

## Endnotes

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within community networks and government, the demand for plastic can be reduced and pave the way for a plastic-free future while ensuring that the burdens of waste management are placed on the plastics industry.

## CONCLUSION

Plastic production is unsustainable. In the time it has taken to research and write this article, devastating heatwaves have hit the pacific northwest, billions of sea creatures have died, and the ocean caught on fire due to oil and gas operations.<sup>172</sup> Tropical storm Elsa broke a record this year when it became the fifth named storm of the 2021 hurricane season.<sup>173</sup> Typically, a fifth named storm would occur in late August.<sup>174</sup> Fires are consuming the pacific northwest and fire season continues to extend later into the year.<sup>175</sup> The remnants of Hurricane Ida caused deadly flooding in New York and New Jersey hundreds of miles away from where it made landfall.<sup>176</sup> Climate change is happening now and it will continue to get worse so long as nations cling to fossil fuels. The Washington Post reported that close to one in three Americans experience a weather related disaster this summer.<sup>177</sup>

Plastic production is a major driver of greenhouse gas emissions, and there must be a ban on non-essential plastic, and it must happen soon.<sup>178</sup> In the meantime, even if plastic production stops tomorrow, it is crucial that the plastic that is already out in the market is responsibly managed. Low-income and minority populations cannot be asked to shoulder the burden of a problem they did not create and from which they have never benefitted. The plastic industry must be tied to the waste they are responsible for generating through the adoption of federal stewardship laws. Whether a federal stewardship law comes about directly from petitioning Congress, going to court, or activism at the community level, it is clear that nothing will happen unless the public makes their concern and dissatisfaction known.

Climate change is an imminent threat to our health, as is evidenced by the recent onslaught of lawsuits designed to hold the fossil fuel industry accountable for the catastrophic harm exploration and production of oil and gas has had on the environment and human and non-human entities. The U.S. must transition away from plastic like other fossil fuel-based products, but it must be done in an equitable fashion that allows for a transition period.

Plastics are inherently unsustainable and a fundamentally dangerous waste product that not only contributes to climate change but disproportionately hurts marginalized groups within the U.S.<sup>179</sup> Better waste management practices must be adopted, but a first step might be to begin weaning ourselves from our addiction to plastic. The goal is to reduce and eventually eliminate plastic dependency; however, the inertia behind decades of plastic use and waste generation will incur administrative costs for the end-of-life management of plastic. By holding responsible parties accountable for the waste they create, the nation can shift responsibility to the entity best suited to handle the problem (*i.e.*, the plastics manufacturers). Getting a handle on waste management means government will not only be shielding historically discounted and politically marginalized communities, it will also be a step toward securing an environmentally just future where the health, safety, and environmental well-being of all communities are worthy of protection.

Implementation of stewardship laws at the federal level would have numerous benefits, including reducing emissions from incineration, slowing landfills from reaching capacity, creating a market for stewardship planning positions within industries (*i.e.*, creating long term green jobs), and protecting the environment from the need to create more landfills to take waste (not to mention saving the taxpayer and government the financial burden of financing and managing more MSW sites).

Waste management is a multifaceted and ongoing challenge. It will require significant planning, stakeholder involvement, and building trusted relationships between government and industry, but it is possible. Stewardship laws are not just an environmental imperative; they are a moral imperative. It is a duty the nation owes to future generations, shielding them from waste management burdens that they were not responsible for but will inevitably be forced to address. By creating regulations that require plastic producers to take back and be responsible for managing the waste they create, law makers would be protecting the most vulnerable communities in the country. If the plastics industry were responsible for taking back their waste, it might discourage them from producing more since it would be an added expense; furthermore, recycled low quality plastic is not a highly desirable commodity. Without the teeth of comprehensive federal legal frameworks, industry alone cannot be trusted to reclaim their harmful products.



## ENDNOTES

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<sup>2</sup> See generally Shanna Swan, *Count Down: How Our Modern World Is Threatening Sperm Counts, Altering Male and Female Reproductive Development, and Imperiling the Future of the Human Race*, (2021).

<sup>3</sup> Luke Holland, *Pollution is Damaging Polar Bears' Dicks*, VICE (Jan. 27, 2015), <https://www.vice.com/en/article/bn5epa/first-the-melting-ice-caps-now-pollution-is-making-polar-bears-dicks-smaller-393>. While such studies are provocative and tremendously impactful when it comes to rallying the

public on climate change and plastic waste issues, this article will focus on pathways to more effectively manage plastic waste and its attendant risks.

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<sup>5</sup> CTR. FOR INT'L ENV'T L., *Plastic & Climate: The Hidden Costs of a Plastic Planet* 80 (May 2019), <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-FINAL-2019.pdf>.

<sup>6</sup> *Plastic Upcycling*, 2 NATURAL CATALYSIS 945-46 (Nov. 14, 2019), <https://www.nature.com/articles/s41929-019-0391-7>.

<sup>7</sup> *Id.*

<sup>8</sup> Hamilton, *supra* note 4.

<sup>9</sup> CTR. FOR INT'L ENV'T L., *supra* note 5.

<sup>10</sup> Jonathan Black, *Story of Plastic Screening and Panel Discussion Convened by New Mexico Recycling Coalition and the Center for Biological Diversity*, YOUTUBE (July 14, 2020), "Current Linear Handling of Plastic Waste" – slide graphic, timestamp 8:45/59:51, <https://www.youtube.com/watch?v=ZmR2c8pSVJ8>.

<sup>11</sup> Ana Isabel Baptista et al., *U.S. Municipal Solid Waste Incinerators: An Industry in Decline*, TISHMAN ENV'T AND DESIGN CTR. 13 (May 2019).

<sup>12</sup> *Id.* at 31.

<sup>13</sup> *Id.*; see also MARY ROBINSON FOUND. CLIMATE JUSTICE, *Principles of Climate Justice*, <https://www.mrfcj.org/principles-of-climate-justice/> (explaining that climate justice "links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resources.").

<sup>14</sup> Patrice Taddonio, *Frontline: Plastics Industry Insiders Reveal the Truth about Recycling*, PBS FRONTLINE (Mar. 31, 2020), <https://www.pbs.org/wgbh/frontline/article/plastics-industry-insiders-reveal-the-truth-about-recycling/>; see also *Frontline (Announcement): Frontline and NPR Investigate How the Plastics Industry Used Recycling to Help Sell More Plastic* PBS FRONTLINE (Mar. 26, 2020), <https://www.pbs.org/wgbh/frontline/announcement/frontline-and-npr-investigate-how-the-plastics-industry-used-recycling-to-help-sell-more-plastic/>.

<sup>15</sup> *The Plastic Problem*, YOUTUBE (PBS News Hour Nov. 27, 2019), <https://www.youtube.com/watch?v=1RDc2opwG0I>.

<sup>16</sup> Shannon Hall, *Exxon Knew about Climate Change almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), <https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>.

<sup>17</sup> *Id.*

<sup>18</sup> See *United States v. An Article*, 409 F.2d 734, 740–41 (2d Cir. 1969). Federal law already prohibits misbranding and mislabeling of products under the Food and Drug Cosmetic Act (FDCA), which is designed to ensure that consumers know the quality and contents of their purchases. In *United States v. An Article*, the court noted that "A primary purpose of the Act [FDCA] is the protection of the ultimate consumer's economic interests."; 409 F.2d 734 (2d Cir. 1969) (citing *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 230 (1943)). The Court also relied on *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910), which concluded that the Federal Trade Commission Act was not established to protect the sophisticated expert, but rather the general public which includes "the ignorant, the unthinking, and the credulous." Thus, the Court in *United States v. An Article* found the remedial purpose of the Federal Trade Commission Act to be comparable to the Federal Food, Drug and Cosmetics Act, justifying the application of the reasoning in *Florence Mfg. Co. v. J.C. Dowd*. While it is essential to take a holistic approach to regulation and employ strategies that target both the front and back ends of plastic production, this article focuses on back-end solutions by assessing the current status of federal and state laws and identifying areas where government can enhance its role in plastic waste management.

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<sup>20</sup> Oliver Milman, *Revealed: 1.6m Americans live near the most polluting incinerators in the US*, THE GUARDIAN (May 21, 2019), <https://www.theguardian.com/environment/2019/may/21/us-pollution-incinerators-waste-burning-plants-report>; see also Jim Erickson, *Targeting minority, low-income neighborhoods for hazardous waste sites*, MICH. NEWS – UNIV. OF MICH. (Jan. 19, 2016), <https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/>.

<sup>21</sup> Myles R. Allen et al., *Global Warming Of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 49, 79 (2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf); see also Phoebe Keane, *How the oil industry made us doubt climate change*, BBC NEWS (Sept. 20, 2020), <https://www.bbc.com/news/stories-53640382>.

<sup>22</sup> Matt Williams, *What is the heliocentric model of the universe?*, PHYS.ORG (Jan. 5, 2016), <https://phys.org/news/2016-01-heliocentric-universe.html>.

<sup>23</sup> *Ocean Warming*, INT'L UNION FOR CONSERVATION OF NATURE (2021), <https://www.iucn.org/resources/issues-briefs/ocean-warming> (last visited Nov. 15, 2021); see also *Why are glaciers and sea ice melting?*, WORLD WILDLIFE FOUND., <https://www.worldwildlife.org/pages/why-are-glaciers-and-sea-ice-melting> (last visited Nov. 15, 2021).

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<sup>27</sup> *Id.*

<sup>28</sup> Stephen Buranyi, *The Plastic Backlash: What's Behind Our Sudden Rage – And Will It Make A Difference?*, THE GUARDIAN (Nov. 13, 2018), <https://www.theguardian.com/environment/2018/nov/13/the-plastic-backlash-whats-behind-our-sudden-rage-and-will-it-make-a-difference>.

<sup>29</sup> Hamilton, *supra* note 4, at 8.

<sup>30</sup> *Id.* at 80.

<sup>31</sup> *Fossil*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/science-innovation/energy-sources/fossil> (last visited Nov. 15, 2021).

<sup>32</sup> *Natural Gas Explained*, U.S. ENERGY INFO. ADMIN. (Dec. 9, 2020), <https://www.eia.gov/energyexplained/natural-gas/>.

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<sup>34</sup> *Id.*

<sup>35</sup> See CTR. FOR INT'L ENV'T L., *supra* note 5; see also Melissa Denchak, *Fossil Fuels: The Dirty Facts*, NRDC (June 29, 2018) <https://www.nrdc.org/stories/fossil-fuels-dirty-facts>.

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<sup>37</sup> *Id.*

<sup>38</sup> Philippe Chalmin, *The History of Plastics: From the Capitol to Tarpeian Rock*, 19 FIELD ACTIONS SCI. REP.'S 6, 7 (Mar. 2019).

<sup>39</sup> *Id.*

<sup>40</sup> Hervé Millet et al., *The Nature of Plastics and Their Societal Use*, in PLASTICS AND THE ENV'T 1, 1 (R.M. Harrison & R.E. Hester eds., 2018) <https://pubs.rsc.org/en/content/chapterhtml/2018/9781788013314-00001?isbn=978-1-78801-241-6>.

<sup>41</sup> See Chalmin, *supra* note 38.

<sup>42</sup> SUSAN FREINKEL, *PLASTIC: A TOXIC LOVE STORY*, 5 (2011).

<sup>43</sup> See *Science of Plastics*, SCIENCE HIST. INST., <https://www.sciencehistory.org/science-of-plastics> (last visited Nov. 14, 2021).

<sup>44</sup> See Peter Halley & Michelle Coote, *The Future of Plastics*, AUSTR. ACAD. OF SCI., <https://www.science.org.au/curious/earth-environment/future-plastics> (last visited Nov. 14, 2021).

<sup>45</sup> See *Science of Plastics*, *supra* note 43.

<sup>46</sup> *Id.*

<sup>47</sup> See Ronald Redwing, *Thermoplastic and Thermosetting Polymers*, PENN STATE COLL. OF EARTH AND MIN. SCIS., SCIENCES, <https://www.e-education.psu.edu/matse81/node/2209> (last visited Nov. 14, 2021).

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<sup>49</sup> See Redwing, *supra* note 47.

<sup>50</sup> See *Thermoplastics Vs Thermosetting Plastics*, RECYCLEDPLASTIC.COM, <https://www.recycledplastic.com/index.html%3Fp=10288.html> (last visited Nov. 14, 2021).

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- <sup>68</sup> *Id.*
- <sup>69</sup> *Id.*
- <sup>70</sup> *Id.*
- <sup>71</sup> See Baptista, *supra* note 11, at 6 (explaining that the current incinerator industry is too costly and creates too many environmental justice issues to be considered sustainable).
- <sup>72</sup> Milman, *supra* note 20.
- <sup>73</sup> Baptista, *supra* note 11, at 31.
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- <sup>76</sup> Pecci, *supra* note 62.
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.*
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- <sup>80</sup> See, e.g., Jayaraj *supra* note 79, at 96; PBDEs *supra* note 79, at 3; PCBs *supra* note 79.
- <sup>81</sup> PCBs *supra* note 79.
- <sup>82</sup> Landfills, N.C. ENV'T. JUST. NETWORK, (last visited Nov. 12, 2021), <https://ncejn.org/landfills/>.
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- <sup>93</sup> See Rochman, *supra* note 88-.
- <sup>94</sup> *Id.* at 170.
- <sup>95</sup> EPA, *Basic Information About Landfill Gas*, <https://www.epa.gov/lmop/basic-information-about-landfill-gas>; see also Arlene Karidis, *What Landfill Operators Should Know About Nuisance Law*, WASTE 360 (Jan. 7, 2021), <https://www.waste360.com/landfill/what-landfill-operators-should-know-about-nuisance-law>.
- <sup>96</sup> Robin Sommer, *Environmental Racism in Louisiana's 'Cancer Alley', Must End, Say UN Human Rights Experts*, UN NEWS (Mar. 2, 2021), <https://news.un.org/en/story/2021/03/1086172>.
- <sup>97</sup> See Mary Robinson Foundation Climate Justice, *supra* note 13.
- <sup>98</sup> See Atapattu, *supra* note 83, at 307-311.
- <sup>99</sup> *Id.* at 304 (citing Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10682 (2000)).
- <sup>100</sup> *Id.* at 307.
- <sup>101</sup> *Id.*



- <sup>102</sup> *Id.* at 308.
- <sup>103</sup> *Id.* at 309.
- <sup>104</sup> *Id.*
- <sup>105</sup> Green New Deal, H.R. Res. 109, 116<sup>th</sup> Cong. (2019), <https://www.congress.gov/116/bills/hres/109/BILLS-116hres109ih.pdf>.
- <sup>106</sup> 42 U.S.C. §§ 6901 et seq. (2018).
- <sup>107</sup> EPA, *History of the Resource Conservation and Recovery Act (RCRA)*, <https://www.epa.gov/rcra/history-resource-conservation-and-recovery-act-rcra>.
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.* Note that RCRA was amended in 1984, when the federal Hazardous and Solid Waste Amendments (HSWA) were added, in 1992 through the Federal Facilities Compliance Act, and in 1996 by the Land Disposal Program Flexibility Act.
- <sup>110</sup> *Id.*
- <sup>111</sup> 42 U.S.C. § 6901(a)(1) (2018).
- <sup>112</sup> *Id.* at § 6901(a)(2).
- <sup>113</sup> *Id.* at § 6901(a)(3).
- <sup>114</sup> *Id.* at § 6901(a)(4).
- <sup>115</sup> EPA, *RCRA Corrective Action Cleanup Enforcement*, <https://www.epa.gov/enforcement/rcra-corrective-action-cleanup-enforcement>.
- <sup>116</sup> EPA, *Resource Conservation and Recovery Act (RCRA) Overview*, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview>.
- <sup>117</sup> 42 U.S.C. § 6901(b)(1).
- <sup>118</sup> *Id.* at § 6901(b)(8).
- <sup>119</sup> EPA, *Resource Conservation and Recovery Act (RCRA) Overview*, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview>; see also Note, *RCRA as a Tool for Environmental Justice Communities and Others to Compel Climate Change Adaptation*, 131 HARV. L. REV. 2409, 2411 (2018).
- <sup>120</sup> See generally Jessica Roake, *Think Globally, Act Locally: Steve Lerner, 'Sacrifice Zones,' at Politics and Prose*, WASH. POST. (Sept. 22, 2010), <https://www.washingtonpost.com/express/wp/2010/09/23/steve-lerner-book-sacrifice-zones/> (explaining that “sacrifice zones,” is an Orwellian term, however, applied to today’s society the term can mean communities that have such severe pollution induced environmental hazards that it seriously impacts public health).
- <sup>121</sup> Inside Washington Publishers, *EPA Waste Chief Advocates Precautionary Approach to Aid Equity Focus*, 31 INSIDE EPA WKLY. REP. 1, 1 (Mar. 19, 2010), <http://www.lawandenvironment.com/uploads/file/epa%20precautionary%20principle%20reprint.pdf>.
- <sup>122</sup> *Id.*
- <sup>123</sup> *Id.*; see also EPA, Extramural Research, *Strengthening Environmental Justice and Decision Making: A Symposium on the Science of Disproportionate Environmental Health Impacts* (Mar. 17-19, 2010), <https://archive.epa.gov/ncer/ej/web/html/agenda.html>.
- <sup>124</sup> Inside Washington Publishers, *supra* note 121 (explaining that the precautionary principle is a “concept that favors regulation to protect human health in the absence of certainty on environmental risks.”).
- <sup>125</sup> *Id.*
- <sup>126</sup> *Id.*
- <sup>127</sup> Allan Gerlat, *19 States with the Most Producer Responsibility Laws*, WASTE 360 (Sept. 15, 2015), <https://www.waste360.com/generators/19-states-most-producer-responsibility-laws>.
- <sup>128</sup> Gemma Alexander, *The State of Producer Responsibility in the United States*, EARTH911 (July 17, 2020), <https://earth911.com/business-policy/producer-responsibility-in-the-united-states/>.
- <sup>129</sup> *Id.*
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.*
- <sup>132</sup> Cal. Pub. Res. § 42970 (2011). [https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=PRC&sectionNum=42970](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=PRC&sectionNum=42970).
- <sup>133</sup> *Id.*
- <sup>134</sup> Prod. Stewardship for Carpets, Cal. Pub. Res. § 42970–83 (2011), [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=PRC&division=30.&title=&part=3.&chapter=20.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=PRC&division=30.&title=&part=3.&chapter=20.&article=).
- <sup>135</sup> *Id.*
- <sup>136</sup> *Id.*
- <sup>137</sup> *Id.*
- <sup>138</sup> Used Mattress Recovery and Recycling Act, Cal. Pub. Res. § 42985–94 (2014), [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=PRC&division=30.&title=&part=3.&chapter=21.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=PRC&division=30.&title=&part=3.&chapter=21.&article=).
- <sup>139</sup> *Id.*
- <sup>140</sup> *Id.*
- <sup>141</sup> 38 M.R.S. § 2144 (2020), <http://www.mainelegislature.org/legis/statutes/38/title38sec2144.html> (creating a stewardship program for architectural paint relating to waste reduction and recycling).
- <sup>142</sup> *Id.*
- <sup>143</sup> *Id.*
- <sup>144</sup> *Id.*
- <sup>145</sup> O’Malley & Brown, *supra* note 87, at 1.
- <sup>146</sup> *Id.* at 5, 33, 47–49, 51.
- <sup>147</sup> *Id.* at 27.
- <sup>148</sup> *Id.* at 1.
- <sup>149</sup> *Id.* at 1, 12.
- <sup>150</sup> *Id.* at 1–2.
- <sup>151</sup> Md. L.D. 1117 (436<sup>th</sup> Legis. 2016) <https://legiscan.com/MD/bill/HB1117/2016> (stating that bill “died in chamber”); see also Cole Rosengren, *Maryland’s ‘Zero Waste’ Plan has been Scrapped – and Maybe that’s OK*, WASTE DIVE (July 5, 2017), <https://www.wastedive.com/news/marylands-zero-waste-plan-has-been-scrapped-and-maybe-thats-ok/446294/>; Jared Beinart, *Despite Tight Landfill Space, Mattress Recycling Bill Failed*, CAP. NEWS SERV. (Apr. 19, 2019), <https://cnsmaryland.org/2019/04/19/despite-tight-landfill-space-mattress-recycling-bill-failed/>.
- <sup>152</sup> Md. L.D. 36 (442<sup>nd</sup> Legis. 2021), <https://legiscan.com/MD/bill/HB36/2021>.
- <sup>153</sup> *Id.*
- <sup>154</sup> Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control, and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENV’T L. REV. 157, 168 (1993) (citing Supreme Court cases *Chem. Waste Mgmt. v. Hunt*, 112 S. Ct. 2009 (1992), *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Fort Gratiot Sanitary Landfill v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353 (1992)), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1455&context=peir>; see also 42 U.S.C. § 6942(b).
- <sup>155</sup> 42 U.S.C. § 6901(a)(4).
- <sup>156</sup> See David Read et al., *The Role of Land Carbon Sinks in Mitigating Global Climate Change*, THE ROYAL SOC’Y 1, 3, 17 (July 2001), [https://royal-society.org/~media/royal\\_society\\_content/policy/publications/2001/9996.pdf](https://royal-society.org/~media/royal_society_content/policy/publications/2001/9996.pdf) (estimating that terrestrial vegetation and soils are absorbing around 40% of current CO<sub>2</sub> emissions); see also Kelly Levin, *How Effective is Land at Removing Carbon Pollution? The IPCC Weighs In*, WORLD RES. INST. (Aug. 8, 2019), <https://www.wri.org/blog/2019/08/how-effective-land-removing-carbon-pollution-ippcc-weighs> (positing “trees and other vegetation suck up carbon dioxide from the atmosphere, sequestering nearly a third of global emissions”).
- <sup>157</sup> *Coca-Cola Company Unveils Paper Bottle Prototype*, THE COCA-COLA CO. (Nov. 6, 2020), <https://www.coca-colacompany.com/news/coca-cola-unveils-paper-bottle-prototype> (describing how the first-generation prototype consists of a paper shell with a 100% recycled plastic closure and liner inside).
- <sup>158</sup> *Our New Initiative: Together, We’re Committed to Getting Every Bottle Back*, AM. BEVERAGE, <https://www.innovationnaturally.org/plastic/> (last visited Oct. 28, 2021) (claiming that the Coca-Cola Company, Keurig Dr Pepper, and PepsiCo are committed to using less plastic and investing in efforts “to get our bottles back so we can remake them into new ones”).
- <sup>159</sup> 42 U.S.C. § 6901(a).
- <sup>160</sup> See generally Dino Grandoni, *States and Cities Scramble to Sue Oil Companies Over Climate Change*, WASH. POST. (Sept. 14, 2020), <https://www.washingtonpost.com/climate-environment/2020/09/14/states-cities-scramble-sue-oil-companies-over-climate-change/> (showing that half a dozen states have brought suits against oil companies, as have major U.S. cities such as Baltimore and San Francisco and smaller municipalities such as Boulder, C.O. and Hoboken, N.J.).
- <sup>161</sup> See 5 U.S.C. § 553 (explaining that agency interpretive rules, sometimes referred to as “guidance” are not subject to notice-and-comment under the Administrative Procedure Act (APA)).
- <sup>162</sup> See *id.* (explaining that rulemaking would be subject to notice-and-comment under the APA so if an agency were to promulgate a rule, stakeholders would be able to provide input and advocate for the standards they would like to be incorporated into the final rule).

<sup>163</sup> Ana Faguy, *U.S. to back global treaty aimed at curbing plastic pollution*, E&E NEWS (Nov. 18, 2021), <https://www.eenews.net/articles/u-s-to-back-global-treaty-aimed-at-curbing-plastic-pollution/>; Valerie Volcovici, *As plastic piles up, U.S. joins effort to reach new global treaty*, (Nov. 18, 2021), <https://www.eenews.net/articles/u-s-to-back-global-treaty-aimed-at-curbing-plastic-pollution/>.

<sup>164</sup> Zoe Loftus-Farren, *Earth Island Sues 10 Companies, Including Coke, Pepsi, and Nestle, Over Plastic Use*, EARTH ISLAND J. (Feb. 26, 2020), <https://www.earthisland.org/journal/index.php/articles/entry/earth-island-coke-pepsi-nestle-plastic-pollution-lawsuit/> (suggesting that suing major corporations that profit(ed) from the sale of single use plastics is a viable strategy for interested parties to recoup some of the costs of cleaning such plastics out of oceans and waterways and mitigating harm to humans and wildlife).

<sup>165</sup> *Id.* (announcing that Earth Island Institute filed its suit in California state court on February 20, 2020).

<sup>166</sup> *Id.* (explaining how Earth Island Institute's litigation strategy follows in the vein of similar efforts to hold Big Oil, Big Tobacco, and Big Pharma responsible for their knowing contribution to public harms and simultaneous effort to obscure those harms and deflect blame).

<sup>167</sup> *Id.* (explaining that Earth Island Institute's lawsuit targets ten major plastic-producing companies—including giants like Coca-Cola, PepsiCo, and Nestle).

<sup>168</sup> See Thunberg, *supra* note 1 (referencing a tongue-in-cheek Tweet posted by climate change activist Greta Thunberg, who has 4.9 million Twitter followers, further emphasizing the goals of environmental justice in light of serious reproductive concerns).

<sup>169</sup> IPCC Report: 'Code Red' for Human Driven Global Heating, Warns UN Chief, UN NEWS (Aug. 9, 2021), <https://news.un.org/en/story/2021/08/1097362> (detailing, among others, unprecedented levels of atmospheric CO2 concentrations and the similarly unprecedented rise of global surface temperature and global mean sea level).

<sup>170</sup> See generally Steven Greenfield & Diogo Verisimmo, *To What Extent Is Social Marketing Used in Demand Reduction Campaigns for Illegal Wildlife Products? Insights From Elephant Ivory and Rhino Horn*, 25 SOC. MKTG. Q. 40 (2019), <https://journals.sagepub.com/eprint/mZT6BRqak7iFvPRQkQyq/full> (highlighting the need for independent consumer research upon which to build target audience insights and the improvement of collaborations across institutions); see also Laura Thomas-Walters et al., *Taking a More Nuanced Look at Behavior Change for Demand Reduction in the Illegal Wildlife Trade*, 2 CONSERVATION SCI. & PRAC. e248, 2 (July 6, 2020), <https://onlinelibrary.wiley.com/doi/full/10.1111/csp2.248> (explaining how demand reduction

interventions aim to influence behavior, and common approaches have focused on legal regulation or prohibition (e.g., trade bans) and law enforcement, but these are not the only ways to persuade people to stop consuming wildlife and/or shift their consumption to more sustainable choices).

<sup>171</sup> See generally Joana C. Prata et al., *Solutions and Integrated Strategies for the Control and Mitigation of Plastic and Microplastic Pollution*, 16 INT'L J. ENV'T RSCH. & PUB HEALTH 2411 (July 7, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6651478/> (proposing short-term, mid-term, and long-term measures, including ten recommendations for stakeholders to reduce plastic pollution).

<sup>172</sup> Abha Bhattarai et al., *Heat Wave Smothers Much of West Coast in Triple-Degree Temperatures*, WASH. POST. (July 10, 2021), <https://www.washingtonpost.com/nation/2021/07/10/heat-wave-california-arizona-nevada/>; Antonia Noori Farzan, *Fire on Surface of Gulf of Mexico is Extinguished, but Questions About Pipeline Leak Remain*, WASH. POST. (July 3, 2021), <https://www.washingtonpost.com/world/2021/07/03/mexico-pipeline-fire/>; Valerie Yurk, *Pacific Northwest Heat Wave Killed More Than One Billion Sea Creatures*, SCI. AM. (July 15, 2021), <https://www.scientificamerican.com/article/pacific-northwest-heat-wave-killed-more-than-1-billion-sea-creatures/>.

<sup>173</sup> Matthew Cappucci, *Tropical Storm Elsa Forms, Becoming Earliest Fifth Named Storm on Record*, WASH. POST. (July 1, 2021), <https://www.washingtonpost.com/weather/2021/07/01/tropical-storm-elsa-caribbean-florida/>.

<sup>174</sup> *Id.*

<sup>175</sup> Dustin Jones, *Western Wildfires May Take Weeks to Months to Contain*, NPR (Aug. 1, 2021), <https://www.npr.org/2021/08/01/1023274008/western-wildfires-oregon-california-drought>.

<sup>176</sup> Maria Louisa Paul et al., *Deaths Climb to at Least 44 from Northeast Floods Caused by Hurricane Ida's Remnants*, WASH. POST. (Sept. 3, 2021), <https://www.washingtonpost.com/weather/2021/09/01/new-york-city-flash-flood/>.

<sup>177</sup> Sarah Kaplan & Andrew Ba Tran, *Nearly 1 in 3 Americans Experienced a Weather Disaster this Summer*, WASH. POST., (Sept. 4, 2021), [https://www.washingtonpost.com/climate-environment/2021/09/04/climate-disaster-hurricane-ida/?itid=ap\\_sarahkaplan](https://www.washingtonpost.com/climate-environment/2021/09/04/climate-disaster-hurricane-ida/?itid=ap_sarahkaplan) (detailing the expanded reach of climate-fueled disasters into American's lives).

<sup>178</sup> See Center for International Environmental Law, *Plastic & Climate*, *supra* note 5 (warning that industry is poised to invest billions in expanding plastic production).

<sup>179</sup> UN NEWS, *supra* note 96 (demonstrating how federal environmental regulations have failed to protect African Americans residing in Louisiana's infamous "Cancer Alley").

## RULEMAKING DOUBLETAKE: AN OPPORTUNITY TO REPAIR AND STRENGTHEN THE NATIONAL ENVIRONMENTAL POLICY ACT

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Alaska Cmty. Action on Toxics v. CEQ, No. 3:20-cv-05199-RS (N.D. Cal. filed July 29, 2020)).

<sup>24</sup> See Press Release, The White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>; Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (repealing Executive Order 13,807 and directing the Council on Environmental Quality (CEQ) and the Office of Management and Budget (OMB) to determine if CEQ should issue a new order).

<sup>25</sup> Binder, *supra* note 4, at 6.

<sup>26</sup> See Blumm, *supra* note 4, at 4–5; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>27</sup> See NEPA, 42 U.S.C. § 4332 (stating that agencies must make the environmental impact statements (EIS's) required under NEPA available to the public pursuant to the Administrative Procedure Act (APA)); APA, 5 U.S.C. §§ 551 et seq. (providing requirements for agencies to make information available to the public); 115 CONG. REC. S19,008 (daily ed. July 10, 1969); 115 CONG. REC. S14,860 (daily ed. June 5, 1969) (statement of Sen. Jackson).

<sup>28</sup> NEPA, 42 U.S.C. §§ 4341–47 (including additional requirements for CEQ to develop recommendations on national policies to foster environmental

quality, to document and define changes in the natural environment and analyze trends and underlying causes, and to provide an annual report on the state of the environment); 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson).

<sup>29</sup> Exec. Order No. 11,514, 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970).

<sup>30</sup> Statement on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724, 7724 (Apr. 23, 1971) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>31</sup> Exec. Order No. 11,991, 42 Fed. Reg. 26,967, 26,967 (May 24, 1977) (to be codified at 3 C.F.R. 902 (1977) (requiring environmental impact statements be concise, clear, and to the point, and supported by evidence reflecting agency effort to address the necessary environmental analyses)).

<sup>32</sup> National Environmental Policy Act Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (to be codified at 40 C.F.R. pts. 1500–1518); *What Is the National Environmental Policy Act?*, ENV'T PROTECTION AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Jan. 30, 2021) [hereinafter *What Is NEPA?*].

<sup>33</sup> National Environmental Policy Act Regulations, 43 Fed. Reg. 55,978; See *What Is NEPA?*, *supra* note 32.

<sup>34</sup> National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,618–20 (Apr. 25, 1986) (to be

codified at 40 C.F.R. pts. 1500–1518) (rescinding the requirement to conduct a worst case analysis when there is incomplete or unavailable information on the environmental impacts of a major federal action); Other Requirements of NEPA, 70 Fed. Reg. 41,148, 41,148 (July 18, 2005) (to be codified at 40 C.F.R. pts. 1500–1518) (making technical modifications under the filing requirements section).

<sup>35</sup> Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017); *see generally* Kalen, *supra* note 8, at 10,406 (discussing motivations to promote economic development by removing environmental requirements).

<sup>36</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (advanced notice of proposal June 20, 2018) (to be codified at 40 C.F.R. pts. 1500–1518); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 32,071 (comment extended July 11, 2018) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>37</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>38</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>39</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518) (curtailing requirements under NEPA that federal agencies review and assess the impact of their actions on the environment by limiting public participation, rolling back requirement that agencies evaluate reasonable alternatives, and undermining government accountability by determining how and when the courts can process and decide NEPA cases); *see* Hazel, *supra* note 20.

<sup>40</sup> NEPA, 42 U.S.C. § 4332.

<sup>41</sup> CEQ Regulations, 40 C.F.R. §§ 1500–1508.28 (1978).

<sup>42</sup> *Id.* at §§ 1502.3, 1502.4, 1508.23, 1508.18.

<sup>43</sup> *Id.* at § 1508.18; *see also* Ezekial J. Williams & Kathy L. Schaeffer, *What Every Land Professional Should Know About NEPA*, 53 MINERAL L. INST. 4–15 (2007) (stating that federal actions include activities such as promulgation of an agency rule or regulation, approval of projects, issuing permits, and providing funding for activities).

<sup>44</sup> CEQ Regulations, 40 C.F.R. §§ 1501.3, 1501.4, 1502.3, 1502.4.

<sup>45</sup> *Id.* at § 1507.3.

<sup>46</sup> *Id.* at §§ 1501.4, 1502.3, 1502.4, 1508.27, 1508.3, 1508.8, 1508.14.

<sup>47</sup> *Id.* at § 1501.4.

<sup>48</sup> *Id.* at §§ 1501.4, 1507.3, 1508.4, 1508.9, 1508.11.

<sup>49</sup> *Id.* at § 1508.27.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at § 1508.7.

<sup>52</sup> *Id.* at §§ 1501.4, 1508.9.

<sup>53</sup> *Id.* at § 1508.9.

<sup>54</sup> *Id.* at §§ 1501.4, 1507.3; *See* Williams & Schaeffer, *supra* note 43.

<sup>55</sup> *Id.* at §§ 1501.4, 1507.3; *See* Williams & Schaeffer, *supra* note 43.

<sup>56</sup> CEQ Regulations, 40 C.F.R. § 1501.4.

<sup>57</sup> *Id.* §§ 1502.13, 1502.14; Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972); *see infra* note 70 and accompanying text.

<sup>58</sup> CEQ Regulations, 40 C.F.R. §§ 1502.15, 1502.16.

<sup>59</sup> Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976) (holding agencies must take a “hard look”).

<sup>60</sup> *See* Nat. Res. Def. Council v. Hodel, 865 F.2d 288, 294–96 (D.C. Cir. 1988); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

<sup>61</sup> *See* Kleppe, 427 U.S. at 409; Robertson, 490 U.S. at 350–51.

<sup>62</sup> CEQ Regulations, 40 C.F.R. §§ 1501.7, 1502.19, 1503.1, 1503.4.

<sup>63</sup> *Id.* at § 1501.7.

<sup>64</sup> *Id.* at § 1506.6.

<sup>65</sup> *Id.* at §§ 1502.19, 1503.1, 1503.4.

<sup>66</sup> *Id.* at § 1503.1.

<sup>67</sup> *Id.* at § 1502.9.

<sup>68</sup> *Id.* at §§ 1505.2, 1506.10.

<sup>69</sup> *Id.* at § 1506.10.

<sup>70</sup> *See* Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 296 (D.C. Cir. 1988) (stating that an objective of the public comment process is to ensure the public, other agencies, and Congress are informed about the impact of

an action “in order to spur all interested parties to rethink the wisdom of the action”).

<sup>71</sup> *See* Binder, *supra* note 4, at 6, 29 (discussing the exceptions carved out of NEPA shortly after it was passed by Congress); *see also* Sher & Hunting, *supra* note 10, at 438–40 (discussing Congress’s action to remove injunctions placed on an Alaskan pipeline); PAMELA BALDWIN ET AL., CONG. RES. SERV., STATUTORY MODIFICATIONS OF THE APPLICATION OF NEPA (1998); Kalen, *supra* note 8, at 10,404.

<sup>72</sup> Sher & Hunting, *supra* note 10, at 438–40.

<sup>73</sup> *See id.* (discussing the decision of the court to decline to rule on the NEPA challenge and invalidating the rule for violating the Mineral Leasing Act); Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 584, 584–85 (1973) (codified as amended at 43 U.S.C. § 1652(d) (1988)).

<sup>74</sup> *See* Sher & Hunting, *supra* note 10, at 441–44; *see also* 115 CONG. REC. S19,008, 19,010 (daily ed. July 10, 1969). *But see* 119 CONG. REC. 24,314 (1973) (discussing the need to expedite production of oil and gas).

<sup>75</sup> BALDWIN ET AL., *supra* note 71.

<sup>76</sup> Sher & Hunting, *supra* note 10, at 447–48.

<sup>77</sup> *Id.* at 449.

<sup>78</sup> *Id.*

<sup>79</sup> *See* BALDWIN ET AL., *supra* note 71.

<sup>80</sup> Kalen, *supra* note 8, at 10,404.

<sup>81</sup> *See* SELECTED ENVIRONMENTAL LAW STATUTES: 2020-2021 EDUCATIONAL EDITION, 1160–61, 1164 (Robin Kundis Craig ed., 2020-2021 ed. 2020) [hereinafter SELECTED STATUTES]; BALDWIN ET AL., *supra* note 71.

<sup>82</sup> SELECTED STATUTES, *supra* note 81.

<sup>83</sup> *Id.*

<sup>84</sup> Kalen, *supra* note 8, at 10,404; Binder, *supra* note 4, at 29.

<sup>85</sup> *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (2021); Zarghamee, *supra* note 12.

<sup>86</sup> Zarghamee, *supra* note 12; *see* Part IV.

<sup>87</sup> Zarghamee, *supra* note 12.

<sup>88</sup> Zarghamee, *supra* note 12.

<sup>89</sup> *See* Blumm, *supra* note 4, at 4–5; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>90</sup> *See* Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 296 (D.C. Cir. 1988) (stating that one purpose of NEPA is “to inform Congress, other agencies, and the general public about environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action”).

<sup>91</sup> *See generally* COUNCIL ON ENVTL. QUALITY, MAJOR CASES INTERPRETING THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) [hereinafter MAJOR NEPA CASES], [https://ceq.doe.gov/docs/laws-regulations/Major\\_NEPA\\_Cases.pdf](https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf) (providing an overview of major court decisions on NEPA); *see also* Sher & Hunting, *supra* note 10, at 449.

<sup>92</sup> *See infra* notes 100–154 and accompanying text. *See generally* MAJOR NEPA CASES, *supra* note 86 (providing a detailed list of summaries and holdings of cases that involve NEPA rulings).

<sup>93</sup> *See* Kalen, *supra* note 8, at 10,401.

<sup>94</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 2, 13; Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976); Calvert Cliffs’ Coordinated Comm. v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

<sup>95</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 4–5, 14–15; Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976).

<sup>96</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 14, 23; Baltimore Gas & Electric Co. v. Nat. Res. Def. Council, 462 U.S. 87 (1983); Marsh v. Or. Nat. Res. Council, 490 U.S. 360 (1989); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990).

<sup>97</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 14, 23; Baltimore Gas, 462 U.S. at 87; Marsh, 490 U.S. at 360; Lujan, 497 U.S. at 871.

<sup>98</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 17; CEQ Regulations, 40 C.F.R. § 1508.27; NEPA, 42 U.S.C. § 4332(C)(iv).

<sup>99</sup> *See* Binder, *supra* note 4, at 28–32; MAJOR NEPA CASES, *supra* note 91, at 1, 15–16; Kalen, *supra* note 8, at 10,401. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008).

<sup>100</sup> *See* Binder, *supra* note 4, at 28–32 (2020); MAJOR NEPA CASES, *supra* note 91, at 1, 15–16; Kalen, *supra* note 8, at 10,401.

<sup>101</sup> Binder, *supra* note 4, at 29–30; Kalen, *supra* note 8, at 10,401.



- <sup>102</sup> Binder, *supra* note 4, at 29–30; Kalen, *supra* note 8, at 10,401.
- <sup>103</sup> Binder, *supra* note 4, at 29–30; Kalen, *supra* note 8, at 10,401.
- <sup>104</sup> Binder, *supra* note 4, at 28–29; Kalen, *supra* note 8, at 10,402.
- <sup>105</sup> See Kalen, *supra* note 8, at 10,402.
- <sup>106</sup> Binder, *supra* note 4, at 30; MAJOR NEPA CASES, *supra* note 91, at 1, 25; Kalen, *supra* note 8, at 10,403–04.
- <sup>107</sup> Binder, *supra* note 4, at 30; MAJOR NEPA CASES, *supra* note 91, at 1, 25; Kalen, *supra* note 8, at 10,403–04.
- <sup>108</sup> Binder, *supra* note 4, at 30; Kalen, *supra* note 8, at 10,403–04.
- <sup>109</sup> See Blumm, *supra* note 4, at 4–5; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.
- <sup>110</sup> See Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 296 (D.C. Cir. 1988).
- <sup>111</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 15–16; Save the Bay, Inc. v. USACE, 610 F.2d 322, 327 (5th Cir. 1980); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272 (8th Cir. 1980); Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990).
- <sup>112</sup> MAJOR NEPA CASES, *supra* note 91, at 1, 15–16; Save the Bay, 610 F.2d at 327; Winnebago, 621 F.2d at 272.
- <sup>113</sup> Winnebago, 621 F.2d at 272 (quoting NAACP v. Med. Ctr., Inc., 584 F.2d 619 (3d Cir. 1978)).
- <sup>114</sup> See Save the Bay, 610 F.2d at 327; Winnebago, 621 F.2d at 272; Macht, 916 F.2d at 13.
- <sup>115</sup> See Save the Bay, 610 F.2d at 327; Winnebago, 621 F.2d at 272; Macht, 916 F.2d at 13.
- <sup>116</sup> Save the Bay, 610 F.2d at 327 (finding that more involvement than just the pipeline is required for a “major Federal action” to exist).
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.* at 326–27.
- <sup>119</sup> See generally *id.* (deciding that the federal action did not federalize the project and the federal action alone was not a major federal action so USACE did not need to complete an EIS); Winnebago, 621 F.2d at 272; Macht, 916 F.2d at 16.
- <sup>120</sup> See Blumm, *supra* note 4, at 4–5 (arguing “the heart of the statute was to make federal agencies evaluate practicable alternative courses of action to foster its goals, including making federal agencies fulfil [sic] their responsibilities ‘as trustee[s] of the environment for succeeding generations’ and promote uses that ensure ‘the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.’”) (alteration in original) (citation omitted); 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.
- <sup>121</sup> NEPA, 42 U.S.C. § 4332.
- <sup>122</sup> *Id.*
- <sup>123</sup> See Binder, *supra* note 4, at 28–32 (2020); Kalen, *supra* note 8, at 10,401; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.
- <sup>124</sup> See CEQ Regulations, 40 C.F.R. § 1506.1.
- <sup>125</sup> *Id.*
- <sup>126</sup> *Id.*
- <sup>127</sup> See *id.*; see generally MAJOR NEPA CASES, *supra* note 91, at 1.
- <sup>128</sup> Winter v. Nat. Res. Def. Council, 555 U.S. 7, 22 (2008).
- <sup>129</sup> *Id.*
- <sup>130</sup> *Id.*
- <sup>131</sup> Monsanto v. Geertson Seed Farm, 561 U.S. 139, 157 (2010).
- <sup>132</sup> See William S. Eubanks II, *Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingerin Questions Left Open by the Court*, 33 VT. L. REV. 649, 652–54 (2009); see also Eric J. Murdock & Andrew J. Turner, *How “Extraordinary” Is Injunctive Relief in Environmental Litigation? A Practitioner’s Perspective*, 42 ENV’T L. REP. 10,464, 10,464–65 (2012) (discussing the application of a flexible approach to balancing injunctive relief factors in environmental cases favoring a preliminary injunction where environmental harms are alleged); Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 544–45 (1987).
- <sup>133</sup> Winter, 555 U.S. at 22.
- <sup>134</sup> Amoco, 480 U.S. at 544–45.
- <sup>135</sup> *Id.* at 534–40.
- <sup>136</sup> *Id.* at 544–45.
- <sup>137</sup> Murdock & Turner, *supra* note 132, at 10,469.
- <sup>138</sup> *Id.*
- <sup>139</sup> Nat’l Parks Conservation Ass’n v. Semonite, 2018 WL 3838809 (D.D.C. 2018) (denying preliminary injunction); Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d 1075, 1088 (D.C. Cir. 2019) (holding that the Army Corps of Engineers violated NEPA); Nat’l Parks Conservation Ass’n v. Semonite, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) (holding that since Virginia Electric and Power Company already completed the project, vacatur was inappropriate).
- <sup>140</sup> Nat’l Parks Conservation Ass’n v. Semonite, 2018 WL 3838809 (D.D.C. 2018) (denying preliminary injunction); Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d 1075 (D.C. Cir. 2019) (holding that the Army Corps of Engineers violated NEPA); Nat’l Parks Conservation Ass’n v. Semonite, 422 F. Supp. 3d 92 (D.D.C. 2019) (holding that since Virginia Electric and Power Company already completed the project, vacatur was inappropriate).
- <sup>141</sup> Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d at 1078.
- <sup>142</sup> *Id.* at 1079.
- <sup>143</sup> Nat’l Parks Conservation Ass’n v. Semonite, 282 F. Supp. 3d 284, 286–87 (D.D.C. 2017).
- <sup>144</sup> *Id.* at 291.
- <sup>145</sup> Nat’l Parks Conservation Ass’n v. Semonite, 311 F. Supp. 3d 350, 380–81 (D.D.C. 2018).
- <sup>146</sup> Nat’l Parks Conservation Ass’n v. Semonite, 2018 WL 3838809, at \*3 (D.D.C. 2018).
- <sup>147</sup> Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d 1075, 1077, 1087–88 (D.C. Cir. 2019).
- <sup>148</sup> Nat’l Parks Conservation Ass’n v. Semonite, 422 F. Supp. 3d 92, 94 (D. 2019).
- <sup>149</sup> *Id.* at 103.
- <sup>150</sup> *Id.* at 103–04.
- <sup>151</sup> See Eubanks, *supra* note 132, at 651. See generally NEPA, 42 U.S.C. §§ 4331 et seq.; CEQ Regulations, 40 C.F.R. §§ 1500 et seq.
- <sup>152</sup> Eubanks, *supra* note 132, at 653–54 (quoting Amoco); See Nat’l Parks Conservation Ass’n v. Semonite, 422 F. Supp. 3d 92 (D. 2019) (denying vacatur after project was completed when NEPA violation was found).
- <sup>153</sup> Madeline Voitier, *Environmental Roadblock: Preliminary Injunction Security and the Need for Change*, 18 LOY. J. PUB. INT. L. 61, 63 (2017).
- <sup>154</sup> See Nat’l Parks Conservation Ass’n v. Semonite, 2018 WL 3838809 (D.D.C. 2018) (denying preliminary injunction); Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d 1075 (D.C. Cir. 2019) (holding that the Army Corps of Engineers violated NEPA); Nat’l Parks Conservation Ass’n v. Semonite, 422 F. Supp. 3d 92 (D.D.C. 2019) (holding that since Virginia Electric and Power Company already completed the project, vacatur was inappropriate); CEQ Regulations, 40 C.F.R. § 1506.1. See generally MAJOR NEPA CASES, *supra* note 91, at 1–29.
- <sup>155</sup> See CEQ NEPA Regulations, *supra* note 19.
- <sup>156</sup> Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017).
- <sup>157</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018) (to be codified at 40 C.F.R. pts. 1500–1518).
- <sup>158</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,312–13 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 32,071 (July 11, 2018) (comment extended July 11, 2018) (to be codified at 40 C.F.R. pts. 1500–1518).
- <sup>159</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020) (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).
- <sup>160</sup> *Id.*
- <sup>161</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,306 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518); COUNCIL ON ENV’T QUALITY, UPDATE TO THE REGULATIONS IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT FINAL RULE RESPONSE TO COMMENTS (2020).
- <sup>162</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.* at 43,359–60 (July 16, 2020); see also *supra* Part III (discussing court jurisprudence restricting NEPA).



<sup>165</sup> *Supra* Part III (discussing court jurisprudence restricting NEPA).

<sup>166</sup> See *supra* text accompanying notes 100–123 (discussing court rulings on exemptions for non-discretionary actions and actions with functional equivalent reviews).

<sup>167</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,403, 43,375 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* notes 111–123 and accompanying text (discussing “small federal handle”).

<sup>171</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,375 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>172</sup> See Binder, *supra* note 4, at 30–31 (discussing court decisions that NEPA requirements apply to major federal actions which occur outside of the U.S.).

<sup>173</sup> See Binder, *supra* note 4, at 28–32; Kalen, *supra* note 8, at 10,401; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>174</sup> CEQ Regulations, 40 C.F.R. § 1502.14 (2020); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,403, 43,365 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>175</sup> CEQ Regulations, 40 C.F.R. § 1502.14 (2020); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,403, 43,365 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>176</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,403, 43,376 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>177</sup> See Nat. Res. Def. Council v. Hodel, 865 F.2d 288, 294–96 (D.C. Cir. 1988); CEQ Regulations, 40 C.F.R. § 1502.14 (2020) (stating that the consideration of alternatives is “the heart” of the Environmental Impact Statement (EIS)); see generally Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing, Planning, Democracy, and the Environment*, 50 ENV’T L. REP. 10,281 (2020) (discussing the Trump Administration’s changes to NEPA regulations).

<sup>178</sup> Richard Glick & Oliver Jamin, *Trump Track: POTUS Upends NEPA Rules in the Name of Speed*, JDSUPRA (July 28, 2020), <https://www.jdsupra.com/legalnews/trump-track-potus-upends-nepa-rules-in-87009/>; see *supra* note 98 and accompanying text.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; see also Jessica Wentz & Michael Burger, *Five Points About the Proposed Revisions to CEQ’s NEPA Regulations*, CLIMATE LAW BLOG (January 10, 2020), <http://blogs.law.columbia.edu/climatechange/2020/01/10/five-points-about-the-proposed-revisions-to-ceqs-nepa-regulations/> (discussing the major role that the cumulative effect requirement has played in recent litigation regarding agency obligations to take into account climate change when conducting NEPA reviews of fossil fuel extraction leases and transport and infrastructure projects such as coal railways and pipelines).

<sup>181</sup> CEQ Regulations, 40 C.F.R. §§ 1501.4, 1508.4.

<sup>182</sup> CEQ Regulations, 40 C.F.R. § 1508.4.

<sup>183</sup> See CEQ Regulations, 40 C.F.R. § 1508.27 (stating significant effect factors); NAT’L OCEANIC & ATMOSPHERIC ADMIN., POLICY AND PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND RELATED AUTHORITIES: COMPANION MANUAL FOR NOAA ADMINISTRATIVE ORDER 216-6A E-6 (2017) (identifying the agency’s categorical exclusions (CEs), including the exclusion of habitat restoration projects that meet specific criteria); *Sea Turtles*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/sea-turtles> (last visited Oct. 2, 2021) (stating that there are six species of sea turtle in the U.S. all of which are endangered or threatened and one of the significant threats to the species is loss and degradation of nesting habitats); see also *Loggerhead Sea Turtle Terrestrial Critical Habitat for the Northwest Atlantic Ocean*, U.S. FISH & WILDLIFE SERV. (Feb. 7, 2018), [https://www.fws.gov/northflorida/seaturtles/2014\\_Loggerhead\\_CH/Terrestrial\\_critical\\_habitat\\_loggerhead.html](https://www.fws.gov/northflorida/seaturtles/2014_Loggerhead_CH/Terrestrial_critical_habitat_loggerhead.html) (discussing critical beach nesting habitat for one species of sea turtles).

<sup>184</sup> See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,360 (July 16, 2020)

(to be codified at 40 C.F.R. pts. 1500–1518); Glicksman & Camacho, *supra* note 177.

<sup>185</sup> See *supra* notes 44–56 and accompanying text (discussing use of CEs).

<sup>186</sup> See Binder, *supra* note 4, at 28–32; Kalen, *supra* note 8, at 10,401; 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>187</sup> Kalen, *supra* note 8, at 10,398; Binder, *supra* note 4, at 50.

<sup>188</sup> See *supra* Part IV (discussing changes made under Trump Administration rulemaking).

<sup>189</sup> See 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>190</sup> See *supra* Parts II–IV (discussing congressional, court, and Administration actions weakening NEPA).

<sup>191</sup> See Congressional Review Act, 5 U.S.C. §§ 881 et seq.; Wild Virginia v. Council on Env’t Quality, 2020 WL 5494519 \*4 (D.W.D. Va. 2020) (noting the following three other cases challenging the rule); Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021); Press Release, The White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/> (announcing the two phased NEPA rulemaking process); National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (providing notice of the phase one proposed rulemaking).

<sup>192</sup> See generally Wild Va. v. CEQ, 2020 WL 5494519 (D.W.D. Va. 2020) (making arguments for setting aside the Trump Administration rulemaking).

<sup>193</sup> See *id.* at \*3; Alaska Cmty. Action on Toxics v. CEQ, No. 3:20-cv-05199-RS (N.D. Cal. 2020); *California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. 2020); Env’t Just. Health All. v. CEQ, No. 1:20-cv-06143-CM (S.D.N.Y. 2020); Iowa Citizens for Cmty Improvement v. CEQ, No. 1:20-cv-02715-TJK (D.D.C. 2020) *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>194</sup> *Chevron*, 467 U.S. at 837.

<sup>195</sup> *Id.*

<sup>196</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (19760); MAJOR NEPA CASES, *supra* note 91, at 1, 17; CEQ Regulations, 40 C.F.R. § 1508.27; see generally Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,375 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–1518).

<sup>197</sup> See Binder, *supra* note 4, at 30–32 (discussing court decisions that NEPA requirements apply to major federal actions which occur outside of the U.S.).

<sup>198</sup> See Paul A. Dame, Note, *Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?* 44 WM. & MARY L. REV. 405, 424 (2002); see generally *Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *stare decisis* as “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”).

<sup>199</sup> See Wild Va. v. CEQ, 2020 WL 5494519, at \*3–4 (D.W.D. Va. Sept. 11, 2020).

<sup>200</sup> Complaint at 162, 172–79, Wild Va. v. CEQ, No. 3:20-CV-0005 (D.W.D. Va. Sept. 11, 2020), 2020 WL 5494519 (stating that an agency rule is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider” (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))); Amended Complaint at 3, Alaska Cmty. Action on Toxics v. CEQ, No. 3:20-CV-05199 (N.D. Cal. Sept. 4, 2020), 2020 WL 6441203 (stating that the Trump Administration “explicitly admitted that it placed the interests of pipelines, fossil fuel energy production, and road building over that of environmental and public health”).

<sup>201</sup> Complaint at 160, 170–71, Wild Va., 2020 WL 5494519 (No. 3:20-CV-0005); Complaint at 6, *California v. CEQ*, No. 3:20-CV-06057 (N.D. Cal. filed Aug. 28, 2020) (stating that CEQ “failed to review the Final Rule’s significant environmental and public health impacts as required by NEPA itself”).

<sup>202</sup> Complaint at 152, 157–60, 164–68, Wild Va., 2020 WL 5494519 (No. 3:20-CV-0005) (stating that when an agency is reversing “a prior policy that ‘has engendered serious reliance interests,’ the agency must ‘provide a more detailed justification than what would suffice for a new policy created on a blank slate’” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))); Complaint at 6, 49, *California v. CEQ*, No. 3:20-CV-06057 (stating that CEQ “failed to provide a rational justification for its sweeping revisions

to the 1978 regulations” and the rulemaking “ignores reliance interests on those longstanding regulations”); Amended Complaint at 3, *Alaska Cmty. Action on Toxics*, 2020 WL 6441203 (No. 3:20-CV-05199).

<sup>203</sup> Complaint at 162, 177–78, *Wild Virginia*, 2020 WL 5494519 (No. 3:20-CV-0005); Complaint at 81–87, *Env’t Just. Health All. v. CEQ*, No. 1:20-CV-06143 (S.D.N.Y. filed Aug. 6, 2020); see Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 602 (2018).

<sup>204</sup> See generally Complaint at 157–79, *Wild Virginia*, 2020 WL 5494519 (No. 3:20-CV-0005) (discussing support for claims); Complaint at 6, 49, *California v. CEQ*, No. 3:20-CV-06057 (discussing support for claims); Amended Complaint at 3, *Alaska Cmty. Action on Toxics*, 2020 WL 6441203 (No. 3:20-CV-05199) (discussing support for claims).

<sup>205</sup> See *supra* notes 71–154 and accompanying text; Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (2021); Zarghamee, *supra* note 12.

<sup>206</sup> Maya Weber, *Eyeing Changes, White House Gives Agencies Two-Year Extension On NEPA*, S&P GLOBAL (June 28, 2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/062821-eyeing-changes-white-house-gives-agencies-two-year-extension-on-nepa>; Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021) (extending the deadline for Federal agencies to develop or revise NEPA procedures).

<sup>207</sup> National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021) (providing notice of the phase one proposed rulemaking); see Press Release, White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>.

<sup>208</sup> Casey F. Bradford & Robert T. Denney, *Federal Court Dismisses NEPA Challenge, Leaving Trump-Era Regulations in Effect, but Stalled During Biden Reconsideration*, JONES DAY (July 2021), <https://www.jonesday.com/en/insights/2021/07/federal-court-dismisses-nepa-challenge-leaving-trump-era-regulations-in-effect-but-stalled-during-biden-reconsideration>; *Alaska Cmty. Action on Toxics v. CEQ*, No. 3:20-CV-05199, 2020 WL 6441203 (N.D. Cal. Sept. 4, 2020) (stayed Feb. 12, 2021); *California v. CEQ*, No. 3:20-CV-06057 (N.D. Cal.) (stayed Feb. 12, 2021); *Env’t Just. Health All. v. CEQ*, No. 3:20-CV-06143 (S.D.N.Y.) (stayed Feb. 16, 2021); *Iowa Citizens for Cmty. Improvement v. CEQ*, No. 1:20-CV-02715 (D.D.C.) (stayed Feb. 9, 2021).

<sup>209</sup> *Wild Va. v. CEQ*, No. 3:20-CV-00045, 2021 WL 2521561 (D.W.D. Va. June 21, 2021) (dismissed June 21, 2021); Bradford & Denney, *supra* note 208; Sebastien Malo, *Enviros ask 4th Circ to Revive Challenge to Trump-Era NEPA Reforms*, REUTERS (July 30, 2021 4:48 PM) <https://www.reuters.com/legal/litigation/enviros-ask-4th-circ-revive-challenge-trump-era-nepa-reforms-2021-07-30/>.

<sup>210</sup> See *supra* Part III (discussing interpretations by the courts where the 1978 regulations were silent). See generally Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (beginning the process of reviewing and reversing environmental rules and orders made under the Trump Administration).

<sup>211</sup> See Exec. Order No. 11,514, 35 Fed. Reg. 4247, 4247–48 (Mar. 7, 1970) (delegating authority to CEQ to issue rulemakings for the implementation of NEPA); APA, 5 U.S.C. §§ 551 et seq.

<sup>212</sup> Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7042 (Jan. 25, 2021).

<sup>213</sup> *Id.*

<sup>214</sup> See Press Release, White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>; National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757, 55,759–55,760 (Oct. 7, 2021) (providing notice of the phase one proposed rulemaking).

<sup>215</sup> National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. at 55,759 (outlining the objectives of each phase of rulemaking).

<sup>216</sup> *Id.* at 55,762–67 (identifying specific revisions throughout the regulations necessary to reinstate the consideration of cumulative impacts and discussing the reasoning behind the changes).

<sup>217</sup> *Id.* at 55,761–62 (identifying revisions to revert to the 1978 regulations which allowed federal agencies to establish additional NEPA procedures and discussing the reasoning behind the changes).

<sup>218</sup> *Id.* at 55,760–61 (identifying revisions the purpose and need regulations to remove changes that limited consideration of alternatives to only those that advance the proposed action and the goals of the applicant and discussing the reasoning behind the changes).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 55,757, 55,760–67 (discussing the proposed revisions in the first phase of rulemaking).

<sup>221</sup> See Binder, *supra* note 4, at 28–29; Kalen, *supra* note 8, at 10,402.

<sup>222</sup> See MAJOR NEPA CASES, *supra* note 91; *Save the Bay, Inc. v. USACE*, 610 F.2d 322, 327 (5th Cir. 1980); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272 (8th Cir. 1980); *supra* notes 47–56 and accompanying text (discussing criteria for determining significant effect and when to develop an EA to determine if there is a significant effect).

<sup>223</sup> See *supra* notes 100–123 and accompanying text.

<sup>224</sup> Dame, *supra* note 198, at 416, 431, 433 (quoting *NBC v. Satellite Broadcasting Networks*, 581 U.S. 823 (1994)).

<sup>225</sup> See *supra* note 118–48 and accompanying text; Dame, *supra* note 198, at 416, 431, 433; See Eubanks, *supra* note 132, at 651; Executive Order No. 11,991, 42 Fed. Reg. 26,967, 26,967 (May 24, 1977) (to be codified at 3 C.F.R. 902 (1977)); see generally NEPA, 42 U.S.C. §§ 4331 et seq.; CEQ Regulations, 40 C.F.R. §§ 1500 et seq.

<sup>226</sup> Dave Kovalesski, *Energy Industry Associations Applaud Trump Administration Rule to Streamline NEPA*, DAILYENERGYINSIDER, (July 17, 2020), <https://dailyenergyinsider.com/news/26346-energy-industry-associations-applaud-trump-administration-rule-to-streamline-nepa/>.

<sup>227</sup> See CEQ Regulations, 40 C.F.R. § 1506.1.

<sup>228</sup> *Environmental Compliance in the Office of Habitat Conservation*, NAT. OCEANIC & ATMOS. ADMIN., (Oct. 7, 2021) <https://www.fisheries.noaa.gov/national/habitat-conservation/environmental-compliance-office-habitat-conservation> (discussing an example of a Programmatic EIS, its role in NEPA compliance, how it maximizes efficiency while ensuring appropriate environmental review, and activities that fall outside of the scope of the EIS).

<sup>229</sup> See *id.*; CEQ Regulations, 40 C.F.R. § 1506.1.

<sup>230</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (2021); Zarghamee, *supra* note 12; See Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (2021); Zarghamee, *supra* note 12.

<sup>231</sup> See *id.*; *supra* notes 124–54 and accompanying text.

<sup>232</sup> See *supra* note 124–54 and accompanying text; Eubanks, *supra* note 132, at 653 (quoting Amoco).

<sup>233</sup> See 124–54 and accompanying text; CEQ Regulations, 40 C.F.R. § 1506.1.

<sup>234</sup> See *supra* notes 124–54 and accompanying text.

<sup>235</sup> See *supra* note 124–54 and accompanying text; Dame, *supra* note 198, at 416, 431, 433; See Eubanks, *supra* note 132, at 651; Executive Order No. 11,991, 42 Fed. Reg. 26,967, 26,967 (May 24, 1977) (to be codified at 3 C.F.R. 902 (1977)).

<sup>236</sup> Kalen, *supra* note 8, at 10,398; Binder, *supra* note 4, at 50.

<sup>237</sup> Kalen, *supra* note 8, at 10,398.

<sup>238</sup> 115 CONG. REC. S19,008, 19,008–09 (daily ed. July 10, 1969); 115 CONG. REC. S14,860, 14,860–61 (daily ed. June 5, 1969) (statement of Sen. Jackson); NEPA, 42 U.S.C. § 4331.

<sup>239</sup> See *supra* notes 155–186 and accompanying text (discussing the harmful effects of the Trump rulemaking).

<sup>240</sup> See *supra* notes 187–235 and accompanying text (discussing recommendations).

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## PAVING A PATH TO INDEPENDENT TINY LIVING: AN INTRODUCTION TO ROADBLOCKS

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<sup>25</sup> *Accessory Dwelling Units*, DCOZ: ZONING HANDBOOK, <https://handbook.decoz.dc.gov/use-categories/other-uses/accessory-dwelling-units/> (last visited Nov. 7, 2021) (defining an Accessory Dwelling Unit as a dwelling unit that is secondary to the principal single household dwelling unit in terms of gross floor area, intensity of use, and physical character, but which has kitchen and bath facilities separate from the principal dwelling and may have a separate entrance.).

<sup>26</sup> See D.C. MUN. REGS. TIT. 11-E, § 5000.2(b) (2021) (stating that, “[a]n accessory building shall... [b]e used for purposes that are incidental to the use of the principal building; provided that no more than one (1) principal dwelling unit shall be allowed”); see also Ileana Schinder, *What Montgomery County can Learn from DC’s Accessory Apartment Policy*, GREATER WASH. (June 26, 2019), <https://ggwash.org/view/72750/dc-legalized-accessory-apartments-in-2016-heres-what-happened-next> (discussing how homeowners can invest in their own ADUs).

<sup>27</sup> Katherine M. Vail, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54 U. LOUISVILLE L. REV. 357, 370 (2016).

<sup>28</sup> Frank Olito, *Tiny-house Owners are Facing Evictions or Living Under the Radar Because Their Homes are Considered Illegal in Most Parts of the US*, INSIDER (Dec. 14, 2020, 9:57 AM) <https://www.businessinsider.com.au/tiny-house-owners-zoning-laws-2020-12>.

<sup>29</sup> Eric Kurzynski, *Most Popular Cities in Oregon for Tiny Home Livings*, UTOPIAN VILLAS: LUXURIOUS RECREATIONAL RETREATS (May 18, 2017), <https://www.utoipan-villas.com/popular-cities-oregon-tiny-home-living/>.

<sup>30</sup> *Tiny-Tranquility: A Tiny House Village & Vintage Trailer Park in Waldport, Oregon*, TINY HOUSE TALK (Apr. 22, 2018), <https://tinyhousetalk.com/tiny-tranquility-a-tiny-house-village-vintage-trailer-park-in-waldport-oregon/>.

<sup>31</sup> *Model Ordinance: Cottage Housing Development*, LEIGH VALLEY PLAN, COMM’N 4-5 (2015) <https://lvpc.org/pdf/cottageHousingDev.pdf>

(In their analysis of single-room-occupancy (SRO) cottages, the Lehigh Valley Planning Commission noted that public resistance to tiny housing is most commonly due to concern that the housing type will ruin the “character” and property-value of the neighborhood).

<sup>32</sup> *Id.* at 5-7.

<sup>33</sup> See generally Ciara Turner, *It Takes a Village: Designating Tiny House Villages as Transitional Housing Campgrounds*, 50 U. MICH. J.L. REFORM 931 (2017) (discussing the SROs in Olympia, Washington).

<sup>34</sup> *Id.* at 940.

<sup>35</sup> *Id.*

<sup>36</sup> See generally *City Proclamation*, SPURFREEDOM (July 17, 2021), <https://www.spurfreesdom.org/city-proclamation/>. (Requiring that a THOW must be secured to a foundation while in city limits in response to the safety concern of high winds which could knock the house over or into someone else’s home and property).

<sup>37</sup> *About Spur*, SPURFREEDOM, <https://www.spurfreesdom.org/sample-page/> (last visited Nov. 7, 2021).

<sup>38</sup> See *id.* (describing itself as having undergone a dramatic population drain to the big cities over the last few decades from a town of several thousand to 1,000 people, leaving the infrastructure of a city. Spur leadership described the town to be “in transitional stage” and “would love to come out of it ahead by ignoring the status quo and becoming a model for 21st century towns.”).

<sup>39</sup> BRILEY, MICH., TOWNSHIP ZONING ORDINANCE ch. II § 201 (last amended Oct. 21, 2020), <https://www.brileytownship.com/doc.zoningordinance.pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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## BISON, TRIBES, AND BRUCELLOSIS IN THE INTERAGENCY BISON MANAGEMENT PLAN

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temporal separation” during periods of high-risk transmission in the GYA is necessary).

<sup>20</sup> See *Letting Buffalo Roam*, COTTONWOOD ENV’T L. CTR., <https://www.cottonwoodlaw.org/work/letting-yellowstone-bison-roam-freely> (last visited Sept. 9, 2021) (aiming to allow Yellowstone bison to roam freely on public lands in Montana and fighting to allow them to do so until the Federal Government completes its new analysis); see also *Free Roaming Bison*, UNITED PROP. OWNERS OF MONT., <http://upom.org/interior-construction/> (last visited Sept. 9, 2021) (insisting that wild bison be classified as livestock rather than wildlife, or else private property owners will bear the costs of the damages caused by free roaming bison).

<sup>21</sup> See *Free Roaming Bison*, *supra* note 20.

<sup>22</sup> See *Bison Management*, *supra* note 6.

<sup>23</sup> See *Bison Management*, *supra* note 6.

<sup>24</sup> See *Bison Management*, *supra* note 6.

<sup>25</sup> See 36 C.F.R. § 2.2(b)(2) (“Hunting may be allowed in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles. Such hunting shall be allowed pursuant to special regulations.”); see generally *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (holding that the lands of the Bighorn National Forest are not categorically “occupied” for purposes of the Crow Tribe’s off-reservation treaty hunting rights). *But see* *Yellowstone Game Protection Act*, 28 Stat. 73, 53 Cong. Ch. 72 (1894).

<sup>26</sup> Ulysse Bex, *Shuffle Off the Buffalo: Groups Push to Ship, not Shoot, Canyon Bison*, CRONKITE NEWS ARIZ. PRESS (Sept. 22, 2021), [https://cronkitenews.azpbs.org/2021/09/22/shuffle-off-the-buffalo-groups-push-to-ship-not-shoot-canyon-bison/?fbclid=IwAR2w\\_dq0yy8zpljoYsCZUnJt0fUGNqy7\\_mY3VgZ-Z9UbleYrkz9gXAGVzFAk](https://cronkitenews.azpbs.org/2021/09/22/shuffle-off-the-buffalo-groups-push-to-ship-not-shoot-canyon-bison/?fbclid=IwAR2w_dq0yy8zpljoYsCZUnJt0fUGNqy7_mY3VgZ-Z9UbleYrkz9gXAGVzFAk).



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