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NEPA and Gentrification: Using Federal Environmental Review to Combat Urban Displacement

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NEPA AND GENTRIFICATION: USING FEDERAL ENVIRONMENTAL REVIEW TO COMBAT URBAN DISPLACEMENT[†]

ABSTRACT

Cities are embracing green spaces and environmental amenities. But as government and private investment surges into urban neighborhoods, residents of historically disinvested communities are evicted and displaced to make room for a wealthier—and often whiter—demographic. The National Environmental Policy Act requires federal agencies to prepare an in-depth environmental impact statement for proposed actions significantly affecting the quality of the human environment. Federally funded redevelopment projects contribute directly to the powerfully displacing forces of gentrification, and environmental impact statements for such projects should affirmatively account for the indirect displacement effects caused by that investment. Articulating a clear legal obligation that federal agencies must consider the specific social and cultural harms associated with gentrification would provide communities with another avenue to address displacement concerns and to force agencies to consider alternative options and mitigation strategies that could alleviate the negative impacts of gentrification.

This Comment demonstrates that agencies should be required to consider indirect urban displacement associated with gentrification in federally mandated environmental impact statements. It discusses the statutory framework of NEPA and its relevance to urban redevelopment projects. It then explores the treatment of urban displacement in NEPA case law and considers the causal relationship between urban reinvestment and indirect displacement. It then focuses on how cumulative impacts of past federal and private actions have contributed to the heightened susceptibility of many communities, especially African American communities, to displacement pressures and how the federal environmental review process can provide a tool to combat the inequities of the urban landscape.

[†] In July 2020, the Council on Environmental Quality issued a final rule comprehensively rewriting the NEPA regulations. This Comment was written prior to the Trump Administration's NEPA rollback and does not address those changes.

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INTRODUCTION

Suburbanization and urban sprawl across the United States have caused numerous environmental and social effects.[1] But over the past several decades, many American cities have witnessed a different type of urban growth, one that embraces "inner-city rehabilitation" and "neighborhood renovation" as an alternative to sprawl.[2] This specific type of urban growth and redevelopment also caters predominantly to higher-income residents.[3] Millennials especially are seeking urban lifestyles that are walkable, sustainable, and more environmentally-friendly than the still-prevalent exurbs.[4] On its face, this renewed "back to the city" movement[5] offers notable public benefits, transforming formerly disinvested and neglected urban neighborhoods into amenities such as greenways[6] and waterfront parks,[7] stimulating commercial development,[8] increasing municipal tax bases, and providing other social and environmental benefits to those wealthy enough to afford them.[9] However, these projects also contribute to displacement and loss of social capital for the very same communities who have historically suffered the most from environmental harms.[10] Projects that increase green space or otherwise improve the

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[1] *See, e.g.*, Michael P. Johnson, *Environmental Impacts of Urban Sprawl: A Survey of the Literature and Proposed Research Agenda*, 33 ENV'T & PLAN.: ECON. & SPACE 717, 721–22 (2007).

[2] Moon Landrieu, *Foreword* to BACK TO THE CITY: ISSUES IN NEIGHBORHOOD RENOVATION ix (Shirley Bradway Laska & Daphne Spain eds., 1980).

[3] *See, e.g.*, Richard T. LeGates & Chester Hartman, *The Anatomy of Displacement in the United States*, *in* GENTRIFICATION OF THE CITY 182 (Neil Smith & Peter Williams eds., 1986).

[4] *See* JOHN JOE SCHLICHTMAN, JASON PATCH & MARC LAMONT HILL, GENTRIFIER 172 (2017) (noting the trend of millennials deciding in large numbers to move into the city rather than out of it); *see also* Miriam Zuk, Ariel H. Bierbaum, Karen Chapple, Karolina Gorska & Anastasia Loukaitou-Sideris, *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 31–44 ("These changes stem not just from individual action and market forces, but also government intervention. The public sector makes investments to stimulate and respond to renewed interest in urban living; these investments put government at risk of becoming an agent of gentrification and displacement.").

[5] *Introduction* to BACK TO THE CITY, *supra* note 2, at xiii; *see* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 407 (2003).

[6] For a discussion of the construction and effects of Manhattan's High Line park, see KENNETH A. GOULD & TAMMY L. LEWIS, GREEN GENTRIFICATION: URBAN SUSTAINABILITY AND THE STRUGGLE FOR ENVIRONMENTAL JUSTICE 2 (2017).

[7] For an analysis of the unique features associated with redevelopment projects taking place on the waterfront, see Pamela Stern & Peter V. Hall, *Greening the Waterfront? Submerging History, Finding Risk*, *in* JUST GREEN ENOUGH: URBAN DEVELOPMENT AND ENVIRONMENTAL GENTRIFICATION 77–91 (Winifred Curran & Trina Hamilton eds., 2018).

[8] Byrne, *supra* note 5, at 416.

[9] *See id.* at 405–06; *Introduction* to BACK TO THE CITY, *supra* note 2, at xiii (discussing the typical demographics of gentrifiers).

[10] *See* Daniel Faber & Shelley McDonough Kimelberg, *Sustainable Development and Environmental Gentrification: The Paradox Confronting the U.S. Environmental Justice Movement*, *in* UPROOTING URBAN AMERICA: MULTIDISCIPLINARY PERSPECTIVES ON RACE, CLASS & GENTRIFICATION 77–92 (Horace R. Hall,

environmental amenities in a community often lead to sharp increases in property values, displacement of local communities, and racial and socioeconomic homogeneity.[11] Oftentimes, the "greening" of the physical urban landscape also coincides with the "whitening" and "richening" of the cultural landscape.[12]

Often, communities that have fought the hardest for environmental cleanups and that have suffered the most from urban environmental hazards are those most likely to be excluded from living in a revitalized urban environment. While there is no universally accepted definition of gentrification, for the purposes of this Comment, the term "gentrification" refers to changes—usually linked to an influx of capital in a particular neighborhood—to the physical, social, cultural, and socioeconomic character of a community and the associated displacement of lower-income residents by a more affluent demographic.[13] The linkage between environmental improvements and gentrification has prompted scholars to examine the "pernicious paradox" facing the environmental justice movement: that successful efforts by members of environmental justice communities to address decades of environmental racism and disproportionate ecological burdens could ultimately contribute to their displacement from their neighborhoods just as the physical landscape becomes cleaner and healthier.[14] This phenomenon has been termed "environmental gentrification,"[15] and it illustrates the tension between a progressive culture of environmental sustainability and the entrenchment of capitalist ideals.[16]

By centering a conception of sustainable cities as places that have room "only for park space, waterfront cafes, and luxury LEED-certified buildings," decision-makers necessarily exclude working-class communities, particularly working-class communities of color—often the same communities who have

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Cynthia Cole Robinson & Amor Kohli eds., 2014).

[11] *See generally* Melissa Checker, *Wiped Out by the Greenwave: Environmental Gentrification and the Paradoxical Politics of Urban Sustainability*, 23 CITY & SOC'Y 210–29 (2011).

[12] *See* GOULD & LEWIS, *supra* note 6, at 47.

[13] Faber & Kimelberg, *supra* note 10, at 80; *see* Winifred Curran & Trina Hamilton, *Introduction* to JUST GREEN ENOUGH, *supra* note 7, at 2–3 (arguing that we have moved beyond Ruth Glass's original definition of gentrification and that the history of industrial activity in many urban centers has interwoven a requirement of environmental remediation into the process of gentrification).

[14] Checker, *supra* note 11, at 211–12, 214, 216, 218–19.

[15] *Id.* at 211.

[16] *Id.* at 212 ("Environmental gentrification describes the convergence of urban redevelopment, ecologically-minded initiatives and environmental justice activism in an era of advanced capitalism. Operating under the seemingly a-political rubric of sustainability, environmental gentrification builds on the material and discursive successes of the urban environmental justice movement and appropriates them to serve high-end redevelopment that displaces low-income residents.").

been historically and disproportionately affected by the environmental degradation associated with past industrial uses.[17] Institutional determinations of the 'highest and best uses' of the urban landscape reflect judgments about who environmental sustainability is for and who has access to live in a 'green' city. Acknowledging these competing interests raises the question of whether the concept of a sustainable city—as defined by institutional actors—is strictly concerned with the greening of a landscape and access to environmental amenities or if a truly sustainable city also recognizes the sustainability of communities and social capital.[18]

The National Environmental Policy Act (NEPA) provides one pathway for addressing the equity gap in urban development by requiring federal agencies to fully consider the gentrification impacts of their actions on these communities.[19] Federal agencies are required to address environmental justice concerns in their decision-making.[20] Where federal funding and involvement contribute to commercial development and environmental gentrification, NEPA can provide a powerful tool for communities to identify displacement concerns and other potential impacts and to ensure that the negative effects are adequately considered.[21] Such impacts can be alleviated by incorporating mitigation strategies into projects from the planning stage and addressing the negative impacts of gentrification at the outset rather than on an ad-hoc basis. This

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[17] Winifred Curran & Trina Hamilton, *Just Green Enough: Contesting Environmental Gentrification in Greenpoint, Brooklyn*, 17 LOCAL ENV'T 1027, 1027–29 (2012); *see also* Faber & Kimelberg, *supra* note 10, at 79 ("[Environmental gentrification] is typically grounded in 'asymmetrical power relations . . . [that] continually influence how and what kinds of environmental issues are addressed.' Resolving this tension requires balancing the demands of environmental activists for such ecological benefits . . . and the concerns of social justice advocates about the impacts of neoliberal development approaches that magnify income disparities and social dislocation." (quoting Elliot Tretter, *Contesting Sustainability: "Smart Growth" and the Redevelopment of Austin's Eastside*, 37 INT'L J. URB. & REG'L RES. 297, 308 (2013))).

[18] *See* Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006). Foster describes social capital as "the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals." *Id.* She characterizes social capital as the "'civic fauna' of urbanism, making the successful governance of cities possible." *Id.* at 531. Land use and urban planning decisions can enhance social capital to promote economic and social welfare gains if the importance of social capital as the fabric of cities is acknowledged. *See id.* at 530–31; *see also* Hope Babcock, *The National Environmental Policy Act in the Urban Environment: Oxymoron or a Useful Tool to Combat the Destruction of Neighborhoods and Urban Sprawl?*, 23 J. ENV'T L. & LITIG. 1, 3–4 (2008) (arguing that NEPA's requirement that federal agencies consider social and cultural impacts of major federal actions may be used to "assess the extent to which federal projects may lessen the diversity and sustainability of urban neighborhoods by adversely affecting their 'social capital'").

[19] 42 U.S.C. §§ 4321–4370.

[20] Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994).

[21] *See* COUNCIL ON ENV'T QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 24–25 (1997).

Comment argues that urban displacement associated with gentrification is a reasonably foreseeable environmental effect of federally funded urban redevelopment projects and that agencies should be required to consider such impacts in environmental impact statements under NEPA.

This Comment proceeds in four parts. Part I describes the statutory framework of NEPA and discusses the role of environmental review in the urban environment. Part II demonstrates the relevance of environmental review in the context of displacement harms associated with gentrification and illustrates that indirect displacement is a reasonably foreseeable effect of reinvestment projects. Part III shows that policy concerns motivating consideration of direct displacement also apply to indirect displacement and argues that the statutory purpose of NEPA, judicial interpretation of NEPA requirements, and the cumulative impacts faced by many historically disinvested communities require the consideration of indirect displacement effects in agency environmental impact statements. Finally, Part IV identifies specific avenues for utilizing NEPA as a tool to combat urban displacement and discusses the limitations of NEPA in the gentrification context.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

Signed into law in 1970, NEPA was the first of several major environmental laws that would be passed in that decade.[22] It declared a national environmental policy to use all "practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to . . . fulfill the social, economic, and other requirements of present and future generations of Americans."[23] To achieve this goal, it requires federal agencies to take certain procedural steps to consider the environmental impacts of federal actions.[24] Primary responsibility for overseeing NEPA's implementation is vested in the Council on Environmental Quality (CEQ), which is authorized to issue regulations regarding the preparation of environmental impact statements.[25] This Part introduces the statutory framework of NEPA and describes the importance of federal environmental review in the context of urban redevelopment.

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[22] Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflection on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 77–78 (2001).

[23] 42 U.S.C. § 4331(a).

[24] *Id.* § 4331(b).

[25] *Id.* § 4321.

A. Scope of NEPA: Environmental Impact Statements

Federal agencies must prepare an in-depth environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[26] Each component of this phrase has been the subject of considerable litigation:[27] whether an action is "major,"[28] whether an action is "federal,"[29] whether an action has "significant effects,"[30] whether an action affects the "human environment,"[31] and even whether an action exists at all.[32] In the context of federal actions spurring gentrification, there are two primary threshold questions for applying the NEPA framework: (1) whether development actions have sufficient federal involvement to trigger NEPA requirements, and (2) whether indirect displacement is a significant effect on the human environment.

1. Major Federal Action

NEPA applies only to "federal" action.[33] This includes direct agency action, such as rulemaking and actions that are implemented exclusively by the federal government, but an action does not need to be "purely" federal to satisfy this requirement.[34] Examples of agency actions covered by NEPA include "making

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[26] *Id.* § 4332(C). For many proposed actions not subject to a categorical exclusion, agencies may prepare a brief, but thorough, environmental assessment (EA) to determine whether the proposed federal action will have significant environmental effects. 40 C.F.R. § 1508.9 (2012). An EA results in either a finding of no significant impact or the decision to conduct a full EIS. *Id.* The vast majority of environmental assessments result in findings of no significant impact. Ted Boling, *Making the Connection: NEPA Processes for National Environmental Policy*, 32 WASH. U. J.L. & POL'Y 313, 321 (2010).

[27] *See, e.g.*, John F. Shepherd & Hadassah M. Reimer, *Range of Proposals Covered by NEPA*, *in* THE NEPA LITIGATION GUIDE 24–26, 34–35, 40–43 (Albert M. Ferlo, Karin P. Sheldon & Mark Squillace eds., 2012).

[28] *See* Minn. Pub. Int. Rsch. Grp. v. Butz, 498 F.2d 1314, 1321–22 (8th Cir. 1974) (finding that any action that causes significant environmental impacts is by definition "major").

[29] *See* Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088–89 (D.C. Cir. 1973) (finding that federal action is not limited to purely federal projects but also exists wherever a federal agency enables a private project to proceed). *See generally* Craig J. Hanson, *Applicability of Federal Statutory Remedies in Housing Displacement Cases: How Much Federal Involvement Is Necessary?*, 59 U. DET. J. URB. L. 341, 341–86 (1982).

[30] *See* Pub. Citizen v. Nat'l Highway Traffic Safety Admin., 848 F.2d 256, 266 (D.C. Cir. 1988) ("Courts, no less than agencies themselves, have found it trying to imbue this 'vague and amorphous term' with a consistent and coherent definition[.]").

[31] *See* Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983) (stating that for psychological health impacts to be required under NEPA, there must be some causal link between the health effects and a change in the physical environment).

[32] *See* South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980) (finding that NEPA did not apply to nondiscretionary, ministerial issuance of a mining patent).

[33] 42 U.S.C. § 4332(C).

[34] Hanson, *supra* note 29, at 363 (citing WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL

decisions on permit applications, adopting federal land management actions, and constructing highways and other publicly-owned facilities."[35] Though the precise level of federal involvement necessary to transform nonfederal action into federal action for NEPA purposes remains unclear,[36] CEQ has stated that federal action includes all actions "potentially subject to [f]ederal control."[37] As the D.C. Circuit explained, federal action exists "not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."[38] Thus, federal action exists wherever a federal agency allows a private project to proceed.[39] When evaluating whether there is sufficient federal involvement to trigger NEPA requirements as a major federal action, courts generally look to two factors: (1) the level of federal control over the proposed project, and (2) the amount of federal support or funding for the proposed project.[40]

Ultimately, Congress intended NEPA to act as an action-forcing provision to ensure that agencies consider the relevant environmental impacts of their

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LAW 761 (1977)).

[35] *What Is the National Environmental Policy Act?*, ENV'T PROT. AGENCY, https://www.epa.gov/nepa/what-national-environmental-policy-act (last visited Dec. 13, 2020).

[36] *See* Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960 (9th Cir. 2002) ("There are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action." (quoting Almond Hill Sch. v. U.S. Dep't of Agric., 768 F.2d 1030, 1039 (9th Cir. 1985))); Touret v. NASA, 458 F. Supp. 2d 38, 43 (D.R.I. 2007) (noting that "federal involvement may take a variety of forms that include regulation, control, financing, and/or authority to approve" and that "there is no bright line rule for determining the precise level of federal involvement that is required to federalize an otherwise private project").

[37] 40 C.F.R. § 1508.18 (2019).

[38] Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

[39] *See* Shepherd & Reimer, *supra* note 27, at 34. The general rule that federal action which enables a nonfederal entity to significantly affect the environment is subject to NEPA review does not apply to purely nondiscretionary agency actions. *See* South Dakota v. Andrus, 614 F.2d 1190, 1192–95 (8th Cir. 1980) (holding that NEPA did not apply to the issuance of a mining patent because it was a purely ministerial, nondiscretionary function). *But see* NAACP v. Med. Ctr., Inc., 584 F.2d 619, 634 (3d Cir. 1978) ("Even in a case in which the agency has no discretion, federal responsibility may be found if that agency has given substantial assistance, financial or otherwise, to the program impacting on the environment."). However, even mandatory agency actions can be subject to NEPA requirements if there is some level of agency discretion involved such that information contained in an EIS could affect the terms of agency decision-making. *See* Shepherd & Reimer, *supra* note 27; Nat. Res. Def. Council, Inc. v. Berklund, 458 F. Supp. 925, 938–39 (D.D.C. 1978) (requiring an EIS prior to the issuance of a mining lease where the Secretary has discretion in setting the lease terms); Atlanta Coal. on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333, 1344 (5th Cir. 1979) (citation omitted) ("The fundamental purpose of NEPA is to compel federal decision makers to consider the environmental consequences of their actions . . . [EIS requirements] work[] as an action-forcing provision to ensure that agencies have relevant environmental information before them when making decisions.").

[40] *See* Hanson, *supra* note 29, at 364.

actions.[41] Based on this underlying rationale, the threshold inquiry of federal involvement depends on whether the agency's consideration of environmental impacts could alter the environmental consequences of the proposed action.[42] In *NAACP v. Medical Center, Inc.*,[43] the Third Circuit addressed the degree of federal control necessary to render an action "federal" for NEPA purposes.[44] In determining that the federal approval of a capital expenditure by a private hospital did not constitute a "major federal" action for purposes of NEPA, the court focused its inquiry on "whether the action of the federal agency demonstrates a federal 'responsibility' for the action."[45] Where an agency enables—through mandatory or nonmandatory action—a nonfederal actor to affect the environment, the court specified a two-part test for determining whether NEPA obligations apply.[46] First, courts must determine "whether the agency action is a legal requirement for the other party to affect the environment."[47] Second, courts look to whether "the agency has any discretion to take environmental considerations into account before acting."[48] In explaining its analysis, the Third Circuit reasoned that "when a federal agency gives a legally necessary discretionary approval" enabling another party's significant impact on the environment, "the agency has significantly contributed to the environmental impact."[49] Thus, when an agency has the discretion to prevent the environmental consequences of some action, that action may be fairly characterized as that of the agency.[50]

The second factor that may trigger NEPA obligations for local or private actions is significant federal funding.[51] Though the presence of federal funding

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[41] *See, e.g.*, *Atlanta Coal. on Transp. Crisis, Inc.*, 599 F.2d at 1344 ("Section 102(2)(C) works as an action-forcing provision to ensure that agencies have relevant environmental information before them when making decisions.").

[42] *NAACP*, 584 F.2d at 634; *see also* Monroe Cnty. Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972) ("The primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices.").

[43] 584 F.2d 619.

[44] *See* Hanson, *supra* note 29, at 364.

[45] *NAACP*, 584 F.2d at 634.

[46] *Id.*

[47] *Id.* The CEQ regulations provide that federal actions include "projects and programs . . . approved by federal agencies . . . ." 40 C.F.R. § 1508.18(a) (2019). However, the regulations do not specifically define "approval." *Id.* Courts have held that nonessential, voluntarily sought federal approvals do not constitute major federal action. *See* N.J. Dep't of Env't Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 417 (3d Cir. 1994) ("Federal approval of a private party's project, where that approval is not required for the project to go forward, does not constitute a major federal action.").

[48] *NAACP*, 584 F.2d at 634.

[49] *Id.* at 633.

[50] *Id.* at 634.

[51] *See, e.g.*, Homeowners Emergency Life Prot. Comm. v. Lynn, 541 F.2d 814, 816–17 (9th Cir. 1976)

is not determinative, it is one factor courts consider in analyzing whether an agency is sufficiently responsible for an otherwise private action.[52] The funding must be substantial and directly related to some specified action, rather than generalized nonspecific funding.[53] For instance, federal aid for a project through general revenue sharing is typically insufficient to constitute major federal action.[54]

In considering whether the presence of federal funding supports a finding of major federal action for purposes of NEPA requirements, courts have held that the proportion of federal funding to the overall cost of the project is a factor to be considered.[55] Though "federal funding is a significant indication that a project constitutes a major federal action,"[56] courts often consider the proportion of federal funds in conjunction with the overall discretion or control the agency has over the project as a whole.[57] Such an analysis recognizes that NEPA is "more than an environmental full-disclosure law" and was "intended to affect substantive changes in decision-making."[58] Courts have therefore reasoned that "because the environmental review process is intended to inform the 'decision-maker,' an agency's 'ability to influence or control the outcome in material respect' is the dominant factor in determining whether a project amounts to 'major federal action.'"[59] In the context of urban development spurring

(holding that a federally funded municipal dam and reservoir required an EIS); 40 C.F.R. § 1508.18(a) ("Actions include new and continuing activities . . . entirely or partly financed . . . by federal agencies . . . .").

[52] VALERIE M. FOGLEMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT: INTERPRETATIONS, APPLICATIONS, AND COMPLIANCE 57 (1990); *see* Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988) (noting that whether an action is sufficiently federal to constitute major federal action under NEPA depends on "the nature of the federal funds used and the extent of the federal involvement"); Sierra Club v. U.S. Dep't Agric., 777 F. Supp. 2d 44, 60 (D.D.C. 2011) ("[F]ederal funding is a significant indication that a project constitutes a major federal action[.]"(quoting Sw. Williamson Cnty. Cmty. Ass'n v. Slater, 243 F.3d 270, 279 (6th Cir. 2001))).

[53] FOGLEMAN, *supra* note 52, at 57–58.

[54] 40 C.F.R. § 1508.18(a) ("Actions do not include funding assistance solely in the form of general revenue sharing funds . . . with no [f]ederal agency control over the subsequent use of such funds.").

[55] *See* Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960–61 (9th Cir. 2002) (noting that the underlying purpose of the NEPA requirement depends on the ability of the federal agency to use its discretion to affect the environmental outcome of a project).

[56] *Slater*, 243 F.3d at 279.

[57] *See Ka Makani 'O Kohala Ohana Inc.*, 295 F.3d at 960–61 (concluding that federal funding of 2% for a state water project was not enough to constitute major federal action where federal agencies "lacked the degree of decision-making power, authority, or control over the Kohala Project needed to render it a major federal action").

[58] Env't Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 470 F.2d 289, 293–94, 297 (8th Cir. 1972) ("In enacting NEPA, Congress resolved that it will not allow federal agencies nor federal funds to be used in a predatory manner so far as the environment is concerned.").

[59] Touret v. NASA, 485 F. Supp. 2d 38, 43 (D.R.I. 2007) (quoting Save Barton Creek Ass'n v. Fed. Highway Admin., 950 F.2d 1129, 1134 (5th Cir. 1992)).

gentrification, federal action typically manifests through federal funding for high-impact development projects.[60]

2. Significantly Affecting the Human Environment

Many negative impacts associated with gentrification, such as indirect displacement and change of community character, are linked to social capital and harms to community cohesion rather than traditional conceptions of environmental harms. NEPA's regulations define the "human environment" to include "the natural and physical environment and the relationship of people with that environment."[61] Social and economic impacts alone are insufficient to trigger an EIS; physical impacts are required.[62] However, if an EIS is prepared and the "economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment."[63]

Thus, NEPA regulations require the consideration of indirect effects on the aesthetic, cultural, economic, social, and health impacts of major federal action.[64] Though social and cultural impacts alone have been held to be insufficient to trigger preparation of an EIS, if an EIS is required by anticipated physical impacts, then agencies must also consider associated social impacts.[65] This distinction is significant for many urban redevelopment projects that already have sufficient physical impacts to require an EIS. For high-impact urban reinvestment projects that have significant federal funding, agencies should be required to consider displacement associated with gentrification in their EISs.

In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Supreme Court addressed the necessary causal relationship between physical and nonphysical effects under NEPA.[66] The Court considered whether the Nuclear Regulatory Commission had complied with NEPA when it approved the renewed operation of a nuclear reactor at Three Mile Island.[67] Nearby residents challenged the approval and argued that operation of the facility would cause "both severe psychological health damage to persons living in the vicinity, and

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60 *See* Babcock, *supra* note 18, at 2–4.
61 40 C.F.R. § 1508.14 (2019).
62 *Id.*; Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983).
63 40 C.F.R. § 1508.14.
64 *Id.* § 1508.8(b) (2019).
65 *Id.* § 1508.14.
66 *Metro. Edison Co.*, 460 U.S. at 774.
67 *Id.* at 768.

serious damage to the stability, cohesiveness, and well-being of the neighboring communities."[68] The Court emphasized that giving the word "environmental" as used in the statute too broad a definition would untether NEPA from its purpose.[69] Instead, to determine whether an EIS must include health effects, courts must consider the closeness of the "relationship between the change in the physical environment and the [health] effect at issue."[70] The Court concluded that the psychological distress of the nearby residents was "simply too remote from the physical environment" to justify requiring the agency to evaluate the psychological health damage that may be caused by renewed operation of the nuclear reactor.[71] The Court explained that nonphysical impacts are only considered if they are "proximately related" to an impact on the physical environment, similar to the proximate cause inquiry in tort law.[72]

Impacts on the human environment required to be evaluated under NEPA include effects on human health and welfare that are proximately linked to changes in the physical environment.[73] Courts have held that NEPA requirements apply to the "quality of life in the urban setting."[74] Though the preparation of an EIS is not required based purely on socioeconomic effects, the distinction between purely socioeconomic impacts and impacts on the quality of the urban environment generally may be difficult to parse. As the Second Circuit explained in *Hanly v. Mitchell*, NEPA does not specify an "exhaustive list of so-called environmental considerations, but without question its aims extend beyond sewage and garbage and even beyond water and air pollution."[75] In determining whether the government had adequately considered the impacts on the human environment stemming from the proposed construction of a jail in lower Manhattan, the court focused on NEPA's recognition of "the profound influences of . . . high-density urbanization . . . [and] the critical importance of

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[68] *Id.* at 769.

[69] *Id.* at 772.

[70] *Id.*

[71] *Id.* at 774.

[72] *Id.*

[73] Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 106–07 (1983) (finding that "NEPA requires an EIS to disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact of a proposed action"); *see also Metro. Edison Co.*, 460 U.S. at 774 (considering whether psychological health problems, caused by changes in the physical environment, must be included in an EIS and concluding that such harms must be "proximately related" to the physical change rather than merely a "but for" cause).

[74] WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris, 603 F.2d 310, 327 (2d Cir. 1979); *see* Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972) ("[NEPA] must be construed to include protection of the quality of life for city residents."); *see also* City of Rochester v. U.S. Postal Serv., 541 F.2d 967, 973–974 (2d Cir. 1976) (concluding that agency must consider the impact of its actions on urban decay and blight).

[75] 460 F.2d at 647 (internal quotation marks omitted).

restoring and maintaining environmental quality to the overall welfare and development of man."[76] Though it did not reach the issue of whether an EIS was required for the project, the court found that the government had not given adequate consideration to the impact on the human environment associated with construction of the jail.[77] The court reasoned that "[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban environment and are surely results of the profound influences of . . . high density urbanization [and] industrial expansion."[78] Thus, the *Hanly* Court found that such considerations were best characterized as secondary socioeconomic impacts tied to a primary impact on the physical environment.[79]

However, other courts have found the criteria enumerated in *Hanly* to be merely socioeconomic effects that need not be independently addressed in NEPA procedures. In *Como-Falcon Community Coalition, Inc. v. U.S. Department of Labor*, the Eighth Circuit considered whether the agency adequately considered the effects on the human environment before deciding not to file an EIS regarding the proposed establishment of a Job Corps center.[80] Local residents argued that the project would affect the environment in numerous ways by increasing vehicular and pedestrian congestion; impacting local utilities, commerce, and social services; contributing to criminal activity; and altering the character of the neighborhood.[81] The court held that the agency's decision not to file an EIS was reasonable.[82] The court reasoned that the impacts described by the plaintiffs were "social and economic factors" and therefore were "not encompassed within the provisions of NEPA."[83] Reiterating that "socioeconomic complaints alone [are] not cognizable under NEPA," the court concluded that "[t]here can be no dispute . . . that there will be no significant impact on the human environment as that term is defined under the Act."[84]

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[76] *Id.* at 642 (quoting 42 U.S.C. § 4331).

[77] *Id.* at 648.

[78] *Id.* at 647 (citing 42 U.S.C. § 4331(a)) (internal quotation marks omitted).

[79] *Id.*

[80] 609 F.2d 342, 343 (8th Cir. 1979). *Como-Falcon Community Coalition, Inc.* is distinguishable from *Hanly v. Mitchell* because establishment of the proposed vocational facility would have involved renovation of an existing building rather than new construction. *Compare id.* at 346, *with Hanly*, 460 F.2d at 642–43. However, the characterization of the environmental harms alleged is instructive and demonstrates the split in authority when considering the appropriate factors to weight in considering whether an impact is entirely socioeconomic. *See also* Fed'n for Am. Immigr. Reform v. Meese, 643 F. Supp. 983, 989 (S.D. Fla. 1986) ("[T]he impact of Cuban immigration upon South Florida's water supply, sewage, and traffic congestion [was] . . . at best socioeconomic.").

[81] *Como-Falcon Cmty. Coal., Inc.*, 609 F.2d at 344.

[82] *Id.* at 345.

[83] *Id.*

[84] *Id.* at 346 (internal quotation marks omitted); *see also* Olmstead Citizens for Better Cmty. v. United

B. Indirect and Cumulative Effects

When an EIS is triggered, agencies are required to consider both direct and indirect effects,[85] which are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[86] These effects specifically include "aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."[87] An impact is reasonably foreseeable if "a person of ordinary prudence would take it into account in reaching a decision."[88] Importantly, the assessment of effects on the human environment is not limited to those circumstances that result in net negative impacts.[89] Rather, effects include "those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."[90] In the context of urban redevelopment and gentrification associated with "greening" or other environmental improvements, the negative impacts of urban development projects are still cognizable under NEPA, even if the agency concludes the proposed action poses a net environmental benefit according to agency criteria.[91]

Indirect effects include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate."[92] According to President Clinton's 1994 executive order, when considering indirect effects, all agencies must specifically consider the disproportionate impacts on low-income and minority communities in their NEPA assessments.[93] In addition, proposed mitigation strategies identified by agencies in its final EIS

States, 793 F.2d 201, 205 (8th Cir. 1986) (internal citation omitted) ("While there is no 'bright line' between the 'physical' and the 'socioeconomic' in the urban context, an impact statement generally should be necessary only when the federal action poses a threat to the physical resources of the area because of anticipated traffic, population-concentration or water-supply problems or involves the irreversible alteration of a rare site."); Breckinridge v. Rumsfeld, 537 F.2d 864, 865 (6th Cir. 1976) (finding that closure of a military base resulting in unemployment and transfer of federal personnel did not require trigger NEPA where there was "no permanent commitment of a national resource and no degradation of a traditional environmental asset, but rather short term personal inconveniences and short term economic disruptions").

[85] 40 C.F.R. § 1502.16 (2019). Effects and impacts as used in the regulations are synonymous. *Id.* § 1508.8(b) (2019).

[86] *Id.*

[87] *Id.*

[88] City of Shoreacres v. Waterworth, 429 F.3d 440, 453 (5th Cir. 2005) (citing Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992) (internal quotation marks omitted)).

[89] 40 C.F.R. § 1508.8(b). *But see* Hanly v. Kleindienst, 471 F.2d 823, 830–31 (2d Cir. 1972) (examining two factors in determining the meaning of "significantly": the degree of potential *adverse* environmental impacts and the quantitative effect of the action on the environment, including the cumulative harm).

[90] 40 C.F.R. § 1508.8(b).

[91] *See* Sarah Fox, *Environmental Gentrification*, 90 U. COLO. L. REV. 803, 834 (2019).

[92] 40 C.F.R. § 1508.8(b).

[93] Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994).

or those mitigation strategies supporting a finding of no significant impact must also address the impacts on these communities.[94]

In addition to indirect effects, agencies must consider cumulative impacts of proposed actions. The CEQ defines cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions."[95] Oftentimes, there is a disconnect between the effects of an action and the scale at which decisions are made.[96] Requiring agencies to recognize the cumulative effects of past actions is intended to combat the "tyranny of small decisions."[97] Taken together with consideration of indirect effects, cumulative impacts analysis acknowledges that the most dramatic environmental impacts are often not directly caused by one discrete action, but rather stem from the synergistic effects of numerous separate actions that may seem insignificant when viewed individually.[98]

There is no single, universally accepted conceptual approach for analyzing cumulative effects.[99] CEQ guidance offers several guiding principles, but ultimately the cumulative effects analysis is a fact-specific inquiry. In the context of gentrification, it is significant that the cumulative effects analysis requires the consideration of the effects of "reasonably foreseeable" future actions regardless of what "agency . . . or person undertakes such other actions."[100] Though there is some debate about the specific causal links driving gentrification, the displacement of residents is a reasonably foreseeable effect of enhanced private and public redevelopment.[101]

The tenets of indirect and cumulative impacts apply in the urban setting as well. Though the environmental effects on the urban built environment may be less obvious, "[t]he particular appropriateness of NEPA in the urban environment becomes even clearer when one looks at the built environment the

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94 William J. Clinton, Memorandum of Executive on Environmental Justice, 1 Pub. Papers 241, 242 (Feb. 11, 1994).

95 40 C.F.R. § 1508.7 (2019).

96 COUNCIL ON ENV'T QUALITY, *supra* note 21, at 4.

97 William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728–729 (1982) (applying Alfred E. Kahn's premise of "the tyranny of small decisions" to environmental issues).

98 COUNCIL ON ENV'T QUALITY, *supra* note 21, at 1.

99 *Id.* at 4.

100 40 C.F.R. § 1508.7.

101 Babcock, *supra* note 18, at 18.

same way modern ecologists view natural environments."[102] Viewed in this context, "the natural environment is conceived as a complex, dynamic, evolving system with interdependent subsystems and networks of interlocking dependencies and positive feedback loops."[103] NEPA obligations for urban development projects are largely triggered by federal funding, such as Community Development Block Grants and other agency funding mechanisms, wherein applicants may be responsible for undertaking NEPA obligations for projects using federal funds.[104]

C. Public Participation and Environmental Justice

Already, NEPA provides an essential tool for public participation in federal decision-making. Intended as an "action-forcing" mechanism, NEPA has been described as an "environmental full-disclosure law," requiring federal agencies to fully consider significant impacts on the human environment by conducting EISs.[105] Public participation through NEPA is especially meaningful because many actions triggering NEPA obligations are often informal actions, such as lease approvals, permitting decisions, and federal funding.[106] Though the statute itself is circumspect in its descriptions of public participation procedures, both judicial decisions and the CEQ regulations have interpreted NEPA to impose substantial requirements for public participation.[107] For urban development and

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[102] *Id.*

[103] *Id.*; *see also* Foster, *supra* note 18, at 533 ("NEPA and its state counterparts have consistently been interpreted in physically deterministic ways, limiting the scope of their normative reach into the ecology of urban environments. This is despite judicial recognition of the ways in which physical land use changes can significantly alter the very ecology of urban communities by severely disrupting, and often triggering the demise of, the fabric of social and economic relationships.").

[104] *See* ROLF PENDALL & LEAH HENDEY, REVITALIZING NEIGHBORHOODS: THE FEDERAL ROLE 15, 27 (2016).

[105] Env't Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 470 F.2d 289, 297–98 (8th Cir. 1972).

[106] *See* Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

[107] Joseph Feller, *Public Participation Under NEPA*, *in* THE NEPA LITIGATION GUIDE, *supra* note 27, at 121–22, 126. The CEQ regulations articulate several specific requirements for meaningful public participation. *Id.* The regulations state that, among other things, "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b) (2019). Federal agencies are required to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." *Id.* § 1500.2(d) (2019). The regulations also indicate that agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[s]olicit appropriate information from the public." *Id.* § 1506.6 (2019). The regulations have been interpreted to impose substantial requirements for public participation. *See* Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (finding that NEPA has twin aims: (1) to consider significant aspects of the environmental impact of a proposed action, and (2) to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process"); Sierra Club v. Flowers, 423 F. Supp. 2d 1273, 1342 (S.D. Fla. 2006) ("Meaningful public participation is a vital part of NEPA."), *vacated in part by* 526 F.3d 1353 (11th Cir. 2008).

renewal projects that implicate equity concerns, environmental review provides a powerful tool for public participation. The CEQ regulations state that, among other things, "public scrutiny [is] essential to implementing NEPA."[108] Under NEPA, federal agencies are required to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."[109]

In 1994, President Clinton issued an executive order requiring agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[110] This includes working to ensure meaningful public participation and access to information.[111] In the memorandum accompanying this order, the President identified specific ways that existing laws, including NEPA, provide tools for agencies to address environmental justice.[112] The CEQ[113] has elaborated on the role NEPA can play in addressing environmental justice by specifying that analysis of agency actions should focus on specific communities within the affected area to prevent the "dilution" of concerns that may not be reflected in an examination of the area as a whole.[114] Additionally, "[d]emographic, geographic, economic, and human health" factors all contribute to whether certain communities face disproportionately high and adverse impacts.[115] NEPA's strong public participation requirements and broad purpose as an action-forcing mechanism underscore the important role public participation plays in environmental analysis. In the urban environment, NEPA provides another tool for affected communities to address negative effects of federal actions and to force agencies to fulfill their obligations to address environmental justice concerns in decision-making.

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[108] 40 C.F.R. § 1500.1(b).

[109] *Id.* § 1500.2 (2019). The regulations also indicate that agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[s]olicit appropriate information from the public." *Id.* § 1506.6.

[110] Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994).

[111] *Id.*; William J. Clinton, Memorandum of Executive on Environmental Justice, 1 Pub. Papers 241, 241–42 (Feb. 11, 1994); COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 13 (1997).

[112] William J. Clinton, Memorandum of Executive on Environmental Justice, 1 Pub. Papers 241, 242 (Feb. 11, 1994)111; COUNCIL ON ENV'T QUALITY, *supra* note 111, at 27.

[113] The Council on Environmental Quality was established by NEPA and is vested with primary responsibility for overseeing NEPA's implementation. *Council on Environmental Quality*, WHITE HOUSE, https://www.whitehouse.gov/ceq/ (last visited Dec. 13, 2020). In addition to the agency's own established protocols for environmental review, CEQ is authorized to issue regulations regarding environmental assessment procedures, such as the preparation of environmental impact statements. *Id.*

[114] COUNCIL ON ENV'T QUALITY, *supra* note 111, at 27.

[115] *Id.*

II. HUMAN ENVIRONMENTAL IMPACTS OF URBAN REDEVELOPMENT

Across the United States, urban sustainability initiatives and redevelopment projects are becoming more common.[116] These projects include environmental improvements, expanded green spaces, walking paths, rehabilitation of parks, energy efficient buildings, and other environmental and urban amenities.[117] To be sure, many environmental cleanups and infrastructure projects associated with the redevelopment of urban spaces present environmental, social, and economic benefits.[118] Yet these environmental and social amenities also lead directly to a growing equity gap, displacing longtime residents from their homes and severing them from established communities.[119] In its 2006 report, the National Environmental Justice Advisory Council described the relationship of urban development to environmental justice, noting that for those who have established support systems in rapidly gentrifying areas, "[e]nvironmental cleanup of these formerly industrialized, now residential, communities can be a powerfully displacing force."[120]

The terms "green gentrification" and "environmental gentrification" have been used to represent how "green initiatives cause and/or enhance gentrification," often by design.[121] Greening initiatives may transform "wasted" spaces into economically productive ones or replace nonmarket uses with commercially valuable ones, but "they do not do so equitably."[122] Regardless of the specific terminology used to describe the relationship between capital, environmental sustainability, and gentrification, the focus remains on the "equity deficit" associated with the process of urban redevelopment.[123] Whether this process is driven by intentional or unintentional displacement, mechanisms to address the inequitable consequences are sorely lacking.[124]

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116 Faber & Kimelberg, *supra* note 10, at 77.

117 *Id.*

118 *See generally* Byrne, *supra* note 5, at 418–19 (discussing benefits such as employment opportunities, smart growth, and economic growth associated with a wealthier tax base).

119 *See* Peter Marcuse, *Foreword* to GENTRIFIER, *supra* note 4, at viii (noting that on the most basic level, "the evil part of gentrification is displacement and the desirable part physical improvement, the constant challenge being who is benefitted, who is hurt, and what can be done about it").

120 NAT'L ENV'T JUST. ADVISORY COUNCIL, UNINTENDED IMPACTS OF REDEVELOPMENT AND REVITALIZATION EFFORTS IN FIVE ENVIRONMENTAL JUSTICE COMMUNITIES 2 (2006).

121 GOULD & LEWIS, *supra* note 6, at 2, 12. Using the Brooklyn Bridge Park and Manhattan's High Line as examples of green gentrification, the authors noted the sustainable practices and environmental benefits of such projects but emphasized the inequitable outcomes. *Id.* The High Line transformed an abandoned rail trestle into a 1.45-mile-long elevated greenway for public use. *Id.* Though successful in the sense of "literal greening," these projects "laid the groundwork for nearby areas to gentrify." *Id.*

122 *Id.*

123 Curran & Hamilton, *supra* note 13, at 3.

124 Similar to the causes of gentrification, there are competing explanations for the root cause of this

This Part demonstrates that indirect displacement is a reasonably foreseeable consequence of federally funded redevelopment projects and explains the relevance of federal environmental review to displacement harms associated with gentrification. Section A of this Part addresses the scope of 'indirect effects' analysis under NEPA. Section B analyzes NEPA's 'cumulative effects' framework in the context of urban redevelopment, focusing on the history of explicit, state-sponsored racism in land use and lending practices that has shaped modern American cities.

A. Indirect Effects of Urban Redevelopment

Indirect displacement associated with rising property values and secondary development is a reasonably foreseeable impact of urban renewal projects. An impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[125] The fact that indirect displacement is spurred through nonfederal actors does not defeat the applicability of NEPA. The CEQ defines "reasonably foreseeable future actions" to include foreseeable projects likely to be undertaken by nonfederal actors:

> *Reasonably foreseeable future actions* include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.[126]

Thus, federally funded development actions that spur additional development and gentrification can implicate indirect displacement impacts.

Indirect effects include growth-inducing effects associated with secondary development enabled or promoted by agency action. In *City of Davis v.*

"equity deficit." *Id.* It may be caused by intentional displacement "in the name of 'higher and best' uses" or by collective market forces and "unintentional displacement resulting from the re-evaluation of neighborhoods by various interests after greening efforts are initiated." *Id.* For a discussion of the role of elites (the green growth coalition) in contributing to gentrification by pursuing capital accumulation, see GOULD & LEWIS, *supra* note 6.

[125] Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992). Even for those indirect effects deemed sufficiently likely to occur, the EIS "need only 'furnish such information as appears to be reasonably necessary under the circumstances for evaluation of the project.'" *Id.* (quoting Britt v. U.S. Army Corps of Eng'rs, 769 F.2d 84, 91 (2d Cir. 1985)).

[126] 43 C.F.R § 46.30 (2019).

Coleman, the city challenged the Secretary of Transportation's construction of a proposed freeway interchange without an EIS.[127] The proposed freeway was not being constructed to meet existing demand but instead was intended to "stimulate and service future industrial development" in the area.[128] In order to accurately evaluate the potential environmental impact of the project, the Ninth Circuit considered the role of the proposed freeway project in promoting future development.[129] The court reasoned that the highway would provide improved access and transportation, "acting as a catalyst for industrial, commercial, or residential development of the area."[130] The court concluded that the "growth-inducing effects of the . . . interchange project are its raison d'etre, and with growth will come growth's problems," including "increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities."[131] Similarly, urban redevelopment projects that are specifically intended to stimulate economic and commercial growth and private reinvestment, come with indirect impacts associated with that economic growth, such as rising property values and urban displacement.

B. Cumulative Impacts of Past Actions

The environmental analysis under NEPA is forward-looking and intended to force a full and transparent consideration of potential impacts of a proposed action.[132] To effectively capture the cumulative impacts of a proposed action, "review of past actions is required to the extent that this review informs agency decisionmaking regarding the proposed action."[133] CEQ guidance on the consideration of past actions in cumulative effects analysis instructs agencies to "look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its

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127 521 F.2d 661, 661, 666 (9th Cir. 1975).

128 *Id.* at 667.

129 *Id.* at 674.

130 *Id.* at 675.

131 *Id.*

132 Memorandum from Council on Env't Quality on Guidance on the Consideration of Past Actions in Cumulative Effects Analysis to the Heads of Federal Agencies 1 (June 24, 2005) (available at https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf).

133 *Id.* The CEQ guidance memo indicates consideration of past actions can occur in two ways: (1) as part of cumulative effects analysis to identify "present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive, and significant relationship to those effects"; and (2) as part of direct and indirect effects analysis to predict the likely effects of a proposed action even where the effects of past actions have no cumulative relationship to the proposed action. *Id.* at 1–2.

alternatives."[134] Agencies may limit the scope of cumulative effects analysis to the extent to which "it is reasonable to anticipate a cumulatively significant impact on the environment."[135] The Supreme Court has also interpreted the required depth of cumulative effects analysis and concluded that the agency need not interpret every possible outcome.[136] Rather, the scope of cumulative effects analysis may be limited based on practical considerations.[137] In the urban context, the impacts of proposed development and revitalization projects often occur in areas that have suffered historic harms from past government actions.

Many of the neighborhoods targeted for high-impact urban redevelopment projects are those communities that have been subject to a pattern of disinvestment fostered by racist government policies.[138] Overt, structural racism in government lending and housing policies—coupled with government-endorsed racially restrictive covenants in new suburban developments—led to lasting racial segregation, neighborhood disinvestment, and severely inequitable urban landscapes.[139] Created as part of the New Deal to help promote home ownership and prevent foreclosures, the government-sponsored Home Owners' Loan Corporation (HOLC) appraised urban neighborhoods to assess creditworthiness based on racial demographics.[140] HOLC "redlined"

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134 *Id.* at 3.

135 40 C.F.R. 1508.27(b)(7) (2019).

136 *See* Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976). In *Kleppe*, environmental organizations challenged issuance of coal leases and other decisions enabling mining operations, arguing that NEPA required a comprehensive EIS for the entire region before issuing individual leases. *Id.* at 390. The Court held that a regional EIS was not required because there was currently no legislation or active plan for regional coal mining. *Id.* at 414–15. Thus, the agency could not feasibly conduct a regional EIS because there was no information available about potential regional mining. *Id.* at 414.

137 *Id.* at 414.

138 *See* Faber & Kimelberg, *supra* note 10, at 78; Babcock, *supra* note 18, at 6 (citing Charles P. Lord, Eric Strauss & Aaron Toffler, *Natural Cities: Urban Ecology and the Restoration of Urban Ecosystems*, 21 VA. ENV'T L.J. 317, 323 (2003)) ("Cities historically have also been places of social injustice, poverty, and public health problems, and continue to be so to this day.").

139 *See* Daniel Aaronson, Daniel Hartley & Bhash Mazumder, *The Effects of the 1930s HOLC "Redlining" Maps* 3–5 (Fed. Rsrv. Bank of Chi., Working Paper No. 2017-12, 2019) (finding that the cities with redlining maps experienced a relative decline in home ownership, house values, and rents, accompanied by a rise in proportion of African Americans and linking discriminatory housing practices to the Black-white wealth gap); RICHARD ROTHSTEIN, COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). Rothstein explains that the Federal Housing Administration (FHA) was one of the worst offenders in promoting segregated housing and preventing African Americans from accessing resources to buy and own homes. *See id.* at 179–80. The FHA provided loans for construction and development of new suburban communities, such as Levittown, New York, on the condition that the community would be a white-only neighborhood. *Id.* at 71. A similar venture outside Stanford University was denied insurance and construction funding from the FHA because the proposed community included African American residents. *Id.* at 11. When the FHA refused to compromise, the same tract of land was sold to a private developer who obtained resources from the FHA to build houses with racially restrictive covenants. *Id.* at 11–12.

140 Aaronson et al., *supra* note 139, at 5–7.

predominantly African American and immigrant neighborhoods, labeled them "hazardous," and systematically denied residents loans and access to credit.[141] Redlining had lasting impacts on urban communities and housing segregation across the country, including lower property values in redlined neighborhoods and lower home ownership rates among African Americans.[142] Disinvestment of many urban communities was compounded by zoning decisions to allow harmful industrial uses in the same neighborhoods, resulting in prevalent health and environmental concerns for these communities and further contributing to the inequity of metropolitan areas.[143]

When analyzing the impacts of newly proposed urban redevelopment projects, agencies should recognize that the historic impacts of both private actions and government policies are interrelated with gentrification trends in modern cities.[144] While disinvestment can also lead to displacement of residents through abandonment and blight,[145] the patterns of disinvestment in urban communities followed by reinvestment "may be successive stages in the cycle of neighborhood change."[146] For example, disinvestment may lead to displacement of some residents, creating "'vacant' land ripe for investment

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[141] *See* BRUCE MITCHELL & JUAN FRANCO, HOLC "REDLINING" MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 5, 13 (2018) (finding that three of four neighborhoods marked hazardous show persistent economic disadvantage over the decades, with lower incomes, fewer businesses, and fewer opportunities to build wealth); ROTHSTEIN, *supra* note 139, at 177–79 (noting that even with the passage of the Fair Housing Act, which prohibited certain discriminatory practices, the patterns of housing segregation were well-established and many working class African American families had already lost out on the appreciation value of suburban homes with racially restrictive deeds, like those in Levittown). These impacts lasted and served to perpetuate and exacerbate housing discrimination and wealth inequality for African Americans. *See id.* at 179–80.

[142] ROTHSTEIN, *supra* note 139, at 113.

[143] *Id.* at 56.

[144] *See* MITCHELL & FRANCO, *supra* note 141, at 14–19 (assessing the relationship between gentrification and HOLC redlining and finding that depressed home values in HOLC-designated "hazardous" areas laid the groundwork for gentrification and greater economic inequality).

[145] *See* Zuk et al., *supra* note 4, at 34 (citing GEORGE GRIER & EUNICE GRIER, URBAN DISPLACEMENT: A RECONNAISSANCE (1978)). In their HUD-sponsored report on revitalization and displacement, Grier and Grier identified twenty-five diverse factors that may lead to displacement, including rent increases, code enforcement and planning decisions, and banks engaging in redlining practices. *Id.* In an attempt to capture the myriad causes associated with urban displacement, Grier and Grier provided a definition that has subsequently been adopted by others: "Displacement occurs when any household is forced to move from its residence by conditions which affect the dwelling or immediate surroundings, and which: 1) are beyond the household's reasonable ability to control or prevent; 2) occur despite the household's having met all previously-imposed conditions of occupancy; and 3) make continued occupancy by that household impossible, hazardous or unaffordable." *Id.*

[146] *See id.* (citing GRIER & GRIER, *supra* note 145). Grier and Grier distinguish between three types of displacement: (1) disinvestment displacement related to deteriorating conditions of a property leading to decay and abandonment; (2) reinvestment displacement related to increased property values and escalating rents that eventually force tenants to leave; and (3) displacement caused by enhanced housing market competition referring to the effects of overall shifts in local and regional housing markets. *Id.*

through gentrification" and making "way for new in-movers to purchase inexpensive housing, resulting in reinvestment and subsequent displacement."[147]

Cumulative effects of past actions may encompass direct physical displacement as well as the negative social and economic impacts of urban renewal. In *St. Paul Branch of the NAACP v. Department of Transportation*,[148] the United States District Court for the District of Minnesota considered whether the Department of Transportation had adequately considered the cumulative impacts of a proposed transit project in light of past actions.[149] Residents challenged the adequacy of the EIS based on four deficiencies, including that the final EIS "fail[ed] to adequately analyze the cumulative impact of displacement/gentrification caused by the [light rail project], construction of the I-94, and urban renewal policies of the 1970s."[150] Previous construction of the I-94 highway had bisected the community and displaced many African American residents.[151] The court found that the final EIS had acknowledged the cultural significance of the community and the historical impact of past highway construction on the area and concluded that the agencies' cumulative impacts analysis was sufficient.[152]

Relying on a 2005 CEQ memorandum that provided additional guidance on cumulative impacts analysis under NEPA, the court reasoned that the historic impacts on the community could adequately be addressed by considering "current aggregate effects of past actions."[153] Thus, the court concluded the

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[147] *See id.* at 34–35 (quoting Peter Marcuse, *Abandonment, Gentrification and Displacement: The Linkages in New York City*, *in* GENTRIFICATION OF THE CITY 153–77 (Neil Smith & Peter Williams eds., 1986)) (emphasizing the link between different types of displacement and introducing the concept of "exclusionary displacement").

[148] 764 F. Supp. 2d 1092 (D. Minn. 2011).

[149] *Id.* at 1104.

[150] *Id.* at 1101.

[151] *Id.* at 1104.

[152] *Id.* at 1105 ("Better transit would play a pivotal role in acknowledging the character and aspirations of places in the Study Area and in the region as a whole. The Central Corridor has local neighborhoods that collectively form the heart of the Twin Cities Metropolitan Area. This distinction is expressed, for example, in the annual Rondo days festival. The Ronda area, one of the city's most diverse communities, was virtually destroyed when it was cut in half in the 1960s to build I-94 between Minneapolis and St. Paul. . . . Concerns regarding community cohesion are brought into sharper relief by a sensitive understanding of the history of what was known as the Rondo neighborhood and which encompassed the environmental justice community between Lexington Parkway and Rice Street. The Rondo community, a historically African American community, was devastated with the construction of Interstate highway 94 in St. Paul during the 1960s.") (emphasis omitted).

[153] *Id.* at 1104 (emphasis omitted); Memorandum from Council on Env't Quality on Consideration of Past Actions in Cumulative Effects Analysis, *supra* note 132, at 2. CEQ's interpretation of NEPA in guidance documents is entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). In addition to past impacts directly from the construction of I-94, plaintiffs also referenced negative impacts on the community caused by "urban renewal policies of the 1970s." *St. Paul Branch of NAACP*, 764 F. Supp. 2d at 1103. The court

agencies' analysis of cumulative impacts was "sufficiently detailed," because the agencies "made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making."[154] As further support for the sufficiency of the agencies' analysis, the court also found that the final EIS evaluated the effects of the project on "the quality and cohesion and community services" and concluded that the project "is not expected to have long-term adverse impact on neighborhood cohesion or identity."[155] A portion of the final EIS was dedicated to examining the potential environmental justice issues for low-income and minority populations in the affected area, including the historical context of each community.[156] In response to concerns raised during the public comment period, the final EIS also made minor adjustments to the project and identified additional mitigation measures planned by the city and neighborhood organizations that would work to combat the adverse impacts identified during the environmental review process.[157] Taken together, the court concluded that the agencies did not act arbitrarily or capriciously in consideration of the cumulative impacts on the community.[158]

Though the court in *St. Paul* did not articulate specific minimum requirements for evaluation of cumulative impacts resulting from past actions, it acknowledged that past urban renewal projects may contribute to the cumulative effects to be considered in an EIS.[159] Plaintiffs in *St. Paul* specifically raised the issue of "urban renewal policies of the 1970s," but the

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acknowledges this claim in a footnote but notes that in the instant case, plaintiffs provided no specific details. *Id.* at 1105 n.12 ("While the court does not doubt that this is true, Plaintiffs do not offer any specifics as to what the policies were or their impact to the community."). Yet the court acknowledged the reality of such impacts and left open the possibility of including such impacts in NEPA's cumulative effects analysis.

154 *St. Paul Branch of NAACP*, 764 F. Supp. 2d. at 1104–05 (quoting Colo. Env't Coal. v. Dombeck, 185 F.3d 1162, 1177 (10th Cir. 1999)).

155 *Id.* at 1106. The EIS also noted that neighborhood concerns were being addressed by other governmental bodies to help mitigate any adverse effects of the light rail project. *Id.* at 1106–07. For instance, the final EIS references a planning initiative by the City of St. Paul to address concerns regarding community cohesion through "a set of guidelines for development at and around stations locations including parks, connections to the neighborhoods, building mass and design, and other guidelines to reflect and enhance neighborhood character." *Id.* at 1107 (internal quotation marks omitted).

156 *Id.* For example, the project added non-signalized pedestrian crossings to ensure easier crossings and prevent harm to community cohesion, included noise and vibration minimization, and "rejected the option of widening an intersection to avoid the demolition of existing minority businesses." *Id.* at 1108 (citation omitted).

157 *Id.*

158 *Id.* The court found, however, that the final EIS was inadequate because it failed to address the loss of revenue from businesses impacted by the construction along the route for the Central Corridor Light Rail Transit (CCLRT) project. *Id.* at 1118. The court noted that the CCLRT would produce substantial environmental impacts and that affected businesses within the zone of impacts would be directly impacted by both the direct environmental impacts and indirect loss of revenue tied to the environmental impacts. *Id.* at 1112.

159 *Id.* at 1105 n.12.

court found insufficient details to evaluate the past impacts.[160] Though the agencies' consideration of past impacts was not arbitrary or capricious, the court discussed multiple instances in the EIS where the agencies considered environmental justice and the historical context for the proposed actions.[161] The court noted, however, the significance of the historical impacts of the projects on particular communities and found that the procedural adequacy of the agencies' NEPA analysis "does not diminish the valid concerns of those in the affected neighborhoods, and in particular the Rondo neighborhood that was devastated by the construction of I-94."[162] The court's attitude reflects one of the primary limitations of NEPA: it is a purely procedural statute.[163] Though the court did not specifically address the role of other urban renewal policies in the cumulative effects analysis, historic disinvestment and subsequent redevelopment of communities leads to detrimental impacts similar to those caused by the highway construction and direct displacement discussed by the court in *St. Paul*.

Urban development and revitalization projects may aim to rectify many of the environmental and public health harms caused by industrial uses and disinvestment in affected communities. However, reinvestment is also a source of displacement for many current residents.[164] For many gentrifying neighborhoods, past actions from both public and private actors have contributed to housing segregation, community instability, ongoing displacement pressures, a racial wealth gap, and other impacts that continue to persist today.[165] Urban redevelopment projects often address some of the harms without providing concrete mechanisms to ensure equitable access to improved environmental amenities. Consideration of the cumulative impacts of urban redevelopment

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160 *Id.*

161 *Id.* at 1107. The affected area at issue had been identified previously as a site that could benefit from additional transit infrastructure to reduce congestion and the pressures of a growing population. *Id.* at 1097. The final EIS ultimately concluded that the benefits of the proposed project outweighed the adverse effects identified. *Id.* at 1118. Specifically, the final EIS indicated that there would be "no disproportionately high and adverse effects on minority and/or low-income populations. . . . [T]he potential adverse effects are not predominantly borne by a minority or low-income populations, but rather that the potential adverse effects are shared by all populations along the proposed route, including non-minority and non-low-income." *Id.* at 1100 (citation omitted).

162 *Id.* at 1109.

163 NEPA does not dictate a particular result. It merely ensures that agencies take a hard look at potential environmental consequences. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (citing Nat. Res. Def. Council v. Morton, 458 F.2d 827, 838 (1972) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.")).

164 Zuk et al., *supra* note 4, at 34 (citing GRIER & GRIER, *supra* note 145).

165 *See id.*

projects should include the consideration of historic impacts on affected communities that now confront environmental gentrification. Failing to fully grapple with the cumulative impacts of urban land use and development policies on gentrifying communities raises the question of who is permitted to enjoy access to a clean, healthy, and sustainable urban environment.

III. NEPA REVIEW IN THE CONTEXT OF URBAN DISPLACEMENT

Direct displacement of residents caused by federal transportation and urban infrastructure projects is evaluated as an environmental impact under NEPA.[166] Urban reinvestment also spurs indirect displacement caused by rising property values, and the same policy concerns motivating consideration of direct displacement also apply to indirect displacement.[167] NEPA's broad action-forcing purpose supports the consideration of indirect displacement caused by federally funded urban redevelopment. For many gentrifying communities, the cumulative effects of racist institutional practices and historic disinvestment have contributed substantially to their current susceptibility to displacement pressures.[168] This Part demonstrates that the policies motivating consideration of direct displacement in NEPA analysis also apply to indirect displacement and argues that the environmental review process should require the consideration of indirect displacement effects in EISs. Section A explains the underlying considerations in evaluating direct displacement consequences. Section B analyzes these considerations in the context of indirect displacement and argues that, based on the statutory purpose of NEPA, judicial interpretation of EIS requirements, and the cumulative impacts faced by historically disinvested communities, agencies should be required to address indirect displacement in EISs.

A. Direct Displacement under NEPA

NEPA requires agencies to consider direct displacement in the environmental review process.[169] A key example of direct displacement is seen

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166 *See* Limerick Ecology Action, Inc. v. U.S. Nuclear Reg. Comm'n., 869 F.2d 719, 745 (3d Cir. 1989) (noting that agencies must consider socioeconomic impacts); Monarch Chemical Works, Inc. v. Exon, 452 F. Supp. 493, 500 (requiring an EIS for a federally funded city redevelopment project in part because of "the environmental consequences of the relocation of an entire community").

167 *See supra* Part II.B.

168 *See* ROTHSTEIN, *supra* note 139, at 177–80.

169 In addition, where property acquisition directly displaces businesses or individuals, agencies must meet the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Acts. *Property Acquisition and Relocation*, FED. TRANSIT ADMIN. (Dec. 18, 2015), https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/property-acquisition-and-relocations.

in federal highway and transportation projects.[170] Courts have also applied NEPA requirements to urban renewal projects that result in the direct displacement of residents and have acknowledged that displacement is a cognizable environmental impact within the meaning of the statute.[171] But federally funded urban redevelopment projects not only cause direct displacement, they also spur secondary development by both government and private actors, which leads to indirect displacement of more residents.[172] Indirect or secondary displacement refers to "moves that result from non-federal action stimulated by federal or federally subsidized activity in the immediate area or in adjacent neighborhoods."[173] For example, a large-scale redevelopment project designed to revitalize a historically disinvested community may result in increased commercial development in the neighborhood along with rising rents.[174] Though generally discussed in the context of secondary private development, federal funding could also stimulate state or local activity that eventually displaces residents.[175]

Cases addressing direct displacement impacts associated with urban development have noted the social impacts of such changes.[176] In *Jones v. Lynn*, the Department of Housing and Urban Development (HUD) increased the relocation grant for an ongoing urban renewal project by eightfold, and residents attempted to enjoin the project pending completion of an EIS.[177] The First

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170 St. Paul Branch of the NAACP v. Dep't of Transp., 764 F. Supp. 2d 1092, 1104–05 (D. Minn. 2011).

171 Hanson, *supra* note 29, at 361.

172 *Id.* at 345–46.

173 *Id.* at 346 (citing DEP'T HOUS. & URB. DEV., DISPLACEMENT REPORT 42–43 (1979) ("As an example, the use of federal funds to rehabilitate a neighborhood may lead to an increased demand for housing in the surrounding area. As a result, private developers, who may have previously found it unprofitable to invest in the neighborhood, respond to the demand by purchasing apartment buildings, evicting tenants, rehabilitating the buildings, and either converting them to condominiums or increasing the rent. The evicted tenants as a result of the rehabilitation are 'secondary displacees' since their dislocation was the indirect result of the federal effort to upgrade the neighborhood.")).

174 *Id.*

175 *Id.* For example, a federal agency may demolish part of a low-income housing facility to construct office buildings. The local government, previously unwilling to burden the entire cost of redeveloping the neighborhood, is now able to develop additional areas throughout the neighborhood at a lower cost, displacing additional residents and altering the character of the community. *Id.*

176 *See* Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975) (noting that relevant case law, CEQ regulations, and HUD regulations indicate that federal agencies must consider urban factors, including density, displacement, relocation, impact of the environment on current residents and their activities, decay and blight, implications for the city growth policy, traffic and parking, noise, and neighborhood stability).

177 Jones v. Lynn, 477 F.2d 885, 887, 890 (1st Cir. 1973). Because the project was initially undertaken prior to NEPA's enactment, the initial phases of the project had not undergone NEPA review. *Id.* at 886–87. Because NEPA is designed to guide and advise agencies in their decision-making processes, the court reasoned that NEPA might still be applicable to subsequent federal actions taken after the passage of NEPA, such as the amendments to the relocation grant amount. *Id.* at 890–92.

Circuit remanded the case to the district court to determine the potential environmental impact of increasing the funding for relocation assistance.[178] The court noted the possibility of "environmental repercussions," such as a change in the "sociological mix of the neighborhood" and a substantial alteration of the "community balance" caused by an accelerated rate of eviction.[179] The court's explicit recognition of social impacts as environmental repercussions is helpful in linking displacement impacts to physical impacts, such as demolition or construction in urban development projects.

B. Indirect Displacement

Indirect displacement implicates similar environmental repercussions to those of direct displacement discussed in *Jones v. Lynn* and other cases considering the issue.[180] Courts have interpreted NEPA to apply to urban environmental effects, such as "quality of life for city residents."[181] In *City of Rochester v. U.S. Postal Service*, the Second Circuit considered the environmental impacts of urban unemployment under NEPA.[182] The City of Rochester sued to enjoin the construction of a new postal facility in neighboring Henrietta and the associated transfer of 1,400 employees to the new location.[183] The Postal Service considered a private environmental impact assessment, which discussed the physical impacts of construction of the new facility but failed to consider the environmental impacts of the transfer of employees and operations to a suburban location or the contemplated abandonment of the

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178 *Id.* at 892–93.

179 *Id.* at 890.

180 *See id.*; Sadler v. 218 Hous. Corp., 417 F. Supp. 348, 354 (N.D. Ga. 1974) (citing Jones v. U.S. Dep't of Hous. & Urb. Dev., 390 F. Supp. 579 (E.D. La. 1974) (noting that alleged inadequacy of low-income housing throughout the city raises "substantial environmental issues warranting further consideration by the court")).

181 *See* Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972) ("[NEPA] must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the profound influences of the 'profound influences of . . . high-density urbanization [and] industrial expansion."). For a discussion of NEPA applications in the urban environment, see Babcock, *supra* note 18. Babcock identifies two primary problems to implementing NEPA in the urban environment: (1) actions may be too small to be considered major federal action within the meaning of the act and therefore too insignificant to trigger an EIS; and (2) actions may not have a significant enough physical impact on the environment even where there is a great deal of harm to the neighborhood's social capital. *Id.* at 25. The narrow applicability of NEPA to actions that have a significant physical impact may limit types of urban development that still have dramatic impact on the community as a whole. This Comment focuses on requiring the consideration of secondary impacts, specifically indirect displacement, for high-impact development projects that would otherwise trigger the preparation of an EIS.

182 City of Rochester v. U.S. Postal Serv., 541 F.2d 967, 973 (2d Cir. 1976).

183 *Id.* at 970–71, 973.

original facility.[184] The court reasoned that the environmental effects associated with employee transfer may well be substantial:[185]

> The transfer of 1,400 employees alone could have several substantial environmental effects, including (1) increasing commuter traffic by car between the in-city residents of the employees and their new job site (only one bus route currently serves the HMF site; whether many current employees will find the HMF a more convenient work location is unknown); (2)(a) loss of job opportunities for inner-city residents who cannot afford or otherwise manage, to commute by car or bus to the HMF site, or (b) their moving to the suburbs, either possibly leading ultimately [to] both economic and physical deterioration in the [downtown Rochester] community; . . . and (3) partial or complete abandonment of the downtown MPO which could, one may suppose, contribute to an atmosphere of urban decay and blight, making environmental repair of the surrounding area difficult if not infeasible.[186]

The court held the Post Office relocation constituted major federal action significantly affecting the quality of the human environment and necessitated a full EIS.[187]

The requirement to conduct an EIS in *City of Rochester* was still linked to physical environmental impacts,[188] but it represents a broad interpretation of

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[184] *Id.* at 973.

[185] *Id.* at 972. The court rejected the Post Office's argument that the construction in neighboring Henrietta was unrelated to effects in Rochester, noting that the acknowledged plan was to transfer operations, and the primary impacts of traffic and possible abandonment of the facility associated with the new construction would be felt in Rochester. *Id.* The court reasoned that NEPA requires the comprehensive consideration of the effects of all federal actions, and "[t]o permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA." *Id.* For a discussion of cumulative impacts associated with urban redevelopment, see *supra* Part II.B.

[186] *City of Rochester*, 541 F.2d at 973; *see also* Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975) (noting that agencies must consider impact of urban decay and blight as well as traffic and neighborhood stability).

[187] *City of Rochester*, 541 F.2d at 973–74.

[188] Subsequent case law has made clear that NEPA does not apply to purely social or economic effects, but social and economic effects that are interrelated with physical impacts sufficient to trigger an EIS must also be considered in an agency's analysis. *See* 40 C.F.R. § 1508.14 (2019); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773–74 (1983). Though significant physical impacts are required for EIS requirements under NEPA, cases are unresolved on whether those necessary physical impacts may include secondary impacts associated with economic and social harm, such as the impacts discussed in *City of Rochester*. 541 F.2d at 973. For a discussion of the holding in *Rochester* and the interpretation of secondary environmental effects, see Elizabeth Manning, *Potential Environmental Effects of Urban Unemployment Require Preparation of an Environmental Impact Statement*, 6 FORDHAM URB. L.J. 169 (1997). The court's explicit recognition of urban decline associated with unemployment and displacement is still grounded in economic terms. *See id.* at

impacts that are sufficient to trigger EIS requirements. Despite the lack of immediate physical impacts felt in Rochester, the court held that the Post Office failed to comply with NEPA requirements based on the potential environmental effects associated with unemployment and the closure of the original facility.[189] The court's recognition of secondary environmental impacts associated with urban unemployment is helpful for parsing environmental review requirements of urban development projects as well. Under *City of Rochester*, impacts that are primarily social and economic may still trigger EIS requirements if they also generate secondary environmental problems.[190] Though the secondary consequences at issue in *City of Rochester* are focused on urban blight and deterioration, the same rationale supports consideration of secondary effects associated with urban redevelopment projects.

In considering urban environmental effects, courts have focused on the linkage of urban deterioration and related traditional environmental harms.[191] But the human environment has been interpreted broadly not to limit environmental considerations strictly to consequences in the natural environment.[192] The justifications underpinning the consideration of direct displacement also apply to indirect displacement induced by gentrification. Displacement associated with rising property values implicates the same physical environmental impacts, such as relocation, traffic, job loss, and others.[193]

Physical displacement—whether caused by demolition or by rising rents—has health impacts on individuals.[194] Possible physical impacts may include

170. In the context of gentrification concerns associated with redevelopment, the concern would not be for blight at the site of development but rather a link between environmental impacts such as traffic, job loss, closure of historic businesses, and other potential secondary impacts.

189 *City of Rochester*, 541 F.2d at 973–74; *see also* Manning, *supra* note 188, at 170–71 (discussing whether indirect environmental effects alone can trigger the EIS provision). Manning argues that using NEPA to address environmental effects rooted in social and economic harm fulfills the statute's legislative purpose. *Id.* at 178 (quoting 42 U.S.C. § 4321) ("Consideration of the environmental consequences of socio-economic effects is consistent with the broad purpose of NEPA 'to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . .'").

190 *See* Manning, *supra* note 188, at 169.

191 *See City of Rochester*, 541 F.2d at 973 (framing urban deterioration as a secondary environmental impact linked to traditional physical impacts).

192 *See* Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972) ("[NEPA] must be construed to include protection of the quality of life for city residents.").

193 *See* Hannah Weinstein, *Fighting for a Place to Call Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794, 820 (2015).

194 *See id.* (discussing how displacement and gentrification may contribute to greater pollution impacts). NEPA provides for the consideration of health impacts of development. *See* 42 U.S.C. § 4331(b)(2) ("[I]t is the continuing responsibility of the Federal Government to use all practicable means . . . [to] assure for all

increased transportation pollution as well as mental and physical health impacts on displaced residents and their families, particularly children.[195] Challenging development actions by identifying negative health outcomes for displaced residents or other pollution-related effects presents an information barrier for current residents and potential litigants, especially where the impacts of gentrification on a specific neighborhood are not well-documented or where gentrification is ongoing. Impacts of future displacement may be deemed too speculative for incorporation into environmental review, especially when scholarship related to gentrification may present competing methodologies for defining and quantifying the impacts of gentrification more broadly.

When gentrification has been considered by agencies, the courts have been silent on specific requirements for environmental review. Local initiatives or unrelated local strategies may provide sufficient basis for consideration of mitigation strategies for harmful impacts identified in an EIS. In *St. Paul Branch of the NAACP*,[196] the court considered whether the final EIS for a light rail line between Minneapolis and St. Paul sufficiently considered the indirect displacement of businesses and residents along the route.[197] Residents alleged that the responsible agencies did not adequately consider the impacts of gentrification, particularly the timing and extent of property tax increases and the vulnerability of current residents to indirect displacement.[198] In evaluating the adequacy of the agency's EIS, the court looked to both the EIS and the administrative record as a whole to determine whether the agency in fact gave the requisite "hard look" to the potential displacement effects through gentrification.[199] The final EIS noted the potential adverse effects, including gentrification, that may accompany the project but concluded that sufficient mitigation measures were in place through local government initiatives.[200] In its

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Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings[.]"). *But see* Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774–78 (1983) (holding that psychological impacts from the operation of a nearby nuclear reactor alone do not require an EIS). *Metropolitan Edison* deals specifically with psychological impacts unrelated to previous physical impacts, unlike high-impact urban development projects, which likely already have a physical impact component sufficient to trigger EIS requirements. *Id.* at 774, 776–77. Thus, the consideration of health and physical impacts associated with physical displacement may still implicate stricter NEPA review procedures.

195 *See* Weinstein, *supra* note 193, at 820–21 n.144 (quoting Jason Corburn, *Reconnecting with Our Roots: American Urban Planning and Public Health in the Twenty-First Century*, 42 URB. AFFS. REV. 688, 699 (2007) ("[R]esidential upheaval and lack of resettlement from urban renewal programs continue to have mental and physical health impacts on African-Americans.")).

196 764 F. Supp. 2d 1092 (D. Minn. 2011).

197 *Id.* at 1113.

198 *Id.* at 1113–14.

199 *Id.* at 1115.

200 *Id.* at 1113. The final EIS recognized the trend for increased development and noted that land and

consideration of the adverse impacts of gentrification, the agency repeatedly referenced the city's development strategy and local mitigation strategies to prevent displacement associated with rising property values.[201] The court held that the final EIS for the project adequately discussed the potential displacement of residents and businesses through gentrification and was therefore not arbitrary and capricious.[202] However, because the agency had specifically addressed and responded to comments raising the issue of gentrification, the court did not address whether consideration of such impacts was necessarily required. The agency's consideration of related mitigation measures discussed in the EIS related to local measures being implemented in anticipation of the light rail project rather than measures implemented as part of the federal action.[203]

The same concerns motivating consideration of direct displacement impacts also underlay impacts related to indirect displacement. Where direct displacement is often quantifiable and easily identified, indirect displacement is less obvious but often equally foreseeable. For instance, the demolition of a public housing project will result in direct displacement of a corresponding number of residents. But the construction of a luxury development in a gentrifying neighborhood may impact rents and affordability for the surrounding community, eventually displacing residents.[204] Residents displaced by reinvestment in communities are not afforded the same relocation assistance

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buildings "near some station areas that are now prime development and redevelopment sites will be built out. More housing opportunities will be available for current residents in the corridor, but population composition and neighborhood character may change as new residents move into the neighborhoods (gentrification) to take advantage of transit." *Id.* In consideration of these effects, the EIS referred to the City of St. Paul's housing strategy aimed to mitigate displacement, stating that the city's development plan aimed "to stabilize natural market forces in the neighborhoods adjacent to the Central Corridor and create a set of guidelines for the development, in effort to retain existing businesses located along the corridor." *Id.* at 1114. Additional measures to provide affordable housing include "supply-side financial incentives, supply-side regulatory incentives, and home ownership assistance." *Id.*

[201] *Id.* at 1108.

[202] *Id.* at 1115.

[203] The court does not review the adequacy of the mitigation strategies proposed by the city to address gentrification; NEPA is solely concerned with whether the agency sufficiently identified and considered impacts. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (stating that the agency's consideration of environmental consequences was all that was required and noting that the Court cannot dictate the relative weight given to environmental considerations in agency decision-making). NEPA acts as an environmental full-disclosure law, but it does not dictate a particular course of action or specify methods through which impacts must be mitigated. Env't Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 470 F.2d 289, 294–95 (8th Cir. 1972). Though the court is not empowered to mandate specific mitigation measures, an insufficient response from the agency regarding an identified harm might provide grounds for a procedural deficiency sufficient to require additions to the EIS. *See id.*

[204] *See* Zuk et al., *supra* note 4, at 26 ("Reinvestment related displacement refers to the case where investments in a neighborhood results in increased rent to a point where it's profitable to sell or raise the rent and tenants are forced to leave.")

required by other statutes for directly displaced residents.[205] Displacement associated with reinvestment in gentrifying neighborhoods may exclude low-income residents just as effectively but also deprives them of recognition of the harm and access to relocation resources.

IV. IMPLEMENTATION

NEPA's built-in public participation framework provides numerous opportunities for communities to raise issues and promote alternatives and mitigation strategies.[206] The primary limitation on NEPA's effectiveness as a tool to combat inequitable urban redevelopment is its lack of a substantive cause of action.[207] Additional barriers include information gaps regarding quantifiable effects of gentrification in specific affected communities as well as a loss of social capital and resultant loss of organizing networks.[208] Though NEPA does not dictate a particular result, forcing agencies to consider the full extent of their actions in urban redevelopment may allow for more informed decision-making and more robust mitigation strategies to address affordable housing concerns. Section A of this Part identifies specific avenues for utilizing NEPA as a tool to combat urban displacement and discusses potential mitigation measures by agencies. Section B discusses the limitations of applying NEPA in the gentrification context.

A. Opportunities for Organizers

In the urban environment, the environmental review process presents a method to directly address equity concerns before-the-fact, rather than after gentrification has occurred. By identifying and taking the requisite 'hard look' at potential gentrification impacts prior to a project's development, agencies will be more prepared to consider alternatives and implement mitigation strategies in conjunction with redevelopment projects. A critical opportunity for public participation occurs during the scoping phase immediately after an agency has

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[205] For example, under the Uniform Relocation Act, HUD provides limited relocation assistance for tenants displaced from housing projects meeting certain conditions. 24 CFR § 570.606 (2013). In addition to statutory remedies explicitly providing for relocation assistance, "a wide range of federal statutes and constitutional provisions have been interpreted by the courts as implicitly providing relief to those seeking to prevent their displacement or to receive assistance in relocation." Hanson, *supra* note 29, at 342. Though these and other regulatory and statutory requirements are limited, particularly in the context of non-governmentally induced displacement, they provide one avenue for directly displaced residents to access resources to compensate displaced persons and alleviate displacement harms. *See id.* at 344–46.

[206] *See supra* Part I.C.

[207] *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

[208] *See* Faber & Kimelberg, *supra* note 10, at 77–92.

decided to prepare an EIS.[209] Through the scoping phase, the public can raise concerns about the way the action is defined, identify potential issues for further study, and contribute to a more comprehensive EIS that more fully captures urban displacement impacts.[210] After an agency publishes a draft EIS, the public can submit comments to both identify deficiencies to be corrected in the final EIS, encourage a more equitable decision by the agency, and lay the groundwork for legal challenges to a final EIS that does not consider indirect displacement associated with gentrification.[211]

1. Alternatives and Mitigation Measures

Recognizing the human environmental impacts arising from gentrification alone does not provide a remedy for those residents facing displacement pressures. As part of the environmental review process, agencies must consider alternative actions and potential mitigation measures to alleviate adverse impacts identified during environmental review.[212] Consideration of appropriate alternatives to a proposed action along with mitigation measures may provide effective means for communities to alleviate adverse effects of gentrification associated with urban redevelopment.

The alternatives analysis has been described as the "linchpin" of NEPA[213] and the heart of the environmental review process.[214] As the D.C. Circuit explained, the purpose of the alternatives analysis is to require agencies to fully consider the possible outcomes and impacts of a proposed project:

> [The alternatives analysis seeks] to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the

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[209] *See* 43 C.F.R. § 46.235 (2012).

[210] EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, A CITIZEN'S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 14 (2007).

[211] *See id.*

[212] NEPA contains two provisions related to evaluation of alternatives. Section 102(2)(c)(iii) provides that environmental impact statements include a detailed statement on "alternatives to the proposed action." 42 U.S.C. § 4332(2)(c)(iii). Section 102(2)(E) also specifies that agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). For a discussion of case law regarding differing interpretations of these provisions, see Catherine E. Kanatas & Maxwell C. Smith, *The Heart of the Matter: Alternatives, Mitigation Measures, and the Clouded Heart of NEPA*, 31 J. LAND USE & ENV'T L. 198, 207–09 (2016).

[213] Nat. Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (quoting Monroe Cnty. Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972)).

[214] 40 C.F.R. § 1501.14 (2019); Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 623 F.3d 633, 642 (9th Cir. 2010).

> project) which would alter the environmental impact and the cost benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.[215]

The alternatives analysis is intended to ensure agencies effectively exercise their discretion to balance the anticipated environmental impacts of a proposed action with other potential positive or negative impacts.[216]

Agencies are not required to consider every conceivable alternative to a proposed action. Instead, they must consider reasonable alternatives.[217] In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court addressed the appropriate bounds of the alternatives analysis.[218] When the Atomic Energy Commission approved a license for the construction of a nuclear reactor, challengers argued that the EIS was deficient, because it failed to consider a variety of energy conservation measures in its analysis of alternatives.[219] In upholding the adequacy of the agency's alternatives analysis, the Court noted that "the concept of 'alternatives' is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood."[220] A common sense reading of "detailed statement of alternatives" does not extend to "every alternative device and

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[215] Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971). In *Calvert Cliffs*, one of the first cases interpreting NEPA, environmental groups challenged the Atomic Energy Commission's issuance of a license for a power plant based on deficiencies in the NEPA process. *Id.* at 1115–16. *Calvert Cliffs* established that NEPA creates judicially enforceable duties and that the procedural requirements of NEPA were underpinned by a substantive obligation to consider environmental impacts "to the fullest extent possible" in balancing the potential environmental impacts of a proposed action with other effects. *Id.* at 1112.

[216] *Id.* at 1114. Specifically, CEQ regulations require agencies to: "(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives not within the jurisdiction of the lead agency. (d) Include the alternative of no action. (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference. (f) Include appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. § 1502.14 (2019).

[217] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978).

[218] *Id.*

[219] *Id.* at 552. In the draft EIS, challengers specifically pointed out the omission of energy conservation in the agency's alternatives analysis. *Id.* After the licensing had taken place, the CEQ updated its regulations for consideration of energy conservation in EIS. *Id.* Environmentalists challenged, and the AEC declined to reopen the licensing proceedings. *Id.* at 520. The Court held that comments must meet a substantive threshold test to "structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions," especially where the requested action deals with "unchartered territory," such as consideration of energy conservation prior to the CEQ's revised regulations. *Id.* at 553.

[220] *Id.* at 552–53.

thought conceivable by the mind of man."[221] The Court held that reasonable alternatives required to be considered under NEPA do not include those that are "only remote and speculative possibilities."[222] In evaluating the range of reasonable alternatives to be considered, courts look to the stated goals and purposes of a project to determine whether the agency's analysis was sufficient.[223]

Because the range of reasonable alternatives depends in part on how the proposed action is defined, the scoping process represents a key step for citizen involvement.[224] Once an agency has determined that an EIS is required, the agency publishes a notice of intent in the Federal Register to begin the scoping process.[225] The scoping process provides an opportunity for members of the public to raise proposed impacts and identify reasonable alternatives that should be evaluated in the EIS.[226] The basis for identifying reasonable alternatives is the agency's statement of "Purpose and Need," which is included in the draft EIS and identifies the goals of the proposed action.[227] A very narrow statement of purpose and need may similarly limit the range of reasonable alternatives.[228]

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[221] *Id.* at 551.

[222] *Id.*; *see also* Nat. Res. Def. Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1971) (noting that NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite").

[223] *See* Kanatas & Smith, *supra* note 212, at 204.

[224] *See* 43 C.F.R. § 46.235 (2019) ("For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process."); *see supra* Part IV.A.2.

[225] *National Environmental Policy Act Review Process*, ENV'T PROT. AGENCY, https://www.epa.gov/nepa/national-environmental-policy-act-review-process (last visited Dec. 13, 2020). CEQ regulations provide that agencies shall involve the public early on to the extent practicable, but agencies have the discretion regarding the level of public involvement in drafting the Environmental Assessment (EA). 40 C.F.R. § 1501.4(e)(2) (2019); EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, *supra* note 210, at 12.

[226] EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, *supra* note 210; *see* Part IV.A.2.

[227] EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, *supra* note 210, at 16.

[228] For example, defining a project purpose as providing twenty-two miles of multi-use trail system encircling central Atlanta provides a much more limited range of reasonable alternatives than a project purpose to "improve access and mobility for existing and future residents and workers by increasing in-city transit and bicycle/pedestrian options, and providing links in and between those networks." ATLANTA BELTLINE FINAL ENVIRONMENTAL IMPACT STATEMENT 3–4 (2012), http://beltline.org/wp-content/uploads/2012/05/ABI-FEIS-4f-Appendices-ALL.pdf.

When conducting alternatives analysis for an EIS, agencies must also consider mitigation measures among the alternatives compared.[229] In its EIS, the agency must analyze environmental consequences of the proposed action and its alternatives, including "means to mitigate adverse environmental impacts."[230] Though required to consider and analyze mitigation measures, agencies are not required under NEPA to commit to identified mitigation strategies.[231] Local actions taken to independently mitigate displacement impacts may be factored into an agency's NEPA analysis.[232] In the context of urban redevelopment, mitigation measures could include binding affordable housing commitments, support for land trusts,[233] deed restrictions,[234] and other programs designed to realize a comprehensive neighborhood plan, rather than a piecemeal approach to development.[235] Forcing agencies to analyze the gentrification impacts of redevelopment actions can also spur agencies to commit to mitigation measures. Importantly, agency commitments to mitigate adverse effects also trigger monitoring and implementation requirements to ensure such mitigation measures are realized.[236] These additional federal requirements may provide an additional mechanism to enforce substantive affordable housing commitments, rather than empty gestures.[237]

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[229] 40 C.F.R. § 1502.14(f) (2019) (including mitigation measures among requirements for EIS alternatives); *id.* § 1508.25(b)(3) (2019) (defining the scope of an EIS to include mitigation measures).

[230] Memorandum from Nancy H. Sutley, Chair of Council on Env't Quality, to Heads of Fed. Dep'ts and Agencies 6 (Jan. 14, 2011) (available at https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

[231] *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989). One important way NEPA has encouraged agencies to implement mitigation measures is at the EA stage: agencies can commit to mitigation measures to support a finding of no significant impact and avoid the requirement to conduct a full EIS. Memorandum from Nancy H. Sutley, *supra* note 230, at 2.

[232] *See* St. Paul Branch of NAACP v. Dep't of Transp., 764 F. Supp. 2d 1092, 1108 (D. Minn. 2011).

[233] *See* Oksana Mironova, *How Community Land Trusts Can Help Address the Affordable Housing Crisis*, JACOBIN (July 6, 2019), https://www.jacobinmag.com/2019/07/community-land-trusts-affordable-housing.

[234] David Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 MISS. L.J. 663, 668–69 (1991).

[235] *See* Hamil Pearsall, *The Future of Philadelphia's Reading Viaduct*, *in* JUST GREEN ENOUGH, *supra* note 13, at 197–208 (arguing that "an environmental initiative that pays minimal attention to its social and economic impacts is likely to create strife, particularly in a neighborhood with diverse resident interests and perspectives on the future of the neighborhood").

[236] *See* Memorandum from Nancy H. Sutley, *supra* note 230, at 8.

[237] In Atlanta, the country's fourth-fastest gentrifying city, BeltLine, Inc. was required to create at least 5,600 affordable homes and apartments within the project boundaries. Willoughby Mariano, Lindsey Conway & Anastaciah Ondieki, *How the Atlanta Beltline Broke Its Promise on Affordable Housing*, AJC (July 13, 2017), https://www.ajc.com/news/local/how-the-atlanta-beltline-broke-its-promise-affordable-housing/0VXnu1BlYC0IbA9U4u2CEM/. Yet halfway to the project's completion, it had dedicated funding for only 785 homes. *Id.* Of those existing units, many are rapidly becoming unaffordable. *Id.* (finding that some units formerly sold as part of the BeltLine's affordable home program are "out of reach for three-quarters of metro Atlanta").

2. Scoping Phase

Before preparing an EIS, NEPA requires agencies to engage in an "early and open" process to determine the scope of issues to be addressed.[238] The scoping process begins after the lead agency publishes a notice of intent in the Federal Register, briefly describing the proposed action and then identifying possible alternatives.[239] The scoping stage is critical because it is designed to solicit participation from the public and from state, local, and tribal governments for the "early identification of concern, potential impacts, relevant effects of past actions and possible alternative actions."[240] The scoping phase therefore provides built-in public participation measures, such as public scoping meetings and other communication methods.[241] Importantly, the scoping phase also lays the groundwork for communication between the agency and the community and for further participation throughout the environmental review process.

NEPA requires agencies to consider "reasonable alternatives," and the evaluation of reasonable alternatives is the heart of the EIS.[242] Whether an alternative—such as a no-action alternative or an alternative incorporating affordable housing requirements—is "reasonable" depends on how the challenged action is defined in the final EIS.[243] Though the statement of purpose and need is ultimately written by the agency, public participation at the scoping stage can influence how the proposed action is defined and thus expand the range of alternatives to be considered in the EIS. In conjunction with evaluating the definition of a proposed action, scoping provides the opportunity to identify additional alternatives for the agency to study.

Another key early-stage opportunity to shape the environmental review process is through defining the "affected environment," or the area where environmental effects will occur.[244] The scope of the affected environment determines what impacts are ultimately studied and included in the EIS. Both the anticipated effects of a proposed action and the characteristics of affected communities are relevant in determining the affected environment.[245] Indirect

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238 40 C.F.R. § 1501.7 (2019).

239 The EPA is required to review and comment on every EIS and to notify the public when an EIS has been filed. 42 U.S.C. § 7609(a); 40 C.F.R. § 1506.09 (2019).

240 43 C.F.R. § 46.235(a) (2019).

241 *Id.* § 46.235(b).

242 40 C.F.R. § 1502.14 (2019).

243 EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, *supra* note 210, at 16.

244 40 C.F.R. § 1502.15 (2019); *see also* CEQ GUIDANCE FOR ENVIRONMENTAL JUSTICE UNDER NEPA, *supra* note 111, at 14.

245 COUNCIL ON ENV'T QUALITY, *supra* note 21, at 24.

urban displacement caused by rising property values and evictions may not be directly within the project area of a proposed urban redevelopment project. However, cumulative and indirect effects of a proposed action on a particular community could shift the definition of the affected environment to more fully capture the distributive consequences for surrounding communities.

NEPA's cumulative effects analysis also depends on the scoping phase to determine the extent to which past actions are considered. CEQ guidance provides that "[b]ased on scoping, agencies have discretion to determine whether, and to what extent, information about the specific nature, design, or present effects of a past action is useful for the agency's analysis of the effects of a proposal for agency action and its reasonable alternatives."[246] Past urban land use practices and other government policies have contributed directly to the vulnerability of many communities, particularly African American communities, now threatened with gentrification and displacement.[247] Evaluating the relationship between past actions and their present consequences "is necessary to describe the cumulative effect of all past actions combined" and satisfy the cumulative effects requirement.[248]

The environmental review process should encourage agencies to address potential indirect displacement effects and promote a more equitable conclusion to proposed actions. Raising issues as early on in the scoping phase as possible increases the likelihood of a more comprehensive EIS and a more equitable decision-making process. Identifying potential issues and concerns about gentrification at the outset of the review process also strengthens potential legal challenges based on procedural deficiencies if the agency fails to properly consider environmental impacts of the proposed action.

3. Comment Period

Following the scoping process, the lead agency will prepare a draft EIS and make that draft available for public review and comment.[249] An agency must respond to all substantive comments in the final EIS and record of decision.[250] Effective comments may identify alternatives or specific mitigation measures, identify deficiencies in what the agency has considered in the EIS, provide

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[246] Memorandum from Council on Env't Quality on Guidance on the Consideration of Past Actions in Cumulative Effects, *supra* note 132.

[247] *See supra* Part II.B.

[248] Memorandum from Council on Env't Quality on Guidance on the Consideration of Past Actions in Cumulative Effects, *supra* note 132, at 2.

[249] Public comment periods on draft statements must last at least 45 days. 40 C.F.R. § 1506.10(c) (2019).

[250] *Id.* § 1503.4 (2019).

additional data about potential effects of the action, or point out the need for more data.[251] Scope of judicial review is not necessarily limited to concerns that were identified in the comments during the environmental review process.[252] However, because the agency has such broad discretion in its decisions, communication with the agency at the comment stage is critical to force the agency to respond to specific concerns and encourage reconsideration of a proposed action prior to a final decision.

B. Limitations

Though NEPA's public participation framework makes it a valuable tool to address inequity in urban redevelopment, the procedural nature of the statute may limit its applicability in the context of gentrification. In order to trigger the robust environmental review requirements of an EIS, an urban redevelopment project must have significant physical environmental effects.[253] In gentrifying communities, attempts to incorporate meaningful public participation prior to the EIS stage might be hampered by information barriers and dwindling social and political capital as residents are displaced.[254] Even if an EIS comprehensively evaluates the negative impacts of gentrification, NEPA does not dictate a particular result: requiring agencies to consider the environmental consequences of proposed actions does not require them to weigh those concerns more heavily than other interests.[255] Once they have satisfied NEPA procedural requirements, agencies receive significant discretion in their ultimate decision to pursue a particular action.

1. Deferential Standard of Review

The primary limitation of NEPA challenges is the lack of substantive obligations under the statute. Because NEPA does not include a citizen suit provision, plaintiffs must challenge NEPA violations under the Administrative

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[251] EXEC. OFF. OF THE PRESIDENT, COUNCIL ON ENV'T QUALITY, *supra* note 210, at 13–14.

[252] *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004) ("[T]he agency bears the primary responsibility to ensure that it complies with NEPA . . . and . . . an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."); Friends of Tim Ford v. Tenn. Valley Auth., 585 F.3d 955, 964 (6th Cir. 2009) (finding that failure to comment during administrative procedures "does not automatically preclude one from challenging the selection" and that "[n]either NEPA itself nor the CEQ regulations for the implementation of NEPA . . . expressly limit judicial review of final agency action to those who preserved their appellate rights through public comment").

[253] *See supra* Part I.A.

[254] *See* Foster, *supra* note 18 and accompanying text.

[255] *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

Procedures Act's deferential arbitrary and capricious standard.[256] NEPA does not dictate any particular result; it merely imposes procedural obligations to force agencies to consider significant environmental impacts.[257] The task of the reviewing court is to ensure that the agency adhered to these procedures, but "[n]either [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."[258] Thus, judicial review of agency decisions under NEPA is necessarily limited to satisfaction of procedural requirements. Once an agency has taken a 'hard look' at the environmental consequences of its actions, NEPA does not require that environmental concerns take precedence over other goals, such as commercial development.[259]

For NEPA claims raising issues of indirect displacement and other environmental justice concerns, challengers carry a heavy burden to show that consideration of environmental justice impacts was insufficient. There are three main avenues for NEPA challenges: (1) challenging a decision not to prepare an EIS, (2) challenging deficiencies in procedures used to prepare an EIS, and (3) challenging the adequacy of the EIS itself.[260] Challenges to an agency's failure to prepare an EIS based on indirect displacement concerns would have to show that the effects were also tied to significant physical impacts. Because of the deferential standard of review, lack of information and resources may limit the effectiveness of challenges to agency conclusions.[261]

2. Barriers to Public Participation

The public participation framework of NEPA is only effective if affected communities are equipped with the resources, information, and organizing networks to utilize it. For even the most engaged communities, the NEPA process can present numerous challenges to meaningful public engagement. Even with proper notification and solicitation of public involvement as required

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256 *See* 5 U.S.C. § 706.

257 *See Strycker's Bay Neighborhood Council*, 444 U.S. at 227.

258 Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); *see also Strycker's Bay Neighborhood Council*, 444 U.S. at 227–28 ("[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.'") (citations omitted).

259 *See Kleppe*, 427 U.S. at 410 n.21.

260 *See* Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T AFFS. L. REV. 601, 619–20 (2006).

261 For a discussion of the weaknesses of NEPA in judicial application, see Clay Hartmann, *NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. AIR L. & COM. 709, 720–30 (1994).

by NEPA regulations,[262] the breadth and often technical content of relevant information can be difficult to parse and even overwhelming for citizens.[263] This information gap is compounded by the nebulous nature of gentrification and empirical gaps regarding displacement in specific areas.[264] Many scholars still disagree on definitions and causes for the phenomenon of gentrification, and lack of available data on indirect displacement in a particular community could limit the effectiveness of comments that must comply with a short window.[265] Another challenge to community engagement regarding urban development projects may be the decline in social capital for many gentrifying communities.[266] In areas that are already experiencing displacement pressures, it may be more difficult both to link indirect displacement pressures definitively to a proposed agency action and to navigate the NEPA process without a strong community network.

3. Requirement of Significant Physical Impacts

Agencies are only required to conduct in-depth environmental impact assessments for proposed actions that will significantly impact the human environment. Socioeconomic impacts alone are insufficient to trigger the EIS requirement.[267] But socioeconomic impacts that are interrelated with physical impacts must be considered if an EIS is conducted.[268] This interpretation may limit the utility of NEPA as a tool to address urban displacement to situations where significant physical impacts already trigger the preparation of an EIS. In many places, where gentrification is the product of many individual actions by state, local, and private actors, the NEPA process will not be able to provide the concrete public participation mechanisms to challenge high-impact individual actions. Though generally less robust than the public participation methods for EISs, many agencies also incorporate public participation into their environmental assessments.[269] Raising community concerns during the earlier

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[262] 40 C.F.R. § 1506.6 (2019).

[263] *See* COUNCIL ON ENV'T QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 20 (1997).

[264] *See* Zuk et al., *supra* note 4, at 33 ("The complexity in defining and documenting gentrification qualitatively has yielded similarly complicated efforts at quantitatively measuring and predicting gentrification. While researchers who use qualitative methods focus on the nuances of how gentrification unfolds over time, most quantitative analyses treat gentrification as an outcome, rather than a process.").

[265] *Id.*

[266] *See* Foster, *supra* note 18; U.S. DEP'T OF HOUS. & URB. DEV., ENSURING EQUITABLE NEIGHBORHOOD CHANGE: GENTRIFICATION PRESSURES ON HOUSING AFFORDABILITY 12 (2016) (discussing the impacts of cultural and political displacement related to gentrification).

[267] 40 C.F.R. § 1508.14 (2019); *see supra* Part II.A.2.

[268] 40 C.F.R. § 1508.14; *see supra* Part II.A.2.

[269] Where an agency is unsure whether an action will significantly affect the human environment, the

stages of the environmental review process would also have the potential to identify displacement issues and pressure the agency to incorporate mitigation measures.[270]

CONCLUSION

NEPA is a bedrock environmental law that provides a valuable tool for citizens wishing to engage in the environmental review process. Historic federal and private actions have perpetuated inequity in the urban environment and made low-income and predominantly African American communities acutely vulnerable to displacement pressures caused by redevelopment. Now, federal reinvestment in previously disinvested urban areas threatens to displace current residents just as their neighborhoods gain improved environmental amenities. Urban redevelopment projects are often undertaken with the explicit purpose of stimulating commercial growth and changing the character of previously disinvested communities. Agencies should be required to address these reasonably foreseeable indirect effects in EISs under NEPA and to substantively consider the disproportionate impact of their proposed actions on low-income and minority populations.

Indirect displacement associated with gentrification is a significant impact on the human environment within the meaning of the statute and should be specifically addressed in environmental impact statements. However, there are substantial limitations to NEPA's application. Mainly, it does not dictate any particular result. Federal agencies are required to consider the impacts of their actions but are not required to take specific mitigation measures to alleviate those impacts. Despite its limitations, NEPA's procedural requirements have proven to be a powerful action-forcing mechanism to improve agency decision-making. NEPA is just one additional tool that can be used by advocates to address the equity gap in our cities.

JESSE HEVIA*

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agency first conducts an environmental assessment (EA) to determine if an EIS is necessary. *National Environmental Policy Act Review Process*, *supra* note 225.

270 Participation in the EA process would pose many of the same challenges as participation in the EIS process. In addition, information costs would likely be higher for lower profile projects with a less robust public participation framework. *See* Outka, *supra* note 260, at 608.

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