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Environmental Justice and the Gullah Geechee: The National Environmental Policy Act's Potential in Protecting the Sea Islands

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ENVIRONMENTAL JUSTICE AND THE GULLAH GEECHEE: THE NATIONAL ENVIRONMENTAL POLICY ACT'S POTENTIAL IN PROTECTING THE SEA ISLANDS

Paul N. Nybo*

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I. INTRODUCTION

On September 24, 2020, the Beaufort County Zoning Board of Appeals unanimously voted to reject a proposed luxury resort development on Bay Point Island,[1] one of the many Sea Islands along South Carolina's coast. In its natural state, Bay Point Island is "ecologically essential for its wildlife habitat value, economically valuable to the seafood industry in South Carolina, and culturally significant to the people of the Gullah/Geechee Nation . . . ."[2] The

* The author's profound gratitude is extended to Professor Shelley Welton, who assisted greatly in the preparation of this Note, and to his parents for their continued support.

1. *Save Bay Point Island!*, S.C. WILDLIFE FED'N (Sept. 24, 2020), http://www.scwf.org/blog/2020/9/21/save-bay-point-island [https://perma.cc/LZ4G-UCAE].

2. *Id.*

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zoning board's decision constituted a rare victory for the Gullah Geechee people in battling the development of their land over the past century.[3]

Today, the South Carolina Lowcountry is one of the fastest growing coastal areas in the United States.[4] The Sea Islands are typically developed through "large scale landscape conversions to single-family resort and retirement communities."[5] However, rises in property value and opportunities for high-end resort development have led to drastic loss of Sea Island land and disintegration among the Gullah Geechee people who have traditionally occupied that land.[6] The consequences of this loss are severe for the Gullah Geechee because it "equates to a loss of their community's culture and way of life."[7]

Despite the cultural importance of Sea Island land, the Gullah Geechee "are now being denied access to the very land they call home."[8] Notwithstanding their resilience and culture, the "historic people of the Sea Islands are in danger, and the environment is being tested under the enormous stress of fervent real estate development. . . . Current efforts to limit the corporatization of the Sea Islands to protect ecological and cultural life . . . are still incomplete."[9] Moreover, the only federal statute specifically aimed toward preserving Gullah Geechee heritage—the Gullah/Geechee Cultural Heritage Act—has been criticized for its inability to protect the living culture.[10]

The Act alone is insufficient to "retain the traditional integrity of the Sea Islands" because it does not address existing threats to the survival of Gullah Geechee culture.[11] This Note argues that, outside of the Act, federal statutory protection for Sea Island land and culture may arise under the National

3. *See* Kamille Wolff Dean, *Corporate Social Responsibility and Conservation: The Preservation of Ecology and Culture to Sustain the Sea Islands*, 37 WM. & MARY ENV'T L. & POL'Y REV. 375, 386 (2013) ("It was not until the mid-1900s that mainstream attention returned to the Sea Islands. Large-scale redevelopment in the Islands displaced traditional African-American landowners." (footnotes omitted)).

4. Elizabeth Brabec & Sharon Richardson, *A Clash of Cultures: The Landscape of the Sea Island Gullah*, 26 LANDSCAPE J. 151, 163 (2007).

5. *Id.*

6. *See* AUDREY ANNE BUTKUS, "THE WORST PROBLEM NO ONE HAS EVER HEARD OF": HEIRS' PROPERTY AND ITS CULTURAL SIGNIFICANCE TO GULLAH-GEECHEE RESIDENTS OF THE SOUTH CAROLINA LOWCOUNTRY 1 (2012), https://repositories.lib.utexas.edu/handle/2152/ETD-UT-2012-08-6086 [https://perma.cc/FF5B-BBHZ].

7. *Id.*

8. Dean, *supra* note 3, at 385.

9. *Id.* at 378–79.

10. *See* Lea Terlonge, *Resistance Is Not Futile: Protecting the Traditional Knowledge of the Gullah/Geechee from Assimilation*, 1 CHARLESTON L. REV. 51, 68–69 (2006) ("Although the Act takes tremendous steps toward preserving Gullah artifacts, its efforts toward protecting the living culture are lacking.").

11. *See* Dean, *supra* note 3, at 378.

Environmental Policy Act of 1969 (NEPA), which is well-suited to consider the Gullah Geechee's unique relationship with their coastal environment.[12]

This Note proceeds in four Parts. Part II describes the history of the Gullah Geechee people, the Gullah/Geechee Cultural Heritage Act, the heirs' property model of ownership and its problems, and NEPA's requirements. Part III considers how an environmental justice analysis can be implemented into the threshold NEPA determination to require consideration of a proposed project's impact on the Gullah Geechee people and culture. Part III also explores alternative forms of protection that may flow from NEPA's application. Finally, Part IV concludes by reiterating NEPA's viability as a tool for ensuring environmental justice concerns are considered at the outset of any proposed project on Sea Island land.

II. BACKGROUND

To understand why NEPA is a better source of federal statutory protection than the Gullah/Geechee Cultural Heritage Act, a basic appreciation of the history behind the Gullah Geechee people is critical. Likewise, to understand the shortcomings of the Act, a basic understanding of the Act itself is necessary. Specifically, it is important to consider how the Act fails to address the heirs' property problem, a driving force behind large-scale Gullah Geechee land loss. Although NEPA may be an unappreciated and relatively unexplored avenue for protecting Gullah Geechee culture, the statute's relationship with environmental justice may protect against continuing threats to the survival of that culture.

A. History of the Gullah Geechee

The Gullah Geechee people are the "only African American population of the United States with a separate, long-standing name identifying them as a separate people[,]" and they are distinct in their reliance upon maritime resources.[13] The Gullah Geechee are direct descendants of "the estimated 213,437 slaves imported directly from Africa during the legal period of the African slave trade . . . and of the countless other slaves illegally brought into the country."[14] In much of the southeastern United States, Africans were enslaved on isolated coastal islands to cultivate rice, indigo, and cotton.[15] The boom of these cash crops corresponded with an

12. *See id.* at 421.
13. *Id.* at 376.
14. Brabec & Richardson, *supra* note 4, at 152.
15. *Id.*

increased demand for slave labor on Sea Island plantations.[16] Unlike other regions in the deep south where slaves were traded between states, the Sea Islands imported slaves directly from Africa.[17] As a result, "Sea Island plantations were constantly being reinforced with people of recent African culture and traditions. In effect, the continuous influx of new slaves renewed the remembrance and understanding of African cultural norms."[18]

On Sea Island plantations, slaves of African descent "greatly outnumbered the white population."[19] For example, by 1860, the population of Beaufort District was 81.2% slaves, second only to Georgetown County.[20] The Sea Islands were unique in their geographic isolation; they were only accessible by boat.[21] In such isolation, the slaves' West African roots became intertwined with the plantation environment and "provided a microcosm for the culture to develop without significant outside white influences."[22] With an overseer being consistently absent, the African majority resisted the imposition of white cultural values.[23]

During the Civil War, Union troops came to occupy many of South Carolina's coastal Sea Islands.[24] This occupation caused plantation owners to evacuate, leaving behind over 10,000 slaves.[25] After the war, many considered the Sea Islands to be uninhabitable except by African-Americans familiar with the land.[26] The Union launched the "Port Royal Experiment" in response, which allowed previously enslaved African-American inhabitants to purchase plots of Sea Island land.[27]

The Gullah Geechee's culture and livelihood are inextricably tied to the Sea Islands on which they reside.[28] Historically, the Gullah Geechee have depended on the Sea Islands' natural resources, particularly locally harvested seafood.[29] The livelihood of many Gullah Geechee people is dependent on their ability to catch and sell seafood.[30] Traditional items, such as hand sewn sweetgrass baskets and fishing nets, are also important economic resources.[31]

16. *Id.*
17. *Id.* at 152–53.
18. *Id.* at 153.
19. *Id.*
20. *Id.*
21. *Id.* at 153–54.
22. *Id.* at 154.
23. *Id.* at 153–54.
24. *Id.* at 155.
25. *Id.*
26. Dean, *supra* note 3, at 383.
27. *Id.* at 382–83.
28. *See* Brabec & Richardson, *supra* note 4, at 158.
29. Dean, *supra* note 3, at 384–85.
30. *Id.*
31. *Id.*

Additionally, the Gullah Geechee community is built upon the family compound.[32] On traditional Gullah Geechee land, "[i]t is not uncommon to find as many as eight to ten buildings centrally located on a piece of land, in an organic arrangement, with little obvious distinctions of property boundaries."[33]

For centuries, the Gullah Geechee people sustained their unique way of life through a "thriving Sea Island economy based on ecology."[34] However, overwhelming, rapid development of the Sea Islands has both endangered natural resources and threatened the Gullah Geechee's living culture.[35] Attracted to their natural beauty, developers began to reshape the Sea Islands in the mid-1900s[36] without input from the Gullah Geechee people who have traditionally occupied the land:

> The sizable Gullah and Geechee communities in the Sea Islands have dwindled over the years. The minimal number of Gullahs and Geechees remaining on the Sea Islands are largely overshadowed by the vast majority of vacationing families and relocated individuals who now inhabit these traditional lands. Retirement communities and luxury beach homes infringed upon these cultural lands without recognition or respect for the underlying communities that comprise the rich Gullah and Geechee culture. Shopping and recreation by the newcomers to the Sea Islands circumvented the traditional farming and fishing of the Gullah people.[37]

Over time, luxury resort development has pushed the Gullah-Geechee population to the periphery of the Sea Islands, physically distancing them

32. Brabec & Richardson, *supra* note 4, at 158–59.

33. *Id.* at 159.

34. Dean, *supra* note 3, at 377.

35. *Id.* at 377, 385; *see* James R. Rhinehart & Jeffrey J. Pompe, *Entrepreneurship and Coastal Resource Management*, 1 INDEP. REV. 543, 548 (1997). "When ownership rights are not defined, users have little or no incentive to take into account the effects of their actions on the welfare of others[,]" and subsequently, "the greatest returns" of the resource and private benefits go to the first-comers. *Id.* Then, "[f]ish grow scarce, water becomes polluted, beaches are crowded and denuded, and wetlands and marshes disappear." *Id.*

36. *See* Dean, *supra* note 3, at 386.

37. *Id.* at 409 (footnotes omitted).

from their heritage.[38] While most development began in the mid-1900s,[39] Congress failed to take notice until the early 2000s.[40]

B. The Gullah/Geechee Cultural Heritage Act

In 2000, Congress authorized the National Park Service to conduct a Special Resource Study of seventy-nine barrier islands and adjacent counties, which "documented the national significance of the Gullah Geechee people and their culture . . . ."[41] As a result of the study, the National Trust for Historic Preservation listed the Gullah Geechee culture as an endangered resource.[42] In 2006, Congress passed the Gullah/Geechee Cultural Heritage Act[43] to recognize "the important contributions made to American culture and history by African Americans known as Gullah Geechee who settled in the coastal counties of South Carolina, North Carolina, Georgia, and Florida."[44]

In the Act, Congress acknowledged that Gullah Geechee culture is a vital aspect of American culture.[45] In part, the Act exists to:

> [A]ssist State and local governments and public and private entities in South Carolina . . . in interpreting the story of the Gullah/Geechee and preserving Gullah/Geechee folklore, arts, crafts, and music[] and assist in identifying and preserving sites, historical data, artifacts, and objects associated with the Gullah/Geechee for the benefit and education of the public.[46]

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38. BUTKUS, *supra* note 6, at 1 ("[T]he coastlands of South Carolina are at risk of becoming sterilized communities for a homogeneous population. The rich, historical identity responsible for the Lowcountry's appeal to tourists from around the world will also disappear with the forced removal of the Gullah-Geechee community, decreasing this appeal to tourists and hurting the Lowcountry's biggest industry.").

39. *See* Dean, *supra* note 3, at 386.

40. GULLAH GEECHEE CULTURAL HERITAGE CORRIDOR COMM'N, MANAGEMENT PLAN 7 (2012), https://gullahgeecheecorridor.org/resources/management-plan/ [https://perma.cc/4CEF-JJ85] [hereinafter MANAGEMENT PLAN].

41. *Id.*

42. *See id.* at 9.

43. Gullah/Geechee Cultural Heritage Act, Pub. L. No. 109-338, § 295, 120 Stat. 1832 (2006). The Gullah/Geechee Cultural Heritage Act was included in a broader Act entitled the National Heritage Areas Act. *See* National Heritage Areas Act of 2006, Pub. L. No. 109-338, 120 Stat. 1783.

44. MANAGEMENT PLAN, *supra* note 40, at 9, 19.

45. Terlonge, supra note 10, at 68.

46. Gullah/Geechee Cultural Heritage Act § 295A(2)–(3). On March 15, 2005, the House of Representatives passed the Gullah/Geechee Cultural Heritage Act, which Congressman Clyburn of South Carolina sponsored. H.R. 694, 109th Cong. (2005) (enacted).

The Act established the Gullah/Geechee Heritage Corridor (Corridor), which is "comprised of those lands and waters"[47] that constitute a "large portion of the land historically occupied by the Gullah[]" Geechee people.[48] The Act also established the Gullah/Geechee Cultural Heritage Corridor Commission (Commission), which is responsible for "assist[ing] Federal, State, and local authorities in the development and implementation of a management plan for those land [sic] and waters" belonging to the Corridor.[49] The Act originally provided for the Commission's termination ten years after its enactment date; however, the Act was amended in 2016 to strike "ten years" and replace it with "fifteen years," and the Commission continues today.[50] The Act prescribes a number of the Commission's duties, which include conducting an assessment of the preservation needs of the Gullah Geechee culture; establishing and submitting a management plan to the U.S. Secretary of the Interior; and identifying and supporting local, state, and federal programs that contribute toward preservation.[51]

Section 295J of the Act protects private property and balances the goals of the Act with the interest of private property owners.[52] The Act states: "Nothing in this subtitle shall be construed to modify any authority of Federal, State, or local governments to regulate land use."[53] The Act does not "require the owner of any private property located within the boundaries of the Heritage Corridor to participate in or be associated with the Heritage Corridor" and provides that "[t]he establishment of the Heritage Corridor and its boundaries shall not be construed to provide any nonexisting regulatory authority on land use within the Heritage Corridor or its viewshed by the Secretary or the local coordinating entity."[54] Further, "[a]ny owner of private

47. Gullah/Geechee Cultural Heritage Act § 295C(b)(1).

48. Terlonge, *supra* note 10, at 69; *see Gullah/Geechee Cultural Heritage Corridor North Carolina, South Carolina, Georgia, Florida*, NAT'L PARK SERV., https://www.nps.gov/nr/travel/american_latino_heritage/gullah_geechee_cultural_heritage_corridor.html [https://perma.cc/8BEW-JADN] ("The Gullah/Geechee Cultural Heritage Corridor extends from Wilmington, North Carolina in the north to Jacksonville, Florida, in the south. The National Heritage Area includes roughly 80 barrier islands and continues inland to adjacent coastal counties, defining a region 30 miles inland throughout the United States Low Country. The Gullah/Geechee Heritage Corridor is home to the Gullah people in the Carolinas, and the Geechee in Georgia and Florida – cultural groups descended from enslaved peoples from West and Central Africa . . . . The Gullah/Geechee Cultural Heritage Corridor is managed by a federal commission made up of local representatives who collaborate with the National Park Service, Community Partners, Grass Root organizations and the State historic preservation offices of North Carolina, South Carolina, Georgia and Florida.").

49. Gullah/Geechee Cultural Heritage Act § 295D(a).

50. Sec. 1, § 295D(d).

51. § 295F.

52. § 295J.

53. § 295J(c).

54. § 295J(d)–(e).

property included within the boundary of the Heritage Corridor shall have their property immediately removed from within the boundary by submitting a written request to the local coordinating entity."[55] Thus, the Act does not authorize the Commission to resist the sale of traditional Gullah Geechee lands to private parties who withdraw from the Corridor. Moreover, the Commission itself "is not in a position to purchase land."[56]

Despite being an important milestone for the recognition of Gullah Geechee culture, the Act is not without its critiques.[57] For example, Lea Terlonge argues that, although the Act *protects* historical artifacts, it fails to *preserve* the living culture.[58] According to Terlonge, "[t]he difference between preserving and protecting is that preservation shows cultures as they used to be, while protection allows cultures to live and flourish by protecting those who live it. Preservation simply stores relics of the culture."[59] Her criticism of the Act focuses on the distinction between protection and preservation:

> While the Gullah/Geechee Cultural Heritage Act purports to preserve the Gullah culture, it is designed to protect the artifacts of the Gullah culture from strictly a preservationist standpoint . . . . The Act's efforts to merely preserve artifacts and historical sites will do little to keep the living culture alive . . . . The United States government must make an effort to protect the traditional knowledge that the members of the Gullah community possess. Otherwise, the Gullah culture will fall victim to dilution and will eventually die, leaving only the artifacts behind. Although collecting the artifacts of a culture is beneficial, it is better to enable the culture to keep producing the goods for which they are renowned.[60]

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55. § 295J(e).

56. Dean, *supra* note 3, at 416.

57. Terlonge, *supra* note 10, at 69 ("The Act makes arrangements for the identification and preservation of cultural artifacts but makes no provision for a program that would enable the Gullah people, who use the traditional methods and create the artifacts, to continue their work.").

58. *Id.* at 69–70 ("Understanding the inadequacies of the Gullah/Geechee Cultural Heritage Act requires an understanding of the difference between *protection* and *preservation* . . . . The distinction between the two becomes clearer when comparing efforts to protect culture versus efforts to preserve culture. In order to protect a culture, steps are taken to permit those in the endangered society to continue engaging in the *activities* that are unique to their particular culture. When preserving a culture, efforts are *directed towards cataloging and preserving the cultural artifacts* for later generations.").

59. *Id.* at 70.

60. *Id.* at 70–71 (footnotes omitted).

In sum, the Act "takes no steps to protect the Gullah culture as it exists" and fails to address continued threats to the Gullah Geechee's living culture and way of life.[61]

C. The Heirs' Property Problem

The heirs' property model of ownership also threatens the continued existence of the Gullah Geechee culture because it allows developers to employ "strong-arm tactics[,]" such as forced partition sales, to acquire traditional Gullah Geechee land.[62] In general, heirs' property is "real property purchased by African Americans and held within families for generations without clear title."[63] Under this model, family members own the land as tenants in common—each family member owns an undivided interest in a fractional share of the property.[64] As cotenants, family members share "unity of possession," which gives each family member undivided property rights.[65] When a family member dies, ownership of the property is passed down generationally to living "heirs, as there is no right of survivorship for tenants in common."[66]

Traditionally, heirs' property is transferred through "word of mouth"—verbally transferred "to other family members without the benefit of a written deed[]"—because "the legal view of land ownership as a commodity does not exist within Gullah Geechee culture; rather, land ownership is regarded as the essence of life, as having a 'place' for which one's ancestors have struggled and sacrificed."[67] Because of this oral tradition, "[t]he original purchasers did not devise their property through the formal probate process."[68] Instead, Gullah Geechee land was passed down for generations, with title growing increasingly unclear with familial growth.[69]

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61. *Id.* at 70.

62. *See* Dean, *supra* note 3, at 378.

63. Faith R. Rivers, *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*, 15 SE. ENV'T L.J. 147, 148 (2006).

64. *Id.*

65. *Id.*

66. *Id.*

67. MANAGEMENT PLAN, *supra* note 40, at 99–100.

68. Rivers, *supra* note 63, at 152.

69. *See* BUTKUS, *supra* note 6, at 5 ("The root cause contributing to heirs' property loss across the country lies in the management of its land title. The only way to ensure heirs' property owners living on the land are able to utilize and retain their property is to obtain a 'free and clear' title. A free and clear title warrants all property rights to the individual or small number of immediate family members who are seeking the title. A free and clear land title can only be obtained through a time-consuming, financially arduous process. Heirs' property owners seeking the clear title must first determine every heir who has a right to the land. Often, many

Along with oral tradition, additional aspects of Gullah Geechee culture have contributed to the prevalence of heirs' property. A high level of illiteracy exists in the community, which likely complicates the formal probate process.[70] Further, most of the Gullah Geechee people cannot bear the cost of legal fees associated with clarifying the title to heirs' property.[71] Critically, "[t]he Gullah-Geechee community has a unique history with outsiders that ha[s] created a culture of distrust with those beyond their immediate community. Racist policies and laws, scheming developers, and even distant family members have been guilty of creating a lower quality of life for these rural, African-American communities."[72] Because of the socioeconomic status, education, and historically distrustful culture of the Gullah Geechee people, heirs' property owners are thrust into an "involuntary tenancy in common property ownership in rapidly developing areas."[73]

Although tenancy in common is a "standard concurrent interest" held by many Americans, in the context of heirs' property, this form of ownership has "a unique history and poses dire consequences for African American land owners in the Lowcountry."[74] "The disposition of tenants in common property is governed by the law of partition[,]" which "provides for the division of property, or its cash 'equivalent,' according to owner interests."[75] The effect, therefore, is that "[a]ny heir has the right to go to court and demand his/her share of the value of the land."[76] In this situation, the other cotenants first have

heirs' property owners no longer live in the area. In fact, many heirs' property owners are unaware of their shares of land or their relatives living on them. Unless the property is a relatively recent heirs' parcel (within the last generation), simply identifying and making contact with the shear number of heirs living across the country becomes too strenuous for the heirs seeking the clear title.").

70. *See id.* at 6 ("Financial and educational resources are limited among heirs' property owners, along with free time to dedicate to filing paperwork and conducting research.").

71. *See id.* ("For most heirs' property owners living on the land, obtaining a clear title proves to be a nearly impossible feat. The vast majority of heirs' property owners are low-income African Americans, who remain closed-off to outsiders.").

72. *Id.* at 19. For further explanation of the Gullah Geechee's distrust of outsiders, see *id.* at 29 ("The same legislative loophole that generates a sense of distrust of private developers among heirs' property owners also leads heirs' property owners to become suspicious of any outsider who shows interest in their land. Due to the fact that it is often a distant family member who indirectly forces family off their land through the selling of their share to a developer, heirs' property owners have attempted to protect their land by adopting a very closed-off attitude to anyone not also living on their property.").

73. *See* Rivers, *supra* note 63, at 154. ("These threats relegate a broad group of African Americans who inherited land through intestacy to a disadvantaged class of property ownership.").

74. *Id.* at 152.

75. *Id.* at 148.

76. MANAGEMENT PLAN, *supra* note 40, at 99.

the opportunity to purchase the petitioning cotenant's interest in the land.[77] If the heirs that possess the land or want to keep it within the family cannot pay the petitioning heirs for their interests, the court can force a sale of the land by public auction to generate funds that satisfy the claim of the petitioning cotenant.[78]

A major issue interest holders face is "pressure from real estate developers to convince some heirs that do not have a very strong connection to the land to sell their interest to those outside the family."[79] If a developer or other interested party convinces at least one family member to sell his or her interest, the developer comes to own a right in the property and may demand a share of the land's value.[80] Frequently, heirs' property owners are unable to pay for the developer's newly acquired share, prompting the developer to file a partition action.[81] The court then orders that the entire parcel of land be auctioned so the subsequent profit can be divided according to the interest each party holds.[82] At auction, "the developer will likely be able to outbid the land-rich but cash-poor" cotenant and force the sale of the property.[83]

The heirs' property model of ownership quickly attracted developers to Gullah Geechee Sea Island land because it created an opportunity to acquire

77. Under South Carolina law, "nonpetitioning" cotenants and joint tenants have a right of first refusal in a partition sale. *See* S.C. CODE ANN. § 15-61-25(A) (2006).

78. *See* MANAGEMENT PLAN, *supra* note 40, at 99.

79. *Id.*; *see* BUTKUS, *supra* note 6, at 21–22 ("Once a developer identifies a parcel of land and discovers it is communally owned, a fairly standard process begins for acquiring it. The developer will determine the family under whom the title is jointly shared and conduct a genealogy search in order to generate a list of all living descendants with 'partial ownership[.]' Many partial stakeholders are not only unaware of their share of this land, but also unfamiliar with the family members currently living on the land. Usually these stakeholders live in another part of the country, having long ago moved away from the South. With no cultural ties to the land and an attractive price tag from a developer, the partial owner will sell a developer their 'share[.]'"); *see also* Rivers, *supra* note 63, at 153 ("It is widely acknowledged by scholars, judges, and lawmakers, as well as property owners and developers, that partition actions are a mechanism for outsiders to acquire private property that is otherwise not for sale.").

80. *See* MANAGEMENT PLAN, *supra* note 40, at 99–100.

81. *See id.*

82. *See* Rivers, *supra* note 63, at 155 ("Typically, court-ordered partition sales draw less than optimal market value because of the forced timed conditions of the court sale where there are willing buyers but 'court-ordered' sellers. In these situations, developers who force partition sales are able to capture the property at bargain prices and realize exponential returns, which far exceed the cost of partition, when the land is re-sold at a higher price pursuant to the newly acquired, consolidated title. In these instances, heirs' property owners not only lose their land, and often the family homestead, but also fail to capture the full economic value of the land once the sale is ordered." (footnotes omitted)).

83. JOSH EAGLE, COASTAL LAW 39 (Erwin Chemerinsky et al. eds., 2d ed. 2015).

extremely valuable land far below market price.[84] As a result, "African Americans were targeted and disproportionately denied property rights in preserving their land and culture on the barrier island coast" during the land's rapid development beginning in the mid-1900s.[85] Although "the scope of the heirs' property problem has been difficult to document[,]"[86] one 1978 study found that at least one-third of "black-owned" property in the rural south was heirs' property.[87] Thus, the large amount of heirs' property held by the Gullah Geechee people rendered them particularly vulnerable to legal exploitation by developers during this time.[88]

Today, the forced partition mechanism remains a serious threat to the preservation of Gullah Geechee culture because the Gullah Geechee hold much of the traditional Sea Island land as heirs' property.[89] A study conducted by the Coastal Community Foundation of South Carolina in 1999, for example, found that a large portion of land in the Lowcountry is still held as heirs' property—identifying over 3,000 tracts within Charleston County and Berkeley County.[90] More recently, in 2012, the Commission estimated that 82.5% of land within the Corridor is "either privately owned, or unrestricted for development, or there is no known restriction."[91] In South Carolina, the Commission estimated that 80.8% of land within the Corridor is privately

84. *See* BUTKUS, *supra* note 6, at 22; Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 334 (2004) ("Isolated, difficult to access, and subject to the front-end forces of the Atlantic Ocean, these islands were first occupied by people who retained their own language well into the twentieth century. Around the time of the Civil War, however, they became peopled as well by city dwellers fleeing the heat and the yellow fever of summers in Charleston and Savannah. The newcomers found sea breezes, unspoiled beaches and the shade of Spanish moss drifting from centuries-old live oak trees. In the American South, it didn't get any better than this. The stage was set for an invasion with but one objective: to get as close to the waves as possible and build there.").

85. *See* Dean, *supra* note 3, at 386–87.

86. Rivers, *supra* note 63, at 148; *see also* BUTKUS, *supra* note 6, at 17 ("It is hard to determine the full extent of remaining heirs' property in the Charleston area. The lack of recorded deeds and secretive nature of heirs' property owners leave government planners with nothing more than tax records to interpret the extent of heirs' property ownership in the Charleston Lowcountry.").

87. Rivers, *supra* note 63, at 148; *see* C. Scott Graber, *Heirs Property: The Problems and Potential Solutions*, 12 CLEARINGHOUSE REV. 273, 273 (1978) (discussing issues and possible remedies for heirs' property).

88. *See supra* text accompanying notes 73, 83.

89. *See* MANAGEMENT PLAN, *supra* note 40, at 100 ("The ability of the Gullah Geechee people to continue to live on their privately owned land within the Corridor is critical to the culture's long-term survival. Family compounds remain the economic and spiritual centers in which Gullah Geechee culture thrives."); Rivers, *supra* note 63, at 168 ("Land loss, family displacement and community demolition have had important impacts on the Lowcountry's Gullah culture.").

90. *See* Rivers, *supra* note 63, at 148.

91. MANAGEMENT PLAN, *supra* note 40, at 100.

owned, unrestricted for development, or not knowingly restricted.[92] While it is unclear what percentage of privately owned land is held as heirs' property, the amount of "family held titles" recorded in property tax records indicates "a majority of rural, low-lying land in the Lowcountry is owned as heirs' property."[93]

When developers force a court-ordered sale of heirs' property, "the externalities of development include the loss of cultural identity and heritage. The effects of these losses can be devastating to a community."[94] Although a few nonprofit and public interest entities within the Corridor have attempted to combat this loss through mediation, litigation, and education,[95] aggressive development continues to threaten the living culture of the Gullah Geechee.[96] Where federal statutes like the Act have preserved but failed to protect Gullah Geechee culture,[97] NEPA and its relationship with environmental justice may provide statutorily protect the living culture of the Gullah Geechee.[98]

D. The National Environmental Policy Act

With respect to the environment, NEPA has "transformed the federal government's approach to decision-making and the public's role in the decision-making process."[99] It mandates agencies "take a hard look at

92. *Id.* at 106 tbl.11.

93. *See* BUTKUS, *supra* note 6, at 17–18 ("It is hard to determine the full extent of remaining heirs' property in the Charleston area. The lack of recorded deeds and secretive nature of heirs' property owners leave government planners with nothing more than tax records to interpret the extent of heirs' property ownership in the Charleston Lowcountry. Recently, the Center for Heirs' Property Preservation underwent a research project aided by grant funding to map the extent of heirs' property in the Lowcountry. These maps and figures have not been released to the public, as this would only further assist encroaching developers in identifying the locations of heirs' property parcels to prey on.").

94. April B. Chandler, *"The Loss in My Bones": Protecting African American Heirs' Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 410 (2005) (footnote omitted); *see also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 509 (2001) ("For other groups, such as African Americans who own land under tenancies in common, judges have not considered it important to support the preferences of the ownership group to maintain their ownership of the land on an ongoing basis. Judges in partition actions, for example, have considered landownership and monetary distributions from a sale of the land to be fungible; the value of stable communities has been ignored or minimized.").

95. MANAGEMENT PLAN, *supra* note 40, at 100.

96. *See* Dean, *supra* note 3, at 378.

97. *See* Terlonge, *supra* note 10, at 62.

98. *See* discussion *infra* Part III.

99. Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENV'T L.J. 317, 317–18 (2015).

environmental consequences" of their proposed actions, consider alternatives, and publicly disseminate such information before taking final action.[100]

Upon enactment, NEPA established the Council on Environmental Quality (CEQ), which issues regulations and guidance detailing the ways that federal agencies must implement NEPA.[101] In 2020, the CEQ issued revised regulations for the first time in over four decades.[102] The final revision "comprehensively update[d], modernize[d], and clarifie[d] the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action."[103] However, this revision has already been challenged by environmental groups,[104] and many public commenters feel it will negatively impact the progress of the environmental justice movement.[105] The future of this revision is even more uncertain following the recent presidential election.[106] Despite such uncertainty, this Note proceeds under current law, applying the regulations enacted in September of 2020. [107]

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100. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (internal quotation marks omitted)).

101. The CEQ is a cabinet-level council created by NEPA and housed in the Executive Office of the President. The CEQ is responsible for promulgating NEPA's implementing regulations. *See* 42 U.S.C. §§ 4342–44.

102. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43304 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–08, 1515–18).

103. *Id.*

104. *Environmental Groups Challenge Final NEPA Rule*, VAN NESS FELDMAN LLP (Aug. 7, 2020), http://www.vnf.com/environmental-groups-challenge-final-nepa-rule [https://perma.cc/DH8A-ZWVK].

105. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43356 ("Commenters stated NEPA's mandate to consider environmental effects, E.O. 12898, agency guidance, and case law establish that agencies cannot ignore the impacts of their actions on low-income and minority communities, and that CEQ is relinquishing its responsibility to oversee compliance with E.O. 12898 and NEPA. Further, commenters contended that CEQ's failure to analyze how the proposed rule and its implementation would affect E.O. 12898's mandates would render the regulations arbitrary and capricious, and exceed the agency's statutory authority. Commenters stated that CEQ provided no explanation or analysis of how the development and implementation of this rule would affect implementation of E.O. 12898 and, consequently, environmental justice communities. Commenters noted the fundamental proposed changes to nearly every step of the NEPA review process will disproportionately impact environmental justice communities and will reduce or limit opportunities for such communities to understand the effects of proposed projects and to participate in the NEPA review process.").

106. *See The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, BIDEN HARRIS, https://joebiden.com/environmental-justice-plan/ [https://perma.cc/H9QC-D3JU].

107. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43304.

1. Environmental Justice and NEPA

In the 1990s, the phenomenon of "environmental discrimination" became increasingly recognized.[108] Environmental discrimination occurs when "low-income racial minorities bear the brunt of environmental assaults and subsidize overall economic growth with their health and lives."[109] In response to increased recognition, the environmental justice movement was born.[110] The environmental justice movement "formally entered the federal lexicon" when President Clinton signed an Executive Order in 1994 to address environmental justice in minority and low-income populations.[111] The Order mandated federal agencies develop strategies for "identifying and addressing . . . [the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations . . . ."[112]

As federal agencies sought to adhere to the Order, the "obvious place to inject this new consideration was into agencies' preexisting analytic frameworks for implementing [NEPA]."[113] The Order naturally found a home in NEPA as "[e]nvironmental justice is consistent with—and even implicit in—the stated goals of NEPA, most notably the goal of assuring 'for *all* Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.'"[114] Additionally, integrating environmental justice into NEPA was consistent with the statute's longstanding requirement that federal agencies "assess the environmental impacts of proposed major federal actions and their alternatives as part of its goal of encouraging 'productive and enjoyable harmony' between human activities and the environment."[115]

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108. *See generally* Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENV'T L. 211, 213–22 (1994) (providing insight on the reports that first brought environmental discrimination to light).

109. *Id.* at 211.

110. *See id.* at 215 ("The GAO and CRJ reports nurtured a burgeoning movement that has been examining the functional relationship between race, poverty, and environmental hazards. The movement is called the 'environmental justice movement.' The term denotes an effort to broaden the goals of environmental protection to include providing a clean and safe environment where racial minorities and low-income people live and work.").

111. Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENV'T AFFS. L. REV. 601, 601–02 (2006) ("The order was an acknowledgment that exposure to environmental hazards is related to race and income levels.").

112. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), *amended by* Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995).

113. Outka, *supra* note 111, at 602–03.

114. *Id.* at 605.

115. *Id.* at 603.

Shortly after the Order was issued, the CEQ delivered guidance to aid agencies in integrating environmental justice into NEPA analyses.[116]

2. Agency Requirements Under NEPA

Under NEPA, federal agencies are required to prepare a "detailed statement[,]" or an Environmental Impact Statement (EIS), to the "fullest extent possible" for "major Federal actions significantly affecting the quality of the human environment . . . ."[117] Accordingly, if an agency determines that a proposed project is not a major federal action or will not have significant impact, the agency does not have to prepare an EIS and may issue a finding of no significant impact (FONSI).[118] For actions with potentially insignificant impacts, agencies must prepare an environmental assessment (EA).[119]

A fundamental limit of NEPA is that, as a procedural statute, it does not guarantee any particular substantive outcomes.[120] Even though an EIS may identify less environmentally harmful alternatives, the agency is not required to choose those alternatives.[121] NEPA's procedural focus, however, does not render it an ineffective source of federal statutory protection; instead, "NEPA is widely regarded as an invaluable, if indirect, protective measure because it makes environmental considerations a central part of federal decisionmaking and opens the process to public dialogue and scrutiny."[122]

When an agency fails to prepare an EIS, this can serve as a procedural injury and form the basis of standing.[123] Although NEPA does not expressly

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116. *Id.*

117. 42 U.S.C. § 4332(C). In the EIS, an agency must assess (1) the environmental impacts of the proposal; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between the short-term uses of the environment and maintenance of long-term productivity; and (5) any irretrievable resource commitments involved if the proposal is implemented. § 4332(C)(i)–(v).

118. *See* § 4332(C).

119. Environmental Assessments, 40 C.F.R § 1501.5(a) (2021). An EA may lead either to a decision to complete an EIS or to a FONSI. "The 2020 regulations set presumptive page and time limits for EAs: 75 pages, excluding appendixes, within one year." NINA M. HART & LINDA TSANG, CONG. RSCH. SERV., IF11549, THE LEGAL FRAMEWORK OF THE NATIONAL ENVIRONMENTAL POLICY ACT 2 (2020).

120. *See* Outka, *supra* note 111, at 605.

121. *See* Record of Decision in Cases Requiring Environmental Impact Statements, 40 C.F.R. §1505.2(a)(1)–(3) (2021).

122. Outka, *supra* note 111, at 605.

123. *See* Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 674 (5th Cir. 1992) ("The procedural injury implicit in the failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing [in NEPA cases] . . . ." (quoting City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975))); *see also* Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n, 457 F.3d 941,

provide for judicial review, challenges to an agency's compliance with its requirements are subject to federal judicial review under the Administrative Procedure Act.[124] Thus, despite NEPA not guaranteeing any particular substantive outcome, an agency's failure to prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment" may be subject to federal judicial review for failure to follow the statute's procedural rules.[125]

III. ANALYSIS: NEPA'S APPLICATION TO SEA ISLAND DEVELOPMENT

Because NEPA raises environmental justice concerns at the decision-making stage of development,[126] it may statutorily protect the living culture of the Gullah Geechee. This is particularly true as development has historically occurred without input from the Gullah Geechee people who have traditionally occupied the land.[127]

For the Gullah Geechee, the most crucial step in determining whether NEPA is a practical environmental justice tool is deciding whether a proposed action will require an EIS.[128] To trigger NEPA's EIS requirement, the project must be a major federal action that will significantly affect the human environment.[129]

A. Development Constitutes a Major Federal Action

While mostly private developers, rather than federal agencies, have initiated development of the Sea Island land, the coastal geography of the Corridor presents a unique opportunity to address environmental justice concerns through NEPA because a proposed project on the land likely requires a permit from a federal agency.[130] Although NEPA itself does not define "major Federal action" except to limit the phrase to actions "subject to Federal

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949–50 (9th Cir. 2006) ("[A] cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under [NEPA] when the plaintiff also alleges a 'concrete' interest—such as an aesthetic or recreational interest—that is threatened by the proposed action." (quoting City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004))).

124. *See* 5 U.S.C. § 702.

125. *Sabine River Auth.*, 951 F.2d at 676; *see also* § 702.

126. *See* Outka, *supra* note 111, at 605.

127. *See* Dean, *supra* note 3, at 409.

128. *See* Outka, *supra* note 111, at 608.

129. *See supra* Section II.D.2.

130. PRAC. L. REAL EST., NAVIGATING WETLANDS REGULATIONS FOR PROJECT DEVELOPERS: OVERVIEW 6 ("Because of the broad definition of dredged and fill materials, project developers generally need a Section 404 permit for any kind of construction activity that impacts a jurisdictional wetland . . . .").

control and responsibility,"[131] the CEQ's definition of major federal action includes "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies . . . ."[132] Generally, major federal actions include "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities."[133]

"Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project" are not considered major federal actions.[134] Further, the Fourth Circuit has held that "a non-federal project is considered a 'federal action' if it cannot 'begin or continue without prior approval by a federal agency . . .' and the agency possesses authority 'to exercise discretion over the outcome.'"[135] Thus, for a private project to trigger NEPA's requirements, the project must depend on the federal action "to come to fruition."[136]

For example, issuing a permit under § 404 of the Clean Water Act (CWA) is a major federal action under NEPA and is therefore subject to environmental impact review.[137] This section empowers the U.S. Army Corps of Engineers to regulate the dredging and filling of materials in "waters of the United States."[138] Under this authority, the Corps has implemented regulations to define "waters of the United States" and require a permit for any dredge and fill activity with the potential to impact those waters.[139] Because "dredged or fill material" is interpreted broadly,[140] whether a proposed project requires a § 404 permit hinges on the project's impact on waters within the Corps' jurisdiction.

131. 40 C.F.R. § 1508.1(q) (2021); *see also* 42 U.S.C. § 4332(D).

132. 40 C.F.R. § 1508.1(q)(2).

133. § 1508.1(q)(3)(iv).

134. § 1508.1(q)(1)(vi).

135. Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 (4th Cir. 1992) (quoting Md. Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986)).

136. *Id.* at 514 (quoting Nat'l Res. Def. Council, Inc. v. Hodel, 435 F. Supp. 590, 599 (D. Or. 1977)).

137. *See* 40 C.F.R. § 1508.1(q)(3)(iv).

138. 33 U.S.C. § 1344(a); 40 C.F.R. § 232.2.

139. 40 C.F.R. § 232.2.

140. *E.g.*, *id.* ("Examples of such material include but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States."); *see also* Rapanos v. United States, 547 U.S. 715, 744 (2006).

The Corps has defined its jurisdiction to include certain wetlands.[141] As the coastal geography of the Gullah Geechee Sea Island naturally includes large amounts of wetlands,[142] this land would likely fall under the Corps' jurisdiction. Consequently, any proposed project on Sea Island land that involves dredging or filling a jurisdictional wetland requires a § 404 permit and thus constitutes a major federal action under NEPA.[143]

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141. *About the Waters of the United States*, U.S. ENV'T PROT. AGENCY http://www.epa.gov/nwpr/about-waters-united-states#main-content [https://perma.cc/QT6E-UMHU]. In its recently published Navigable Waters Protection Rule, the Army Corps of Engineers included wetlands in the revised definition of "waters of the United States[.]" *Id.* The rule became effective in all states except Colorado on June 22, 2020. *Id.* In part, the definition includes:

> [Waters] which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide . . . interstate waters including interstate wetlands . . . [and] other waters such as . . . mudflats, sandflats, wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters . . . .

Id. However, the new rule limits the interpretation of "waters of the United States" because it provides a definition for "adjacent wetlands," or wetlands that are "meaningfully connected to other jurisdictional waters," such as those directly abutting or having regular surface water communication with jurisdictional waters. Armando Benincasa, *New Rule Re-Defining Waters of the United States Released*, NAT'L L. REV. (Jan. 24, 2020), http://www.natlawreview.com/article/new-rule-re-defining-waters-united-states-released [https://perma.cc/8U7V-F3MJ]. The new rule is a subject of controversy, and states, such as South Carolina, with more expansive definitions than the federal definition may need to fill gaps through state permitting agencies where federal permits were previously required. *See id.*

142. *See* MANAGEMENT PLAN, *supra* note 40, at 77 (explaining the ecological characteristics of the Gullah Geechee wetlands, which include "seasonally high water levels" as well as "numerous swamps, marshes, and pocosins").

143. *See* Michelle B. Nowlin, *NEPA and Environmental Justice*, ALI-ABA COURSE STUDY, Feb. 2008, at 583, 593–94 ("In the late 1990s, the South Carolina State Ports Authority sought a permit from the U.S. Army Corps of Engineers to construct a massive shipping terminal on Daniel Island in Charleston Harbor. The agency prepared a DEIS, which revealed not only major environmental impacts but also major inadequacies in the manner the agency was evaluating those impacts. Southern Environmental Law Center and South Carolina Coastal Conservation League submitted extensive comments to the agency. Ultimately, the Ports Authority dropped the Daniel Island proposal and decided to pursue new terminal facilities at an abandoned naval base."); *see also* Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs, No. 2:12-2942, 2013 WL 6488282, at *2 (D.S.C. Sept. 18, 2013). District Court Judge Richard Gergel determined that a federal permit to construct a $35 million cruise ship terminal in Charleston, South Carolina, was improperly issued by the Corps because the agency did not properly consider the scope of the project under NEPA. *Id.* at *1, *15–16. Although the permit at issue was required under the Rivers and Harbors Act rather than the CWA, Judge Gergel found that "[t]he Army Corps' determination to limit the 'scope of analysis' to the impact of five concrete pile clusters, rather than a new passenger terminal, dramatically and improperly constricted the assessment of the potential environmental and historic landmark impacts of the proposed activity." *Id.* at *11 ("The concrete pilings comprise no more than 0.01 acres and have,

B. Development Significantly Impacts the Human Environment

To determine whether a proposed project will have a "significant impact" on the Gullah Geechee, environmental justice concerns must be considered.[144] NEPA's "significant impact" prong is best suited for "identifying and addressing . . . [the] disproportionately high and adverse human health or environmental effects of programs, policies, and activities on minority populations and low-income populations . . . ."[145]

Under the CEQ regulations, agencies can consider only those effects that have "a reasonably close causal relationship to the proposed action."[146] Reasonably foreseeable effects are further limited to "what a person of ordinary prudence in the position of the agency decision maker would consider in reaching a decision."[147] When weighing the potential effects of a proposed project, the CEQ regulations require agencies to consider the "potentially affected environment."[148] The CEQ has explained that an agency's "consideration of economic and social effects is interrelated with consideration of natural or physical environmental effects."[149] Additionally, the CEQ regulations require agencies to consider the *degree* of the effects.[150] The CEQ has further clarified that "agencies 'should' (rather than 'may') consider the affected area specific to the proposed action . . . and the affected area's resources."[151]

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standing alone, no discernible adverse environmental or landmark impact. On the other hand, the proposed new passenger terminal would be 108,000 square feet and potentially would bring an estimated 350,000 cruise passengers to the area immediately adjacent to the landmark Charleston Historic District, more than tripling the number of cruise passengers visiting Charleston in 2010.").

144. *See* ENV'T PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 37 (1998).

145. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), *amended by* Exec. Order No. 12,948, 60 Fed. Reg. 6381 (Jan. 30, 1995).

146. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43343 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–08, 1515–18).

147. *Id.* at 43351.

148. 40 C.F.R. § 1501.3(b) (2021). Prior to the updated CEQ regulations, agencies were required to look at the "context," including societal, affected region and interests, locality, and the "intensity" or "severity of impact" in determining significance. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43321–22. The CEQ's final rule explains that "'potentially affected environment' relates more closely to physical, ecological, and socioeconomic aspects than 'context.'" *Id.*

149. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43331.

150. *Id.* at 43322. Several "intensity" factors have been reorganized under "degree." *Id.* "The final rule uses the term 'degree' because some effects may not necessarily be of an intense or severe nature, but nonetheless should be considered when determining significance." *Id.*

151. *Id.*

The Gullah Geechee people affected by land development are an example of a minority, low-income group that the Executive Order was meant to protect.[152] Residential and recreational development on Sea Island land has caused the Gullah Geechee's total population to increasingly dwindle; development has led to a shift in population from "the traditional rural black majority to an affluent white majority."[153]

Development of Sea Island land also has disproportionately high and adverse effects on the Gullah Geechee people who depend on that land to survive.[154] For the Gullah Geechee, "[l]and is widely considered the most valuable of all Gullah Geechee cultural assets. It has always been the base for economic and social development."[155] Development forces the Gullah Geechee to the boundary of their traditional Sea Island land and deprives them of their most valuable asset.[156]

In addition to the Sea Island land itself, the Gullah Geechee have historically depended on the land's natural resources for their ecology-based economy.[157] So much so that, for many Gullah Geechee, their only source of income is small family farms.[158] The Sea Island land is a fragile ecosystem, and "[p]oorly planned development . . . can cause shoreline erosion, polluted water, noisy and crowded surroundings, and extensive loss of trees, wetlands, fish and other wildlife."[159] Population growth spurred by development will likely have large-scale, adverse environmental effects as a reduction in land availability incentivizes developers to "fill in marshes, destroying fish and animal habitats."[160] Moreover, the use of pesticides, fertilizers, toxic chemicals, and pollutants during development may damage coastal

152. *See supra* Section II.A.

153. Dean, *supra* note 3, at 391 n.90.

154. *See id.* at 18 (explaining the risks of developing Sea Island land).

155. *Id.* at 179.

156. *See* Dean, *supra* note 3, at 378 ("Instead of living in a cohesive racial and economic environment, Sea Island resort and community developers erected gates and barriers on the barrier islands.").

157. *Id.* at 377.

158. MANAGEMENT PLAN, *supra* note 40, at 179 ("Small family farms are often the source of income for those who live on the Sea Islands in isolation of employment centers.").

159. Rhinehart & Pompe, *supra* note 35, at 543. Additionally, the Commission has identified a number of threats to cultural, historical, and natural resources within the heritage area caused by urbanization and development. *See* MANAGEMENT PLAN, *supra* note 40, at 18 ("The transition of natural areas to urbanized or developed areas poses a number of threats to Corridor resources, only some of which are . . . loss of wetlands and the ecological services they provide[,] habitat fragmentation, conversion from agricultural to urban land uses, and loss of arable land for locally grown food[,] loss of cultural landscapes[,] increases in impervious surfaces and increased urban stormwater problems that negatively impact water quality[,] [and] deteriorating air quality as a result of increased automobile traffic.").

160. *See* Rhinehart & Pompe, *supra* note 35, at 544.

habitats.[161] The continued existence of these habitats is threatened by "large amounts of nitrogen and phosphorous that pour daily into estuaries [and] result in algae blooms that remove oxygen from the water, sometimes producing fish kills."[162] Considering the Gullah Geechee's relationship with Sea Island land, harsh consequences arise when development damages the land's natural resources.[163]

The recent case of *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* provides an analogous example of the environmental justice analysis under NEPA.[164] In *Standing Rock*, the trial court found that the Corps violated NEPA because it did not "adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice . . . ."[165] In describing the inadequacy of the EA, the court explained:

> The EA is silent, for instance, on the distinct cultural practices of the Tribe and the social and economic factors that might amplify its experience of the environmental effects of an oil spill. Standing Rock provides one such example in its briefing: many of its members fish, hunt, and gather for subsistence. Losing the ability to do so could seriously and disproportionately harm those individuals relative to those in nearby non-tribal communities. The Corps need not necessarily have addressed that particular issue, but it needed to offer more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill.[166]

Although the court did not vacate the EA on remand, the most recent decision in *Standing Rock*'s ongoing litigation directed the Corps to complete an EIS.[167]

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161. *Id.*

162. *Id.*

163. *See* MANAGEMENT PLAN, *supra* note 40, at 18.

164. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017).

165. *Id.* at 112. While the court found the EA was sufficient for considering the impact of construction, it was insufficient in failing to consider the impact of a potential oil spill. *See id.* at 134. The EA simply stated: "The primary issue related to impacts on the aquatic environment from operation of the Proposed Action would be related to a release from the pipeline." *Id.* Additionally, the court found that the geographic scope selected by the Corps was unreasonable as it pertained to the impact of a potential oil spill. *Id.* at 138.

166. *Id.* at 140 (internal citations omitted).

167. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1, 29 (D.D.C. 2020). The court based its decision on the old, pre-revision CEQ regulations' "highly controversial" intensity factor and chose not to discuss the environmental justice issue because the outcome of the decision would be unaffected. *See id.* at 9.

Standing Rock suggests that an agency may be required to consider the Gullah Geechee's reliance on aquatic resources when making threshold determinations under NEPA.[168] Although the EA in *Standing Rock* was sufficient regarding construction impacts, the case proposed that an agency failing to adequately consider construction impacts when making a threshold NEPA determination would be subject to challenge on environmental justice grounds.[169]

It is important to note, however, that the *Standing Rock* court also stated, "[t]he Corps need not necessarily have addressed that particular issue" of the tribe losing its ability to "fish, hunt, and gather for subsistence."[170] But the "bare-bones conclusion" that the tribe "would not be disproportionately harmed by a spill" was insufficient.[171] The key reason this issue was considered in *Standing Rock* is because, in reply to the Corps' motion for summary judgment, Standing Rock demanded that the court address it.[172]

Notably, the resources relied upon by Standing Rock were implicated by treaty rights to water, fish, and game.[173] This may be problematic for the Gullah Geechee people because they cannot bolster an environmental justice argument by focusing on harm to natural resources guaranteed by treaty.[174] However, treaty rights are a nonessential component of an environmental justice challenge.[175] While the Gullah Geechee may argue they are guaranteed unfettered use of natural resources through the public trust doctrine,[176] at the very least, judicial review of an agency's threshold NEPA determination is a

168. *See Standing Rock*, 255 F. Supp. 3d at 140.

169. *Id.* at 139.

170. *Id.* at 140.

171. *Id.*

172. *Id.* at 131.

173. *See id.*

174. *See id.*

175. In its most recent decision in the ongoing litigation, the court indicated that the failure to consider a violation of treaty rights is separate from failure to consider the disproportionate harm caused an oil spill under an environmental justice analysis. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d. 1, 13 (D.D.C. 2020).

176. *See* Rivers, *supra* note 63, at 155–57 ("South Carolina's public trust doctrine has an extensive lineage . . . . As the doctrine evolved, the State's interest evolved from extraction of resources to acting as guardian of 'natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils)' for the public benefit. The State has claimed title to tideland, marshes and marsh islands, and existing and newly created wetlands, as well as the right to control land below the high water mark. This regulatory control has empowered the State to protect marine life and water quality for the public trust purposes of navigation and fishery." (footnotes omitted)). In her article, Rivers argues "the state may affirmatively utilize the public trust doctrine to protect coastal lands," and "this should be accomplished with sensitivity to the unique situation of heirs' property owners along the Gullah Coast." *Id.* at 155.

viable instrument that ensures environmental justice concerns are considered at the decision-making stage.[177]

C. NEPA's Limitations in the Gullah Geechee Context

Although NEPA presents an opportunity to raise environmental justice concerns, there are several limitations worth addressing.

1. NEPA Is Strictly Procedural

NEPA's main limitation is that it is "essentially procedural" and does not guarantee any substantive outcome.[178] Thus, as long as an agency adequately considers the potential impacts that a proposed action will have on a low-income, minority group, there is no requirement the agency take an alternative, less harmful course of action.[179] NEPA may, however, allow the Gullah Geechee to have a voice—which they have historically lacked—in reshaping their traditional lands.[180]

One way the Gullah Geechee can take advantage of NEPA is through the public comment process.[181] Where NEPA's fundamental requirements are met, the public comment period plays a critical role in decision-making by allowing opponents to raise objections.[182] The public comment process further draws scrutiny and criticism to a proposed project by calling agency action into question.[183] For the Gullah Geechee people, NEPA's public comment process presents an opportunity to have their voice heard by a new audience.[184]

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177. *See* Outka, *supra* note 111, at 605.

178. *Id.*

179. *See id.*; *Standing Rock*, 255 F. Supp. 3d at 136 (finding an EA was sufficient where it considered the impacts of construction on a low-income, minority group); Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin., 959 F. Supp. 2d 982, 999 (W.D. Ky. 2013) (finding no NEPA violation where agencies acknowledged that tolling facilities would disproportionately burden low-income areas, encouraged input from low-income and minority community representatives, and adopted various mitigation strategies to address potential disparate impacts).

180. *See supra* Section II.A.

181. *See* 40 C.F.R. § 1503.1 (2021).

182. *NEPA Rules Rewrite: Public Involvement Process*, NOSSAMAN LLP (Aug. 20, 2020), http://www.nossaman.com/newsroom-insights-nepa-rules-rewrite-public-involvement-process [https://perma.cc/E9E9-66A8].

183. *See* Outka, *supra* note 111, at 605.

184. The public comment process is of great consequence in a NEPA challenge because parties may not raise claims based on issues they themselves did not raise during the public comment period. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43317 (July 16, 2020) (to be codified

2. *Some Projects Are Not Major Federal Actions*

An inherent limitation of using NEPA in the Gullah Geechee context is that most development projects are undertaken by private developers, and any projects not requiring a federal permit do not constitute a major federal action for the purposes of NEPA.[185] Additionally, revisions to the definition of "waters of the United States" significantly limit the Corps' jurisdiction.[186]

To incorporate an environmental review for agency actions that are not considered major federal actions, a minority of states have adopted their own versions of NEPA.[187] These statutes are "commonly referred to as SEPAs—and many have incorporated environmental justice within those frameworks."[188] SEPA statutes require state agencies to prepare impact statements for proposed actions that affect the state's environment.[189] For states, like South Carolina, that have not enacted a SEPA statute, "it is less likely that environmental justice will consistently be a part of official decisionmaking" at the state level.[190] Therefore, South Carolina should follow other coastal states' lead and adopt a SEPA statute.[191]

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at 40 C.F.R. pts. 1500–08, 1515–18); *see, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764–65 (2004) (finding claims were forfeited because respondents had not raised particular objections to the EA in their comments). The updated CEQ regulations accelerate the NEPA process, meaning deadlines are now an even more important consideration during the public comment period. *See* 40 C.F.R. § 1500.3(b)(1) (2021); *see also* 40 C.F.R. § 1506.11(b). Although comments to proposed revisions of the CEQ regulations "noted [that] the fundamental proposed changes to nearly every step of the NEPA review process will disproportionately impact environmental justice communities and will reduce or limit opportunities for such communities to understand the effects of proposed projects and to participate in the NEPA review process," the CEQ responded that the final rule "expands the already wide range of tools agencies may use when providing notice to potentially affected communities and inviting public involvement." *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43356; *see* 40 C.F.R. § 1506.6(b) (explaining NEPA's public comment process).

185. *See supra* Section III.A.

186. *See supra* note 141 and accompanying text.

187. *See* Outka, *supra* note 111, at 611.

188. *Id.* In the thirty-four states that have not adopted a SEPA statute, including South Carolina, there is no similar requirement. *Id.*

189. 6 AM. JUR. 3D *Citizen Suit for Injunctive Relief Pending Federal Agency's Compliance with National Environmental Policy Act* § 12 (2020) [hereinafter *Citizen Suit for Injunctive Relief*].

190. *See* Outka, *supra* note 111, at 611.

191. There is some variance in the existing SEPA statutes that South Carolina could elect to follow. In some states, including North Carolina, the requirement of preparing an impact statement applies only to governmental agencies at the state level. *See* N.C. GEN. STAT. ANN. § 113A-4(2) (West 2015). In other states, the requirement of an impact statement applies to local governments as well as to some private developers. *Citizen Suit for Injunctive Relief*, *supra* note 189, § 12. For example, in *Berkeley Hillside Preservation v. City of Berkeley*, the City of

3. *NEPA Does Not Address the Heirs' Property Problem*

In the Gullah Geechee context, NEPA's most defeating limitation is its inability to directly address the heirs' property problem. By design, NEPA was not intended to address or prevent the purchase of land by a private developer, regardless of the purchase's injustice.[192] Additionally, while NEPA requires that agencies analyze and consider environmental justice consequences before taking a major federal action, the Supreme Court has noted that, when it enacted NEPA, Congress "did not require agencies to elevate environmental concerns over other appropriate considerations."[193] In the Gullah Geechee context, the main interest competing with environmental justice is economic development.[194]

The costs associated with NEPA compliance may disincentivize developers from aggressively targeting Sea Island land. Completing an EIS can be prohibitively expensive, possibly deterring development.[195] The cost of litigating related issues is a similar deterrent.[196] Developers may choose to abandon a project if total expected costs, including legal compliance and litigation, exceed expected returns.[197]

Berkeley's approval of use permits to build large residences was subject to review under the state's Environmental Protection Act. 343 P.3d 834, 858 (Cal. 2004). The court held that, unless the city could prove a categorical exemption to the state's Act on remand, it would be required to prepare an environmental impact report. *Id.* Thus, by enacting a SEPA statute similar to California's, South Carolina would require environmental review of proposed developments on Gullah Geechee Sea Island land if those developments require permits at the state or local levels.

192. *See supra* Section III.C.2.

193. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983).

194. *See supra* Section II.C. *But see* Rhinehart & Pompe, *supra* note 35, at 557 (discussing private developers' efforts to protect environmental resources along the South Carolina coast).

195. *See* U.S. GOV'T ACCOUNTABILITY OFF., NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 13 (2014) ("[A]n EIS typically cost[s] from $250,000 to $2 million."). President Trump's efforts to streamline NEPA resulted in several changes to expedite environmental process delivery—most notably, an emphasis on delivering an EIS in two years and any subsequent permitting 90 days thereafter. CHARLES P. NICHOLSON ET AL., 2018 ANNUAL NEPA REPORT OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) PRACTICE 31 (2019).

196. *See* John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 ENV'T L. 479, 497 (2020) ("Litigation that follows completion of a NEPA document can also add to the time-cost of NEPA compliance.").

197. *See id.* at 482. ("Staff to the U.S. House of Representatives Committee on Natural Resources asserted that NEPA is the 'weapon of choice'—a form of 'lawfare,' used by activists for the 'manipulation of the legal system' to 'stop, delay, restrict, or impose additional costs on all types of federal action.'").

Additionally, although NEPA does not directly address or solve the heirs' property problem, it may mitigate the harm to the Gullah Geechee.[198] Despite NEPA being a procedural statute that does not require agencies to adopt a mitigation plan,[199] mitigation measures may internalize the external costs of development imposed on the Gullah Geechee people. From an economic perspective, the environmental injustice suffered by the Gullah Geechee could be described as a harsh externality created by development of their traditional Sea Island land.[200] Accordingly, NEPA may give private developers an opportunity to internalize costs they impose on the native population through mitigation. The challenge with this approach is determining how to measure and remedy the damage done to the Gullah Geechee culture and way of life. Given the Gullah Geechee's reliance on natural resources, one form of mitigation that would at least attempt to alleviate this harm is providing access through conservation easements.[201]

IV. CONCLUSION

NEPA is a viable tool that ensures environmental justice concerns are considered at the decision-making stage for a proposed project on Sea Island land. When a proposed project triggers NEPA's requirements, the statute may allow for the Gullah Geechee to, at the very least, have a newfound voice in

198. *See* Albert I. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 ECOLOGY L.Q. 51, 72 (1986) ("[M]ost federal appellate courts which have considered the matter allow agencies to justify FONSI's with mitigation measures that reduce impacts to less than significant levels. This majority approach provides agencies with time and cost incentives to mitigate a project's significant impacts."). The updated CEQ regulations provide that agencies may consider mitigation measures if those measures would avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts, and they may also require mitigation pursuant to substantive statutes. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43324 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500–08, 1515–18).

199. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43324 n.82.

200. *But see* Rhinehart & Pompe, *supra* note 35, at 551 ("Because the developers own most of the natural resources on the islands, they internalize the costs associated with decisions regarding resource use.").

201. *See* Dean, *supra* note 3, at 396–97. ("Conservation easements may also prove to be an effective technique to protect land in the Sea Islands."). *See generally* Ann Harris Smith, *Conservation Easement Violated: What Next? A Discussion of Remedies*, 20 FORDHAM ENV'T L. REV. 597–98 (2010) ("Conservation easements have become very popular because they meet the needs of conservation organizations and landowners. Easements appeal to conservation organizations because many landowners are willing to donate them, allowing the organizations to protect land at little or no cost. Conservation easements are attractive to landowners because they often provide substantial tax benefits, and they allow owners to protect their land in perpetuity while still maintaining ownership of it.").

reshaping their traditional lands. Although NEPA is an imperfect solution that would not directly address the heirs' property problem, its heightened compliance requirements could delay and disincentivize developments that require a federal permit.[202] Additionally, NEPA would allow the Gullah Geechee to bargain for mitigation when development threatens their traditional culture and way of life on Sea Island land.

202. *See* Outka, *supra* note 111, at 605.