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Reversing Course on Environmental Justice under the Trump Administration

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REVERSING COURSE ON ENVIRONMENTAL JUSTICE UNDER THE TRUMP ADMINISTRATION

Uma Outka & Elizabeth Kronk Warner***

This Article traces how policy reversals in the first years of the Trump Administration implicate protections for diverse, low-income communities in the context of environmental pollution and climate change. The environmental justice movement has drawn critical attention to the persistent inequality in exposure to environmental harms, tracking racial and income lines. As a result of decades of advocacy, environmental justice has become an established, if not realized, principle in environmental law. Shifting positions under the Trump Administration now undermine this progress. To illustrate, this Article uses three exemplary contexts—agency transition, environmental law implementation, and international relations on climate change—to outline the impacts of reversing course on environmental justice.

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I. INTRODUCTION

The field of environmental law emerged in the 1970s with inspiring congressional consensus to protect endangered species, restore water quality, and protect the soil and air for future generations.¹ In the decades since, however, it became clear that the federal environmental statutes have a critical flaw—they fail to address the ways that environmental harms disproportionately affect low-income people, especially low-income people of color.

For more than a quarter of a century, the environmental justice movement has drawn attention to this problem.² The cause was validated with formal federal recognition when President Clinton signed Executive Order 12,898 requiring federal agencies to consider

1. See generally 16 U.S.C. § 1531 (2018); 33 U.S.C. § 1251 (2018); 42 U.S.C. § 7401 (2018).

2. The history of the environmental justice movement is beyond the scope of this Article, with its focus on the first years of the Trump Administration. For an early account of that history, see generally LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001). For a more recent effort to situate the movement in a broader historical context, see generally Jedidiah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809 (2018). The disparity in exposure to environmental harms tracking income and racial lines has long been an acknowledged problem in the United States. Some of the most important early documentations can be found in U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <http://archive.gao.gov/d48t13/121648.pdf>; COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987), updated in ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE AT TWENTY 1987–2007, at 16 (2007). For more recent research confirming disparities, see, for example, ADRIANNA QUINTERO ET AL., U.S. LATINOS AND AIR POLLUTION: A CALL TO ACTION (2011) (compiling data from a variety of sources showing air pollution exposure rates for Latinos across the United States); Kerry Ard, *Trends in Exposure to Industrial Air Toxins for Different Racial and Socioeconomic Groups: A Spatial and Temporal Examination of Environmental Inequality in the U.S. from 1995 to 2004*, 53 SOC. SCI. RES. 375 (2015) (tracking environmental inequality from 1995–2004 and finding middle income African Americans exposed to more industrial toxins than lower income whites); Mercedes A. Bravo et al., *Racial Isolation and Exposure to Airborne Particulate Matter and Ozone in Understudied US Populations: Environmental Justice Applications of Downscaled Numerical Model Output*, 92 ENV'T INT'L 247 (2016) (finding strong association between high particulate matter and racially isolated census tracts, especially in rural Midwest); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018) (finding that African Americans have a higher burden of particulate exposure beyond what would be explained by strictly socioeconomic considerations); Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENVTL. RES. LETTERS 115008 (2015) (finding race to be a factor apart from socioeconomics in polluting facility siting).

the environmental justice implications of their decisions.³ Since the 1990s, across presidential administrations, federal engagement with environmental justice has waxed and waned and mostly disappointed—even as environmental justice has become a foundational principle and aspiration within the field. Renewed focus on these issues under the Obama Administration was encouraging, as the Environmental Protection Agency (the “EPA” or “the Agency”) developed an *EJ 2020 Action Agenda* (“*EJ 2020*”) designed to methodically and deeply integrate environmental justice into the EPA’s federal and regional operations.⁴

Whatever promise *EJ 2020* may have held now appears to be in jeopardy. President Trump’s first proposed budget diminished the EPA, including funding cuts to environmental justice programs.⁵ The White House and EPA Administrator Scott Pruitt immediately and systematically took action to undercut a wide range of regulatory protections for public health that are especially important for environmental justice communities exposed to higher environmental burdens.⁶ That work, which contravenes the letter and spirit of *EJ 2020*, continues under Administrator Andrew Wheeler, who assumed leadership of the EPA after Pruitt’s departure in July 2018.⁷

These signals of reversal have extended beyond just the EPA, seeming to reflect a reduced engagement with environmental justice concerns that spans the new administration’s approach to projects and policies at all scales. Within a week of being sworn into office, President Trump issued an executive memorandum directing the Secretary of the Army to take all steps consistent with applicable law to approve permits necessary for the completion of the Dakota Access

3. Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

4. U.S. EPA, *EJ 2020 ACTION AGENDA: THE U.S. EPA’S ENVIRONMENTAL JUSTICE STRATEGIC PLAN 2016–2020* (2016).

5. See ENVTL. PROT. NETWORK, *ANALYSIS OF TRUMP ADMINISTRATION PROPOSALS FOR FY 2018 BUDGET FOR THE ENVIRONMENTAL PROTECTION AGENCY 3–5* (2017), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/PDF/Analysis-of-Trump-Administration-Proposals-for-FY2018-Budget-for-the-Environmental-Protection-Agency.pdf> [hereinafter ENVTL. PROT. NETWORK FY2018]. See also Lisa Garcia, *Environmental Justice Office Could be Shuttered by Proposed EPA Cuts*, EARTHJUSTICE (Sept. 20, 2017), <https://earthjustice.org/blog/2017-september/environmental-justice-office-could-be-shuttered-by-proposed-epa-cuts>.

6. Mr. Pruitt served as President Trump’s EPA Administrator from February 2017 until his resignation in July 2018. Ledyard King & David Jackson, *Trump EPA Chief Scott Pruitt Resigns as Ethical Scandals Mount*, USA TODAY (July 5, 2018), <https://www.usatoday.com/story/news/politics/2018/07/05/scott-pruitt-resigns/480430002/>.

7. Andrew Wheeler was confirmed as the EPA’s fifteenth Administrator in February 2019. See *EPA’s Administrator: Andrew Wheeler*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/aboutepa/epas-administrator> (last visited Mar. 24, 2019).

Pipeline—a project that thousands of individuals and tribes had been protesting over the prior year for a variety of urgent reasons, including concerns centered in environmental justice.⁸ By June 2017, oil started flowing through the pipeline.⁹ Environmental justice advocates argue the pipeline was placed less than a mile from a tribal community after its placement near majority-white Bismarck, North Dakota, was deemed a threat to water resources for that community.¹⁰ Further, questions emerged regarding the methods used by the Army Corps of Engineers both in relation to conducting an environmental justice review of the proposed project and to conducting consultations with affected tribes.¹¹

At a global scale, the Trump Administration's rejection of climate science and repudiation of the Paris Agreement represents a conscious refusal to take steps to prevent and—equally important—protect against climate change impacts.¹² This stance directly harms low-income communities of color in the United States and around the globe, which are expected to experience the worst environmental, economic, and health effects of climate change.¹³ Climate adaptation planning—aimed at preparing for and minimizing these impacts—has all but stopped under the Trump Administration; instead, President Trump focuses on reviving the ailing coal sector, one of the most polluting industries in U.S. history.¹⁴

Building from these three discrete contexts, this Article offers a unique perspective on the Symposium's theme by tracing how the

8. Memorandum from President Trump on Construction of Dakota Access Pipeline to Sec'y of the Army (Jan. 24, 2017) (on file with author).

9. Robinson Meyer, *Oil is Flowing Through the Dakota Access Pipeline*, ATLANTIC (June 9, 2017), <https://www.theatlantic.com/science/archive/2017/06/oil-is-flowing-through-the-dakota-access-pipeline/529707/>; *The Dakota Access Pipeline Keeps America Moving Efficiently and in an Environmentally Safe Manner*, DAKOTA ACCESS PIPELINE FACTS, <https://dapipelinefacts.com/About.html> (last visited Mar. 13, 2019).

10. Blake Nicholson & Dave Kolpack, *Corps: No New Impacts Found in Dakota Access Pipeline Review*, ASSOCIATED PRESS (Aug. 31, 2018), <https://www.apnews.com/0f9a62a3c94742528679b3b49f65164b>.

11. *Id.*

12. See Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

13. See *infra* Part IV.

14. See Exec. Order No. 13783 (“Promoting Energy Independence and Economic Growth”), 82 Fed. Reg. 16093 (Mar. 28, 2017) (reemphasizing coal as an energy resource, Sec. 1(b) and 2(a), and reversing an Obama-era leasing moratorium for coal on federal lands, Sec. 6). For perspective relating these goals to the coal industry's trajectory, see Jennifer A. Dlouhy et al., *Trump Promised to Bring Back Coal. It's Declining Again*, BLOOMBERG (Aug. 21, 2018), <https://www.bloomberg.com/news/articles/2018-08-21/trump-promised-to-bring-back-coal-it-s-declining-again>.

Trump Administration has explicitly and implicitly reversed course on environmental policies to the detriment of low-income communities of color. In Part II, this Article addresses reversal in the context of agency transition, with a focus on the EPA—the Agency with primary responsibility for implementation of the federal environmental statutes. Part III then turns to implementation, with a focus on the Administration’s legal and political response to the high-profile Dakota Access Pipeline. This pipeline proposal has spanned the Obama and Trump Administrations and at the time of this writing remains the subject of litigation following President Trump’s fast-track permit approval of the project. The Dakota Access Pipeline has been fiercely opposed by the Standing Rock Sioux Tribe, whose tribal lands are within the immediate watershed of the proposed pipeline route and water crossings, with support from thousands who travelled to stand with the Tribe in protest during 2016 and 2017. Part IV considers the broader implications for environmental justice of President Trump’s withdrawal from the Paris Agreement and related domestic policy reversals affecting both climate mitigation and adaptation measures at the federal level, as well as suppression of climate science. This Article concludes by casting environmental justice as a less recognized yet crucial aspect of what the Symposium terms the Administration’s “war on diversity” with potentially long-lasting consequences in the United States and abroad.

II. AGENCY TRANSITION: ENVIRONMENTAL JUSTICE AT THE EPA

On January 19, 2017, the last day of the Obama Administration’s second term and the day before Donald Trump’s presidential inauguration, the EPA External Civil Rights Compliance Office sent a letter to Father Phil Schmitter and to the Michigan Department of Environmental Quality (“MDEQ”), resolving a long pending environmental justice claim.¹⁵ Over twenty years ago, Father Schmitter and other residents of the majority African American city of Flint, Michigan, filed a civil rights complaint with the Agency alleging racial discrimination by MDEQ in its Clean Air Act permit approval process for the Genesee Power Station.¹⁶ Title VI of the Civil

15. Letter from Lilian S. Dorca, Dir., U.S. EPA External Civil Rights Compliance Office of Gen. Counsel, to Father Phil Schmitter (Jan. 19, 2017), <https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html>; Letter from Lilian S. Dorca, Dir., U.S. EPA External Civil Rights Compliance Office of Gen. Counsel, to Heidi Grether, Dir., Mich. Dep’t of Env’tl. Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>.

16. At the time the complaint was filed, the MDEQ was known as the Michigan Department of Natural Resources (“MDNR”). Letter from Lilian S. Dorca to Father Phil Schmitter, *supra* note 15, at 2. The investigation also

Rights Act (“Title VI”) prohibits discrimination on the basis of race,¹⁷ and the EPA’s regulations implementing Title VI likewise prohibit any recipient of EPA financial assistance—here, MDEQ—from treating people differently on the basis of race.¹⁸ Although few have been successful, civil rights claims in the context of environmental law implementation represent an important remedial tool for environmental justice.

In the letter, the EPA told Schmitter the investigation revealed that “[b]oth individually and as a community, African Americans were subjected to adverse actions by . . . MDEQ, while similarly situated, non-African Americans and non-African American communities were not subjected to the same adverse actions.”¹⁹ The Agency found that “a preponderance of the evidence” in the record supported the conclusion “that race discrimination was more likely than not the reason why African Americans were treated less favorably than non-African Americans during the 1992–1994 public participation for the [Genessee Power Station] permit.”²⁰ The EPA also found significant flaws in the MDEQ’s nondiscrimination policy and made recommendations for MDEQ to fix the deficiencies and ensure fair treatment for all.²¹

By January 2017, the Genessee Power Station had been operating for many years.²² A number of the complainants had died.²³ Yet, the rare determination, finding discrimination did occur, was a resonant parting message by the Obama EPA, even though there was little to be gained for local residents from a response so many years overdue. It marked the conclusion of a genuine, if not wholly successful, effort to invigorate the Agency’s environmental justice commitment through acknowledgement of longtime failings and concrete steps to integrate that commitment meaningfully across the work of the Agency. In the early years of the Obama EPA, Administrator Lisa Jackson commissioned an evaluation of the civil

included the role of the Michigan Air Pollution Control Commission (“MAPCC”).
Id.

17. See 42 U.S.C. § 2000d (providing that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

18. 40 C.F.R. § 7.35(a) (2018).

19. Letter from Lilian S. Dorka to Father Phil Schmitter, *supra* note 15, at 16.

20. *Id.* at 17.

21. *Id.* at 23–28, 30–35; see also Letter from Lilian S. Dorka to Heidi Grether, *supra* note 15, at 31–35.

22. Letter from Lilian S. Dorka to Father Phil Schmitter, *supra* note 15, at 1.

23. See Robin Bravender, *Civil Rights Advocates Despair After Decades of Agency Inaction*, GREENWIRE (Feb. 19, 2015), <https://www.eenews.net/stories/1060013679>.

rights record at the Agency, which detailed serious structural and procedural problems in the handling of Title VI complaints.²⁴ A 2011 final report detailed “a poor record of performance” over the prior decade: only six percent of 247 Title VI complaints were accepted within the Agency’s twenty-day time limit, a significant backlog of cases were pending for years, no system for tracking cases existed, there was a lack of community outreach, and the Agency failed to provide guidance to funding recipients, like MDEQ, on Title VI compliance.²⁵ In anticipation of the twentieth anniversary of the Clinton Executive Order, the Agency crafted *Plan EJ 2014*, which included a detailed accounting of opportunities to promote environmental justice under environmental statutes it administers, from the Clean Air Act and the Clean Water Act to the waste and cleanup statutes, the Resource Conservation and Recovery Act and Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).²⁶ Building on *Plan EJ 2014* under Jackson’s successor, Gina McCarthy, the Agency developed *EJ 2020 Action Agenda*,²⁷ a strategy expanding community outreach and internal implementation, paired with technical resources for advancing environmental justice in key areas including rulemaking, permitting, and enforcement.²⁸ Facing criticism for moving too slowly in addressing Title VI complaints,²⁹ the Agency charted a new

24. DELOITTE CONSULTING LLP, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (2011); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-77, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION 31 (2011) (prepared the same year and useful to the Obama EPA’s internal reform efforts).

25. DELOITTE, *supra* note 24, at 2, 25–29.

26. *See* U.S. EPA, PLAN EJ 2014: LEGAL TOOLS (2011). The development of the Legal Tools document was one element of the EPA’s PLAN EJ 2014.

27. U.S. ENVTL. PROT. AGENCY, EJ 2020 ACTION AGENDA: THE U.S. EPA’S ENVIRONMENTAL JUSTICE STRATEGIC PLAN FOR 2016–2020 (2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf; *see also*, *EJ 2020 Action Agenda: EPA’s Environmental Justice Strategy*, ENVTL. PROTECTION AGENCY, https://19january2017snapshot.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy_.html (last updated Jan. 5, 2017) (featuring related information including tribal consultations, public comment, outreach, and supporting resources).

28. *See, e.g.*, *EJSCREEN: EJ Screening and Mapping Tool*, ENVTL. PROTECTION AGENCY, https://19january2017snapshot.epa.gov/ejscreen_.html (last updated on Jan. 19, 2017); *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, ENVTL. PROTECTION AGENCY, https://19january2017snapshot.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis_.html (last updated Jan. 19, 2017).

29. *See generally* U.S. COMM’N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (2016), https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf

strategic plan for ensuring external civil rights compliance.³⁰ The January 19, 2017 racial discrimination finding was the final act of the Obama EPA in that effort.³¹

President Trump's inauguration and appointment of Scott Pruitt as EPA Administrator marked a significant change for the Agency, widely considered a "hostile take-over."³² Pruitt was well known as an adversary of the EPA who, as Oklahoma Attorney General, had repeatedly sued the EPA in opposition to environmental regulation and openly advanced the energy industry's agenda.³³ The policy reversals began almost immediately, with seeming antagonism to the Agency and its work.³⁴

The sharp shift in leadership at the EPA intersects with environmental justice in multiple direct and indirect ways. Consider the following four aspects of this shift.

(issuing strong critique of EPA's record on civil rights, state guidance, and related issues); Kristen Lombardi & Talia Buford, *Civil Rights Commission to Hold Hearing on Environmental Justice*, CTR. FOR PUB. INTEGRITY (Feb. 4, 2016), <https://publicintegrity.org/environment/civil-rights-commission-to-hold-hearing-on-environmental-justice/> (highlighting delays and other problems in the EPA's response to environmental justice claims under Title VI).

30. U.S. ENVTL. PROT. AGENCY, OFFICE OF CIVIL RIGHTS., EXTERNAL COMPLIANCE AND COMPLAINTS PROGRAM STRATEGIC PLAN: FISCAL YEAR 2015–2020 (2017), https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf.

31. Talia Buford, *Rare Discrimination Finding by EPA Civil-Rights Office*, CTR. FOR PUB. INTEGRITY (Jan. 25, 2017), <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/>.

32. See, e.g., Dan Farber, *Industry's Hostile Takeover of EPA*, LEGAL PLANET (July 27, 2017), <https://legal-planet.org/2017/07/27/the-industry-take-over-of-epa/>; Rich Heidorn Jr., *Pruitt Begins Hostile Takeover at EPA*, RTO INSIDER (Feb. 20, 2017), <https://www.rtoinsider.com/scott-pruitt-epa-39083/>; Editorial, *Scott Pruitt's Hostile Takeover of EPA*, S.F. CHRON. (Feb. 18, 2017), <https://www.sfchronicle.com/opinion/editorials/article/Scott-Pruitt-s-hostile-takeover-of-EPA-10943678.php>.

33. Notably, for example, Pruitt challenged EPA's authority under the Clean Air Act to develop the Clean Power Plan, see Complaint, State of Oklahoma ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma v. Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency, No. 15-CV-369-CVE-FHM (July 1, 2015), 2015 WL 7888250(N.D.Okla.) (Trial Pleading). See generally Eric Lipton, *Energy Firms in Secretive Alliance With Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html>. Eric Lipton won a Pulitzer Prize for this investigative reporting on Scott Pruitt's industry ties. See Eric Lipton of The New York Times, PULITZER PRIZES, <https://www.pulitzer.org/winners/eric-lipton> (last visited Apr. 1, 2019).

34. Nadja Popovich et al., *78 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (last updated Dec. 28, 2018), <https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html>.

A. *Proposed Budget Cuts*

The Trump Administration's first budget proposal sent a clear message that environmental justice was no longer a priority. The White House fiscal year 2018 budget proposed a thirty-one percent cut to the EPA's budget overall and the near complete elimination of the Office for Environmental Justice.³⁵ An analysis of the budget by the Environmental Protection Network pieced together how the plan would cut "all of its staff positions and most of its funding . . . to eliminate the program in all but name."³⁶

The disheartening impact of this expression of disregard cannot be overstated—especially after the very recent renewal of the EPA's environmental justice work under the Obama Administration. Within days of the budget's release came the high-profile resignation of Mustafa Ali, a longtime advisor and associate administrator at the EPA who helped establish the environmental justice program at the Agency and worked for years spanning both Republican and Democratic presidential administrations.³⁷ His resignation letter, addressed to Pruitt, was widely publicized, cautioning that "while we have made great strides in protecting the air, water and land for most of our citizens, there are still many disproportionate environmental impacts occurring in our most vulnerable communities."³⁸

Consistent with the reversal on environmental justice, the budget proposed deep cuts to the Indian Environmental General Assistance Program, which at the time supported over five hundred tribal governments in efforts to establish environmental protection programs for tribal lands.³⁹ It also included cuts to funding for critical sewage and drinking water infrastructure needed for public health and basic sanitation in native Alaskan villages and impoverished mostly Latino and indigenous communities along the U.S.-Mexico border.⁴⁰ The U.S.-Mexico border program and border infrastructure grants at stake focus on serious environmental issues and drinking water and wastewater needs in counties along the two thousand miles of U.S.-Mexico border with high poverty rates and depressed local

35. ENVTL. PROT. NETWORK FY2018, *supra* note 5 at 3-5.

36. *Id.* at 42.

37. See, e.g., Brady Dennis, *EPA Environmental Justice Leader Resigns, Amid White House Plans to Dismantle Program*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/09/epas-environmental-justice-leader-steps-down-amid-white-house-plans-to-dismantle-program/?utm_term=.2cab600f65cf.

38. Letter from Mustafa Ali, Assistant Assoc. Adm'r. U.S. Env'tl. Prot. Agency, to Scott Pruitt, U.S. Env'tl. Prot. Agency Adm'r. 1 (Mar. 8, 2017), <https://assets.documentcloud.org/documents/3514958/Final-Resignation-Letter-for-Administrator.pdf>.

39. ENVTL. PROT. NETWORK FY2018, *supra* note 5, at 46-47.

40. *Id.* at 43-46.

economies.⁴¹ Moreover, the proposal slashed funding to states and tribes—which implement and enforce much of federal environmental law—by forty-five percent.⁴²

Congress rejected the Administration’s budget proposal for the EPA in 2018.⁴³ Yet, when the White House developed a proposal for fiscal year 2019, it once again targeted the EPA for significant cuts at twenty-six percent of the EPA’s budget—a steeper reduction than for any other agency.⁴⁴ Proposed funding cuts for states and tribes were nearly the same at forty-three percent.⁴⁵ The 2019 budget pulled back from proposing to effectively eliminate the EPA’s environmental justice work, but still proposed to deeply cut funding by sixty-nine percent.⁴⁶ Likewise, the budget included near elimination of Alaska Rural and Native Village water funding and complete elimination of environmental funding and water infrastructure grants for U.S.-Mexico border communities.⁴⁷

Beyond the cuts targeting programs with explicit significance to environmental justice, it is important to recognize that the billions of dollars in reductions to other aspects of the EPA’s work—from brownfield revitalization to clean air protections⁴⁸—implicate environmental justice as well. Where exposure to environmental harms disproportionately tracks racial and income lines, cutting programs addressing those harms risks exacerbating them for those already most burdened. As Mustafa Ali warned in his resignation letter, cuts to core environmental programs “will increase the public health impacts and decrease the economic opportunities in these communities.”⁴⁹

41. *Id.* at 44–47.

42. *Id.* at 11–13.

43. See Consolidated Appropriations Act 2018, Pub. L. 115-141, 132 Stat. 348 (2018); *2018 Consolidated Appropriations Act Overview: EPA Escapes the Chopping Block, Remains at Inadequate but Level Funding*, ENVTL. PROTECTION NETWORK (Apr. 30, 2018), <https://www.environmentalprotectionnetwork.org/overview-epa-provisions-2018-consolidated-appropriations-act-epa-escapes-chopping-block-remains-inadequate-but-level-funding/> (summarizing the effects of the Consolidated Appropriations Act 2018 on EPA funding).

44. ENVTL. PROT. NETWORK, UNDERSTANDING THE FULL IMPACTS OF THE PROPOSED FY 2019 EPA BUDGET 1 (Mar. 14, 2018), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/PDF/Understanding-the-Full-Impacts-of-the-Proposed-FY-2019-EPA-Budget-March-14-2018.pdf> [hereinafter ENVTL. PROT. NETWORK FY2019].

45. *Id.* at 2.

46. *Id.* at 9.

47. *Id.*

48. See ENVTL. PROT. NETWORK FY2018, *supra* note 5, at 23–35 (quantifying the impacts of proposed cuts across federal environmental law implementation); ENVTL. PROT. NETWORK FY2019, *supra* note 44, at 4–7 (same).

49. Letter from Mustafa Ali to Scott Pruitt, *supra* note 38, at 2.

The House and Senate rejected the full extent of White House budget cuts for the EPA a second time.⁵⁰ This has allowed agency work on environmental justice to continue. The Trump Administration's budgets have nonetheless sent a strong negative message—to the EPA's workforce and to the public—that much of the Agency's work, in particular work for environmental justice, is dispensable. The result of the White House budget cuts, if not intercepted by Congress, would have only compounded the broader harms that regulatory rollbacks will cause if they survive legal challenge, as discussed below.

B. Regulatory Rollbacks

Immediately upon arrival at the EPA, former Administrator Pruitt initiated an ambitious deregulation agenda—reversing and loosening environmental regulations that are important protections for environmental justice communities.⁵¹ Not all efforts have been successful—some are mired in litigation, some are still in the rulemaking process—but taken together, they are unified by a consistent deregulatory theme.⁵²

Perhaps the highest-profile reversal has involved the controversial Clean Air Act rule finalized by the Obama EPA in 2015, regulating carbon emissions from existing power plants for the first time.⁵³ This rule, known as the Clean Power Plan, was a carefully crafted framework to structure state-by-state emissions reduction from the electric power sector.⁵⁴ Importantly, in final form, the rule

50. See ENVTL. PROT. NETWORK, A TALE OF TWO BUDGETS: HOUSE AND SENATE APPROPRIATIONS COMMITTEES ADVANCE VERY DIFFERENT VISIONS FOR EPA (2018), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2018/06/ThDraft-EPN-diagnosis-of-HR-FY-19-Bill.docx.pdf>.

51. Susan E. Dudley, *Pruitt's Legacy at EPA*, FORBES (July 9, 2018, 10:05 AM), <https://www.forbes.com/sites/susandudley/2018/07/09/pruitts-legacy-at-epa/#38fd534b4ce6> (discussing Pruitt's reputation for deregulation). The deregulatory theme has by no means been limited to the EPA, though that is the focus here. For detailed information on the wide-ranging deregulatory efforts across federal agencies under the Trump Administration to date, see *Tracking Deregulation in the Trump Era*, BROOKINGS INSTITUTION (Mar. 20, 2019), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> (providing an interactive resource for tracking the status of deregulation efforts across the federal government under the Trump Administration).

52. See Dudley, *supra* note 51; *Tracking Deregulation in the Trump Era*, *supra* note 51.

53. Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (becoming final on Dec. 22, 2015) [hereinafter Clean Power Plan Final Rule].

54. See *The Clean Power Plan*, ENVTL. DEF. FUND, <https://www.edf.org/clean-power-plan-resources> (last visited Jan. 21, 2019); Adam Vaughan, *Obama's Clean Power Plan Hailed as US's Strongest Ever Climate Action*, GUARDIAN (Aug. 3, 2015, 6:55 AM),

heeded calls from environmental justice advocates to include provisions targeting low-income communities for clean energy investment.⁵⁵ The Clean Power Plan was a cornerstone of the Obama Administration's Climate Action Plan,⁵⁶ and many of the policy reversals at the EPA in the last two years have centered on repealing or otherwise making less stringent Obama-era rules designed to reduce greenhouse gas emissions.⁵⁷ The broader implications for environmental justice of President Trump's stance on climate change is addressed more fully in Part IV. Here, the key point is that regulatory rollbacks affect a wide spectrum of environmental issues and risk undercutting protections that are important for environmental justice communities.

President Trump's early decision to repeal the Clean Power Plan, for example, affects not just the rule's potential to reduce carbon emissions or the prospect of targeted clean energy investment at the community scale. It also eliminates the rule's projected "co-benefits" of reduced particulate matter, ozone, nitrogen oxides, and mercury that affect local air quality.⁵⁸ These benefits would have been meaningful for the communities living close to coal-burning power plants. A study conducted by the NAACP graded three hundred coal plants against environmental justice criteria, finding that four million people, over half of which are people of color, live within three miles of the seventy-five plants with the worst grades.⁵⁹ In these areas, \$17,000 was the average per capita income.⁶⁰ At the time of this writing, the Clean Power Plan has been in a litigation standstill

<https://www.theguardian.com/environment/2015/aug/03/obamas-clean-power-plan-hailed-as-strongest-ever-climate-action-by-a-us-president>.

55. See, e.g., Environmental Justice Leadership Forum on Climate Change, Comment Letter on Clean Power Plan, (Dec. 1, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0602-22585> (criticizing the proposed rule for not doing enough to protect environmental justice communities); Jalonnie L. White-Newsome, *Here's How Environmental Justice Advocates Improved Obama's Clean Power Plan*, GRIST (Aug. 13, 2015), <https://grist.org/climate-energy/heres-how-environmental-justice-advocates-improved-obamas-clean-power-plan/> (comparing provisions from proposed and final rule).

56. See EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 4–7 (2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

57. The Sabin Center for Climate Change Law maintains a comprehensive tracker of all federal agency deregulatory activities relevant to climate policy. See Sabin Ctr. for Climate Change Law, *Climate Deregulation Tracker*, COLUM. L. SCH., <http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/>.

58. Clean Power Plan Final Rule, *supra* note 53, at 64,679–82.

59. NAT'L ASS'N ADVANCEMENT COLORED PEOPLE, COAL BLOODED: PUTTING PROFITS BEFORE PEOPLE 27 (n.d.), <http://www.naacp.org/wp-content/uploads/2016/04/CoalBlooded.pdf>.

60. *Id.*

since the Supreme Court granted a stay of the rule pending litigation in early 2016.⁶¹ The Trump EPA has since proposed both a rule to repeal the Clean Power Plan⁶² and a purported replacement rule, dubbed the Affordable Clean Energy Rule,⁶³ which public interest critics worry will increase emissions and exacerbate environmental justice.⁶⁴ The rule has yet to be finalized.

Other rollbacks with implications for environmental justice include:

- A new rule loosening regulation of toxic coal ash waste under the Resource Conservation and Recovery Act. Coal ash is commonly stored at or near the power plant generating the waste, making it a concern for the same reasons the NAACP raised in its study grading coal plants, which found many plants were located in environmental justice communities.⁶⁵
- A proposal to weaken vehicle emissions and fuel efficiency standards finalized by the Obama EPA.⁶⁶ This will freeze the existing rule's timetable for increased stringency, rescinding a Clean Air Act waiver that allows California to

61. Order for Stay, 136 S. Ct. 1000 (Feb. 9, 2016).

62. Repeal of carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

63. Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

64. See, e.g., Alice Kaswan, *The 'Affordable Clean Energy' Rule and Environmental Justice*, CTR. FOR PROGRESSIVE REFORM (Aug. 29, 2018), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=14781598-011F-57F9-24E49D98CF58AB70>; Julie McNamara, *Trump Administration's "Affordable Clean Energy" Rule is Anything But*, UNION CONCERNED SCIENTISTS (Aug. 31, 2018, 10:34 AM), https://blog.ucsusa.org/julie-mcnamara/ace-dangerous-clean-power-plan-replacement?_ga=2.47150114.441279383.1543519878-669330689.1543519878 (concluding that the rule creates "an emission standard that is projected to increase coal generation even beyond that expected in a future with no carbon standard at all").

65. Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36,435 (July 30, 2018) (to be codified at 40 C.F.R. pt. 257). The rule amends a 2015 rule finalized by the Obama EPA to regulate coal ash from power plants. See Hazardous Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at C.F.R. pts. 257 and 261).

66. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, and 537).

develop stricter vehicle emission standards.⁶⁷ Tailpipe pollution is a major contributor to local air pollution in urban areas and has been documented to disproportionately affect low-income communities of color.⁶⁸

– A proposed rule to exempt animal waste emissions from factory farms from the Emergency Planning and Community Right-to-Know Act and CERCLA.⁶⁹ This rule would insulate industrial animal operations from restrictions on the noxious emissions from stockpiled animal waste, which has recently been the focus of environmental justice litigation due to the concentration of factory farms in low-income communities of color.⁷⁰

– An order reversing a ban on the pesticide chlorpyrifos, which was restricted due to evidence that the pesticide is a health risk for farm workers and harms children’s brains when exposed through food, drinking water, and pesticide drift.⁷¹ Environmental justice and labor advocates won a victory in court when the Ninth Circuit Court of Appeals vacated Pruitt’s order and remanded to the agency “with directions to revoke all tolerances and cancel all registrations for chlorpyrifos within 60 days.”⁷²

An exhaustive list of actions comprising Administrator Pruitt’s deregulation agenda, continuing now under Administrator Wheeler, is beyond the scope of this Article. These examples nonetheless suffice to demonstrate that the Trump EPA’s focus on easing regulatory protections implicate environmental justice, even where its relevance may not be explicit.

67. *Id.*

68. *See, e.g.,* QUINTERO ET AL., *supra* note 2, at 11.

69. Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 83 Fed. Reg. 56,791 (proposed Nov. 14, 2018) (to be codified at 40 C.F.R. pt. 355).

70. *See, e.g.,* NCEJN Petitions U.S. EPA to Stop Environmental Injustice in NC, N.C. ENVTL. JUST. NETWORK (Sept. 5, 2014), <https://ncejn.org/2014/09/ncejn-petitions-u-s-epa-to-stop-environmental-injustice-in-nc/> (featuring links to complaint filed by Earthjustice on behalf of the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help, and Waterkeeper in response to a general permit for industrial swine facilities, which they argue results in a disproportionate impact on communities of color).

71. Chlorpyrifos; Order Denying PANNA and NRDC’s Petition to Revoke Tolerances, 82 Fed. Reg. 16,581 (Apr. 5, 2017).

72. *See* League of United Latin Am. Citizens v. Wheeler, 899 F.3d 814, 829 (9th Cir. 2018).

C. *Less Enforcement*

The benefits of federal environmental law depend on robust enforcement. With disproportionate siting of polluting facilities in or near low-income areas and communities of color, these same areas are most likely to be affected if enforcement is weak. Both Trump White House budgets for the EPA to date included cuts to environmental law enforcement resources—the 2018 budget proposed twenty-three percent cuts to the EPA enforcement program as well as deep cuts in funding to states and tribes, which conduct much of the enforcement activity under the federal statutes.⁷³ The 2019 budget included more of the same.⁷⁴ As noted above, the signaling from these budgets was that enforcement under the Trump Administration would be a lower priority at the EPA.

This shift in priorities seems to have borne out in practice beyond the budget signaling context. In an analysis of the first nine months of the Trump Administration, *The New York Times* found that the EPA initiated roughly one-third fewer civil enforcement cases than the EPA had initiated over the same period under President Obama and a quarter fewer than under President George W. Bush.⁷⁵ The EPA under Pruitt also sought much lower civil penalties in the cases it did pursue in contrast to the prior two presidential administrations.⁷⁶ According to the Environmental Integrity Project, which reviewed consent decrees filed between January 20, 2017, and January 20, 2018, penalties were down by almost fifty percent.⁷⁷

73. ENVTL. PROT. NETWORK FY2018, *supra* note 5, at 11–15 (state and tribal), 48–50 (EPA enforcement).

74. ENVTL. PROT. NETWORK FY2019, *supra* note 44, at 2–3 (state and tribal) and 9–10 (EPA enforcement).

75. Eric Lipton & Danielle Ivory, *Under Trump, EPA Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html>; *see also* Eric Schaeffer, *Environmental Enforcement Under Trump*, ENVTL. INTEGRITY PROJECT 1, 1 (Aug. 10, 2017), <https://www.environmentalintegrity.org/wp-content/uploads/2017/08/Enforcement-Report.pdf>.

76. Lipton & Ivory, *supra* note 75 (discovering that the EPA under the Trump Administration pursued civil penalties that were “39 percent of what the Obama Administration sought and about 70 percent of what the Bush Administration sought over the same period”).

77. Eric Schaeffer & Tom Pelton, *Paying Less to Pollute*, ENVTL. INTEGRITY PROJECT 1, 1 (Feb. 15, 2018), <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Enforcement-Report.pdf> (comparing penalties for pollution violations in civil cases by presidential administration); *see also* OFFICE OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENVT'L PROT. AGENCY, FISCAL YEAR 2018: EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS (2019), <https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>; Juliet Eilperin & Brady Dennis, *Under Trump, EPA Inspections Fall to a 10 Year Low*, WASH. POST. (Feb. 8, 2019), <https://www.washingtonpost.com/climate-environment/2019/02/08/under-trump->

Some observers caution against assuming that the Agency's shift in focus to compliance assistance will result in less environmental protection,⁷⁸ and certainly there is debate about how best to measure the effectiveness of enforcement strategies.⁷⁹ Yet the Trump EPA's enforcement trends to date are worrisome to many, and environmental justice communities inevitably have the most at stake.

D. *Environmental Justice Agenda?*

Against the backdrop of proposals to undo EPA programs that advance environmental justice through the budget process, wide-ranging regulatory rollbacks, and reduced enforcement, the true status of the *EJ 2020 Action Agenda* ("*Action Agenda*") is unclear. The *Action Agenda* still appears on the EPA's website.⁸⁰ In 2018, the Agency released the *FY2017 Environmental Justice Progress Report* ("*Progress Report*")—marking the twenty-fifth anniversary of the establishment of the EPA's Office of Environmental Justice.⁸¹ The year, which ran from October 1, 2016 to September 30, 2017, featured wide-ranging activities that invariably spanned the Obama and Trump Administrations, including work in communities, such as increased air quality monitoring in low-income areas, brownfields revitalization, and installing clean water systems on tribal land, as well as to internal improvements at the Agency, such as actions to further integrate environmental justice in enforcement strategies.⁸²

Importantly, the work described in the *Progress Report* was supported by an EPA budget approved during President Obama's

epa-inspections-fall-year-low/?utm_term=.17f7a927bfa8 (analyzing data released by the EPA); Kristen Stade, *Criminal Enforcement Collapse at EPA*, PROTECTING EMPS. WHO PROTECT OUR ENVT. (Jan. 15, 2019), <https://www.peer.org/news/press-releases/criminal-enforcement-collapse-at-epa.html> (referencing similar enforcement reductions in civil and administrative enforcement).

78. See, e.g., Wayne D'Angelo, *EPA in the Trump Era: Enforcement and Compliance Changes*, LAW360 (Feb. 26, 2018, 4:40 PM), <https://www.kelleydrye.com/getattachment/f39711e5-1cd4-4280-864c-c52d17eac0a8/attachment.aspx> (arguing that the EPA's focus on compliance assistance over enforcement may lead to the same environmental results).

79. See, e.g., Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 ENVTL. L. REP. 10751, 10751 (2014) (critiquing the EPA's Next Generation Compliance developed under the Obama Administration).

80. See *EJ 2020 Action Agenda: EPA's Environmental Justice Strategy*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy> (last updated Jan. 5, 2017) (citing to the Obama-era report and other resources).

81. U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE FY2017 PROGRESS REPORT 1, 5 (2018), https://www.epa.gov/sites/production/files/2018-04/documents/usepa_fy17_environmental_justice_progress_report.pdf.

82. *Id.*

final year in office.⁸³ In February 2018, Pruitt's Associate Administrator Samantha Dravis (who has since resigned) released a memorandum assuring the EPA's ongoing commitment to environmental justice—"not just an ideal to be achieved" but "a deeply rooted commitment."⁸⁴ In light of her long history with Pruitt and active early role advancing his regulatory rollbacks,⁸⁵ the memo was received with skepticism. At the same time, some of the FY2017 activities touted in the *Progress Report* soon appeared to be undermined. For example, Pruitt's decision to move the Office of Environmental Justice from the Office of Enforcement and Compliance to the more political Office of Policy appeared to be at odds with the prior year's efforts to integrate environmental justice and enforcement.⁸⁶

Looking at progress from FY2018 and beyond under the exclusive purview of a Pruitt- and Wheeler-led EPA, the vitality of *EJ 2020 Action Agenda* will rest with EPA employees continuing its implementation despite threats to their effectiveness. Many have served the Agency through multiple administrations—so long as their work is not defunded, people at the EPA who are dedicated to this work may continue to advance the agenda with the resources they have. The value of this work seems mostly lost on the Administration, however, given that the very existence of the program now appears to depend on congressional intervention.

III. IMPLEMENTATION: ENVIRONMENTAL JUSTICE AND THE DAKOTA ACCESS PIPELINE

The previous Part examined how the Trump Administration's policies have resulted in the EPA underemphasizing environmental justice goals. Such course reversals are not limited to the internal work of the EPA and other agencies of the executive branch. This turn has had profound implications on the application of law to

83. Devin Henry, *EPA Funding Boost in Obama's Budget*, HILL (Feb. 9, 2016, 12:23 PM), <https://thehill.com/policy/energy-environment/268759-epa-gets-funding-boost-in-obamas-budget>.

84. Memorandum from Samantha Dravis, Assoc. Admin. U.S. EPA Office of Policy, to Assistant Administrators et al. (Feb. 23, 2018), https://www.epa.gov/sites/production/files/2018-02/documents/epa_ej_memo_02.23.2018.pdf. Dravis resigned in April 2018. See Miranda Green, *Top Pruitt Aide Resigns from EPA Amid Controversies*, HILL (Apr. 5, 2018, 10:30 AM), <https://thehill.com/policy/energy-environment/381773-top-pruitt-aide-resigns-from-epa-amid-controversies>.

85. Sara Ganim, *Top Pruitt Aide Resigning*, CNN, <https://www.cnn.com/2018/04/05/politics/samantha-dravis-scott-pruitt/index.html> (last updated Apr. 5, 2018, 12:44 PM).

86. Robin Bravender, *Pruitt Tightens Political Reins on Key Operations*, ENV'T. & ENERGY PUB. (Sept. 6, 2017), <https://www.eenews.net/stories/1060059803> (citing critics' concern that the move to politicize the office; Dravis stated it was to elevate the office).

projects affecting environmental justice communities. A strong example of this impact is the controversy surrounding the Dakota Access Pipeline, which is “a 1,172-mile underground . . . 30” pipeline extending from the Bakken/Three Forks production area in North Dakota to Patoka, Illinois.”⁸⁷ Today, “[t]he pipeline transports domestically-produced, light, sweet crude oil from North Dakota to major refining markets”⁸⁸ In 2016, at the end of the Obama Administration, Native peoples and their supporters, collectively known as “the water protectors,” gathered in historic numbers near the Standing Rock Sioux Reservation in North Dakota⁸⁹ to protest the construction of the Dakota Access Pipeline.⁹⁰ The water protectors challenged the construction of the pipeline and related pollution that will occur when it leaks.⁹¹ Although the proposed pipeline does not cross existing tribal lands,⁹² it threatens Lake Oahe and potentially the Missouri River, which are sources of water vital to Standing Rock Sioux Tribe’s (the “Tribe”) survival.⁹³ Further, significant sites of tribal cultural, religious, and spiritual importance are located along the pipeline’s route.⁹⁴ Broadly, through numerous court filings, petitioners argued that the Tribe was not adequately included in consultations leading to the pipeline approval, that the Religious Freedom Restoration Act (“RFRA”) prohibited construction, and that the Army Corps of Engineers failed to meet the requirements of the National Environmental Policy Act (“NEPA”) in approving the

87. *The Dakota Access Pipeline Keeps America Moving Efficiently and in an Environmentally Safe Manner*, DAKOTA ACCESS PIPELINE FACTS, <https://dapipelinefacts.com/About.html> (last visited Mar. 13, 2019).

88. *Id.*

89. Sasha von Oldershausen, *Standing Rock Pipeline Fight Draws Hundreds to North Dakota Plains*, NBC NEWS (Oct. 17, 2016, 11:29 AM), <http://www.nbcnews.com/news/us-news/standing-rock-pipeline-fight-draws-hundreds-north-dakota-plains-n665956>.

90. *Id.*

91. See Susan Cosier, *The Dakota Access Pipeline Fight Fields Battles Across the Country*, NAT. RESOURCES DEF. COUNCIL, (Mar. 27, 2017), <https://www.nrdc.org/stories/dakota-access-pipeline-fight-fuels-battles-across-country>.

92. von Oldershausen, *supra* note 89 (stating that portions of the Dakota Access Pipeline are located within traditional tribal lands that were guaranteed to the Tribe in prior treaties).

93. Elizabeth Ann Kronk Warner, *Improving Tribal/Federal Consultation Following the Dakota Access Pipeline Controversy*, A.B.A., https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2018/spring/conference_materials/20_kronk_warner.authcheckdam.pdf (last visited Jan. 27, 2019).

94. Kristen A. Carpenter & Angela R. Riley, *Standing Tall: The Sioux’s Battle Against a Dakota Oil Pipeline is a Galvanizing Social Justice Movement for Native Americans*, SLATE (Sept. 23, 2016, 1:30 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/09/why_the_sioux_battle_against_the_dakota_access_pipeline_is_such_a_big_deal.html.

required permit.⁹⁵ It is this last argument regarding NEPA that eventually led a federal court to examine whether the federal government adequately considered the environmental justice impacts of the pipeline.

Although environmental justice was not the focus of the initial claims filed in federal court, many water protectors were troubled from the outset that the federal government considered and rejected a proposed route for the pipeline that would have crossed the Missouri River ten miles north of Bismarck, North Dakota.⁹⁶ This Bismarck route was rejected, in part, because of concerns about protecting municipal water supply wells from potential pipeline spills.⁹⁷ Due in large part to factors related to the size of Bismarck and the location of that community's water resources, the pipeline's route was moved from close proximity to the nondiverse Bismarck community—where 90% of the population is white—to almost adjacent to the Standing Rock Sioux Reservation, where only 13.9% of the population is white.⁹⁸ It may be argued that this decision—to move the pipeline away from non-Native communities and towards a Native community—is evidence of the federal government's discriminatory intent toward indigenous people. In other words, this decision was not environmentally just.⁹⁹ From an environmental justice

95. *Id.* For ready access to key litigation documents related to the Dakota Access Pipeline, see Earthjustice, Dakota Access Pipeline Library, at: https://earthjustice.org/library/?f%5B0%5D=im_taxonomy_vocabulary_7%3A790&f%5B1%5D=bundle%3Afile. Earthjustice represents the Standing Rock Sioux Tribe.

96. MIKE FAITH JR. ET AL., STANDING ROCK SIOUX TRIBE: IMPACTS OF AN OIL SPILL FROM THE DAKOTA ACCESS PIPELINE ON THE STANDING ROCK SIOUX TRIBE 72 (2018), https://www.standingrock.org/sites/default/files/uploads/srst_impacts_of_an_oil_spill_2.21.2018.pdf.

97. *Id.*

98. *Compare Bismarck, North Dakota*, CITY-DATA.COM, <http://www.city-data.com/city/Bismarck-North-Dakota.html> (last visited Jan. 26, 2019) (showing that 88.1% of the residents of Bismarck, North Dakota identify as white, and 4.0% identify as Indian alone), *with Sioux County Demographics*, N.D. DEMOGRAPHICS BY CUBIT, <http://www.northdakota-demographics.com/sioux-county-demographics> (last visited Jan. 26, 2019) (showing that Sioux County, North Dakota, where the majority of the Standing Rock Sioux Reservation is located, is only 12.5% white and 81.6% Indian).

99. To fully understand the justice concerns generally associated with this controversy, it must be put in its proper historical context. The Lakota/Dakota/Sioux people have long suffered at the hands of the federal government. For example, the federal government abrogated treaties with the Great Sioux Nation after gold was found in the Black Hills. Carpenter & Riley, *supra* note 94. Additionally, after the Sioux gave up the lands in question, the federal government tried to starve them by overhunting buffalo and denying rations guaranteed by treaty. *Id.* In 1890, approximately two hundred Sioux people were shot and killed by the federal government while they prayed during a ceremony called a Ghost Dance. *Id.* Fifty years ago, the federal government

perspective, such decisions are unjust because they disproportionately impact people of color regardless of the subjective intent of federal government officials.¹⁰⁰

Initially, however, the legal controversy related to the pipeline focused on the Tribe's efforts to secure an emergency injunction to halt construction of the pipeline around the Lake Oahe area and not on environmental justice concerns. The Tribe argued that an injunction was appropriate because the federal government failed to participate in adequate tribal consultations under the National Historic Preservation Act ("NHPA") prior to approval of the pipeline near tribal lands.¹⁰¹ As the United States District Court for the District of Columbia explained, "The Tribe fears that construction of the pipeline . . . will destroy sites of cultural and historical significance. [The Tribe asserts] principally that the [Army Corps of Engineers] flouted its duty to engage in tribal consultations under the National Historic Preservation Act and that irreparable harm will ensue."¹⁰² The court denied the Tribe's motion for preliminary injunction, finding that the Army Corps of Engineers (the "Corps") complied with NHPA and the Tribe failed to demonstrate irreparable

seized individual homes on the Standing Rock Reservation to build the Oahe hydroelectric dam project, and today, many descendants of the Great Sioux Nation live in some of the poorest reservations and counties within the United States. *Id.* For many of the water protectors, federal approval of the Dakota Access Pipeline offers another example in a long history of the federal government acting to the detriment of Native people, and such actions are certainly unjust.

100. U.S. antidiscrimination law has limited the scope of protection available to racial and ethnic minorities by requiring proof of intentional discrimination. Consequently, environmental justice claims based on disparate impact have generally failed. Carmen G. Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, 26 *TRANSNAT'L L. & CONTEMP. PROBS.* 281, 303–05 (2017). By contrast, international law on the right to equality recognizes the right to be free from intentional discrimination as well as practices that have a discriminatory impact. *Id.* at 307–08.

101. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2016 U.S. Dist. LEXIS 121997, at *2 (D.D.C. 2016). For local perspective, Mike Nowatzki & Amy Dalrymple, *Appeals Court Orders Temporary Halt of Pipeline Construction Near Lake Oahe*, WEST FARGO PIONEER, (Sept. 16, 2016, 10:34 PM), <https://www.westfargopioneer.com/news/4117303-appeals-court-orders-temporary-halt-pipeline-construction-near-lake-oahe>.

102. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2016 U.S. Dist. LEXIS 121997, at *2 (D.D.C. 2016).

harm.¹⁰³ The Tribe appealed the district court's decision,¹⁰⁴ but the United States Court of Appeals for the District of Columbia Circuit denied the emergency injunction request, finding, as the district court had, that the Tribe failed to meet its burden demonstrating that such an extraordinary remedy was appropriate.¹⁰⁵ Despite the failure to secure an emergency injunction, on December 4, 2016, the Army Corps of Engineers announced that it would not grant the easement for the Dakota Access Pipeline to cross Lake Oahe.¹⁰⁶

This victory for the Tribe was short lived, however. On January 24, 2017, within days of his inauguration, President Trump issued a memorandum that called on the Secretary of the Army to direct the appropriate assistant secretary to review and approve the pipeline on an expedited schedule, subject to applicable laws.¹⁰⁷ President Trump's quick work to reverse the actions of the Obama Administration is therefore indicative of how the Trump Administration's views on environmental justice have negatively impacted projects straddling the two Administrations. On February 7, 2017, the Army Corps of Engineers announced its intention to approve the easement for the Dakota Access Pipeline under Lake Oahe.¹⁰⁸ The water protectors' camps were ultimately cleared and

103. *Id.* at 91. The Departments of Justice, the Army, and the Interior, however, released a joint statement regarding the case immediately following the district court's decision. Press Release, Office of Pub. Affairs, Dep't of Justice, Joint Statement from the Dep't of Justice, the Dep't of the Army, and the Dep't of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing-rock-sioux-tribe-v-u-s-army-corps-of-engrs>. While these departments acknowledged and appreciated the district court's decision, they also recognized that important issues raised by the Tribe remained. *Id.* The joint statement noted that concerns about the consultation process exist and that there may be a need for reform. *Id.* The departments announced that "[t]he Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws." *Id.*

104. Emergency Mot. for Inj. Pending Appeal, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-5259 (D.D.C. 2016).

105. Court Order dissolving administrative injunction, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-5259 (D.C.C. 2016).

106. Press Release, Stand with Standing Rock, Standing Rock Sioux Tribe's Statement on U.S. Army Corps of Eng'rs Decision to Not Grant Easement (Dec. 4, 2016), <http://standwithstandingrock.net/standing-rock-sioux-tribes-statement-u-s-army-corps-engineers-decision-not-grant-easement/>.

107. Presidential Memorandum Regarding Constr. of the Dakota Access Pipeline, Office of the Press Sec'y, The White House, to the Sec'y of the Army (Jan. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/>.

108. Letter from Paul D. Cramer, Deputy Assistant Sec'y of the Army, to Hon. Raul Grijalva, Ranking Member of the U.S. House of Representatives Comm. on Natural Resources (Feb. 7, 2017),

closed on February 23, 2017.¹⁰⁹ On March 7, 2017, the district court rejected a claim brought by the Tribe that the presence of oil in the pipeline desecrated the Tribe's sacred water, making it impossible for the Tribe to exercise its religious beliefs and therefore violating the RFRA.¹¹⁰ Oil began flowing through the pipeline in June 2017.¹¹¹

In addition to the failed claims based on the NHPA and RFRA, the Tribe also separately claimed that the Corps inadequately complied with the NEPA.¹¹² The Tribe argued that the Corps failed to adequately consider the pipeline's environmental effects before granting the permits to construct and operate the pipeline under Lake Oahe.¹¹³ The majority of the Tribe's NEPA claims were unsuccessful, but the court did find that the Corps failed to adequately consider the impacts of the pipeline on the Tribe's usufructuary rights, how highly controversial the impacts would be, and the pipeline's environmental justice implications.¹¹⁴

With regard to environmental justice, the Tribe argued that the Corps' environmental justice analysis was arbitrary and capricious.¹¹⁵ The Clinton-era 1994 Executive Order discussed above requires agencies to take into consideration achieving environmental justice when reviewing certain projects.¹¹⁶ Although the Executive Order does not create a private right to judicial review, federal courts have allowed environmental justice challenges through either NEPA or the Administrative Procedure Act—the argument being that a party failed to adequately comply with the appropriate act through failure to consider the environmental justice concern.¹¹⁷ Accordingly,

<https://turtletalk.files.wordpress.com/2017/02/dakota-access-pipeline-notification-grijalva.pdf>.

109. Mayra Cuevas et al., *Dakota Access Pipeline Protest Site is Cleared*, CNN (Feb. 23, 2017, 7:09 PM), <https://www.cnn.com/2017/02/22/us/dakota-access-pipeline-evacuation-order/index.html>.

110. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 225 F. Supp. 3d 101, 112 (D.D.C. 2017).

111. Robinson Meyer, *Oil is Flowing Through the Dakota Access Pipeline*, ATLANTIC (June 9, 2017), <https://www.theatlantic.com/science/archive/2017/06/oil-is-flowing-through-the-dakota-access-pipeline/529707/>.

112. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 112.

113. *Id.* at 108.

114. *Id.* at 112.

115. *Id.* at 136.

116. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

117. *Cmtys. Against Ry. Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004). Recent efforts within at least one federal agency seem designed to minimize the role of environmental justice in NEPA analyses. In September 2018, investigative journalists reported that the Department of the Interior “quietly rescinded two policy memos that provided specific guidance on how to implement principles of environmental justice”—one focused on the NEPA context, the other on Native American trust resources and sacred sites on federal land. See Adam Federman, *The Interior Sidelines Environmental Justice*, TYPEINVESTIGATIONS (Nov. 13, 2018),

the Tribe could bring its environmental justice claim as part of its NEPA claims.

The Corps did nominally include environmental justice in the Environmental Assessment of the pipeline. However, it limited its analysis to a 0.5-mile radius around the pipeline crossing of the lake; the Tribe is 0.55 mile away from the crossing.¹¹⁸ As a result of this decision, the county where the Tribe is located was excluded from the environmental justice analysis. Also, the two counties considered in the analysis were upstream from the potential impact of a spill and not part of the tribal community.¹¹⁹ The Corps defended its choice of a 0.5-mile radius by arguing that transportation projects and natural gas pipeline projects regularly use a 0.5-mile radius.¹²⁰ However, because the Corps failed to supply an example of an oil pipeline using such a limited radius when evaluating the environmental justice impacts of a spill, the court could not conclude that the 0.5-mile radius excluding the Tribe was reasonable.¹²¹ Also, although the Corps did consider the Tribe's interests, it did not include a discussion of the impacts of a potential oil spill on the Tribe but rather focused solely on the impacts of the construction.¹²² Ultimately, the court concluded that while the Corps did take some steps to consider environmental justice, it failed to fully account for the environmental justice implications of the pipeline.¹²³

The example of the controversy over the Dakota Access Pipeline demonstrates how the shift in policy from the Obama Administration to the Trump Administration dramatically affected a project with clear environmental justice implications. It further reinforces the assertion that the Trump Administration has reversed course on environmental justice in ways that profoundly impact diverse communities, such as the Standing Rock Sioux Tribe. In this regard, the Administration's course reversal is not limited to internal agency operations but can be seen in discretionary decisions in the implementation of environment law.

IV. BROADER IMPLICATIONS: ENVIRONMENTAL JUSTICE AND REPUDIATION OF THE PARIS AGREEMENT¹²⁴

The regulatory rollbacks at the EPA have international as well as domestic implications for environmental justice. Under the Obama

<https://www.typeinvestigations.org/investigation/2018/11/13/the-interior-department-is-sidelining-environmental-justice>.

118. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 137–38.

119. *Id.* at 137.

120. *Id.* at 138.

121. *Id.* at 138–39.

122. *Id.*

123. *Id.* at 147.

124. See Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and the*

Administration, regulatory measures to curtail greenhouse gas emissions were designed to advance the President's Climate Action Plan.¹²⁵ This plan, in turn, performed an important function in detailing the United States' efforts to advance its international commitment to climate change mitigation under the United Nations Framework Convention on Climate Change ("UNFCCC").¹²⁶

Environmental justice advocates have long demanded action on climate change—in this context, often calling for "climate justice"¹²⁷—recognizing that climate-change impacts, like other environmental harms, are expected to disproportionately affect low-income communities of color. In 2015, parties to the UNFCCC—including the United States and virtually every other nation on earth—took a significant step to reinvigorate decades of international climate negotiations with a new climate accord, the Paris Agreement.¹²⁸ In this agreement, parties renewed the shared commitment to prevent global temperatures from rising more than two degrees Celsius above preindustrial levels and to increase the ambition of domestic policy measures to achieve this goal.¹²⁹ The Paris Agreement, which entered into force in November 2016, called on parties to pledge Nationally Determined Contributions ("NDC") to the common cause.¹³⁰ The United States submitted its NDC, stating an intention to "achieve an economy-wide target of reducing its GHG emissions by 26-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%."¹³¹

Impacts on Indigenous Peoples in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3, 3 (Randall S. Abate and Elizabeth Ann Kronk eds., Edward Elgar 2013).

125. *Id.* at 34.

126. Under the UNFCCC, parties each agreed to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." United Nations Framework Convention on Climate Change, art. 4, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

127. The NAACP, for example, maintains an Environmental and Climate Justice Program, see <https://www.naacp.org/issues/environmental-justice/>. See also Randall S. Abate, *Public Nuisance Suits for the Climate Change Justice Movement: The Right Thing at the Right Time*, 85 WASH. L. REV. 199–200 (2010).

128. United Nations Framework Convention on Climate Change, Paris Agreement art. 2, *opened for signature* Feb. 16, 2016, C.N.735.2016.TREATIES-XXVII.7.d, https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf.

129. *Id.*

130. *Id.* at art. 4.

131. See *INDCs as Communicated by Parties*, U.N. Framework Convention on Climate Change, <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> (identifying carbon pollution standards for existing

Within six months of taking office, President Trump reversed course by announcing that the United States would withdraw from the Paris Agreement.¹³² This repudiation was signaled formally in a letter of intent to withdraw sent to the United Nations in August 2017.¹³³ This political move coincided with concrete steps at the EPA, and other federal agencies, to reverse course on regulatory measures to cut greenhouse gas emissions. At the same time, the Administration has tried to discredit and undercut climate science.¹³⁴

Although there are state and local governments continuing to advance the Paris Agreement objectives,¹³⁵ the failure to accelerate climate mitigation at the federal level risks dire consequences. Despite efforts by these sub-federal governments and other countries to fill the void created by the American exit from the Paris Agreement, it will be much harder to stop the world from warming less than two degrees Celsius without action from the United States.¹³⁶ Further, that President Trump's turn away from the Paris Agreement is part of his stated commitment to stimulate domestic fossil fuel production suggests the United States may be on a path to increasing greenhouse gas emissions instead of merely not assisting in reducing such emissions.¹³⁷

power plans as among the domestic measures the US intended to implement for emissions reduction).

132. See Shear, *supra* note 12.

133. A party may not officially withdraw before three years after the Agreement has entered into force for a party. United Nations Framework Convention on Climate Change, *supra* note 128, at art. 28.

134. See *Silencing Science Tracker to Keep Tabs on Trump Administration Attacks on Environmental, Public Health, Climate Science*, COLUM. L. SCH. (Jan. 19, 2018), <http://columbiaclimatelaw.com/resources/silencing-science-tracker/silencing-science-tracker-to-keep-tabs-on-trump-administration-attacks-on-environmental-public-health-climate-science/> (tracking federal government attempts to restrict or prevent scientific research, education, discussion or the publication or use of scientific information).

135. See *US Action on Climate Change is Irreversible*, WE ARE STILL IN, <https://www.wearestillin.com/us-action-climate-change-irreversible> (last visited Jan. 15, 2019).

136. See UNITED NATIONS ENV'T PROGRAMME, EMISSIONS GAP REPORT 2018 U.N. Doc. EGR2018 (Nov. 2018) (detailing how countries are falling short in efforts toward climate mitigation goal); Kate Wheeling, *The U.S.'s Exit from the Paris Agreement Could Spell Disaster Not Just for the Environment, But Also for Our Economy*, PACIFIC STANDARD (June 1, 2017), <https://psmag.com/social-justice/americas-exit-from-the-paris-agreement-could-spell-disaster-not-just-for-the-environment-but-also-for-our-economy> ("Less optimistic emissions projections suggest that leaving the accord could result in an extra three billion tons of carbon dioxide added to the atmosphere every year, with the U.S. alone responsible for up to a half a degree of global warming – accelerating ice melt, sea level rise, and the frequency and severity of extreme weather. If other countries follow in Trump's footsteps, the environmental effects could be much graver.").

137. Zhang Yong-Xiang et al., *The Withdrawal of the U.S. from the Paris Agreement and Its Impact on Global Climate Change Governance*, 8 ADVANCES

As a result, the withdrawal of the United States from the Paris Agreement will have profound climate justice and environmental justice impacts. As an extension of environmental justice, climate justice is understood to focus on “equal rights and opportunities [for] every individual to seek a high quality of life under the impacts of global climate change.”¹³⁸ Given that the United States has imperiled the likelihood that the goals of the Paris Agreement will be met, it has in turn decreased the possibility that climate justice can be achieved. The Fourth National Climate Assessment confirms that people in disadvantaged socioeconomic areas and people of color who are already vulnerable to climate change impacts are the most likely to feel the impacts of the United States’ withdrawal.¹³⁹ Further, environmental justice requires that governments protect vulnerable communities.¹⁴⁰ As demonstrated below, because the impacts of climate change imperil such vulnerable communities, the Administration’s decision to withdraw from the Paris Agreement violates principles of both climate justice and environmental justice.

To fully understand how this decision is contrary to notions of both climate and environmental justice, one need only consider the broad impacts of climate change. The Intergovernmental Panel on Climate Change has studied the impacts of climate change extensively and received the 2007 Nobel Peace Prize for its invaluable work in this field.¹⁴¹ Its most recent report, *Global Warming of 1.5°C*, examines how the impacts of climate change would differ at a 1.5°C temperature increase versus a 2°C increase.¹⁴² The report details the impacts of climate change on the global environment, which include increased temperatures across the world, higher precipitation in several regions, droughts in other regions, sea rise, species loss and increased extinction, increased ocean temperatures that lead to increased ocean acidity, decreased ocean oxygen levels, loss of

CLIMATE CHANGE RES. 213, 214 (2017); *see also Some Progress Since Paris, but Not Enough, as Governments Amble Towards 3°C of Warming*, CLIMATE ACTION TRACKER (Dec. 11, 2018), <https://climateactiontracker.org/publications/warming-projections-global-update-dec-2018/> (listing the United States as one of five countries whose stance on climate change mitigation is “critically insufficient”).

138. *Id.* at 215.

139. Kristie L. Ebi et al., *Fourth National Climate Assessment Volume II: Chapter 14: Human Health*, U.S. GLOBAL CHANGE RES. PROGRAM (2018), <https://nca2018.globalchange.gov/chapter/14/> (last visited Mar. 25, 2019) (“People and communities are differentially exposed to hazards and disproportionately affected by climate-related health risks. Populations experiencing greater health risks include children, older adults, low-income communities, and some communities of color.”).

140. *Id.* at 10.

141. *See The Nobel Peace Prize 2007*, NOBEL PRIZE (Jan. 15, 2009), <https://www.nobelprize.org/prizes/peace/2007/summary/>.

142. *Global Warming of 1.5°C: Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Oct. 8, 2018), https://www.ipcc.ch/pdf/special-reports/sr15/sr15_spm_final.pdf.

biodiversity and ecosystems, and risks to human health, livelihoods, food security,¹⁴³ water supply, human security, and economic growth.¹⁴⁴

Around the world, the negative impacts of climate change will primarily harm low-income areas and people of color, due to their lack of resources and limited capacity to adapt to such impacts. For example, in the United States, many of these communities are already located in disenfranchised areas with a lack of voter potential, and as a result, there is a very low likelihood that governmental officials will act to protect the health and vitality of such communities.¹⁴⁵ Consistent with these concerns, the American Bar Association Section of Civil Rights and Social Justice has drawn the following conclusion:

The Administration's decision to withdraw the United States from the Paris Agreement has several long-term [environmental justice] implications. The impoverished suffer most from a changing climate, in the form of reduced access to clean water, arable land, and nutrition. Rising temperatures increase the frequency of extreme heat events and flooding, both of which hit lower socioeconomic classes hardest. Those with more wealth can afford air conditioning, flood insurance, or to relocate altogether; the poor are often forced to stay in dangerous condition for lack of resources.¹⁴⁶

In addition to the physical impacts on these communities, the decision to exit the Paris Agreement also has rhetorical ramifications. In the words of one observer, President Trump's decision is seen by some as "affirming that the environmental racism in which local governments, state governments and companies traffic daily is acceptable and will not be challenged."¹⁴⁷

143. See, e.g., Helen Kang, *Food Insecurity Impacts on the U.S. Poor as the World Warms*, NAT. RESOURCES & ENV'T, Fall 2013, at 3, 3–4.

144. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5° C: SUMMARY FOR POLICYMAKERS § B.5.5 (2018), <https://www.ipcc.ch/sr15/> [hereinafter IPCC].

145. See Pew Research Center, "The Party of Nonvoters: Younger, More Racially Diverse, More Financially Strapped" (Oct. 31, 2014) (reporting on a survey results showing "wide demographic divides between nonvoters and likely voters" based on race, age, education level, and income), at: <https://www.people-press.org/2014/10/31/the-party-of-nonvoters-2/> (last visited Apr. 2019).

146. AM. BAR ASS'N SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE/ENVTL. LAW INST., ENVIRONMENTAL PROTECTION IN THE TRUMP ERA, ch. 13, (Spring 2018), https://www.eli.org/sites/default/files/docs/epinte_spring2018.pdf.

147. Symone D. Sanders, *Examining Environmental Racism: How Trump's Blatant Disregard for Climate Change Affects People of Color*, ESSENCE (June 2, 2017), <https://www.essence.com/news/politics/trump-paris-climate-accord-environmental-racism-black-people/>; Dominic A. Williams, *Why Trump Pulling Out of the Paris Climate Deal Will Worsen Environmental Racism*, BLAVITY,

Looking beyond the United States, the experiences of indigenous peoples around the world further underscores that the impacts of climate change disproportionately affect the poor and people of color. Climate change impacts many indigenous peoples on a daily basis across the world.¹⁴⁸ In the Amazon Rainforest, for example, the Yanomami, a local indigenous group, report decreased rain leading to severe drought.¹⁴⁹ Likewise, Canadian indigenous groups, such as the Tl'azt'en and the Gitga'at, are experiencing marked increases in temperature that have resulted in insect infestations that negatively impact vegetation.¹⁵⁰ Indigenous peoples in Africa have experienced loss of vegetation due to increased temperatures and wind, which wreaks havoc on traditional livestock practices.¹⁵¹ Similarly, in Asia and South America, climate change threatens traditional agricultural practices.¹⁵²

In the Arctic, where some of the most drastic impacts of climate change can be seen, significant threats to traditional lifestyles and subsistence culture exist. Increasing temperatures related to climate change have caused the melting of sea ice and permafrost.¹⁵³ Moreover, climate change is also severely impacting daily activities such as whaling, sealing, fishing, and reindeer herding—activities

<https://blavity.com/why-trump-pulling-out-of-the-paris-climate-deal-is-a-black-issue> (last visited Jan. 17, 2019).

148. U.N. Permanent Forum on Indigenous Issues, *International Expert Group Meeting on Indigenous Peoples and Climate Change: Summary Report*, ¶ 1, U.N. Doc. E/C.19/2008/CRP.9 (Apr. 14, 2008), http://www.un.org/esa/socdev/unpfi/documents/E_C19_2008_CRP_9.doc.

149. DANIEL C. NEPSTAD, *THE AMAZON'S VICIOUS CYCLES* 4 (2007), http://assets.panda.org/downloads/amazonas_eng_04_12b_web.pdf; SURVIVAL INT'L, *THE MOST INCONVENIENT TRUTH OF ALL* 3 (2009), https://assets.survivalinternational.org/documents/132/survival_climate_change_report_english.pdf.

150. ANDREA CARMEN, INT'L INDIAN TREATY COUNCIL, *CLIMATE CHANGE, HUMAN RIGHTS, AND INDIGENOUS PEOPLES* 19–20 (2008), http://www.usnepalonline.com/archives/climate_change_hr_indigenous_peoples_12_08.pdf; SURVIVAL INT'L, *supra* note 149, at 4.

151. IPCC, *supra* note 144, at B.5.3; *Global Warming Solutions Are Hurting Indigenous People, Says U.N.*, MONGABAY (Apr. 2, 2008), <https://news.mongabay.com/2008/04/global-warming-solutions-are-harming-indigenous-people-says-u-n/>.

152. IPCC, *supra* note 144, at B.5.3; MONGABAY, *supra* note 151.

153. Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RESOURCES & ENV'T, Winter 2008, at 45, 47 (“Alaska may be experiencing the impacts of global warming more than any other place on Earth, and Alaska Native tribes are among the first American populations to feel the effects of global climate change. Erosion and flooding affect 86 percent of Alaska Native villages to some extent, with the greatest effects felt along the coast.”) (citing U.S. GEN. ACCOUNTING OFFICE, GAO-04-142, *ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE* (2003)).

essential for the survival of many Arctic indigenous groups.¹⁵⁴ Reindeer herders report declining populations because the animals find it increasingly difficult to access food and are more likely to fall through melting ice.¹⁵⁵ Melting ice also threatens many indigenous communities that rely on ice for important tasks such as food storage.¹⁵⁶ These impacts may be particularly devastating for indigenous people who for legal, cultural, and spiritual reasons may be tied to specific areas of land.¹⁵⁷

Indigenous peoples living on low-lying island nations are not immune from the negative impacts of climate change.¹⁵⁸ Low-lying nations are disappearing, due to sea level rise resulting from melting ice caps.¹⁵⁹ As a result, indigenous people located on low-lying island nations are facing losses of property, culture, and traditions related to these locations. They are also facing substantial changes to their biodiversity of their local environment.¹⁶⁰ Bleached coral reefs, which are of great importance to many indigenous peoples within Pacific Island nations, emerge with greater frequency as increased temperatures cause the bleaching.¹⁶¹ These reefs are also important to biodiversity as they shelter many organisms; a decline in reef biodiversity leads to a decline in fish biodiversity.¹⁶² Because of climate change, indigenous peoples located in these areas of the world may no longer be able to secure the species upon which they have historically relied for subsistence.¹⁶³

The foregoing examples underscore why President Trump's decision to withdraw from the Paris Agreement imperils those in poverty and people of color in the United States and abroad. At the same time, the Administration's refusal to act on climate change has special domestic significance in the context of climate change adaptation policy. In contrast to climate mitigation, which aims to

154. Mark Nuttall et al., *Hunting, Herding, Fishing, and Gathering: Indigenous Peoples and Renewable Resource Use in the Arctic*, in ARCTIC CLIMATE IMPACT ASSESSMENT 649, 652, 659 (2005).

155. Henry Huntington et al., *The Changing Arctic: Indigenous Perspectives*, in ARCTIC CLIMATE IMPACT ASSESSMENT 61, 85, 88 (2005).

156. SURVIVAL INT'L, *supra* note 149, at 3.

157. 43 U.S.C. § 1603 (2006); Cordalis & Suagee, *supra* note 153, at 47.

158. Brad Burnham, *Impacts of Global Climate Change*, in CLIMATE CHANGE AND PACIFIC RIM INDIGENOUS NATIONS 8, 9 (2006), https://www.terrain.org/articles/30/Climate_Change_Pacific_Rim_Indigenous_Nations_2006.pdf.

159. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 COLO. L. REV. 1625, 1636–37 (2007).

160. *Id.* at 1636–37 (“In addition, an increased prevalence and severity of storms linked to climate change would be especially devastating in such regions, as would be the inevitable loss of biodiversity for ocean species, including the loss of coral reefs and the fisheries in these areas.”).

161. Burnham, *supra* note 158, at 16.

162. MONGABAY, *supra* note 151.

163. *Id.*

reduce greenhouse gas emissions that contribute to climate change, the focus of climate adaptation is supporting communities in adapting to the particular climate change impacts affecting them. Across the United States, the experience of climate change will vary by region, and there is a pressing need for adaptation measures to be tailored to specific impacts as well as the most vulnerable groups facing them. Given the conclusion in the Fourth National Climate Assessment—that communities of color and low-income communities face a “higher risk of exposure to adverse climate-related health threats”—reversing course on climate adaptation policy *is* reversing course on environmental justice.¹⁶⁴ The signal that climate adaptation is not a federal priority was sent clearly with the revocation of Executive Order 13,653, “Preparing the United States for the Impacts of Climate Change,” an Order that created a structure for “coordinated action on climate change preparedness and resilience across the Federal Government.”¹⁶⁵ The consequences for environmental justice of this turn away from climate adaptation at the federal level leaves states and cities to protect vulnerable communities against increasingly challenging climate risks.

V. CONCLUSION

Environmental justice seeks to protect low-income communities and communities of color from the disproportionate impacts of environmental harms and ensure civil rights in the application of environmental law. To reverse course on environmental justice is to disregard environmental justice communities. Environmental justice is therefore a crucial, if less recognized, aspect of the Trump Administration’s “war on diversity,” bringing a unique perspective to the Symposium’s theme. This Article has grounded this assertion in three distinct but related contexts, from agency transition, to a high-profile permitting decision, to the international climate context. First, the Administration’s treatment of environmental justice within the EPA, from budget cuts to decreased enforcement, strongly signals that upholding the values of environmental justice is not a priority for the Administration. This concern is reinforced by President Trump’s actions outside of the EPA, especially when looking to his memorandum calling on the Secretary of the Army to approve the Dakota Access Pipeline—a memorandum released the first week of his presidency. As determined by the courts, in approving the pipeline, agencies failed to fully consider environmental justice impacts on the tribal community less than a mile away. Similarly, when President Trump announced he will withdraw the United

164. Ebi et al., *supra* note 139.

165. Exec. Order No. 13,653, Preparing the United States for Climate Change, 78 Fed. Reg. 66,819 (2013), *revoked by* Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093 (2017). *Id.*

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States from the Paris Agreement, there was no indication that the Administration considered the impacts on environmental justice communities. The President's decisions have profound implications for some of the most vulnerable populations, here in the United States and beyond.