Watered Down Voices, Watered Down Justice: A Demand for Polycentricism, Demosprudence, and Praxis in WOTUS Regulatory Reform

MARTIN MCCRORY*, INARA SCOTT**, ANGIE RAYMOND***, AND PAUL LEVY****

ABSTRACT

For decades, science has demonstrated that discrete populations have been disproportionately forced to suffer the horrors of living in areas contaminated by toxic and hazardous substances. Communities of color, indigenous communities, and other marginalized communities continuously endure the effects of multigenerational water, air, and land pollution. Whether intentionally or not, the Environmental Protection Agency (EPA) and regulatory elites have promulgated so-called "neutral rules" that have resulted in a systemic and ever-expanding national environmental caste. For this to end, EPA must stop being a knowing or unknowing participant in regulatory oppression and become an active agent of regulatory change.

EPA is required to take environmental justice concerns into account when promulgating new regulations; amplifying the voices of traditionally subordinated affected communities is an essential element of this goal. Nevertheless, EPA lacks a systematic method to incorporate direct outreach to and engagement with impacted communities and has no detailed outline nor specific strategy to ensure that the voices of impacted communities are heard. Thus, the Trump Administration was able to promulgate new regulations related to the

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definition of "waters of the United States" (WOTUS) that are likely to have significant negative impacts on water quality, much of which will be borne by disenfranchised communities, while affording those communities little to no voice in the regulatory process.

This Article maintains that the Biden EPA should adopt a sociolegal approach, informed by the theoretical principles of polycentrism and demosprudence, to address systematic and decades-long environmental injustices. This approach would help shift and redistribute power from environmental regulatory elites to the people most affected by environmental harms. Using the case study of WOTUS regulatory reform, we argue that the Biden EPA has a perfect opportunity to create a more inclusive regulatory process that expands the power of historically disenfranchised people, while addressing known harms that will result from the current regulations. The Biden EPA could use WOTUS reform to establish a new paradigm for expanding the power of non-elites and to create a model for a more equitable form of regulatory decision making and a more democratic form of governance.

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INTRODUCTION

I know that it is hard for one who has held the reins for so long to give them up; it cuts like a knife. It will feel all the better when it closes up again.
—Sojourner Truth[1]

Communities of color and marginalized, disadvantaged communities have been plagued for decades by environmental harm. This harm has included the siting of massive hazardous waste sites, highly polluting factories, and highways and transportation infrastructure built near or directly through certain residential neighborhoods. The result is that these communities disproportionately suffer the effects of decades of water, air, and land pollution. The attempt to actively consider and address these harms is at the basis of the environmental justice movement.

One challenge of the environmental justice movement is that marginalized communities are less likely and less able to marshal extensive resources to lobby government agencies to take their interests into account. Although the Environmental Protection Agency (EPA) is required to take environmental justice concerns into consideration when promulgating new regulations,[2] it lacks a systematic process for doing so and has no specific strategies in place to ensure that the voices of those communities most impacted by the legacy of environmental harm are heard. As a result, it is often the voices of wealthy corporations or industry groups that are heard most clearly in the regulatory process. Even when well-meaning, large, environmental advocacy groups participate, they may lack direct grassroots connections to the communities they seek to represent. Consequently, environmental policy and regulations have resulted in a multigenerational state of environmental injustice for discrete groups of voiceless and powerless Americans.

Using the example of the Clean Water Act (CWA)[3] and the recent turmoil over the definition of "waters of the United States" (WOTUS), we demonstrate how the lack of a system for engaging communities and impacted people's voices at EPA has resulted in two different rulemaking processes: one, completed by the

1. Sojourner Truth, Address to the First Annual Meeting of the American Equal Rights Association (May 9, 1867).
2. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
3. 33 U.S.C. §§ 1251–1388 (2018).

Obama Administration, collected input from millions of individuals;[4] the other, completed by the Trump Administration, sought input almost exclusively from a small circle of industry groups.[5] Both resulted in rules that redefined the definition of WOTUS, but it is the Trump-era regulation that is currently in place. If it is left to stand, this regulation is likely to have massive negative impacts on water quality, much of which will be borne by disenfranchised communities that had no voice in the final regulation. This Article presents a reconstructive framework via the application of theory through praxis, by applying solid theoretical principles to a particular environmental justice issue: the definition of WOTUS. Informed by the theories of polycentric governance and demosprudence, we argue that EPA should adopt a systematic, sociolegal approach to seeking citizen input for the promulgation of new regulations. This approach would help shift power from environmental elite players and redistribute power to the people most affected by environmental harms.

The Article proceeds as follows: in Part I, we outline the theory of environmental justice and explain how communities of color and marginalized communities are disproportionately impacted by environmental harms, resulting in significant health impacts to these populations. In this Part, we also provide case studies of water quality, illustrating how certain communities are often ignored and how their health is compromised by a failure to consider environmental impacts on them. In Part II, we turn to the concept of polycentric governance, a theory that grows out of the work of Nobel Laureate Elinor Ostrom. Using the theory of polycentric governance, we describe how grassroots, community governance structures can be successful in protecting and maintaining common resources, such as water, and how the failure to create grassroots, participatory governance structures can result in further environmental degradation. In Part III, we discuss the concept of demosprudence, which suggests that to create equitable legal structures and responses, we must directly engage marginalized and impacted communities. In Part IV, we provide the context and history of the WOTUS regulations and describe how they demonstrate a failure to directly engage highly impacted communities, resulting in a missed opportunity to provide greater protection for common and local resources and justice to impacted people. We conclude with general strategies for the EPA to create these structures to better engage with communities, particularly in the context of the WOTUS regulations.

I. ENVIRONMENTAL JUSTICE

Environmental justice represents the ongoing struggle for fairness and equality that disadvantaged, underserved communities and communities of color have

4. *See infra* Part IV.A.2.
5. *See infra* Part IV.A.3.

sought for decades.[6] Although scholars, academics, and activists have debated over a uniform definition for environmental justice, the core principles are rooted in equality, fairness, and equity. This is because on one level, the issues are the same; the issues always involve community empowerment, the structure of institutional decision making, and policy reforms.[7] Dr. Bunyan Bryant defined environmental justice as "those cultural norms, and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing and protective."[8] Dr. Robert Bullard condensed the basic principles of environmental justice to include the following basic goals: 1) protect all persons from environmental degradation; 2) adopt a public health prevention of harm approach; 3) place the burden on those who seek to pollute; 4) obviate the requirement to prove intent to discriminate; and 5) redress existing inequities by targeting action and resources.[9] EPA defines environmental justice as:

> the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no population, due to policy or economic disempowerment, is forced to bear a disproportionate share of the negative human health or environmental impacts of pollution or environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies.[10]

In another simplified version, the principle may be condensed to one concise idea, that "all people and communities are entitled to equal protection of environmental and public health laws and regulations."[11] Despite these longstanding ideals, the intentional placement of hazardous wastes, disposal plants, and other highly polluting facilities in economically depressed, disenfranchised, impoverished, and marginalized areas within the United States has been a repeated refrain

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6. John Callewaert, *The Importance of Local History for Understanding and Addressing Environmental Injustice*, 7 LOC. ENV'T 257, 257–58 (2002); Paul Mohai et al., *Environmental Justice*, 34 ANN. REV. ENV'T. & RES. 405, 406 (2009) (describing disproportionate risk to minority communities that face a slew of environmental injustices).

7. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 18 (2001).

8. *See* CLIFFORD VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 11 (3d ed. 2020) (quoting Professor Bryant as he broadly defines the nature and goals of environmental justice).

9. *Id.* (quoting Dr. Bullard and adding that Professor Bullard wants to have the process be more democratic by asking the questions of "who gets what, why and how much").

10. U.S. INST. MED. COMM. ON ENVTL. JUSTICE, TOWARD ENVIRONMENTAL JUSTICE: RESEARCH, EDUCATION, AND HEALTH POLICY NEEDS 1 (1999) (with pressure from advocacy groups, civil-rights, and labor organizations to demand equity and equal protection under the law, EPA first defined environmental justice in the 1990s).

11. *See* Robert D. Bullard, *Environmental Justice: It's More Than Waste Facility Siting*, 77 SOCIAL SCIENCE QUARTERLY 493, 493 (1996) (offering an alternative definition for EJ that has been modified and tailored by other groups).

for decades.[12] These patterns and prevailing trends of disproportionate polluting of the lowest income, impoverished communities continue to transpire across the U.S.[13] However, the past few decades have created resilient voices to combat these terrible, outdated practices and policies, and more recently new voices have joined the challenge. [14]

To appropriately understand the struggle to alleviate the poisoning of marginalized and unrepresented communities, it is critical to reflect on the history and context of the environmental justice movement—what actors played a role in this effort, what communities were targeted, and how we can measure and alleviate long-term environmental impacts. One must realize that environmental injustice is deep-rooted and longstanding. It is not an accidental result, but rather the result of institutional choices and decisions, marketing practices, *de facto* and *de jure* discrimination, and the endless quest for economic growth and profit.[15] By analyzing and considering these factors, the new administration can be better equipped to consolidate and translate a rich repository of resources into clear and decisive action.

A. INCEPTION AND MOBILIZATION

Although there were many cases and incidents considered to be early calls for environmental justice, many scholars consider Warren County, North Carolina to be the birth of the modern environmental justice movement.[16] In 1982, the Afton community in Warren County was designated by state authorities as a site to construct a landfill for the disposal of polychlorinated biphenyls (PCBs), man-made chemicals that do not readily break down in the environment and are known to cause a number of health effects on the immune, reproductive, and endocrine systems.[17] Despite the danger, officials ignored the local outrage and passionate

12. *See* Robert D. Bullard, *Confronting Environmental Racism in the Twenty-First Century*, GLOB. DIALOGUE, Winter 2002, at 34; Robert Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV'T L. 371, 374 (2008) (arguing that environmental inequities have historically taken root in marginalized communities and details strategies advocacy and justice groups can draw on to improve their quality of life and disrupt this imbalance).

13. *See* Rick Mullin, *The Rise of Environmental Justice*, 98 CHEM. & ENG'G NEWS (Aug. 24, 2020), https://perma.cc/5QS4-8WMD (chronicling the rise in grassroots organizations and activists combatting environmental injustices across the U.S. as social justice movements increase).

14. *Id.*

15. *See* RICHARD HOFRICHTER, TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 4 (2002) (stating that environmental justice concerns eliminating privilege and exploitation connected with people's health and the production and use of society's resources).

16. *See* Mullin, *supra* note 13 (detailing Warren County as a seminal point for the environmental justice movement); *see also* Bean v. South Western Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F. 2d. 1038 (5th Cir. 1986) (plaintiffs alleging racial bias in the siting of a solid waste facility in their neighborhood). *See generally* Rene Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), https://perma.cc/NUZ4-AXRT (describing the history of the movement dating back to the 1960s and the culmination of the movement's efforts: the 1994 Executive Order regarding environmental justice).

17. Mohai et al., *supra* note 6, at 406.

activists and accepted PCB-contaminated soil at the Afton landfill.[18] The state claimed the decision was an impartial and unbiased ruling rooted in science; however, subsequent reports have demonstrated that the landfill was never adequately designed to accept large quantities of PCB chemicals.[19] At the time, Warren County's population was 65% Black and ranked toward the bottom for GDP per county statewide.[20] Despite their lack of political and economic power, Warren County residents protested the site by spearheading peaceful marches, hunger strikes, and picket rallies.[21] Although they did not halt the landfill's construction, their voices were beginning to be heard; the modern environmental justice movement was underway.

Following the protests in Warren County, a landmark report commissioned by the Commission for Racial Justice of the United Church of Christ released findings on the racial and socio-economic characteristics of communities with hazardous waste sites.[22] Some of the study's most groundbreaking conclusions found that communities with the highest proportion of racial and ethnic minority residents were associated with the greatest number of commercial hazardous wastes, and three out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.[23] In sum, the study identified that race was the most important factor in predicting where hazardous sites would be placed.[24] Nearly a decade later, researchers would corroborate these findings in an independent analysis and push EPA to formulate polices aimed at remedying these inequities.[25] By 1992, a collaboration including academics, environmental organizations, and grassroot activists pushed EPA to create an Office of Environmental Justice and appointed leadership to further explore racial and socioeconomic inequalities.[26]

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18. Bullard et al., *supra* note 12, at 373.

19. CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES 8 (1987) (the first seminal report to comprehensively document the association of hazardous waste sites in close proximity to racial and ethnic communities across the country).

20. Spencer Banzhaf, Lala Ma & Christopher Timmins, *Environmental Justice: The Economics of Race, Place, and Pollution*, J. ECON. PERSP. 185, 185 (2019) (detailing the history of the environmental justice movement and the distribution of waste sites, and integrating models used to describe the relationship between race, pollution, and regulation).

21. Matt Reimann, *The EPA chose this county for a toxic dump because its residents were 'few, black, and poor'*, TIMELINE (Apr. 3, 2017), https://perma.cc/P8JL-Q6B7 (using geographic information systems and spatial analysis to demonstrate racial and environmental inequality).

22. *See generally* LEE, *supra* note 19, at 8.

23. *Id*. at xiv.

24. *Id*. at 13.

25. Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, ANN. REV. PUB. HEALTH 103, 112 (Apr. 2006) (EPA published environmental justice findings and recommendations in a report entitled *Environmental Equity: Reducing Risks for All Communities*, which led to a number of scholarly publications on the topic and raised the level of EJ issues into the national consciousness and federal government purview).

26. *Id*.

As researchers, academics, policymakers, and others began to investigate the health risks associated with the pollution in underserved areas and communities of color, their holistic approach drew attention to the dangerous residue of this inaction. Long-term failure by government at all levels to address this problem has resulted in years of unregulated contamination and disastrous public health consequences that continue to this day.

B. RESULTS OF INACTION: HEALTH IMPACTS

As a result of the creation of EPA's Office of Environmental Justice, the field of public health began to broaden its research efforts, with practitioners and academics taking active steps to measure the health effects of environmental pollutants.[27] Environmental contaminants such as lead, dioxins, PCBs, mercury, arsenic, pesticides, and herbicides began to present themselves as contaminants of concern in public spaces, affecting air and water quality.[28] Years of neglect and exposure to these pollutants caused decades of silent suffering for many communities, resulting in a disproportionate burden of respiratory ailments, cardiovascular disease, and cancer within minority and low-income areas.[29] The intersection of environmental pollution, structural racism, and economic public policy left underserved minority communities as victims entangled in the web of capitalism.[30]

Despite the increase in governmental concern and funding for environmental justice, the years that have followed present new challenges. One particular challenge is that the harms caused by placing toxic facilities (such as waste sites, landfills, industrial factories, and railroad tracks) adjacent to poorer communities are difficult to measure, especially considering that many environmental-related diseases are chronic in nature and take years to develop.[31] Nevertheless, environmental justice advocacy organizations, researchers, and government agencies have collected enough data to showcase problematic trends that further isolate and marginalize the poorest communities.[32]

One such organization, the National Resources Defense Council (NRDC), compiled a systematic review of disease clusters that included cancer, birth defects, and chronic ailments affecting communities in close proximity to toxic

27. *Id.* at 113.

28. *Id.* at 112–13.

29. *Id.*

30. *See generally* Karen Bell, *Can the capitalist economic system deliver environmental justice?* 10 ENV'T RSCH. LETTERS 125017 (2015) (arguing that capitalism exacerbates social inequities and cannot deliver environmental justice).

31. Andrew Szasz & Michael Meuser, *Unintended, Inexorable: The Production of Environmental Inequalities in Santa Clara County, California*, 43 AM. BEHAV. SCI. 58, 602 (2000) (examining toxic releases specifically in Santa Clara County to document how citizens were affected by pollution over time); Brulle & Pellow, *supra* note 25, at 107.

32. Callewaert, *supra* note 6, at 258.

waste sites.[33] These clusters were found in thirteen states with residents living close to a variety of pollution sources, including, but not limited to, manufacturing plants, contaminated landfills, smelter factories, and cotton mills.[34] The chemicals released from these facilities that have been linked to disease clusters included dioxins, PCBs, and asbestos.[35] As researchers continue to investigate these clusters, they offer caution in ascribing direct causations between these sites and cancer. The challenge in linking toxic waste sites to cancer clusters is the relative rarity of many cancers.[36] Often an individual must be exposed to carcinogens for a long time and gradually accumulate this substance within the body, a process known as bioaccumulation.[37] Without a longitudinal epidemiological study that follows individuals in an isolated community over an extended period of time, it is difficult to make conclusive causative links to detrimental health effects, such as cancer.[38] However, NRDC's study and the organizational push to direct federal agencies to investigate these clusters offer new opportunities to bridge these claims and bring necessary evidence to bear.

Despite these challenges to showing direct causation, additional research has demonstrated an overall burden of exposure to general contaminants within minority communities.[39] For example, poorer communities of color are often found in close proximity to roadways, which leads to heightened noise and air pollution and can be linked to increased asthma, cardiovascular diseases, and respiratory challenges.[40] Researchers examining nationwide air pollution burdens with respect to particulate matter (PM), a suspended air particle which has been associated with respiratory and cardiovascular diseases,[41] found that Black individuals face a 54% higher health burden from air pollution when compared to the overall

33. KATHLEEN NAVARRO ET AL., HEALTH ALERT: DISEASE CLUSTERS SPOTLIGHT THE NEED TO PROTECT PEOPLE FROM TOXIC CHEMICALS 3–4 (Carlita Salazar ed., NRDC) (2011) (highlighting large clusters of disease within pockets of the U.S. and arguing that more needs to be controlled through reform of the Toxic Substances Control Act).

34. *Id*. at 4–23 (Texas, California, Michigan, North Carolina, Pennsylvania, Florida, Ohio, Delaware, Louisiana, Montana, Tennessee, Missouri, and Arkansas).

35. *Id*. at 3.

36. Mark B. Russi et al., *An Examination of Cancer Epidemiology Studies Among Populations Living Close to Toxic Waste Sites*, ENV'T HEALTH 1, 1 (2008) (reviewing a number of studies to identify how to classify cancer mortality clusters that appear in close proximity to toxic waste sites. There are a number of limitations to making definitive conclusions but valid hypotheses have been developed to offer future studies in this area).

37. *Id*.; *Ecological Risk Assessment Glossary of Terms,* EPA: VOCABULARY CATALOG (Jan 05, 2012), https://perma.cc/5VJ3-2T24.

38. Russi et al., *supra* note 36.

39. Laura Perez et al., *Near-Roadway Pollution and Childhood Asthma: Implications for Developing "Win-Win" Compact Urban Development and Clean Vehicle Strategies*, 120 ENV'T HEALTH PERSP. 1619, 1619 (2012) (estimating that 27,100 cases of childhood asthma in Los Angeles County were at least partly attributable to pollution associated with residential location within 75 meters of a major road).

40. *Id*. at 1625.

41. Meredith Franklin et al., *Association Between PM 2.5 and All-Cause and Specific-Cause Mortality in 27 US Communities*, 17 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 279, 279 (2007)

population.[42] When extrapolating this to the overall population, communities of color have a 28% higher health burden overall.[43] To compound this problem, researchers who reviewed the Toxic Release Inventory (TRI), a system developed to support the publication of hazardous releases, found that people of color comprised 56% of the population living in areas near TRI facilities.[44]

These data points serve to highlight that the locations in which people live, work, and play have a dramatic effect on health outcomes. Nowhere is this more stark than within the domain of water safety and security.

C. WATER SAFETY CHALLENGES

Water quality concerns have become increasingly more complex and dynamic as industrial and chemical runoffs continue to impact our water sources.[45] On a national front it is essential to understand how contaminated water may adversely contribute to the health and well-being of residents. With the rise of environmental justice movements, previously buried or neglected cases of water contamination have moved into the national consciousness.[46] Stories of the Flint water crisis have garnered public attention, but their ability to sustain national attention is often fleeting. Meanwhile, an expansive cross section of marginalized communities stretching across the United States' collective belts (Sun, Rust, Corn, and Bible) are encountering their own crises.[47] Indigenous lands, rural America, and inner cities, the forgotten landscapes of the United States, often face the most enduring challenges—industrial runoff, corrosive pipe networks, and leached wastes—which contribute to a wide variety of health complications.[48]

For example, the U.S. touts itself as having one of the safest water supplies in the world but does not even rank in the top ten internationally for clean water indicators.[49] Moreover, although many community water systems where the EPA regulates and sets maximum concentration levels for chemicals and pollutants can be considered safe, many other sources of drinking water cannot be.[50] The Safe Drinking Water Act (SWDA), established by the EPA in 1974, ensures

(suggesting that particulate matter can worsen chronic obstructive pulmonary disease (COPD) and worsen existing cardiovascular disease).

42. Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH, 480, 481 (2018).

43. *Id.* at 482 (finding that nationwide disparities exist from factories that release particulate matter and those in poverty and Black have a much higher burden of exposure to these pollutants).

44. *See* Bullard et al., *supra* note 12, at 396.

45. Brulle and Pellow, *supra* note 25, at 113.

46. Mohai et al., *supra* note 6, at 418.

47. *See* Mullin, *supra* note 13.

48. Bullard, *supra* note 12, at 36.

49. *See, e.g.,* Manuela Tobias, *No, the United States Isn't the Cleanest Country*, POLITIFACT (July 23, 2018), https://perma.cc/8HLD-NPKT (noting that the United States ranked 29th internationally with regard to clean water on the Environmental Performance Index).

50. ELENA H. HUNPHREYS & MARY TIEMANN, SAFE DRINKING WATER ACT (SDWA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 2 (2017) (summarizing the SDWA and its major programs

certain levels of quality water standards, yet it only protects sources of water that serve at least twenty-five people.[51] This leaves large regions of the U.S., especially rural communities, unprotected by SWDA regulations.[52]

A polluted water source can often exacerbate existing social determinant inequities. In public health, poor social determinants of health often overlap with limited access to and availability of personal, economic, and environmental resources. For instance, in Flint, Michigan, the full extent of the water crisis could not be clearly articulated without also acknowledging the dimensions of residential segregation, employment rates, access to health services, or other community-based resources, in addition to their contaminated water supply.[53] Water insecurity raised the profile of these underlying factors and their potential relationship with water instability. However, many seeking to address water security fail to take a holistic view that considers the existing health, environment, and social dynamics of the affected communities. By solely reviewing water contaminants in a vacuum, and failing to talk to the people, it is likely both policymakers and researchers can miss the intersectionality[54] of day-to-day challenges faced within environmental justice communities. To understand the complex web of inequalities that impact the health of indigenous, Black, and other racialized and marginalized communities, one must appreciate the structural and distal determinants affecting their health.[55] The following two case studies may help demonstrate the problems faced by the people in affected communities and the benefits of working directly with those residents.

1. Water Case Study: Navajo Nation

In the present-day Navajo Nation, an area that covers modern day northeastern Arizona, northwestern New Mexico, and southeastern Utah, many abandoned uranium mines have affected the area's water supply. Researchers working with these communities have discovered that up to 30% of people in the Navajo Nation have no access to potable water in their homes and must drive long

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and regulatory requirements, including how the law protects public water supplies from harmful contaminants).

51. *Id*. at 4–5.

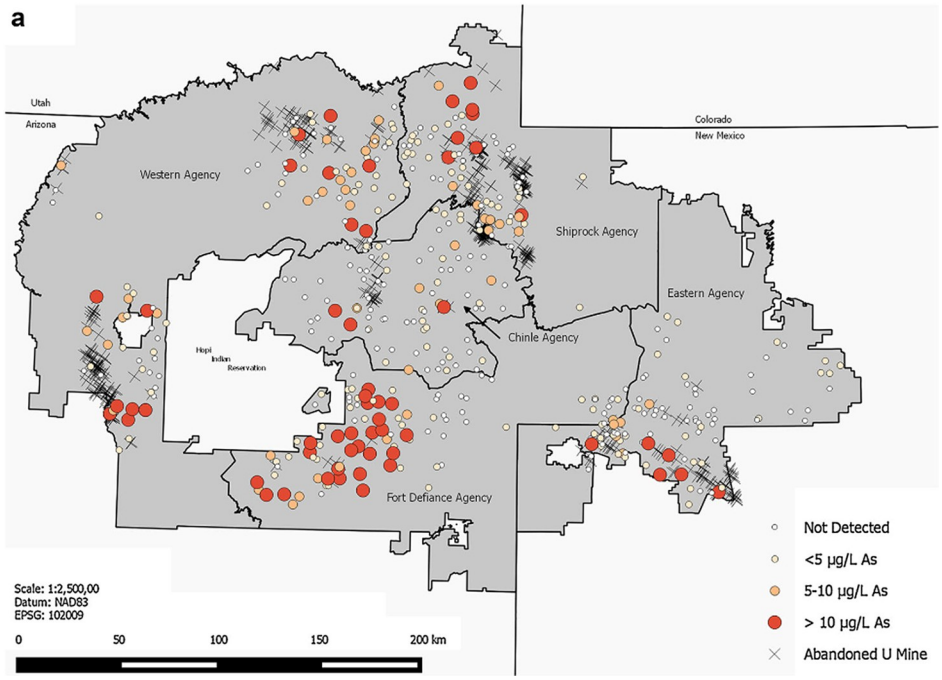
52. C.E Marcillo & L.H. Krometis, *Small Towns, Big Challenges: Does Rurality Influence Safe Drinking Water Act Compliance?* 1 AWWA WATER SCI. 1120 (2019).

53. *See generally* Susan J. Masten et al., *Flint Water Crisis: What Happened and Why?*, 108 J. AM. WATER WORKS ASS'N. 22 (2016) (historical overview of the Flint water crisis, including an overview of the major actors involved and an analysis of reporting documents amongst water treatment facilities and managers).

54. INGRID R.G. WALDRON, THERE'S SOMETHING IN THE WATER: ENVIRONMENTAL RACISM IN INDIGENOUS AND BLACK COMMUNITIES 3–4 (2020) (describing intersectionality as a variety of determinants that work to compromise a community's health).

55. *Id*. at 92 (discussing the complex web of intersecting social, political, and environmental inequalities that impact the health and well-being of marginalized people; further explaining how the combination of structural, distal, intermediate, and proximate determinants relate to the environmental and health impacts of the affected communities).

distances to supply their families with clean water.[56] Because of this, many families are forced to use water from contaminated sources intended only for livestock. In addition to uranium, these wells contain a wide assortment of harmful chemicals, including arsenic, manganese, and lithium.[57] Without a viable alternative water source, Navajo communities are forced to make difficult short-term decisions that will have long-term health consequences. By working directly with the affected communities, researchers were able to understand the balancing act associated with the immediate need for safe water and the long-term challenges centered around cleaning the water and improving health access.



56. Joseph Hoover et al., *Elevated Arsenic and Uranium Concentrations in Unregulated Water Sources on the Navajo Nation, USA*, 9 EXPOSURE & HEALTH 113, 114 (2017) (analyzing the distribution of unregulated water sources throughout Navajo nation and finding heightened levels of arsenic and uranium that exceeded national drinking water standards. The potential for exposure to these chemicals is extremely high due to the close proximity of the sites).

57. *Id.* at 122.

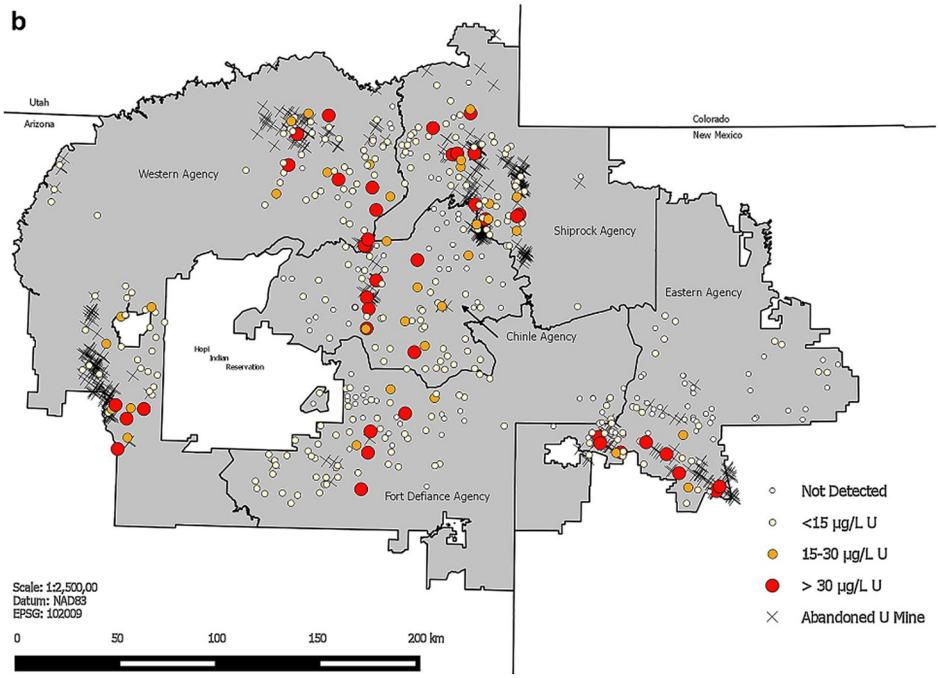


Figure 1 and 2: These maps show the concentration of arsenic and uranium in water sources within Navajo Nation.[58]

2. Water Case Study: West Virginia

In the late 1950s the Washington Works plant in West Virginia became a primary Teflon manufacturing site.[59] In the manufacturing of Teflon, per and polyfluoroalkyl substances (PFAS), a specialized manmade chemical, is a significant component in the development process. During the manufacturing process, PFAS entered groundwater within the Ohio River as well as in solid deposits.[60] Alternatively known as "forever chemicals," this class of chemicals does not break down easily in the environment and has been linked to lower birth weight,

58. *Id.* at 120.

59. Nathaniel Rich, *The Lawyer Who Became DuPont's Worst Nightmare*, N.Y. TIMES (Jan. 6, 2016), https://perma.cc/V8HH-4657.

60. Kyle Steenland et al., *Predictors of PFOA Levels in a Community Surrounding a Chemical Plant*, 117 ENV'T HEALTH PERSP. 1083, 1083 (2009) (authors studied over 69,000 residents in six contaminated districts of the mid-Ohio Valley living near a known chemical plant that released large quantities of PFAS).

higher cholesterol, and impaired liver function.[61] By the 1980s, the major manufacturing plant, well aware of PFAS' carcinogenic properties, purchased land from a local farmer to continue disposal of the chemical.[62] Following years of witnessing abnormal deaths and illness of farm animals, the farmer filed a suit against the company, DuPont.[63] Careful examination of reports by legal teams and researchers showed willful neglect on the part of DuPont, resulting in remediation of water sources and healthcare compensation.[64] Since the suit was settled in 2004, PFAS exposure has been linked to 5 diseases—ulcerative colitis, pregnancy-induced hypertension, thyroid disease, testicular cancer, and kidney cancer.[65] Health complications from PFAS waste disposal continue to emerge, affecting a mostly rural and poor West Virginia area.

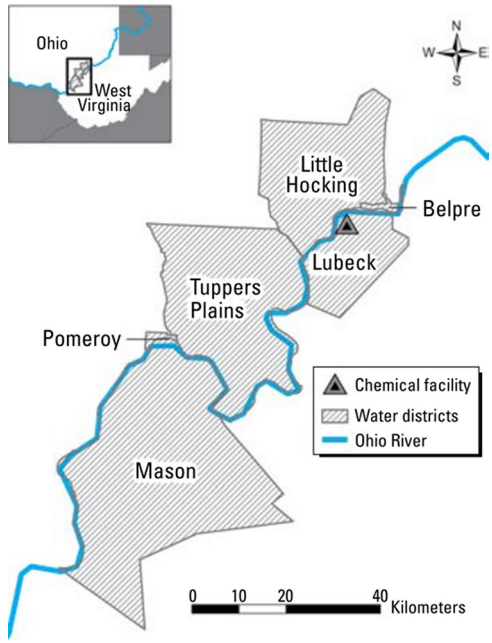


Figure 3: Contaminated water districts resulting from DuPont's PFAS runoff[66]

61. Edward Anthony Emmett et al., *Community Exposure to Perfluorooctanoate: Relationships Between Serum Levels and Certain Health Parameters*, 48 J. OCCUPATIONAL & ENV'T MED. 771, 771 (2006) (authors determined PFAS results from a random sample of residents living in close proximity to tainted PFAS water supply has PFAS serum that greatly exceeded national averages).

62. Steenland et al., *supra* note 60, at 1083.

63. Sharon Lerner, *The Teflon Toxin: DuPont and the Chemistry of Deception*, THE INTERCEPT (Aug. 11, 2015, 3:35 PM), https://perma.cc/5AFA-LKUE (alleging negligence and deception practiced by the DuPont corporation to hide their PFAS findings from public).

64. Steenland et al., *supra* note 60, at 1083.

65. *Id.*

66. *Id.* at 1084.

3. Water Case Studies: Lessons Learned

Although involving different locations, different cultures, and different chemical harms, both case studies demonstrate similar problems: surveillance challenges; limited resources; and shifting political agendas. They also illustrate the challenge of addressing long-term contamination in areas with significant intersecting inequities, including lack of access to water resources and a dearth of economic resources to address community safety. Moreover, the cases show that dynamic and negative feedback loops can create a multitude of social, economic, and political barriers that can play a role in environmental justice.

Despite their differences, both examples highlight the importance of community engagement. In a stakeholder-driven process, it is more likely that one can uncover root- level causes of environmental injustice and the health consequences.[67] Involving communities and community leaders in scientific and policy aims can drive meaningful community-related outcomes and enhance the sustainability of environmental interventions.[68] Accessing local knowledge through a citizen-science policy approach is a relatively recent initiative that has shown promise; by its nature it involves an understanding of community history, exposure, and desired outcomes.[69] Centralized top-down decision making is not the answer; in fact, it is part of the problem. The solution is a bottom-up collaborative decision sharing, polycentric governance.

II. POLYCENTRIC GOVERNANCE

Polycentric governance is a theory of collaborative governance where semi-autonomous nodes of decision making and authority exist and collaborate across multiple levels and multiple institutions.[70] Originally developed and proposed by Elinor Ostrom and Vincent Ostrom, the notion of polycentric governance has been applied in a variety of contexts, though it was originally developed and applied with regard to natural resource management.[71] Most scholars agree that polycentric governance is a system of diverse centers of authority (or partial

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67. Bullard, *supra* note 12, at 472 (arguing the significance of grassroots environmental partners being at the table to drive policy or regulatory change).

68. Frederique Froeling et al., *Narrative Review of Citizen Science in Environmental Epidemiology: Setting the Stage for Co-created Research Projects in Environmental Epidemiology*, ENV'T INT'L, 1 (July 2021) (arguing the significance of including citizens in research interventions through a cooperative co-learning process driven by community members. This enables substantial buy-in and commitment from the community on a given intervention or proposed policy).

69. *Id*. at 2.

70. Keith Carlisle and Rebecca L. Gruby, *Polycentric Systems of Governance: A Theoretical Model for the Commons*, 47 Pol'y Stud. J. 927, 928 (2019); *see also* MICHAEL D. MCGINNIS, ELIZABETH B. BALDWIN & ANDREAS THIEL, WHEN IS POLYCENTRIC GOVERNANCE SUSTAINABLE? USING INSTITUTIONAL THEORY TO IDENTIFY ENDOGENOUS DRIVERS OF DYSFUNCTIONAL DYNAMICS 1 (2020).

71. *See id*. Elinor and Vincent Ostrom founded Indiana University's Workshop in Political Theory and Policy Analysis, which changed how people think about shared resources, public services, centralization, and privatization. Elinor Ostrom won the Nobel Prize for Economics in 2009. *See*

authority) that work to collectively cover a full range of tasks. For example, the U.S. government is polycentric in that it has networks of public agencies—with levels of authority—which each have authority (or partial authority) to make decisions on specific tasks. The construct of 'polycentric governance' demands consideration of eight main pillars:

> (1) existence of multiple decision centers; (2) autonomy of decision-making authorities; (3) different decision centers have/share overlapping jurisdictions; (4) decision centers are engaged into processes of mutual adjustment; (5) there are emergent patterns of behavior, an emergent order, that are shared across decision centers; (6) low entry and exit costs; (7) existence of an overarching system of rules, values, norms; (8) existence of means for effective coordination at all levels (whether at the level of a decision center or the system as a whole).[72]

In Part IV.D, we propose a community-based governance strategy to build significant long-lasting community involvement in local water governance. This approach draws from and builds on the work of scholars in the areas of polycentric governance, institutional theory, and studies of common resource management, each of which will briefly be explored here.

A. THE GOVERNANCE OF THE COMMONS

We start by drawing upon the work of Nobel Laureate Elinor Ostrom, whose research concerned the governance of common resources (also known as the commons).[73] Examples of common resources that were particular areas of research for the Ostroms include fishing areas and shared waterways.[74] Unsurprisingly, there are difficulties in governing these types of resources. As Garrett Hardin argues, shared resources such as water can and often are overexploited, and/or the care and sustainability of the resource may be overlooked by users.[75] When faced with a shared resource, people may elect to behave

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generally, Erik Nordman, THE UNCOMMON KNOWLEDGE OF ELINOR OSTROM, ESSENTIAL LESSONS FOR COLLECTIVE ACTION (2021).

72. Nordman, *supra* note 71, at 10.

73. In general, the commons are considered resources that belong to everyone in common, but this is overly simplistic. "Common pool resources" are "resources which 1) produce a steady flow of resource units (benefits accruing from the resource), and 2) resources that are so large (an ocean for example) that excluding the individuals that use them unsustainably becomes almost impossible—hence her stress on the maximization of collaboration between users of common pool resources." ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS AND COLLECTIVE ACTION, 30, (James E. Alt and Douglass C. North eds., 1990) [hereinafter Governing the Commons]. The success of self-governing institutions, concludes Ostrom, proves that policies of privatization and government control are not the only alternatives open to everyone. *Id*. at 5.

74. *Id*. at 143.

75. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). Hardin argues a common-pool resource is both subtractable, meaning that one person's use of a resource reduces the amount available for other users, and nonexcludable, meaning that it is not possible to exclude a person

opportunistically,[76] especially in a situation where the possibility of being excluded from the use of the resource is limited.[77] In such a situation, individuals may be incentivized to maximize their personal benefits and ignore the costs of their impact.[78] This, of course, is also true in water management; if individuals are allowed to exploit the consumption of water and suffer limited to no consequences if they pollute or otherwise destroy or deeply damage the water resource, they may have little incentive not to continue that behavior, particularly if doing so is in their economic self-interest. Hardin believed the remedy for this "tragedy" was to either create government regulation and oversight or privatize shared resources.

Elinor Ostrom argued that alternative governance structures existed that could enable collective self-governance without a top-down regulatory approach and also avoid the need for privatization to protect vulnerable common resources.[79] In her seminal work, *Governing the Commons,* she identified eight design principles characterizing rules and structures of robust institutions associated with sustainable governance of common-pool resources.[80] These eight design principles relate to the boundaries of the system; congruence with local conditions; opportunities for collective choice and local self-determination; approaches to monitoring, sanctions, and conflict resolution; and incorporation of multiple, nested layers of organization.[81]

Research following *Governing of the Commons* has found support for these principles as an effective means of governance, such as in a case study of community-based irrigation systems.[82] Other research supports the use of decentralized, participatory, community-based systems in managing common-pool natural

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from using the resource. Absent some sort of governance structure, a tragedy will result because no one can be excluded from using the resource, so it will be depleted as all individuals act rationally to use it before others do. *Id.*

76. *See* Governing the Commons, *supra* note 73, at 2–5.

77. *See id.* For a discussion of the notion of exclusion in common pool resources, see Janine S. Hiller and Scott J. Shakelford, *The Firm and Common Pool Resource Theory: Understanding the Rise of Benefit Corporations*, 55 Am. Bus. L.J. 5, 20–21 (2018).

78. *See id.*

79. *See Elinor Ostrom-The 'Non-Tragedy of the Commons',* CGIAR https://perma.cc/GXR6-PSLJ (last visited Aug. 13, 2021).

80. *See generally* Governing the Commons, *supra* note 73.

81. *See id.* at 90. *See* Vincent Ostrom, *Water and Politics California Style*, *in* POLYCENTRIC GOVERNANCE AND DEVELOPMENT: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS, 31–36 (Michael D. McGinnis ed., 1999) (discussing the movement from complexity to a water industry); Vincent Ostrom & Elinor Ostrom, *Legal and Political Conditions of Water Resource Development*, *in* POLYCENTRIC GOVERNANCE AND DEVELOPMENT: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS, 50–51 (Michael D. McGinnis ed., 1999) (identifying the central task of water resource development to be one of conceptualizing appropriate institutional solutions that will take account of the heterogenous sets of interests involved among diverse communities of water users).

82. *See, e.g.*, Elinor Ostrom, *Design Principles in Long- Enduring Irrigation Institutions*, *in* POLYCENTRIC GOVERNANCE AND DEVELOPMENT: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS 74, 83 (Michael D. McGinnis ed., 1999).

resources, particularly where the authority rests with those who actually live and rely on the resources in question.[83] As Peter Hill and Shawn Regan note, "Ostrom's work suggests that the different formulations of governance structures to manage natural resources are best discovered through a process of experimentation driven by people who have localized control—in other words, through bottom-up institutional evolution."[84]

B. ENVIRONMENTAL WATER GOVERNANCE

Given the challenges of managing common resources, government regulators including EPA often turn to command-and-control regulatory approaches, which embrace top-down, uniform national standards. However, scholars of environmental governance have noted that such a system can cause additional problems, as this approach may over-emphasize enforcement by government actors and create an escalating cycle of additional enforcement layers that ultimately prove counterproductive.[85] Thus in a "monitor-and-enforce system":

> Monitors and enforcers need to be monitored and sanctioned if they fail to fulfil their duties, and the second layer of monitors and enforcers also needs to be monitored, and so on. This creates an apparent paradox. At each layer of monitoring and enforcement, there exists a possibility of failure, either due to personal interests and opportunism of the parties involved, due to lack of legitimacy, or due to errors and lack of information.[86]

Vincent Ostrom suggested this top-down approach to enforcement would ultimately undermine the self-reliance and democratic urges of individuals in society.[87] The solution to this negative cycle could be polycentricity.[88] As Elinor Ostrom noted in her Nobel Lecture *Beyond Markets and States: Polycentric Governance of Complex Economic Systems,* polycentric systems can allow for shared authority and decision making, with multiple and potentially overlapping

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83. *See id*. at 75.

84. Peter J. Hill & Shawn Regan, *Resource Governance in the American West: Institutions, Information, and Incentives*, *in* THE ENVIRONMENTAL OPTIMISM OF ELINOR OSTROM 1, 3 (Megan E. Jenkins ed., 2020).

85. Shahla Ali, *Measuring Success in Devolved Collaboration*, 26 J. LAND USE & ENV'T L. 93, 94 (2010).

86. Paul Dragos Aligica & Vlad Tarko, *Institutional Resilience and Economic Systems: Lessons from Elinor Ostrom's Work*, 56 COMP. ECON. STUD. 52, 65 (2014).

87. Vincent Ostrom argued that "democratic societies are necessarily placed at risk when people conceive of their relationship as being grounded on principles of command and control rather than on principles of self-responsibility and self-governing communities of relationships." VINCENT OSTROM, THE MEANING OF DEMOCRACY AND THE VULNERABILITIES OF DEMOCRACIES: A RESPONSE TO TOCQUEVILLE'S CHALLENGE 4 (1997).

88. Michel D. McGinnis, *Series Forward*, *in* POLYCENTRIC GOVERNANCE AND DEVELOPMENT: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS, xi–xiv (Michael D. McGinnis ed., 1999) (the term "polycentricity" describes a social system of many decision centers having limited and autonomous prerogatives and operating under an overarching set of rules).

areas of jurisdiction. Rather than seeking hierarchical approaches to enforcement, this approach allows for multiple, shared loci of control, and importantly, control of resources by local stakeholders.[89] In the environmental justice context, this approach reflects and honors the need for "distributional and procedural equity in environmental and natural resource decisions."[90]

It is worth noting, however, that the process of creating a successful polycentric framework is not easy. As Elinor Ostrom notes:

> Instead of presuming that optimal institutional solutions can be designed easily and imposed at low cost by external authorities. . . . 'getting the institutions right' is a difficult, time-consuming, conflict-invoking process . . . [that] requires reliable information about time and place variables as well as a broad repertoire of culturally acceptable rules.[91]

That said, a polycentric approach garners overwhelming support through the engagement of local actors. Though challenging, polycentric systems and multinodal governance structures engage a variety of stakeholders, create community participation and support, and allow for the development of individualized solutions to complex resource management problems, all tailored to local conditions. At the same time, this type of complex structure allows for an entity—in this case the EPA—to participate across a broad range of jurisdictions and assist in regulating large, institutional actors who may also utilize (and potentially abuse) resources across jurisdictions.

Authentic engagement with lower levels of government and private associations can incentivize further participation and may move voiceless people into more powerful positions in terms of local control and management.[92] Such incentives advance the use of local knowledge and encourage and create trust. Furthermore, when people are truly engaged and considered members of the trusted community, they have more freedom to develop their own rules and strategies that conform to their unique circumstances and preferences.[93] At this moment in time, trust in governmental institutions and officials is at an all-time low. Creating environments where individuals are given a voice and are treated as valued members of the community can begin to rebuild lost trust. Polycentrism requires policymakers at all levels to look for ways to actively engage local

89. Elinor Ostrom, *Polycentric Governance of Complex Economic Systems* (Dec. 8, 2009).

90. Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENV'T L. REV. 459, 461 (2002) (relying on UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994)).

91. *Id.*

92. Ostrom frequently wrote about the nature of collective choice arrangements. She asserts—and has been widely supported in advancing—that "most individuals affected by the operational rules can participate in modifying operational rules." In the absence of incentives and grounds for participatory collective action, the system often suffers difficulties (failures). *See* Governing the Commons *supra* note 73, at 93.

93. *See id.*

communities, private associations, and lower levels of government to experiment with alternative institutional arrangements and aggregations that fit unique local circumstances and preferences.

Although polycentric systems are not "centralized," they also cannot simply be considered "decentralized" in a traditional sense:

> In a polycentric system, the interconnected and interrelated spheres of power make sure that there are multiple forms of checks and balances. Simple decentralization would mean devolving decision-making power to the lowest levels possible, and without proper checks and balances, each local decentralized jurisdiction could become its own small tyranny. A polycentric system will have significant amounts of decentralization, but the lowest levels of decision making are nested within higher levels.[94]

Therefore, under polycentrism, EPA could continue to play a leading role in the governance of pollution mitigation, regulation, and the protection of water quality. The vast number of local governments and actors across thousands of miles of interconnected water systems requires participation of an entity with the ability to consider broad jurisdictional issues and the need for protection of diverse and varied communities. The real-world practicalities of creating and operating national water policy militate against a purely local regulatory scheme, particularly where global corporate actors move with impunity between localities, states, and countries. As such, there is a need for a federal authority like the EPA to incentivize large corporations to behave appropriately and engage with local communities. Moreover, as the work of Elinor Ostrom and related researchers demonstrates, polycentric systems can and do work, even in situations where local communities must interact and co-exist with large federal organizations. For example, as Shane Day describes, "Pacific salmon management is an example of complex polycentric governance that involves an unusual tribal role entailing significant coordination and decision making responsibilities at a level coequal to that of state and national actors.[95]

Effective water governance is dependent upon an open social structure that enables broader participation by civil society, private enterprise, and all stakeholders networking to support and influence government.[96] Water regulatory policy must have a goal of sustainable development and preservation of water resources; to do this, it must actively involve all material stakeholders in the regulatory process.[97] Economic growth and water use that only serves the interests of

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94. Jordan K. Lofthouse, *Self-Governance, Polycentricity, and Environmental Policy*, *in* THE ENVIRONMENTAL OPTIMISM OF ELINOR OSTROM 31, 40 (Megan E. Jenkins ed., 2020).

95. Shane Day, *Pacific Salmon Fisheries Management: An (Unusual) Example of Polycentric Governance Involving Indigenous Participation at Multiple Scales*, *in* THE ENVIRONMENTAL OPTIMISM OF ELINOR OSTROM 61, 63 (Megan E. Jenkins ed., 2020).

96. Peter Rogers & Alan W. Hall, *Effective Water Governance*, TEC BA BACKGROUND PAPERS, January 2003, at 4, 26.

97. *Id.* at 16.

the policy elites can backfire, resulting in long-term governance problems for local communities.[98]

Given the complexities of sustainable water use within the United States, managing it equitably and efficiently requires that disparate voices are heard and respected in decisions over the vast water commons.[99] Involving local and regional stakeholders, particularly those who actually use and depend on common resources, in governmental decision making is a long, intensive process that requires a new way of thinking.[100] This new water security and governance paradigm would include those most familiar with the area's climate, geology, hydrology, economy, and culture.[101] Water can dramatically change in its economic, ecological, cultural, recreational, religious, agricultural, and subsistence character as it moves from mountains, valleys, deserts, and deltas, or through urban, rural, and indigenous communities.[102] The idea of polycentric sharing in environmental law easily blends with the general concept of demosprudence and its practical application.

III. DEMOSPRUDENCE AND PRAXIS

Professors Lani Guinier and Gerald Torres created the term *demosprudence* to describe the process of creating law outside of the typical legal perspective.[103] The general idea is based upon the notion that social movements can and should create legal change.[104] Following this reasoning, movements like the

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98. *See* DIANA SUHARDIM, ALAN NICOL & EVERISITO MAPEDZA, WATER GOVERNANCE AND COLLECTIVE ACTION: MULTI-SCALE CHALLENGES (2017).

99. *Id.*

100. *See* Rose Francis & Laurel Firestone, *Implementing the Human Right to Water in California's Central Valley: Building a Democratic Voice Through Community Engagement in Water Policy Decision Making,* 47 WILLAMETTE L. REV. 495, 512 (2011). "The human right to water has real symbolic power as a tool for raising community consciousness. Whether this tool is empowering, however, depends on the rhetorical manner in which this entitlement is framed—that is, whether the onus is placed on the government (to dispense to passive recipients) or on communities (to stand up and assert this entitlement themselves). The former is subtly disempowering, while the latter has the opposite effect." *Id.*

101. *See* Rhett B. Larson, *Water Security,* 112 NW. U.L. REV. 139, 176 (2017) (discussing a regionalist governance paradigm for water and water footprinting).

102. *Id.*

103. *See* Gerald Torres, *Eighty-Third Cleveland-Marshall Fund Visiting Scholar Lecture: Legal Change*, 55 CLEV. ST. L. REV. 135, 135–36 (2007); *see also* Martin A. McCrory & Anjanette H. Raymond, *Navigating Murky Waters: The Rise and Fall of Clean Water Production in the United States*, 29 S. CAL. REV. L. & SOC. JUST. 143, 187 (2020) (the premise of demosprudence is that major legal change can only occur when cultural modifications accompany the technical legal rule change and demosprudence postulates that social movements can create predictable and inevitable legal changes). *See generally* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740 (2014) (describing the framework and philosophy of demosprudence).

104. Torres, *supra* note 103, at 137 (quoting Professor Stoddard's essay describing the significance of cultural shifts as being necessary to produce significant social change). For a discussion and application of demosprudence to the issue of poverty and the criminalization of poverty, see generally

Environmental Justice movement, the Black Lives Matter movement, and Stop AAPI Hate provide the perfect medium for the growth of demosprudence and the broad changes it can facilitate. These movements and their predecessors[105] are slowly but surely causing a renewed societal awareness of the problems many communities have faced for decades, if not centuries.

We argue that the concept of demosprudence and the related notion of praxis provide the theoretical foundation upon which citizen participation can be sought and relied upon in the development of future legal structures and in the movement for environmental justice. In section A of this Part, we will describe the theory of demosprudence and its relation to modern problems of domination and underrepresentation. In section B, we set forth a formulation of a demosprudence praxis. As part of that discussion, we analyze the theories of antiracism and antisubordination and use them to expand the idea of a demosprudence praxis. Ultimately, we contend that the practical application of demosprudence praxis can shape environmental regulatory reform (specifically, Clean Water Act regulations).

A. DEMOSPRUDENCE

Demosprudence gives the people behind social movements and those within communities impacted by legal structures a place within the making, interpretation, and execution of the law. As Professor Torres put it, "[d]emosprudence is a philosophy, a methodology and a practice that systematically views lawmaking from the perspective of popular mobilizations."[106] However, these types of changes take time and constant effort. Dr. Beverly Wright, sociologist and longtime environmental justice leader, posits that history shows us that governments seldom initiate actions to protect the people; that governments react to outside pressures; and that these pressures must be applied over an extended period of time to achieve lasting results.[107] It is the constant pressure of strong, diverse, cooperative groups of people that moves governments toward long-term change (prime examples of this are the environmental, anti-war, civil rights, and women's movements of the 1960s).[108] These groups include courts, regulators, lawyers, and academics working with people actually affected by the laws to facilitate a praxis that pushes the next wave of environmental regulatory change.

Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020).

105. *See generally* EDWARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM (describing the predecessors of environmental justice).

106. Torres, *supra* note 103, at 135.

107. ROBERT BULLARD, THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 197 (2005).

108. *Id.* For a discussion of the need for "non-reformist reforms," which aim to solve current civil and human rights crises through direct citizen action and collective participation, see Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90 (2020). Professor Akbar argues "movements are making demands for the public to have greater say in the commons: our collectively generated wealth, the land, and our shared built environment." *Id.* at 98.

Still, meaningful change must be based upon a continuous drive toward a philosophy of antidomination.[109] No one group should dominate the discourse or rulemaking; all people, including community members and individuals without systemic power, must be equal partners. The current democracy-deficient legal paradigm results in predictable outcomes, ones that generously benefit elites who are able to navigate an inordinately complex legal and administrative regulatory system, as well as those with the wealth to influence decisionmakers, with costs disproportionately borne by the marginalized communities.[110] Even at the local level, the government often provides the richest engagement to the elites, while the interests of the poor and people of color take a subservient role in relation to the decisions that directly affect their health and environment.[111]

The move toward genuine social and regulatory change should not and cannot be dominated by elite actors. Scientists, lawyers, judges, regulators, corporations, NGO officials, legislators, and academics are often the controlling voices in a movement toward actual change.[112] As it currently stands, the dominant opinions and views of these elites become interwoven in the fabric of environmental regulations. [113] This current environmental regulatory regime is fundamentally undemocratic.[114] The environmental decisionmakers are not the affected people nor the people's representatives; [115] most of the elites creating environmental regulations have never held an elected office. Many claim to represent affected people, though many have neither visited a representative number of environmentally affected communities nor met with a quorum of affected peoples. They make regulatory decisions that have multigenerational effects on polluted communities, yet many have never spoken to a single person who has been or will be affected by their regulatory decisions. Because these voices do not represent affected people, they often result in regulatory stagnation that only benefits elites.

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109. *See generally* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008) (exploring how illegitimate exercises of power and dominance threatens the democratic process).

110. *See generally* Barbara L. Bezdek, *Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality*, 33 ST. LOUIS U. PUB. L. REV., 19 (2013) (describing the power differentials associated with community engagement).

111. *See generally* Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, HARV. J. ON RACIAL & ETHNIC JUST., Spring 2018, at 1 (discussing how poor and black citizens are subjected to maldistributions and democratic defects because of subordination).

112. *See generally* Guinier & Torres, *supra* note 103, at 2745 (stressing the point that the people must lead social change, not the elites).

113. *See* Francis & Firestone, *supra* note 100, at 519–20 ("Like many scholars and activists before us, CWC firmly believes that lack of political voice is at the heart of most environmental human rights violations and the greatest source of environmental injustice.").

114. *See* RICHARD HOFRICHTER, TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 51 (Univ. of Utah Press 2002) (1993) (discussing how the history of environmental regulations has not stopped ever-increasing environmental deterioration).

115. *Id.*

A movement toward a significant change in environmental thinking and practice must be dominated by the people.[116]

This raises the question, who speaks for the people? The answer is simple: the people must speak for themselves.[117] The people who live under constant environmental threats must speak for themselves. Without this change, the issues, ideas, and lived environmental experiences of the affected people will be presented in a watered-down form via pseudo-proxies the people will never meet. The foregone result is an environmental regulatory scheme with demonstrable disparate impacts on the poor, people of color, indigenous, and rural people. Since its inception, America has classified, labeled, branded, and forced people into their respective roles to meet the needs of the larger society.[118] The vestiges of this era can be seen today in many hidden communities affected by pollution. There is a growing population of invisible people that are relegated to living in toxic districts, cities, towns, or neighborhoods so others may live in clean ones.

At best, the traditional algorithm for environmental regulatory change involves the elicitation of comments from the "usual suspects," consisting of the same or similar groups of people. These are people with whom regulatory elites feel some measure of affinity and comfort. At worst, the regulatory matrix involves an economical number of token town hall meetings (often virtual) to elicit soon-to-be-ignored comments, problems, and complaints. Through inaction and inattention (that is, nullification), regulatory elites continue to promulgate so-called "neutral rules" that perpetuate a systemic and ever-growing environmental caste system based upon race, income, and social status. This regulatory relic is the antithesis of modern American democracy.[119] As Professor Wendy Wagner notes in her discussion of the need for citizen participation in watershed management, particularly around issues related to whether and how to clean degraded waters, "without the public's participation in or acknowledgment of the significant policy decisions, not only will the decisionmakers not be accountable, but the decisions may not comport with the public's interests."[120]

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116. *Id.*

117. *See generally* D. WATKINS, WE SPEAK FOR OURSELVES: HOW WOKE CULTURE PROHIBITS PROGRESS (2020).

118. *See* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENT 53 (2020) (comparing the American caste system to a long-running play in which the actors have incorporated their assigned roles into their very being—they merge into their assignment until it becomes a part of their inner selves and changes how they see the world and how they are seen in the world).

119. *See* Jaime Alison Lee, "Can You Hear Me Now?": *Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 409 (2013) (discussing the need for participatory governance as a means for promoting democratic ideals).

120. Wendy E. Wagner, *Restoring Polluted Waters with Public Values*, 25 WM. & MARY ENV'T L. & POL'Y REV. 429, 443 (2000).

Deeper long-term participatory regulatory development is a cornerstone for democratic growth and transformation.[121] Deeper and more meaningful public participation can result in intrinsic and instrumental benefits to low-income communities and communities of color affected by pollution.[122] Demosprudence emphasizes the pre-eminence of "We the People" in our lawmaking process,[123] alluding here to "We the People" as defined by Frederick Douglass: the human inhabitants of the United States, not just the privileged class, not just the elites.[124] Demosprudence focuses on the ways that ordinary people can permanently change both the people who make law and the landscape upon which the law is made.[125] Demosprudence looks for answers in the people themselves and not individual preference-holders.[126] Demosprudence is an idea that can be expanded beyond a broad theory of social movements. It can be brought to life through its practical application during regulatory formation.

The theory of demosprudence suggests that a primary function of law resides in its power to translate lived experiences of non-expert constituencies.[127] It can easily be adapted to include environmental regulatory reform. Regulating agencies like EPA can become an integral part of the process of creating laws from an external perspective.[128] The demosprudential notion of new voices is especially important in the context of environmental regulation.[129] The collective wisdom and voice of the people (especially affected people) should always inform rulemaking in our democracy.[130] The condescending philosophy of elitism and exclusion can end with a praxis of demosprudence directly involving "We the People."

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121. *See generally* Damon Y. Smith, *Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment*, 29 ST. LOUIS U. PUB. L. REV. 243 (2009) (exploring the benefits of public participation when coupled with legislative accountability).

122. *Id*. at 271–72.

123. *See* Lani Guinier, *The Supreme Court 2007 Term Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 138 (2008); *see also* McCrory & Raymond, *supra* note 103, at 188 (quoting the Frederick Douglass Dred Scott Speech).

124. McCrory & Raymond, *supra* note 103, at 191; *see also Frederick Douglass Speech in New York on the Anniversary of the American Abolition Society on the* Dred Scott *Decision*, *in* TWO SPEECHES BY FREDERICK DOUGLASS: ONE ON WEST INDIA EMANCIPATION, AND THE OTHER ON THE DRED SCOTT DECISION, at 27, 40 (C.P. Dewey prtg. 1857).

125. *See* Guinier & Torres, *supra* note 103, at 2750.

126. *Id*. at 2755.

127. *Id*. at 2745 (listing a four-part test involved in changing the wind of civil rights).

128. Torres, *supra* note 103, at 135–36 (describing a theory of legal change based upon the influence of social movements).

129. *See* McCrory & Raymond, *supra* note 103, at 187–88 (describing demosprudence as an exploration of how ordinary people can become involved in participatory democracy).

130. *Id*. at 187; *see also* Guinier & Torres, *supra* note 103, at 2744 (discussing the balance of power between lawmaking and social action and the role of dynamic constituencies).

B. PRAXIS

The idea of praxis in this context borrows from the general theories of critical systemic praxis and critical race praxis.[131] The central theme that follows is the link between theory and action.[132] For this Article, praxis, or theory-to-practice,[133] focuses pragmatically on theories and concepts that provide workable methods for understanding and diminishing oppressive conditions.[134] This section also draws from the work of Dr. Paulo Friere who believed that praxis is action based upon reflection used to transform the world.[135] Demosprudence can smoothly transform reflection into action that can better the lives of marginalized communities.

In fact, Professor Torres says that demosprudence is not just a philosophy; it entails a methodology and practice of lawmaking involving popular mobilizations that make formal institutions more representative and more democratic.[136] In this respect, a praxis relating to demosprudence would enable the discovery of insights into the ways in which marginalized people can work with EPA to transform powerless conditions into powerful possibilities,[137] thereby informing a much broader vision than what previously existed.[138]

For example, this praxis would necessitate an end to the hegemonic power exercised by the governmental regulators and regulatory elites over historically subordinated people. A demosprudence praxis revolves around "We the People"; it requires a critical engagement with non-elite people and a movement toward more inclusive action. Similar to the notion of critical race praxis, demosprudence praxis can be viewed as the grounding of justice in concrete places, events, and group interactions.[139] This grounding moves away from a primary reliance

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131. *See generally* Mcintyre-Mills, *infra* note 143 and Yamamoto, *infra* note 136.

132. *Id.*

133. *See* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L REV. 2129, 2161 (1992) ("This theory-practice approach, a praxis, if you will, finds a variety of emphasis among those who follow it, and the concepts are now rather open and still being explored.")

134. *See* Yamamoto, *infra* note 136, at 882.

135. *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 51–52 (New York: Seabury Press) (1970) (describing the need for critical awareness of the problem followed by action).

136. Torres, *supra* note 103, at 135–36.

137. *See* Mcintyre-Mills, *infra* note 143, at 7 (stating that critical systems praxis stresses the links between thinking and practice to develop grounded theories and practice); Yamamoto, *infra* note 136, at 875–78 (describing critical race praxis as combining pragmatic socio-legal analysis with political lawyering and community action with anti-subordination as a central focus).

138. *See* Julia M. Allen and Lester Faigley, *Discursive Strategies For Social Change: An Alternative Rhetoric of Argument*, 14 RHETORIC REV. 1, 142–72, (1995) (defining discursive strategy as any means of change using words, including words that are spoken, printed, or broadcasted via other media) https://perma.cc/ZFV5-LRRU.

139. *See generally* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (discussing the difference between traditional justice theory and the need for a praxis – critical race praxis that connects discourse analysis with practice).

on discursive strategies (strategies to shape the narrative and frame using discourse)[140] and moves towards a reliance on experiences and perceptions related to people's actual lives.[141] This form of practical demosprudence can bring the intellectual resources of lawyers, regulators, academicians and others to bear in an effort to enhance opportunities to shift power to non-elites.[142] In this sense, praxis calls for practicing new forms of intersectional representation and regulatory governance that actually bring new voices and bodies into the discourse.[143] Actualizing the theory of demosprudence can work to reverse the decades of discriminatory impacts, including environmental impacts.

A pragmatic view of demosprudence could include a general interpretation of environmental lawmaking that increases democracy in everyday social life.[144] This expansive view of demosprudence would incorporate the principles of recognitional justice; environmental regulators must recognize the differences between themselves and those who actually live in the affected communities.[145] They both live on the same planet, but they often live in entirely different worlds. Environmental regulators would recognize that they do not live in the same spaces, do not subsist on the same foods, do not have access to the same healthcare, and do not drink the same water or even breathe the same air. Those traditionally involved in regulatory promulgation must recognize the numerous intersectional issues plaguing affected communities, issues magnified by decades of institutional neglect. The only way to do that is through open discourse between the environmental regulatory elites and the people actually affected by the pollution.

Similar to systemic praxis, in this context, a demosprudence praxis would stress the links between transcultural thinking (theory) and transcultural practices.[146] This would necessitate a new regulatory paradigm that derives critical insights from the "insiders," the people actually living within the communities

140. *Id.* at 882 (arguing that progressives concentrate on discursive strategies at the expense of strategies that actually solve concrete problems).

141. *Id.* at 882 (although revolving around race, critical race praxis easily lends itself to the ideas fostered in demosprudence and a front-line practice of demosprudence. Critical race praxis requires justice through practice and antisubordination).

142. *Id.* at 842.

143. *Id.*

144. Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 449 (2019); *see also* Bryan Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT'L. L. 111, 112 (2011) (arguing that demosprudence allows for a wide range of lawmaking activities). *See generally* Guinier & Torres, *supra* note 103, at 2751 (describing demosprudence as a practice and interpretation of law that gives a voice to the non-elite).

145. *See* Candice Youngblood, *Put Your Money Where Their Mouth Is: Actualizing Environmental Justice by Amplifying Community Voices*, 46 ECOLOGY L.Q. 455, 463 (2019) (by addressing the existence of difference between society's dominant and subordinate groups, we help ensure that the societal issues that create environmental injustices will not continue).

146. *See* JANET MCINTYRE-MILLS, CRITICAL SYSTEMIC PRAXIS FOR SOCIAL AND ENVIRONMENTAL JUSTICE: PARTICIPATORY POLICY DESIGN AND GOVERNANCE FOR A GLOBAL AGE 7–16 (2003) (using a "transcultural" lens to advance public policy goals).

affected by pollution (that is, the communities directly affected by environmental regulations).[147] This new paradigm involves humanizing, deracializing, and individualizing regulatory behavior.[148] Regulatory agencies like EPA stop being merely regulatory neutrals; they become active agents of change. The challenge for the agency is to think systemically to critically analyze their regulatory actions with an eye towards intervention and transformation.[149] The regulatory agencies recognize how the regulatory system and process have functioned in a way that maintains and exacerbates inequality.[150] EPA would talk to both potentially affected communities and also those actually affected to assist in determining the impact of new regulations. Moreover, when EPA takes a closer look at the communities affected by past practices and policies, it will see that the harms are often intergenerational.[151] A conscious effort to involve "We the People" in the regulatory process would help alleviate the systemic intergenerational discriminatory impacts of environmental regulations.

The agency would work to actively build relationships with marginalized communities to develop long-standing trust and accountability.[152] This would require a fundamental change in EPA's organizational structure and attitude.[153] To reiterate, this call for systemic change has reemerged in modern civil rights movements.[154] These movements call for governmental units to adopt antisubordination practices that recognize racial disparities and harms resulting from longstanding cumulative impacts of discriminatory systems, structures, and institutions.[155] When environmental regulators begin practicing the ideals of demosprudence, it will necessitate employing the concepts of both antiracism[156] and antisubordination.[157]

1. Antiracism

Actualizing the general idea of demosprudence to create systemic change requires EPA to actively practice antiracism through allyship.[158] For example,

147. *Id*. at 7.

148. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 69 (2019).

149. *See* MCINTYRE-MILLS, *supra* note 146, at 12.

150. *See* Tyson, *supra* note 111, at 4.

151. *Id*. at 29 (discussing how so-called "race-neutral" policies and laws often have cumulative self-generating effects).

152. *Id*.

153. *Id*.

154. *Id*. at 3.

155. *Id*. at 30.

156. *See generally* KENDI, *supra* note 148 (describing personal and institutional changes necessary to create an anti-racist environment).

157. *See* Tyson, supra note 111, at 1 (exploring the racial underpinnings of city organization and consequently subordination).

158. *See generally* Anietie Akpan & Mia Lorik, *Lawyering While Black: Examining the Practice of Law Through the Prism of the Black Experience*, HOUS. LAW., Sept.–Oct. 2020, at 26, 27 (discussing the importance of allyship in eliminating racism and inequality).

EPA must actively engage in antiracist procedures when promulgating regulations like its water regulations. To do this it must recognize pollution's disparate impacts on communities of color and other disenfranchised communities in policy. Instead of working primarily with state and local governments (or with select elite appointed proxies), EPA must actively seek the voice of the voiceless by including historically excluded peoples in regulatory negotiations and promulgations. This new EPA must recognize that the exclusion of affected communities results in the repeated promulgation of regulations that may harm traditionally disenfranchised neighborhoods and communities.[159] By adopting antiracist ideals, EPA will increase the likelihood that its officials will internalize antiracist ideals and create a new norm for governance and rulemaking.[160]

To ensure "We the People" are heard, EPA must change the regulatory environment to create a new socio-political mosaic to guide its regulatory decision making.[161] Yet, equitable social change is only possible when all people are seen as important and all are seated at the regulatory table. For example, it is of little import to say that Black Lives Matter if one ignores or subordinates the voices of black people actually affected by environmental regulatory change. The status quo is that affected black, brown, indigenous, rural, and poor lives do not seem to matter when it involves the degradation of the water, air, and soil in their communities. Certainly, their lives do not matter enough for their voices to be heard during regulatory promulgations. Demosprudence and antiracism call for an end to this suppression and a basic level of devolved collaboration.[162]

By engaging the people actually affected by regulatory actions, the regulatory agency would actively address the issue of the racial expendability of communities of color.[163] These communities would not continue to believe that they are being sacrificed on the altar of expedience and profit. EPA would actively work to show that marginalized communities threatened and exposed to environmental harms are not to be ignored as expendable or part of a simple cost-benefit analysis.[164] EPA would give the people a significant role in regulating their own health and environment. As the United States' top environmental regulating body, EPA would become a change agent with a renewed sense of social consciousness and

159. *See* Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 52 (2013) (describing the internalization of antiracist ideals creating a new norm for governance).

160. *Id.*

161. *Id.* at 56.

162. *See also* KENDI, *supra* note 148, at 23 (outlining antiracist steps to lessen inequality in communities). *See generally* Foster, *supra* note 90 (describing the emergence of place-based decision making and the collaborative work with stakeholders).

163. *See* Waldron, *supra* note 54, at 9 (discussing John D. Marquez's concept that racialized people are often treated as expendable because the state and legal systems perceive them as deficient).

164. *Id.*

a commitment to work toward social change.[165] It would remember that environmental protection was itself a movement toward social change. It would work as a conscious collaborator, building the power of non-elites to confront systems that perpetuate political, economic, and environmental subordination across generations.[166]

Environmental policy challenges remain intractable in part because there is rarely any emphasis on systemic transcultural understanding and respect.[167] EPA would become an agency that protects *everyone's* environment. This new model would ground an amalgam of theories with practice and actualize a new transcultural regulatory practice.[168] However, progress toward environmental transculturalism cannot become a new way to subordinate (co-opt or whitewash) the unique cultural issues of affected people.[169] Transcultural understanding cannot flourish until the dominant culture relinquishes a portion of its power and allows traditionally subordinated people the right to help govern. Accordingly, healing the wounds caused by decades of intergenerational environmental neglect and abuse will require a policy of active antisubordination.

2. Antisubordination

EPA's regulations must also strive for a praxis that disrupts the use of the law as an instrument for perpetuating hierarchal power structures.[170] Racial subordination can be defined as an impeding, freezing, or elimination of racial progress for the sake of pursuing another non-racist interest.[171] For example, the normative belief within mainstream American culture that less government and less regulation is better subordinates opposing cultural views.[172] Although it can be reasoned that this is a neutral argument, it is just as true that this belief subordinates the cultural view of racial minorities and others who seek, need, and prefer governmental

165. *See generally* Thalia Gonzalez, *Root to Rise: Mindful Lawyering for Social Justice*, 41 N.Y.U. REV. L. & SOC. CHANGE 91, 120 (2017) (describing how engaging multiple voices and diverse perspectives in social justice lawyering links individualist enterprises and collective action together, allowing lawyers to become agents of change with a renewed sense of social consciousness and commitment to work that responds to the need for change in an unjust world).

166. *Id.*

167. *See* McIntyre-Mills, *supra* note 146, at 7 (developing a practical systemic approach to address poverty, improve governance, and enhance participatory democracy).

168. *Id.* at 7.

169. *See* ROY L. BROOKS, THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE 134 (2017) (discussing cultural subordination through diversity).

170. Gitanjali S. Guitierrez, *Taking Account of Another Race: Reframing Asian-American Challenges to Race Conscious Admission in Public Schools*, 86 CORNELL L. REV. 1283, 1312–18 (2001) (discussing the idea of critical race praxis in relation to antisubordination).

171. *See* Roy L. Brooks, *Subordination Is the New Inequality*, YALE U. PRESS BLOG (May 3, 2017), https://perma.cc/Z8HQ-KUWB (describing racial subordination in relation to law and culture).

172. *Id.*

regulations that root out and address the vestiges of age-old intergenerational discrimination, including *de jure* and *de facto* environmental discrimination.[173]

Moreover, subordination works to capture both conceptual and material patterns of systematic hierarchical domination that accompany economic, social, racial, political, cultural, and gender inequalities.[174] Again, as a regulating agency, EPA must first recognize that certain groups in our society have been subjected to pervasive discrimination with respect to environmental harms.[175] Once again, it is not important to place or accept blame for the impacts of the past regulatory decisions; it is more important to recognize and undo the effects of past and current subordinating policies.[176] Our institutions were designed to build upon inequalities, and they do so with great efficiency; by defaulting to the current regulatory system, EPA will simply reproduce inequity.[177]

A new environmental governance of the people cannot default to the same order that is systematically creating the environmental caste. EPA must unshackle the people from the toxic bondage and usher in a new system of environmental governance that challenges the current order. Of course, dismantling a half-century of subordinating policies will be troubling to some; but as John Lewis said, this is a "good trouble."[178] The current environmental inequities are a natural outcome of many long-standing intertwined socio-political processes; consequently, a robust, intentional, and determined change is required to effectuate environmental justice.[179] Social dynamics have created a persistent pattern of differentiation in relation to environmental risks and harms for EPA to address.[180] The Biden EPA must become an ally in creating a good trouble that confronts the enviro-political status quo.

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173. *See id.*

174. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. Rev. 533, 534 n.4 (1992) (stating that "subordination is intended to capture conceptual and material patterns of systematic hierarchical domination that accompanies the economic, social, and political inequalities, seen in American society along identifiable group identities such as race, ethnicity, and gender").

175. Ruth Colker, *Antisubordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1012 (1986) (discussing historical development of equal protection principle to remedy a history of subordination against a particular group in society).

176. *Id.* at 1007 (explaining that antisubordination seeks to eliminate power disparities by developing laws and policies that directly redress those disparities).

177. *See* ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 153 (2018) (arguing that removing the current system requires a courageous intentionality which is neither passive nor complacent).

178. *See* John Lewis, *John Lewis' 2016 Commencement Address at Washington University in St. Louis*, THE RECORD, (May 20, 2016), https://perm.cc/5GQJ-KKWP. ("They said, 'That's the way it is. Don't get in the way. Don't get in trouble.' But . . . I listened to the words of Martin Luther King Jr. The action of Rosa Parks and the words and leadership of Dr. King inspired me to find a way to get in the way. I got in the way. I got in trouble. Good trouble, necessary trouble . . . When you see something that is not right, not fair, not just, you must . . . get in the way.")

179. *See* Brulle & Pellow, *supra* note 25, at 114–15 (giving a comprehensive overview of environmental justice in the United States).

180. *Id.* at 109.

The call for environmental demosprudence and antisubordination shares some key aspects with the idea of political ecology.[181] Political ecology explains that there is a direct causal relationship between various social and economic factors and environmental degradation.[182] Environmental degradation and deprivation can be seen through a multifaceted causal lens that views environmental decisions as a function of many factors, including class, marginality, poverty, and entitlement.[183] Therefore, socio-ecological sustainability can only be achieved through strategies enhancing the equitable distribution of social and political power.[184] For this to happen, the non-elites and those not entitled must equally share in the regulatory decision making power in order to obtain the privilege of living in a pollution-free environment.

This requires environmental elites to listen to and scrutinize the voices, experiences, and understandings of marginalized people.[185] Moreover, these notions intersect with some of the basic tenets of critical race theory (CRT).[186] CRT contains an activist dimension that seeks to alter society's organizations and hierarchies for the better.[187] For example, the tenets of CRT insist upon an exploration of both the experiential knowledge and critical conscience of the affected people in making law and regulating society.[188]

Amplifying the traditionally subordinated voices of the affected communities is an essential element of actualizing environmental justice and demosprudence because it creates effective solutions from the ground up.[189] Affected marginalized communities are experts when it comes to the injustice of being essentially disregarded during the decision making process and disproportionately impacted by the pollution resulting from a failure of governmental protection.[190] Affected people are continually endangered by regulatory policies that fail to recognize the

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181. *See* GORDON WALKER, ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE, AND POLITICS 71 (2012) (asserting that environmental degradations are social in origin and shaped by political and economic forces); *see generally* MICHAEL WATTS & RICHARD PEET, LIBERATION ECOLOGIES: ENVIRONMENT, DEVELOPMENT, SOCIAL MOVEMENTS 3–43 (2d ed. 2004) (explaining in depth the idea of political ecology).

182. *See* Youngblood, *supra* note 145, at 481.

183. *Id.*

184. *Id.* at 473.

185. *See* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U.L. REV. 329, 355 (2006) (discussing the tenets of antisubordination as they relate to critical race theory).

186. *Id.* at 354

187. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY 8 (3d ed. 2017) (distinguishing CRT from other academic disciplines by its activist dimensions and its recognition that racism is ordinary, not aberrational; it is how society does every-day business. So, change only comes from active recognition and work toward transformation).

188. *See* Mutua, *supra* note 185, at 354.

189. *See* Youngblood, *supra* note 145, at 481 (stating that the environmental justice revolution has made its greatest strides when its efforts have been focused on the ground; this is because the EJ communities are experts of environmental injustice).

190. *Id.*

difference between their realities and that of other societal groups (especially societal elites).[191] When the differences are acknowledged, they are minimized and are not considered in the regulatory process. This is certainly true in the realm of environmental policymaking.

No matter their experience or expertise, the statements of historically marginalized groups relating to their specific environmental interests and issues are often deemed pejoratively "special" and not entitled to serious consideration.[192] They are seen as shadows of the majority and not in need of separate consideration. This leads to purportedly color-blind or neutral rules that treat all people the same; as stated above, this can easily ignore the disproportionate effects only seen by some.[193] Affected people must be empowered to speak for themselves; they require a new level of empowerment that validates their experiences, knowledge, and role as residential experts.[194] The Clean Water Act and the recent deregulation of certain U.S. waters provide a perfect opportunity to put the general theories of polycentric governance and demosprudence into practice.

IV. THE CLEAN WATER ACT

CWA regulations can be an excellent model for a new regulatory paradigm. The CWA is one of the most important pieces of environmental legislation. It enjoys widespread support, though as with all environmental legislation it has been the subject of controversy, particularly as it restricts what developers and property owners can do with their land. As described in Part I.C, water quality has enormous impacts on local communities, but the impacts of water quality stretch far beyond narrow geographic regions, potentially impacting communities across state lines and hundreds of miles away. For this reason, the CWA presents a unique and important case study for the application of the principles of polycentric governance and demosprudence discussed herein. In section A of this Part, we review the ongoing dispute over the jurisdictional reach of the statute, describing the 2015 and 2020 rulemaking proceedings intended to define the "waters of the United States" and the engagement—or lack thereof—with impacted communities. In section B, we set forth an alternative path to developing new WOTUS regulations that would create deep interconnections and dialogue that would more closely mirror a polycentric governance approach and allow individual and local participation beyond the usual suspects of lobbying groups and lawyers.

A brief introduction to the CWA may be helpful to orient the discussion. The objective of the CWA is straightforward: to "restore and maintain the chemical,

191. *Id.*

192. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 140 (1992).

193. *See* DELGADO & STEFANCIC, *supra* note 187, at 8.

194. *Id.*

physical, and biological integrity of the Nation's waters."[195] The statute's structure is similarly clear: the discharge of "any pollutant"[196] from a point source[197] into a jurisdictional body of water is prohibited, unless authorized under the statute. The EPA or states[198] authorize the discharge of pollutants under the National Pollutant Discharge Elimination System (NPDES).[199] NPDES permits operate under two schemas. First, NPDES permits limit the discharge of pollutants based on existing pollution-control technology ("technology-based"). Second, permits set limits for the discharge of pollutants as needed to maintain or ensure water quality standards.

The statute is an example of the environmental scheme of *cooperative federalism*, where the federal government broadly sets minimum environmental standards but leaves specific implementation to the states.[200] Two federal agencies are engaged in the application and enforcement of the statute: the Army Corps of Engineers (Corps) and the EPA. The Corps oversee the permitting of discharge or fill materials into wetlands (known as a 404 permit),[201] while the EPA oversees the NPDES permitting system (also known as a 402 permit).[202] The Clean Water Act is a state-led environmental program; the CWA provides for states to operate the permitting programs, if authorized by the federal agencies.[203] Most states operate their own NPDES permitting program.[204]

States and authorized tribes also develop the water quality standards for watersheds and water bodies within their boundaries.[205] If a water body or segment

195. 33 U.S.C. § 1251(a).

196. *Id.* §§ 1311(a), 1362.

197. A point source is defined under the act as any "discernable, confined and discrete conveyance." *Id.* § 1362(14).

198. *NPDES State Program Authorization Information*, EPA, https://perma.cc/PTK7-TTDN (last visited May 27, 2021).

199. 33 U.S.C. § 1342 (2018).

200. In cooperative federalism, federal, state, local, and tribal governments work together to achieve policy goals. Though this has long been a central characteristic of U.S. environmental law, the Trump Administration in particular sought to reduce federal oversight and authority, deferring to state governments to set environmental policy goals and implement environmental law. *See The Evolution of a Cooperative Federalism*, TUL. U.L. SCH. BLOG (Apr. 15, 2021), https://perma.cc/79U6-KPCT ("EPA is embracing cooperative federalism and working collaboratively with states, local government, and tribes to implement laws that protect human health and the environment, rather than dictating one-size-fits-all mandates from Washington."). Redefining WOTUS was seen as a part of this overall goal, prioritizing the statutory policy of the CWA (to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." § 1251(b) recommend making this quote a separate sentence) over the statute's objective (restoring and maintaining water quality) in its drafting of its 2020 WOTUS Rule.

201. *See* 33 U.S.C. §§ 1344(a), (d).

202. *See id.* § 1342(a).

203. *State or Tribal Assumption of the Section 404 Permit Program*, EPA, https://perma.cc/5Y64-KP9X (last visited May 27, 2021) (noting that only two states have sought Section 404 permitting authority).

204. *NPDES State Program Authority*, EPA, https://perma.cc/WF7H-EVP7 (last visited May 27, 2021).

205. 33 U.S.C. §§ 1313(a)–(c)(1) (2018); 1377(e).

does not meet the intended standard, it is considered "impaired." For any pollutant causing the impairment, the state sets a "total maximum daily load" (TMDL), which is then used for permit planning purposes. States may also develop permitting programs for non-point source pollutants, though few have.

A. CWA JURISDICTION (WOTUS)

Although this overall structure is relatively straightforward, the jurisdiction of the CWA is anything but clear. The CWA prohibits the "discharge of any pollutant by any person," into "navigable waters," unless authorized. Navigable waters are defined as the "waters of the United States."[206] This phrase, often referred to as "WOTUS," has caused confusion and disagreement among the agencies and courts from the early days of the statute's implementation. Rivers, lakes, and bodies of water that are navigable in fact are easy to characterize, but from there things become much more difficult. Are wetlands "waters of the United States"? What about small tributaries or streams that feed into larger waterways?[207] What about physically isolated or connected ponds, or drainage ditches? What about waterways that flow intermittently? What about groundwater that hydrologically connects to other waterways (including navigable waterways)? As the Court noted in *United States v. Riverside Bayview Homes* ("Riverside Bayview"):[208]

> Our common experience tells us . . . the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.[209]

Initially, the Army Corps of Engineers interpreted the phrase WOTUS narrowly, finding its jurisdiction limited to waterways that were navigable in fact. Courts pushed back, requiring the Corps to redefine its jurisdiction more broadly in order to effectuate the statute's objective.[210] Logically, one cannot restore or maintain the water quality of the Cuyahoga River without addressing the hazardous wastes that are deposited into tributaries or streams that feed directly into the river. Similarly, the water quality of a reservoir cannot be maintained if pollutants are dumped into dry stream beds that periodically and predictably drain into the reservoir during times of heavy rains. Indeed, it has been argued that the

206. *Id.* § 1362(7).

207. For an excellent and thorough discussion of the importance of these "little streams" in the overall development and evolution of regulation under the CWA, including the evolution of WOTUS regulations, see Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1 (2017).

208. 474 U.S. 121 (1985).

209. *Id.* at 132.

210. *See* Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

definition of WOTUS was left deliberately vague to allow the agencies to define it broadly, in a manner that would affect the objective of the statute.[211]

After this initial adjustment, EPA and the Corps defined WOTUS to the broadest extent possible, including not only waters that were navigable in fact, but also "tributaries of such waters . . . and non-navigable intrastate waters whose use or misuse could affect interstate commerce."[212] In *Riverside Bayview*, the Court held that wetlands that were "adjacent" to navigable waters could be included in the definition of WOTUS even where they lacked a surface connection to a navigable waterway because they could affect the water quality of the adjacent navigable waters.[213]

In 1995, however, the Supreme Court narrowed the federal government's authority under the Commerce Clause in *United States v. Lopez*,[214] a case that would have substantial impact on subsequent interpretations of WOTUS. Where the federal government was not directly regulating channels of interstate commerce, or instrumentalities of interstate commerce (including persons and things in interstate commerce), the *Lopez* Court found that the federal government's authority was limited to "those activities having a *substantial relation* to interstate commerce."[215] Following this retrenchment, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[216] the Court narrowed the scope of WOTUS as it applied to wetlands, finding that WOTUS could not include non-navigable, isolated, wholly intrastate waters if those waters were not part of a "tributary system to interstate waters or to navigable waters."[217] Importantly, the Court noted that in *Riverside Bayview*, the wetlands in question bore a "significant nexus" to navigable waters, and that this informed their holding in that case.[218] This phrase would appear in the Court's next influential WOTUS case, *Rapanos v. United States*.[219]

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211. *See* Hannah Duus, Note, *Waters of the United States: How the Governmental Branches Struggled to Settle the Jurisdiction of the Clean Water Act*, 30 GEO. ENV'T L. REV. 379, 385–86 (2018) (pointing to House and Senate Committee Reports stating that "'navigable waters' [was to] be given the broadest possible constitutional interpretation" citation); *see also* Cameron Secord, Comment, *Uncertain Waters: The Legal Implications of the "New Waters of the United States" Rule on the Energy Sector and a Potential Remedy Within Administrative Law*, 54 HOUS. L. REV. 963, 967 (2017) (suggesting that the statute was written vaguely to allow for a case-by-case determination that would allow for individual hydrology and agency expertise to play a role).

212. *Riverside Bayview*, 474 U.S. at 123.

213. *Id.* at 138.

214. 514 U.S. 549, 561–63 (1995).

215. *Id.* (emphasis added)

216. 531 U.S. 159 (2001).

217. *Id.* at 168.

218. *Id.* at 167.

219. 547 U.S. 715 (2006).

1. Rapanos

In *Rapanos*, the Court once again considered the appropriate definition of WOTUS in the context of a wetland. This time, the Court was unable to reach a majority opinion, and the splintered opinions that resulted—a plurality, two concurrences, and two dissents—left the definition of WOTUS in confusion. In the plurality, authored by Justice Scalia, the Court substantially narrowed the definition of WOTUS, arguing that WOTUS was intended to refer to a "relatively permanent, standing or continuously flowing" body of water, including wetlands connected thereto by surface waters. Justice Kennedy, who authored a concurring opinion, rejected the plurality's reasoning. Referring back to the concept of a "significant nexus," he suggested that to be jurisdictional, a wetland must bear a significant nexus to waters that were navigable in fact or could reasonably be made so. Lacking an opinion with a rationale to apply, lower courts across the country began to apply differing standards, leaving the interpretation of WOTUS unresolved and chaotic. The dissent authored by Justice Stevens, and joined by Justices Souter, Ginsburg, and Breyer, argued that the Court should have maintained the *Riverside Bayview Homes* statutory interpretation, which would have appropriately construed navigable waterways as contemplated by the objectives of the statute.

2. President Obama: WOTUS Rules (2015)

To address the confusion, EPA in 2011 began a process to redefine WOTUS in a manner consistent with science, previous precedent, and public participation. First, in a massive report that came to be known as the "Connectivity Report," EPA analyzed over 1,200 peer-reviewed and published scientific studies that examined the way wetlands and streams could actually affect downstream waters.[220] The report concluded, "[t]here is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters."[221] Based upon the Connectivity Report, the goals of the CWA, and existing precedent, in 2014 EPA and Corps released a proposed new rule redefining WOTUS.[222]

220. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA (2015), https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414 (last visited May 27, 2021) (click "Downloads" to access the report, errata, fact sheet, and EPA responses to comments).

221. *Id.* (from "Overview").

222. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2015)).

After soliciting comments on its proposed rule for over 200 days, the agencies released a final rule, referred to herein as the 2015 Rule. [223] According to the agencies, this rule reflected

> . . . over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others.[224]

The rule also incorporated an economic analysis that demonstrated that the benefits of the rule far outweighed the costs.[225]

The 2015 Rule defined WOTUS in a manner that was intended to be consistent with the CWA's broad statutory objective of restoring and maintaining the integrity of the nation's waters, while also providing straightforward and clear guidance. It defined WOTUS to include tributaries of traditional navigable waters, waters "adjacent" to traditional navigable waters, and waters bearing a "substantial nexus" to traditional navigable waters. It also categorically excluded certain waters from WOTUS, including groundwater, stormwater management systems, and certain ditches.

A variety of groups in a number of jurisdictions challenged the 2015 Rule, including thirty-one states and a number of industry and trade groups.[226] Many conservatives and Republicans found the fight over WOTUS to be a convenient symbol of federal "overreach."[227] Farmers and ranchers in particular argued against CWA limits on their activities on private and public lands.[228] Appellate court challenges[229] to the rule were consolidated into a single case before the U.S. Court of Appeals for the Sixth Circuit, which issued a nationwide stay in October 2015.[230] While these cases were pending, there was a seismic shift in U.S.

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223. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (effective Aug. 28, 2015) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2015)).

224. *Id*. at 37,057.

225. *See* EPA & U.S. ARMY CORPS OF ENGR'S, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 53 (2015).

226. Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not be Enough*, 64 ST. LOUIS L.J. 373, 389 (2020).

227. Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020), https://perma.cc/6PQD-9A69.

228. Reagan Waskom & David J. Cooper, *Why Farmers and Ranchers Think the EPA Clean Water Rule Goes Too Far*, PBS (Mar. 4, 2017, 12:41 PM), https://perma.cc/8MYG-4WDF; Amena H. Saiyid, *Farmers, Ranchers Dispute Legal Limits of Revamped Water Rule*, BLOOMBERG LAW (May 11, 2020, 3:00 AM), https://perma.cc/U7X9-HQ6V.

229. Due to a divided interpretation of the appropriate jurisdiction for the challenges, cases were also filed in federal district courts.

230. Ohio v. United States Army Corps of Eng'rs, 803 F.3d 804, 806 (6th Cir. 2015), *vacated*, Nat'l Ass'n of Mfrs. v. DOD, 138 S. Ct. 617 (2018) (finding on procedural grounds that the case should have been heard in the various district courts, rather than being brought directly to the Court of Appeals).

politics: the election of President Donald Trump, whose campaign promises included rolling back the 2015 Rule.

3. President Trump: WOTUS Rules (2020)

What followed was a dizzying array of administrative maneuverings by the Trump Administration to eliminate the 2015 Rule, alongside massive pushback from public interest and environmental groups to keep it. Because the 2015 Rule had been adopted through notice and comment rulemaking,[231] it could only be undone by the same.[232] However, notice and comment rulemaking is legally complex and notoriously time- consuming.[233] Less skilled at administrative law and impatient to undo existing environmental protections (a combination that proved fatal in many environmental cases[234]), it took the Trump Administration three separate rules to block and ultimately replace the 2015 Rule, efforts that led to years of litigation, much of which was ongoing at the time Trump's term in office ended. First, the administration tried to immediately repeal the 2015 Rule and put back into place the regulations that had been in effect prior to its adoption.[235] However, realizing that effort might not work fast enough to block the 2015 Rule from taking effect, the Trump Administration then also sought to delay its implementation through a separate rulemaking.[236] Finally, Trump's EPA developed a hasty replacement for the 2015 Rule (the 2020 Rule)[237] intended to restrict the scope of WOTUS in a manner that aligned with the plurality in *Rapanos*.[238] However, there were many problems.

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231. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (effective Aug. 28, 2015) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2015)).

232. *See* Env't Def. Fund v. Gorsuch, 713 F.2d 802, 815 (D.C. Cir. 1983); Johnson, *supra* note 226, at 374, 392.

233. *See* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENV'T L. 767, 768–69 (2008); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 87 (2018); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1750 (2007).

234. Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 9:05 AM), https://perma.cc/Z6XT-U3SU.

235. Definition of "Waters of the United States"-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (proposed July 27, 2017) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2019)).

236. Definition of "Waters of the United States"-Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2019)).

237. Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2020)).

238. The Executive Order directing the Corps and the EPA to review and revise the 2015 Rule states that the agencies should "consider interpreting the term 'navigable waters' . . . in a manner consistent with the [plurality] opinion in . . . Rapanos." Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

a. Minimal Outreach and Input

In contrast to the 2015 Rule, the Trump Administration pushed ahead with the 2020 Rule with minimal public participation. Instead of allowing 200 days for comments, the draft 2020 Rule was open for public comment for only 2 months.[239] Rather than holding 400 meetings, the Trump Administration held only 10 teleconferences to receive public input—only *1* of which was open to the public.[240] The other nine teleconferences were dedicated to specific sectors, including business sectors, public agencies, and scientific organizations.[241] The administration held only *one in-person meeting*, and that was for small entities, not the public.[242] Rather than receiving over 1,000,000 public comments, the proposed 2020 Rule only received 11,440 comments.[243] Importantly, the administration conducted no specific outreach to heavily impacted communities, low-income communities, indigenous communities, or communities of color that are disproportionately likely to live in areas with drinking water violations.[244]

Despite the extremely limited public outreach and timeframe, the rulemaking received numerous comments expressing grave concerns about the impact of the 2020 Rule on water quality, yet the rule did not address these concerns.[245] The challenge for opponents and concerned public citizens is that the scope or method of public participation in CWA rulemaking is not specifically set forth in rule or statute. The length of time required for public comment on a proposed rule under the Administrative Procedures Act (APA) is unclear, though an accepted rule "in most cases" is a minimum of sixty days.[246] Rules do not establish requirements for in-person meetings, forms of targeted public outreach, or any other more cooperative notion of a public process. Moreover, there is no rule regarding what the administration is required to do with negative comments, other than cases stating that an administration cannot completely disregard public input or come into a rulemaking process with an "unalterably closed mind."[247] Given this

239. *See* 84 Fed. Reg. 4154 (soliciting public comment from February 14, 2019–April 15, 2019).

240. Definition of Waters of the United States: Public Meetings, 82 Fed. Reg. 40,742-3 (Aug. 27, 2017).

241. *Id.*

242. *Id.*

243. 84 Fed. Reg. 4154, 4154–220.

244. Kristi Pullen Fedinick, *Watered Down Justice*, NRDC (Mar. 27, 2020), https://perma.cc/8242-262U.

245. *See, e.g.*, Complaint at 24–5, Conservation Law Found. v. EPA, No. 1:20-cv-10820 (D. Mass. filed Apr. 29, 2020). The concerns were dismissed in the notice of the final rule. *See generally* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22, 250 (Apr. 21, 2020) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2020).

246. Exec. Order No. 12,866, sec. 6, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Johnson, *supra* note 226, at 392.

247. *See* Vermont Yankee Nuclear Power Corp. v. Nat. Def. Council, Inc., 435 U.S. 519, 541 (1976) (stating that it is clear that it is proper for the court to scrutinize the record to ensure that genuine opportunities to participate in a meaningful way were provided); McClouth Steel Prods Corp. v.

minimal standard, courts are unlikely to overturn a rule with some evidence of public participation and response, particularly when dealing with a contested rule that is popular with some highly vocal interest groups.

b. The Aftermath of the 2020 Regulation

After years of litigation, President Trump's 2020 Rule took effect on June 22, 2020.[248] As anticipated, the 2020 Rule directly reduced the scope of WOTUS by eliminating broad categories from the definition, including wetlands that do not share a surface water connection to navigable-in-fact waterways and ephemeral streams that only run after rainstorms.[249] In arid western states, this change alone could remove protections for virtually all streams and wetlands—more than 95% in Arizona and New Mexico,[250] 66% in California, and 81% across the Southwest.[251] In addition, EPA estimates suggest over half of wetlands will lose protection.[252] Critics of the rule—including the Administration's own Science Advisory Board—also argue that the rule ignores established science[253] and that the economic and scientific analyses used to justify the rule were based on dubious assumptions. For example, the analysis supporting the rule assumes that every state has the same baseline number of wetland acres and that removing protections from streams will not cause an increase in contamination because states will regulate streams no longer protected under the CWA.[254] Of course, the analysis does not mention how the states will pay for this increase in regulatory responsibility.

Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988); Johnson, *supra* note 226, at 392. *But see* Robert Glickman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy,* 68 DUKE L.J. 1651 (2019) (warning that courts must insist on adherence to core administrative law requirements or run the risk of creating an administrative mindset that leads to devastating rulemaking consequences).

248. *Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA, https://perma.cc/AC57-X7VY (last visited May 27, 2021); Ellen M. Gilmer, *Trump Water Rule Halted in Colo., Can Take Effect Elsewhere*, BLOOMBERG LAW (June 19, 2020, 2:30 PM), https://perma.cc/MKT5-LDKG; Ian James, *Trump Rollback of Clean Water Rules Leaves Many Arizona Streams Without Protection*, AZ CENT. (Jan. 23, 2020, 6:50 PM), https://perma.cc/RP4M-9DA9/4554278002/.

249. Davenport, *supra* note 227; Brad Finney, *One WOTUS, Two POTUS: The Clean Water Act and the Economic Impact*, 86 TENN. L. REV. 895, 904, 929–31 (2019).

250. Ian James, *Trump Rollback of Clean Water Rules Leaves Many Arizona Streams Without Protection*, AZ CENT. (Jan. 23, 2020, 6:50 PM), https://perma.cc/D2TZ-RCFG.

251. Mark Olalde, *Trump Administration Unveils New Clean Water Act Rules. California Could See Big Impact*, DESERT SUN (Jan. 23, 2020, 5:05 PM), https://perma.cc/S9YA-HQ3C.

252. Annie Snider, *Trump Erodes Water Protections: 6 Things to Know*, POLITICO (Jan. 23, 2020, 1:22 PM), https://perma.cc/6BKM-JU3J.

253. Rebecca Beitsch, *States Sue Trump Administration Over Rollback of Obama-Era Water Protections*, THE HILL (May 1, 2020, 3:12 PM), https://perma.cc/SS6P-EFRA.

254. David Keiser, *New Report Says EPA Used Dubious Methodology to Justify Weakening the Clean Water Act*, U. MASS. AMHERST (Dec. 17, 2020), https://perma.cc/7YY4-SANR.

Litigation over the 2020 Rule has been extensive, with multiple actions in federal district courts,[255] including an action filed in Northern California joined by twenty states and the District of Columbia.[256] Among the arguments made to overturn the rule are: 1) it adopts a plurality opinion from *Rapanos* that is not controlling as a matter of law[257]; 2) it ignores science and does not consider the significant damage to water quality that will result from application of the rule[258]; 3) it ignores public comment and concerns raised about the impact of the rule on water quality, particularly in the West[259]; and 4) it fails to justify or adequately explain why it ignored and/or contradicted previous agency findings and scientific studies.[260] To date, these suits have been ineffective in preventing the 2020 Rule from taking effect (other than a temporary stay in Colorado that was lifted in March 2021).[261] Yet, even as supporters of the rule celebrated, more changes were on the way.

c. President Biden

On January 20, 2021, newly elected President Biden issued an Executive Order directing all federal agencies to review federal regulations promulgated by former President Trump.[262] Accordingly, the EPA requested that the Justice Department seek a stay of ongoing litigation related to the 2020 Rule so its EPA could review the rule and decide upon an appropriate course of action.[263] It seems

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255. *See, e.g.*, Colorado v. EPA, 445 F.Supp. 3d 1295 (D. Colo. 2020); Pascua Yaqui Tribe v. EPA, No. 4:20-cv-00266 (D. Ariz. filed June 22, 2020); Chesapeake Bay Found. v. Wheeler, No. 1:20-cv-01064 (D. Md. filed Apr. 27, 2020); Puget Soundkeeper All. v. EPA, No. 2:20-cv-00950 (W.D. Wash. filed June 22, 2020).

256. California v. Wheeler, 467 F.Supp. 3d 864 (N.D. Cal. 2020).

257. Appellant's Opening Brief at 2, Colorado v. EPA, 989 F.3d 874 (10th Cir. 2021) (No. 1:20-cv-01461).

258. Brief of Scientific Societies as Amici Curiae Supporting Plaintiffs at 6, California v. Wheeler, 467 F.Supp. 3d 864 (N.D. Cal. 2020) (No. 3:20-cv-03005).

259. *See id.* at 3, 10.

260. *Id.* at 12.

261. The rule was stayed in Colorado until March 2, 2021, when the stay was overturned by the 10th Circuit. Colorado v. EPA, 989 F.3d 874, 890 (10th Cir. 2021).

262. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021); *see also Fact Sheet: List of Agency Actions for Review*, THE WHITE HOUSE (Jan. 20, 2021), https://perma.cc/U4H8-47GU (identifying 2020 Rule as a regulation to be reviewed).

263. *See* Defendants' Motion to Hold Appeals in Abeyance, Colorado v. EPA, 989 F.3d 874, Nos. 20-1238, -1262, -1263, Doc. 010110474124 (10th Cir., filed Feb. 2, 2021) (pending); Oregon Cattlemen's Ass'n v. EPA, No. 3:19-cv00564, (D. Or. Feb. 2, 2021) (court ordered case stayed through June 2, 2021); Conservation Law Found. v. EPA, No. 1:20-cv-10820 (D. Mass. Feb. 10, 2021) (court granted consent motion to extend deadline for reply brief to May 10, 2021); New Mexico Cattle Growers' Ass'n v. EPA, No. 1:19-cv-00988, (D.N.M.Feb. 10, 2021) (court ordered case held in abeyance until May 1, 2021); Puget Soundkeeper All. v. EPA, No. 2:20 cv-00950, (W.D. Wash. Feb. 8, 2021) (court ordered case stayed through May 1, 2021); Washington Cattlemen's Ass'n v. EPA, No. 2:19 cv-569, (W.D. Wash. Feb. 8, 2021) (court ordered case stayed through May 1, 2021); Navajo Nation v. Wheeler, No. 2:20-cv-602, (D.N.M. Feb. 4, 2021) (court granted joint motion to extend all deadlines by 30 days); Chesapeake Bay Found., Inc. v. Wheeler, No. 20-cv-1063, (D. Md. Feb. 2, 2021)

highly unlikely that the Biden Administration will keep and defend the 2020 Rule, yet replacing it may require a fresh round of administrative toil that may stretch 1 or 2 years.[264] Ultimately, it will require a Supreme Court opinion, Congressional action, and/or regulatory changes to resolve the morass of litigation necessary to reverse the policy positions that have characterized the fight over WOTUS.[265]

The real question is who will be directly involved in this round of WOTUS changes. That is to say, will the Biden Administration actually involve those directly affected by the decisions in the decision making process? The inevitable change in WOTUS regulations gives the government an opportunity to rectify a system of environmental rule promulgation that has often failed affected people. New WOTUS hearings can allow the people direct influence on the rules and have a long-lasting effect on their lives. It is these traditionally disenfranchised communities that should be at the table throughout the regulatory process because these are the communities that will be most likely affected by any environmental protection failures. This call for direct and meaningful access to the environmental decision making process is not new; it is decades old. Yet, it is a call that is still unanswered by President Biden.[266]

(court ordered case held in abeyance through July 29, 2021); Murray v. Wheeler, No. 1:19-cv-1498, (N.D.N.Y. Feb. 2, 2021) (case held in abeyance until August 2, 2021); Oregon Cattlemen's Ass'n v. EPA, No. 3:19-cv00564, (D. Or. Feb. 2, 2021) (court ordered case stayed through June 2, 2021); Envtl. Integrity Project v. Wheeler, No. 1:20-cv-01734 (D.D.C. Jan. 28, 2021) (court ordered the case stayed indefinitely); S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-01687 (D.S.C. Jan. 27, 2021) (30-day continuance of summary judgment hearing date; hearing not yet rescheduled).

264. Hannah Northey, *Biden Would Face Slog to Ditch Trump's WOTUS*, E&E NEWS (Aug. 20, 2020), https://perma.cc/QL9P-ZD46; Kyle Robisch, *Sea Change? Water Policy Under the Biden Administration*, JD SUPRA (Feb. 19, 2021), https://perma.cc/V3UN-X7NF.

265. In January 2022, the Supreme Court announced its intention to enter the fray by granting certiorari in *Sackett v. U.S. Env't Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021), a dispute centered on the definition of WOTUS.

266. In the summer of 2021, President Biden's administration, as expected, launched an effort to create a new WOTUS rule to replace the 2020 Rule. However, as this article goes to press, the process appears unlikely to engage relevant community members in the manner outlined herein. For one thing, the outcome of the rulemaking process was largely predetermined, illustrated by the pre-rulemaking announcement of the intention to restore the pre-2015 regulations and guidance. A limited number of pre-rulemaking outreach sessions were held in August 2021, but these were not dialogues with community members, but rather opportunities for some participants (chosen on a first-come, first-served basis) to provide a three-minute public comment via a public web conference. The proposed rule was filed on December 7th and a narrow 60-day comment period provided. Ten geographically-based roundtables were also announced, but participants had not been selected nor the roundtable held prior to the close of the public comment period. *See* Notice of Public Meetings Regarding ''Waters of the United States;" Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911 (Aug. 4, 2021) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120) (announcing pre-publication rulemaking activities and intention to reform 2020 Rule); *see also* Deadline Extension for Regional Roundtable Discussions Regarding "Waters of the United States," 86 Fed. Reg. 61,730 (Nov. 8, 2021) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120) (announcing extension of deadline to apply to participate in geographic roundtables).

B. A WOTUS REGULATORY MODEL

Assuming the Biden Administration chooses to repeal and replace the Trump WOTUS regulations, this would be a perfect opportunity for EPA to pilot a program that answers the call to include the voices of those people most affected (and least heard) in the rulemaking. President Biden should issue an immediate executive order requiring the EPA to review the efficacy of the significant or substantial nexus analysis, the potential impact of the new Clean Water Act WOTUS regulations on water quality, and any and all potential negative impacts of the current 2020 WOTUS regulations on communities of color, indigenous communities, low-income communities, and rural communities.

1. Environmental Justice Executive Order

A renewed examination of WOTUS regulations would also be in line with Executive Order 12898, Federal Actions to address the Environmental Justice in Minority Populations and Low-Income Populations (1994).[267] The Executive Order states that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations" within the area affected.[268] It mandates federal agencies to incorporate environmental justice into all of their regulations, policies, and programs.[269] EPA's anemic effort toward citizen participation and affected community participation during the last regulatory promulgation is inexcusable given the history of the Clean Water Act, the Executive Order, and the potential disparate effects of environmental contamination.

2. The 2020 WOTUS Regulations

EPA specifically stated that the 2020 change in the water rule does not present a disproportionate health risk to children, indigenous people, or minorities.[270] But in doing so, the regulatory agencies completely ignored the predictable disparate public health and safety impacts on traditionally marginalized people within the U.S.[271] A review of the regulations shows that there is no discussion regarding people currently affected by water pollution in the "stakeholder outreach" section

267. *See* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb 16, 1994).

268. *Id.*

269. *Id.*; *see also* BULLARD, *supra* note 107.

270. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,103–04 (effective Aug. 28, 2015) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2015)) (making a blanket statement that there are no disproportional effects on children, low-income, or minority populations, with no recitation of evidence to support the conclusion).

271. *See also* McCrory & Raymond, *supra* note 103, at 181. *See generally* Comment Letter from Jon Devine, Senior Attorney & Dir. of Fed. Water Policy to Michael Mcdavit, EPA, & Jennifer A. Moyer,

of the rule.[272] Although there is a recitation regarding a "webinar" for public advocacy groups, which one can assume included environmental justice advocates, this cannot be construed as actively involving people who are currently and have historically suffered disparate transgenerational effects of hazardous pollution.[273] EPA's lack of commitment is insulting to the affected communities and the environmental justice movement. The lackluster effort and cursory recitation violate both the essence of the Executive Order and spirit of national environmental protection for the people.[274]

3. Demosprudential Collaborations

A meaningful WOTUS model of demosprudentially-minded regulatory promulgation must include an acceptance that the problems faced by traditionally disenfranchised affected populations cannot be rectified by either the affected communities or the regulatory elites acting alone. It must involve a robust and concerted effort of interested and affected parties working toward a goal of protecting the environment and the people who live within it.

a. Determining the Affected Communities

EPA must first identify the people that will be most adversely affected by the change in the WOTUS rules by determining the communities that are currently most affected by pollution (including water pollution). EPA currently has data that can be used to help determine which communities should be involved in the promulgation.

The Enforcement Compliance History Online (ECHO) data reports include data specifically related to water pollution and relevant demographics.[275] ECHO provides an online method for searching more than 800,000 facilities focusing on water, air, and soil pollution discharges, inspections, violations, and enforcements. EPA's Toxic Release Inventory (TRI) provides information on releases of toxic substances and the locations of those releases.[276] The TRI covers all

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U.S. Army Corps of Eng'rs., NAT'L RES. DEF. COUNCIL 51–59 (Apr. 15, 2019) [hereinafter, Devine, NRDC 2019 Water Rule Comments], https://perma.cc/27WW-5JPS.

272. Revised Definition of Waters of the United States, 84 Fed. Reg. 4154, 4163 (proposed Feb. 14, 2019) (codified at 33 C.F.R. § 328, 40 C.F.R. §§ 110, 112, 116–17, 122, 230, 232, 300, 302, 401 (2020)).

273. *See id.* (to be codified at 40 C.F.R. § 230.3(s)) (failing to discuss the risk to potential affected communities); Executive Summary, Clean Water Rule: Definition of "Waters of the United States, 80 Fed. Reg. at 37,057 (discussing who was actually invited to give input through outreach); Clean Water Rule: Definition of "Waters of the United States, 80 Fed Reg. at 37,103–04 (making a blanket statement that there are no disproportional effects on children, low-income, or minority populations).

274. *See* Hausrath v. United States Dep't of the Air Force, 491 F. Supp. 3d 770, 795 (D. Idaho 2020) (finding that there is no private cause of action under the Executive Order, but United States Air Force's consideration of environmental justice impacts was too cursory).

275. *Enforcement and Compliance History Online*, EPA, https://perma.cc/7JH6-RWQZ (last visited May 31, 2021).

276. *Toxic Release Inventory*, EPA, https://perma.cc/ZL6E-L5P2 (last visited May 31, 2021).

environmental media; that is, it tracks the release of toxic chemicals into the air, water, and land, and waste transfers.[277] It also allows one to specifically search metropolitan areas, Tribal Lands, and watersheds.[278]

Additionally, EPA gathers data specifically related to environmental justice and pollution. EPA's Environmental Justice and Screening Tool (EJSCREEN) provides EPA with a national dataset that combines environmental and demographic indicators.[279] EPA is supposed to use this data screen for at-risk areas that may need additional consideration or outreach as it develops programs, policies, and activities.[280] Unfortunately, the agency does not use its primary environmental justice screening tool for the following purposes:

> 1) As a means to identify or label an area as an "EJ community"; 2) to quantify specific risk values for a selected area; 3) to measure cumulative impacts of multiple environmental factors; and 4) as a basis for agency decision-making or making a determination regarding the existence or absence of EJ concerns.[281]

EPA states that it hopes to refine its utilization of the data in the future;[282] however, the future is now. The promulgation of the new WOTUS regulations provides a chance to employ tools such as EJSCREEN and ECHO to map and define communities that could be hardest hit if the WOTUS regulations fail. TRI, ECHO, and EJSCREEN are prime examples of tools EPA must utilize to identify communities that should be more actively involved in the new WOTUS promulgations.

b. Establishing a Framework for Inclusion

Many different methods of collaborative decision making can assist in advising EPA. An amalgamation of Lewicki's integrative decision paradigm,[283] Arnstein's hierarchical structure of citizen decision making, ranking system (Arnstein's Ladder),[284] and Kendi's collaborative team model[285] are useful in developing a foundational framework.

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277. *Id.*

278. *Id.*

279. *EPA's Environmental Justice and Screening Tool*, EPA, https://perma.cc/H7WK-CUBB (last visited May 31, 2021).

280. *Id.*

281. *How Does EPA Use EJSCREEN?*, EPA, https://perma.cc/ABZ5-R3DQ (last visited May 31, 2021).

282. *Id.*

283. *See* ROY LEWICKI, BRUCE BARRY & DAVID SANDERS, NEGOTIATIONS 71–106 (6th ed., McGraw Hill, 2010) (discussing the key steps in creating an integrative negotiation process).

284. *See* Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INSTITUTIONAL PLANNERS 216, 217 (1969) (describing a hierarchical structure of citizen participation from nonparticipation to citizen control).

285. *See* KENDI, *supra* note 148, at 231.

First, EPA must understand and acknowledge that the current environmental inequities are a direct reflection of bad environmental policies. This recognition does not require EPA to state that the policies are a product of bad peoples' intentional discrimination against discrete populations. On the contrary, the purpose of the recognition is to demonstrate an awareness of long-standing problems that require immediate solutions. This is a predicate for trust-building and the creation of a supportive, empathetic atmosphere for this type of collaborative environmental decision making.[286]

Second, as stated above, EPA must bring the right people to the table. Co-opted, handpicked "worthies" will be seen as dishonest, a banal attempt to placate the masses.[287] EPA must determine what communities are actually adversely affected or could be adversely affected by the new WOTUS rules and invite representatives from those communities to the negotiation table. There are several ways for EPA to begin this process. For example:

- It can begin to scout for proper representation by holding information gathering meetings, community town hall meetings, educational/informational sharing meetings, and informational surveys.
- The agency can ask local government leaders, clergy, and civic leaders for names of prospective representatives.
- EPA can survey or otherwise solicit names directly from the communities or ask the communities to supply names of appointed representatives. This method actually allows the people to speak for themselves in terms of who will most properly represent their interests during the rule-making process.
- Most importantly, a representative selection process must be adaptive. EPA must constantly ask if there needs to be another seat at the table. The stakes are much too high to shy away from over-inclusion.

Third, EPA must engage in interest-based negotiations (not zero-sum position-based negotiations). The agency must determine the common and shared interests of the parties and determine a way to meet those interests.[288] As part of this, EPA must actually listen to the communities to uncover the issues that create the actual or perceived inequities. EPA cannot understand the people's water-related problems unless it asks. The initial meetings must establish a common or shared set of environmental goals[289] to be achieved using the new WOTUS regulations; the goals established at this meeting will set the groundwork for the rest of the inclusive regulatory process. The parties should agree early on the desired benefits

286. *See generally id.*

287. *See* Arnstein, *supra* note 284, at 220.

288. *See* LEWICKI ET AL., *supra* note 283, at 79.

289. *See id.* at 95 (defining common goals as an objective that results in the same gain for each party and shared goals as an objective that results in different gains for each party).

resulting from the new regulations, and they must commit to working cooperatively towards that result. However, the process of regulatory goal setting cannot be seen as top-down. Instead, EPA must consistently strive for consensus, based upon a willingness to accept that the positions of the traditionally disenfranchised communities are both sincerely held and valid from their perspective.

Once more, EPA must remember not take the negotiations as a personal attack on the agency or its staff. Years of injustice and pent-up frustration may result in distrust and anger during the initial phases. Nevertheless, the agency's goal is not to accept or place blame, to become entrenched in positions, or to become entangled in challenging differing positions. The ultimate goal is to understand water concerns, establish regulatory goals, and determine alternatives to achieve those goals. Therefore, whenever possible, the problems, issues, and positions should be reframed as goals. This reframing and incorporation allow for strong participatory inclusion and a redistribution of power.

Fourth, EPA must create WOTUS regulations that alleviate or eliminate environmental inequities. Then, EPA must actually implement those regulatory changes and monitor the changes. Too often, regulatory meetings result in little actual change. EPA must use the WOTUS regulations as an opportunity to incorporate real solutions to issues that are raised by the people with a tangible and substantial interest. EPA can highlight those changes within the regulations. In this way, people can see that their issues were heard and respected.

Finally, there must be an oversight unit established within the EPA, perhaps within EPA's Office of Environmental Justice, to specifically monitor and evaluate the effectiveness of the new WOTUS regulations. The oversight group should issue periodic reports evaluating the effects of the regulatory changes. These reports should be shared online, and the reports can be the basis for regular adaptive regulatory water governance. The reports should form the basis of new guidance documents, amended regulations, or even amended statutory language. This constant review and concomitant adaptations could become a standard part of U.S. environmental governance. This adaptive regulatory feature would allow dynamic community input.

CONCLUSION

Frederick Douglass once said that America "glor[ies] in its refinement" but continues to maintain a "dreadful . . . system begun in avarice, supported in pride, and perpetuated in cruelty."[290] Over two hundred years later, these words still

290. *See* JOHN R. MCGIVEN, JULIE HUSBAND & HEATHER L. KAUFMAN, THE SPEECHES OF FREDERICK DOUGLASS 85 (2018) (Though arguing against slavery, in many ways Douglass' argument still rings true relative to subjugation of traditionally disenfranchised people and people of color as it relates to environmental regulations and environmental injustice).

ring true to many; the cycle of repression and disenfranchisement continues. This is especially true relative to environmental protection. Although Douglass was referring to slavery, the ideas of hegemonic power, economic oppression, and necropolitics[291] remain to this day. For decades, we have known that discrete, disposable populations have been disproportionately forced to endure the horrors of living in areas contaminated by toxic and hazardous substances.[292] Whether intentionally or unintentionally, EPA and regulatory elites have promulgated so-called neutral rules that have resulted in a systemic and ever-expanding national environmental caste.[293] The promulgation of new WOTUS regulations under the CWA gives the Biden Administration a perfect opportunity to break the multigenerational cycle of environmental injustice.

Merging praxis with theory, EPA can apply the ideas of polycentrism and demosprudence to help foster a new wave of environmental justice. Environmental regulatory promulgations can become a collaboration between affected communities and regulatory allies that incorporate the voices, lived experiences, and perspectives of traditionally eco-marginalized and subordinated peoples.[294] To accomplish this, the government must remember the humanity of the people it serves by hearing their environmental grievances and seeking their environmental solutions. EPA must stop being a knowing or unknowing participant in regulatory oppression and become an active agent of regulatory change.[295] Through WOTUS, the Biden EPA can establish a new regulatory paradigm that actively engages in policies of antisubordination, antiracism, and anticlassism.

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291. *See* Achille Mbembe *Necropolitics,* PUBLIC CULTURE, Winter 2003, at 11 (describing a unique form of politics and power that creates an existence in which vast populations are subjected to conditions that confer upon them the status of living dead).

292. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-B-211461, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1 (1983).

293. *See* Martin A. McCrory, *EPA Must Be an Active Agent of Change*, ELI ENVIRONMENTAL FORUM, May–June 2021, at 37. *See generally* JULIAN AGYEMAN, ROBERT BULLARD, AND BOB EVANS, JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 6–12 (2003) (tracing the beginnings of the modern environmental justice movement to citizen's revolt against the siting of toxic and hazardous waste in the 1980's); COLE & FOSTER, *supra* note 7, at 22–32 (describing the history of the environmental justice movement as beginning with the civil rights movement of the 1950s and '60s and the Anti-toxic movement of the 1970s); HOFRICHTER, *supra* note 15, at 13–32 (describing the environmental justice movement as emerging in the 1960s and '70s out of a concern for public health and occupational health); DORCETA TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 1–5 (2014) (discussing publicized concerns over toxic contamination in minority communities beginning in the 1970s).

294. *See* McCrory, *supra* note 293, at 37. *See generally* AGYEMAN ET AL., *supra* note 293, at 6–12; COLE & FOSTER, *supra* note 7, at 22–32; HOFRICHTER, *supra* note 15, at 13–32; TAYLOR, *supra* note 293, at 6–12.

295. *Id.* at 37.

In her powerful poem about the Flint water crisis, *No Filter*, Shea Cobb wrote, "When you think about water, you don't think about Government, you don't think of people at all."[296] This must change. The government has a statutory duty to protect the people and their common environment. When we think about water, we must think about the government and this statutory duty. The people must exercise their power to demand a voice in regulating their water and their environment. The Biden EPA can assist in developing the power of non-elite people toward the ultimate goal of creating a more equitable distribution of regulatory power and a more democratic form of regulatory governance.

296. *See Latoya Ruby Fraizer: What is the Human Cost of Toxic Water and Environmental Racism*, NPR: TED RADIO HOUR (Aug. 7, 2020), https://perma.cc/E6WK-9D52.