

2023

## Putting the Public in Public Transit: A Proposed Amendment to the Citizen Participation Regulations Implementing the National Environmental Policy Act

Sofia Johnson

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### Recommended Citation

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Available at: <https://ir.lawnet.fordham.edu/ulj/vol50/iss2/4>

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**PUTTING THE PUBLIC IN PUBLIC TRANSIT:  
A PROPOSED AMENDMENT TO THE CITIZEN  
PARTICIPATION REGULATIONS  
IMPLEMENTING THE NATIONAL  
ENVIRONMENTAL POLICY ACT**

*Sofia Johnson*\*

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### INTRODUCTION

It was a September evening in Beverly Hills, California, and the Roxbury Park Community Center was filled with people.<sup>1</sup> So full, in fact, that the Center had to accommodate an overflow room.<sup>2</sup> Cameras rolled so people outside the Center could tune in to the proceedings.<sup>3</sup> At 6:15 PM, Jody Litvak, the presider, had to remind people in the room to quiet down for the

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1. See L.A. CNTY. METRO. TRANSP. AUTH., FINAL ENV’T IMPACT STATEMENT/ENV’T IMPACT REPORT—VOLUME 1 H-5.4-2, H-5.4-7 (2012).

2. See *id.* at H-5.4-7.

3. See *id.*

recording.<sup>4</sup> The public hearing about the proposed subway extension for the Los Angeles Metro (“Metro”) was about to begin.<sup>5</sup>

Ms. Litvak first reminded the attendees of the meeting’s structure: participants were given two minutes to speak about the proposed subway extension’s newly-released Draft Environmental Impact Statement.<sup>6</sup> To comply with the National Environmental Policy Act (NEPA), the Los Angeles County Metropolitan Transportation Authority (LACMTA) had to issue such a statement and hear the public’s reaction.<sup>7</sup> Any comments the public wanted to get on the record were welcome.<sup>8</sup> The Metro would take these comments into consideration as it prepared its final environmental report and subsequent decision about the subway proposal.<sup>9</sup>

One by one, residents stood up and voiced their opposition to the subway line extension.<sup>10</sup> One commenter called the Draft Environmental Impact Statement “slanted,” saying that the Metro “lost all [its] credibility.”<sup>11</sup> Another pleaded with the Metro, “Please don’t do this. Be respectful. Be good. Do good.”<sup>12</sup> When one commenter’s time ran up, another commenter interjected, “[t]his is ridiculous. You don’t want to listen.”<sup>13</sup> One resident simply said, “[t]his project is a farce. That’s where it belongs,” indicating something the transcript did not catch.<sup>14</sup> LACMTA provided a detailed written response to each comment in its Final Environmental Impact Statement,<sup>15</sup> but did not change its subway route proposal in response.<sup>16</sup> Bitter lawsuits followed, lasting years and costing millions of dollars.<sup>17</sup>

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4. *See id.*

5. *See id.*

6. *See id.* at H-5.4-8.

7. *See infra* Section I.B.

8. *See* L.A. CNTY. METRO. TRANSP. AUTH., *supra* note 1, at H-5.4-13.

9. *See id.* at H-5.4-13–14.

10. *See generally id.*

11. *Id.* at H-5.4-71.

12. *Id.* at H-5.4-152.

13. *Id.* at H-5.4-168.

14. *Id.* at H-5.4-159.

15. *See generally id.*

16. *See* L.A. CNTY. METRO. TRANSP. AUTH., RECORD OF DECISION—ATTACHMENT C 4 (2012) (responding to concerns raised by the City of Beverly Hills and finding “no substantial changes or significant new circumstances or information that would require supplemental environmental review”).

17. *See* Elijah Chiland, *Beverly Hills Oversight Committee Questions Use of \$15M in Bond Money to Fight Metro’s Subway to the Westside*, CURBED L.A. (July 29, 2019, 8:11 AM), <https://la.curbed.com/2019/7/29/8932166/beverly-hills-purple-line-lawsuits-cost> [<https://perma.cc/8WXX-CPTT>]; Joe Linton, *Court Sides with Metro on Beverly Hills Lawsuit, Again*, STREETS BLOG L.A. (May 18, 2020), <https://la.streetsblog.org/2020/05/18/court-sides-with-metro-on-beverly-hills-subway-lawsuit-again/> [<https://perma.cc/HS47-V4XJ>].

Local opposition to public transit proposals is commonplace.<sup>18</sup> Tense public hearings on such proposals are also frequent. These hearings, however, are a fixture of NEPA.

The initial objective of NEPA was to require agencies to consider local environmental concerns, and to think twice before implementing federally funded projects.<sup>19</sup> The law was therefore designed to encourage environmentally responsible decision making.<sup>20</sup> Over 50 years later, however, NEPA has swelled into an administrative behemoth.<sup>21</sup> Compliance with the statute adds years of delay and piles of paperwork to government initiatives.<sup>22</sup> Meanwhile, many consider NEPA's rules that require public input to be performative, condescending, and a barrier to progress.<sup>23</sup>

Proposals to reform NEPA are frequent.<sup>24</sup> The last two presidential administrations promulgated rules to try to fix the statute.<sup>25</sup> Reform goals, however, often conflict with one another. Amendments adopt a give-and-take stance; improving one aspect of NEPA, particularly its public input regulations, entrenches the statute's flaws elsewhere.

The problem of transit deserts highlights the failings of these failed reform efforts. Transit deserts are communities that lack accessible transit options and yet, paradoxically, depend heavily on mass transit to get from place to place.<sup>26</sup> Transit deserts are pervasive throughout the United States, and they have profound detrimental effects on local economies, public health, and

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18. See Audrey G. McFarlane, *Black Transit: When Public Transportation Decision-Making Leads to Negative Economic Development*, 106 IOWA L. REV. 2369, 2385 (2021).

19. See National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–47).

20. See, e.g., James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENV'T L.J. 74, 76 (2003).

21. See COUNCIL ON ENV'T QUALITY, LENGTH OF ENV'T IMPACT STATEMENTS (2013–2018) 1 (2020).

22. See Tripp & Alley, *supra* note 20, at 83.

23. See *id.* at 81–84; *infra* Section I.C.

24. See Tripp & Alley, *supra* note 20, at 75 (“[D]espite this position as one of the most fundamental and ubiquitous federal environmental statutes, NEPA is under fire from all sides.”).

25. See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. §§ 1500–08, 1515–18) [hereinafter *2020 NEPA Regulations*] (promulgating rules to streamline and limit NEPA); National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022) (to be codified at 40 C.F.R. §§ 1502, 1507–08) [hereinafter *2022 NEPA Regulations*] (enacting regulations to reverse some of the Trump Administrations's 2020 changes).

26. See Junfeng Jiao & Maxwell Dillivan, *Transit Deserts: The Gap Between Demand and Supply*, 16 J. PUB. TRANSP. 23, 24 (2013).

upward mobility.<sup>27</sup> The best way to alleviate transit deserts is to quickly build more transit infrastructure, specifically to benefit the most disenfranchised and vulnerable communities.<sup>28</sup>

Any infrastructure project (including those in transit deserts) must first go through NEPA's environmental review processes.<sup>29</sup> Currently, NEPA's public participation regulations obstruct the swift development that transit deserts desperately need. A procedural change to these regulations, however, can shrink this obstacle, making the environmental review process both more efficient and equitable. This Note proposes amending the regulations governing NEPA's public participation policy to diminish the number of transit deserts. Specifically, this Note proposes changes that will allow more opportunities for public input early in environmental review and restrict the participation channels towards the end, after substantial work has already been completed. Under these rules, public input will be both more meaningful and more streamlined, leading to more transit options in areas where they are most needed.

Part I of this Note explores the phenomenon of transit deserts, the environmental review regulations that govern infrastructure projects, and the two junctures at which these regulations require public participation. It also discusses the critiques of these environmental review regulations and the tension among those critiques. Part II focuses on the public participation aspects of NEPA's implementation rules, showcasing both the drawbacks of too much public input and the perils of no input at all. Part III proposes a change to these participation rules that threads the needle between efficiency and equity. Part III also suggests strategies to implement this amendment, with an eye towards environmental justice.

## I. TRANSIT DESERTS AND THE ENVIRONMENTAL REVIEW NECESSARY TO FIX THEM

This Part pairs two intractable problems: a spatial phenomenon common to American cities with significant social justice implications, and a landmark law that seemingly creates as many problems as it aims to solve. Section I.A provides background on transit deserts, the policies that created

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27. See Junfeng Jiao & Nicole McGrath, *Stranded in Our Own Communities: Transit Deserts Make It Hard for People to Find Jobs and Stay Healthy*, CONVERSATION (July 25, 2017, 9:53 PM), <https://theconversation.com/stranded-in-our-own-communities-transit-deserts-make-it-hard-for-people-to-find-jobs-and-stay-healthy-77450> [https://perma.cc/QJH3-J4A5].

28. See Jesus M. Barajas & Anne Brown, *Not Minding the Gap: Does Ride-Hailing Serve Transit Deserts?*, 90 J. TRANSP. GEOGRAPHY 1, 11 (2021); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1205 (2003).

29. See *infra* Section I.B.

them, and the legal roadblocks to solving them. Section I.B explores one of these roadblocks: NEPA's public participation requirements. Section I.C discusses critiques of NEPA, and recent efforts to amend the statute. This Section also discusses the shortcomings of these reform proposals in the context of transit deserts.

### A. How We Got Here: Transit Deserts in the United States

The United States is no stranger to substandard public transit.<sup>30</sup> A 1999 survey from the Department of Commerce found that over half of American families have no public transit options nearby.<sup>31</sup> The percentage of households with satisfactory public transit options is even smaller, a meager 28.8%.<sup>32</sup> Yet poor transit numbers were not always a foregone conclusion. In the beginning of the twentieth century, most American cities had public transit systems.<sup>33</sup> American city-dwellers in the 1920s enjoyed access to 17,000 miles of streetcar routes nationwide.<sup>34</sup>

As cars became more popular, this heyday quickly faded away. Governments at the state and federal level began subsidizing maintenance costs for roads, but not streetcar services.<sup>35</sup> Streetcars became dependent on fare prices to operate; when city contracts limited fares to five cents per ride, streetcar companies struggled to stay in business.<sup>36</sup> By 1919, a third of American streetcar companies had gone bankrupt.<sup>37</sup> Americans began flocking to the automobile as their primary mode of transport, a trend that

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30. See, e.g., Jonathan English, *Why Did America Give Up on Mass Transit? (Don't Blame Cars.)*, BLOOMBERG CITYLAB (Aug. 31, 2018, 11:38 AM), <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story> [<https://perma.cc/UMM8-6KLV>].

31. See Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 347 (2000).

32. See *id.*

33. See Stanley Mallach, *The Origins of the Decline of Urban Mass Transportation in the United States, 1890–1930*, 8 URBANISM PAST & PRESENT 1, 1 (1979) (describing how “mass transit dominated urban passenger transportation”).

34. See Joseph Stromberg, *The Real Reason Behind the Demise of America's Once-Mighty Streetcars*, VOX (May 7, 2015, 9:20 AM), <https://www.vox.com/2015/5/7/8562007/streetcar-history-demise> [<https://perma.cc/3B2U-VR2L>].

35. See Lewyn, *supra* note 31, at 312–13.

36. See Stromberg, *supra* note 34 (describing the contracts that streetcar companies made with city governments “for the explicit right to operate as a monopoly in that city,” and the concessions that streetcar companies consequently agreed to).

37. See Lewyn, *supra* note 31, at 313.

never reversed.<sup>38</sup> Transit systems across the country fell into disrepair.<sup>39</sup> The results of these policies are still felt today: a 2018 study of 52 major American cities found transit deserts in each city observed.<sup>40</sup>

The term “transit desert” comes from urban planning scholars Junfeng Jiao and Maxwell Dillivan.<sup>41</sup> A transit desert is an area with a significant gap between people’s need for transit and the available transit options.<sup>42</sup> People who depend on public transit, according to Jiao and Dillivan, constitute “a significant portion of mass transit riders.”<sup>43</sup>

While limited transit options contribute to transit deserts,<sup>44</sup> scarcity does not tell the whole story.<sup>45</sup> Transit deserts occur when people who have no choice but to take public transit lack options for doing so.<sup>46</sup> Generally, people who depend on public transit are older, poorer, and more likely to be disabled.<sup>47</sup> Residents of transit deserts, therefore, have fewer resources and are more likely to belong to marginalized communities.<sup>48</sup>

Legal decisions and policies that favored the development of cars and created incentives for people to move away from cities contributed to the issue of transit deserts.<sup>49</sup> The Federal Highway Act, passed in 1921, earmarked over 200,000 miles of road for federal funds.<sup>50</sup> 35 years later, the Interstate Highway Act allowed the federal government to allocate \$26

38. See Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 52 (2006) (“In 1945, public transit accounted for over thirty percent of all urban passenger miles traveled, but fifty years later, the figure had dropped to barely two percent.”).

39. See Stromberg, *supra* note 34.

40. See Junfeng Jiao & Chris Bischak, *People are Stranded in ‘Transit Deserts’ in Dozens of US Cities*, CONVERSATION (Mar. 14, 2018, 10:26 AM), <https://theconversation.com/people-are-stranded-in-transit-deserts-in-dozens-of-us-cities-92722> [<https://perma.cc/G8WG-JU7L>].

41. See Jiao & Dillivan, *supra* note 26, at 23.

42. See *id.*

43. *Id.* at 24.

44. See Javad Jomehpour Chahar Aman & Janille Smith-Colin, *Transit Deserts: Equity Analysis of Public Transit Accessibility*, 89 J. TRANSP. GEOGRAPHY 1, 3, 7 (2020).

45. See *id.* at 7 (arguing how “availability of transit infrastructure and the allocation of vehicles for service may not be sufficient to characterize the lack of access to opportunity created by transit deserts”).

46. See *id.* at 1.

47. See Jiao & Dillivan, *supra* note 26, at 25.

48. See *id.*

49. See Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1268 (2020); Joseph Stromberg, *The Real Reason American Public Transportation is Such a Disaster*, VOX (Aug. 10, 2015, 5:49 PM), <https://www.vox.com/2015/8/10/9118199/public-transportation-subway-buses> [<https://perma.cc/86JS-C29A>].

50. See Lewyn, *supra* note 31, at 313 (“By contrast, most transit systems were privately owned, received no government assistance, and paid taxes to support the highway system and other government functions.”).



billion towards an interstate highway system.<sup>51</sup> Transit development received no such financial assistance.<sup>52</sup> Additionally, federal housing policies encouraged relocation to the suburbs, away from high-density city centers.<sup>53</sup> These laws made transit more inaccessible and entrenched American inequalities.<sup>54</sup>

Even today, the political capital of the suburbs has an outsize influence on urban planning.<sup>55</sup> State and federal budget allocations reflect this disproportionate prioritization.<sup>56</sup> In the beginning of the twenty-first century, the United States allocated 80% of its transportation costs to highway development, reserving only 20% of funds for public transportation.<sup>57</sup> The transit projects that do receive funding focus their priorities on attracting affluent suburban riders at the expense of projects that would benefit low-income “captive riders.”<sup>58</sup>

Living in a transit desert hampers social mobility.<sup>59</sup> Urban residents who lack means to travel around the city have fewer employment opportunities.<sup>60</sup> Without transit options, many people have “no safe or affordable way to get to work.”<sup>61</sup> In poorer urban areas, the problem is more severe: many people are cut off from basic stepping stones to economic sufficiency because “the majority of entry-level jobs are not transit accessible.”<sup>62</sup>

51. See Archer, *supra* note 49, at 1273.

52. See *id.*

53. See Bezdek, *supra* note 38, at 53.

54. See Bullard, *supra* note 28, at 1205 (“Race and class dynamics operate to isolate many low-income and people of color central city residents from expanding suburban job centers.”).

55. See Jiao & Dillivan, *supra* note 26, at 25.

56. See Bullard, *supra* note 28, at 1186 (“Follow the transportation dollars and one can tell who is important and who is not.”).

57. See *id.*

58. See *id.* at 1189, 1197 (noting the “reverse robin hood” policy of many transit systems where poorer, transit-dependent city-dwellers end up subsidizing transit for wealthier riders). A “captive rider” differs from a “discretionary rider” in that a captive rider is more likely to be low-income and depend on public transit services, while a wealthier discretionary rider uses mass transit at their convenience. See Mark Garrett & Brian Taylor, *Reconsidering Social Equity in Public Transit*, 13 BERKELEY PLAN. J. 6, 7, 23 (1999).

59. See Jiao & McGrath, *supra* note 27.

60. See Richard Briffault, *Our Localism Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 438 (1990) (noting that lack of transit “contributes to the ever-widening income gap between city and suburb”).

61. Christina Stacy et al., *The Unequal Commute*, URB. INST. (Oct. 6, 2020), <https://www.urban.org/features/unequal-commute> [<https://perma.cc/6GKD-H4SF>]. In California, for example, fewer than 10% of jobs in the state are within an hour’s commute on public transit, making jobs inaccessible for residents who cannot afford a car. See Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L. & POL’Y 21, 53 (2018).

62. See Lewyn, *supra* note 31, at 348.

In addition to economic problems,<sup>63</sup> transit deserts also have public health consequences.<sup>64</sup> Lack of transit options means that more people rely on cars to get where they need to go, leading to higher rates of air pollution in transit deserts.<sup>65</sup> This decreased air quality leads to higher rates of diseases such as asthma.<sup>66</sup> More vehicles on the road also increases the likelihood of traffic accidents.<sup>67</sup> For people without cars, public mass transit provides access to vital public services such as education and health care.<sup>68</sup> People living in transit deserts are surrounded by more health risks, and fewer means to access health care.<sup>69</sup>

Transit deserts compound existing social inequities.<sup>70</sup> People of color and people with lower incomes are more likely to be transit-dependent.<sup>71</sup> At the same time, these demographic groups are less likely to live near adequate public transit.<sup>72</sup> Addressing transit deserts, therefore, becomes an urgent matter of social justice.<sup>73</sup> Reducing transit deserts would provide more opportunities to shed systemic inequities.<sup>74</sup>

63. See Jiao & McGrath, *supra* note 27.

64. See *id.*

65. See Bullard, *supra* note 28, at 1202.

66. See *id.* at 1203.

67. See *id.* at 1206.

68. See *id.* at 1183.

69. See Jiao & McGrath, *supra* note 27; Julianne Cuba, *Report: Racial and Economic Inequities in Transit Affect Accessibility to Jobs, Healthcare*, STREETS BLOG NYC (June 18, 2021), <https://nyc.streetsblog.org/2021/06/18/report-racial-and-economic-inequities-in-transit-affect-accessibility-to-jobs-healthcare/> [<https://perma.cc/BX2B-7PAD>] (describing how New York City residents without a car have longer transit times to access pharmacies, urgent care centers, and hospitals).

70. See Bullard, *supra* note 28, at 1191 (“Lack of car ownership and inadequate public transit service in many central cities and metropolitan regions with a high proportion of ‘captive’ transit dependents exacerbate social, economic, and racial isolation, especially for low-income people of color — residents who already have limited transportation options.”).

71. See *id.* at 1190 (noting that “[i]n urban areas, African Americans and Latinos comprise over 54% of transit users (62% of bus riders, 35% of subway riders, and 29% of commuter rail riders),” and that “African Americans are almost six times as likely as whites to use transit to get around”).

72. See Corinne Ramey, *America’s Unfair Rules of the Road: How Our Transportation System Discriminates Against the Most Vulnerable*, SLATE (Feb. 27, 2015), <https://slate.com/news-and-politics/2015/02/americas-transportation-system-discriminates-against-minorities-and-poor-federal-funding-for-roads-buses-and-mass-transit-still-segregates-americans.html> [<https://perma.cc/2759-PTT3>] (“Nationally, the United States remains a country where many forms of transportation are effectively still segregated — whites and minorities ride different kinds of transportation, resulting in an unequal ability to reach jobs, education, and a better life.”).

73. See Barajas & Brown, *supra* note 28, at 1.

74. See Jiao & Dillivan, *supra* note 26, at 24–25.

Building more transit infrastructure remains the best solution to the problem of transit deserts.<sup>75</sup> A 2018 study by Jiao and Chris Bischak contemplated the possibility of other services, such as rideshares, as alternatives or supplements to public transit, where such transit is unavailable.<sup>76</sup> However, research suggests that rideshares do not offer a meaningful transit desert solution.<sup>77</sup> Studies of ride-hailing services in Chicago and New York City found that ride-hailing trips were concentrated in wealthier neighborhoods with fewer transit-dependent populations, and that lower-income neighborhoods used these services less.<sup>78</sup> Although explanations for this pattern are still unknown, one argument is that ride-sharing is unaffordable for people in low-income neighborhoods.<sup>79</sup>

Financial investment in public transportation has the potential to “bring new life and revitalization [to cities].”<sup>80</sup> Fortunately, federal funding for public transit infrastructure is on the horizon.<sup>81</sup> The Infrastructure Investment and Jobs Act,<sup>82</sup> signed into law in November 2021, allocates nearly \$70 billion in funding for public transit, in both urban and rural areas across the country.<sup>83</sup> This amounts to a 40% increase over current levels of federal funding.<sup>84</sup> While this legislation does not solve the problem of transit

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75. See Barajas & Brown, *supra* note 28 (“From an environmental and economic equity perspective, investment in high-quality, frequent, reliable transit is preferable to a solution that encourages predominantly single-rider trips in areas of low service but relatively high need.”).

76. See Jiao & Bischak, *supra* note 40.

77. See Barajas & Brown, *supra* note 28.

78. See *id.*

79. See *id.*

80. Bullard, *supra* note 28.

81. See Rodney Slater, *Now is Our Opportunity to do Public Transit Differently*, NEWSWEEK (Apr. 15, 2021, 6:00 AM), <https://www.newsweek.com/now-our-opportunity-do-public-transit-differently-opinion-1583402> [<https://perma.cc/J43H-G5ZK>] (explaining that the American Jobs Plan introduced by President Biden and Secretary Buttigieg is an important step in public transit funding and transformation).

82. Pub. L. 117-58, 135 Stat. 429.

83. See, e.g., Mallory Box, *What’s in the Infrastructure Bill for Transit*, CITIZENS FOR MOD. TRANSIT (Dec. 15, 2021), <https://cmt-stl.org/whats-in-the-infrastructure-bill-for-transit> [<https://perma.cc/F8LN-6478>]; *Infrastructure Investment and Jobs Act*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 8, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/infrastructure-investment-and-jobs-act.aspx> [<https://perma.cc/584J-7CJU>].

84. See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 83.

deserts,<sup>85</sup> many people see it as a meaningful step in the right direction.<sup>86</sup> Supporters of the Act hope that this increase in funding will give cities the opportunity to not just build infrastructure, but to do so in a more equitable manner.<sup>87</sup>

### B. How We'll Get There: Environmental Review and Public Participation Requirements

Any solution to a transit desert must go through NEPA and its regulations. NEPA is a sweeping statute with a goal to “assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing environment.”<sup>88</sup> NEPA requires every federal agency to prepare “a detailed statement” on the environmental impacts of projects before implementing them.<sup>89</sup> This statement must list detrimental effects, potential alternatives to the project, and strategies to mitigate these detrimental effects.<sup>90</sup>

NEPA serves as the organic statute for the Council on Environmental Quality (CEQ), a federal agency tasked with crafting regulations to implement NEPA’s statutory goals.<sup>91</sup> CEQ procedural requirements vary depending on the type of project a federal agency wishes to complete.<sup>92</sup> A more complex project, with a greater likelihood of severe environmental consequences, will likely require a more comprehensive environmental

85. See *APTA Urges Congress to Fully Fund the Infrastructure Investment and Jobs Act in Transportation Appropriations Act*, AM. PUB. TRANSP. ASS’N (Feb. 11, 2022), <https://www.apta.com/news-publications/press-releases/releases/apta-urges-congress-to-fully-fund-the-infrastructure-investment-and-jobs-act-in-transportation-appropriations-act> [<https://perma.cc/TLR4-SS2E>].

86. See Shyam Kannan et al., *Leverage the IIJA to Prepare Your Transit Agency for the Next Generation of Mobility*, HDR INC. (May 17, 2022), <https://www.hdrinc.com/insights/leverage-iija-prepare-your-transit-agency-next-generation-mobility> [<https://perma.cc/QTN5-84E8>] (calling the infrastructure Investment and Jobs Act a “once-in-a-generation infusion” of funds to “advanc[e] transit in underserved communities”).

87. See Matthew Robare, *Infrastructure Investment and Jobs Act Will Lay the Groundwork for America’s Future*, URBAN SDK (Jan. 13, 2022), <https://www.urbansdk.com/blog/infrastructure-investment-jobs-act-iija-spending> [<https://perma.cc/ZEQ8-XFZJ>] (“The IIJA presents the nation with an opportunity to reinvent itself with regards to mass transit, reaping all the benefits that come along with it.”); Stephen Coleman Kenny, *Transit Funding in the Infrastructure Bill: What Can It Do For Me?*, TRANSP. FOR AM. BLOG (Jan. 25, 2022), <https://t4america.org/2022/01/25/transit-funding-infrastructure-bill/> [<https://perma.cc/X2NU-GTDJ>].

88. 42 U.S.C. § 4331(b)(3).

89. *Id.* § 4332(c).

90. *See id.*

91. *See id.* § 4342.

92. *See* 40 C.F.R. § 1501.3 (2022).

review.<sup>93</sup> The agency has discretion to evaluate the type of stringency required.<sup>94</sup>

Per CEQ regulation, environmental review falls into three tiers.<sup>95</sup> The first tier is a Categorical Exclusion (CE), which applies to certain enumerated projects that do not need any environmental review.<sup>96</sup> The middle tier is an Environmental Assessment (EA), for projects outside the realm of a CE, yet are unlikely to lead to a significant environmental impact.<sup>97</sup> An EA requires a brief investigation into the environmental impacts, resulting either in a report of the environmental impacts,<sup>98</sup> or a Finding of No Significant Impact (FONSI).<sup>99</sup> If, after an EA, the agency determines that a project will have significant environmental effects, then the agency must prepare an Environmental Impact Statement (EIS), the most stringent form of environmental review available.<sup>100</sup>

As part of this environmental review, any new transit development must first receive the input of the public.<sup>101</sup> Public participation is encoded into CEQ regulations.<sup>102</sup> However, NEPA's statutory language does not mention public participation.<sup>103</sup> Furthermore, public participation does not appear in NEPA's legislative history.<sup>104</sup> The first mention of public input comes from a 1970 executive order that required agencies to "develop procedures" to ensure public notice in "the fullest practicable provision[s,]" including provisions for public hearings "whenever appropriate"<sup>105</sup>

Today, public involvement is considered "essential" to the NEPA environmental process.<sup>106</sup> Nicholas C. Yost, the former general counsel for the CEQ and the drafter of the CEQ's original regulations, referred to the

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93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* § 1501.4.

97. *See id.* § 1501.3.

98. *See id.* § 1501.5.

99. *See id.* § 1501.6.

100. *See id.* § 1501.3.

101. *See* Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENV'T AFF. L. REV. 263, 278 (1999).

102. *See id.*

103. *See* Wyatt G. Sassman, *Community Empowerment in Decarbonization: NEPA's Role*, 96 WASH. L. REV. 1511, 1534 (2021).

104. *See id.*

105. Exec. Order No 11,514, 35 Fed. Reg. 4,247 (Mar. 7, 1970).

106. *See* Sassman, *supra* note 103.

public participation requirements a matter of “good public policy.”<sup>107</sup> For Yost, public input requirements were common sense: to properly understand all the environmental impacts for a project, an agency must listen to the concerns of the people living near an affected area.<sup>108</sup>

The public participation requirements of NEPA vary depending on the level of necessary environmental review. CEs require no public participation.<sup>109</sup> EAs have discretionary public input requirements; the CEQ requires agencies to involve local governments and affected parties in agencies only “to the extent practicable.”<sup>110</sup> If the EA results in a FONSI, no public review is necessary, with a specific exception.<sup>111</sup> Even without a full EIS, a FONSI nevertheless requires a comment period if the project is “without precedent,” or if it would typically require an EIS.<sup>112</sup>

EIS’s require public participation twice: after the period of scoping, and after a Draft Environmental Impact Statement (DEIS) has been published.<sup>113</sup> During the scoping process, agencies identify “the significant issues” that will appear in an EIS.<sup>114</sup> CEQ regulations require agencies to “invite the participation” of “likely affected or interested persons” during scoping, encouraging them to hold public meetings and distribute information.<sup>115</sup> After the scoping period ends, an agency must publish a Notice of Intent, informing the public that the agency will prepare an EIS and describing the scoping process the agency undertook.<sup>116</sup>

Once the first draft of the EIS is complete, the mandatory comment process begins.<sup>117</sup> This is the second opportunity for public participation. The agency must publish the DEIS and solicit feedback from the affected public.<sup>118</sup> At the close of this period, the agency must “consider substantive comments timely submitted.”<sup>119</sup> The final EIS, published after the close of

107. Nicholas C. Yost, *The National Environmental Policy Act*, in PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 36, 36 (ABA Pub. Servs. Div., Standing Comm. on Env’t L. ed., 1994).

108. See Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as A Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 133–34 (2013).

109. See 40 C.F.R. § 1501.4 (2022).

110. *Id.* § 1501.5.

111. See *id.* § 1501.6.

112. *Id.*

113. See *id.* §§ 1501.9, 1503.1.

114. *Id.* § 1501.9.

115. See *id.*

116. See *id.*

117. See *id.* § 1503.1.

118. See *id.*

119. *Id.* § 1503.4.

the comment period, should contain responses to the comments.<sup>120</sup> While the regulations do not require a response to each comment, they do require the agency to explain why certain comments “do not warrant” an agency’s further attention.<sup>121</sup>

At the end of the NEPA process, the agency issues a Record of Decision (ROD) based on its review, where the agency informs the public the course of action it chooses to take.<sup>122</sup> Similar to the FEIS, the ROD requires the agency to affirm that it has considered the comments it received throughout the environmental review.<sup>123</sup>

### C. Where Do We Go Next? Critiques of NEPA and Tensions in Calls for Reform

NEPA is a cornerstone in environmental law.<sup>124</sup> Nevertheless, the statute has plenty of critics.<sup>125</sup> From the perspective of government agencies and industry advocates, NEPA stops progress in its tracks.<sup>126</sup> Its cumbersome requirements make many developments impossible.<sup>127</sup> Social necessities like affordable housing are often stopped in their tracks by NEPA’s procedural web.<sup>128</sup> On the other hand, environmental critics consider NEPA a statute without any real bite.<sup>129</sup> While NEPA purports to encourage a policy of conservation, environmentalists argue that the design of the statute does little to halt environmentally harmful projects or impose any accountability on the people spearheading them.<sup>130</sup>

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120. *See id.* § 1502.9.

121. *Id.* § 1503.4.

122. *See id.* § 1505.2.

123. *See id.*

124. *See* Jonathan Hahn, *Trump’s NEPA Rollback Favors More Pollution and Less Community Input*, SIERRA CLUB (July 17, 2020), <https://www.sierraclub.org/sierra/trumps-nepa-rollback-favors-more-pollution-and-less-community-input> [https://perma.cc/T4XF-FD6W] (calling NEPA “one of the nation’s bedrock environmental laws”).

125. *See* Tripp & Alley, *supra* note 20, at 81.

126. *See id.*; *see also* Eli Dourado, *Why Are We So Slow Today? Five Amazing Facts About Environmental Review*, CTR. FOR GROWTH & OPPORTUNITY (Mar. 12, 2020), <https://www.thecgo.org/benchmark/why-are-we-so-slow-today/> [https://perma.cc/4JXJ-NAYW].

127. *See* letter from Libby Schaaf, Mayor of Oakland, CA, to Federal Highway Administration (Apr. 13, 2022) (on file with Law & The Environment Blog) (characterizing NEPA as slowing and discouraging solutions to Oakland’s affordable housing crisis).

128. *See id.*

129. *See* Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA in the Ninth Circuit*, 2 WASH. J. ENV’T L. & POL’Y 193, 198 n.15 (2012).

130. *See* Fromherz, *supra* note 108, at 139.

The most prominent critique of NEPA is its cost: the procedures required by the statute are too expensive and take far too much time.<sup>131</sup> A 2020 study from the CEQ found that between the years of 2013–18, an average EIS stretched 661 pages and took four and a half years to complete.<sup>132</sup> Although very few programs require a full EIS each year,<sup>133</sup> the EIS process forms a cloud over any federal government project.<sup>134</sup>

The threat of litigation over an EIS looms over many agencies.<sup>135</sup> The Administrative Procedure Act leaves environmental review procedures “open to attack” by judicial review.<sup>136</sup> An insufficient EIS is the claim behind many lawsuits.<sup>137</sup> As a result, many agencies feel the need to “bulletproof” an EIS — not for the sake of the review, but to avoid a lengthy courtroom process.<sup>138</sup> This litigation insulation stretches out environmental review.<sup>139</sup> When such a watertight review is practically unfeasible, an agency has incentives to sidestep the NEPA process whenever possible.<sup>140</sup>

Meanwhile, others argue that the NEPA regulations are still too lenient.<sup>141</sup> Despite the ubiquity of environmental review procedures, these procedures seldom lead to more environmentally conscious decision making.<sup>142</sup> This is partially due to the limited availability of substantive judicial review.<sup>143</sup> The Supreme Court has interpreted NEPA’s requirement to consider alternatives “essentially procedural.”<sup>144</sup> While an agency must weigh environmental impacts in its review, it need not give environmental concerns any particular

131. See Tripp & Alley, *supra* note 20, at 81.

132. See COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 21.

133. See Bradley C. Karkkainen, *Toward A Smarter Nepa: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 909–10 (2002) (“Federal agencies annually conduct approximately 50,000 EAs leading to ‘Findings of No Significant Impact’ (or ‘FONSIs,’ in the NEPA jargon); in contrast, only about 500 EISs are produced each year.”).

134. See Jerusalem Demsas, *Community Input Is Bad, Actually*, ATL. MONTHLY (Apr. 22, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/local-government-community-input-housing-public-transportation/629625/> [<https://perma.cc/3K77-23EU>].

135. See Karkkainen, *supra* note 133, at 917–18.

136. Tripp & Alley, *supra* note 20, at 82–83 (noting that the environmental review process leaves agencies “open to attack under the Administrative Procedure Act (APA) and other administrative laws”).

137. See Karkkainen, *supra* note 133, at 917–18.

138. See, e.g., *id.* at 918; Tripp & Alley, *supra* note 20, at 83.

139. See Tripp & Alley, *supra* note 20, at 83.

140. See Karkkainen, *supra* note 133, at 919.

141. See Tripp & Alley, *supra* note 20, at 84 (citations omitted).

142. See David R. Hodas, *The Role of Law in Defining Sustainable Development: Nepa Reconsidered*, 3 WIDENER L. SYMP. J. 1, 37 (1998).

143. See *id.* at 37–38.

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



weight.<sup>145</sup> An agency satisfies its statutory requirements so long as it “considers” environmental impacts.<sup>146</sup> Moreover, courts defer to agencies in determining what level of consideration is appropriate.<sup>147</sup> For many people, this interpretation hollows out the statute.<sup>148</sup>

NEPA’s critics have one point of agreement: despite all the resources that are spent to comply with the statute, NEPA does not effectively achieve its goals.<sup>149</sup> The need for statutory reform has wide recognition.<sup>150</sup> Any consensus, however, ends there.<sup>151</sup> Where one coalition sees an idea to fix NEPA, another sees an opportunity to exacerbate its shortcomings.

The tension between proposed NEPA reforms came to a head in 2020, when the Trump administration promulgated sweeping changes to CEQ regulations.<sup>152</sup> These new rules set page and time limits for environmental review processes, added an exhaustion requirement for any litigant seeking judicial review, and directed agencies to not consider “indirect” effects of climate change in their analyses.<sup>153</sup> These reforms also prevented agencies from adding more steps to their own environmental reviews.<sup>154</sup> The stated policy behind these changes was to streamline infrastructure development and prevent projects from drowning in paperwork.<sup>155</sup>

Condemnation of these new regulations was swift.<sup>156</sup> Environmental groups claimed that the new regulations weakened environmental

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145. See *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

146. See *id.*

147. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837–38 (D.C. Cir. 1972) (holding agencies’ consideration of environmental impacts to a “reasonableness” standard and rejecting the argument that a court should “interject itself” into the agencies’ discretionary choices).

148. See Karkkainen, *supra* note 133, at 917 (characterizing the information that NEPA generates as “quantity, not quality”).

149. See Eli Dourado, *Clearing a Path for New Infrastructure*, CITY J. (Jan. 21, 2020), <https://www.city-journal.org/environmental-review-process-reform> [<https://perma.cc/Q5XJ-F7P8>] (“All that paperwork might be worth the trouble if NEPA really protected the environment. But environmental review is a procedural hurdle, not a conservationist step.”).

150. See Todd S. Aagaard, *A Functional Approach to Risks and Uncertainties Under NEPA*, 1 MICH. J. ENV’T & ADMIN. L. 87, 93 (2012) (describing the “common theme” in NEPA criticisms amidst “differences in perspective” amongst critics).

151. See *id.* (noting the different imperatives “between these two different groups of critics, one of which thinks NEPA should do more and one of which thinks NEPA should do less”).

152. See *2020 NEPA Regulations*, *supra* note 25.

153. *Id.*

154. See *id.*

155. See generally *id.*

156. See, e.g., David J. Hayes, *It’s Not NEPA, It’s You*, N.Y.U. SLATE ENERGY & ENV’T IMPACT CTR. (Aug. 6, 2020), <https://stateimpactcenter.org/insights/its-not-nepa-its-you> [<https://perma.cc/DQ9G-BM3U>] (calling the 2020 NEPA reforms “destructive”).

protections and denied the public the ability to make their voices heard.<sup>157</sup> Pulling back any of the procedural safeguards that NEPA had in place would result in environmental catastrophe, hurting marginalized communities just so the fossil fuel industry could maximize profits.<sup>158</sup> The very heart of NEPA, according to these critics, was “under attack.”<sup>159</sup>

Not everyone shared these concerns.<sup>160</sup> Renewable energy activists supported the streamlined regulations.<sup>161</sup> Faster and less strict environmental review would lead to more renewable energy infrastructure.<sup>162</sup> The urgencies of climate change and the need for new innovations in energy infrastructure, activists argued, demanded such reforms.<sup>163</sup>

Some — but not all — of these reforms were short-lived.<sup>164</sup> The CEQ published a final rule in April 2022 reversing some of these changes, namely by restoring requirements to consider indirect impacts of climate change; these changes went into effect May 2022.<sup>165</sup> Beyond these changes, the law around NEPA remains in flux. In August 2022, the United States Senate voted to overturn these same new regulations.<sup>166</sup> Meanwhile, the Biden

157. See Hahn, *supra* note 124.

158. See Stephen Lee et al., *Trump’s NEPA Changes Imperil Communities of Color, Advocates Say*, BLOOMBERG L. (July 16, 2020), <https://news.bloomberglaw.com/environment-and-energy/trumps-nepa-changes-imperil-communities-of-color-advocates-say> [<https://perma.cc/8689-WJT2>].

159. James Goodwin & Rob Verchick, *A Legal Pillar of Environmental Justice is Now Under Attack*, HILL (Sept. 1, 2021), <https://thehill.com/opinion/energy-environment/570320-a-half-century-old-environmental-justice-bill-is-under-attack/> [<https://perma.cc/9TZ8-76R6>].

160. See David R. Hill, *Biden Should Keep Trump’s Reforms to the National Environmental Policy Act*, COLUM. CLIMATE SCH. (Mar. 2, 2021), <https://news.climate.columbia.edu/2021/03/02/biden-trump-nepa-reforms/> [<https://perma.cc/W4D9-DD4P>].

161. See Sassman, *supra* note 103, at 1518.

162. See *id.*

163. See Hill, *supra* note 160; Noah Kazis, *Legal Ease: How NIMBYs Use ‘Environmental Review’ to Stop Green Projects*, STREETS BLOG NYC (Aug. 16, 2019), <https://nyc.streetsblog.org/2019/08/16/legal-ease-how-nimbys-use-environmental-review-to-stop-green-projects/> [<https://perma.cc/Z6QB-S4H3>] (“Environmental review tends to protect the status quo, and right now, the status quo isn’t working for our planet.”).

164. See James M. Auslander et al., *CEQ Reverses First Set of Trump-Era NEPA Regulatory Reforms*, NAT. L. REV. (Apr. 21, 2022), <https://www.natlawreview.com/article/ceq-reverses-first-set-trump-era-nepa-regulatory-reforms> [<https://perma.cc/VSP2-L9NL>].

165. See *2022 NEPA Regulations*, *supra* note 25.

166. See *In Surprise Vote, Senate to Overturn Biden Environment Rule*, PBS (Aug. 4, 2022, 7:55 PM), <https://www.pbs.org/newshour/politics/in-surprise-vote-senate-to-overturn-biden-environmental-rule> [<https://perma.cc/R5V7-TA6A>] (noting that the Senate’s vote “sends the measure to the Democratic-controlled House, where it is unlikely to move forward”).

administration has promised to enact more changes to NEPA in the future.<sup>167</sup> The CEQ introduced interim guidance in January 2023, governing NEPA review of greenhouse gas emissions.<sup>168</sup> Other anticipated changes aim to “help ensure full and fair public involvement in the environmental review process,” and to restore the CEQ’s regulations to their earlier status as a procedural floor.<sup>169</sup>

Just like the Trump administration’s reforms, the Biden administration’s proposal to change NEPA faces criticism from multiple directions.<sup>170</sup> Each political maneuver to change NEPA adopts a familiar push-pull stance. Advocates for less strict reforms cite the need to develop infrastructure to save marginalized communities from government neglect.<sup>171</sup> Advocates for stricter reforms cite a need to consider the voices of local communities to protect them from brazen government action and lack of foresight.<sup>172</sup>

The problem of transit deserts provides a unique lens into the strengths and weakness of NEPA’s public participation requirements. Transit deserts require both fast infrastructure development and attunement to the needs of communities in transit desert areas.<sup>173</sup> For many people, transit is vital quality-of-life infrastructure.<sup>174</sup> Delays in transit development mean stalled

167. See Dino Grandoni & Anna Phillips, *Biden Restores Climate Safeguards in Key Environmental Law, Reversing Trump*, WASH. POST (Apr. 19, 2022, 9:53 AM), <https://www.washingtonpost.com/climate-environment/2022/04/19/biden-nepa-climate-trump/> [<https://perma.cc/ULZ2-GCSM>].

168. See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1,196 (Jan. 9, 2023).

169. Press Release, The White House, CEQ Proposes to Restore Basic Community Safeguards during Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/> [<https://perma.cc/8RVW-KQGM>].

170. Compare Adam Carlesco, *Biden Administration Dodges Any Real Reform of Trump’s NEPA Rules*, FOOD & WATER WATCH (Nov. 12, 2021), <https://www.foodandwaterwatch.org/2021/11/12/biden-administration-dodges-any-real-reform-of-trumps-nepa-rules/> [<https://perma.cc/7K8M-72ZR>] (arguing that the 2021 reforms do not do enough to mitigate the damages of the 2020 rule, which must be repealed in its entirety), with Washington Newline, *Proposed Rollback of NEPA Reforms Conflicts with Biden’s Transportation Infrastructure Goals*, AM. ROAD & TRANSP. BUILDERS ASS’N (Oct. 21, 2021), <https://newline.artba.org/2021/10/21/proposed-rollback-nepa/> [<https://perma.cc/DU4Y-TJ2E>] (noting that the NEPA reforms run “counter to the Biden administration’s own support for a massive increase in transportation infrastructure investment”).

171. See Lee et al., *supra* note 158.

172. See Goodwin & Verchick, *supra* note 159 (dismissing critics’ concerns about developing sustainable infrastructure as a “cynical ploy”).

173. See *supra* Section I.A.

174. See Mikayla Bouchard, *Transit Emerges as Crucial to Escaping Poverty*, N.Y. TIMES (May 7, 2015), <https://www.nytimes.com/2015/05/07/upshot/transportation-emerges-as-crucial-to-escaping-poverty.html> [<https://perma.cc/K7VN-JNDC>] (“The relationship

benefits and missed opportunities that transit could bring. At the same time, without community input, projects risk ignoring the needs of people this infrastructure would most directly impact. Because federal transit projects must undergo NEPA review prior to implementation, NEPA's regulations must address both goals at once. An agency must be both efficient in its environmental review and robust in its public participation.

## II. BETWEEN A ROCK AND A HARD PLACE: NEPA'S PUBLIC PARTICIPATION PROBLEMS

The role of public input is at the crux of any substantial NEPA reform proposal.<sup>175</sup> The Supreme Court considers communication with the public to be one of NEPA's "twin aims."<sup>176</sup> The opportunity for the public to voice their concerns about a government project is frequently touted as one of NEPA's greatest strengths.<sup>177</sup> At the same time, soliciting public input adds time and expense to the environmental review process.<sup>178</sup> A successful reform to NEPA must examine and address the role that public input plays in the process head on.

This Part discusses the pros and cons of NEPA's public participation regulations. Section II.A examines how public input hinders mass transit projects. Too much public input increases the cost of transit development, inadvertently amplifies longstanding prejudices against public transit, and allows for weaponized litigation. Section II.B describes the opposite concerns, highlighting the necessity of public input in government projects for marginalized communities, and the devastating consequences when that public input is denied.

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between transportation and social mobility is stronger than that between mobility and several other factors, like crime, elementary-school test scores or the percentage of two-parent families in a community.”).

175. See Sassman, *supra* note 103, at 1519 (noting the “competing visions of communities’ role in a reformed NEPA process”).

176. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted) (characterizing NEPA as a statute that “places upon [an] agency *the obligation to consider every significant aspect* of the environmental impact of a proposed action” and “ensures that [the] agency will *inform the public* that it has indeed considered environmental concerns in its decision-making process”) (emphasis added).

177. See Fromherz, *supra* note 108, at 134 (“While public involvement improves some projects—taking them from marginal to reasonable—the specter of public involvement screens out truly bad ideas from ever being proposed in the first place.”)

178. See Leah Brooks & Zachary Liscow, *Infrastructure Costs* (Dec. 1, 2021) (working paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3428675](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428675) [<https://perma.cc/B5VB-6NWN>] (explaining how infrastructure costs have increased in the twentieth century as the “citizen voice,” or public involvement in government projects, has expanded).

**A. Too Much Participation: How NEPA's Public Participation Requirements Block Transit Development**

*1. The Extended Controversy Over the Los Angeles Purple Line Extension*

In 2014, Los Angeles broke ground on a new subway line extension.<sup>179</sup> Previously terminating at Wilshire Center, the planned route would eventually stretch Los Angeles' Metro to the Westwood Hospital.<sup>180</sup> This extended subway, once complete, would connect Los Angeles residents to the region's second largest job center by train.<sup>181</sup>

As part of its environmental review, LACMTA took pains to reach out to populations that would live near the new stations and invited them to comment.<sup>182</sup> When commuters did not attend evening public meetings, LACMTA held additional meetings during lunch hours.<sup>183</sup> To reach people outside of public hearings, the agency sent mail postcards to every resident near a proposed subway station, and established a social media presence.<sup>184</sup> To hear from retail and service workers, LACMTA contacted local businesses to learn about the commute needs of their employees.<sup>185</sup> Throughout this process, LACMTA asked varied questions about public priorities, station locations, and construction concerns.<sup>186</sup>

Despite this extensive outreach, LACMTA still faced two lawsuits about the subway extension, in which the petitioners from Beverly Hills claimed that the project's environmental review did not hear their many, vociferous concerns.<sup>187</sup> The proposed purple line tunnel would travel near oil wells and

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179. See *supra* notes 1–17 and accompanying text; see also Dave Sotero, *Long Wait Over: Groundbreaking Held for Wilshire Boulevard Subway Extension*, METRO (Nov. 10, 2014), <https://thesource.metro.net/2014/11/10/long-wait-is-over-groundbreaking-ceremony-today-for-subway-extension-under-wilshire-boulevard/> [<https://perma.cc/H7X4-Q3EE>].

180. See *Purple (D Line) Extension Transit Project*, METRO, <https://www.metro.net/projects/westside/> [<https://perma.cc/9A86-RND2>] (last visited Oct. 10, 2022).

181. See *id.*

182. See SCOTT GIERING, PUBLIC PARTICIPATION STRATEGIES FOR TRANSIT, A SYNTHESIS OF TRANSIT PRACTICE 22 (Transp. Research Bd. ed., 2011) (noting the “vast institutional knowledge” that LACMTA utilized in its public outreach).

183. See *id.* at 23.

184. See *id.*

185. See *id.* at 24.

186. See *id.*

187. See First Amended Complaint for Writ of Mandate and Complaint at 7, *Beverly Hills v. Los Angeles County Metropolitan Transportation Authority* (Filed May 30, 2012) (No. BS137607); *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSx), 2016 U.S. Dist. LEXIS 192573, at \*61 (C.D. Cal. Feb. 1, 2016).

underneath Beverly Hills High School.<sup>188</sup> The litigants claimed that subway construction could disturb the oil wells, putting students in danger.<sup>189</sup> Moreover, they argued that LACMTA unlawfully ignored these issues after concerned residents raised them during the required comment period.<sup>190</sup> Finally, according to the plaintiffs, the FEIS released new information on which the litigants could not properly comment.<sup>191</sup>

## 2. *The All-Encompassing Design of NEPA's Public Comment Regulations*

The uproar over the purple line metro extension struck many people as absurd.<sup>192</sup> A tunnel that goes underneath a building is a common practice and seldom causes problems.<sup>193</sup> Yet, the public comment provisions in NEPA welcome this very type of concern. Under the regulations, agencies must solicit commentary from “[anyone] who may be interested in or affected by” a proposed project, after a DEIS.<sup>194</sup>

The phrase “who may be affected” by an environmental project has no clear definition. Many studies of public participation do not define “the public,” and use different terms interchangeably to describe the same amorphous concept.<sup>195</sup> Some scholars, arguing for a broad definition, note that the public is not a homogenous entity, and that environmental decisions “affect virtually everybody’s quality of life.”<sup>196</sup> Others contend that effective environmental assessments require a narrow definition of the

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188. See First Amended Complaint for Writ of Mandate and Complaint at 3, *Beverly Hills v. Los Angeles County Metropolitan Transportation Authority* (Filed May 30, 2012) (No. BS137607).

189. See *id.* at 1.

190. See *id.* at 14.

191. See *id.* at 7–8.

192. See The Times Editorial Board, *Editorial: Seriously, Beverly Hills? Cut Your Purple Line Hysteria, Already*, L.A. TIMES (Oct. 12, 2018, 4:10 AM PT), <https://www.latimes.com/opinion/editorials/la-ed-beverly-hills-purple-line-20181012-story.html> [<https://perma.cc/KV8R-74MQ>].

193. See *id.*

194. See 40 C.F.R. § 1503.1 (2022).

195. See Anne N. Glucker et al., *Public Participation in Environmental Impact Assessment: Why, Who, and How*, 43 J. ENV'T IMPACT ASSESSMENT REV. 104, 109 (2013).

196. See *id.*

public, to save time and resources.<sup>197</sup> In practice, most project leaders take a broad approach.<sup>198</sup>

Public transportation complicates the traditional perception of the affected “public.” Transit takes people from one physical space to another. Affected people include people living next to the actual transportation infrastructure, current transit users, and anyone who might use transit in the future, no matter where they live. For this reason, transit agencies cast a wide net in their public engagement, seeking input from transit users and non-users alike.<sup>199</sup>

This expansive definition of “the public” has its challenges. The more people included in environmental reviews, the more viewpoints are bound to arise.<sup>200</sup> While diverse perspectives ultimately benefits agencies, the task of meeting a wider variety of expectations becomes more difficult.<sup>201</sup> If desires are not met, frustrations are likely to swell, which could depress participation in environmental reviews in the future.<sup>202</sup>

### 3. *The Exclusionary Effects of Public Participation*

Unequal power dynamics from different segments of the public further complicate a wide regulatory scheme. Generally, homeowners and long-standing residents (or residents with more resources) will enjoy more weight in public participation.<sup>203</sup> For communities with fewer resources, many avenues for public participation are inaccessible.<sup>204</sup> With fewer opportunities to participate in environmental review, the views of marginalized communities are often “systematically devalued or completely excluded.”<sup>205</sup>

NEPA’s regulations inadvertently encourage asymmetric representation in who participates. The language requiring public input in NEPA

197. *See, e.g., id.* (citations omitted) (noting some scholars’ concerns that “it would be inefficient and a waste of time and money to include the full scope of public actors in all environmental controversies”); Sheila R. Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENV’T L. REV. 459, 486 (2002) (observing a desire to balance broad inclusion in participation with other, practical concerns).

198. *See, e.g.,* Glucker et al., *supra* note 195.

199. *See* GIERING, *supra* note 182, at 13.

200. *See* Glucker et al., *supra* note 195.

201. *See id.*

202. *See id.*

203. *See* Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Processes*, 90 FORDHAM L. REV. 1083, 1126 (2021) (“In practice, the community meeting is for homeowners, not renters, and [a renter] knows [she] is not welcome.”).

204. *See* Foster, *supra* note 197, at 470–71.

205. *Id.* at 470.

regulations is broad.<sup>206</sup> While agencies must engage the public in some manner, outreach methods are largely up to each agency.<sup>207</sup> A requirement to “affirmatively solici[t] comments” does not specify how those comments must be solicited.<sup>208</sup> The regulations do not even provide best practices.<sup>209</sup> As such, the agency is free to set its own terms for effective public outreach.<sup>210</sup> This freedom means that agencies vary in the processes and resources they use to solicit the public.<sup>211</sup> Common methods of public outreach include invitations to submit written comments, public meetings, and conference calls.<sup>212</sup> Agencies seek this participation by placing notices in newspapers, the Federal Register, or on their website.<sup>213</sup>

Many methods of public outreach inadvertently exclude marginalized communities from the participation process.<sup>214</sup> Publishing invitations to comment in the Federal Register is restricted to those groups of people with the resources to read the Federal Register in the first place.<sup>215</sup> While publishing in local newspapers mitigates this trouble, publication remains a passive form of outreach. Nevertheless, because passive outreach satisfies the public input requirement, agencies lack incentives to ensure that affected communities have read or understood official communications.

While public meetings guarantee an audience, the logistical challenges of a public hearing can still render them inaccessible.<sup>216</sup> Location and timing

206. See 40 C.F.R. § 1503.1 (2022).

207. See *id.*

208. *Id.*

209. See *id.*

210. See *id.*

211. See NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 42–43 (Thomas Dietz & Paul C. Stern eds., 2008) (“Since 2000, some agencies seem to have retained or even increased their commitment to public participation, while in others, formal requirements and institutional mechanisms such as advisory councils remain in place but are given little funding and attention by decision makers.”).

212. *How Citizens Can Comment and Participate in the National Environmental Policy Act Process*, ENV’T PROT. AGENCY (Oct. 5, 2022), <https://www.epa.gov/nepa/how-citizens-can-comment-and-participate-national-environmental-policy-act-process> [<https://perma.cc/A5SV-U4WR>].

213. *Id.*

214. See John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J. ENV’T L. 169, 196 (1999).

215. See *id.* at 204.

216. See Caron Chess & Kristen Purcell, *Public Participation and the Environment: Do We Know What Works?*, 33 ENV’T SCI. & TECH. 2685, 2688 (1999) (citations omitted) (“[A]gencies have undercut effectiveness of public meetings through poor outreach to potential participants, limited provision of technical information, procedures that disempower citizens, unwillingness to accommodate discussion of social issues, and timing hearings to be held after a decision has been made or late in the decision-making process.”).



are both key: many public hearings are scheduled at inconvenient times, or in locations that are arduous to reach.<sup>217</sup> Without transport access to a public meeting, many people will not be able to attend even if they wanted to.<sup>218</sup> Transit deserts exacerbate this problem: the people who are most likely to live in transit deserts are least likely to be able to easily reach the location of a public hearing.<sup>219</sup>

The content of participation procedures itself can also exclude public input. People who do not speak English may be unable to weigh in on a DEIS if invitations to comment are only published in English-language publications, or if only English speakers attend public meetings.<sup>220</sup> Absent active work on the agency's part to engage the public in multiple languages, the agency loses the input — and the perspectives — of people without English proficiency.<sup>221</sup>

The highly technical nature of environmental impact reports can also exclude some people from public participation.<sup>222</sup> Environmental reviews are likely to contain scientific terms and complex jargon.<sup>223</sup> Without the necessary education to understand the subject matter, an environmental review can be incomprehensible.<sup>224</sup> Participants in public meetings about environmental issues can feel “patronized” by the government's procedures.<sup>225</sup> In turn, agencies commonly believe that the public lacks the necessary expertise to adequately comment on a project.<sup>226</sup> This exacerbates community feelings of patronization.<sup>227</sup>

These exclusionary impacts are not employed out of malice or prejudice, but are rather an unintended consequence of cost-cutting measures. Public participation significantly adds to the cost of infrastructure development.<sup>228</sup> If an agency must work to connect with hard-to-reach communities, the

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217. See Duncan, Jr., *supra* note 214, at 194.

218. See Fromherz, *supra* note 108, at 145.

219. See *id.* (noting that lack of access to cars and buses can prevent some people from attending a public meeting, even if the meeting is held in an otherwise convenient location).

220. See Duncan, Jr., *supra* note 214, at 198.

221. See GIERING, *supra* note 182, at 14–15 (noting the “difficulty” transit agencies frequently have reaching communities with limited English proficiency).

222. See Perkins Spyke, *supra* note 101, at 274.

223. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. UNIV. L. REV. 173, 225 (1997) (describing the risk of “information overload” from “heavy scientific jargon”).

224. See *id.* (explaining how technical environmental review prevents “meaningful dialogue about an [environmental impact statement's] substance”).

225. See Chess & Purcell, *supra* note 216, at 2686.

226. See Chiara Armeni, *Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms*, 28 J. ENV'T L. 415, 415–16 (2016).

227. See *id.*

228. See Brooks & Liscow, *supra* note 178, at 20–21.

necessary time and effort for a comprehensive, equitable outreach increases. The extra costs associated with public input incentivize agencies to accept low hanging fruit and perform the minimum outreach that the regulations require.

4. *Not Underneath My Backyard: How Anti-Transit Sentiments Dominate Public Participation*

Agency efforts that only engage in surface level outreach inadvertently limit public participation to people with financial resources. Wealthier people have an easier time getting to meetings.<sup>229</sup> They can more easily voice their opinions and spend more time assembling coalitions of support.<sup>230</sup> Not in My Backyard (NIMBY) attitudes — held by people opposed to development in their communities — can vocally resist a project and distort an agency’s sense of public opinion.<sup>231</sup> Well-resourced opponents dominate channels of public participation.<sup>232</sup>

NIMBY sentiments do not account for all opposition to infrastructure development.<sup>233</sup> Nevertheless, NIMBY hostility to public transit has delayed many public transit projects.<sup>234</sup> Suburban communities have consistently opposed new public transportation developments near their towns, even when these suburbs supported other infrastructure facilities, because transit allows city-dwellers to travel to suburbs that were previously physically inaccessible.<sup>235</sup>

Stigmas over public transit can cast a shadow over a project, even one with widespread support. According to law professor Audrey McFarlane, public transit projects suffer from “disinvestment dynamic[s],” a phenomenon where governments remove funds from projects considered socially undesirable.<sup>236</sup> Public transit infrastructure is “racialized and classified,” seen as only benefiting a city’s Black and poor residents.<sup>237</sup> Government disinvestment in public transit infrastructure is often heralded

229. See *supra* notes 215–27 and accompanying text.

230. See Lemar, *supra* note 203, at 1101.

231. See *id.* at 1126. NIMBY is often a pejorative term. Compare *id.*, with Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV’T L. 217, 218 n.1 (2018) (rejecting a uniform characterization of NIMBYs as racist and classist).

232. See Rossi, *supra* note 223, at 240 (describing the relationship between participation increases and a “lopsided pluralist decisionmaking process”).

233. See Sassman, *supra* note 103, at 1529 (characterizing the NIMBY narrative as “simplistic”).

234. See *infra* notes 237–49 and accompanying text.

235. See Briffault, *supra* note 60, at 376.

236. See McFarlane, *supra* note 18, at 2372.

237. See *id.* at 2384.

as virtuous austerity imposed on populations deemed undeserving of resources.<sup>238</sup>

For example, in 2015, Maryland's governor Larry Hogan rejected \$900 million in federal funding to build a light rail across Baltimore.<sup>239</sup> The light rail, according to Governor Hogan, was a "wasteful boondoggle."<sup>240</sup> Despite years of planning, the governor cancelled the project just before construction began.<sup>241</sup>

Suspicion of investing in public transit is prevalent across the United States.<sup>242</sup> A 2008 study on bus routes in Tempe, Arizona found that social stigma led residents to oppose new bus routes.<sup>243</sup> Residents thought that a bus would let outsiders into Tempe, bringing crime and a decreased quality of life with them.<sup>244</sup> Elsewhere across the country, racial and class-based stigmas have similarly led to local opposition to transit projects.<sup>245</sup> Local residents view public transit as a project that benefits other people, to the detriment of the local community.<sup>246</sup> This perception leads many to conclude that public transit is a waste of taxpayer dollars.<sup>247</sup> Across the country, from coastal cities<sup>248</sup> to outer suburbs,<sup>249</sup> people continuously raise quality-of-life objections to more mass transit.

238. *See id.* at 2386.

239. *See id.* at 2371.

240. *See* Colin Campbell, *Five Years Later, Many Across Baltimore Bitterly Lament Gov. Hogan's Decision to Kill the Red Line Light Rail*, BALTIMORE SUN (Sept. 11, 2020, 6:00 AM), <https://www.baltimoresun.com/politics/bs-md-pol-red-line-five-years-20200911-b2d3knvbpngdrirbc44fd55pti-story.html> [<https://perma.cc/T5XS-SM3U>] (noting that Governor Hogan would later "shift \$736 million of state money to roads in the surrounding, predominately white counties").

241. *See* McFarlane, *supra* note 18, at 2371.

242. *See id.* at 2385 (noting examples of when stigma against public transit resulted in the demise of proposed transit projects).

243. *See* Rose Weitz, *Who's Afraid of the Big Bad Bus? NIMBYism and Popular Images of Public Transit*, 1 J. URBANISM 157, 163–64 (2008).

244. *See id.*

245. *See* McFarlane, *supra* note 18, at 2385–86.

246. *See* Weitz, *supra* note 243, at 163–64 ("Opponents uniformly assumed that neither they nor anyone they knew would use [the bus] but that 'outsiders' would.").

247. *See id.* at 164 ("Let the users pay their own fares, not the taxpayers.").

248. *See* John Toscano, *N Train Extension to LaG Scrapped*, QUEENS GAZETTE, [https://web.archive.org/web/20090525091226/http://www.qgazette.com/news/2003/0716/Front\\_Page/002.html](https://web.archive.org/web/20090525091226/http://www.qgazette.com/news/2003/0716/Front_Page/002.html) [<https://perma.cc/NC2Z-B6PN>] (last visited Oct. 10, 2022); Carrie Sisto, *Richmond Merchant Group Sues to Block Geary Bus Rapid Transit Project*, HOODLINE (Feb. 15, 2017), <https://hoodline.com/2017/02/richmond-merchant-group-sues-to-block-geary-bus-rapid-transit-project/> [<https://perma.cc/F9QH-3TT6>].

249. *See* Arielle Kass, *Gwinnett County, Ga., Transit Expansion Project Voted Down*, GOV. TECH. (Nov. 12, 2020), <https://www.govtech.com/transportation/gwinnett-county-ga-transit-expansion-project-voted-down.html> [<https://perma.cc/JV6A-6XC6>] ("[Charlotte] Nash, the outgoing commission chairman, said many who moved to Gwinnett did so to get away from a city environment, and worry increased transit might replicate it.").

NIMBYS often cite environmental concerns when attacking public transit projects. The Tempe study found that residents associated more buses with increases in pollution and noise.<sup>250</sup> These concerns are often addressed in an environmental review. Consequently, the environmental review requirements of public transit projects create ample opportunity for NIMBY opposition. The public participation process allows people to weaponize these concerns against public transit projects.

Public participation requirements in environmental review provide a platform for people to voice anti-transit sentiments. Due to the broad definition of “public,” anyone with a tangential relationship to the affected project can voice their displeasure.<sup>251</sup> This principle is evident in the opposition to the Los Angeles Metro, where the objections to the subway extension echo many of the common objections to any form of public transit.<sup>252</sup> In addition to concerns about the route running directly under Beverly Hills High School, opponents of the subway extension called the train a “rogue route,” a waste of taxpayer dollars, and a burden on the community.<sup>253</sup> The objection to the tunnel route through the high school appears almost as an afterthought.

##### 5. *Stuck in Traffic: When Public Participation becomes Predatory Litigation*

Public participation can also be used as a cudgel for judicial review.<sup>254</sup> Lawsuits like in the Beverly Hills project rarely result in victories for litigants.<sup>255</sup> There, the case resolved in favor of the government.<sup>256</sup> Even without a win in court, however, opponents to a project can still use litigation as an anti-development tool. If a project’s opponents have the dedication and the funds, they can use litigation as a delaying tactic, which is sometimes enough to kill a project. Wealthy anti-transit activists are more likely to have

250. See Weitz, *supra* note 243, at 166.

251. See, e.g., 40 C.F.R. § 1503.1 (2022).

252. See Rachel Gunther, *California’s Purple Line Extension Must Be Stopped*, CAL. GLOBE (Nov. 5, 2019), <https://californiaglobe.com/opinion/californias-purple-line-extension-must-be-stopped/> [<https://perma.cc/V2D7-F46Z>].

253. See *id.*

254. See Hernandez, *supra* note 61, at 23 (noting, in a study of lawsuits alleging violations of the California Environmental Quality Act, California’s state-level counterpart to NEPA, that “more transit projects were challenged than roadway and highway projects combined”).

255. See Fromherz, *supra* note 108, at 123 (citing Dorothy W. Bisbee, *NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 31 B.C. ENV’T AFF. L. REV. 349, 351 (2004)).

256. See Laura J. Nelson, *Judge Backs Subway Route*, L.A. TIMES (Apr. 3, 2014), <https://web.archive.org/web/20140414001533/http://articles.latimes.com/2014/apr/03/local/la-me-subway-lawsuit-ruling-20140403> [<https://perma.cc/3CNU-LGWH>]; Linton, *supra* note 17.

the funds available for this tactic. As such, they are more equipped to use them.

The Trump administration reforms to NEPA were designed to partially limit environmental review litigation.<sup>257</sup> The rules added an exhaustion provision to the CEQ regulations: any objection to a project not raised in the comments is precluded from later judicial review.<sup>258</sup> This rule is procedural; it does not limit judicial review based on the substance of any particular objection. Instead, it regulates timing. Whoever files a comment on time can file an environmental review lawsuit. Because anyone affected by a project may submit a comment, anyone affected may sue, claiming that the agency unlawfully ignored their concerns.<sup>259</sup>

Delayed implementation of public transit projects means that building infrastructure to alleviate transit deserts is painstakingly slow.<sup>260</sup> This leads to a cascading failure situation for transit deserts. The longer it takes governments to complete transit infrastructure, the more likely people are to see transit as never-ending construction rather than as a public good.<sup>261</sup> Delayed project implementation contributes to the notion that public transit is not worth the social investment.<sup>262</sup>

### B. Transit Deserts Demonstrate NEPA's Necessity for Public Input

Despite the problems that participation schemes pose to transit development, proposals to restrict or remove public input are equally unacceptable.<sup>263</sup> Structures for participation in government are invaluable means of ensuring that the needs of marginalized communities are served. In the right circumstances, opportunities for public input can both protect

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257. See 2020 NEPA Regulations, *supra* note 25.

258. See 40 C.F.R. § 1500.3 (2022).

259. See *id.* § 1503.1.

260. See Henry Grabar, *The Perverse Reason It's Easier to Build New Highways Than New Subways*, SLATE (Aug. 19, 2021, 1:00 PM), <https://slate.com/business/2021/08/congestion-pricing-nyc-bart-tunnel-san-francisco-bay-environmental-reviews.html> [https://perma.cc/CCH4-KFD9] (describing how community engagement in transit environmental review turns a “cut-and-dried assessment into an interminable back-and-forth”).

261. See Laura Bliss, *Why U.S. Infrastructure Costs So Much*, BLOOMBERG CITYLAB (Dec. 8, 2021, 7:00 AM), <https://www.bloomberg.com/news/articles/2021-12-08/why-building-roads-and-transit-costs-more-in-the-u-s> [https://perma.cc/GBU6-HGEK] (noting how many people “have not lived with seeing the benefits of a whole new subway line,” and positing that people would “have less reason to complain” if they saw those benefits).

262. See Audrey G. McFarlane, *supra* note 18, at 2385–86 (noting the perception of public transit as an “unworthy detrimental public expenditure”).

263. See Duncan, Jr., *supra* note 214, at 197 (“Environmental regulation cannot proceed while blind to social realities, and social realities cannot be explored adequately without the assistance of those whose lives are most impacted by environmental risk.”).

vulnerable communities from exploitation and improve the quality of government projects.

*1. Urban Renewal, Highway Construction, and the Devastating Consequences of Ignoring Locally Effected Communities*

In the 1950's, the United States government took on a mission to revitalize American cities. The 1949 Housing Act established a program of slum clearance, where cities would purchase privately-owned land, demolish it, and sell it to be developed anew.<sup>264</sup> The Interstate Highway Act of 1956 funded roads that would stretch across the country,<sup>265</sup> displacing more than a million people living in over 475,000 households across the country.<sup>266</sup> Millions more were left in “hollowed-out communities.”<sup>267</sup>

For many people, these laws signified social progress — in fact, the slum clearance programs still carry the name “urban renewal.”<sup>268</sup> Rather than renewal, however, these programs brought about destruction and tragedy.<sup>269</sup> The federal government implemented its slum clearance program without public input, “unless . . . the aims of more ‘efficient’ administration would also be served.”<sup>270</sup> The Interstate Freeway System was similarly built without regard for the local communities that these new roads would slice through, ignoring or dismissing local concerns.<sup>271</sup> As a result, both urban renewal clearance and highway building tore apart communities, eviscerated neighborhoods, and severed vital social infrastructure.<sup>272</sup> The scars of urban renewal in the United States showcase what happens when public input is not sought in the name of infrastructure, and who suffers as a result.<sup>273</sup>

The effects of these government programs still linger today. Decades after the Interstate Highway Act came into law, the highways that displaced people still impact the social and economic lives of the remaining

264. See, e.g., 42 U.S.C. §§ 1401–86; *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1295 (S.D.N.Y. 1985).

265. See *Congress Approves the Federal-Aid Highway Act*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Federal\\_Highway\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm) [<https://perma.cc/UBE5-HSL6>] (last visited Aug. 19, 2022); Archer, *supra* note 49, at 1273.

266. Archer, *supra* note 49, at 1273 (citations omitted).

267. *Id.*

268. See, e.g., A. Mechele Dickerson, *Revitalizing Urban Cities: Linking the Past to the Present*, 46 U. MEM. L. REV. 973, 974–75 (2020).

269. See Omari Scott Simmons, *Urban Removal: Reshaping Urban Landscapes Through a Responsive Communitarian Lens*, 29 CORNELL J. L. & PUB. POL’Y 885, 886 (2020).

270. Barlow Burke, Jr., *The Threat to Citizen Participation in Model Cities*, 56 CORNELL L. REV. 751, 754 (1971).

271. See Fromherz, *supra* note 108, at 147.

272. See Simmons, *supra* note 269, at 886.

273. See Archer, *supra* note 49, at 1286.

communities.<sup>274</sup> Towns and neighborhoods that lost displaced residents never recovered them.<sup>275</sup> Businesses that had to close could not reopen.<sup>276</sup> Residents of once prosperous communities fell below the poverty line in increasing numbers and had little opportunity to economically recover.<sup>277</sup> As highways cut towns in half, they severed the social fabric that kept communities together.<sup>278</sup>

The tragedy of the highway program presents a particularly strong lesson for transit deserts. The highway system was public infrastructure that significantly improved many people's quality of life. For white suburban residents, highways were an easy and convenient way to commute to work, and retreat to the suburbs when the day was done.<sup>279</sup> These benefits, however, came at the expense of the communities on which the highways were built. A myopic idea of who could and should benefit from a government project resulted in substantial injustice. Without channels of public participation, there were no means available to challenge that view.

In the context of highway building, the government eventually recognized the importance of public participation only after the public spoke up, in the form of protests.<sup>280</sup> These protests ended up partially shaping NEPA's inception.<sup>281</sup> Requiring federal agencies to consider the local environmental impacts of a project was meant to help ensure that community concerns would not be ignored in the same way again.<sup>282</sup>

## 2. *Public Participation's Positive Potential*

Good public participation can benefit both an agency's environmental review and resulting decisions.<sup>283</sup> A community might have legitimate concerns about a project or draw attention to a perspective that an agency did not consider. Public input into government projects also provides an avenue

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274. *See id.*

275. *See id.* at 1286–88 (describing a study where each road leading out of a city “causes approximately a 9 percent decline in central city population”).

276. *See id.* at 1289.

277. *See id.* at 1268.

278. *See id.* at 1267.

279. *See* Joseph Stromberg, *Highways Guttled American Cities. So Why Did They Build Them?*, Vox (May 11, 2016, 11:20 AM), <https://www.vox.com/2015/5/14/8605917/highways-interstate-cities-history> [<https://perma.cc/75TM-G3A8>] (“Wealthier residents fled to the suburbs, using the highways to commute back in by car.”)

280. *See id.*

281. *See* Fromherz, *supra* note 108, at 147.

282. *See id.*

283. *See* Glucker et al., *supra* note 195, at 104 (describing the “widespread consensus that public participation is also key to effective environmental assessment”).

for affected communities to advocate for their needs. Those perspectives are invaluable to an agency.

While NIMBY opposition to government developments takes up oxygen in the public participation debate, it is far from the only narrative.<sup>284</sup> Objections to government projects can stem from inequitable distribution of resources,<sup>285</sup> as well as concerns over gentrification and displacement.<sup>286</sup> Including local knowledge and community values in project decisions has been shown to improve them.<sup>287</sup> Local communities have invaluable perspectives and expertise on the environmental issues that affect where they live, which agencies should not ignore.<sup>288</sup> Hearing different perspectives and learning about the impacts of a project, if done right, can make a project more sustainable, more resilient, and better adapted to change.

### 3. *The Right Connections: The Lessons of LaGuardia's AirTrain*

A recent example of the benefits of public input comes from New York City's most recent attempt to connect LaGuardia airport to the rest of the city's transit system. In 2015, Governor Cuomo called for a new project to make that connection.<sup>289</sup> The proposed AirTrain would constitute 1.5 miles of rail track in Queens,<sup>290</sup> connecting LaGuardia airport at two points to the Mets-Willets Point Station on the 7-train subway.<sup>291</sup> For many people, the

284. See Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 522 (1994); Patrick Sisson, *The Landmark Environmental Law Inside a NIMBY Firestorm*, BLOOMBERG CITYLAB (Apr. 20, 2022, 8:00 AM), <https://www.bloomberg.com/news/features/2022-04-20/the-landmark-environmental-law-inside-a-nimby-firestorm> [<https://perma.cc/9ZB9-P4NK>] (noting how “[California’s environmental review statute] creates opportunities for vulnerable people as well as classic NIMBYs”).

285. See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1405–06 (2012) (describing a lawsuit against Bay Area Regional Transit Authority for prioritizing wealthy, white transit riders at the expense of low-income riders and riders of color).

286. See Jesse Hevia, *NEPA and Gentrification: Using Federal Environmental Review to Combat Urban Displacement*, 70 EMORY L.J. 711, 715 (2021).

287. See John F. Devlin et al., *Public Participation in Environmental Assessment: Case Studies on EA Legislation and Practice*, 24 CAN. J. DEV. STUDIES 488, 488 (2005) (citations omitted).

288. See Duncan, Jr., *supra* note 214.

289. See Michael M. Grynbaum, *Cuomo Wants Elevated Train Link Built to Ill-Served LaGuardia Airport*, N.Y. TIMES (Jan. 20, 2015), <https://www.nytimes.com/2015/01/21/nyregion/cuomo-proposes-train-link-to-la-guardia-airport.html> [<https://perma.cc/C2NX-8LN3>].

290. See *Building a New New York*, N.Y. STATE, [https://www.ny.gov/sites/ny.gov/files/atoms/files/ABNY\\_airtrain.pdf](https://www.ny.gov/sites/ny.gov/files/atoms/files/ABNY_airtrain.pdf) [<https://perma.cc/NL5C-A7LH>] (last visited Oct. 10, 2022).

291. See *id.*



AirTrain simply did not make sense.<sup>292</sup> The project was expensive, with a supposedly backwards solution: why go farther away from downtown just to turn around and come back?<sup>293</sup> These concerns did not sway the Port Authority of New York and New Jersey, who insisted that the AirTrain provided the best solution to the gap in New York City's transit infrastructure.<sup>294</sup>

The DEIS from the Federal Aviation Administration faced widespread criticism. The project's costs and inefficiencies met particular objection.<sup>295</sup> Yet unlike NIMBY resistance, commenters advocated for a solution that would arguably expand transit in more places.<sup>296</sup> This solution would extend the N/W subway lines through the neighborhoods of Astoria and East Elmhurst, connecting a transit desert to the rest of the subway system in addition to linking the subway to the airport.<sup>297</sup> Here, public participation allowed people to advocate for a transit desert solution, not contribute to a problem.

### III. HAVE YOUR TRANSIT AND USE IT TOO: PROPOSED AMENDMENTS TO NEPA'S PUBLIC PARTICIPATION REGULATIONS

Supporters of public participation in environmental review ignore the destructive effects of excessive, weaponized comments. Critics of too much participation, however, also miss the point. The problem is not the participation itself, but the structure in which it is used and deployed. A successful reform to NEPA does not unequivocally add or restrict public participation, but instead looks for ways to make it more strategic and effective.<sup>298</sup> Public participation in environmental review, if implemented correctly, can help alleviate transit deserts. This Part proposes an amendment to current public participation regulations that facilitates this

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292. Benjamin Kabak, *Op-Ed: Stop the Runaway LaGuardia AirTrain*, STREETS BLOG N.Y.C. (Jan. 3, 2020), <https://nyc.streetsblog.org/2020/01/03/op-ed-stop-the-runaway-laguardia-airtrain/> [<https://perma.cc/G66G-WTXW>].

293. *See id.*

294. *See* Danielle Muoio Dunn, *Hochul Paused The Controversial LaGuardia AirTrain. Now What?*, POLITICO (Oct. 28, 2021, 5:00 AM), <https://www.politico.com/states/new-jersey/story/2021/10/28/hochul-paused-the-controversial-laguardia-airtrain-now-what-1392065> [<https://perma.cc/D5VX-TTY8>] (noting that the Port Authority's support for the route was partially because the project did not require eminent domain).

295. *See, e.g.*, U.S. FAA, LA GUARDIA AIRPORT (LGA) ACCESS IMPROVEMENT PROJECT: FINAL ENV'T IMPACT STATEMENT app. S (2021).

296. *See, e.g., id.* (collecting public comments from the AirTrain's EIS).

297. *See id.*

298. *See* Sisson, *supra* note 284 ("Process can be extremely important to equitable and environmental outcomes. The question is, how do we shape that process?").

goal: to expand early-stage scoping and limit the opportunities for public comment late in the environmental review process to special circumstances.

When preparing an EIS, requirements for public input occur in two separate junctures: the scoping stage and the comment stage.<sup>299</sup> According to Nicholas C. Yost, who drafted CEQ's original regulations, each avenue for public participation serves its own particular purpose.<sup>300</sup> Scoping alerts agencies to important issues.<sup>301</sup> Comment requires an agency to explain itself to a concerned citizen.<sup>302</sup> The ultimate goal of scoping is listening, while the ultimate goal of comment is accountability.<sup>303</sup>

As implemented, however, these two junctures create inefficiency in environmental review.<sup>304</sup> The regulations governing scoping and public comment use nearly identical language.<sup>305</sup> The CEQ requires an agency to reach out to affected communities in the same broad terms both during scoping and after submitting a DEIS, without providing any details on what that outreach looks like.<sup>306</sup> This creates duplicate work.<sup>307</sup> Because scoping and public comment serve different purposes, their regulatory schemes should look different.

A better approach would be to expand public input where it best serves the agency and the public, and to limit public input where it is least helpful. Empirical research shows that public input at the scoping phase, where the agency and the public are most likely to be in dialogue, is most effective.<sup>308</sup> Public input at the comment phase, meanwhile, has fewer benefits and more challenges.<sup>309</sup> This Part proposes to change the CEQ's regulations to reflect this research. It recommends that CEQ should pare down the comment requirements after a DEIS has been published by removing the mandatory notice-and-comment period between a draft and final EIS, limiting

299. *See supra* Part I.B.

300. *See* Yost, *supra* note 107.

301. *See* NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 211, at 38.

302. *See* Yost, *supra* note 107, at 37.

303. *See id.* at 36–37.

304. *See infra* Section III.A.3.

305. *See* 40 C.F.R. § 1501.9 (b) (2022) (“As part of the scoping process, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and *other likely affected or interested persons.*”) (emphasis added); *id.* § 1503.1(a)(2)(v) (requiring an agency, after submitting a DEIS, to request comments from “[t]he public, affirmatively soliciting comments in a manner designed to inform those persons or organizations *who may be interested in or affected by* the proposed action”) (emphasis added).

306. *See id.* § 1501.9(b); *id.* § 1503.1(a)(2)(v).

307. *See infra* Section III.A.3.

308. *See infra* Section III.A.2.

309. *See id.*

comments to exceptional circumstances after an EIS. In exchange, the CEQ should make the scoping regulations more robust.

Section III.A explains how this change to the CEQ's public comment regulations would align with NEPA's statutory and regulatory objectives better than the current scheme. It describes how this change would make public input in environmental review more effective and equitable. It also discusses benefits of this proposal for agencies. Section III.B suggests a change in the CEQ's regulatory language to limit post-EIS comment without completely denying the public an opportunity to weigh in on an EIS. Section III.C proposes some strategies and structures to use in a more comprehensive scoping plan.

### A. The Benefits of Expanded Scoping and Limited Comment

#### 1. Expanded Scoping and Limited Comment Better Aligns with NEPA's Statutory Requirements

Strengthening public participation during scoping will better align with NEPA's objectives and improve public input and agency projects alike. Nicholas Yost argues that scoping plays a paramount role in establishing NEPA's policy.<sup>310</sup> Scoping, he reasons, is where NEPA's policy of allowing the public to take part in decision-making comes to light.<sup>311</sup> He sees "real opportunities" to find consensus between an agency and the public at the scoping stage.<sup>312</sup>

Devoting more resources to scoping would also allow agencies to better conduct concurrent review. The CEQ's regulations currently require that agencies identify and consider relevant environmental information "early in the process,"<sup>313</sup> and promote conducting environmental review and project planning concurrently.<sup>314</sup> Scoping achieves this goal by kickstarting the environmental review. Once the public knows about an agency's plans or proposed plans, the public can help facilitate and steer the agency's plans.

Concurrent review is a frequent suggestion for NEPA reform.<sup>315</sup> If an agency examines the impacts of a plan while it is still being formed, environmental review becomes a cohesive part of agency planning, instead

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310. See NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 211, at 38–39.

311. See Yost, *supra* note 107.

312. See NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 211, at 39. *But see* Yost, *supra* note 107, at 37 (expressing concern that scoping sessions would become "the first step in post-EIS litigation").

313. 40 C.F.R. § 1500.1 (2022).

314. See *id.* ("Finally, the regulations in this subchapter promote concurrent environmental reviews to ensure timely and efficient decision making.")

315. See Tripp & Alley, *supra* note 20, at 90.

of a burden to clumsily add on.<sup>316</sup> By the time an agency has decided it wishes to pursue a project, the environmental review is nearly complete, and the agency can implement its plans.

The CEQ calls on agencies to minimize procedural delays and avoid duplicate work.<sup>317</sup> Despite this, an agency must go through the process of creating an EIS twice — first in draft form, then as a final version.<sup>318</sup> At best, this is a duplicitous step for an agency to produce the same work twice. At worst, the agency's workload doubles. By limiting public comment to exceptional circumstances, the agency no longer needs to provide two lengthy reports for each project, saving the agency time and resources. This proposal also removes the requirement to respond to every comment, even just to explain why the agency ignored the comment.<sup>319</sup> What is left is a public participation regime that better suits the CEQ's policies for flexibility.

## 2. *Expanded Scoping and Limited Comment Facilitates Better Public Participation*

Critics of this proposal may argue that it removes an important opportunity for affected communities to voice their concerns. The threat to meaningful participation, however, is minimal. Restricting input at the comment stage only takes away public input in its most confrontational and least effective point.<sup>320</sup> Meanwhile, comprehensive scoping adds opportunities to participate precisely where that input is most likely to be heard.<sup>321</sup>

Research around public participation suggests that opportunities to comment on a proposal after most of the work is done on a project are ineffective.<sup>322</sup> If an agency solicits comments after an EIS has been completed, public input is not considered at the same time as all other factors that go into an environmental review.<sup>323</sup> This relegates public comment to a process of noting preferences, while experts make decisions independent of

316. *See id.*

317. *See* 40 C.F.R. § 1500.1 (calls to “reduce unnecessary burdens and delays”); *id.* § 1500.4 (directing agencies to “eliminat[e] duplication . . . by providing for joint preparation of environmental documents where practicable”).

318. *See* 40 C.F.R. § 1502.9.

319. *See* 40 C.F.R. § 1503.4.

320. *See* Chess & Purcell, *supra* note 216, at 2685.

321. *See* NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 211, at 39 (“[T]here is great value in engaging the public in problem formation. This can sometimes broaden the range of alternative actions considered in ways that lead to better decisions.”).

322. *See* Chess & Purcell, *supra* note 216, at 2685.

323. *See* Greg Hampton, *Environmental Equity and Public Participation*, 32 POL'Y SCIS. 163, 167 (1999) (citations omitted).

these preferences.<sup>324</sup> This lack of connection between federal agencies and the affected communities leads many governments to see compliance with environmental laws as a bureaucratic hurdle.<sup>325</sup> Agencies have an incentive to either quickly surpass these environmental laws, or avoid their procedural requirements whenever possible.<sup>326</sup>

Because public comment is solicited after a DEIS has already been completed, people are invited to comment on a document that is hundreds of pages long.<sup>327</sup> This hinders the public's ability to participate effectively.<sup>328</sup> Few people have the time or the energy to sift through hundreds of pages of technical material to find and articulate a specific issue to challenge, no matter how important that challenge may be.<sup>329</sup> Situations where an agency might truly benefit from public input can get lost in the details.<sup>330</sup>

Soliciting comments after a DEIS has been written creates a barrier in the agency's willingness to listen to public input. At the point of a DEIS, an agency has already invested significant resources in putting together a project.<sup>331</sup> Listening to significant pushback from the public or hearing significant support for an alternative would put those years of work on a DEIS to waste.<sup>332</sup> By the time the agency solicits public comments in response to a DEIS, these comments are too late to influence agency decisions in any meaningful way.<sup>333</sup> This forces agencies to defend every aspect of a DEIS wholesale, without the ability to separate areas of public objection from potential points of consensus. Agency officials might agree with the public on broader policy grounds, yet in the environmental review process, agencies might find themselves in bitter opposition to the public.<sup>334</sup>

This process mirrors what law professor Chiara Armeni calls an "acceptance," rather than a "participatory," approach to public input.<sup>335</sup> An acceptance model to public participation places the government's focus on

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324. *See id.*

325. *See* Armeni, *supra* note 226, at 423.

326. *See id.*; Karkkainen, *supra* note 133, at 907.

327. *See* 40 C.F.R. §1503.1; COUNCIL ON ENV'T QUALITY, *supra* note 21 (noting an average length of a DEIS between 2013 and 2017 as 575 pages).

328. *See* Rossi, *supra* note 223, at 237–38 (expressing concerns that the "expertise-laden scientific format" of the EIS public comment process "may encourage passivity by many citizens").

329. *See* Duncan, Jr., *supra* note 214, at 195 n.127.

330. *See* Rossi, *supra* note 223.

331. *See* Tripp & Alley, *supra* note 20, at 87.

332. *See id.* (describing the process in which, "when an [environmental assessment] or [environmental impact statement] is finally prepared, the review process causes the planning gears to grind to a halt").

333. *See* Karkkainen, *supra* note 133, at 906.

334. *See* Tripp & Alley, *supra* note 20, at 83–84.

335. Armeni, *supra* note 226, at 422.

justifying existing decisions, rather than using the public to shape decisions from the start.<sup>336</sup> Public input in these models emphasize awareness of a project and transparency over consensus building.<sup>337</sup> These models imply an assumption that the public is a barrier to sound decision-making and development, not a facilitator.<sup>338</sup> As a result, people have little, if any, ability to influence government decisions.<sup>339</sup> Purely procedural participation rights mislead the public and obscure decisions which have already been made.<sup>340</sup>

Seeking public comment “after most of the work of reaching a decision has been done” can build resentment between the agency and the commenting public.<sup>341</sup> If the public feels like they either were not solicited, or that their comments were ignored, the public participation process can turn adversarial.<sup>342</sup> Moreover, the agency may feel like the public is stalling important infrastructure development.<sup>343</sup> A public meeting can quickly devolve into a place to air grievances, with both parties talking past one another.<sup>344</sup> Public participation becomes performative, generating distrust between local communities and the government.<sup>345</sup>

Empirical studies suggest that sustained, holistic efforts to engage the public, as well as collaboration between a governing body and the public, are both key to successful public participation.<sup>346</sup> A collaborative process allows the agency to understand the values underlying a public’s decision and adapt its vision to those values.<sup>347</sup> When a government body aligns its vision in response to public values, they give local communities decision-making power in a project. This power builds trust between a governing body and the affected community,<sup>348</sup> setting the stage for successful and smooth interactions in the future.

Public participation at the scoping stage is more effective because it allows for more open dialogue and opportunities to build consensus.<sup>349</sup>

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336. *See id.* at 416.

337. *Id.* at 422–23.

338. *See id.* at 423.

339. *See id.*

340. *See id.* at 423.

341. Chess & Purcell, *supra* note 216, at 2685.

342. *See* Fromherz, *supra* note 108, at 134 (“Giving a voice to the public is not the same as *listening* to the public.”).

343. *See* Armeni, *supra* note 226, at 422 (describing the public as a “barrier”).

344. *See* Fromherz, *supra* note 108, at 139–40.

345. *See* GIERING, *supra* note 182, at 37.

346. *See id.* at 43.

347. *See id.*

348. *See* Sassman, *supra* note 103, at 1529.

349. *See* NAT’L RSCH COUNCIL OF THE NAT’L ACADS., *supra* note 211, at 39 (positing that the scoping process provides “a forum for using consensus-building techniques”).

Because scoping occurs at an early stage of environmental review, an agency can focus more on communicating the “desired outcomes” of a given project, instead of the methods used to achieve those outcomes.<sup>350</sup> Community discussions focusing on desired outcomes gives the public a greater understanding of the project on the table. This framework allows for people who are not as well-versed in environmental matters to comment on a project, increasing access to the participatory process. Mutual understanding of desired outcomes is also more likely to lead to compromises in a project’s “design details.”<sup>351</sup>

Scoping also solicits public opinions when “multiple options are still open for discussion,” and an agency has not yet made up its mind about a particular project.<sup>352</sup> This process allows the public to be “involved in the definition of the problem to be addressed,”<sup>353</sup> and gives affected communities “a meaningful opportunity to influence decisions.”<sup>354</sup>

### 3. *Expanded Scoping and Limited Comment Would Save Agency Resources and Facilitate More Transit Development*

A focus on scoping can make environmental review more efficient and less costly. Public participation during scoping allows agencies to determine which feedback will be most useful for a project, and tailor their reviews accordingly.<sup>355</sup> An agency does not need to invest as many resources in evaluating alternatives in an EIS if it can attain local communities’ desires early on.<sup>356</sup> Investing into public input at the scoping stage is therefore more likely to pay off.<sup>357</sup>

If an agency adequately engages the public and listens to their concerns during scoping, there would likely be no need to seek additional comments after a DEIS. This would expedite the environmental review process, saving the agency money and time. A DEIS would just become an EIS. The second juncture for public input would largely become obsolete.

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350. See Carissa Schively Slotterback, *Public Involvement in Transportation Project Planning and Design*, 27 J. ARCHITECTURAL & PLAN. RSCH 144, 154–55 (2010).

351. See *id.* at 153–55.

352. Armeni, *supra* note 226, at 422.

353. Devlin et al., *supra* note 287, at 492 (citations omitted).

354. Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1146 (2013); see also Hampton, *supra* note 323.

355. See GIERING, *supra* note 182, at 43.

356. See, e.g., Grabar, *supra* note 260 (calling an analysis of 24 alternatives in the EIS of Seattle’s East Link light rail an “enormous waste of time, talent, and money”).

357. See Chess & Purcell, *supra* note 216, at 2691; GIERING, *supra* note 182, at 36 (noting that “building and maintaining partnerships with community organizations can alleviate internal challenges associated with a lack of resources”).

A comprehensive scoping process would also limit the risk of future litigation. Projects reached through consensus with the affected public enjoy higher compliance rates, a greater sense of legitimacy, and are less likely to face public rejection and animosity.<sup>358</sup> If citizens feel more satisfied with the participation process, they are less likely to sue.<sup>359</sup> The agency needs to spend less time bulletproofing an EIS against litigation or defending its decisions in court.

Together, these factors would result in the completion of more transit projects. The public would experience the benefits of public transit firsthand. This could reduce the stigma of public transit as a dangerous waste of money.

The John Young Parkway in Orlando, FL exemplifies the benefits of soliciting public participation early on in a project's life. Before its reconstruction, the John Young Parkway was called a "nice, wide road serving no real purpose."<sup>360</sup> Previous pitches to expand the road were scrapped after public opposition, as the proposals would take the parkway through Washington Shores, one of Orlando's oldest Black neighborhoods.<sup>361</sup> In 1998, however, the Federal Highway Administration (FHWA) and Florida Department of Transportation prepared an EIS to extend the Parkway and connect it with the rest of Florida's highway infrastructure again.<sup>362</sup> Despite the complexities of the project, the environmental review process for the John Young Parkway was completed in only two years.<sup>363</sup> The Record of Decision to expand the parkway was issued in August 2000.<sup>364</sup>

The FHWA credited, among other measures, public involvement in the project to its efficiency and success.<sup>365</sup> To garner public support for this project, the FHWA approached public participation differently than normal.<sup>366</sup> Instead of focusing on public input as solely a statutory

358. See Foster, *supra* note 197, at 482.

359. See GIERING, *supra* note 182, at 36; Fromherz, *supra* note 108, at 140 (describing a perception that litigation provides citizens with "their only vehicle to achieve meaningful participation").

360. Dan Tracy, *John Young Parkway Plan Ruffles Washington Shores*, ORLANDO SENTINEL (Apr. 24, 1988, 12:00 AM), <https://www.orlandosentinel.com/news/os-xpm-1988-04-24-0030340152-story.html> [<https://perma.cc/L49Y-HM59>].

361. See *id.*

362. See Tianjia Tang & Steve Tonjes, *Lessons Learned*, PUB. RDS., May–June 2003, <https://highways.dot.gov/public-roads/mayjune-2003/lessons-learned> [<https://perma.cc/QA6M-CETX>].

363. See *id.*

364. See *id.*

365. See *id.* (noting that "a project that truly enjoys public support will move more quickly through all EIS phases").

366. See *id.*



requirement, the FHWA examined other purposes it might serve.<sup>367</sup> In its environmental review, the FHWA separated the goals of participation into three distinct categories: mandatory, substantive, and emotional.<sup>368</sup> The mandatory needs of public input require simple compliance with local and federal laws and procedures.<sup>369</sup> Separating out substantive needs allowed the FHWA focus on the quality-of-life issues of the residents living near the expanded road.<sup>370</sup> Emotional needs emphasized maintaining the relationships between the FHWA and the affected communities.<sup>371</sup>

By identifying the most pressing emotional and substantive needs of the impacted community members, the FHWA could tailor the scope of its environmental review to address residents' biggest concerns, and to divide controversial issues into more manageable sub-issues.<sup>372</sup> To address community concerns, the FHWA met with community activists and concerned citizens, both individually and in groups.<sup>373</sup> This gave people in affected communities the sense that their input mattered.<sup>374</sup>

The environmental review of the John Young Parkway represents the possibilities of what public participation can achieve. The magnitude of this project required extensive environmental review, for which public input was necessary.<sup>375</sup> The FHWA's flexible, adaptive approach allowed them to seamlessly integrate the participation requirements with the rest of the environmental review.<sup>376</sup> This process of public involvement streamlined the environmental review and brought the project to implementation more quickly.<sup>377</sup> A regulatory regime of increased scoping and limited public comment can apply these lessons learned across agencies wishing to conduct environmental review.

## B. Recommendations for Streamlining Public Comment

Despite the practical limitations of NEPA's current comment regulations, they nevertheless serve a valuable purpose and still exist in some form. Allowing the public to comment on a given proposal ensures some degree of public scrutiny in the environmental review process. Requiring an agency

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367. *See id.*

368. *See id.*

369. *See id.*

370. *See id.*

371. *See id.*

372. *See id.*

373. *See id.*

374. *See id.*

375. *See id.*

376. *See id.*

377. *See id.*

to reveal the information it considered and ignored in the decision-making process increases administrative transparency and prevents the agency from sweeping inconvenient facts under the rug.<sup>378</sup>

The current regulations around public comment for EAs satisfy this requirement without adding duplicate work. The CEQ currently requires federal agencies to solicit public comment on environmental assessments, even when there is a finding of no significant impact, whenever the project would normally require an EIS, or when “the nature of the proposed action is one without precedent.”<sup>379</sup> If a project involves a novel issue, then the current regulations require more review opportunities.

The CEQ should promulgate a rule to extend this framework to EIS preparation as well. Public input would already be solicited through an EIS. Requiring additional public comment for novel, unprecedented issues would bring additional accountability to the agency, without the need for the agency to duplicate its work or its outreach.

If these comments raise a novel issue for the agency, existing regulations already provide adequate procedural safeguards in these exceptional circumstances. CEQ regulations currently require an agency to release a supplemental environmental impact statement in the face of “significant new circumstances or information” that could affect the project or alter its environmental impacts.<sup>380</sup> If a comment from the public, made in the wake of requisite special circumstances, revealed new relevant information, an agency would be obligated to re-think its environmental review. An agency can still be held accountable for their decisions, without a full-fledged notice-and-comment period for every EIS.

### C. Recommendations for More Robust Scoping

The following recommendations list some ideas that have been suggested for making scoping more robust. While these recommendations all require investment up-front, they result in streamlined savings later on in a project’s development.

#### 1. *Environmental Justice Directives*

In 1994, President Clinton issued an executive order adopting a government policy to prioritize environmental justice.<sup>381</sup> This executive order required agencies to “make achieving environmental justice part of its mission” by identifying and disclosing disproportionate adverse impacts in

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378. See Karkkainen, *supra* note 133, at 914.

379. 40 C.F.R. § 1501.6 (2022).

380. *Id.* § 1502.9.

381. *Id.*

“minority populations and low-income populations” in any federal government action.<sup>382</sup> An accompanying Presidential Memorandum explicitly applied the executive order’s directives to environmental review procedures pursuant to NEPA.<sup>383</sup>

Despite the wide applicability of the 1994 environmental justice executive order, its legal weight is minimal.<sup>384</sup> The executive order does not create any substantive or procedural legal rights.<sup>385</sup> Environmental justice mandates therefore cannot be enforced in court. While effectively engaging with affected communities is essential aspect of environmental justice,<sup>386</sup> the governing requirements around environmental justice allow environmental justice to be ancillary to public engagement.

A rule to include environmental justice communities in scoping outreach can turn abstract concerns into concrete tasks. Because the order to dedicate government resources for environmental justice evaluations already exists, this rule would require minimal additional leg work.<sup>387</sup> A requirement for agencies to affirmatively reach out to environmental justice communities as part of their scoping regulations would integrate two separate, but similar, aspects of environmental review.

The overlap of transit deserts and environmental justice concerns makes this suggestion particularly promising. Communities plagued by environmental justice issues are already more likely to live without adequate

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382. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). Furthering the needs of minority and low-income populations has since become synonymous with the term “environmental justice,” also referred to as “environmental equity.” Environmental justice, as a concept, exists to reverse the disproportionate environmental burdens that low-income and minority communities face. *See, e.g.*, FRANK P. GRAD, TREATISE ON ENV’T LAW § 9.10 (2022).

383. *See Environmental Justice*, NEPA.GOV, <https://ceq.doe.gov/nepa-practice/justice.html> [<https://perma.cc/J7S4-3FXD>] (last visited May 20, 2022). *But see* CONGRESSIONAL RESEARCH SERVICE, ADDRESSING ENV’T JUSTICE THROUGH NEPA 1 (2021) (“Currently, NEPA does not require agencies to consider environmental justice, but some agencies do consider it as part of their NEPA processes as a result of Executive Order 12898, issued in 1994.”).

384. *See* Adam Mahoney, *What Biden Could Learn From Bill Clinton’s Unfinished Work on Environmental Justice*, GRIST (Feb. 24, 2021), <https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/> [<https://perma.cc/D6UB-XPHN>] (“E.O. 12898 lacked any concrete requirements that environmental justice be a determining factor in siting, rulemaking, and permitting decisions, and it didn’t create any pathways for judicial review regarding compliance.”).

385. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

386. *See* Duncan, Jr., *supra* note 214, at 184.

387. *See, e.g.*, Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994); *Environmental Justice FAQs*, FED. TRANSIT AUTH. (Dec. 10, 2015), <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/environmental-justice/environmental-justice-faqs#ref1> [<https://perma.cc/9THZ-GZ4P>] (“Project-specific [environmental justice] analysis is conducted as part of a NEPA document.”).

transit.<sup>388</sup> If an agency is legally obligated to hear the concerns of people living in these communities, their concerns would be significantly harder to ignore.

## 2. *Ongoing Citizens Advisory Boards*

A Citizens Advisory Board (CAB) is a collection of people who regularly meet to discuss issues surrounding a particular location or a project.<sup>389</sup> These groups select their members based on who has an identifiable stake in the matter.<sup>390</sup> CABs have potential to effectively tackle transit deserts, because the membership of an advisory board can be tailored to select members based on where people live. Communities who have been historically shut out of the conversation can have a representative seat at the table.

The primary benefit of a CAB is that it is deliberative in nature.<sup>391</sup> The issues presented to CABs are presented before any solutions are proposed. The members of the group then discuss potential solutions together.<sup>392</sup> This structure allows for an agency to find common ground with the representative members of the group. In a smaller, more interactive group setting, an agency can more easily share knowledge and explain technical details of a project. This assistance would further help break down the communication barriers between government experts and affected communities.<sup>393</sup>

The structure of a CAB can potentially benefit agencies as well as local communities. Government projects enjoy more overall public support and a more effective planning process if an agency collaborates with community members known to be “local champion[s].”<sup>394</sup> These individuals, frequently local activists and organizers, can effectively communicate community issues to the agencies, gather project support from the local community, and navigate potential conflicts.<sup>395</sup> Working with a CAB comprised of these local champions during the scoping process would build off existing bonds of trust within a community, and would give agencies a reliable point of contact. A multi-member CAB would also allow agencies to maintain

388. See *EJ 2020 Glossary*, ENV'T PROT. AGENCY (Sept. 7, 2021), <https://www.epa.gov/environmentaljustice/ej-2020-glossary> (interpreting Executive Order 12,898 to focus on “minority populations, low-income populations or indigenous peoples”) [<https://perma.cc/GBQ2-956F>]; see also *supra* notes 70–74 and accompanying text.

389. See John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 921 (1998).

390. See *id.* at 922.

391. See *id.* at 921.

392. See *id.*

393. See Foster, *supra* note 197, at 479.

394. See Schively Slotterback, *supra* note 350, at 153.

395. See *id.* at 154.

relationships with a community even if a particular local champion was no longer “available.”<sup>396</sup>

CABs can also meet continuously, instead of in response to a particular project. Meeting over a longer period of time increases the opportunities for dialogue between the CAB and the government.<sup>397</sup> It can also turn environmental review into a proactive process, rather than a reactive one. An agency can learn of the problems affecting local communities and brainstorm solutions to match. If these problems turn into projects requiring environmental review, the required public participation regulations will already be underway, and the agency will already have a good sense of the appropriate level of review.

CABs have their limitations. Excess control from an agency over a CAB diminishes the effectiveness of the Board.<sup>398</sup> A CAB that is not representative of the local community risks ignoring or neglecting local issues, in favor of the desires of the CAB.<sup>399</sup> Conversely, a CAB with weak ties between the agency and the community risks fewer communications on important issues.<sup>400</sup> With effort, however, these issues can be managed. The structure of CABs provides an important tool to foster effective scoping in environmental review.

### 3. *Community Benefits Agreements*

A Community Benefits Agreement (CBA) is a contract between a project’s sponsor or initiator and various community groups that operate around a project’s site.<sup>401</sup> CBAs are most common in real estate affairs, where a developer agrees to contribute financial resources or other public amenities to an impacted community in exchange for that community’s support for a project.<sup>402</sup> The potential for CBAs in environmental review processes has been recognized,<sup>403</sup> and a CBA has the potential to make scoping more fair in measurable ways.

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396. *See id.*

397. *See* Chess & Purcell, *supra* note 216, at 2689.

398. *See id.* at 2690.

399. *See* Hampton, *supra* note 323, at 170.

400. *See id.*

401. *See* Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 *CARDOZO L. REV.* 1773, 1776 (2016); Patricia Salkin, *Understanding Community Benefit Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 *UCLA J. ENV’T L. POL’Y* 291, 293 (2008).

402. *See* Salkin, *supra* note 401, at 301.

403. *See* Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 *FORDHAM ENV’T L. REV.* 543, 545 (2010) (“CBAs could be a tool to address the mitigation of significant adverse environmental impacts from a

Incorporating CBAs into the end of a scoping process could make scoping more robust by requiring a government agency to directly negotiate with the surrounding communities.<sup>404</sup> A CBA therefore gives the affected public direct decision-making power in a project's existence and implementation.<sup>405</sup> Beyond a simple right to be aware of a government's decision, a CBA gives the affected public leverage.<sup>406</sup> This leverage allows affected communities to "effectively re-locali[z]e benefits and (re)open the debate about their expectations and values."<sup>407</sup> In a CBA, people living in transit deserts can directly ask for better transit access.

Because Community Benefits Agreements are relatively new, the legal implications behind them are still undetermined.<sup>408</sup> Although a CBA resembles a common-law contract, some scholars are unsure whether a breach of a CBA would be enforceable in court.<sup>409</sup> Questions remain regarding who would have standing to bring an enforcement proceeding, and whether community litigants would have adequate consideration.<sup>410</sup> The answers to these questions are unknown, however, partly due to a relative lack of litigation from CBAs.<sup>411</sup> This speaks well of a CBA's prophylactic potential.<sup>412</sup>

Legal experts have also advised against governments requiring the creation of a CBA for approval on a given project.<sup>413</sup> Even if the CEQ cannot use its regulations to require CBAs as part of scoping, however, agencies still can adopt CBAs into their standard scoping practices at their discretion.<sup>414</sup>

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proposed project, and thus could be included as part of an environmental impact statement or permit.").

404. See Edward W. De Barbieri, *Community Engagement and Transportation Equity*, 44 *FORDHAM URB. L.J.* 1103, 1106 (2017).

405. See Salkin, *supra* note 401, at 299 (2008).

406. See De Barbieri, *supra* note 404 (noting that "parties could agree to provide certain terms that address equity issues across metropolitan regions").

407. See Armeni, *supra* note 226, at 440.

408. See Fazio & Wallace, *supra* note 403, at 554.

409. See Salkin, *supra* note 401, at 324.

410. See *id.* at 325.

411. See Fazio & Wallace, *supra* note 403, at 554.

412. See *id.* ("The fact that there is little litigation on CBAs suggests that CBAs are supported by communities and are having a positive effect in resolving conflicts between developers and community groups."). *But see id.* at 548 ("The Atlantic Yards CBA also illustrates the limits of such agreements, because it has not prevented litigation by local opponents challenging various aspects of the project.").

413. See Fazio & Wallace, *supra* note 403, at 550.

414. See *id.*

CBAs have their flaws.<sup>415</sup> Developers in CBAs can still bring disproportionate bargaining power to an agreement.<sup>416</sup> A good CBA must have representative community members as parties to the agreement.<sup>417</sup> Effective CBAs are expensive to negotiate, monitor, and enforce.<sup>418</sup> Finally, the agreements reached in a CBA would not extend beyond one project, making CBAs ill-equipped to tackle larger structural issues.<sup>419</sup> The case-by-case nature of a CBA, however, fits seamlessly with the singular-project focus of environmental review. Other procedural safeguards and smart resource investment can mitigate or avoid these issues.

None of these suggestions for improved scoping can singlehandedly fix NEPA's scoping procedures.<sup>420</sup> Instead, these proposals envision frameworks for better public participation in environmental review.

### CONCLUSION

Transit deserts present a social and economic dilemma for American cities. People living in transit deserts are more likely to be historically marginalized and disadvantaged. The lack of mobility associated with transit deserts leads to an inability to access the tools necessary to improve one's quality of life. Providing transit infrastructure to transit deserts, therefore, can transform lives and potentially reverse decades of built-up institutional disenfranchisement.

Environmental review statutes stand in the way of straightforward solutions to transit deserts. NEPA, with all the paperwork it generates, can add years of delay to transit infrastructure and balloon its budget to the point of infeasibility. The public participation requirements in NEPA's governing regulations contribute to this problem. Broad guidelines to request public input allow stigmas against public transit to come front and center. NIMBY coalitions and other transit opponents can bring solutions to transit deserts to a halt in court.

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415. See Neil DeMause, *What Ever Happened to CBAs? The Rise and Fall of 'Community Benefits Agreements' in NYC*, CITYLIMITS (Jan. 18, 2022), <https://citylimits.org/2022/01/18/the-rise-and-fall-of-community-benefits-agreements-in-nyc/> [<https://perma.cc/N62T-PEN7>].

416. See *id.*

417. See Salkin, *supra* note 401, at 320 (arguing that "a CBA coalition that leaves out stakeholders may not be fully accepted by the community").

418. See *id.* at 323; De Barbieri, *supra* note 404, at 1105.

419. See De Barbieri, *supra* note 404, at 1105.

420. See Foster, *supra* note 197, at 495 ("The search for improved, legitimate, and equitable environmental decisions will require more than crafting a stronger participatory norm and shifting decision-making power to the local 'people' affected by environmental decisions.").

Regardless of its shortcomings, NEPA, along with its public participation requirements, is necessary to ensure that people have opportunities to raise concerns with government agencies. While NEPA needs reform to adequately address the problem of transit deserts, that reform cannot add or remove public input from NEPA's regulations wholesale.

A better solution is to change existing regulations to limit public comment where it is least effective, after most of the work in environmental review has already been done. This solution would then allow for increased participation opportunities early on, where communities impacted by a project can have the most meaningful input.

Public transit cannot be built in a day. Yet as a matter of policy, the problem of transit deserts necessitates this feat. Federal environmental review currently exacerbates the problem of transit deserts, despite the noble policy goals of the statute and regulations implementing that environmental review. Fortunately, the building blocks to resolve this problem are already present in the existing environmental review regulations. The rules just need re-arranging.