



# PROMISES TO KEEP

*For half a century, the federal government has used NEPA to safeguard Americans from the ill effects of large-scale development. But only when its language is equitably translated into policy designed to help those communities most adversely affected are the law's guarantees fully realized.*

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When I was in graduate school, I remember learning about the legal requirements for performing an environmental assessment under a law I was not very familiar with. I was so excited I wanted to run from campus to my neighborhood almost a mile away to tell people about my discovery. I had found that we could use the procedures and requirements of the National Environmental Policy Act in our battle with the behemoth North River Sewage Treatment Plant, which lines the banks of the Hudson River along Manhattan island in the West Harlem community for almost half a mile. In addition to being an eyesore that denied our community the considerable aesthetic benefits of the waterfront, the plant fouled the air we breathed. Residents frequently complained of noxious “rotten egg” odors and said they could not open their windows during the hottest months.

I conducted significant further research into the land use and siting history of this largely federally funded facility and uncovered that EPA Region 2 had twice declared a Finding of No Significant Impact under NEPA for the North River plant. A FONSI meant that the city and state were not required to perform an Environmental Impact Statement as required by the statute, or even a less formal environmental assessment. So the public was never informed about how a facility designed to treat 180 million gallons a day of raw sewage and wastewater, constructed without any odor-control features at all, might impact the tens of thousands of people who live near the plant.

I found that even though the federal government funded 75 percent of the construction cost of the North River plant, NEPA environmental reviews were not required by the regulators. This was not unique, I would discover through my work as an advocate for environmental justice, but rather a common practice across the country in communities whose demographics were like the place

where I lived. For me, it raised the question of how race and place can influence when environmental analyses are conducted, and when NEPA's requirements are ignored in determining if a federal facility (or federally funded facility) could have a significant adverse impact on surrounding communities. It also raises questions about how determinations are made concerning whose well-being matters when major infrastructure development is planned and constructed—and whose does not.

My environmental education continued. I realized early on that not only under NEPA but also other environmental statutes, flowery guarantees of equal treatment before the law were not available to everyone. My conclusion was that NEPA's promise would only be realized if it was fully enforced and equally applied to protect against threats to human health and the environment wherever federally funded projects are involved—be they wastewater treatment plants like North River, or highways, airports, seaports, nuclear waste storage facilities, energy infrastructure, or so many other major federal projects that can impact surrounding neighborhoods.

I further discovered that very few of what we would come to define as environmental justice communities were treated equally when NEPA analyses were conducted for projects nearby these residential areas. Since the passage of the 1969 statute, too many once-thriving neighborhoods have been obliterated, dissected, cut off, or encircled by infrastructure serving large-scale federally funded facilities—often projects that brought with them benefits for the larger public but major adverse environmental and public health burdens for the local residents. These adverse effects include elevated disease rates and premature and excess mortality rates. For these unfortunate communities, the promise of the foundational statute was never theirs to realize.

What is the promise of NEPA? The act's fundamental objective is to "encourage productive and enjoyable harmony between man and his environment," a high calling when the evils of pollution were so apparent a half century ago. Further, some of the expressly stated goals of the original statute completely align with the goal of achieving environmental justice, as we would later come to define it. Indeed, NEPA endeavors to "preserve ... an environment which supports diversity and variety of individual choice" and to "achieve ... high standards of living and a wide sharing of life's amenities." In the text of the law, Congress even "recognizes that each person should enjoy a healthful environment." And the law stoutly "assure[s] for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings."

Given that these goals were enshrined by Congress in the statute 50 years ago, it is easy to see why at first environmental justice advocates, myself included, thought that NEPA held much promise as a tool to slow down the common practice of siting large-scale, highly disruptive projects and facilities near where people of color, indigenous people, and poor and immigrant populations live. But as promising as the statute is, getting federal, state, and local government agencies to ensure that facility or project design, planning, construction, operation, and monitoring would be conducted in a manner fully consistent with the goals stated above has too often fallen short.

**T**he problems with implementation of the statute were already clear a quarter century after its enactment, when in 1994, President Clinton signed Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. The order provides that "each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations." In the memorandum to all heads of agencies and departments that accompanied EO 12898, the president specifically recognized the importance of procedures under NEPA

for identifying and addressing environmental justice concerns. One of the principal requirements of the order was the performance of an environmental justice analysis as part of a NEPA review.

Two years later, the White House Council on Environmental Quality, created by the act, pulled together a working group (on which I served) to develop its environmental justice guidance under NEPA, which CEQ published in 1997. In the preamble of the guidance CEQ states that "there are several provisions of the executive order and a number of supporting documents to which agencies should refer when identifying and addressing environmental justice concerns in the NEPA process."

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The EO itself emphasizes issues that are pertinent to the process. "The order requires the development of agency-specific environmental justice strategies" and to issue guidance as appropriate. The order "recognizes the importance of research, data collection, and analysis, particularly with respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes." As a result, "data on these exposure issues should be incorporated into NEPA analyses as appropriate."

The accompanying memorandum also identified four important ways to "consider environmental justice under NEPA." Specifically, "Each federal agency should analyze the environmental effects, including human health, economic, and social effects, of federal actions on low-income, minority, and tribal populations, when such analysis is required by NEPA." Agencies also "must provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices."

Finally, the EO established an interagency working group on environmental justice. The working group then developed guidance "that reflects a general consensus based on federal agencies' experience and understanding of the issues presented." The order requests that agencies "should apply the guidance with flexibility."

Nineteen years later, President Obama revived the Interagency Working Group on Environmental Justice. The working group established a NEPA Task Force which produced a comprehensive document entitled “Promising Practices for EJ Methodologies in NEPA Reviews.” The task force deliberated for 48 months to produce this report and consulted with more than a dozen affected agencies and the Nuclear Regulatory Commission. The report opens by declaring, “Federal agencies should ensure recipients of federal financial assistance engaged in the NEPA process comply with Title VI [of the Civil Rights Act of 1964] in addition to fulfilling the requirements of NEPA. A separate Title VI analysis may be necessary.”

“Promising Practices” is a truly comprehensive document that provides an in-depth exploration of various considerations under each of its sections, as well as guiding principles, and specific steps one can take in conducting these components of a NEPA analysis. In the section about “Developing and Selecting Alternatives,” the guidance recommends a series of specific measures. For instance, “When minority and low-income populations would be affected by the proposed action, agencies may wish to consider the following types of mitigation for selecting reasonable alternatives,” and the document goes on to list several possible actions ranging from “identify alternative locations or sites” to “incorporate pollution prevention practices and policies to reduce the size or intensity of an action or its impacts,” as well as exploring not building the project in the proposed location.

The current political climate might not be the best environment to judge whether these recommendations are having an impact. But federal agencies are newly engaged around how NEPA can be utilized as a tool to advance environmental justice considerations, and “Promising Practices” offers a wide array of approaches to fully incorporate environmental justice considerations into analyses performed under the foundational statute.

As federal policy for environmental justice matured, I observed how NEPA implementation could fall short of achieving equity—but better, I discovered how it could succeed.

A noteworthy example was the process to design and construct the North River plant in my old New York neighborhood, which unfolded over decades. The story is a classic case in point of how NEPA’s stated goals are not uniformly applied. Though discussions had been underway since the 1930s about the need for a facility to manage the disposal of raw sewage and wastewater generated on the West Side of Manhattan, it wasn’t until the mid-1950s that those conversations began in earnest. Over several years, private discussions were held in the upper echelons of New York City government along with the federal Department of Public Works, a forerunner to EPA.

**Despite the present political climate, federal agencies are newly engaged around how NEPA can be utilized as a tool to advance environmental justice considerations**

The initial decision was to site the plant on the Hudson River waterfront near the cruise ship piers. Enter Robert Moses, the legendary power broker who transformed the city into a modern beribboned homage to concrete. He was already planning a massive urban renewal project near the preferred site for the plant. That development, known as the West Side Improvement Project, would go on to become Lincoln Center, the home of the Metropolitan Opera, the New York City Ballet, Avery Fisher Music Hall, and the Juilliard School of Music.

A new location had to be found somewhere else along the waterfront. The site selected ran from West 135th Street north to West 145th Street, which was a predominantly African American community. The neighborhood is historic and includes the west part of Harlem and the community of Hamilton Heights, named after Alexander Hamilton, who had lived there and whose historic home still brings tourists to the neighborhood. But no one informed the more than 100,000 residents near the proposed facility that the city, state, and federal governments were intending to build a massive sewage treatment plant across the street from the highly prized residences of Riverside Drive.

Development planning continued apace behind closed doors until 1968, when New York state’s legislature passed a raft of sunshine laws requiring public notice of any activities that would require the expenditure above a threshold amount of state or local tax dollars. It was only after the passage of these laws that the residents found out that a massive sewage treatment plant was going to be constructed on the riverfront adjacent to where they lived.

People were outraged that so much planning had gone on without any discussion with the community that would be directly impacted by the construction and operation of this massive plant. Less than a year after West Harlem residents became aware of the city's plans, Congress passed NEPA. And three years after that, Congress passed the Clean Water Act. Both statutes would affect the North River plant when their implementation plans collided.

After the CWA became law in 1972, EPA Region 2 began to threaten New York City with daily fines for continuing to discharge wastewater and raw sewage directly into the Hudson River. The federal agency required that the city expedite the design and construction process to bring the North River plant on-line. As mentioned, EPA would render two Findings of No Significant Impact for the plant under NEPA's implementing language. And in response to federal pressure to come into CWA compliance, the city and its engineers approved shortcuts in the design and construction process that allowed the huge plant to be built without an odor-control system. Thus, in the service of enforcing the new water pollution law, EPA and the city created a severe public nuisance that impinged upon property rights, neglected enforcement of Title VI of the Civil Rights Act, as well as ignored the stated purpose and intent of NEPA.

To make a long story short, the neighborhood would suffer for eight long years until West Harlem Environmental Action and the Natural Resources Defense Council successfully sued the city for operating the plant as a public and private nuisance by creating overwhelming odor and air quality impacts for the adjacent community. WeACT received a \$1.1 million settlement fund, and the city was required to spend \$55 million to install odor-control systems and fix other engineering flaws at North River. WeACT and NRDC were also entered as permanent intervenors in the implementation of corrective actions.

**T**he North River plant and the two examples that follow demonstrate the centrality of identifying and mitigating the adverse impacts of federal infrastructure projects on nearby residential populations, as required by NEPA. North River represents what can

happen when human health considerations are subjugated to broader environmental objectives. But as the long arc of history unfolds, the two examples that follow demonstrate that the practice of discounting adverse impacts upon vulnerable communities for broader economic goals will not necessarily achieve automatic approval from NEPA reviews going forward.

The Low Country Alliance for Model Communities represents a group of seven neighborhoods near the Port of Charleston's proposed terminal expansion site in the city of North Charleston, South Carolina. Some people in the nearby communities were skeptical of the expansion because of the repeated adverse impacts (truck traffic, air, noise and light pollution, lack of waterfront access) they experienced from the port over several decades. However, LAMC recognized the historical advantages the port

could bring to their community if the expansion were conducted in a manner that balanced the economic needs of the developers with considerations for residents' quality of life. In 2014, LAMC, the City of North Charleston, and the South Carolina State Port Authority spearheaded a historic effort to create the first mitigation fund under NEPA for an environmental justice community.

Mitigation plans were a well-established component of NEPA analyses in the past, but no environmental justice community had heretofore received serious consideration of adverse impacts from a federal project, nor received millions of

dollars to fund efforts designed to blunt the deleterious impacts of those projects before LAMC achieved this victory.

The vision for the community mitigation plan was to provide environmental security to LAMC residents and meet social, residential, educational, and economic needs for generations to come, resonating strongly with NEPA's evocative language concerning posterity. As a result, residents would be able to actively engage in the redevelopment and revitalization of their neighborhoods; benefit from newly created for-profit opportunities; and celebrate their rich heritage.

**These examples demonstrate the centrality of identifying and mitigating the adverse impacts of federal infrastructure projects on nearby residential populations**



Over several years, the city and LAMC worked with the port authority to create some very significant benefits for the affected areas. The resulting agreement calls for the authority to provide \$4.08 million in local projects. Specific community priorities that will be funded through this effort include a trust for the creation of affordable housing. There will be air pollution monitors installed by the port to quickly identify environmental quality problems. Educational needs of residents will be supported via childhood education vouchers, enhanced afterschool programs, tuition assistance, GED classes, and college scholarships. Entrepreneurs will be supported through programs that assist qualified local vendors in securing new business. A second fund of \$4 million was also secured by LAMC for a total of \$8.08 million in NEPA mitigation funding. The port of Charleston redevelopment is a bona fide NEPA success story due in large measure to the unceasing advocacy of LAMC and its team of local experts.

**I**n the 1950s, the Hillcrest and Washington Coles communities were the only neighborhoods in Corpus Christi, Texas, where blacks and Latinos were allowed to purchase homes. Strictly enforced racial covenants and deed restrictions ensured that residential segregation narrowly defined where people of color could live in the city. The two communities were also inside the flood plain, adjacent to the Port of Corpus Christi and its ship channel, home to petrochemical refineries and their storage tanks, and a sewage treatment plant. During storms, raw sewage and chemical-laced effluent flooded into people's homes in these neighborhoods.

In between the two communities sits a wide, busy highway that provides a direct route to the port of Corpus Christi and the ship channel. In 1959 the Harbor Bridge was constructed to provide more direct access to the port. Its construction split the communities in half, disconnecting them from access to schools, hospitals and pharmacies, grocery stores, and other basic necessities. The increase in truck traffic going to and from the port and resultant diesel particulate pollution, a known carcinogen and health threat, were significant.

**Mitigation plans were a well-established component of NEPA analyses in the past, but no environmental justice community had heretofore received serious consideration**

The recent expansion of the Panama Canal, completed four years ago, has required most existing U.S. ports to expand their harbor depths and goods movement capacity to allow much larger commercial container ships to dock. In response to this pressure to remain competitive and the need to modernize an existing bridge, the Texas Department of Transportation proposed to construct a new Harbor Bridge. EO 12898 required that in addition to a NEPA environmental justice analysis that a Title VI analysis should be conducted as well to ascertain the impact of the federal projects on environmental justice communities. I was asked to help facilitate a final public meeting before the Record of Decision (as required

under NEPA) would be signed for the new bridge. But first, I asked a few basic questions like what alternative plans were discussed with the community, what mitigation measures the residents asked for, and what the EIS identified as potential air pollution impacts. My questions were not well received. It seemed that what they wanted was for me to come and preside over a pro-forma public meeting that was the last step in the march toward signing the ROD to fund the almost \$1 billion of bridge construction. Ultimately, I was unable to facilitate this meeting, but I did refer my concerns about a lack of consistency

with both the requirements of EO 12898 for a NEPA environmental justice analysis and lack of enforcement of Title VI to the Federal Highway Administration's assistant administrator for civil rights.

Five days before the ROD was due to be signed, the FHWA Office of Civil Rights halted the NEPA process and undertook a full investigation of the bridge project in response to a Title VI complaint filed by the local communities. The Lawyers' Committee for Civil Rights Under Law, which issued the complaint on the citizens' behalf, proudly proclaimed success in using the order's requirement that Title VI compliance should also be required during NEPA reviews for federal infrastructure projects. The result was an environmental justice victory for the Hillcrest and Washington Coles communities.

The Lawyers' Committee announced, "The Federal Highway Administration reached a landmark agreement with the Texas state highway agency that will be worth tens of millions of dollars in mitigation (via NEPA) and relocation funding (via the Uniform Relocation Act) for the residents of a Corpus Christi, Texas, neighborhood created by Jim Crow segregation." The committee further states, "The agreement addresses the discriminatory and disparate impacts on Hillcrest neighborhood residents of a new highway planned to run through a neighborhood already hemmed in by a ship channel, refineries, and an interstate highway."

The lawyers noted that the community had suffered from decades of problems associated with the city's celebrated ship channel and the new construction would cut it off from most businesses as well as public services, while "adding increased pollutants like benzene to the already compromised air and soil of the neighborhood."

The Lawyers Committee noted that "as a result of that complaint and the resulting investigation, FHWA and TxDOT ratified a voluntary resolution agreement in December of 2015, that responds to many issues raised by residents. TxDOT, the City of Corpus Christi, the Port Authority, and the Corpus Christi Housing Authority signed a subsidiary agreement to support and implement the larger agreement." Specifically, the agreements include a voluntary relocation program, with compensation for expenses. The agreements established a city liaison in the neighborhood for four years. The community will also benefit from new parks and other extensive mitigation measures. Groundbreaking for the new Harbor Bridge took place in 2015 and is on schedule to open in 2020.

**W**hat will be the future for NEPA's ability to protect low-income populations or communities of color? Will the act's high purpose be realized for all citizens? Hopefully, at the time of the NEPA centennial we will be able to celebrate the full promise of the foundational statute. Equal protection before the law is a constitutionally guaranteed protection for all, not only for some. A future without a full guarantee of NEPA's applicability in our most vulnerable communities renders our environmental regulatory framework weak and futile for many citizens.

A chance to look back at the history of the law's implementation via these three examples demonstrates that now is the time to sharpen our focus, broaden our enforcement efforts, and deliver NEPA's full promise to all, especially to our most vulnerable communities. This would be the best way I can think of to truly honor the 50th anniversary of our bedrock environmental law.

But as of this writing we are awaiting new rules that could threaten the very foundation of the National Environmental Policy Act. While environmental justice communities want to see more vigorous and comprehensive enforcement of NEPA where federal projects could potentially threaten their quality of life and the integrity of their communities, NEPA is hanging in the balance and with it the hopes of so many communities that they might receive at long last equal treatment before the law.

## About the Author



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Vernice is an executive vice president for environment and sustainability at Metropolitan Group. Her work has included environmental justice, racial inequity, clean air and water issues, hazardous and solid waste, community revitalization and environmental restoration, equitable development, and sustainable land use planning.



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