

WHAT’S FERC GOT TO DO WITH IT? PROMOTING ENVIRONMENTAL JUSTICE IN THE PIPELINE PERMITTING PROCESS

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I. INTRODUCTION

New York City may sound like an unlikely place for a pipeline show-down, but a group of residents and activists in North Brooklyn are hard at

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work bringing the fight to a natural gas pipeline running under their homes.¹ Construction on the pipeline began in 2017 and operations started in 2020, but community members say they were not properly informed about the project and oppose its location in an area already crowded with air-polluting facilities.²

As with many such protests, the fight over this pipeline is about the past, the present, and the future, all at once. When residents talk about the pipeline, they invoke its place in a bigger, broader set of environmental injustices. “Our neighborhoods in Brooklyn have always been dumping zones,” says Pati Rodriguez, a community organizer.³ Gabriel Jamison, another organizer, describes the area as a “sacrifice zone.”⁴ Notably, the seven-mile, underground pipeline “zigzags through predominantly Black and Latino neighborhoods, bypassing whiter, wealthier parts of Brooklyn.”⁵ The Environmental Protection Agency (“EPA”), having recently renewed its commitment to civil rights after decades of lackluster enforcement, has agreed to investigate.⁶

This particular fight also coincides with debates happening elsewhere in government. Though the North Brooklyn Pipeline was regulated by state government, interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission (“FERC”). FERC has spent decades dodging serious consideration of environmental justice but has recently started the process of updating its permitting process.⁷ In this Note, I consider the options available to FERC as it undertakes reforms. In Part II, I discuss the backdrop for this work and recount the history of FERC’s inaction. In Part III, I look at four broad approaches to evaluating environmental justice and describe the lessons learned from case studies. In Part IV, I explore possible paths forward for FERC.

II. BACKGROUND

A. *Defining Environmental Justice*

To start, it is important to define what “environmental justice” means—or rather, what it can mean. The modern environmental justice

¹ Greta Moran, ‘A Slap in the Face’: Pipeline Violates Civil Rights, *Say New Yorkers*, GUARDIAN (Feb. 11, 2022), <https://www.theguardian.com/us-news/2022/feb/11/brooklyn-pipeline-violates-black-latin-civil-rights-new-york> [https://perma.cc/5SVJ-7DWM].

² *See id.*

³ *Id.*

⁴ Audrey Carleton, ‘They’re Liars’: Activists Say Brooklyn Residents Were Not Informed of Fracked Gas Pipeline, GUARDIAN (Dec. 21, 2020), <https://www.theguardian.com/environment/2020/dec/21/brooklyn-natural-gas-pipeline-fracking-bushwick> [https://perma.cc/4AZ7-L3LG].

⁵ *Id.*

⁶ *See Moran, supra* note 1.

⁷ *See infra* notes 65–74 and accompanying text.

movement is often considered to have begun in 1982, when residents of Warren County, North Carolina engaged in extensive activism and peaceful protesting over the construction of a toxic waste landfill in their rural, largely Black community.⁸ The protests drew national attention and built a bridge to the broader civil rights movement. Subsequent studies by researchers, activists, the United Church of Christ, and the Government Accounting Office revealed that Warren County was part of a troubling larger trend in the siting of toxic waste landfills.⁹

It was not until 1994 that the federal government took its first major step toward recognizing the problem when President Bill Clinton issued Executive Order 12898 (“EO 12898”).¹⁰ EO 12898 directed federal agencies to “make achieving environmental justice part of [their] missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations”¹¹ The order emphasized the need to “promote enforcement” of relevant laws in all communities, “ensure greater public participation,” “improve research and data collection,” and “identify differential patterns” in natural resource use.¹²

Though the order used the term “environmental justice”—and in doing so, perhaps helped vault the term into public consciousness—other terms for the same general concept had been floated.¹³ The United Church of Christ, for example, used the term “environmental racism” in the immediate aftermath of the protests in Warren County, emphasizing acts of “racial discrimination,” “deliberate targeting,” and “official sanctioning” that undergirded the problem.¹⁴ By contrast, before EO 12898, the EPA used “environmental equity” to reflect the issue it felt could be best measured in scientific terms.¹⁵ Grassroots activists disliked the term, which they saw as ignoring the need for prevention and as invoking flawed scientific methods for risk analysis.¹⁶

Thus, while “environmental justice” remains the most publicly visible term and is the framework for government action, fundamental debates about the nature of the problem and its potential solutions remain unresolved. Even today, “environmental justice” essentially operates as an umbrella term for many conceptions of “justice,” each of which implies a

⁸ See Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/9VX6-T9R4>].

⁹ See *id.*

¹⁰ See Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

¹¹ *Id.*

¹² *Id.*

¹³ See Ryan Holifield, *Defining Environmental Justice and Environmental Racism*, 22 URB. GEOGRAPHY 78, 79–83 (2001).

¹⁴ See *id.* at 83.

¹⁵ See *id.* at 80.

¹⁶ See *id.*

different solution. Along these lines, Professor Robert Kuehn has proposed four “taxonomic groups” of environmental justice, a categorization that is itself a synthesis and expansion of frameworks developed by scholars like Professors Robert Bullard, Kenneth Manaster, Alice Kaswan, and Dorceta Taylor.¹⁷ It should be noted that these categories are not mutually exclusive. There is no need to choose a “winner” or even rank the categories in terms of preference or priority. Instead, as Kuehn writes, each is an aspect of the problem, and each aspect must be considered.¹⁸

The first aspect is distributive. Distributive justice deals primarily with equity, risk, and the distribution of benefits and burdens.¹⁹ This is perhaps the form most visible to the general public.²⁰ Some of the environmental justice movement’s most visible fights have been over distributive justice, and popular coverage often focuses on distributive injustice.²¹ For example, the body of work that was produced in the wake of the Warren County protests heavily emphasized the inequitable distribution of the harmful exposures associated with toxic waste landfills.²²

The second aspect is procedural. Procedural justice deals primarily with information flow, agency processes, and establishing relationships with potentially affected communities. This approach is enshrined in EO 12898 and federal environmental laws,²³ which have been described as essentially “an exercise in community relations.”²⁴ This misalignment between environmental justice as pursued by the public and as pursued by government creates an inherent tension. After all, while communities often do seek better representation and communication in decision making processes,²⁵ it is generally far from the only thing on their minds. In the North Brooklyn Pipeline fight, for example, residents have repeatedly emphasized that the pipeline’s developers “never reached out” and never obtained their approval.²⁶ But they have also expressed a belief that the pipeline is fundamentally unjust and needs to be shut down.²⁷

The third aspect is corrective. Corrective justice deals primarily with rectifying past harms. Kuehn notes that this aspect of environmental injus-

¹⁷ See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV’T L. REP. NEWS & ANALYSIS 10681, 10682 n.1 (2000).

¹⁸ See *id.* at 10703.

¹⁹ See *id.* at 10682.

²⁰ See *id.* at 10683.

²¹ See *id.*

²² See *id.* at 10685; see also Skelton & Miller, *supra* note 8. In particular, the congressional report, United Church of Christ study, and Professor Robert Bullard’s book *Dumping in Dixie* emphasized statistical and disproportionate correlations between race and exposure to toxic waste landfills. See Skelton & Miller, *supra* note 8.

²³ See, e.g., Exec. Order No. 12,898, 3 C.F.R. 859 (1994); 42 U.S.C. §§ 4321–47.

²⁴ See Carlton Waterhouse, *Abandon Hope All Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENV’T L. REV. 51, 61 (2009).

²⁵ See, e.g., Holifield, *supra* note 13, at 83 (quoting Benjamin Chavis as criticizing “the history of excluding people of color from leadership of the environmental movement”).

²⁶ See Moran, *supra* note 1; Carleton, *supra* note 4.

²⁷ See Moran, *supra* note 1; Carleton, *supra* note 4.

tice often arises from a lack of action—for example, when the government fails to enforce existing laws or fund necessary programs.²⁸ Corrective justice was a top priority for the foundational Principles of Environmental Justice,²⁹ but it is essentially absent from EO 12898. The actions “mandated” by EO 12898 only prevent agencies from worsening environmental injustice, leaving them powerless to promote corrective forms of environmental justice. Instead, remedies for past or ongoing environmental injustice must often take the form of specialized or individualized actions like tort suits and buyouts.³⁰ For example, though the North Brooklyn pipeline activists are in the process of fighting to get better review of the pipeline and permits associated with its operation, they also have to contend with the fact that the pipeline is built.³¹

The fourth aspect is social. Social justice deals primarily with systemic problems and solutions. Though social justice is emphasized in the Principles of Environmental Justice and acknowledged in EO 12898, agencies often see themselves as the wrong institutions for carrying out “a broader agenda that emphasizes social, racial, and economic justice.”³² For example, Kuehn notes that projects and proposals challenged on environmental justice grounds have historically implicated further injustice involving financial profits, labor, and taxation.³³ Pipelines can represent environmental injustice for a wide array of reasons, ranging from preexisting concentrations of pollution caused by racist redlining³⁴ to respiratory health disparities to unfair rate hikes.³⁵

Taken as a whole, this four-dimensional model helps to explain why modern environmental justice programs—EO 12898, programs implemented in accordance with it, and a scattered handful of judicial actions—fall short of addressing the needs of environmental justice communities. As discussed below, federal approaches to environmental justice tend to prioritize one aspect of environmental justice at a time. Federal environmental law emphasizes process (procedural justice), and the federal regulatory regime emphasizes distribution (distributive justice). Corrective justice and social justice are largely absent from the discussion. Thus, when advocates pursue corrective justice or social justice through traditional means, they are utilizing channels designed to lead elsewhere, and the difficulties they encounter reflect that. This Note asserts as a starting position that successful environ-

²⁸ See Kuehn, *supra* note 17, at 10694–97.

²⁹ DELEGATES TO THE FIRST NAT'L PEOPLE OF COLOR ENV'T LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), <http://www.ejnet.org/ej/principles.pdf> [<https://perma.cc/5N6D-S63R>].

³⁰ See Kuehn, *supra* note 17, at 10698.

³¹ See Moran, *supra* note 1.

³² See Kuehn, *supra* note 17, at 10699.

³³ See *id.* at 10700–02.

³⁴ See Moran, *supra* note 1.

³⁵ See Carleton, *supra* note 4.

mental justice actions will engage multiple aspects of justice and attempt to maximize justice along all four dimensions.

B. Environmental Justice, FERC, and Pipelines

In this Note, I look specifically at the promotion of environmental justice in FERC's permitting of interstate natural gas pipelines.³⁶ FERC, the government body in charge of regulating energy infrastructure and development, could and should play a major role in both short-term and long-term environmental justice. In the short-term, energy production—including pipeline construction,³⁷ fracking,³⁸ and even many renewable energy systems³⁹—can directly create harmful environmental exposures. Access to clean, affordable energy also directly impacts the financial and physical well-being of community members.⁴⁰ In the long-term, the development of sustainable energy systems is crucial for a world where marginalized and under-resourced communities will be hit first and hardest by climate change.⁴¹

Despite this, environmental advocates have sometimes found FERC to be

It should be noted that interstate natural gas pipelines a a source of frustration.⁴² Though EO 12898 required most federal agencies to consider environmental justice, FERC is an independent agency that is only “strongly encouraged” to do so.⁴³ At times, it simply chooses not to.⁴⁴ The agency also,

³⁶ To the extent possible, I will use and refer to numbers, examples, and cases involving interstate natural gas pipelines. If the pipeline being discussed is an oil or intrastate pipeline, this will be indicated.

³⁷ See, e.g., Ryan E. Emanuel, Martina A. Caretta, Louie Rivers III & Pavithra Vasudevan, *Natural Gas Gathering and Transmission Pipelines and Social Vulnerability in the United States*, 5 GEOHEALTH 1, 6 (2021).

³⁸ See generally Yelena Ogneva-Himmelberger & Liyao Huang, *Spatial Distribution of Unconventional Gas Wells and Human Populations in the Marcellus Shale in the United States: Vulnerability Analysis*, 60 APPLIED GEOGRAPHY 165 (2015) (describing the disparate harmful effects on marginalized populations of drilling and extraction).

³⁹ See generally A.M. Levenda, I. Behrsin & F. Disano, *Renewable Energy for Whom? A Global Systematic Review of the Environmental Justice Implications of Renewable Energy Technologies*, 71 ENERGY RSCH. & SOC. SCI., 2021, at 1 (“[M]any energy technologies classified as renewable have human health and livelihood implications that jeopardize the wellbeing of those already most vulnerable to the impacts of climate change.”).

⁴⁰ See generally Eric Scheier & Noah Kittner, *A Measurement Strategy to Address Disparities Across Household Energy Burdens*, 13 NATURE COMM'NS, 2022 at 5 (finding that sixteen percent of households experience energy poverty and that energy poverty disproportionately impacts Black, Hispanic, and Native American Communities).

⁴¹ SHALANDA BAKER, SUBIN DEVAR & SHIVA PRAKASH, *THE ENERGY JUSTICE WORKBOOK 9–11* (2019), <https://iejusa.org/wp-content/uploads/2019/12/The-Energy-Justice-Workbook-2019-web.pdf> [<https://perma.cc/6JYW-855U>].

⁴² See, e.g., DEL. RIVERKEEPER NETWORK, *PEOPLE'S DOSSIER: FERC'S ABUSES OF POWER AND LAW* (2019), <https://www.delawariverkeeper.org/sites/default/files/all%20combined%20sections.pdf> [<https://perma.cc/6MNT-3DZK>].

⁴³ See Exec. Order. No. 12,898, 3 C.F.R. 859 (1994).

⁴⁴ See, e.g., *City of Tacoma, Wash.*, 86 FERC ¶ 61,311 (1999) (concluding that because EO 12898 “does not apply to independent agencies . . . [this] EIS is not deficient for failing to include a specific discussion of [environmental justice]”).

until recently, spent over three decades avoiding its 1978 statutory obligation to create an Office of Public Participation that would coordinate communications with the public, going so far as to say that the office was unnecessary in 2007.⁴⁵

re an issue squarely within FERC's purview. In the United States, such pipelines can only be built upon issuance of a "certificate of public convenience and necessity" ("PCN certificate") from the agency.⁴⁶ This certificate is the first required step in the pipeline application process, and upon receiving it, developers receive the power to use eminent domain in acquiring rights-of-way for pipeline construction.⁴⁷ FERC may attach conditions and mitigation requirements to the certificate, and grants and denials can be reheard by the agency or appealed to a federal court.⁴⁸ Over time, however, this pivotal first step has turned out to be a rubber stamp. In 2020, the House Committee on Oversight and Reform noted that FERC has granted over ninety-nine percent of certificates and often approves construction while challenges are still pending.⁴⁹ Because revoking permits is difficult, an ill-considered certificate can cause lasting damage once granted.⁵⁰

Meanwhile, the environmental injustices associated with these pipelines have become increasingly apparent. A 2021 study showed that the density of natural gas pipeline infrastructure is higher in areas that the Centers for Disease Control and Prevention consider more "socially vulnerable,"⁵¹ and a 2022 study found that for several metropolitan regions, the density of natural gas pipeline leaks was associated with various indicators of environmental justice communities.⁵² Another recent study reviewed natural gas infrastructure more generally and found that marginalized groups in Massachusetts

⁴⁵ PUB. CITIZEN, PETITION TO INITIATE A RULEMAKING TO ESTABLISH THE OFFICE OF PUBLIC PARTICIPATION AS ESTABLISHED BY CONGRESS AND TO FUND ITS WORK (2016), <https://www.citizen.org/wp-content/uploads/public-citizen-ferc-public-participation-petition.pdf> [<https://perma.cc/4H3H-ZT78>].

⁴⁶ PAUL W. PARFOMAK, CONG. RSCH. SERV., R45239, INTERSTATE NATURAL GAS PIPELINE SITING: FERC POLICY AND ISSUES FOR CONGRESS 5 (2022), <https://sgp.fas.org/crs/misc/R45239.pdf> [<https://perma.cc/F4HL-SRHD>].

⁴⁷ See *id.* at 5–8. Developers have the option to engage in pre-filing stakeholder outreach and receive FERC input before applying for a PCN certificate. *Id.*

⁴⁸ See *id.* at 7–8. Other environmental reviews and approvals, including those required by the National Environmental Policy Act (NEPA) and state regulators, may be part of the process as well. *Id.*

⁴⁹ See Press Release, House Comm. on Oversight and Reform, Subcommittee Releases Preliminary Findings Showing FERC Pipeline Approval Process Skewed Against Landowners (Apr. 28, 2020), <https://oversight.house.gov/news/press-releases/subcommittee-releases-preliminary-findings-showing-ferc-pipeline-approval> [<https://perma.cc/T8ZR-GY79>].

⁵⁰ See Chris Lisinski, *FERC Declines to Revoke Weymouth Compressor Certificate*, COMMONWEALTH (Jan. 20, 2022), <https://commonwealthmagazine.org/energy/ferc-declines-to-revoke-weymouth-compressor-certificate/> [<https://perma.cc/L75X-WBGU>].

⁵¹ See Emanuel et al., *supra* note 37, at 6.

⁵² Zachary D. Weller, Seongwon Im, Virginia Palacios, Emily Stuchiner & Joseph C. von Fischer, *Environmental Injustices of Leaks from Urban Natural Gas Distribution Systems: Patterns Among and Within 13 U.S. Metro Areas*, 56 ENV'T SCI. & TECH. 8599, 8606 (2022).

had disproportionate rates of exposure to natural gas leaks and experienced longer waits for repairs.⁵³

In particular, tribal communities and communities of color are often disproportionately exposed to the harms and risks associated with pipeline development. For example, the now-scrapped Atlantic Coast Pipeline would have run through Lumbee land in North Carolina. Though indigenous peoples make up only one percent of the North Carolina population, they comprised thirteen percent of those within a mile of the proposed route.⁵⁴ Researchers looking at two affected counties found that the population alongside the pipeline's route was disproportionately comprised of people of color in both counties and, in one county, significantly more "socially vulnerable" census tracts.⁵⁵ Similarly, as will be discussed later in this Note, over eighty percent of the currently operational Sabal Trail Pipeline's route is in or near environmental justice communities (as defined by FERC itself)—including rural, historically Black communities like Albany, Georgia that already have hundreds of polluting facilities.⁵⁶

Residents are not irrational to worry about their proximity to pipelines. Our pipeline infrastructure, natural gas and otherwise, is aging quickly and, in many places, poorly.⁵⁷ Ten years ago, environmental activists were already warning that pipelines were "ticking time bombs."⁵⁸ Oversight, standards, and inspections are generally lacking: many types of pipelines are essentially unregulated,⁵⁹ and the government generally has just over 300 inspectors on staff to cover the whole country.⁶⁰ Even setting aside the most

⁵³ Marcos Luna & Dominic Nicholas, *An Environmental Justice Analysis of Distribution-level Natural Gas Leaks in Massachusetts, USA*, 162 ENERGY POLY 1, 5 (2022).

⁵⁴ See Elizabeth Ouzts, *North Carolina Tribes Fear Impact of Atlantic Coast Pipeline Construction*, ENERGY NEWS NETWORK (Mar. 21, 2018), <https://energynews.us/2018/03/21/north-carolina-tribes-fear-impact-of-atlantic-coast-pipeline-construction/> [<https://perma.cc/P9HN-WLDX>]. The Atlantic Coast Pipeline developers asserted that the communities were not environmental justice communities at all. See Ben Paviour & Abi Cole, *A Historically Black Town Stood in the Way of a Pipeline—So Developers Claimed It Was Mostly White*, GUARDIAN (Sept. 16, 2021), <https://www.theguardian.com/us-news/2021/sep/16/virginia-atlantic-coast-pipeline-union-hill-historically-black-town> [<https://perma.cc/BGE6-7E2G>].

⁵⁵ See Sarah Wraight, Julia Hoffman, Justine Allpress & Brooks Depro, *Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina*, RTI PRESS PUB. NO. MR-0037-1803, 1, 8 (2018). The researchers noted that results were statistically significant and criticized FERC's methodology for its lack of statistical analysis and transparency. See *id.*

⁵⁶ See *infra* notes 86–105 and accompanying text.

⁵⁷ See Lena V. Groeger, *Pipelines Explained: How Safe are America's 2.5 Million Miles of Pipelines?*, PROPUBLICA (Nov. 15, 2012), <https://www.propublica.org/article/pipelines-explained-how-safe-are-americas-2.5-million-miles-of-pipelines> [<https://perma.cc/9APE-2G8X>].

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., U.S. DEP'T OF TRANSP., REPORT TO CONGRESS ON THE OFFICE OF PIPELINE SAFETY: FY20 HIRING ACTUALS AND FY21 HIRING PLAN 1 (2021), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-05/PHMSA%20Report%20to%20Congress%20-%20PHMSA%20FY%202021%20Pipeline%20Safety%20Staffing%20and%20Hiring%20Plan.pdf> [<https://perma.cc/2WUJ-CZEP>].

dramatic, eye-catching explosions that sometimes result from faulty natural gas pipelines, the numbers are concerning. A recent survey of the eleven-year period between 2010 and 2021 found over 2,500 reported natural gas pipeline leaks resulting in over 300 explosions, 100 deaths, 600 injuries, and nearly \$4 billion in costs to communities.⁶¹ Releases of greenhouse gases from gas leaks more generally (nearly 27 billion cubic feet) were equivalent to the yearly emissions of over 2 million passenger vehicles,⁶² and such leaks may also cause respiratory illnesses for those that are exposed.⁶³ And though the release of gases is a primary concern for natural gas pipelines, spills of gas liquids or drilling fluids can also endanger water resources.⁶⁴

Despite this grim picture, we are at a point for cautious optimism. Under the Biden administration, FERC is taking steps in the right direction. In June 2021, FERC created and filled a new position: the Senior Counsel for Environmental Justice and Equity.⁶⁵ The agency has also planned to open and start staffing its new Office of Public Participation.⁶⁶ Most recently, in April 2022, the agency released an Equity Action Plan⁶⁷ as part of its voluntary compliance with the Biden administration's Executive Order 13985, which sought to address systemic racism and injustice.⁶⁸ The plan emphasizes the Office of Public Participation, improving relationships with tribal governments, changes to the hydropower licensing process, and increased

⁶¹ U.S. PUB. INT. RSCH. GRP., METHANE GAS LEAKS (2022), <https://pirg.org/edfund/resources/methane-gas-leaks/> [<https://perma.cc/5CN8-DTVE>].

⁶² See *id.*

⁶³ See Lilia R. Lukowsky, Claudia Der-Martirosian, Alicia R. Gable & Aram Dobalian, *Impact of the Aliso Canyon Gas Leak on Respiratory-Related Conditions Among US Department of Veterans Affairs (VA) Users*, 13 DISASTER MED. & PUB. HEALTH PREPAREDNESS 419, 419 (2018).

⁶⁴ See Amy Mall, *Gas Pipelines: Harming Clean Water, People, and the Planet*, NAT. RES. DEF. COUNCIL (May 24, 2021), <https://www.nrdc.org/experts/amy-mall/gas-pipelines-harming-clean-water-people-and-planet> [<https://perma.cc/6D9M-SCHZ>]; see also Press Release, Pa. Off. of the Att'y Gen., Case Update: Energy Transfer Convicted of Criminal Charges Related to Construction of Mariner East 2 Pipeline, Revolution Pipeline in Pennsylvania (Aug. 5, 2022), <https://www.attorneygeneral.gov/taking-action/case-update-energy-transfer-convicted-of-criminal-charges-related-to-construction-of-mariner-east-2-pipeline-revolution-pipeline-in-pennsylvania/> [<https://perma.cc/BMQ3-TS3R>].

⁶⁵ Melissa Horne, *FERC Fills Newly Created EJ Position*, JD SUPRA (June 2, 2021), <https://www.jdsupra.com/legalnews/ferc-fills-newly-created-ej-position-3063056/> [<https://perma.cc/5B7V-6VSH>]; Press Release, Fed. Energy Regul. Comm'n, Glick Names Montana Cole to Top Environmental Justice Post at FERC (May 20, 2021), <https://www.ferc.gov/news-events/news/glick-names-montina-cole-top-environmental-justice-post-ferc> [<https://perma.cc/7YDS-Q25J>].

⁶⁶ Press Release, Fed. Energy Regul. Comm'n, FERC Chairman Announces Sitaraman as Deputy Director, Office of Public Participation (Feb. 17, 2022), <https://www.ferc.gov/news-events/news/ferc-chairman-announces-sitaraman-deputy-director-office-public-participation> [<https://perma.cc/KQ5K-HC4M>]. See FED. ENERGY REGUL. COMM'N, REPORT ON THE OFFICE OF PUBLIC PARTICIPATION (2021).

⁶⁷ FED. ENERGY REGUL. COMM'N, FERC EQUITY ACTION PLAN (Apr. 15, 2022), <https://www.ferc.gov/equity> [<https://perma.cc/65Q2-MMHQ>].

⁶⁸ See Exec. Order No. 13,985, 3 C.F.R. 409 (2022). The Biden administration also issued Exec. Order No. 14,008, 3 C.F.R. 477 (2022), which outlined its environmental justice commitments and established several executive-level initiatives.

staff capacity to promote equity.⁶⁹ The plan also commits to evaluating “natural gas infrastructure certification and siting policy and processes” in light of environmental justice, though its language only describes general “review.”⁷⁰

Most relevantly to this Note, in March 2022, FERC opened the comment period for two draft policy statements that would reform its PCN certificate process,⁷¹ which is currently governed by a 1999 policy statement with relatively few environmental considerations.⁷² The first would incorporate consideration of greenhouse gas emissions as a “downstream” effect of pipeline construction, allowing the agency to consider the impact of its certificates on climate change.⁷³ The second, as discussed below, discusses the factors that go into evaluating “public convenience and necessity,” while explicitly bringing in environmental and environmental justice considerations.⁷⁴ As FERC continues finetuning its PCN process, it is worth considering whether its late arrival might have a silver lining. Having waited so long, FERC can now look to the actions of the many agencies and states that acted in the past thirty years. It can evaluate what has worked and learn from what has not.

III. ANALYZING THE APPROACHES

In the next two Parts of this Note, I survey four broad approaches to regulation: (1) procedural policies; (2) cost-benefit analysis; (3) balancing tests; and (4) disparate impact. I then make recommendations about the way forward. Underlying each discussion is the ability of each approach to promote various dimensions of environmental justice, as well as the ways that they allocate responsibility between various branches of government. Each Section will have three subsections. First, a Background subsection de-

⁶⁹ See FERC EQUITY ACTION PLAN, *supra* note 67.

⁷⁰ See *id.*

⁷¹ The changes were initially issued as updated policy statements, *see e.g.*, Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (Feb. 18, 2022), but after backlash from stakeholders, FERC retroactively deemed the statement to be a draft and sought public comment, *see* Press Release, Fed. Energy Regul. Comm’n, FERC Seeks Comment on Draft Policy Statements on Pipeline Certification, GHG Emissions (Mar. 24, 2022), <https://www.ferc.gov/news-events/news/ferc-seeks-comment-draft-policy-statements-pipeline-certification-ghg-emissions> [<https://perma.cc/8N98-EDQ9>]. For an overview of the backlash and retroactive change in statuses, *see* PARFOMAR, *supra* note 46, at 24–27.

⁷² Certification of New Interstate Natural Gas Pipeline Facilities, 64 Fed. Reg. 51,309 (Sept. 22, 1999). In the 1999 PCN Policy, FERC listed environmental concerns as one of “the factors that the Commission considers.” *Id.* at 51,314. Immediately following, however, the statement describes the “current certificate policy” as being entirely composed of market and contract considerations. At the end of section, it briefly brings up “environmental review”—most likely a reference to NEPA. *Id.*

⁷³ Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14,104 (Mar. 11, 2022).

⁷⁴ Certification of New Interstate Natural Gas Facilities, 87 Fed. Reg. 11,548 (Mar. 1, 2022).

scribes the approach. Second, a Case Study subsection looks at how this approach has already supported or failed to support environmental justice. Third and finally, a Lessons Learned subsection considers how the case study reveals environmental justice-specific considerations for this approach.

A. Procedural Policies

The following Background subsection describes the basics of the procedural approach as embodied in the National Environmental Policy Act (“NEPA”).⁷⁵ The Case Study summarizes a D.C. Circuit opinion upholding the NEPA analysis for the Sabal Trail Pipeline. The Lessons Learned subsection considers how focusing on procedure alone prevents the development of consistent definitions and standards related to environmental justice, putting all parties in a state of uncertainty.

1. Background

The first approach is the procedural policy exemplified in NEPA, a foundational environmental statute.⁷⁶ Passed in 1970 after a series of environmental crises and with strong bipartisan support, NEPA requires all agencies to analyze the environmental impacts of their actions by performing analyses and preparing documents.⁷⁷ For a “major federal action”⁷⁸ that is “likely to have significant effects,”⁷⁹ agencies must prepare an Environmental Impact Statement (“EIS”) that describes potential consequences, evaluates alternatives, and solicits public comment.⁸⁰ Though FERC has suggested in the past that it has significant discretion over its administration of NEPA, it has so far voluntarily complied with generally applicable NEPA rules.⁸¹

⁷⁵ 42 U.S.C. §§ 4321–47.

⁷⁶ See Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL’Y 293, 293 (2010) (calling NEPA “the Magna Carta of environmental law”).

⁷⁷ See Brenda Mallory, *NEPA 50 Years Later: Where Do We Go From Here? (Looking Back to Move Forward)*, ENV’T L. INST. (Dec. 20, 2019), <https://www.eli.org/vibrant-environment-blog/nepa-50-years-later-where-do-we-go-here-looking-back-move-forward> [<https://perma.cc/89GZ-4Z55>]; see also 40 C.F.R. 1505.2 (2022). Mallory is now the Chair of the Council on Environmental Quality, which implements the regulations associated with NEPA. Jeff Turrentine, *Biden’s Choice for the Council on Environmental Quality: Brenda Mallory*, NRDC (Apr. 14, 2021), <https://www.nrdc.org/stories/bidens-choice-council-environmental-quality-brenda-mallory> [<https://perma.cc/5L45-D7BV>].

⁷⁸ 40 C.F.R. § 1502.4 (2021).

⁷⁹ 40 C.F.R. § 1501.3 (2021).

⁸⁰ 40 C.F.R. §§ 1502.12–1502.17 (2021).

⁸¹ NEPA regulations are promulgated by the Council on Environmental Quality (CEQ) and are generally binding on all federal agencies. When it first issued its NEPA regulations in 1987, FERC noted that because it was “voluntarily complying with CEQ regulations,” there was “no need” to decide whether such regulations are binding “as a matter of law.” *Regulations Implementing the National Environmental Policy Act of 1969*, 52 Fed. Reg. 47,897, 47,898 (Dec. 17, 1987). Commenters had argued that they were. See *id.* FERC further

NEPA also requires agencies to “look before they leap” by engaging in public participation.⁸² The designers of this approach hoped this would encourage communities to ask for and respond to local knowledge.⁸³ In the first major NEPA case, involving a proposed nuclear facility, the D.C. Circuit insisted the statute was enforceable and not a “paper tiger” that agencies could treat as discretionary or delayable.⁸⁴ But since then, courts have acknowledged that the enforceable requirements are “essentially procedural” and require little of the agency’s actual final decision.⁸⁵

2. Case Study: The Sabal Trail Pipeline

NEPA’s primacy in the federal environmental regime means that pipeline opponents often invoke it in their challenges. In 2017, the fight over the Sabal Trail Pipeline, an interstate natural gas pipeline that crosses three Southeastern states, reached the D.C. Circuit after unsuccessful challenges before FERC, which issued a PCN certificate.⁸⁶ In *Sierra Club v. FERC*, the D.C. Circuit held that NEPA’s mandate required FERC’s EIS to consider the pipeline’s potential impact on climate change.⁸⁷ Notably, this swept climate change into NEPA’s (and FERC’s) domain for the first time.⁸⁸

This climate change argument, however, was perhaps not the plaintiffs’ primary argument.⁸⁹ Much of the coverage and attention surrounding the Sabal Trail Pipeline focused on environmental justice. Over eighty percent of the pipeline’s proposed route crossed through or near environmental justice communities.⁹⁰ As the court noted, the pipeline runs through an area of

noted that “CEQ regulations by their terms are not binding on the Commission to the extent that they are inconsistent with the Commission’s statutory obligations.” *Id.* Courts before and after these statements have found that CEQ regulations do bind FERC. *See Sugarloaf Citizens Ass’n v. FERC*, 959 F.2d 508, 512 n.3 (4th Cir. 1992) (“CEQ regulations implementing NEPA . . . are binding on all federal agencies.”); *Steamboaters v. FERC*, 759 F.2d 1382, 1393 n.4 (9th Cir. 1985).

⁸² CLIFFORD VILLA, NADIA BATOOL AHMAD, REBECCA M. BRATSPIES, ROGER LIN, CLIFFORD RECHTSCHAFFEN, EILEEN P. GAUNA & CATHERINE A. O’NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 409–10 (3rd ed. 2020).

⁸³ *See* KEVIN DEGOOD, CTR. FOR AM. PROGRESS, THE BENEFITS OF NEPA: HOW ENVIRONMENTAL REVIEW EMPOWERS COMMUNITIES AND PRODUCES BETTER PROJECTS 2 (2018), <https://www.americanprogress.org/wp-content/uploads/2018/01/BenefitsNEPA-brief-3.pdf> [<https://perma.cc/FS7A-LHGL>].

⁸⁴ *See* Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

⁸⁵ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

⁸⁶ *See* Elly Benson, *In Major Climate Decision, D.C. Circuit Rejects Federal Approval of Sabal Trail Pipeline*, SIERRA CLUB (Aug. 28, 2017), <https://www.sierraclub.org/planet/2017/08/sabal-trail-pipeline-FERC-fracked-gas-pipeline> [<https://perma.cc/HZ2D-GJAG>].

⁸⁷ 867 F.3d 1357, 1363 (D.C. Cir. 2017).

⁸⁸ *See* Benson, *supra* note 86.

⁸⁹ *See* Sean Sullivan, ‘Environmental Justice’ at Center of Suit Against FERC’s Sabal Trail Approval, S&P GLOBAL MARKET INTELLIGENCE (Apr. 20, 2017), <https://www.spglobal.com/marketintelligence/en/news-insights/trending/4sdk3pew9m9mfx1bahewa2> [<https://perma.cc/NT85-VQKV>].

⁹⁰ *See* Benson, *supra* note 86.

Georgia with 259 hazardous waste facilities, 78 air-polluting facilities, 20 toxic-polluting facilities, and 16 water-polluting facilities.⁹¹ Residents of Albany, Georgia—a majority-Black city with respiratory health disparities⁹²—raised these concerns in the pipeline’s NEPA review, FERC’s certification process, and before the court. The cost of doing so—of commissioning studies, retaining counsel, and engaging in a protracted back-and-forth—was high: petitioners requested over \$400,000 in attorneys’ fees alone⁹³ and were ultimately awarded just over \$130,000.⁹⁴

Despite this compelling case, the D.C. Circuit held that FERC’s EIS was sufficient on this topic. Along the way, the court avoided answering what could and should have been an important legal question: “the standard for when a particular environmental effect raises an environmental-justice concern.”⁹⁵ FERC maintained throughout the proceedings that an environmental justice concern only arose if there was evidence of “disproportionately high and adverse” impacts.⁹⁶ Sierra Club argued that an environmental justice concern should arise if there is “any effect . . . regardless of its intensity, extent, or duration, if it is not beneficial and falls disproportionately on environmental-justice communities.”⁹⁷ The choice between the two interpretations has the potential to shape and define future environmental justice claims.

The court resolved the issue without choosing a standard, however, because “even if we assume [Sierra Club’s] understanding to be correct, we cannot see how this EIS was deficient.”⁹⁸ The court emphasized that NEPA’s goal is simply to “foster[] well-informed decision-making and public comment.”⁹⁹ As a result, the agency’s analysis—no matter how contested or perhaps flawed—satisfied NEPA. All that was required was that FERC “grappled with the disparate impacts of the various possible pipeline routes”—not that it addressed, avoided, or even correctly articulated them.¹⁰⁰

The court reached a similar outcome on two other issues: (1) the agency’s definition of “environmental justice community,”¹⁰¹ and (2) its failure to discuss Dougherty County’s existing environmental burdens in its

⁹¹ See *Sierra Club*, 867 F.3d at 1370–71.

⁹² See Elly Benson, *A Coronavirus Hot Spot Gets More Air Pollution*, SIERRA CLUB (Apr. 22, 2020), <https://www.sierraclub.org/articles/2020/04/coronavirus-hot-spot-gets-more-air-pollution> [<https://perma.cc/KV2E-7MK6>].

⁹³ See Motion for Att’y’s Fees by Pet. at 23, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329).

⁹⁴ Order Granting Att’y’s Fees, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329). FERC declined to grant fees for the administrative stage. *Id.*

⁹⁵ See *Sierra Club*, 867 F.3d at 1368.

⁹⁶ *Id.* (citing Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 1370.

“cumulative impacts” analysis.¹⁰² On the first issue, the court reiterated that “[t]he goal of environmental-justice analysis is satisfied once an agency recognizes and discusses a project’s impacts on predominantly-minority communities, even if it does not formally label each such community an ‘environmental justice community.’”¹⁰³ On the second, the court acknowledged that “[p]erhaps FERC could have said more,” but again found that “the discussion it undertook of the cumulative impacts of the proposed route fulfilled NEPA’s goal of guiding informed decision-making.”¹⁰⁴

In closing, the D.C. Circuit wrote that “the EIS acknowledged and considered the *substance* of all the concerns Sierra Club now raises.”¹⁰⁵ Perhaps that is true on questions of fact, but the court’s analysis failed to address the legal substance of the plaintiffs’ concerns. Despite hundreds of pages of briefs and three court decisions, the parties entered and exited without even agreeing whether environmental injustice occurred.

3. *Lessons Learned*

Sierra Club shows how a procedural approach can render substantive legal standards and definitions irrelevant. Part of the judiciary’s role in administrative law is to establish legal obligations and standards.¹⁰⁶ But under NEPA, FERC’s interaction with the substantive legal content—“environmental justice community,” “disproportionately high and adverse,” “cumulative impacts,” etc.—was so fleeting that it allowed no oversight. Even if the agency was mistaken about what constituted environmental injustice, it cleared the low bar of reviewing and writing up an assortment of facts. What it actually did with those facts—how it interpreted them—was beyond the statute and court’s concern.

This outcome cuts against the model of environmental enforcement envisioned in NEPA. The point of delegating the interpretation of a standard like “disproportionately high and adverse” or a term like “environmental justice community” to agencies is to ensure that they develop in an informed way.¹⁰⁷ But NEPA insulates these delegations to a fault. If FERC is wrong (a possibility the court acknowledges), it has no incentive to correct its error or even to engage in debate. And even if FERC is not wrong, the possibility of litigation becomes increasingly costly, extensive, and risky; all parties end up operating in a state of uncertainty. By requiring so little, this approach allows agencies to avoid performing (or at least correctly performing) the technical analyses entrusted to them. In turn, this approach imposes a signifi-

¹⁰² See *id.* at 1370–71.

¹⁰³ *Id.* at 1370.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1371.

¹⁰⁶ For example, the Administrative Procedure Act allows courts to invalidate agency actions that are “otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

¹⁰⁷ This is “fill[ing] up the details”—a long-accepted category of congressional delegation. See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

cant burden on participating communities and, contrary to congressional intent,¹⁰⁸ prevents the development of enforceable standards.

This outcome is also reflective of four major shortcomings already identified in the NEPA framework. First, the procedural approach espoused in NEPA is prospective, rendering untouchable the unjust decisions of the past.¹⁰⁹ Second, public participation timelines often inject resident input after agencies have invested so much into their proposals that it becomes impractical to reverse course.¹¹⁰ In many cases of NEPA review, agencies are essentially incentivized to defend their plans rather than consider amendments to or abandonment of them.¹¹¹ Third, NEPA's scope is subject to revision by the Council of Environmental Quality ("CEQ"). During the Trump administration, CEQ moved to, among other things, curtail consideration of "cumulative" and "indirect" environmental impacts—changes that would have dramatically undermined the ability to raise environmental justice concerns.¹¹² The Biden administration has rolled many of these changes back, but the episode underscores the instability of NEPA's already porous requirements.¹¹³ Fourth and finally, as just noted, procedural obligations are satisfied by the mere consideration of environmental justice.¹¹⁴ Agencies do not need to actively minimize, avoid, or mitigate. In the end, NEPA is a procedural policy that can only promote procedural justice. If distributive, corrective, or social injustice arises from a pipeline—or any other major federal action—NEPA provides neither remedy nor insight.

There is at least one way to tighten up procedural review. In *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, the D.C. Circuit rejected FERC's NEPA analysis for three liquefied natural gas facilities in Texas.¹¹⁵ In particular, the court found it "arbitrary" for the agency "to analyze the projects' impacts . . . only in census blocks within two miles of the project sites . . . given its determination that environmental effects from the

¹⁰⁸ See *infra* notes 231–235 and accompanying text.

¹⁰⁹ See Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T AFFS. L. REV. 601, 607 (2006).

¹¹⁰ See *id.* at 608–10.

¹¹¹ See *id.*

¹¹² See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020); Christy Goldfuss, Claire Moser & Sally Hardin, *5 Ways Trump's Latest Anti-Environmental Proposal Would Allow Fossil Fuel Companies to Bulldoze Communities*, CTR. AM. PROGRESS (Jan. 16, 2020), <https://www.americanprogress.org/article/5-ways-trumps-latest-anti-environmental-proposal-allow-fossil-fuel-companies-bulldoze-communities/> [<https://perma.cc/L3J3-RCPT>].

¹¹³ See National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022); Kelsey Brugger, *Biden Restores Climate to NEPA, Undoing Trump's Efforts*, E&E NEWS (Apr. 19, 2022), <https://www.eenews-net.ezp-prod1.hul.harvard.edu/articles/biden-restores-climate-to-nepa-undoing-trumps-efforts/> [<https://perma.cc/RQT7-TFQL>].

¹¹⁴ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978).

¹¹⁵ See 6 F.4th 1321, 1325 (D.C. Cir. 2021).

projects would extend well beyond two miles from the project sites.”¹¹⁶ Based on these “deficient” analyses, it ordered the agency to reconsider its PCN certificate grant.¹¹⁷

Vecinos thus suggests one important and appropriate role for reviewing courts: enforcing consistency. Though the extent to which agencies must act consistently is contested, “unexplained inconsistency is not permissible.”¹¹⁸ When changing course, agencies must “engage with the ‘facts and circumstances that underl[ay]’ an earlier action.”¹¹⁹ Similarly, agencies must “act consistently with [their] own commitments and practices.”¹²⁰ This requirement is helpful to environmental justice advocates, though it also demonstrates the procedural approach’s fragility. In *Vecinos*, the consistency analysis relied on the existence of the agency’s own findings. Without a requirement that agencies make such findings, a consistency requirement is toothless.

B. Cost-Benefit Analysis

The following Background subsection discusses the basics of cost-benefit analysis (“CBA”) and the vision behind it. The Case Study subsection focuses on how the federal government’s use of CBA has shaped environmental regulation and influenced attempts to rectify environmental injustice. The Lessons Learned subsection shows that the uncertainties inherent to the CBA process, the economic principles embedded in it, and perhaps the foundational assumptions underlying it are bad fits for environmental justice claims.

1. Background

While the federal environmental regime is grounded in a procedural approach, the federal regulatory regime more generally is built around cost-benefit analysis, or CBA. As its name suggests, CBA attempts to assess and evaluate the costs and benefits of a proposed agency action.¹²¹ It first requires decision makers to “assign[] economic value[]” to these costs and benefits.¹²² Armed with that information, decision-makers attempt to maximize benefits, minimize costs, or achieve some other balance of the two.¹²³

¹¹⁶ *Id.* at 1330.

¹¹⁷ *Id.* at 1331.

¹¹⁸ William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1401 (2018) (internal quotation marks and citation omitted).

¹¹⁹ *Id.* at 1401 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)).

¹²⁰ *Id.*

¹²¹ See Cass R. Sunstein, *Cost-Benefit Analysis and the Environment*, 115 ETHICS 351, 351 (2005).

¹²² See *id.* at 352.

¹²³ See *id.* at 353.

The approach's proponents argue that "[f]or certain kinds of governmental programs, the use of cost-benefit analysis is a requirement of basic rationality."¹²⁴ Because we do not have unlimited resources with which to fight oftentimes intractable problems, understanding the costs and benefits of any given action allows us to make informed decisions about when to spend (and stop spending), provides transparency and therefore accountability for decision makers, and "imposes structure on the vast discretion that is given to administrative agencies."¹²⁵ And though CBA is commonly associated with deregulatory movements, pro-regulation advocates have also argued that a reformed version of the approach can be used to convince the public that "many times, the choices are *not* tragic" and "regulation is justified."¹²⁶

CBA has been a foundational part of federal regulation for several decades¹²⁷ and, like environmental justice analysis, came to prominence after being promoted in an executive order.¹²⁸ In recent years, there have been attempts to merge its principles with environmental justice. In 2020, environmental groups testified before the EPA on the importance of incorporating environmental justice principles into the CBA analysis for proposed Clean Air Act revisions.¹²⁹ In 2022, the Biden administration announced that its social cost of carbon figures, designed to quantify downstream effects of carbon, will incorporate environmental justice considerations.¹³⁰ Similarly, FERC received comments on PCN certificate reform that utilized the language of CBA.¹³¹ Over the past few years, commentators have proposed that CBA should be specially formulated to account for the kinds of concerns

¹²⁴ RICHARD REVESZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 12 (2008).

¹²⁵ *See id.* at 12–13.

¹²⁶ *Id.* at 17, 19.

¹²⁷ *See* Sunstein, *supra* note 121, at 351.

¹²⁸ *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981). The order, simply titled "Federal regulation," required federal agencies to only take actions if "the potential benefits to society for the regulation outweigh the potential costs to society," to choose regulatory objectives that "maximize the net benefits to society," and if selecting between options, to select the one that "involv[es] the least net cost to society." *Id.*

¹²⁹ *See* Ben Levitan, Comments of Environmental Defense Fund at EPA's Public Hearing on "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," 85 Fed. Reg. 35,612 (June 11, 2020).

¹³⁰ *See* Jean Chemnick, *Here Comes the Social Cost of Carbon. Will It Address EJ?*, E&E NEWS (Feb. 10, 2022), <https://www.eenews-net.ezp-prod1.hul.harvard.edu/articles/here-comes-the-social-cost-of-carbon-will-it-address-ej/> [<https://perma.cc/Z3V8-H22B>].

¹³¹ For example, comments encouraged the agency to "classify cultural and historic losses as direct costs." SUSAN F. TIERNEY, FERC'S CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES: REVISING THE 1999 POLICY STATEMENT FOR 21ST CENTURY CONDITIONS 38 (2019), https://www.analysisgroup.com/globalassets/content/insights/publishing/revising_ferc_1999_pipeline_certification.pdf [<https://perma.cc/P9FB-RWTY>].

that drive environmental justice claims¹³² and, more directly, incorporated into FERC's decision making.¹³³

2. Case Study: OIRA

One need not speculate about how CBA plays out in the environmental and environmental justice contexts. The Office of Information and Regulatory Affairs (“OIRA”) traditionally performs a CBA for each federal agency action and, under the Obama administration, controversially turned the tide on two environmental regulatory efforts: the development of ozone standards and the disposal of coal ash.¹³⁴ Notably, both are environmental justice issues. Because ozone is exacerbated by uneven enforcement, its health impacts have escalated into an environmental injustice crisis.¹³⁵ And because coal ash is often disposed of near vulnerable communities, it too has emerged as an environmental justice flashpoint.¹³⁶

The fight over standards for ozone pollution erupted over attempts by environmentalists to obtain more health-protective limits in 2011, halfway through the five-year cycle of review for such standards.¹³⁷ The EPA's own analysis showed that a stricter standard would result in \$35–100 billion of monetized benefits, based on improvements to health.¹³⁸ The administration and agency both indicated interest in adopting the standards, calling the existing ones “legally indefensible.”¹³⁹ Despite this, the Obama administration suddenly announced in September 2011 that it was instructing the EPA to halt the process and reinstate the old limits.¹⁴⁰ The reason? According to OIRA, changing the standard before the mandatory review would produce “needless uncertainty” during a recession, and its mandate was to “minimize regulatory costs and burdens, particularly in this economically challenging time.”¹⁴¹

¹³² See generally Karl S. Coplan, *The Missing Element of Environmental Cost-Benefit Analysis: Compensation for the Loss of Regulatory Benefits*, 30 GEO. ENV'T L. REV. 281 (2018).

¹³³ See Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENV'T L. 419, 436 (2020).

¹³⁴ Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENV'T & ADMIN. L. 209, 257–68 (2012).

¹³⁵ See Juliet Eilperin & Darryl Fears, *Deadly Air Pollutant 'Disproportionately and Systematically' Harms Americans of Color, Study Finds*, WASH. POST (Apr. 28, 2021) <https://www.washingtonpost.com/climate-environment/2021/04/28/environmental-justice-pollution/> [<https://perma.cc/TD2R-STFD>].

¹³⁶ See Brian Bienkowski, *Toxic Coal Ash Hits Poor and Minority Communities Hardest*, SCI. AM. (Jan. 14, 2016) <https://www.scientificamerican.com/article/toxic-coal-ash-hits-poor-and-minority-communities-hardest/> [<https://perma.cc/X843-LZK2>].

¹³⁷ See Steinzor, *supra* note 134, at 257.

¹³⁸ *Id.* at 258.

¹³⁹ *Id.* at 257–58.

¹⁴⁰ See *id.*

¹⁴¹ *Id.* at 257–59. This mandate was rooted in an executive order issued earlier in 2011. *Id.* at 259 n.256.

Similar controversy plagued the Obama administration's efforts to regulate coal ash disposal. Coal ash is a toxic byproduct of coal power plants and a likely carcinogen.¹⁴² Despite this, it is more or less unregulated and is often disposed of in unlined, uncovered "ponds" near bodies of water used for drinking and recreation.¹⁴³ In 2009, EPA announced rules that would more strictly regulate disposal and prevent harms to human health.¹⁴⁴ A year later, in 2010, EPA abruptly changed its proposal to be significantly less protective.¹⁴⁵ OIRA again provided the reason: it was concerned that the "stigma" of increased regulation would impede coal ash reuse and recycling.¹⁴⁶ The final analysis suggested that the costs of regulation could actually outweigh benefits by over \$200 billion.¹⁴⁷

3. *Lessons Learned*

These two episodes were, in some ways, anomalies. Both of the justifications behind OIRA's actions were criticized as unusual and unjustified.¹⁴⁸ But taken together, two episodes illustrate how, more broadly, "the forty-year history of centralized White House regulatory review . . . presents compelling evidence that OIRA operates as a one-way ratchet toward weaker rules."¹⁴⁹ Instead of acting as a safeguard, critics allege, "OIRA . . . may be using cost-benefit analysis to impose its own normative preference for deregulation."¹⁵⁰

Such concerns have long dogged the use of CBA. In 1981, commentators expressed concern that "the very process of placing a monetary value on such things as human life and pristine wilderness devalues those things."¹⁵¹ Even then, there was "broad agreement that the process can be manipulated."¹⁵² Over time, these concerns and complaints have become more concrete.

The entire CBA approach is premised on the presumption that fundamental rights and matters of justice can and should be rendered in economic terms. In a way, even attempting this exercise risks demeaning or "miscon-

¹⁴² See *Mapping the Coal Ash Contamination*, EARTHJUSTICE (July 29, 2021), <https://earthjustice.org/features/coal-ash-contaminated-sites-map> [<https://perma.cc/5NCU-YQUJ>].

¹⁴³ See *id.*

¹⁴⁴ See Steinzor, *supra* note 134, at 260.

¹⁴⁵ See *id.* at 261–62.

¹⁴⁶ See *id.* at 265–68.

¹⁴⁷ See *id.* at 268. Observers also expressed concern over the possible impact of a concerted effort by industry groups to pressure the EPA. See *id.* at 262–65.

¹⁴⁸ See *id.* at 259, 266–67.

¹⁴⁹ *Id.* at 268.

¹⁵⁰ Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 75 (2006).

¹⁵¹ Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), <https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html> [<https://perma.cc/A7EN-TCAQ>].

¹⁵² *Id.*

stru[ing] the very benefits under review . . . [V]iolence and subordination [are transformed] into just another day at the market.”¹⁵³ Though environmental justice advocates are often forced to engage with CBA in their analysis, this constant pressure to describe their rights and injuries in technical or clinical terms “reflect[s] a fundamental tension in applying civil rights law.”¹⁵⁴

Even if quantification is normatively acceptable, it is not clear that it can be done accurately in this context. As one scholar notes, “[i]n an area such as environmental protection, where so many important benefits are not susceptible of quantification, or at least not with the time and resources available, a calculation that requires such quantification will leave many important features of the problem unaddressed.”¹⁵⁵ As the analysis proceeds, the challenges compound. Decision makers often must attempt to monetize the quantified costs and benefits—again, a “vexing” problem for questions of health, human well-being, and the environment.¹⁵⁶ Worse, CBA tends to “shrink[] the perceived benefits of policies that address future harms—which is exactly what many, if not most, environmental policies aim to do.”¹⁵⁷ Indeed, while the fight for stricter ozone standards, better coal ash disposal, and cleaner energy systems do produce immediate benefits, their urgency comes from the desire to safeguard the future.

The ozone standard dustup especially highlighted the uncertainties inherent to this process. There, EPA went through the effort of quantifying the potential economic benefits of its proposal, but this analysis was ultimately just one part of the malleable big picture of federal regulation. In that big picture, the much vaguer, but presumably larger, cost of “regulatory uncertainty” in a weak economy held more weight. Indeed, the regulatory climate at the time explicitly chose to focus on near-term economic recovery over uncertain future environmental progress. Those evaluating the costs and benefits of ozone standards, coal ash disposal, and pipeline development alike will reckon with these same uncertainties as they deal with nebulous, value-laden concepts like human health, environmental degradation, and the harms of racism.

Then there is the question of what one does with these figures. Unlike in the procedural approach, where quantification is (ideally) used to define a problem and guide decision making, findings from a CBA essentially dictate the result. And the mandated result uses language—maximization of benefits—that reflects only one aspect of environmental justice: distributive justice. The process of calculating and maximizing benefits, even if highly

¹⁵³ Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY, & ENV'T L. REV. 287, 296 (2019).

¹⁵⁴ Wyatt G. Sassman, *Environmental Justice as Civil Rights*, 18 RICHMOND J.L. PUB. INT. 441, 447 (2015).

¹⁵⁵ Heinzerling, *supra* note 153, at 293.

¹⁵⁶ *See id.* at 293–94.

¹⁵⁷ *Id.* at 297.

optimized and taken seriously, does nothing to ensure that voices are heard (procedural justice), that past wrongs are righted (corrective justice), or that problems beyond the analysis are addressed (social justice). Unfortunately, the CBA approach is often unable to achieve even distributive justice because it assumes that values can be sacrificed on economic grounds. Taken on its own terms, the approach collapses into a test so vague that it “shunts fairness to the side in its pursuit of overall wealth.”¹⁵⁸

The coal ash disposal controversy illustrates this disconnect. There, again, the EPA did attach numbers to its proposals and its anticipated consequences. But even if its calculations about “stigma” were accurate, the analysis was ill-equipped to grapple with the inequitable distribution of its costs and benefits beyond the overall market—or to challenge the legitimacy of a cost-effective action that perpetuated inequality. Notably, these same questions—as well as the market “uncertainty” arguments raised by the ozone standards—would likely factor into a CBA for pipeline development, a process that is intricately tied up with FERC’s evaluations of the natural gas market more generally.

Even if one treats these examples as improper or inadequate CBAs, it is not difficult to understand why the methodology often fails to promote environmental justice—and to expect that these problems will persist in the pipeline context. Such claims are the type of claims for which “willingness to pay” (WTP), a central metric of CBA, is least likely to work. Put simply, WTP is an attempt to capture the benefits of a regulation by assessing “how much money people are willing to pay to obtain the benefits or how much money they are willing to accept as compensation for forgoing the benefits.”¹⁵⁹ A close look at WTP reveals that even if OIRA had attempted good faith analyses of ozone standards or coal ash disposal rules (or if FERC had taken a closer look at the costs of pipelines), it was likely to reach unsatisfactory outcomes.

For one thing, when the stakes are high, WTP actually reflects only capacity to pay.¹⁶⁰ Generally, people are willing to pay a great deal for clean air (in the case of ozone pollution), clean water (in the case of coal ash disposal), or both (in the case of pipelines). But because environmental justice communities are often excluded or mistreated, their capacity to pay will appear misleadingly low. In fact, the complexity of calculating WTP means that economists must make unrealistic assumptions about whether people are voluntarily assuming the risks of their predicament.¹⁶¹ In instances of structural discrimination—that is, issues of social justice—this calculation does

¹⁵⁸ See *id.* at 292.

¹⁵⁹ *Id.* at 294.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 295.

not account for “other factors that might limit their ability to bargain for a better tradeoff between risk and money.”¹⁶²

CBA’s proponents acknowledge this. Professor Cass Sunstein—the head of OIRA during the Obama administration—has written that “sensible societies do not aggregate” WTP for things like race or sex discrimination, because preferences in discriminatory scenarios may actually be adaptations to deprivation.¹⁶³ Of course, environmental justice claims are necessarily claims about discrimination. This is true of pipelines, as discussed, and it was also the case for ozone exposure, which scholars have shown can be linked to historical patterns of racist redlining.¹⁶⁴ Similarly, environmental activists have alleged that coal ash disposal site selection is directly influenced by intent to discriminate against historically-Black communities.¹⁶⁵ Sunstein has also written that WTP is most useful “in cases in which the beneficiaries . . . pay all or most of its cost.”¹⁶⁶ By definition, then, most environmental justice claims limit the utility of WTP. Ozone pollution, coal ash contamination, and risky pipelines present instances in which the affected communities cannot and should not be expected to cover the cost of fixing the problem.¹⁶⁷

C. *Balancing Tests*

The following Background subsection describes the use of open-ended balancing tests and how they are incorporated into environmental law (including FERC’s new proposal). The Case Study subsection illustrates how a balancing test did not substantively improve outcomes in a pipeline permit challenge in Minnesota state court. The Lessons Learned subsection explores the ways in which balancing tests, despite their intuitive appeal, can nonetheless become an opaque and distorted lens through which to view a claim.

1. *Background*

Perhaps recognizing the limits of purely procedural approaches and cost-benefit analyses, FERC is now moving toward the use of open-ended

¹⁶² *Id.*

¹⁶³ Sunstein, *supra* note 121, at 373.

¹⁶⁴ See Alejandra Borunda, *In California, Extreme Heat and Ozone Pollution Hit Poor Communities Hardest*, NAT’L GEOGRAPHIC (May 25, 2021), <https://www.nationalgeographic.com/environment/article/-in-california-extreme-heat-and-ozone-pollution-hit-poor-communities-hardest> [https://perma.cc/3RHT-DLKV].

¹⁶⁵ See Oliver Milman, *Environmental Racism Case: EPA Rejects Alabama Town’s Claim Over Toxic Landfill*, GUARDIAN (Mar. 6, 2018), <https://www.theguardian.com/us-news/2018/mar/06/environmental-racism-alabama-landfill-civil-rights> [https://perma.cc/2UPF-7KEA].

¹⁶⁶ See Sunstein, *supra* note 121, at 377.

¹⁶⁷ Cf. Eric T. Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous With the Polluter Pays Principle*, 38 VAND. J. TRANSNAT’L L. 541, 551–55 (2005) (describing the “polluter pays” regime in Superfund remediation).

balancing. The agency's draft PCN policy lays out a "balancing test"¹⁶⁸ that "weigh[s] the public benefits of a proposal . . . against its adverse impacts."¹⁶⁹ In defining "adverse impacts," the agency lists "four major interests," including "environmental interests" and "the interests of landowners and surrounding communities, including environmental justice communities."¹⁷⁰ Notably, the test stops short of imposing anything beyond this vague balancing requirement. In keeping with its existing policy, FERC "decline[d] to adopt any bright-line standards for how we will carry out this balancing; rather, the approach must remain flexible enough for the Commission to resolve specific cases and take into account the different interests that must be considered."¹⁷¹

This approach has an intuitive appeal. NEPA itself set out as one of its goals the achievement of "a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities."¹⁷² Furthermore, balancing tests populate much of the law, including the constitutional law domains where environmental justice claims often originate.¹⁷³ In that context, the tests were devised to "facilitate[] doctrinal changes in times of social flux."¹⁷⁴ The idea was to "provide[] flexibility without sacrificing legitimacy."¹⁷⁵ No doubt FERC's decision makers have similar hopes for their balancing test, which arrives at a time when the agency is newly interested in heeding calls for environmental justice.

In fact, balancing tests lurked in the shadows of environmental advocacy for many years before FERC's recent pivot. In 2004, EPA released an environmental justice toolkit that suggested promoting environmental justice by working it into balancing tests like the Clean Air Act's New Source Review, decisions about registration of pesticides, and the Clean Water Act's public interest review.¹⁷⁶ Before that, commentators argued that the open-ended standards in modern environmental statutes were capacious enough to

¹⁶⁸ Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (Feb. 18, 2022)

¹⁶⁹ *Id.* at 14.

¹⁷⁰ *Id.* at 16. The other two interests are (1) those of the applicant's existing customers, and (2) those of other existing pipelines and their customers. *Id.*

¹⁷¹ *Id.* at 25.

¹⁷² 42 U.S.C. § 4331(b)(5).

¹⁷³ Or, at least, could originate. Environmental justice claims often implicate questions of equal protection, and, as discussed in the next section, early litigation efforts focused on these questions. More recently, such claims have become harder to make. *See also* Waterhouse, *supra* note 24; David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 N.W. L. REV. 93 (2017); Michael Daniel, *Urging the Fourteenth Amendment to Improve Environmental Justice*, 30 HUM. RTS. 4, 15 (2003) ("Equal protection of the law lies at the core of environmental justice").

¹⁷⁴ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 960 (1987).

¹⁷⁵ *Id.* at 961.

¹⁷⁶ ENV'T PROT. AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE B-17-B-57 (2004), <https://www.epa.gov/sites/default/files/2015-02/documents/ej-toolkit.pdf> [<https://perma.cc/WJ32-7JW4>].

incorporate environmental justice.¹⁷⁷ Even FERC’s original PCN process operated as a “flexible balancing process”—albeit one largely devoid of environmental considerations.¹⁷⁸ Unsurprisingly, when FERC opened rulemaking on PCN reforms, it received comments encouraging it to build on this approach by better balancing environmental justice considerations.¹⁷⁹

2. Case Study: Enbridge Line 3

While balancing reserves space for environmental justice concerns, it cannot be the end-all, be-all for environmental justice analysis. Minnesota’s state PCN analogue illustrates this. The statute formally codifies a balancing test in which a “certificate of need” for pipelines will be issued only if “the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate.”¹⁸⁰ This includes environmental impacts and environmental justice concepts.¹⁸¹

These requirements were still not enough to obtain substantive review of the Enbridge Line 3 pipeline, an oil pipeline that runs through Minnesota on its way from North Dakota to Wisconsin. Proponents of the pipeline called it a “vital energy link” that would connect sources of Canadian crude oil to the Midwestern areas (and Minnesota refineries) that demanded it.¹⁸² Opponents of the pipeline rejected these assertions and raised concerns about the impacts of abandoning the existing, damaged pipeline and of constructing and operating a new pipeline that would impact the natural and cultural resources of the nearby Ojibwe tribe.¹⁸³ They also expressed frustration with the social injustice of fossil fuel infrastructure and the procedural injustices levied on “silenced” tribal voices.¹⁸⁴ Ultimately, the state granted a certificate,¹⁸⁵ and on review, the Minnesota court of appeals was deferen-

¹⁷⁷ See generally Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGICAL L. Q.* 617 (1999).

¹⁷⁸ Statement of Policy, 88 FERC ¶ 61,227 (Sept. 15, 1999).

¹⁷⁹ See TIERNEY, *supra* note 131, at 27.

¹⁸⁰ MINN. ADMIN. R. 7853.0130(C) (2003).

¹⁸¹ *Id.* at (C)(1)–(4). In particular, (C)(2) considers “the effect . . . upon the natural and socioeconomic environments,” while (C)(4) looks at “socially beneficial uses . . . including its uses to protect or enhance environmental quality.” *Id.*

¹⁸² ENBRIDGE, LINE 3 REPLACEMENT PROJECT SUMMARY 7, [https://www.enbridge.com/~media/Enb/Documents/Projects/Line%203/ProjectHandouts/ENB_Line3_Public_Affairs_ProjectSummary.pdf](https://www.enbridge.com/~/media/Enb/Documents/Projects/Line%203/ProjectHandouts/ENB_Line3_Public_Affairs_ProjectSummary.pdf) [<https://perma.cc/CCA7-FZFR>].

¹⁸³ See generally *Issues, STOP LINE 3*, <https://www.stoline3.org/issues/> [<https://perma.cc/6KSB-M9DY>]. Opponents pointed to the troubling track record of the existing pipeline network, which had a history of documented spills, failures, and defects. See *id.* They also noted the importance of the affected ecological systems to state’s environment and the tribe’s traditional activities. See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See Sheila Regan, “We Will Not Stop”: Pipeline Opponents Ready for America’s Biggest Environmental Fight, *GUARDIAN* (June 20, 2021), <https://www.theguardian.com/us-news/2021/jun/20/line-3-pipeline-indigenous-environmental-justice> [<https://perma.cc/7QCG-AHCP>].

tial to the decision.¹⁸⁶ Emphasizing that “reasonable minds may differ regarding the balancing of societal harms,” the court concluded that the only legal question was “whether the commission’s assessment . . . is reasonable, based on the record.”¹⁸⁷ The court concluded that it was.¹⁸⁸

The majority reached this decision despite what the dissent described as three discrete problems with the state’s process: (1) an erroneous interpretation of a statutory term; (2) errors and inconsistency in its technical analyses; and (3) failure to consider several of the factors listed in the state’s balancing test.¹⁸⁹ These are similar claims to the ones raised in *Sierra Club*, but according to the majority, they too fell outside the scope of judicial review—even with a balancing test in place. Indeed, this challenge arose from a previous challenge on procedural grounds: the court had previously found the pipeline’s environmental review to be inadequate in its consideration of oil spills, and this case arose from a review of the updated review.¹⁹⁰ While application of the balancing test made such injustice more obvious to the dissent, it ultimately did not provide any additional enforceability or reviewability.

3. *Lessons Learned*

The *Enbridge Line 3* case brought to the surface two issues that balancing tests have presented in other areas of the law. First, balancing tests are difficult to review. In constitutional law, where many environmental justice arguments (like equal protection claims) originate, such tests reduce constitutional rights to “interests” and balance them against non-constitutional interests.¹⁹¹ The result is that constitutional interpretation devolves into “a general discussion of the reasonableness of governmental conduct.”¹⁹² This discounting of rights resembles the cheapening of rights in CBA, but it results in outcomes similar to those found in the procedural approach. Even though balancing tests theoretically impose more substantive requirements than procedural policies, courts reach the same answer on review—that “reasonable minds may differ,” as the Minnesota court wrote.¹⁹³

Second, balancing tests are manipulable. This is related to the first problem. Because balancing tests are difficult to review, it is hard to meaningfully critique their application.¹⁹⁴ The tests do not require decision makers to explicitly state their “underlying hierarchy of values,” and even if they do, there is no way to contest the legitimacy of those hierarchies.¹⁹⁵ In the

¹⁸⁶ See *In re Enbridge Energy*, 964 N.W.2d 173, 207 (Minn. Ct. App. 2021).

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 212–20 (Reyes, J., dissenting).

¹⁹⁰ See *id.* at 188–92.

¹⁹¹ See Aleinikoff, *supra* note 174, at 987.

¹⁹² *Id.*

¹⁹³ *In re Enbridge Energy*, 964 N.W.2d 173, 207 (Minn. Ct. App. 2021).

¹⁹⁴ See Patrick M. McFadden, *The Balancing Test*, 29 B.C.L. REV. 585, 642–43 (1988).

¹⁹⁵ *Id.* at 644.

case of pipelines, there may be reason to fear that the hierarchies underpinning the use of balancing tests are the same ones that permitted or created environmental injustice in the first place. Furthermore, because reasonable minds may differ, a second decision maker can reasonably differ from a prior one.¹⁹⁶ Thus, balancing tests “[do] not ensure, even in theory, that like cases will be treated alike, and provide no ‘guidance about what behavior is permitted and what is not.’”¹⁹⁷ In the environmental justice context, these flaws result in the same outcomes as the procedural approach: a lack of consistency or clarity for parties. In *Enbridge Line 3*, advocates called out the state for its inaccurate and inconsistent analysis. What they learned, unfortunately, was that this manipulation of the test was somewhat inherent to its design.

D. Disparate Impact

The following Background subsection describes the components of a disparate impact analysis and notes its conceptual strengths. The Case Study subsection considers a successful disparate impact claim brought by environmental justice advocates, as well as subsequent developments to the doctrine that limit its utility. The Lessons Learned subsection discusses the New Jersey Environmental Justice Law, which FERC can take as a model for incorporating disparate impact into a permitting process.

1. Background

There is another framework in the world of constitutional law that could accommodate environmental justice: the burden-shifting disparate impact test framework. This is not a new or innovative proposal. Early environmental justice suits were disparate impact suits, and advocates were optimistic about the framework’s utility.¹⁹⁸ Environmental justice advocates remain aware of its potential: one of the proposed Environmental Justice for All Act’s provisions is a revival of disparate impact.¹⁹⁹ As will be discussed, however, it is currently unavailable for many environmental justice cases because of the 2001 Supreme Court decision in *Alexander v. Sandoval*.²⁰⁰

¹⁹⁶ See *id.* at 645.

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155, 1165–78 (1999).

¹⁹⁹ Environmental Justice for All Act, S. 872, 117th Cong. §§ 4–5 (2021). The Act would also inject environmental justice more explicitly into NEPA and permitting decisions under the Clean Air and Clean Water Acts, as well as provide funding for public health initiatives and assistance programs related to clean energy transitions. See *id.*

²⁰⁰ 532 U.S. 275 (2001).

Where it does apply, the disparate impact framework is a three-part process.²⁰¹ Under this approach, a plaintiff must make a prima facie case that causally connects a specific policy or practice with a disparate impact or statistical disparity.²⁰² If the case is made, the burden shifts to the defendant—often an agency—to show that their action is “necessary to achieve one or more substantial, legitimate, non-discriminatory interests.”²⁰³ If they are successful, the burden shifts back to the plaintiff, who must show that a less discriminatory alternative exists.²⁰⁴ If the court is satisfied by the alternative, disparate impact is found, and the underlying policy or practice can be invalidated.²⁰⁵ The plaintiff is not required to prove intent.²⁰⁶

Disparate impact claims are considered an important tool in the arsenal because they address injustice that may arise from “unconscious prejudices and disguised animus that escape easy classification.”²⁰⁷ Some twenty-six federal agencies ranging from the Department of Education to the Department of Energy use the framework in determining when those receiving federal funds may be engaging in discrimination.²⁰⁸ The Supreme Court has also periodically shaped the doctrine’s form and use.²⁰⁹

2. Case Study: South Camden

A 2001 New Jersey case illustrates how this framework operates. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,²¹⁰ a federal district court vacated a state permit for an industrial cement facility, citing the state’s failure to consider the existing environmental burden on a neighborhood and the racial composition of that neighborhood.²¹¹ At the framework’s first step, the permitting agency argued that the projected emissions were per se not adverse because of their compliance with federal air pollutant limits.²¹² The court, reviewing an extensive record compiled by the plaintiffs and federal investigators, rejected this and found “that the permitting and operation of the . . . facility, when considered in the context of the current health conditions and existing environmental burdens . . . is likely to adversely affect their health to a degree that meets the standard of ‘adversity’ under Title VI.”²¹³ This finding was a mix of

²⁰¹ Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, 576 U.S. 519, 527 (2015) [hereinafter *Inclusive Communities*].

²⁰² *See id.*

²⁰³ *Id.* (quoting 24 C.F.R. § 100.500).

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.*; *see also* U.S. Dep’t of Just., Title VI Legal Manual, § 7 (2021).

²⁰⁷ *Inclusive Communities*, 576 U.S. at 540.

²⁰⁸ *See* U.S. Dep’t of Just., Title VI Legal Manual, § 7 n.3 (2021).

²⁰⁹ *See id.*

²¹⁰ 145 F. Supp. 2d 446 (D.N.J. 2001).

²¹¹ *See id.* at 451–52.

²¹² *See id.* at 485.

²¹³ *See id.* at 484–91.

factual review (drawing on agency expertise) and legal analysis (based on court experience).

At the next step, the court acknowledged that there was little guidance on determining the legitimacy of a justification but ruled that the defendants failed to provide a sufficient record.²¹⁴ Notably, the defendants argued that their actions were justified in part because they “consulted with the community.”²¹⁵ They also alleged that the “economic and social benefits” associated with the facility were necessary for the community.²¹⁶ These arguments are often enough under NEPA review, but here, the court correctly identified that the correct analysis was under Title VI and its associated precedents and regulations.²¹⁷ Presumably because the agency failed at this step, the court did not discuss alternatives.

South Camden was a short-lived win, and its aftermath explains why disparate impact is not often discussed. Less than a week after *South Camden* was decided, the Supreme Court issued its opinion in *Alexander v. Sandoval*,²¹⁸ which found that disparate impact regulations do not provide a private cause of action.²¹⁹ Thus, violations—in all cases, not just environmental ones—can only be enforced by the government and not by private parties. This functionally foreclosed environmental justice disparate impact claims as a litigation tool for activists, though as noted in the Lessons Learned, it does not affect its use as a regulatory tool.²²⁰

Lower courts have gone even further to undermine the doctrine where it does apply. In *Inclusive Communities Project, Inc. v. Lincoln Property Co.*,²²¹ the Fifth Circuit misread the Supreme Court’s decision in *Inclusive Communities* to require that a defendant cause not only the immediate harm alleged but also the underlying inequity being compounded.²²² This standard, so far only adopted in the Fifth Circuit,²²³ renders the test essentially useless for addressing environmental justice, which is built on a history of systemic injustice.

²¹⁴ See *id.* at 495–97.

²¹⁵ *Id.* at 496.

²¹⁶ *Id.*

²¹⁷ See *id.* at 496–97. The court turned to draft guidance from the EPA’s Office of Civil Rights, which required “a substantial, legitimate justification” and offered further considerations for evaluating economic benefits. See *id.*

²¹⁸ 532 U.S. 275 (2001).

²¹⁹ *Id.* at 293.

²²⁰ In a second case involving the South Camden facility and parties, the Third Circuit also foreclosed the use of § 1983 claims. See *South Camden Citizens in Action v. N.J. Dep’t of Env’t Prot.*, 274 F.3d 771, 774 (3d Cir. 2001).

²²¹ 920 F.3d 890 (5th Cir. 2019), *reh’g en banc denied*, 930 F.3d 660 (5th Cir. 2019).

²²² See *id.* at 908–09.

²²³ The Fourth Circuit has reached the opposite conclusion. See *Reyes v. Waples Mobile Home Park*, 903 F.3d 415, 423–39 (4th Cir. 2018).

3. *Lessons Learned*

Despite these losses, an echo of the disparate impact framework can still be heard today at the state level. Though over a dozen states have turned their attention to environmental justice, most are still in the early phases of planning, often with NEPA-style procedural review as the starting point.²²⁴ Interestingly, New Jersey—home to South Camden—has vaulted to the forefront with its Environmental Justice Law.²²⁵ The law starts with a procedural policy but improves on it in two crucial respects. First, the law defines its terms. It sets a standard for and identifies overburdened communities.²²⁶ It lists a number of facility types that must receive an environmental justice review before a permit will be considered.²²⁷ It also expressly names cumulative impacts as part of the analysis.²²⁸ Second, the law mandates permit denials when the review establishes a disproportionately negative impact on overburdened communities.²²⁹ This presumption can be overcome if “a new facility will serve a compelling public interest in the community where it is to be located.”²³⁰

It remains to be seen whether this will work. Terms like “compelling public interest” are fairly vague, and the “public interest” justification was advanced by the state in *South Camden* to try and justify its harmful actions. Overall, however, the law is an example of how states are deviating from the procedural model. Despite bearing superficial similarities to NEPA, New Jersey’s law requires specific findings and establishes a rebuttable presumption—a fundamentally substantive approach. In fact, taken as a whole, the law functions like the first two steps of the disparate impact test. Viewed as a model, the law shows how agencies and legislatures can use disparate impact without waiting for courts to unlock the door.

Certainly, this framework seems to provide a better starting position than the other approaches. Unlike the procedural approach, which gives agencies no incentive to refine environmental justice concepts, burden-shifting requires agencies to make three specific findings: whether there is a prima facie case, whether the challenged action is necessary and legitimate, and whether less discriminatory alternatives exist. This does not require agencies to collect or consider anything new. It simply requires them to actually decide how they use that information and to do it in a way that is transparent and reviewable. *South Camden* provided an example of this process

²²⁴ See NAT’L CONF. OF STATE LEGISLATURES, STATE AND FEDERAL ENVIRONMENTAL JUSTICE EFFORTS (2022), <https://www.ncsl-org.ezp-prod1.hul.harvard.edu/research/environment-and-natural-resources/state-and-federal-efforts-to-advance-environmental-justice.aspx> [https://perma.cc/3UUB-JEQM].

²²⁵ N.J. STAT. ANN. § 13:1D-160 (2020).

²²⁶ N.J. §§ 13:1D-158–59 (2020).

²²⁷ N.J. § 13:1D-158 (2020).

²²⁸ N.J. § 13:1D-160(3)(d) (2020).

²²⁹ N.J. § 13:1D-160(3)(c) (2020).

²³⁰ *Id.*

in action. Similarly, disparate impact sets a higher bar than the balancing approach by requiring agencies to show necessity, rather than just reasonableness. The default presumption is that environmental injustice, once shown, is per se invalid. And while disparate impact claims require the development of findings and standards, they do not demand the kind of quantification and monetization required by cost-benefit analysis.

The disparate impact framework thus achieves a more appropriate delegation of tasks between the three branches of government. Though sometimes described as a creation of courts, disparate impact was in fact the product of a “civil rights[] hybrid enforcement regime—one that lodges implementation power not just in courts, but also in agencies.”²³¹ When Congress passed the Fourteenth and Fifteenth Amendments, it declined to define discrimination.²³² That task was left to agencies, which are closer to the issues and more able to adapt to changing conceptions of equal protection.²³³ Agencies were also given enforcement power in Title VI of the Civil Rights Act of 1964, which prohibits discrimination in programs that receive federal funding.²³⁴ Essentially, “Title VI sought to unleash administrative power.”²³⁵ This arrangement falls apart when courts undertake the deferential procedural review exemplified in cases like *Sierra Club v. FERC* or engage in overzealous balancing analysis.

By contrast, disparate impact draws on the institutional competencies of courts and agencies. The framework presents courts with three discrete opportunities to review agency action. While agencies would still be the first to consider what constitutes a prima facie case, necessity, or reasonable alternative, courts could play a substantive role in evaluating their decisions. Again, in *South Camden*, the court was able to participate in the analysis by reviewing the record to answer the types of questions that it could address.

IV. RECOMMENDATIONS

This brief survey underscores what a complex problem FERC faces. How can it use this array of regulatory tools to tackle the multifaceted challenge of environmental justice in pipeline permitting? While these approaches seem woefully inadequate in their current states (and when used alone), reformed and recombinant versions of them might prove to be workable. Two possibilities are worth highlighting. Importantly, these possibilities are not mutually exclusive. FERC can use them together or at different points in its permitting process. It can also use one or the other as a stopgap while it waits for longer-term legislative action.

²³¹ Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 127 (2014).

²³² See *id.* at 135–39.

²³³ See *id.*

²³⁴ See *id.*

²³⁵ *Id.* at 138.

A. *Improving the Status Quo*

First, FERC can improve on the procedural and balancing approaches in a way that provides regulatory cues to courts about how to effectively review their work. Left unchecked, procedural requirements and balancing tests produce manipulable, unreviewable decisions. *Vecinos* was one example of how courts can be prompted to actually hold agencies accountable.²³⁶ In that case, the agency's own finding provided a foothold for the court. To facilitate this, FERC's new PCN policy should be detailed about what factors and findings go into its analysis. It should also commit to making actual findings for each and to utilizing them in predictable ways. In response, courts should lean into their roles as enforcers of consistency. Under this model, FERC gets one free pass in the first instance—say, in *Sierra Club*—but in every instance thereafter, it is supposed to build a body of consistent and reasonable definitions.²³⁷ While this approach still prioritizes procedural justice, the substance of the resulting tests can incorporate other aspects of environmental justice. For example, the factors can include a proposed project's distribution of benefits and burdens; potential to rectify past injustices associated with a pipeline project (like in the case of *Enbridge 3*, which involved abandoning an existing pipeline); and interrelationships with other structural issues like climate change, the labor workforce, or profit-sharing.

In this scenario (and the next), cost-benefit analysis might not retain its dominant position in the regulatory regime. However, it can survive—as pro-regulation advocates have suggested—as a useful decision making tool and a kind of general guardrail. FERC can still limit itself to granting permits where the projected benefits outweigh the projected costs, and it can still seek to quantify those benefits and costs in a way that accounts for their economic values. It would simply undertake and utilize this analysis in a way that better reflects goals beyond the simple maximization of short-term benefit.

B. *Reviving Disparate Impact*

Second, FERC can adopt the disparate impact framework as its internal regulatory framework for deciding if a PCN certificate should be denied on environmental justice grounds. As inspiration, it could look to New Jersey's Environmental Justice Law. Under this approach, once parties have established a *prima facie* case that a pipeline will cause environmental injustice, the agency's default stance should be that the pipeline will not be approved. From there, it should fall on the pipeline's proponents to prove that it is

²³⁶ See *supra*, notes 118–120 and accompanying text.

²³⁷ Of course, there is no guarantee that the resulting case law will be favorable to pipeline opponents. Still, having shared standards and definitions should allow advocates to be more efficient and targeted when making challenges or seeking change.

actually necessary—a more demanding test than the current “convenience” analysis and ideally more stringent than the “compelling public interest” test. And even if that is established, opponents of the pipeline should then—going beyond New Jersey’s law—have an opportunity to propose alternative ways of meeting the energy demands associated with the project.

Importantly, FERC should do this in a formal way through binding rules and regulations, which are—in contrast to general policy statements like the current FERC guidance—legally binding and judicially reviewable.²³⁸ Because Supreme Court jurisprudence requires agencies to follow their own rules and regulations, this essentially creates a cause of action for private parties even with *Sandoval* in place.²³⁹ If it follows these formal procedures, FERC should clarify that claims can be predicated on long-standing, historical patterns of discrimination, even if FERC did not cause those patterns. Otherwise, an aggressive judiciary could render disparate impact dead on arrival.

Ultimately, this approach would come closest to promoting all aspects of environmental justice. By requiring agencies to make findings, it captures the procedural justice benefits of a NEPA-style approach and gives parties an early, open shot at making their voices heard. And by rooting out disparate impacts, it gets at the distributive injustices underlying much environmental injustice. Though the doctrine alone cannot singlehandedly achieve corrective or social justice, its enforceability and default position against disparate impacts give advocates tools with which to pursue those aspects of environmental justice. Furthermore, its final two steps—showing necessity and evaluating alternatives—revolve around findings broad enough to encompass information about past injustice and future goals.

V. CONCLUSION

Pipelines are problematic. In the long-term, they exacerbate a growing climate catastrophe with short-sighted energy planning. In the short-term, they pollute and otherwise threaten the stability of vulnerable communities. FERC has largely failed to wrestle with the implications of permitting these pipelines, but it seems more interested than ever in tackling these big questions. The approach—or approaches—it takes moving forward will have an enormous impact on environmental justice. In this Note, I have suggested that FERC should implement a more rigorous version of its current approach

²³⁸ See JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW 6–17 (2016), <https://sgp.fas.org/cts/misc/R44468.pdf> [<https://perma.cc/2XB5-6Z7C>].

²³⁹ This so-called *Accardi* principle, named after the 1954 case from which it originated, does not have a clear source. See generally Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 571–87 (2006). Though modern courts are applying *Accardi* more strictly, it has historically “provide[d] a basis for judicial review in circumstances where review would otherwise be unavailable or at least doubtful.” *Id.* at 591.

while also reviving the disparate impact framework. With these safeguards in place, FERC will actually have a shot at contributing to environmental justice through its work. Without them, FERC will be vulnerable to attacks by industry groups, skeptical courts, a hostile executive branch, and perhaps above all, future iterations of itself.

