

## NEPA’S ENVIRONMENTAL VISION: CLOSE, BUT NOT QUITE

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*The National Environmental Policy Act (“NEPA”) has been hailed as the “Magna Carta” of environmental law. NEPA not only crystalized the nation’s environmental vision in its “Declaration of National Environmental Policy,” but it also formalized the federal government’s relationship with the environment by requiring agencies to consider environmental impacts in their decision-making process. By examining NEPA’s legislative history and historical context, this Note seeks to elucidate NEPA’s environmental vision—beyond the formal policy declaration, what kind of relationship with the environment did NEPA seek to establish? This Note traces the evolution of American environmental thought espoused by the various iterations of NEPA bills leading up to its enactment. Additionally, this Note examines missed opportunities for the integration of environmental justice and climate change—two of contemporary environmentalism’s most pressing concerns. As the nation enters a uniquely pivotal era of environmental regulation, NEPA’s historical accomplishments and shortcomings illustrate the importance of going all the way in advancing environmental progress.*

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INTRODUCTION

The climate crisis has prompted a global reckoning with the outsized impact of human activity on the environment.<sup>1</sup> Unpredictable weather patterns<sup>2</sup> have exported the impacts of fossil fuel emissions and dirty electrical grids<sup>3</sup> everywhere—from declining snowfall at the one percent’s ski resorts<sup>4</sup> to inhabitability threatening entire island-nations.<sup>5</sup> What was once the tree-hugger’s problem has now become everyone’s

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<sup>1</sup> See Jeff Turrentine & Melissa Denchak, *What is Climate Change?*, NAT. RES. DEF. COUNCIL (Sept. 1, 2021), <https://www.nrdc.org/stories/what-climate-change> (“Humans—more specifically, the greenhouse gas (GHG) emissions that human activity generates—are the leading cause of the earth’s rapidly changing climate today.”); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 4 (2023), [https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) [hereinafter IPCC Report].

<sup>2</sup> Courtney Lindwall, *What Are the Effects of Climate Change?*, NAT. RES. DEF. COUNCIL (Oct. 24, 2022), <https://www.nrdc.org/stories/what-are-effects-climate-change>; IPCC Report, *supra* note 1, at 5–6.

<sup>3</sup> See Jeff Turrentine, *What Are the Causes of Climate Change?*, NAT. RES. DEF. COUNCIL (Sept. 13, 2022), <https://www.nrdc.org/stories/what-are-causes-climate-change>.

<sup>4</sup> Kirk Siegler, *Will Skiing Survive? Resorts Struggle Through a Winter of Climate and Housing Woes*, NPR (Mar. 31, 2022), <https://www.npr.org/2022/03/31/1088236413/will-skiing-survive-resorts-struggle-through-a-winter-of-climate-and-housing-woe>.

<sup>5</sup> Kausea Natano, *The Climate Crisis is Making the Pacific Islands Uninhabitable. Who Will Help Preserve Our Nations?*, TIME (Sept. 28, 2022), <https://time.com/6217104/climate-crisis-pacific-islands-uninhabitable>.

problem.<sup>6</sup> From Goldman Sachs<sup>7</sup> to Goop,<sup>8</sup> mung-bean eggs<sup>9</sup> to the \$370 billion Inflation Reduction Act,<sup>10</sup> an eclectic (and oft-contentious) amalgam of activists, corporations, government actors, and ordinary people are scrambling to turn the tide of “the biggest threat to security that modern humans have ever faced.”<sup>11</sup>

While environmentalism may be a keystone of twenty-first century consciousness, America’s relationship with the environment has experienced many different iterations throughout history—from English colonists’ ambition that “this Wilderness should turn a mart for Merchants”<sup>12</sup> to nineteenth-century naturalists’ vision of national parks “reserved and withdrawn from settlement, occupancy, or sale.”<sup>13</sup> In the midst of these vying narratives, the National Environmental Policy Act of 1969 (“NEPA”) crystalized the nation’s environmental vision. Hailed as “[m]odern society’s first formal declaration recognizing the relationship between the environment and the welfare of human beings,”<sup>14</sup> NEPA was signed into law on January 1, 1970.<sup>15</sup>

NEPA stands out among peer environmental statutes. Rather than specifying substantive prohibitions, NEPA operates procedurally,

<sup>6</sup> See *From Greenpeace to Greta, This Is How Environmentalism Became Mainstream*, WORLD ECON. F. (Oct. 25, 2019), <https://www.weforum.org/agenda/2019/10/this-is-how-climate-science-went-mainstream>. However, climate change has affected different communities to varying extents. As for many other facets of life, wealthy, white people (and nations) enjoy a greater degree of immunity from climate change’s most devastating effects. See *id.*; Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), <https://www.nrdc.org/stories/environmental-justice-movement>.

<sup>7</sup> See, e.g., Dino Grandoni, *The Energy 202: Goldman Sachs Rules out Financing for Arctic Drilling. Will Other U.S. Banks Follow?*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2019/12/17/the-energy-202-goldman-sachs-rules-out-financing-for-arctic-drilling-will-other-u-s-banks-follow/5df7d2c2602ff125ce5b503b>.

<sup>8</sup> See, e.g., *The Best Climate Change Solution We’ve Heard*, GOOP, <https://goop.com/wellness/environmental-health-civics/the-best-climate-change-solution-weve-heard/> (last visited Feb. 13, 2024).

<sup>9</sup> See Kat Thompson, *These New Egg-Less Eggs Are Shaking Up Breakfast. Here’s What They Taste Like*, THRILLIST (Aug. 22, 2019), <https://www.thrillist.com/news/nation/just-egg-vegan-eggs-review-ingredients>.

<sup>10</sup> Jim Tankersley, *Biden Signs Expansive Health, Climate and Tax Law*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/business/biden-climate-tax-inflation-reduction.html>.

<sup>11</sup> Press Release, Security Council, Climate Change ‘Biggest Threat Modern Humans Have Ever Faced,’ World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation, U.N. Press Release SC/14445 (Feb. 23, 2021) (quoting David Attenborough).

<sup>12</sup> WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 167 (rev. ed. 2003).

<sup>13</sup> Yellowstone National Park Protection Act, ch. 24, 17 Stat. 32, 32 (1872); see also John Muir, Address at the Meeting of the Sierra Club (Nov. 23, 1895), in 1 SIERRA CLUB BULL. 271 (1896).

<sup>14</sup> Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, NAT. RES. & ENV’T, Fall 1995, at 3, 3.

<sup>15</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 852 (1970).

requiring federal agencies to look before leaping.<sup>16</sup> NEPA consists of three primary elements:<sup>17</sup> First, it declares a national environmental policy promoting “productive harmony” between “man and nature.”<sup>18</sup> Second, NEPA empowers the president’s Council on Environmental Quality (“CEQ”)<sup>19</sup> to prepare an annual Environmental Quality Report, conduct research on environmental quality, and advise the president and agencies on their environmental obligations.<sup>20</sup> Lastly, and of most practical significance, NEPA requires federal agencies to consider “environmental amenities and values” in their decision-making process by preparing a “detailed statement” before taking on “major Federal actions significantly affecting the quality of the human environment.”<sup>21</sup> Known as Environmental Impact Statements (“EIS”),<sup>22</sup> the preparation of these documents is no small feat—the median EIS completion time from 2010 to 2018 was 3.5 years.<sup>23</sup> Although procedural, EISs can have an “action-forcing” effect either by encouraging agencies to skirt the clunky EIS process through lowering their environmental impacts below the “significant” threshold, or by influencing agency behavior through the information gathered as part of the EIS process.<sup>24</sup> Often dubbed the “Magna Carta” of environmental law,<sup>25</sup> NEPA hardwired environmental awareness into federal agency decision-making.<sup>26</sup>

NEPA not only formalized the nation’s relationship with the environment, but it also kickstarted the 1970s as what President Nixon

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<sup>16</sup> Gladwin Hill, *Midpoint of ‘Environmental Decade’: Impact of National Policy Act Assessed*, N.Y. TIMES, Feb. 18, 1975, at 14.

<sup>17</sup> RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 214–21 (3d ed. 2020).

<sup>18</sup> National Environmental Policy Act § 101(a).

<sup>19</sup> *Id.* § 202.

<sup>20</sup> *Id.* §§ 201–204.

<sup>21</sup> *Id.* § 102.

<sup>22</sup> EISs are only one of three potential types of statements agencies are required to prepare under NEPA. First, an “environmental assessment” (“EA”) is prepared when a proposed action is “not likely to have significant effects or when the significance of the effects is unknown.” 40 C.F.R. § 1501.5(a) (2024). Second, a “finding of no significant impact” (“FONSI”) is prepared when the EA demonstrates that “the proposed action will not have significant effects.” *Id.* § 1501.6(a). Third, an “environmental impact statement” (“EIS”) is prepared for proposed actions with a significant impact “as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” *Id.* § 1502.2(g).

<sup>23</sup> COUNCIL ON ENV’T QUALITY, *ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018)* 4 fig.1 (2020), [https://ceq.doe.gov/docs/nepa-practice/CEQ\\_EIS\\_Timeline\\_Report\\_2020-6-12.pdf](https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf).

<sup>24</sup> Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1515, 1519 (2012).

<sup>25</sup> ANDREWS, *supra* note 17, at 215.

<sup>26</sup> Notwithstanding NEPA’s lofty aims, its actual implementation has been criticized as weak, perfunctory, and lacking. *See, e.g.*, Brigham Daniels, Andrew P. Follett & James Salzman, *Reconsidering NEPA*, 96 IND. L.J. 865, 872–75 (2021); ANDREWS, *supra* note 17, at 218–19.

christened “The Environmental Decade.”<sup>27</sup> “Environmental law” was formally coined in 1969,<sup>28</sup> and NEPA’s enactment forced “all major companies and commercial developers” to hire new-fangled environmental lawyers “[o]vernight.”<sup>29</sup> On April 22, 1970, the nation celebrated its very first Earth Day,<sup>30</sup> and the United States Environmental Protection Agency (“EPA”) launched operations that same year.<sup>31</sup> Flagship statutes that still form the backbone of twenty-first century environmental law<sup>32</sup>—the Clean Air Act,<sup>33</sup> Clean Water Act, and Endangered Species Act—were all passed within the decade.<sup>34</sup> NEPA itself became a formidable statute through the “vigor with which the Federal judiciary [used] the law to reduce threats to the environment.”<sup>35</sup> Even just five years out from its enactment, NEPA transformed the role of the environment in courts from private nuisance or tort actions to hard-charging citizen suits<sup>36</sup> with the power to cancel or modify “hundreds of programs, from highway projects to pesticide uses.”<sup>37</sup> In other words, NEPA was the gateway to a robust and distinctive field of environmental law.

NEPA provides a unique lens from which to examine America’s environmental vision. It fundamentally rewired agency decision-

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<sup>27</sup> Hill, *supra* note 16, at 14.

<sup>28</sup> This occurred at the first-of-its-kind national Conference on Law and the Environment, which helped spur the development of key environmental law organizations like the Environmental Law Institute and the Natural Resources Defense Counsel. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 47 (2004); *History of the Environmental Law Institute*, ENV’T L. INST., <https://www.eli.org/history-environmental-law-institute> (last visited Feb. 16, 2024).

<sup>29</sup> DOUGLAS BRINKLEY, *SILENT SPRING REVOLUTION: JOHN F. KENNEDY, RACHEL CARSON, LYNDON JOHNSON, RICHARD NIXON, AND THE GREAT ENVIRONMENTAL AWAKENING* 589 (2022).

<sup>30</sup> George C. Wilson, *Demonstration to Mark U.S. ‘Earth Day’ Today*, WASH. POST, Apr. 22, 1970, at A1.

<sup>31</sup> *The Origins of EPA*, U.S. ENV’T PROT. AGENCY (June 5, 2023), <https://www.epa.gov/history/origins-epa>.

<sup>32</sup> See Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001>.

<sup>33</sup> The Clean Air Act (“CAA”) was originally enacted in 1955 as the Air Pollution Control Act, but the 1970 amendments added substantial teeth to the CAA, shaping it into our modern conception of the Act. RICHARD K. LATTANZIO, CONG. RSCH. SERV., RL 30853, *CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS* 1–3 (2022), <https://crsreports.congress.gov/product/pdf/RL/RL30853>.

<sup>34</sup> Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE 15, 23 (2014).

<sup>35</sup> *Five Years of N.E.P.A.*, N.Y. TIMES, Feb. 5, 1975, at 36.

<sup>36</sup> NEPA lawsuits are technically brought under the Administrative Procedure Act (“APA”) since NEPA itself does not provide for judicial review. NINA M. HART, CONG. RSCH. SERV., R47205, *JUDICIAL REVIEW AND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969* 6 (2022).

<sup>37</sup> Hill, *supra* note 16, at 14.

making<sup>38</sup> and empowered the public by “giving citizens a broad new base on which to challenge administrative decisions at Federal agencies.”<sup>39</sup> NEPA “remains unchanged by any significant amendment,”<sup>40</sup> and, as of 2021, NEPA was the most frequently litigated environmental statute, with most suits centering around EISs.<sup>41</sup> Most recently, starting in October 2021, the Biden administration embarked on a series of CEQ rulemakings to “restore three core procedural provisions” of NEPA<sup>42</sup> in a reversal<sup>43</sup> of the Trump administration’s rollback of NEPA regulations.<sup>44</sup> This regulatory tug-of-war between the Trump and Biden administrations demonstrates NEPA’s continuing significance as the nation’s environmental Magna Carta.

By examining NEPA’s legislative history, this Note seeks to unpack the nuances of NEPA’s environmental vision, beyond its formal policy declaration or any neat historical categorization. While preexisting literature has examined NEPA’s legislative history—either to offer a broader historical background or to elaborate on specific policies<sup>45</sup>—this Note offers a deep dive into the evolution of NEPA’s underlying environmental theory. In other words, what kinds of relationships between humans and the environment did NEPA conceptualize? And does the environmental Magna Carta hold up as contemporary society barrels towards a climate crisis and grapples with environmental justice concerns?

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<sup>38</sup> See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENV’T L.J. 333, 333 (2004) (“NEPA . . . has assumed quasi-constitutional status as one of the foundational laws of the modern administrative state.” (footnote omitted)).

<sup>39</sup> Hill, *supra* note 16, at 14.

<sup>40</sup> ANDREWS, *supra* note 17, at 215.

<sup>41</sup> NINA M. HART & LINDA TSANG, CONG. RSCH. SERV., IF11932, NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW AND REMEDIES 1 (2021).

<sup>42</sup> Press Release, White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021) [hereinafter CEQ Press Release], <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews>.

<sup>43</sup> Dino Grandoni & Anna Phillips, *Biden Restores Climate Safeguards in Key Environmental Law, Reversing Trump*, WASH. POST (Apr. 19, 2022), <https://www.washingtonpost.com/climate-environment/2022/04/19/biden-nepa-climate-trump>.

<sup>44</sup> *NEPA Modernization*, COUNCIL ON ENV’T QUALITY, <https://trumpwhitehouse.archives.gov/ceq/nepa-modernization>; Emma Newburger, *Trump Weakens Environmental Law to Speed up Permits for Pipelines and Other Infrastructure*, CNBC (July 15, 2020), <https://www.cnn.com/2020/07/15/trump-to-weaken-national-environmental-policy-act.html>.

<sup>45</sup> See, e.g., Daniels et al., *supra* note 26, at 865 (offering a “nuanced and engaging history of the EIS provision”); Bear, *supra* note 14, at 3–5 (surveying NEPA’s historical context and legislative proceedings); Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RES. J. 243, 244–56 (1976) (examining the context of the legislative process and the historic development of NEPA’s key components).

This Note will trace NEPA's decade-long journey to enactment and the development of its environmental vision along the way. Part I will uncover NEPA's origin story, starting with the proposed Resources and Conservation Act of 1960, to examine its conservationist emphasis on natural resource management. Part II will explore the emerging environmental movement and its impact on the proposed Ecological Research and Surveys Act of 1965. Finally, Part III will study NEPA as enacted and its incorporation of and expansion on its predecessors' environmental understandings. Addressing moments throughout NEPA's environmental evolution, Part III of this Note will also discuss missed opportunities to capitalize on emerging understandings of environmental justice and climate change.

### I. CONSERVATION: NATURE AS AMERICA'S STOREHOUSE

NEPA's origin story began long before 1969—a decade earlier, the Resources and Conservation Act of 1960<sup>46</sup> sought to make its mark on national environmental policy. Introduced by Senator James E. Murray, a Montana Democrat, the proposed Resources and Conservation Act was ultimately shot down, facing opposition from the Eisenhower administration.<sup>47</sup> Nevertheless, several of its key tenets were revived in NEPA a decade later.<sup>48</sup> First, the bill declared a national environmental policy of “conservation, development, and utilization of the [Nation's] natural resources,”<sup>49</sup> which NEPA later expanded upon.<sup>50</sup> Second, it called for the President to prepare an annual “conservation report” on the state of the nation's natural resources,<sup>51</sup> which was mirrored in NEPA's annual Environmental Quality Report.<sup>52</sup> Third, the bill called for the formation of a “Council of Resources and Conservation Advisors” in the Office of the President,<sup>53</sup> which later became the CEQ.<sup>54</sup> Accordingly, the Resources and Conservation Act awakened the initial impulses driving the creation of a national environmental policy in NEPA.

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<sup>46</sup> S. 2549, 86th Cong. (1959). The committee hearings refer to the bill as the Resources and Conservation Act of 1960, but it was introduced in 1959, and other works refer to it as the Resources and Conservation Act of 1959. *See, e.g.*, LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* 25 (1998).

<sup>47</sup> Bear, *supra* note 14, at 3.

<sup>48</sup> *See* LINDA LUTHER, CONG. RSCH. SERV., RL33152, *THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION* 2 (2011).

<sup>49</sup> S. 2549 § 2.

<sup>50</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852, 852 (1970).

<sup>51</sup> S. 2549 § 3(a).

<sup>52</sup> National Environmental Policy Act § 201.

<sup>53</sup> S. 2549 § 4(a).

<sup>54</sup> National Environmental Policy Act § 202.

A. *Pinchot vs. Muir: Conservation vs. Preservation*

Senator Murray's bill was forthright in its aim—resource conservation—and the 1960 committee hearings confirmed that “[c]onservationists [were] deeply interested in S. 2549.”<sup>55</sup> Conservation was far from novel in 1960, having experienced its heyday under President Theodore Roosevelt in the early 1900s.<sup>56</sup> Gifford Pinchot<sup>57</sup>—President Roosevelt's right-hand conservation man, whom he appointed as the first Chief of the United States Forest Service—conceptualized conservation as “the wise use of the earth and its resources for the lasting good of men.”<sup>58</sup> Pinchot's bottom line was simple: “the greatest good of the greatest number in the long run,” a philosophy called utilitarianism.<sup>59</sup> Conservation is often conceptualized as a foil to preservation, which was embodied by Pinchot's land use “frenemy,”<sup>60</sup> naturalist John Muir,<sup>61</sup> a national parks advocate and co-founder of the Sierra Club.<sup>62</sup> Muir decried “the clearing, trampling work of civilization,”<sup>63</sup> finding solace in the fact that “[n]one of Nature's landscapes are ugly so long as they are wild.”<sup>64</sup> That is, while conservation prioritized “the proper use of nature,”

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<sup>55</sup> *Proposed Resources and Conservation Act of 1960: Hearings on S. 2549 Before the S. Comm. on Interior & Insular Affs.*, 86th Cong. 91 (1960) [hereinafter *Resources and Conservation Act Hearings*] (statement of C.R. Gutermuth, Vice President, Wildlife Management Institute).

<sup>56</sup> ANDREWS, *supra* note 17, at 125–27.

<sup>57</sup> Pinchot was an “active and influential” eugenicist, and his conservation work was intertwined with eugenics, which this Note acknowledges and condemns. See Garland E. Allen, “Culling the Herd”: *Eugenics and the Conservation Movement in the United States, 1900–1940*, 46 J. HIST. BIOLOGY 31, 36 (2013).

<sup>58</sup> *Gifford Pinchot: A Legacy of Conservation*, U.S. DEP'T OF INTERIOR (Aug. 9, 2017), <https://www.doi.gov/blog/gifford-pinchot-legacy-conservation> [https://web.archive.org/web/20230330133506/https://www.doi.gov/blog/gifford-pinchot-legacy-conservation].

<sup>59</sup> Letter from James Wilson, Secretary, U.S. Dep't of Agric., to Gifford Pinchot, Chief, U.S. Forest Serv. (Feb. 1, 1905), [https://foresthstory.org/wp-content/uploads/2017/02/Wilson\\_letter.pdf](https://foresthstory.org/wp-content/uploads/2017/02/Wilson_letter.pdf). The letter was actually written by Pinchot himself. Stanley L. Pringle, *The Greatest Good for the Greatest Number*, 68 FORESTRY CHRON. 182, 182 (1992).

<sup>60</sup> Lukas Keel, *Frenemies John Muir and Gifford Pinchot*, HUMANITIES (2020), <https://www.neh.gov/article/frenemies-john-muir-and-gifford-pinchot>.

<sup>61</sup> Muir was a racist who penned offensive descriptions of Indigenous and Black people, and his preservation work was intertwined with racism, which this Note acknowledges and condemns. Darryl Fears & Steven Mufson, *Liberal, Progressive — and Racist? The Sierra Club Faces Its White-Supremacist History.*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/climate-environment/2020/07/22/liberal-progressive-racist-sierra-club-faces-its-white-supremacist-history>.

<sup>62</sup> Anna Maria Gillis, *John Muir, Nature's Witness*, HUMANITIES (2011), <https://www.neh.gov/humanities/2011/marchapril/feature/john-muir-natures-witness>.

<sup>63</sup> JOHN MUIR, *OUR NATIONAL PARKS* 5 (1916 ed. 1901).

<sup>64</sup> *Id.* at 6–7.

preservation sought the “protection of nature from use.”<sup>65</sup> Despite their differences, both Pinchot and Muir favored public land management, eschewing private property regimes that left nature in the hands of a wealthy few. Pinchot condemned “large individual or corporate owners whose object is always the making of profit,”<sup>66</sup> and Muir denounced the “forest robbery” accomplished by “thieves who are wealthy” in the name of “vested rights.”<sup>67</sup> Accordingly, conservation and preservation—and Pinchot and Muir themselves—enjoyed periods of harmonious alignment.<sup>68</sup>

Nevertheless, Pinchot and Muir’s differences came to a head over the proposed construction of a dam at Hetch Hetchy Valley in Yosemite National Park.<sup>69</sup> Pinchot was pro-dam, declaring, “Whether [the park] will be more beautiful, I doubt, but the use of the park will be enormously increased.”<sup>70</sup> Muir, on the other hand, called out conservationists for “flooding [the Hetch Hetchy Valley] from wall to wall and burying its gardens and groves one or two hundred feet deep” in a “grossly destructive commercial scheme.”<sup>71</sup> To conservationists, scenic beauty was just one of many resources at play in the “greatest good” equation. To preservationists, natural beauty was the ultimate goal, notwithstanding the accommodation of minimal human use. Ultimately, throughout the late nineteenth and early twentieth centuries, Pinchot’s conservation movement accomplished “multiple-use commodity production” through publicly managed lands and water resources,<sup>72</sup> and Muir’s preservation advocacy effectuated a national park boom.<sup>73</sup> However, the ensuing world wars interrupted these developments, calling for all hands—and trees—on deck.<sup>74</sup> In the 1960s, as postwar America shouldered the economic

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<sup>65</sup> *Conservation vs Preservation and the National Park Service*, NAT’L PARK SERV. (Oct. 29, 2019), <https://www.nps.gov/teachers/classrooms/conservation-preservation-and-the-national-park-service.htm>.

<sup>66</sup> GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 12 (Univ. of Wash. Press, Americana Library ed. 1967) (1910).

<sup>67</sup> John Muir, *The American Forests*, 80 ATL. MONTHLY 145, 155–56 (1897), <https://www.theatlantic.com/magazine/archive/1897/08/the-american-forests/305017/>.

<sup>68</sup> Keel, *supra* note 60. Pinchot and Muir actually enjoyed a close friendship over their shared love of nature—they “talked until midnight, huddled around a campfire on the south rim of the Grand Canyon,” feeling like, in Pinchot’s words, “guilty schoolboys.” *Id.*

<sup>69</sup> *Id.* Even in this moment of conflict, Pinchot still referred to Muir as “an old and a very good friend of mine,” although he had “never been able to agree with him.” *Hetch Hetchy Dam Site: Hearing on H.R. 6281 Before the H. Comm. on the Pub. Lands*, 63d Cong. 28 (1913) [hereinafter *Hetch Hetchy Dam Hearings*] (statement of Gifford Pinchot).

<sup>70</sup> *Hetch Hetchy Dam Hearings*, *supra* note 69, at 28.

<sup>71</sup> JOHN MUIR, *THE YOSEMITE* 256 (1912).

<sup>72</sup> ANDREWS, *supra* note 17, at 141.

<sup>73</sup> *Id.* at 133.

<sup>74</sup> *Id.* at 143–44.

pressures of the Cold War and a baby boom,<sup>75</sup> proponents of the Resources and Conservation Act were eager to resurrect Pinchot's conservation legacy and replenish America's coffers.<sup>76</sup>

### *B. Conservation: A Boon to the Nation's Resources*

Apart from its name, the Resources and Conservation Act's most obvious indication of its conservationist slant lies in its policy declaration, which called for the "conservation, development, and utilization of the natural resources of the Nation to meet human, economic, and national defense requirements, including recreational, wildlife, scenic and scientific values."<sup>77</sup> In other words, America's environmental policy constituted a duty to do right by its natural resources. While the mention of "recreational, wildlife, [and] scenic . . . values" tips a hat towards preservation's "nonconsumptive . . . uses,"<sup>78</sup> it nevertheless bore an economic gloss, a la Pinchot. Committee hearing participants saw recreation as a "resource benefit"<sup>79</sup> targeting "city families, blessed with sufficient income and greater leisure time."<sup>80</sup> Furthermore, proponents pointed to the bill's potential to "stimulate to a tremendous degree a booming recreation industry."<sup>81</sup> Accordingly, recreational values did not mean nature for nature's sake,<sup>82</sup> but rather incorporated nature as a part of the feedback loop of economic prosperity. In fact, legislators specifically criticized the preservationist dream of an untouched wilderness,<sup>83</sup> declaring that

<sup>75</sup> *Id.* at 171.

<sup>76</sup> *See Resources and Conservation Act Hearings*, *supra* note 55, at 15 (statement of Sen. Francis Case) ("Gifford Pinchot was among the first to see conservation and use of our natural resources as essentially a single, unified problem.").

<sup>77</sup> S. 2549, 86th Cong. § 2 (1959).

<sup>78</sup> *Resources and Conservation Act Hearings*, *supra* note 55 at 13 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>79</sup> *Id.* at 48 (statement of Sen. Philip Hart).

<sup>80</sup> *Id.* at 17 (statement of Gov. Gaylord A. Nelson, Wisconsin); *see also id.* at 85 (statement of James. B. Carey, President, International Union of Electrical, Radio, and Machine Workers) ("It took many hundreds of years for employers to grasp the self-evident fact that workers become better workers if they have regular periods of leisure, relaxation, and recreation, release from the cloying monotony of day-to-day routine work.").

<sup>81</sup> *Id.* at 35 (statement of Gov. Edmund G. Brown, California); *see also id.* at 113 (statement of Mrs. Arthur E. Whittemore, Member, Board of Directors, League of Women Voters of the United States) ("Can recreation also serve as one of the main sources of income for the scenic, less settled areas of the country?").

<sup>82</sup> *See ANDREWS*, *supra* note 17, at 132–34 (describing the Hudson River School's vision of "an idealized Romantic view of nature in America, [which] emphasize[d] the beauty and grandeur of unspoiled wild nature.").

<sup>83</sup> *See V. E. Shelford*, *Conservation Versus Preservation*, 77 *SCIENCE* 535, 535 (1933) (explaining that "preservation lets nature take its course"); *ANDREWS*, *supra* note 17, at 132–33

“[c]onservation should not be confused with ideas which suggest we should lock our natural resources into a safe and forget about them, under the pretense of saving them for future generations.”<sup>84</sup> Pinchot’s “insistence on keeping all lands open to potential commodity-production uses” won out over Muir’s prioritization of “recreation, spiritual inspiration, and respect for wildlands and wildlife in their natural state.”<sup>85</sup> It is evident, then, that “recreational, wildlife, scenic, and scientific values” were just a few of the many competing considerations espoused in the bill’s Declaration of Policy.<sup>86</sup>

Then-Governor (later Senator) Gaylord Nelson, a Wisconsin Democrat and environmental icon<sup>87</sup> who would later introduce his own NEPA predecessor bill,<sup>88</sup> characterized the “essence of the bill [as] the inventory feature, which will give us a basis for knowing and understanding the character and nature of all of our natural resources.”<sup>89</sup> This inventory characterization is evident in Senator Murray’s introductory statement. He projected the bill’s expected impact across four different categories of “Neglected Resources”: “Forest Resources,” “Water Resources,” “Recreation,” and “Energy Resources.”<sup>90</sup> The bill itself provided for an annual “conservation report” describing “the condition of the soil, water, forest, grazing, wildlife, recreational, and other natural resources” and “the adequacy of available natural resources for fulfilling human and economic requirements.”<sup>91</sup> Accordingly, Senator Murray perceived the nation’s “unhealed gullies, denuded forest lands, uncontrolled floods, and polluted waters” as a report card evincing poor resource management.<sup>92</sup> Rather than targeting the environment per se, the bill conceptualized nature as a resource storehouse.

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(discussing preservationist beliefs that “some natural landscapes should not be exploited for commodities but should be preserved in their natural state”).

<sup>84</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 15 (statement of Sen. Francis Case).

<sup>85</sup> See ANDREWS, *supra* note 17, at 141–42.

<sup>86</sup> S. 2549, 86th Cong. § 2 (1959).

<sup>87</sup> See Ann Barker, *Focus: Gaylord Nelson*, 19 BIOSCIENCE 649, 649 (1969) (“Under [Nelson’s gubernatorial] leadership Wisconsin enacted some of the most far-sighted conservation legislation up to that time.”); Adam Rome, *The Genius of Earth Day*, 15 ENV’T HIST. 194, 196–97 (2010) (discussing Senator Nelson’s central role in organizing America’s first Earth Day).

<sup>88</sup> S. 2282, 89th Cong. (1965).

<sup>89</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 18 (statement of Gov. Gaylord Nelson, Wisconsin).

<sup>90</sup> *Id.* at 4–8 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>91</sup> S. 2549 § 3(a).

<sup>92</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 4 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.).

Recognizing that “[a]ll citizens, all private enterprises, and all levels of Government share in the benefits of and the responsibilities for resources,”<sup>93</sup> Senator Murray envisioned two primary (and intersecting) roles for people in relation to the environment: (1) consumers and (2) managers. First, Senator Murray witnessed a “lag” between “virtually every one of our natural resources” and an “unprecedented expansion of population and economic production.”<sup>94</sup> From water for hydroelectric power<sup>95</sup> to trees for paper,<sup>96</sup> nature furnished raw commodities to be harnessed for both individual and corporate consumption. Interestingly, while consumers created exponentially-increasing demand,<sup>97</sup> the bill did not focus on curbing that demand—instead, it called for better management of the resources that existed.<sup>98</sup>

Senator Murray held a rather optimistic view of good management. While recognizing that natural resources could be “depleted,” he attributed this to a lack of “proper care.”<sup>99</sup> From water pollution management<sup>100</sup> to long-distance transmission lines,<sup>101</sup> strategic management could not only conserve resources to avoid future depletion but also develop them to achieve economic gains—something the Cold War demanded.<sup>102</sup> Nature left unused or underdeveloped, was undesirable, even dangerous. Senator Gale McGee of Wyoming provided the most dramatic interpretation of this problem. In his words, Americans were “selling ourselves short,” and as a result, facing a long-term “economic assault” even “more dangerous and sinister than the flagrant assault upon us by Mr. Hitler or Mr. Tojo or Mr. Mussolini 20 years

<sup>93</sup> *Id.* at 9.

<sup>94</sup> *Id.* at 4–5. More specifically, Senator Murray projected that, “[w]ithin the next two decades, we will be a Nation of 250 million people, our economy will operate at a rate approaching \$800 billion per year, industrial production will have grown to twice its present size.” *Id.* at 4.

<sup>95</sup> *Id.* at 8.

<sup>96</sup> *Id.* at 126 (statement of William C. Hammerle, Forester, American Pulpwood Association).

<sup>97</sup> *Id.* at 4 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.) (explaining that “the rising rate of per capita consumption compounds the rate of population increase”).

<sup>98</sup> *See id.* at 4 (“Resources for human and industrial consumption must be available when needed and at reasonable costs, because the alternative would be a dwindling economy and an impoverished people.”). *But cf. id.* at 20 (statement of Sen. Gale W. McGee) (“I am among those who fear that we are placing a much greater emphasis on consumer comforts than upon national requirements. I hasten to add, there, that I think we can meet both, but that if we had to choose, the national security could come first.”).

<sup>99</sup> *Id.* at 5 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>100</sup> *Id.* at 51 (statement of Gov. G. Mennen Williams, Michigan).

<sup>101</sup> *Id.* at 37 (statement of Gov. Edmund G. Brown, California).

<sup>102</sup> *See, e.g., id.* at 26 (statement of Gov. Steve McNichols, Colorado) (“Our own resource policies should aid and augment our foreign policies—and not, instead, provide the glaring and embarrassing examples of mismanagement that threaten America’s role as the leading economic and political democracy of the world.”).

ago.”<sup>103</sup> Echoing Pinchot’s sentiments, nature merited maximization — “the use of the natural resources for the greatest good for the greatest number for the longest time.”<sup>104</sup> Muir’s preservationist vision of a sprawling, spiritual wilderness had no place in a nation bearing the brunt of both exponentially increasing domestic consumption and a global economic battle.

### C. Coordinated Management for a Coordinated Supply Chain

A win for both Pinchot and Muir, however, was the bill’s continuing emphasis on *public* land management. While Senator Murray recognized that “[a]ll citizens, all private enterprises” had a role in land management, he envisioned an elevated role for the federal government.<sup>105</sup> The federal government had a “major responsibility . . . to provide the leadership, the stimulus, and the example for State and local governments, for private industry, and for individual citizens.”<sup>106</sup> In addition to leadership, the federal government was to serve as an important center of *coordinated* resource management. Bill supporters decried the fragmented state of “uncoordinated” land management resulting in “harmful competition, conflict, and working at cross purposes.”<sup>107</sup> As such, Senator Murray envisioned that the bill’s “annual Resources and Conservation Report of the President should certainly reveal the areas of confusion and conflict, and thus . . . highlight the administrative correction needed.”<sup>108</sup> Coordinated information would empower coordinated action.

The emphasis on coordination was not just to improve administrative efficiency—it was because nature itself behaved in a coordinated manner. Per Senator Murray, “[w]ise management of natural resources involves important interrelationships.”<sup>109</sup> Chemical pollution in rivers would not only “ruin the channel for many miles downstream,” but also “make unusable the beaches and parks on the adjacent lands.”<sup>110</sup> Thus, coordinated conservation recognized the interrelationship among natural resources, effectively protecting their multi-use potential. Essentially, nature encompassed a complex supply chain between humans on the front end as managers of raw commodities and on the back end as end-use consumers of finished goods. Humans were not yet fully immersed in the

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<sup>103</sup> *Id.* at 21 (statement of Sen. Gale W. McGee).

<sup>104</sup> *Id.* at 15 (statement of Sen. Francis Case) (quoting W.J. McGee).

<sup>105</sup> *Id.* at 9 (statement of Sen. James E. Murray, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 11.

<sup>108</sup> *Id.* at 12.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 13.

natural world as biological counterparts. The conceptualization of nature as resources and humans as managers and consumers left room for a lingering degree of separation between the human and natural worlds.

One participant in the committee hearings, however, held a particularly prescient view of such natural interconnectedness. James B. Carey, President of the International Union of Electrical, Radio, and Machine Workers saw beyond the interconnectedness of natural resources to recognize the link between nature and pressing social issues.<sup>111</sup> A “[c]ocky and bantam-size” labor advocate, Carey founded the Union and served as its first president.<sup>112</sup> Carey went a step further than his peers in two ways. First, he envisioned both “a healthier American population and a healthier American economy.”<sup>113</sup> Without coordinated national management, he feared the country would “endow [American children] with leukemia, cancer, the stench of smog, and water that smells to high heaven, like the Potomac River in August.”<sup>114</sup> Thus, to Carey, nature was not only a source of economic resources but also something that penetrated directly into human health outcomes. Carey’s peers, on the other hand, considered health largely in relation to outdoor recreation as a cheaper alternative to the “huge expenditures” demanded by hospitals.<sup>115</sup>

Second, while his counterparts focused on prosperity and the growing middle class with “[i]ncreasing leisure time [and] greater income,”<sup>116</sup> Carey was the only person to mention the fact that “more than 32 million Americans[] still live in poverty, appalling poverty.”<sup>117</sup> Carey argued that

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<sup>111</sup> See *id.* at 79–83 (statement of James B. Carey, President of International Union of Electrical, Radio, and Machine Workers).

<sup>112</sup> Emanuel Perlmutter, *James B. Carey Is Dead at 62; Labor Leader Founded I.U.E.*, N.Y. TIMES, Sept. 12, 1973, at 50. Carey is a wonderful example of labor’s underappreciated role in the environmental movement. For further reading, see generally CHAD MONTRIE, *THE MYTH OF SILENT SPRING: RETHINKING THE ORIGINS OF AMERICAN ENVIRONMENTALISM* (2018).

<sup>113</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 85 (statement of James B. Carey, President of International Union of Electrical, Radio, and Machine Workers).

<sup>114</sup> *Id.* at 83.

<sup>115</sup> *Id.* at 56 (statement of Herbert Eagon, Director, Ohio Department of Natural Resources); *id.* at 52 (statement of Gov. G. Mennen Williams, Michigan) (“Outdoor recreation is an important element of healthy life . . .”).

<sup>116</sup> *Id.* at 67 (statement of Spencer Smith, Secretary, Citizens Committee on Natural Resources).

<sup>117</sup> *Id.* at 83 (statement of James B. Carey, President of International Union of Electrical, Radio, and Machine Workers). Carey did not explicitly mention race in the committee hearings, so it is unclear whether his discussion of poverty also connoted racial disparities. However, it *is* clear that Carey was pro-civil rights. He “attacked President Eisenhower for his ‘lack of integrity and firmness in civil rights’ and accused him of aiding the race-haters when the President spoke in favor of a slower action in school integration on August 27, 1958.” Monroe B. Sullivan, *A Study of the Labor Philosophy of James B. Carey, President of the International Union of Electrical, Radio, and Machine Workers* 11 (June 1961) (M.S.I.R. thesis, Loyola University Chicago) (Loyola

the attention on “resources conservation and development” that would result from the Resources and Conservation Act, “coupled with the effective operation of a real full employment policy, would enable us to cut sharply and quickly into the shameful core of poverty in this country.”<sup>118</sup> To Carey, American environmental policy should not only aim to protect picket fence prosperity but also provide opportunities for those living in poverty. However, Carey’s vision was not reflected in the bill itself. The bill’s Declaration of Policy sought to “foster and promote the general welfare,” and “meet human . . . requirements,” but it did not explicitly mention, let alone emphasize, human health impacts and resource disparities.<sup>119</sup>

In sum, the Resources and Conservation Act represented a win for Pinchot’s conservationist principles of the environment as a resource storehouse demanding wise human intervention. While NEPA’s environmental policy ultimately encompassed much more than natural resource conservation, the Resources and Conservation Act nevertheless provided a critical starting point for the development of a national environmental policy. Conservation was the activating impetus, and it would continue to be a throughline in NEPA’s development. Sadly for Senator Murray, the Eisenhower administration, several federal agencies, and organized business all opposed the bill.<sup>120</sup> Then-Vice President Nixon would have preferred “a council composed of cabinet secretaries” instead.<sup>121</sup> The following year, a subsequent iteration of the bill—the Resources and Conservation Act of 1961<sup>122</sup>—similarly flopped.<sup>123</sup> The political impetus for such a comprehensive scheme simply did not yet exist. Nevertheless, hope was far from lost, as exciting environmental innovations were just around the corner.

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eCommons). Carey was also a member of President Truman’s Committee on Civil Rights. Exec. Order No. 9,808, 3 C.F.R. § 590 (1943–1948).

<sup>118</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 83 (statement of James B. Carey, President of International Union of Electrical, Radio, and Machine Workers).

<sup>119</sup> S. 2549, 86th Cong. § 2 (1959).

<sup>120</sup> CALDWELL, *supra* note 46, at 27.

<sup>121</sup> *Id.*

<sup>122</sup> S. 239, 87th Cong. (1961); S. 1415, 87th Cong. (1961). For the committee hearings, see *Resources and Conservation Act of 1961: Hearing on S. 239 and S. 1415 Before the S. Comm. on Interior & Insular Affs.*, 87th Cong. (1961).

<sup>123</sup> This time around, the Kennedy administration was to blame for the bills’ failure. Bear, *supra* note 14, at 3.

## II. ECOLOGY: HUMANS IN THE ENVIRONMENT

The year 1962 is frequently credited with snapping America out of its conservation era and awakening a more ardent, expansive, and ambitious environmental consciousness.<sup>124</sup> Rachel Carson's seminal *Silent Spring* not only alerted Americans to the dangers of DDT—the miracle insecticide turned villainous chemical<sup>125</sup>—but also forced the nation to grapple with “the environment as a living system—a ‘web of life,’ or ecosystem, in which humans are participants.”<sup>126</sup> To be sure, Carson did not invent ecology, a concept with nineteenth-century roots,<sup>127</sup> but she did weave it into the modern environmental era.<sup>128</sup> Her book functioned as a “20th-century ‘Uncle Tom’s Cabin,’”<sup>129</sup> shifting the nation’s rallying cry away from “wise use”<sup>130</sup> to, “Hey, farmer, farmer, put away the DDT now!”<sup>131</sup> Within two years of publication, *Silent Spring*’s message reached over a million readers.<sup>132</sup> *Silent Spring* is thus critical to understanding NEPA’s environmental ambitions and ecological underpinnings. This section therefore examines the incorporation of Carson’s environmental theory into a key waystation on the road to NEPA: the Ecological Research and Surveys Act of 1965.<sup>133</sup>

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<sup>124</sup> Rachel Carson’s *Silent Spring*, which came out in 1962, is largely recognized as the catalyst for this era. See Ralph H. Lutts, *Chemical Fallout: Rachel Carson’s Silent Spring, Radioactive Fallout, and the Environmental Movement*, 9 ENV’T REV. 210, 211 (1985) (“Never before or since [*Silent Spring*] has a book been so successful in alerting the public to a major environmental pollutant, rooting the alert in a deeply ecological perception of the issues, and promoting major public, private and governmental initiatives to correct the problem.”); BRINKLEY, *supra* note 29, at xvii (“It was Rachel Carson, full stop, who, in an urgent, visceral way, sparked an eco-revolution with *Silent Spring* by connecting Rooseveltian preservation with public health concerns about the pesticide DDT.”).

<sup>125</sup> See *DDT – A Brief History and Status*, U.S. ENV’T PROT. AGENCY (Apr. 3, 2023), <https://www.epa.gov/ingredients-used-pesticide-products/ddt-brief-history-and-status>.

<sup>126</sup> ANDREWS, *supra* note 17, at 191.

<sup>127</sup> *Id.*

<sup>128</sup> See Edwin McDowell, ‘*Silent Spring*,’ 20 Years a Milestone, N.Y. TIMES, Sept. 27, 1982, at C16.

<sup>129</sup> Walter Sullivan, *Books of the Times*, N.Y. TIMES, Sept. 27, 1962, at 35.

<sup>130</sup> *Resources and Conservation Act Hearings*, *supra* note 55, at 15 (statement of Sen. Francis Case).

<sup>131</sup> JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON, at 1:01 (Reprise Recs. 1970). While Joni Mitchell’s iconic song was technically released in 1970, I think it accurately captures the environmental sentiment that cropped up around *Silent Spring*.

<sup>132</sup> Cate Lineberry, *How Rachel Carson’s ‘Silent Spring’ Awakened the World to Environmental Peril*, HISTORY (Apr. 22, 2022), <https://www.history.com/news/rachel-carson-silent-spring-impact-environmental-movement>.

<sup>133</sup> S. 2282, 89th Cong. (1965).

### A. Silent Spring and The Quiet Crisis

*Silent Spring* achieved resounding success in its campaign against DDT,<sup>134</sup> which was ultimately banned in 1972.<sup>135</sup> But even more importantly and inconspicuously, Carson fundamentally reshaped Americans' relationships with their environment.<sup>136</sup> A gifted biologist, writer, and naturalist,<sup>137</sup> if anyone was capable of "taking dull scientific facts and translating them into poetical and lyrical prose,"<sup>138</sup> it was Carson. She educated eager readers on the "closely knit fabric of life"<sup>139</sup> that extended the consequences of human activity not only to our natural resources—our wildlife,<sup>140</sup> water,<sup>141</sup> and farmlands<sup>142</sup>—but also to our immediate selves—our dinner tables,<sup>143</sup> minds,<sup>144</sup> bodies,<sup>145</sup> and fertility.<sup>146</sup> Human beings were not tangential to nature as mere consumers and resource managers but were instead a part of it, "sharing our [E]arth with other creatures . . . with living populations and all their pressures and counter-pressures, their surges and recessions."<sup>147</sup> As Carson later warned Congress, "our heedless and destructive acts enter into the vast cycles of the earth and in time return to bring hazard to ourselves."<sup>148</sup> Carson thus catalyzed the transition from conservation to modern environmentalism by looking beyond humans *and* their environment to consider humans *in* their environment.

While sometimes overlooked in the shadows of *Silent Spring*, then-Secretary of the Interior Stewart Udall's *The Quiet Crisis*,<sup>149</sup> published in 1963, was also a significant source of modern environmental thought.<sup>150</sup>

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<sup>134</sup> *The Story of Silent Spring*, NAT. RES. DEF. COUNCIL (Aug. 13, 2015), <https://www.nrdc.org/stories/story-silent-spring>.

<sup>135</sup> *DDT – A Brief History and Status*, *supra* note 125.

<sup>136</sup> *See The Story of Silent Spring*, *supra* note 134.

<sup>137</sup> Linda J. Lear, *Rachel Carson's Silent Spring*, ENV'T HIST. REV., Summer 1993, at 23, 24–25, 29–30.

<sup>138</sup> *Rachel Carson Dies of Cancer; 'Silent Spring' Author Was 56*, N.Y. TIMES, Apr. 15, 1964, at 1.

<sup>139</sup> RACHEL CARSON, *SILENT SPRING* 67 (1994 ed. 1962).

<sup>140</sup> *Id.* at 85.

<sup>141</sup> *Id.* at 40–41.

<sup>142</sup> *Id.* at 56–57.

<sup>143</sup> *Id.* at 178–80.

<sup>144</sup> *Id.* at 196–98.

<sup>145</sup> *Id.* at 188–89.

<sup>146</sup> *Id.* at 205–08.

<sup>147</sup> *Id.* at 296.

<sup>148</sup> *Interagency Coordination in Environmental Hazards (Pesticides): Hearings on Agency Coordination Study Before the Subcomm. on Reorg. & Int'l Orgs. of the S. Comm. on Gov't Operations*, 88th Cong. 206 (1963) (statement of Rachel Carson).

<sup>149</sup> STEWART L. UDALL, *THE QUIET CRISIS* (1963).

<sup>150</sup> *See CALDWELL*, *supra* note 46, at 26 ("Books . . . especially by Rachel Carson (1962) and Stewart Udall (1963) contributed cumulatively to a heightened public awareness of an endangered

Just as Carson leveraged her scientific background to outline America's environmental crisis, Udall leveraged his government experience to trace the evolution of America's environmental policy crisis.<sup>151</sup> While Udall is perhaps best remembered as a prolific conservationist,<sup>152</sup> he also incorporated an environmentalist gloss in his conservation work, recognizing that “we are not outside nature, but in it; that it is . . . a community to which we belong.”<sup>153</sup> In this way, *The Quiet Crisis* endorsed classic conservation reform—“preserving, improving and renewing the quality and usefulness of all our resources.”<sup>154</sup> But it also incorporated Carson's conception of humans as part of the “fabric of life.” Udall bemoaned “what Rachel Carson has called an ‘age of poisons,’ an indiscriminate use of pesticides [that] threatens both man and wildlife.”<sup>155</sup> In Udall's eyes, a modern environmental policy must “stress the oneness of our resources and the live-and-help-live logic of the great chain of life.”<sup>156</sup> In calling for “an ever-widening concept . . . of conservation,”<sup>157</sup> Udall actually united preservationists' pride in America's lush landscapes,<sup>158</sup> conservationists' commitment to the nation's natural storehouse, and environmentalists' understanding of iterative ecological impacts.

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environment.”); Thomas G. Smith, *John Kennedy, Stewart Udall, and New Frontier Conservation*, 64 PAC. HIST. REV. 329, 349 (1995) (“*The Quiet Crisis* also gave additional impetus to the nascent environmental movement.”).

<sup>151</sup> Udall served as a Democratic congressman and led John F. Kennedy's presidential campaign efforts in Arizona prior to becoming Secretary of the Interior. John de Graaf, *Stewart Udall: A Remembrance*, SIERRA MAG. (Apr. 25, 2020), <https://www.sierraclub.org/sierra/stewart-udall-remembrance>.

<sup>152</sup> Here, “conservationist” is being used in a non-technical sense, encompassing aspects of preservation and environmentalism. See Keith Schneider & Cornelia Dean, *Stewart L. Udall, Conservationist in Kennedy and Johnson Cabinets, Dies at 90*, N.Y. TIMES (Mar. 20, 2010), <https://www.nytimes.com/2010/03/21/nyregion/21udall.html>.

<sup>153</sup> Stewart L. Udall, *To Save the Wonder of the Wilderness*, N.Y. TIMES, May 27, 1962, at 22. To be fair, Udall embraced a lot of different environmental philosophies, from (his perception of) Indigenous traditions to Thoreau's poetic affinity for the wilderness. *Id.*

<sup>154</sup> UDALL, *supra* note 149, at 173 (quoting President John F. Kennedy, Conservation Message to Congress (March 1, 1962)).

<sup>155</sup> *Id.* at 175.

<sup>156</sup> *Id.* at 190.

<sup>157</sup> *Id.* at 191.

<sup>158</sup> Udall was a staunch and successful advocate of national parks. See Stewart Udall, *National Parks for the Future*, ATLANTIC, June 1961, at 81, 83–84; Schneider & Dean, *supra* note 152 (noting that Udall's administration acquired four national parks, six national monuments, nine national recreation areas, and fifty wildlife refuges).

*B. Ecological Research and Surveys Act*

Senator Gaylord Nelson appeared to be quite a fan of both Carson's and Udall's writings.<sup>159</sup> A regular on the environmental scene, he would later go on to found America's first Earth Day in 1970.<sup>160</sup> However, in 1965, he was busy mustering support for his recently introduced Ecological Research and Surveys Act.<sup>161</sup> Senator Nelson's bill not only illustrates NEPA's firm grounding in modern environmentalism, but also traces the development of what would eventually become Title II of NEPA:<sup>162</sup> the CEQ.<sup>163</sup>

The Ecological Research and Surveys Act of 1965 was launched with a semicolon-stocked soliloquy on the never-ending interconnectedness of Earth's natural systems. First, man imposed "population pressures, the development of transportation systems, agricultural practices, numerous natural resource developments, and other technological advances" on the earth.<sup>164</sup> These anthropogenic activities, in turn, "changed [the environment] markedly," from "serious losses in valuable species of fauna and flora" to the waning value of "many areas of outstanding interest, scientific value and scenic beauty."<sup>165</sup> This "storm of modern change" then began "degrading man's environment and threaten[ed] his very existence."<sup>166</sup> To remedy this alarming cycle, Senator Nelson proposed "a comprehensive program of research, studies, and surveys" to promote an "understanding of our natural resources and the environmental forces responsible for their development and well-being" and to ensure "the future protection, enhancement, and proper utilization of the natural environmental systems of the United States."<sup>167</sup>

Ecology is not only in the name of the bill but also forms the underlying policy premise. At the 1966 committee hearings, Secretary Udall himself offered up a definition of ecology as "the scientific study

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<sup>159</sup> See Sen. Gaylord Nelson, Remarks Before the Wisconsin Department of Natural Resources: State Ban on DDT (Dec. 2, 1968), <https://content.wisconsinhistory.org/digital/collection/tp/id/29625/> (noting that *Silent Spring* "visibly shook a country that had become complacent about the indiscriminate spreading of . . . long-lived poisons"); Sen. Gaylord Nelson, Remarks to Mid-Winter Meeting, State Bar of Wisconsin: America's Last Chance (Feb. 19, 1965), <https://content.wisconsinhistory.org/digital/collection/tp/id/29597> (describing the "reawakening of the Nation to what Secretary Udall has called 'the quiet crisis'").

<sup>160</sup> See discussion *supra* note 87.

<sup>161</sup> S. 2282, 89th Cong. (1965).

<sup>162</sup> CALDWELL, *supra* note 46, at 28.

<sup>163</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, §§ 201–206, 83 Stat. 852, 854–56 (1970).

<sup>164</sup> S. 2282 § 1.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

of the dynamic interrelations of living organisms with each other and with their immediate physical and chemical environment.”<sup>168</sup> Under this line of reasoning, the environment was something that required scientific study—the natural world’s iterative dynamism prevented a simple cause-and-effect analysis. This fundamentally reimagined the government’s approach to the natural world—merely taking inventory or managing forest growth was no longer enough. As the Assistant Secretary of Fish and Wildlife and Parks put it, “our concern has been confined largely to specific expected events. We have paid precious little attention to what is happening or will happen to the *total environment*.”<sup>169</sup> In light of humans’ potential to unintentionally “effect massive changes in our environment,”<sup>170</sup> ecological research had to precede “large modifications in[] our environment.”<sup>171</sup> An ecological understanding of the environment merited more than the coordination contemplated by the Resources and Conservation Act—it required a vigilant eye on the lurking unknowns.

Additionally, the bill recognized humans as fundamentally embedded in the environment—man functioned not only as a “manipulant”<sup>172</sup> but also as a recipient of the ecological feedback loop. In Senator Nelson’s words, humans were “part of the natural environment and not over and above it.”<sup>173</sup> While man might be the “primary manipulant of this world,” the “manipulations which we make bear[] not only on our economics or upon our standards of living or upon our comforts but . . . upon the whole biological network.”<sup>174</sup> In this way, Senator Nelson penetrated the gap between the human and natural worlds—humans were not only economic managers and consumers, but also biological specimens susceptible to environmental impacts alongside flora and fauna.

Interestingly, the bill seemed to view humanity’s “manipulant” and recipient roles—human nature—with more ominous undertones than

<sup>168</sup> *Ecological Research and Surveys: Hearing on S. 2282 Before the S. Comm. on Interior & Insular Affs.*, 89th Cong. 5 (1966) [hereinafter *Ecological Research Hearing*] (statement of Stewart L. Udall, Secretary, Department of the Interior); see also *id.* at 10 (statement of Stewart L. Udall, Secretary, Department of the Interior) (also defining ecology as “the science of the web of life and of its interrelationship to the whole of resource or to all of our resources”).

<sup>169</sup> *Id.* at 13 (statement of Stanley A. Cain, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior) (emphasis added).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 30 (statement of Dr. Colin M. MacLeod, Deputy Director, Office of Science and Technology); see also *id.* at 110 (statement of Dr. Robert U. Ayres, Hudson Institute) (“[O]ur environment is constantly responding to manmade disturbances . . . in unexpected and unpleasant ways, which we are often at a loss to understand or counteract. Yet, in many cases, prediction would make prevention possible.”).

<sup>172</sup> *Id.* at 49 (statement of Dr. John C. Calhoun, Jr., Vice Chancellor, Texas A. & M.).

<sup>173</sup> *Id.* at 48 (statement of Sen. Gaylord Nelson, Member, S. Comm. on Interior & Insular Affs.).

<sup>174</sup> *Id.* at 48–49 (statement of Dr. John C. Calhoun, Jr., Vice Chancellor, Texas A. & M.).

were expressed in the Resources and Conservation Act.<sup>175</sup> Specifically, committee hearing participants directly criticized the dark side of humanity's exploitative environmental impulses. For instance, one Audubon biologist declared that "man, is by nature, inclined to over-exploit his environment. This is a biological trait shared with most animal species. . . . But man can no longer allow human exploiters of marginal environments to struggle and die by themselves."<sup>176</sup> Likewise, Senator Nelson recognized that "Americans have generally taken an exploitative view of their environment" encouraged by "[o]ur early experience as a small nation of colonists on the edge of an immense wilderness . . . . But now it is absolutely crucial that we change."<sup>177</sup>

Perhaps now that people actually existed *in* the environment "as a place to live, rather than merely as a place to make money,"<sup>178</sup> their "manipulant" abilities carried implications that hit a little too close to home. Rather than focusing on man's potential to maximize economic security, many of the hearing participants were primarily concerned with environmental health and safety. Indeed, scientists' testimony regarding the human impact rendered by the ecological "web of life" confirmed that something much worse than untapped economic potential was at stake. Thoughtless human activities could lead to disease and cancer,<sup>179</sup> and while they were a little better off than the birds, people still remained vulnerable to pesticides in their "air, food, and water."<sup>180</sup> Environmental alarm bells were ringing in Americans' backyards and bedrooms, yet even the nation's smartest scientists could not fully ascertain the extent of the human fallout.

The Ecological Research and Surveys Act of 1965 painted a more sweeping environmental portrait than Americans had previously

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<sup>175</sup> To be sure, the Resources and Conservation Act hearings contained ominous language, as well. Ever the oracle, Carey warned of "industrial wastes, automobile gases, and nuclear explosions [that] have made the very air we breathe a source of horrible death, a source with threatens to become an infinitely greater killer if nuclear explosions and more industrial and automobile wastes are recklessly loosed into the atmosphere." *Resources and Conservation Act Hearings*, *supra* note 55, at 82 (statement of James B. Carey, President, Union of Electrical, Radio, and Machine Workers). However, apart from Carey, much of the fatalism concerned the worry that America might fall behind the Soviet Union in resource development, just like it had "in the field of rockets and missiles," rather than human nature itself. *Id.* at 44 (statement of Sen. Alan Bible, Member, S. Comm. on Interior & Insular Affs.).

<sup>176</sup> *Ecological Research Hearing*, *supra* note 168, at 56 (statement of Dr. Roland C. Clement, New York Staff Biologist, Audubon Society).

<sup>177</sup> *Id.* at 1 (statement of Sen. Gaylord Nelson, Member, S. Comm. on Interior & Insular Affs.).

<sup>178</sup> *Id.* at 34 (statement of Dr. S. Dillon Ripley, Secretary, Smithsonian Institution).

<sup>179</sup> *Id.* at 139 (statement of Stanley I. Auerbach, Ecologist and Secretary, Ecological Society of America); *id.* at 61 (statement of Dr. Kenneth Norris, Chairman, Natural Land and Water Reserves System, UCLA).

<sup>180</sup> *Id.* at 72 (statement of Dr. Robert Whittaker, Brookhaven National Laboratory).

envisioned. Humanity lost its outsider immunity and was forced to grapple with the full-circle consequences of its actions in the “web of life.” Fortunately, science presented an opportunity for Americans to better forecast and manage their environmental impacts. By facing up to the complex ecological effects stemming from their actions, Americans could not only avoid environmental degradation but also achieve improved health and safety.

Senator Nelson’s bill received “almost uniform[.]” support, although it was ultimately shot down by federal department heads who preferred to complete a joint study by the Office of Science and Technology and the Bureau of the Budget before moving forward with the bill.<sup>181</sup> In subsequent years, similar bills in both the House<sup>182</sup> and Senate<sup>183</sup> seeking to establish an environmental advisory council also failed.<sup>184</sup> Notwithstanding these legislative flops, Congress’s appetite for a national environmental policy grew even larger. The 90th and 91st Congresses received “as many as forty separate proposals relating to environmental policy and protection.”<sup>185</sup> Any disappointment surrounding Congress’s failure to pass Senator Nelson’s Ecological Research and Surveys Act would soon be tampered by the ecstasy of enacting an even more expansive, ambitious, and comprehensive environmental policy—the “Magna Carta” of environmental law itself.

### III. NEPA: ENVIRONMENTALISM ON FIRE

NEPA’s enactment in 1970 can be characterized as the culmination of a decade-plus of hard work, failed attempts, and coalition-building, but it is just as much the outcome of fortuitous timing. Spurred on by *Silent Spring* and *The Quiet Crisis*, the wheels of modern environmentalism had already started spinning. Moreover, environmentalism found an unlikely ally in President Richard Nixon—a reluctant and short-lived but impactful environmental politician. In other words, NEPA emerged from the perfect storm. Part III of this Note will discuss America’s environmental consciousness at the time of NEPA’s drafting and enactment.

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<sup>181</sup> *An Ecology Bill*, RES. MAG., Jan. 1967, at 12, 12.

<sup>182</sup> H.R. 7796, 90th Cong. (1967); H.R. 13211, 90th Cong. (1967); H.R. 14605, 90th Cong. (1968).

<sup>183</sup> S. 2805, 90th Cong. (1967).

<sup>184</sup> See CALDWELL, *supra* note 46, at 28.

<sup>185</sup> *Id.*

### A. A Not-So Quiet Crisis

On January 28, 1969, only eight days into Nixon's presidency, at 10:45AM PST, dark sludge bubbled up from the Pacific Ocean less than six miles off the Santa Barbara coastline.<sup>186</sup> A well blowout had occurred on the Union Oil Company's Platform A oil rig, and in just twenty-four hours, it dumped three million gallons of oil (the equivalent of 4.5 Olympic swimming pools<sup>187</sup>) into the Pacific Ocean, covering thirty-five square miles.<sup>188</sup> The United States Geological Survey had granted Union Oil a waiver to go sixty-one feet under the minimum requirement for protective casing around the drilling hole, and the subpar casing had caved under pressure.<sup>189</sup>

Santa Barbara was the "ecological 'shot heard round the world.'"<sup>190</sup> Not only was the environmental fallout great, but so was the public outcry. Over 3,700 seabirds perished from oil exposure,<sup>191</sup> and more than 80 million Americans tuned into their TVs to witness these oil-soaked birds struggle to fly in vain.<sup>192</sup> Santa Barbara's ocean scenery was replaced with the "stench of the oil waft[ing] several miles inland," the contamination of "700 pleasure boats," and the evacuation of "'live-aboard' boating people."<sup>193</sup> Although Santa Barbara was traditionally Republican stomping grounds, partisan politics paled in the face of the universal displeasure of inhaling crude oil odors.<sup>194</sup> When President Nixon visited Santa Barbara to witness the oil spill's aftermath, "[t]housands of citizens, kept at a distance by stringent security measures, chanted: 'Get Oil Out!'"<sup>195</sup> The environmental disaster prophesied by Carson and Udall had leapt out of the pages into millions of Americans' nostrils, newspapers, and television screens, making it impossible to ignore.

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<sup>186</sup> BRINKLEY, *supra* note 29, at 565.

<sup>187</sup> Lia Thulin, *How an Oil Spill Inspired the First Earth Day*, SMITHSONIAN MAG. (Apr. 22, 2019), <https://www.smithsonianmag.com/history/how-oil-spill-50-years-ago-inspired-first-earth-day-180972007>.

<sup>188</sup> BRINKLEY, *supra* note 29, at 565.

<sup>189</sup> Thulin, *supra* note 187.

<sup>190</sup> Gladwin Hill, *One Year Later, Impact of Great Oil Slick Is Still Felt*, N.Y. TIMES, Jan. 25, 1970, at 42.

<sup>191</sup> Thulin, *supra* note 187.

<sup>192</sup> BRINKLEY, *supra* note 29, at 566.

<sup>193</sup> Gladwin Hill, *Santa Barbara Harbor Closed; Oil Fouls Beaches, Fire Hazard Feared*, N.Y. TIMES, Feb. 6, 1969, at 1.

<sup>194</sup> BRINKLEY, *supra* note 29, at 566.

<sup>195</sup> Ross MacDonald & Robert Easton, *Santa Barbarans Cite an 11th Commandment: 'Though Shalt Not Abuse the Earth'*, N.Y. TIMES, Oct. 12, 1969, at 32.

The Cuyahoga River added fuel to the environmental fire—quite literally—when it burst into flames on June 22, 1969.<sup>196</sup> This wasn't the Cuyahoga's first rodeo. The notoriously polluted river cutting through Cleveland, Ohio, had previously experienced at least a dozen fires.<sup>197</sup> In this particular fire, the culprit was a spark from a railroad bridge that came into contact with surface debris.<sup>198</sup> The fire only lasted around thirty minutes and was so brief that no one managed to photograph it.<sup>199</sup> While the irony of a river on fire might have been a shocking headline in another city, in Cleveland, it was “just another fire.”<sup>200</sup> The conflagratory properties of the Cuyahoga River were no surprise to locals who took the river's role as “an open sewer used by industry . . . as a matter of course.”<sup>201</sup>

The Cuyahoga River was not only a hazardous dumping ground but also the dividing line between Black and white Cleveland.<sup>202</sup> Crossing the Cuyahoga from white West Cleveland towards Black East Cleveland meant entering a drastically different world shaped by discriminatory housing policies.<sup>203</sup> To Gary Bound, a white city employee who crossed over from Old Brooklyn, “a white working-class neighborhood on the southwest side of Cleveland,” to read meters in Hough, a Black East Side neighborhood, the East-West divide was particularly shocking.<sup>204</sup> In a 1969 letter to the mayor, Bound wrote: “The dampness, the decay—and I am *not* over-emphasizing—the stench is beyond proper description. You simply ‘must’ see it to actually believe it, and still it all strikes as like a horrid nightmare, an unreal horror story.”<sup>205</sup> In July 1966, the simmering resentment over Cleveland's racial chasm bubbled over into

<sup>196</sup> BRINKLEY, *supra* note 29 at 572.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 573.

<sup>199</sup> Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444>.

<sup>200</sup> DAVID STRADLING & RICHARD STRADLING, *WHERE THE RIVER BURNED: CARL STOKES AND THE STRUGGLE TO SAVE CLEVELAND* 145 (2015).

<sup>201</sup> *Id.*

<sup>202</sup> *Carl B. Stokes: Ground-breaking Cleveland Mayor*, NAT'L PARK SERV. (Feb. 2, 2022), <https://www.nps.gov/people/carl-b-stokes.htm>.

<sup>203</sup> Rachele Mongiovi, *Lasting Impact of Cleveland's 'Redlined' Neighborhoods*, SPECTRUM NEWS 1 (June 17, 2020), <https://spectrumnews1.com/oh/columbus/news/2020/06/17/lasting-impact-of-cleveland-s-redlined-neighborhoods>; Todd Michney, *What the History of One Cleveland Neighborhood Can Teach Us About Race and Housing Inequality*, CLEV. SCENE (Aug. 2, 2017), <https://www.clevescene.com/news/what-the-history-of-one-cleveland-neighborhood-can-teach-us-about-race-and-housing-inequality-9031621>; Kenneth L. Kusmer, *African Americans*, ENCYCLOPEDIA OF CLEV. HIST., <https://case.edu/ech/articles/a/african-americans> (last visited Feb. 13, 2024).

<sup>204</sup> STRADLING & STRADLING, *supra* note 200, at 46–47.

<sup>205</sup> *Id.* at 47.

the Hough Uprising,<sup>206</sup> reportedly triggered by a bar owner who refused to serve a Black man water.<sup>207</sup> The initial scuffle escalated into five days of violence and the loss of four Black lives.<sup>208</sup>

In 1967, on the heels of the Hough Uprising and the national Civil Rights movement, Cleveland elected the first Black mayor of any major American city, Carl Stokes.<sup>209</sup> Stokes was raised in an East Cleveland public housing project,<sup>210</sup> so he certainly did not need a white city employee to tell him just how dire Cleveland's environmental outlook was. Stokes grew up breathing the stench of the City's polluted waterways<sup>211</sup> and "cover[ing] the rat holes with the tops of tin cans" in his "rickety old two-family house."<sup>212</sup> As mayor, Stokes sought to ensure an environmentally healthy Cleveland.<sup>213</sup> In 1968, his first year in office, Stokes helped the City secure a \$100 million bond for the environmental cleanup of the Cuyahoga River.<sup>214</sup> On Independence Day of that same year, Stokes and Director of Public Utilities Ben Stefanski welcomed both Black and white Clevelanders to enjoy a chlorine-filled, curtain-bound pool in Lake Erie, which, unlike the surrounding waters, was safe for swimming.<sup>215</sup>

Notwithstanding his passion for Cleveland's waterways, Stokes rejected the "environmentalist" label.<sup>216</sup> He worried that "the priorities on air and water pollution may be at the expense of what the priorities of the country ought to be: proper housing, adequate food and clothing."<sup>217</sup> Stokes was not content to pursue environmentalism in a whitewashed vacuum. He wanted to create a better "urban environment"<sup>218</sup> for all

<sup>206</sup> While some refer to this event as the "Hough Riots," I purposefully avoid this characterization to emphasize that the violence *rose up out of* decades of racial discrimination and disenfranchisement — it was far from a riot for rioting's sake. See *The Hough Uprising*, CLEV. CIV. RTS. TRAIL, <https://clevelandcivilrightstrail.org/explore-the-trail/the-hough-uprising> (last visited Feb. 16, 2024).

<sup>207</sup> STRADLING & STRADLING, *supra* note 200, at 68.

<sup>208</sup> *Id.* at 68–69; *The Hough Uprising*, *supra* note 206.

<sup>209</sup> BRINKLEY, *supra* note 29, at 573.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*; *Carl Stokes: A Pioneer of Environmental Justice*, NAT'L PARK SERV. (Feb. 27, 2023), <https://www.nps.gov/articles/000/carl-stokes-a-pioneer-of-environmental-justice.htm>.

<sup>212</sup> CARL B. STOKES, *PROMISES OF POWER: A POLITICAL AUTOBIOGRAPHY* 23 (1973).

<sup>213</sup> *Carl Stokes: A Pioneer of Environmental Justice*, *supra* note 211.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*; STRADLING & STRADLING, *supra* note 200, at 114–17. The venture was tragically derailed by a storm that caught thousands of beachgoers and hundreds of boaters off guard. *Id.* at 116.

<sup>216</sup> *Carl Stokes: A Pioneer of Environmental Justice*, *supra* note 211.

<sup>217</sup> *Id.*

<sup>218</sup> *Carl B. Stokes and the 1969 River Fire*, NAT'L PARK SERV., (Dec. 20, 2023) <https://www.nps.gov/articles/carl-stokes-and-the-river-fire.htm>.

Clevelanders.<sup>219</sup> This meant considering “all kinds of problems . . . housing, welfare, air and water pollution, education, law enforcement.”<sup>220</sup> Modern environmentalists have labeled Stokes as an environmental justice pioneer<sup>221</sup>—someone who recognized the disproportionate distribution of environmental harms<sup>222</sup> and fought at the intersection of environmental and civil rights issues.<sup>223</sup> Although the environmental justice movement, as we define it today, did not officially emerge until the 1980s,<sup>224</sup> Stokes was no doubt a man ahead of his time.

The day after the Cuyahoga fire, Stokes embarked on a “pollution tour” of the river, giving local press and government officials a glimpse of the river’s dire polluted state, along with the damage from the fire.<sup>225</sup> However, Stokes’s “pollution tour” barely made a stir in the local press.<sup>226</sup> After all, it was just another sparky day on the Cuyahoga. Things changed on August 1, 1969, when *Time* published an article that propelled the Cuyahoga to the forefront of Americans’ minds.<sup>227</sup> Titled, “The Cities: The Price of Optimism,” the article featured a dramatic photograph of the Cuyahoga River in flames,<sup>228</sup> which was actually taken in 1952 of a previous Cuyahoga fire, not in 1969.<sup>229</sup> The article also pictured Mayor Stokes with Director Stefanski, a white “30-year-old lawyer-turned-urbanist” to whom “[m]uch of the credit” for Cleveland’s environmental progress was apparently due.<sup>230</sup> Mayor Stokes, meanwhile, was quoted as “sadly” remarking that the Cuyahoga was “a terrible reflection on our

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<sup>219</sup> See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing A History of Environmental Protection*, 14 *FORDHAM ENV'T L.J.* 89, 113 (2002) (“Mayor Stokes forthrightly declared that, as Mayor, he ‘face[d] many more serious crises which affect the lives of my constituents to a greater degree than air and water pollution. . . . These include housing, jobs, food, clothing and the ability to live in a society free of racial hatred.’”).

<sup>220</sup> STRADLING & STRADLING, *supra* note 200, at 112.

<sup>221</sup> See, e.g., *Carl Stokes: A Pioneer of Environmental Justice*, *supra* note 211; *Mayor Carl Stokes*, SIERRA CLUB OHIO (Feb. 26, 2021), <https://www.sierraclub.org/ohio/blog/2021/02/mayor-carl-stokes>; Rachel Musetti, *Remembering Mayor Carl B. Stokes for Bringing National Attention to Water Quality and Environmental Justice*, EMORY OFF. OF SUSTAINABILITY INITIATIVES (Feb. 8, 2021), <https://sustainability.emory.edu/remembering-mayor-carl-b-stokes-for-bringing-national-attention-to-water-quality-and-environmental-justice>.

<sup>222</sup> John E. Milner & John Turner, *Environmental Justice*, 13 *NAT. RES. & ENV'T* 478, 478 (1999).

<sup>223</sup> Suzi Ruhl & Jonathan Ostar, *Environmental Justice*, *GPSOLO MAG.*, May/June 2016, at 42.

<sup>224</sup> Skelton & Miller, *supra* note 6.

<sup>225</sup> STRADLING & STRADLING, *supra* note 200, at 144.

<sup>226</sup> *Id.* at 148 (“[I]nitially the story was about the damaged trestles, not the burning river. If the Cleveland papers made little of the incident, the national press initially ignored the blaze altogether.”).

<sup>227</sup> BRINKLEY, *supra* note 29, at 574.

<sup>228</sup> *The Cities: The Price of Optimism*, *TIME*, Aug. 1, 1969, at 41.

<sup>229</sup> Adler, *supra* note 219, at 90 n.4.

<sup>230</sup> *The Cities: The Price of Optimism*, *supra* note 228, at 41.

city.”<sup>231</sup> The article did not mention race at all, merely painting a grim blanket picture of the Cuyahoga as “an open sewer filling Lake Erie with scummy wavelets, sullen reminders that even a great lake can die.”<sup>232</sup> While the article fell short of accurate photojournalism and missed an opportunity to tell a larger environmental justice story, it did successfully call attention to “one of the great symbolic environmental catastrophes of the industrial era”<sup>233</sup>—a river so polluted it could burn. The clamor was so great that the White House kept careful tabs on a fall 1969 grand jury investigation that pointed to a cyanide-dumping steel corporation as the fire’s culprit.<sup>234</sup>

### B. Nixon, a Not-So-Environmentalist

Before Santa Barbara and Cuyahoga, a decidedly less flashy event had already demonstrated the public’s growing appetite for environmental legislation. On July 17, 1968, Congress held a Joint House-Senate Colloquium to Discuss a National Policy for the Environment.<sup>235</sup> The press did not deign to cover this wonky gathering, but for Capitol Hill types, the Colloquium was a critical juncture on the road to NEPA.<sup>236</sup> It demonstrated just how bicameral and bipartisan of an issue the environment had become.<sup>237</sup> True to its name, the Colloquium focused on the need for a “clearly stated national attitude toward the environment” in order to “know what our hopes and goals are.”<sup>238</sup> Taking for granted the “strong and deep-seated concern among the American people for a better environment,”<sup>239</sup> Colloquium participants debated what exactly a

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Daniel Stradling & Richard Stradling, *Perceptions of the Burning River: Deindustrialization and Cleveland’s Cuyahoga River*, 13 ENV’T HIST. 515, 517 (2008).

<sup>234</sup> BRINKLEY, *supra* note 29, at 575.

<sup>235</sup> *Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the S. Comm. on Interior & Insular Affs. and the H. Comm. on Sci. & Astronautics*, 90th Cong. 1 (1968) [hereinafter *Colloquium Hearing*].

<sup>236</sup> Jim Kershner, *NEPA, the National Environmental Policy Act*, HISTORYLINK (Aug. 27, 2011), <https://www.historylink.org/File/9903>.

<sup>237</sup> See *Colloquium Hearing*, *supra* note 235, at 13 (statement of Stewart L. Udall, Secretary, Department of the Interior) (discussing a Vermont beautification bill that banned highway billboards via a “bill passed [by] a Republican legislature with a Democratic Governor after very vigorous debate”); *id.* at 61 (statement of Rep. Richard L. Ottinger) (“I and Congressman Miller, Congressmen Blatnik, Reuss, in a bipartisan effort—on the Republican side, MacGregor, O’Konski, and Senators Muskie, Nelson, and Hansen—are getting a group with the Smithsonian Institution tentatively to do some of the coordinating between the scientific community and Congress [on environmental threats] . . .”).

<sup>238</sup> *Id.* at 5 (statement of Laurance S. Rockefeller).

<sup>239</sup> *Id.* at 4.

national policy for the environment would encompass and accomplish.<sup>240</sup> Aside from building legislative momentum towards a national environmental policy, the Colloquium also produced a Congressional White Paper on A National Policy for the Environment,<sup>241</sup> which outlined the “Aspects of Environmental Management”<sup>242</sup> that a national policy would cover and suggested next steps for Congress, such as the formation of a “temporary environmental management council.”<sup>243</sup>

Ultimately, the Santa Barbara and Cuyahoga disasters, as well as the Colloquium, laid out a series of very politically fortunate events for freshly minted President Nixon. Nixon was no green-bleeding environmentalist. Even better: he was a politician. Nixon once reportedly called the environmental movement “crap” for “clowns,”<sup>244</sup> but personal feelings aside, Nixon recognized that the environment provided the perfect bipartisan, feel-good platform to prop up the early aughts of his presidency against the fallout over Vietnam.<sup>245</sup> To Nixon, environmental protection was not just a vehicle for political popularity—he also feared the consequences of failing to act on such a popular issue backed by strong public consensus.<sup>246</sup> According to one Nixon aide, White House domestic advisor John Ehrlichman convinced the president that “it was politically dangerous if he didn’t get on board [with the environment].”<sup>247</sup>

For such an environmental mercenary, Nixon was incredibly well-versed on the issue—he surprised White House lawyer and conservationist Russell Train<sup>248</sup> with his ability to recognize the “overlooked” issue of the “relationship between poverty and the

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<sup>240</sup> See *id.* at 2–3 (statement of Rep. George P. Miller, Chairman, H. Comm. on Sci. & Aeronautics).

<sup>241</sup> S. COMM. ON INTERIOR & INSULAR AFFS. & H. COMM. ON SCI. & ASTRONAUTICS, CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT (1968).

<sup>242</sup> *Id.* at 1.

<sup>243</sup> *Id.* at 13.

<sup>244</sup> Elizabeth Drew, *Nostalgia for Nixon?*, WASH. POST (June 9, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/08/AR2007060802260.html>.

<sup>245</sup> ANDREWS, *supra* note 17, at 221.

<sup>246</sup> See Thomas Dietz, Commentary, *Earth Day: 50 Years of Continuity and Change in Environmentalism*, 2 ONE EARTH 306, 306–07 (2020); Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater and the Early Reagan to the 21st Century*, 59 ARIZ. L. REV. 1005, 1011–13 (2017).

<sup>247</sup> BRINKLEY, *supra* note 29, at 590 (quoting EVAN THOMAS, BEING NIXON: A MAN DIVIDED 252–53 (2015)).

<sup>248</sup> Train went on to become the EPA’s second Administrator, highlighting a period in time when environmentalism still had bipartisan force—Train identified as both a conservative and an “environmentalist.” Juliet Eilperin, *Russell E. Train, Former EPA Head, Dies at 62*, WASH. POST (Sept. 17, 2012), [https://www.washingtonpost.com/local/obituaries/russell-e-train-former-epa-head-dies-at-92/2012/09/17/3d2c8494-010c-11e2-b257-e1c2b3548a4a\\_story.html](https://www.washingtonpost.com/local/obituaries/russell-e-train-former-epa-head-dies-at-92/2012/09/17/3d2c8494-010c-11e2-b257-e1c2b3548a4a_story.html).

environment.”<sup>249</sup> When Train raised the importance of environmental issues to the president, Nixon replied, “[T]hat sounds pretty good. But, what about the poor and the [B]lacks living in the inner cities?”<sup>250</sup> Perhaps the fact that Nixon was a politician rather than an environmentalist per se gave him a more nuanced perspective than the diehard, tree-hugging bunch.<sup>251</sup> Either way, NEPA was as much, if not more, of a political play as it was an environmental accomplishment. Consequently, the following discussion of NEPA’s legislative history from introduction to enactment will focus on a handful of key political players with competing environmental visions.

### C. Declaring a National Environmental Policy

On April 16, 1969, the Senate Committee on Interior and Insular Affairs gathered to discuss S. 1075, “A Bill to authorize the Secretary of the Interior to conduct investigations, studies, surveys, and research relating to the Nation’s ecological systems, natural resources, and environmental quality, and to establish a Council on Environmental Quality.”<sup>252</sup> This bill, introduced by Senator Henry M. Jackson, a Washington state Democrat<sup>253</sup> and chairman of the very committee discussing the bill,<sup>254</sup> looked very different from the statute that was eventually enacted. It had no national environmental policy declaration, and it did not contain any look-before-you-leap “action-forcing” provisions.<sup>255</sup> Instead, it seemed to piggyback off of the earlier

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<sup>249</sup> BRINKLEY, *supra* note 29, at 565 (quoting *Russell E. Train, Oral History Interview*, U.S. ENV’T PROT. AGENCY (July 1993), <https://www.epa.gov/archive/epa/aboutepa/russell-e-train-oral-history-interview.html>).

<sup>250</sup> *Id.* at 564–65 (quoting from *Russell E. Train, Oral History Interview*, U.S. ENV’T PROT. AGENCY (July 1993), <https://www.epa.gov/archive/epa/aboutepa/russell-e-train-oral-history-interview.html>).

<sup>251</sup> The environmental movement has strong historical ties to white supremacy and has explicitly refused to ally with civil rights movements in the past. See Jedediah Purdy, *Environmentalism’s Racist History*, NEW YORKER (Aug. 13, 2015), <https://www.newyorker.com/news/news-desk/environmentalisms-racist-history>. Modern-day environmentalism has still not come to terms with its troubling past. See Dorceta E. Taylor, *Dorceta E. Taylor on Environmental Justice*, SIERRA MAG. (Dec. 22, 2020), <https://www.sierraclub.org/sierra/2021-1-january-february/feature/dorceta-e-taylor-environmental-justice>.

<sup>252</sup> *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior & Insular Affs.*, 91st Cong. 1 (1969) [hereinafter *National Environmental Policy Hearing*]. While the committee hearings discussed similar bills—S. 237 and S. 1752—Senator Jackson’s bill ultimately won out to become NEPA. CALDWELL, *supra* note 46, at 29–30. S. 237 and S. 1752, unlike S. 1075, did have a “Declaration of Policy” section. See S. 237, 91st Cong. § 2 (1969); S. 1752, 91st Cong. § 2 (1969).

<sup>253</sup> Jackson, *Henry Martin (Scoop)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/J000013> (last visited Feb. 16, 2024).

<sup>254</sup> *National Environmental Policy Hearing*, *supra* note 252, at 1.

<sup>255</sup> S. 1075, 91st Cong. (1969).

ecological bills—after all, it was a reintroduction of S. 2805, a failed ecology bill Senator Jackson had introduced in 1967.<sup>256</sup>

S. 1075 authorized the Secretary of the Interior to “conduct investigations . . . relating to ecological systems and environmental quality”<sup>257</sup> and created a “Council on Environmental Quality” in the Office of the President that would publish an annual environmental report and “study and analyze environmental trends.”<sup>258</sup> Notwithstanding the lack of a national policy declaration, Senator Jackson described one of the bill’s purposes as the “establish[ment of] a national policy on the environment.”<sup>259</sup> From the way the committee hearing played out, it seems very likely that Senator Jackson’s bare-bones bill was part of a broader political maneuver to persuade committee participants that such a policy statement was *their* idea.<sup>260</sup> Despite two failed presidential campaigns, Senator Jackson was a Capitol Hill mainstay, and the strategic know-how of this “quiet, contemplative . . . just short of unfashionable” political powerhouse<sup>261</sup> shone through as he shepherded S. 1075 through Congress.

Thanks to Senator Jackson’s deft maneuvers, S. 1075 emerged from committee with two key areas for amendment. First, Senator Jackson gathered support for a statutory declaration of a national environmental policy. Jackson poked holes in his own bill, mentioning that “Professor [Lynton] Caldwell who is an expert in this field . . . feels a more explicit and broader statement of policy is perhaps needed. . . . S. 1075 is a working paper . . . and I do not want to leave the impression that it represents a final declaration.”<sup>262</sup> When one Dr. DuBridge—Nixon’s Science Adviser<sup>263</sup>—waxed eloquent on powerplant site selection, Senator Jackson interjected, “But I take it that you do support a statutory declaration of policy?”<sup>264</sup> to which DuBridge replied, “Yes, sir.”<sup>265</sup> Immediately after the committee returned from its lunch break,<sup>266</sup> Jackson introduced Professor Caldwell as an expert who “ha[d] done a lot of

<sup>256</sup> S. 2805, 90th Cong. (1967); CALDWELL, *supra* note 46, at 29.

<sup>257</sup> S. 1075, § 101(a).

<sup>258</sup> *Id.* § 202(a).

<sup>259</sup> *National Environmental Policy Hearing*, *supra* note 252, at 205 (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>260</sup> See WENDY READ WERTZ, LYNTON KEITH CALDWELL: AN ENVIRONMENTAL VISIONARY AND THE NATIONAL ENVIRONMENTAL POLICY ACT 159–67 (2014).

<sup>261</sup> David Shribman, *Senator Henry M. Jackson is Dead at 71*, N.Y. TIMES, Sept. 3, 1983, at 10.

<sup>262</sup> *National Environmental Policy Hearing*, *supra* note 252, at 83 (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>263</sup> *Id.* at 68.

<sup>264</sup> *Id.* at 84.

<sup>265</sup> *Id.* (statement of Dr. Lee A. DuBridge, President’s Science Adviser).

<sup>266</sup> See WERTZ, *supra* note 260, at 162–63.

outstanding work” in the environmental space.<sup>267</sup> Caldwell, a political science professor<sup>268</sup> and frequent environmental policy consultant to Congress,<sup>269</sup> then took the stage.

With the committee buttered up, Professor Caldwell “agree[d] heartily with the observation of Dr. DuBridge that the administration would welcome a statement of policy by the Congress.”<sup>270</sup> Caldwell defined the environment as “the relationship between man and these physical and biological and social forces that impact upon him.”<sup>271</sup> To him, a national environmental policy was “not a public policy for those things out there. It [was] a policy for people.”<sup>272</sup> In his view, the environment was “the life support system of the Continental United States . . . [that] makes[s] all the difference in the world to our own prosperity, happiness, health, and even survival.”<sup>273</sup> If *Silent Spring* demonstrated the entrenchment of humans within the natural environment, Caldwell dug even deeper into the human element with his emphasis on “social forces” and a “policy for the people.” Environmentalism was a *social* issue—it did not just affect Americans’ physical bodies and biological makeup, but also the societies they lived in. Caldwell had uttered the magic words Jackson wanted the committee to hear, and the Senator let the professor know that “[w]e will be calling upon you for some help before we get this bill out of committee.”<sup>274</sup>

When the bill graduated from committee to introduction before the full Senate, it touted a brand-new statutory “Declaration of National Environmental Policy.”<sup>275</sup> The policy declaration integrated the hodgepodge of environmental theories that had built up over time. Muir would have approved the bill’s commitment to “preserve important historic, cultural, and natural aspects of our national heritage.”<sup>276</sup> Pinchot’s conservation movement found a home in the policy’s aim to

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<sup>267</sup> *National Environmental Policy Hearing*, *supra* note 252, at 111 (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>268</sup> Emily Vetne, *Lynton Keith Caldwell: Professor, Legislator, and Environmentalist*, VOICES FROM THE IU BICENTENNIAL (Jan. 28, 2019), <https://blogs.iu.edu/bicentennialblogs/2019/01/28/lynton-keith-caldwell-professor-legislator-environmentalist>.

<sup>269</sup> See John H. Perkins & Debora R. Holmes, Special Section, *Lynton K. Caldwell’s Legacy is NEPA and More*, 8 ENV’T PRAC. 205, 205 (2006); WERTZ, *supra* note 260, at 129–44.

<sup>270</sup> *National Environmental Policy Hearing*, *supra* note 252, at 113 (statement of Lynton K. Caldwell, Professor of Government, University of Indiana).

<sup>271</sup> *Id.* at 118.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 122 (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior & Insular Affs.).

<sup>275</sup> S. 1075, 91st Cong. tit. 1 (as reported by S. Comm. on Interior & Insular Affs., July 9, 1969).

<sup>276</sup> *Id.* § 101(a)(4).

realize “the widest range of beneficial uses of the environment.”<sup>277</sup> And Carson’s *Silent Spring* had a say in the policy’s recognition of the “profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances on our physical and biological surroundings and on the quality of life available to the American people.”<sup>278</sup>

#### *D. Close but Not Quite: Environmental Justice and Climate Change*

Jackson’s crowning jewel, however, was the declaration that “each person has a fundamental and inalienable right to a healthful environment.”<sup>279</sup> To Jackson and Caldwell, the environment was not just a system of interconnected “things out there” that just so happened to include humans—rather, it was an innate part of societal structures, so fundamental as to be an “inalienable right.” Unfortunately, this provision fell victim to the bicameral amendment process. The final version of the bill merely declared that “each person should enjoy a healthful environment.”<sup>280</sup> The House insisted on “compromise language . . . because of doubt . . . with respect to the legal scope of the original Senate provision.”<sup>281</sup> Apparently, the establishment of an “inalienable right” struck the House as a bit too forceful.

The compromise language significantly diminished where humans stood in relation to the environment: a “healthful environment” was something that humans *should*, not even *shall*, enjoy. That is, it put forth only an aspirational goal. This edit infuriated Senator Jackson, who declared that “if an individual in this great country of ours cannot at the present time protect his right and the right of his family to a healthful environment, then it is my view that some fundamental changes are in order.”<sup>282</sup> Ultimately, NEPA declared that the environment was something that *should* support healthful human life, but the “should” left open the “buts” and “ifs” for competing priorities.

Additionally, when S. 1075 declared that “each person” should live in a healthy environment, it missed the opportunity to recognize that marginalized communities would need extra support to manage disparate environmental impacts. Professor Caldwell testified that “environmental degradation affects all of the American people regardless of income or

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<sup>277</sup> *Id.* § 101(a)(3).

<sup>278</sup> *Id.* § 101(a).

<sup>279</sup> *Id.* § 101(b).

<sup>280</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 101(c), 83 Stat. 852, 854 (1970).

<sup>281</sup> 115 CONG. REC. 39702 (1969).

<sup>282</sup> 115 CONG. REC. 40416 (1969).

condition, or race, or whether they live in the cities or whether they live in the rural areas; we are all affected.”<sup>283</sup> He also considered the relationship of environmentalism with other social issues, including the civil rights movement: “What is its priority in relation to other needs of society? (To social welfare, civil rights, or economic growth?).”<sup>284</sup> Professor Caldwell did not go as far as the embryonic environmental justice movement, which would take root just over a decade later in 1982 when Black activists in Warren County, North Carolina protested the siting of a toxic chemical landfill in their community.<sup>285</sup> Instead, he discussed environmental impacts “regardless of . . . race,”<sup>286</sup> but not *because of* race and discriminatory policies that clustered Black residents in cities’ most toxic and unsanitary pockets. He did, however, mention Mayor Stokes’s discussion of “the threat to American security posed by the pollution and decay of our urban environments,” a threat which “[w]ith millions of other Americans he daily experiences.”<sup>287</sup> While Caldwell did not mention race in his discussion of Mayor Stokes and “urban environments,” maybe the race element was just that obvious. Whatever the reason, Caldwell failed to explicitly connect racial discrimination with environmental harm, but he did recognize that the environment existed in conjunction with other social issues. Had Professor Caldwell’s “regardless of income or condition, or race, or whether they live in the cities or whether they live in the rural areas” language been included in NEPA’s policy statement, it could have paved the way for the seamless integration of emerging environmental justice concepts later down the road.

In another prescient twist, the committee also missed the opportunity to integrate the emerging science of climate change in further clarifying the human-environment relationship. Myron Tribus, an engineer by trade and Nixon’s Assistant Secretary of Commerce for Science and Technology,<sup>288</sup> warned of anthropogenic impacts on the environment: “[B]y the burning of fossil fuels, by the expansion of cities, by the flight of aircraft, and by the launching of space vehicles[, humans] may

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<sup>283</sup> *National Environmental Policy Hearing*, *supra* note 252, at 112 (statement of Lynton K. Caldwell, Professor of Government, University of Indiana).

<sup>284</sup> *Id.* at 128.

<sup>285</sup> See Darryl Fears & Brady Dennis, ‘*This is Environmental Racism*,’ WASH. POST. (Apr. 6, 2021), <https://www.washingtonpost.com/climate-environment/interactive/2021/environmental-justice-race>.

<sup>286</sup> *National Environmental Policy Hearing*, *supra* note 252, at 112 (emphasis added).

<sup>287</sup> *Id.* at 135.

<sup>288</sup> Nicholas Fisher & Norbert Vogel, Obituary, *Myron Tribus*, AMSTAT NEWS (Oct. 1, 2017), <https://magazine.amstat.org/blog/2017/10/01/obituary-myron-tribus>.

inadvertently and adversely modify our weather and climate.”<sup>289</sup> While Tribus was the only one to mention climate change in the hearing, he was one of a few early climate prophets.<sup>290</sup> For instance, Nixon’s domestic affairs advisor, Daniel Patrick Moynihan, drafted a stark memorandum on September 17, 1969, writing, “It is now pretty clearly agreed that the CO<sub>2</sub> content will rise 25% by 2000. This could . . . raise the level of the sea by 10 feet. Goodbye New York. Goodbye Washington, for that matter.”<sup>291</sup> While early climate science clearly pointed to startling outcomes, the fledgling field gave way to more immediate, concrete environmental concerns, like pollution and exposure to toxic substances.<sup>292</sup> Tribus’s statement presented policymakers with a future vision of not just a toxic America, but an inherently unviable America. Ultimately, however, NEPA was more concerned with the Santa Barbaras and the Cuyahogas—the “constant interplay of resource use and exploitation, manufacturing processes, and air, water, and soil pollution.”<sup>293</sup> Had NEPA acknowledged the full extent of humans’ ability to manipulate their environment through climate change, it would have provided more explicit avenues for climate analysis in NEPA reviews, like the CEQ’s recent proposed rule directing agencies to consider “foreseeable climate change-related effects” when determining the impacts of the proposed action and alternatives in an EIS.<sup>294</sup>

### *E. Environmentalism: Stop Signs or Speed Bumps*

The second key amendment to Senator Jackson’s bare-bones bill was the addition of an action-forcing mechanism—what would eventually become the Environmental Impact Statement, or colloquially the “EIS.” At the committee hearing, Professor Caldwell explained that if a national

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<sup>289</sup> *National Environmental Policy Hearing*, *supra* note 252, at 12 (statement of Myron Tribus, Assistant Secretary of Commerce for Science and Technology).

<sup>290</sup> Several other scientists and policymakers provided early warnings of human-caused climate change. *See* BRINKLEY, *supra* note 29, at 583.

<sup>291</sup> *Id.* at 584 (quoting Memorandum from Daniel P. Moynihan, Assistant for Urb. Affs., Exec. Off. of the President, to John Ehrlichman, White House Couns. (Sept. 17, 1969), <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jul10/56.pdf>).

<sup>292</sup> *Id.* at 585.

<sup>293</sup> *National Environmental Policy Hearing*, *supra* note 252, at 6 (statement of J. Phil Campbell, Under Secretary, U.S. Department of Agriculture).

<sup>294</sup> National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, 49950 (proposed July 31, 2023) (to be codified at 40 C.F.R. pts. 1500–1508); *see also* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1200 (proposed Jan. 9, 2023) (directing federal agencies to quantify, disclose, and contextualize climate impacts of proposed action and alternatives); MICHAEL BURGER, ROMANY M. WEBB & JESSICA A. WENTZ, SABIN CTR. FOR CLIMATE CHANGE LAW, INCORPORATING CLIMATE CHANGE IN NEPA REVIEWS: RECOMMENDATIONS FOR REFORM 7–21 (2022) (proposing regulatory mechanisms for integrating climate impacts into NEPA review).

policy declaration were to be developed, it should “have an action-forcing, operational aspect.”<sup>295</sup> He suggested, for example, that federal agency proposals would have to include “an evaluation of the effect of these proposals upon the state of the environment.”<sup>296</sup> Caldwell accordingly sought to give the national policy paper teeth—while agencies would have to consider the environment, they would not be obligated to make a substantive decision in a certain direction. This action-forcing provision attracted the ire of a formidable opponent—Senator Edmund Muskie, a “charming if often volatile Democrat” from Maine<sup>297</sup> who earned the nickname “Mr. Clean” for his relentless dedication to environmental legislation.<sup>298</sup> Senator Muskie thought NEPA cut a little too close to his own comprehensive water pollution bill.<sup>299</sup> Additionally, Muskie was the Chairman of the Public Works Committee.<sup>300</sup> Air and water pollution were Senator Muskie’s turf, and he did not want Senator Jackson snatching away jurisdictional authority for future environmental legislation from Public Works to Interior and Insular Affairs.<sup>301</sup>

Egos aside, Muskie versus Jackson was more than just a political pissing match—their conflict also represented their diverging environmental philosophies. Muskie preferred external policing over NEPA’s self-policing, action-forcing provisions.<sup>302</sup> To Muskie, environmentalism required stop signs, not speed bumps. Jackson, on the other hand, feared that if S. 1075 came on too strong by establishing substantive requirements, agencies might view this as a preemptive threat to their jurisdictional turf.<sup>303</sup> Muskie was able to twist Jackson’s arm into beefing up the action-forcing mechanism, requiring agencies to produce a “*detailed* statement” of their environmental findings, adding a bit more bite to NEPA’s paper teeth.<sup>304</sup>

The action-forcing provision ultimately required agencies to “include in every recommendation or report on . . . major Federal actions

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<sup>295</sup> *National Environmental Policy Hearing*, *supra* note 252, at 116 (statement of Lynton K. Caldwell, Professor of Government, University of Indiana).

<sup>296</sup> *Id.*

<sup>297</sup> R.W. Apple, Jr., *Edmund S. Muskie, 81, Dies; Maine Senator and a Power on the National Scene*, N.Y. TIMES, Mar. 27, 1996, at D21.

<sup>298</sup> *Biography*, EDMUND S. MUSKIE ARCHIVES & SPECIAL COLLECTIONS LIBR., <https://www.bates.edu/archives/edmund-s-muskie-and-his-legacy/biography/> (last visited Feb 16, 2024).

<sup>299</sup> WERTZ, *supra* note 260, at 153, 183.

<sup>300</sup> Kershner, *supra* note 236; WERTZ, *supra* note 260, at 153.

<sup>301</sup> Kershner, *supra* note 236; WERTZ, *supra* note 260, at 135, 153.

<sup>302</sup> Kershner, *supra* note 236; WERTZ, *supra* note 260, at 183.

<sup>303</sup> WERTZ, *supra* note 260, at 184.

<sup>304</sup> *Id.* at 183–84 (emphasis added).

significantly affecting the quality of the human environment, a detailed statement by the responsible official” on the “environmental impact,” “adverse environmental effects,” alternative actions, “relationship between local short-term uses . . . [and] long-term productivity,” and “any irreversible and irretrievable commitments of resources.”<sup>305</sup> Thus, although NEPA built environmental concerns into every agency’s decision-making calculus, it did not place the environment on an all-powerful pedestal. Theoretically, under NEPA, the government still could have authorized oil drilling off of Santa Barbara—just after issuing a “detailed statement” on environmental considerations. However, NEPA’s action-forcing mechanism might have given agencies pause through front end consideration of the potential environmental fallout. In the end, NEPA did not so much espouse bright line environmental protection as it did environmental *consideration*.

While Senator Jackson rallied the Senate, in the House, Representative John Dingell, a Michigan Democrat<sup>306</sup> and Chairman of his own Subcommittee—Fisheries and Wildlife Conservation<sup>307</sup>—was mustering support for a similar bill, H.R. 12549.<sup>308</sup> Representative Dingell’s bill passed the House Committee relatively smoothly: “In the main, all witnesses were in favor of the legislation.”<sup>309</sup> Representative Dingell’s bill, similarly to post-amendment S. 1075, envisioned a national policy “to create and maintain conditions under which man and nature can exist in productive harmony,”<sup>310</sup> and called for an annual presidential “Environmental Quality Report” on the “status and condition of the major natural, manmade, or altered environmental classes of the Nation,”<sup>311</sup> along with a CEQ in the Office of the President that would “formulate and recommend national policy to promote the improvement of our

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<sup>305</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(C), 83 Stat. 852, 854 (1970).

<sup>306</sup> Keith Schneider & Katharine Q. Seelye, *John Dingell Jr., a House ‘Bull’ Who Served the Longest, Is Dead at 92*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/john-dingell-dead-longest-congressman.html>.

<sup>307</sup> *Environmental Quality: Hearings on H.R. 6750, H.R. 11886, H.R. 11942, H.R. 12077, H.R. 12180, H.R. 12207, H.R. 12209, H.R. 12228, H.R. 12264, H.R. 12409, H.R. 12143 Before the Subcomm. on Fisheries & Wildlife Conservation of the H. Comm. on Merch. Marine & Fisheries*, 91st Cong. 1 [hereinafter *Environmental Quality Hearings*] (statement of Rep. John D. Dingell, Chairman, Subcomm. on Fisheries & Wildlife Conservation).

<sup>308</sup> The bill was originally introduced as H.R. 6750, a bill “To amend the Fish and Wildlife Coordination Act to provide for the establishment of a Council on Environmental Quality, and for other purposes,” along with a bevy of other bills. *Id.* at 5 (statement of James T. Lynn, Gen. Couns., Dep’t of Com.). The House Committee eventually reported out a cleaned-up, consolidated version as H.R. 12549. H.R. REP. NO. 91-378, pt. 1, at 1–3 (1969).

<sup>309</sup> 115 CONG. REC. 26572 (1969) (statement of Rep. John Dingell).

<sup>310</sup> H.R. 6750, 91st Cong. (1969).

<sup>311</sup> *Id.*

environmental quality.”<sup>312</sup> After passing their respective bills, a joint Senate-House committee toggled with the minor variances between S. 1075 and H.R. 12549.<sup>313</sup> The week before Christmas break, the House and Senate greenlit the finalized National Environmental Policy Act of 1969 and sent the bill off to President Nixon for his yay or nay.<sup>314</sup>

White House lawyer Russell Train warned Nixon that if he shot down NEPA, Congress would override his veto and Democrats would become the environmental heroes.<sup>315</sup> On January 1, 1970, Nixon signed NEPA “on a holiday . . . in a beach house . . . just before a football game . . . with few reporters present.”<sup>316</sup> While Nixon made a point of signing NEPA at the start of a new decade, he did not make as much of a fuss as he could have—perhaps out of concern for his “oil, gas, construction, real estate, and chemical” constituents, as the 1972 election loomed ahead.<sup>317</sup> Maybe the fact that Nixon enacted NEPA was the ultimate symbolic gesture—NEPA was the brainchild of political forces that declined to take advantage of opportunities for a far more progressive environmental vision.

#### CONCLUSION

Statutes encapsulate not only legal mandates but also theoretical principles. As the nation’s environmental Magna Carta, NEPA crystalized the evolution of American environmental thought from preservation and conservation to ecology and environmentalism. However, NEPA also stopped short of its maximum potential, capturing the nation’s reluctance to embrace the intersection of environmentalism and civil rights. It also missed the opportunity to incorporate emerging climate science. While President Biden’s recent updates to the NEPA regulations provide a welcome nod to both environmental justice and climate change,<sup>318</sup> presidential administrations come and go, for better and for worse. NEPA’s language remains the statutory bedrock of our nation’s environmental policy and vision. As America faces mounting

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<sup>312</sup> *Id.*

<sup>313</sup> BRINKLEY, *supra* note 29, at 586.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* For a fascinating discussion of the politics of environmental law, see Free Range with Mike Livermore, *Richard Lazarus on the Shifting Politics of Environmental Law* (July 12, 2023), <https://open.spotify.com/episode/5cldxZCeTX2GCiP5aFCy3A>.

<sup>316</sup> BRINKLEY, *supra* note 29, at 588.

<sup>317</sup> *Id.*

<sup>318</sup> CEQ Press Release, *supra* note 42.

extreme weather events triggered by the climate crisis<sup>319</sup> and as environmental law explores innovations like nature's rights<sup>320</sup> and constitutional rights to a clean environment,<sup>321</sup> both NEPA's accomplishments and missed opportunities offer a case study on the importance of going all the way in advancing environmental progress. New legislation,<sup>322</sup> administrative reform,<sup>323</sup> and impact litigation<sup>324</sup> are ushering in a new era of national environmental policy. Moving forward, America must pursue environmental protection alongside environmental justice and proactively integrate new developments in environmental science.

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<sup>319</sup> See, e.g., Christopher Flavelle & Manuela Andreoni, *How Climate Change Turned Lush Hawaii into a Tinderbox*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/10/climate/hawaii-fires-climate-change.html>; Denise Chow & Evan Bush, *Climate Change and NYC: Historic Rains Buckle City's Infrastructure, Again*, NBC NEWS (Sept. 29, 2023), <https://www.nbcnews.com/science/environment/nyc-flooding-climate-change-infrastructure-limitations-rcna118170>.

<sup>320</sup> See, e.g., Eamon Whalen, *The Latest Attempt to Stop Line 3 Hits a Snag in Tribal Court*, MOTHER JONES: MOJO WIRE (Apr. 6, 2022), <https://www.motherjones.com/mojo-wire/2022/04/the-latest-attempt-to-stop-line-3-hits-a-snag-in-tribal-court> (discussing the dismissal of a lawsuit filed on behalf of wild rice).

<sup>321</sup> See Amy Beth Hanson & Matthew Brown, *Young Environmental Activists Prevail in First-of-Its Kind Climate Change Trial in Montana*, ASSOCIATED PRESS (Aug. 14, 2023), <https://apnews.com/article/climate-change-youth-montana-trial-c7fdc1d8759f55f60346b31c73397db0>.

<sup>322</sup> See, e.g., Tankersley, *supra* note 10.

<sup>323</sup> See, e.g., CEQ Press Release, *supra* note 42.

<sup>324</sup> See, e.g., Hanson & Brown, *supra* note 321.