Statement for the Army Corp of Engineers' St. Johns New Madrid Floodway Project (Jan. 19, 2017), https://ceq.doe.gov/docs/nepa-practice/2.19.17-Resolution-letter-on-New-Madrid-project.pdf [https://perma.cc/V2Y6-H73L].

documentation of the CEQ referral process would facilitate both political and public accountability.[266] As others have noted, publicity generated from the CEQ referral process has occasionally prompted action from Congress.[267] Moreover, creating a more complete record of EPA or CEQ's dissatisfaction with agency final decisions could support citizen lawsuits, which in turn can act as an indirect form of enforcement.[268] Nevertheless, stronger EPA and CEQ oversight would be preferable to relying on citizen enforcement in most cases, both as a means of reducing judicial reliance and improving initial agency decisions.[269]

Two final observations are helpful here. First, the process envisioned by these reforms is compatible with more substantive requirements directed at community empowerment and advancing justice, such as an express community veto over projects proposed in communities of color or low-income communities.[270] While not necessary achieve these proposals' goals, the regulatory structure envisioned here could accommodate these changes, whether as part of NEPA's regulations or in other policies intended to advance justice in decarbonization. Second, a revived executive oversight structure depends on investments in staff and personnel.[271] A long-standing limit to EPA and CEQ's review authority has been limited budgets and limited personnel.[272] Expanding both will be necessary to invest in an effective oversight structure, and this need resonates with broader calls by decarbonization advocates to increase

266. *See* Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ENV'T L. REP. 10287, 10302 (2015) (noting that "NEPA perhaps assumes the president will" implement NEPA's policy "by jawboning and other informal means" hidden from public view).

267. Andreen, *supra* note 131, at 258 ("Moreover, the publicity generated by formal referrals may, on occasion, prompt direct congressional intervention.").

268. Biber, supra note 258, at 52–57 (describing the indirect agency regulation model, where a third parties enforce substantive obligations through, for example, citizen suits).

269. *See* Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENV'T L. REV. 277, 309 (1990) (noting that a greater role for EPA and CEQ in enforcing NEPA would "reduce reliance on court injunctions to implement the nation's environmental policy").

270. *See, e.g.*, Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109 (2013) (proposing a kind of community veto for environmentally significant projects).

271. Andreen, *supra* note 131, at 259 ("None of these reforms, however, will succeed unless CEQ and EPA request and receive additional funding and staff to initiate this expanded form of environmental oversight."); Blumm, *supra* note 269, at 286–87 ("[T]he effectiveness of CEQ's oversight role will still be constricted by its small size"); *see also* Holly Doremus, *Through Another's Eyes: Getting the Benefit of Outside Perspectives in Environmental Review*, 38 B.C. ENV'T AFFS. L. REV. 247, 272 (2011) (discussing the importance of agency capacity and expertise in effective oversight).

272. *See* Andreen, *supra* note 131, at 259.

agency capacity to implement NEPA.[273]

### *B. Benefits*

This section offers three lines of argument in support of these proposals. First, the proposals will empower communities of color and low-income communities in decarbonization both during the NEPA process and more broadly by building capacity in communities. Second, the proposals support rapid decarbonization by enabling community engagement that is likely to avoid opposition to projects and generate better project outcomes. Finally, harmonizing NEPA's public-participation and executive-oversight structures breathes new life into NEPA's original purpose of unifying federal administrative actions regarding the environment towards a common goal. By leveraging NEPA to center justice in federal policy, the proposals offer a credible tool for advancing the Biden Administration's "whole-of-government" commitment to justice in decarbonization.[274]

#### *1. Empowering Communities*

Together, these proposals provide a regulatory framework for meaningfully engaging communities in federal decision-making during decarbonization and supporting that engagement with an executive oversight function. While these proposals are intended to improve specific project outcomes, they also serve three broader goals in empowering communities of color and low-income communities.

First, the proposals leverage NEPA to build capacity in communities of color and low-income communities. Specifically, the proposals place the burden on agencies to provide technical or other resources necessary for these communities' meaningful involvement in the decision-making process. These principles carry deep importance in the transition to a clean energy economy. A central task of ensuring justice and equity in the transition is ensuring that communities are not simply involved in decarbonization, but have the capacity and expertise to guide major decisions affecting their community. These targeted reforms can leverage NEPA to help build this capacity in a meaningful, albeit incremental, way.

Second, these proposals recognize the limits of public participation procedures in achieving justice and seek to empower communities of color and low-income communities for when the process fails them. The

273. Gerrard, *supra* note 67, at 10604–05 (arguing for an increase to staffing at agencies to handle NEPA responsibilities).

274. *See Fact Sheet on Biden Climate Plan*, *supra* note 60 (using the phrase "whole-of-government" approach).

proposals do so in two senses. To start, the proposals articulate the agency's obligations to communities of color and low-income communities. In addition to improving agency outcomes in the process, the proposals leverage agency procedures to help distinguish these communities' claims from possible framing as NIMBY opposition. This both increases the potential that agencies will be responsive to these communities' concerns in the process, and also helps guard against attempts to lump community claims together as NIMBYism in later executive or judicial review.[275] Moreover, making EPA and CEQ's review of agency decisions public can further leverage any issues raised by those agencies in later judicial review.

Finally, these proposals leverage NEPA's influence as the primary model for public participation in environmental decision-making. Historically, NEPA has served as a model for similar state and international laws.[276] Reforms to NEPA's process, particularly in public participation, can have important influence beyond NEPA.[277] As an early step in legal reforms to enable decarbonization, NEPA can serve as a model for better incorporating communities in decision-making methods at various levels of government.

### *2. Supporting Rapid Decarbonization*

The proposals also support rapid decarbonization by leveraging methods likely to reduce opposition to renewable energy development and result in better projects. Arguing in favor of more and more meaningful community engagement as a way to speed up the environmental review process may be counterintuitive. More requirements and more opportunities for public involvement, the argument might go, creates more opportunities for delay and conflict. But as this section will explain, empirical research on public opposition to renewable energy projects suggests the opposite: that early and meaningful community involvement is key to resolving opposition to projects.

While every project is different and complex, community opposition to

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275. *See* Kaswan, *Bridging the Gap*, *supra* note 97, at 286 ("Information gleaned through environmental laws and environmental review procedures can assist in generating a 'prima facie case' that the site is not 'qualified' and can assist a community's challenge of the justifications offered by decisionmakers. The identification of irrationalities or inconsistencies in the siting process may strengthen the inference that the decision was motivated by a disregard for a community, and increase the evidence supporting the claim that a community's opposition goes beyond NIMBY to include a demand for fairness.").

276. See Houck, *supra* note 33, at 173.

277. *See* Jayni Foley Hein & Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change*, 10 MICH. J. ENV'T. L. & ADMIN. L. 1, 8 (2020) (noting how NEPA reforms can serve as inspiration for innovations at the state level).

renewable energy projects frequently shares two features: a lack of trust in developers, regulators, or the process, and a sense that the local community is not benefitting from the project.[278] Early and meaningful involvement of communities in the siting and planning process can address both issues.

First, studies suggest that early and meaningful involvement of communities can reduce opposition by building trust between project developers, regulators, and the community. Community trust in regulators appears to be a central element in effective projects, and communities value a fair process regardless of project outcomes.[279] Again, the ability of communities to influence the ultimate outcome is central to the fairness of the process.[280] When a community perceives that the project developer or regulator comes to the community having already made the central decisions regarding the project, an early breakdown of trust can sour the process and result in opposition.[281] In this sense, a poorly designed process can be worse than no process at all. This puts NEPA's process in important context, as it is frequently criticized as involving communities only after the major decisions regarding the project have been made.[282] By requiring early and meaningful involvement of communities, the proposals seek to leverage NEPA's process to build trust rather than the opposite.

Second, meaningful community engagement can reduce opposition by better producing benefits for a community. One of the principal sources of opposition to renewable energy projects is a perceived unfairness that the projects' main benefits are being enjoyed beyond the local community.[283] Several decades of research suggest that socioeconomic impacts of a project are "very important" to motivating community

278. Rand & Hoen, *supra* note 94, at 20 (noting the importance of benefits and trust in community acceptance of wind projects).

279. *Id.* ("A planning process that is perceived as 'fair' can lead to greater toleration of the outcome, even if it does not fully satisfy all stakeholders.").

280. *See, e.g.*, Lu Liu, Thijs Bouman, Goda Perlaviciute & Linda Steg, *Public Participation in Decision Making, Perceived Procedural Fairness and Public Acceptability of Renewable Energy Projects*, 1 ENERGY & CLIMATE CHANGE 100013, 100014 (2020) (conducting three studies showing "that project acceptability is higher when people perceive the decision-making process as fairer," and that "one way to enhance perceived procedural fairness is to involve people in decision making, and particularly by enabling people to influence decisions over major aspects of the project").

281. *See* Rand & Hoen, *supra* note 94, at 16–17 (noting how excluding affected communities from the development process can generate feelings of injustice and distrust).

282. *See, e.g.*, NEJAC Letter, *supra* note 218 (noting that, in NEPA assessments, "analysts often go into their work with a predetermined preferred alternative").

283. Rand & Hoen, *supra* note 94, at 20 ("In general, those living near wind facilities want benefits that stay in the local community, and they feel a sense of injustice about bearing the burden of costs when consumption of and profits related to the power are enjoyed elsewhere.").

opposition, and these issues are exacerbated when communities feel economically or politically disconnected from the project.[284] As such, community benefit agreements or other direct benefits to local communities are becoming increasingly common in siting renewable energy projects.[285] Interested parties can develop these arrangements through the environmental permitting process, including the NEPA process.[286] Incorporating communities more fully in the planning process can direct developers to provide clear and more appropriate benefits for a community.[287]

Lessons from the siting and development of offshore wind in the United States have supported these insights.[288] Successful examples share two elements of meaningful community engagement.[289] First, the project design process showed that all participants, including experts and local stakeholders, learned from each other while reconciling technical expertise with community values.[290] Second, outcomes included clear benefits for the community that the community helped develop.[291] The proposals offered here create a regulatory structure for achieving these outcomes for all communities, including communities of color and low-income communities, through NEPA's process.

The proposals' express requirements to empower and elevate communities of color and low-income communities also help ensure that these communities benefit from the transition. Studies show that the ultimate effectiveness of benefits agreements associated with renewable energy developments is directly related to the power dynamic between the

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284. *Id.* at 11, 20.

285. *See* Sandy Kerr, Kate Johnson & Stephanie Weir, *Understanding Community Benefit Payments from Renewable Energy Development*, 105 ENERGY POL'Y 202, 202 (2017) ("It is increasingly common for renewable energy projects to incorporate financial packages that make payments directly, or in kind, to local communities.").

286. *See, e.g.*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, EVALUATING BENEFITS OF OFFSHORE WIND ENERGY PROJECTS IN NEPA 3–39 (2017), https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Studies/Renewable-Energy/Final-Version-Offshore-Benefits-White-Paper.pdf [https://perma.cc/YY4F-N8UA] (describing the role of community benefits in evaluating an offshore wind project's impacts under NEPA).

287. *See* Sarah C. Klain, Terre Satterfield, Suzanne MacDonald, Nicholas Battista & Kai M.A. Chan, *Will Communities 'Open-Up' to Offshore Wind? Lessons Learned from New England Islands in the United States*, 34 ENERGY RSCH. & SOC. SCI. 13, 22 (2017) (noting the fairness, clarity, and certainty values of developing benefits with community members).

288. *Id.* at 16–17.

289. *Id.*

290. *Id.*

291. *Id.*

developer and communities.[292] Leveraging federal authority to empower communities in this process would help correct imbalanced dynamics and would advance commitments that these communities' benefit from in the transition. As Professor Alice Kaswan has noted, projects generated with the leadership of communities intended to benefit from the project are more likely to meet their actual needs, rather than their perceived needs, and less likely to do unintended harm to those communities.[293] Professor Baker makes a similar point, noting that "stakeholders, particularly the most vulnerable, are best positioned to create frameworks that unburden them."[294]

While these studies support the proposals here, it is important not to overemphasize past experience. The scale of decarbonization will require development at scale and speeds never before seen, largely under new social and geographic conditions than prior projects in the United States. The important takeaway here is that empirical evidence supports more and more meaningful community involvement, not less, if the sole goal is to enable rapid deployment of renewable energy. Even streamlined, federalized methods of siting energy infrastructure still face opposition from state and local interests.[295] This takeaway should align those skeptical of community engagement's role in decarbonization with those that recognize the essential role that communities must play in achieving the transformative potential of decarbonization.

### *3. Centering Justice*

In addition to empowering communities and supporting decarbonization, leveraging NEPA's structure to empower communities offers the potential to center justice as a guiding value in environmental policy. The proposals here offer potential to do so in two senses.

First, the Article's proposals give EPA and CEQ practical oversight authority over a wide range of federal actions implicating justice in decarbonization. A central opportunity in reforming EPA's section 309 and referral authorities is to transition EPA and CEQ into an oversight role similar to that of OMB and OIRA. While OIRA's success leveraged

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292. *See* Kerr, et al., *supra* note 285, at 209 (concluding that "[p]ower relations are at the heart" of effective community benefits payments agreements and "that achieving[] optimum benefit payment[] outcomes requires policy that is adapted to underlying power relations and institutional frameworks").

293. Kaswan, *Greening the Grid*, *supra* note 190, at 1160.

294. Baker, *supra* note 80, at 43.

295. *See* Alexandra B. Klass & Jim Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENV'T L. REV. 423, 430 (2017) (describing how state, local, and non-profit groups can present barriers to even federalized siting procedures such as those for natural gas pipelines).

its expertise in economic analysis, here the idea would be for EPA and CEQ to leverage specific expertise in environmental justice to the many government actions needed to mitigate and adapt to climate change. This expertise would serve an important role in policing agency involvement with communities affected by federal decisions, but would also extend beyond community engagement to broader policy choices of decarbonization. EPA and CEQ are therefore uniquely positioned as agencies with authority over a huge range of federal actions to implement commitments to community empowerment.

Second, the proposal would place greater emphasis on environmental justice within EPA and CEQ. As others have emphasized, commitment to principles of environmental justice within agencies has been hindered by a perceived disconnect between the models of environmental decision-making that emphasize generalized, utilitarian outcomes and approaches sensitive to inequality that emphasize context-specific and individual outcomes. Placing greater emphasis on environmental justice and community empowerment within these agencies' staff, expertise, mission, and regular interaction with other agencies can help shift agency culture towards the contextual and individualized frameworks needed to center justice within federal environmental policy.

## CONCLUSION

NEPA's structure is uniquely suited to address two early and important needs of our transition to renewable energy. It offers a method of leveraging federal public participation requirements to empower communities, and a credible oversight structure for implementing the Biden Administration's "whole-of-government" approach to climate action that centers justice. Failing to leverage this opportunity risks undermining the goals of decarbonization, as well as consigning NEPA to further marginalization. Certainly, there is a risk of asking too much of NEPA. But its true potential has never been realized. The challenge of climate change demands the most of our legal and governance structures. We should approach NEPA's unique tools with equal optimism and urgency, leveraging all available tools toward community empowerment in rapid decarbonization.