

FEED IT TO THE OCEAN: THE FEDERAL APPROACH TO DECOMMISSIONING IN ALASKA NATIVE CLIMATE ADAPTATION PROJECTS

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SUMMARY

This Article calls on the Council on Environmental Quality (CEQ) to issue guidance clarifying that concurrent decommissioning is a “connected action” under the National Environmental Policy Act for relocation, managed retreat, and protect-in-place projects aimed at replacing infrastructure in environmentally threatened Alaska Native communities. In 2018, the Denali Commission completed the final environmental impact statement for Alaska’s first community-driven village relocation of the millennium, facilitating construction of essential infrastructure at Mertarvik, Newtok’s relocation site. The Commission chose to exclude a full-scale decommissioning plan for Newtok’s existing infrastructure. Over 73 Alaska Native villages face unprecedented severe threats from flooding, erosion, permafrost degradation, and the combined effects of each. The Commission’s segmented approach to decommissioning exposed critical gaps in interagency cooperation, tribal consultation, and funding priorities, setting a dangerous precedent for similar at-risk communities facing toxic pollution of their water and subsistence resources. As tribal organizations and partner agencies work to protect these communities from environmental threats and historic inequities, CEQ guidance on decommissioning is more pressing now than ever.

If we cannot get this right, what happens to the rest?

—Romy Cadiente, *Relocation Coordinator*,
Newtok Village Council, 2017¹

As the planet heats and the sea level rises, vulnerable low-lying and coastal communities will increasingly release hazardous waste into their surrounding environments.² Warming four times faster than the rest of the United States due to Arctic amplification,³ 73 highly threatened Alaska Native villages face flooding, erosion, permafrost

thaw,⁴ and various combinations of each—such as *usteq*, a Yup’ik word to define catastrophic destruction of perma-

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1. VICE News, *Climate Change Is Making This Alaska Town Fall Into the Ocean*, YouTube (Nov. 16, 2017), <https://www.youtube.com/watch?v=G40ooKz1664>.
 2. See, e.g., *Effects of Coastal Sea Level Rise on US Hazardous Waste*, U.S. ENV’T PROT. AGENCY (May 18, 2023), <https://rcrapublic.epa.gov/rcra-public-web/action/posts/5>.
 3. Mika Rantanen et al., *The Arctic Has Warmed Nearly Four Times Faster Than the Globe Since 1979*, 3 COMM’NS EARTH & ENV’T art. 168 (2022), <https://doi.org/10.1038/s43247-022-00498-3>.

4. U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), GAO-22-104241, REPORT TO CONGRESSIONAL REQUESTERS; ALASKA NATIVE ISSUES: FEDERAL AGENCIES COULD ENHANCE SUPPORT FOR NATIVE VILLAGE EFFORTS TO ADDRESS ENVIRONMENTAL THREATS 19 (2022) [hereinafter GAO-22-104241]; but see ALASKA NATIVE TRIBAL HEALTH CONSORTIUM (ANTHC), THE UNMET NEEDS OF ENVIRONMENTALLY THREATENED ALASKA NATIVE VILLAGES: ASSESSMENT AND RECOMMENDATIONS 7 (2024), https://www.anthc.org/wp-content/uploads/2024/01/Unmet_Needs_Report_22JAN24.pdf (“144 Alaska communities face infrastructure damage from erosion, flooding, and permafrost degradation.”); GAO, GAO-04-142, REPORT TO CONGRESSIONAL COMMITTEES; ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 2 (2003) [hereinafter GAO-04-142] (“Flooding and erosion affects 184 out of 213, or 86 percent, of Alaska Native villages to some extent.”); UNIVERSITY OF ALASKA FAIRBANKS INSTITUTE OF NORTHERN ENGINEERING ET AL., STATEWIDE THREAT ASSESSMENT: IDENTIFICATION OF THREATS FROM EROSION, FLOODING, AND THAWING PERMAFROST IN REMOTE ALASKA COMMUNITIES A-1 to A-11 (2019) (Rep. No. INE 19.03), <https://www.denali.gov/wp-content/uploads/2019/11/Statewide-Threat-Assessment-Final-Report-20-November-2019.pdf> (ranking 187 communities across three categories of threatened infrastructural risk: erosion, flooding, and permafrost degradation); see also *Alaska’s Environmentally Threatened Communities*, STATE ALASKA DIV. GEOLOGICAL & GEOPHYSICAL SURVS. (Feb. 23, 2021), <https://storymaps.arcgis.com/stories/2a0d221e55ca48dd8092427b50a98804>

frost with associated land collapse, as well as lost sea ice and permafrost coastal protection.⁵ Alaska Native villages are subject to federal policies designed to mitigate these threats through adaptive management infrastructural development projects, also called relocation, managed retreat, or protect-in-place (RMP) projects.⁶

Today, federal agencies leading RMP projects in environmentally threatened Alaska Native villages question whether decommissioning original facilities is within the scope of the same National Environmental Policy Act (NEPA) environmental assessment (EA) process as construction of the facilities designed to replace them. Unfortunately, the current approach is to punt reasonably foreseeable decommissioning to an unspecified future date under an unknown authority. The gap in agency authority and accountability, combined with a lack of explicit guidance by the Council on Environmental Quality (CEQ), deteriorates the health and natural environment of these communities, worsening the environmental/climate injustices and undermining mitigation efforts.⁷

Central to these challenges is the emergence of waste-erosion sites—locations where improperly managed waste from compromised infrastructure is released into the environment due to escalating erosion and permafrost thaw, further endangering subsistence resources and exacerbating the ecological and public health crises facing Alaska Native villages. To date, the generation of waste-erosion sites in Alaska is a combined product of (1) Arctic amplification climate warming⁸; (2) improper placement of *permanent* village infrastructure⁹; (3) inadequate rural Alaska

solid waste standards and federal policies on consumer economies and waste management¹⁰; and (4) a failure to integrate decommissioning into RMP projects.¹¹

This Article focuses on the fourth point listed above, and suggests that decommissioning should be an in-scope “connected action” for the RMP projects that replace the same functional type of infrastructure existing at the threatened site, thus occurring concurrently. While existing scholarship asserts the federal duty to relocate environmentally threatened Alaska Native villages,¹² this is the first to focus on decommissioning and the federal responsibility to correct existing and future violations of environmental quality for the health and safety of Alaska Native subsistence communities. Ultimately, the Article exposes a partially executed commitment to Alaska Natives, and asks for its assertion in full.

Part I introduces a representative Alaska village RMP project: the village of Newtok’s survival initiative to relocate to Mertarvik. It also provides background on the historical and legal framework governing Alaska tribes, the health impacts from toxic waste-erosion sites, RMP and backhauling concepts and logistics, as well as the impacts of the Denali Commission’s scoping decision in Newtok on future funding proposals. Part II exposes improper EA scoping, contentious interagency consultations, and inadequate tribal consultations. Part III then calls upon CEQ to issue NEPA guidance clarifying decommissioning as a “connected action” when considered for Alaska’s tribal RMP projects. Part IV concludes.

I. Newtok Relocation: Background and Agency Relations

This part builds the background necessary to assert that decommissioning should be within the scope of Alaska tribal RMP projects. The relocation of Newtok is the first Alaska Native village relocation within the millennium, serving as a pilot project and case study for Alaska’s many other environmentally threatened communities. While the Denali Commission faced programmatic limitations,¹³ its inability to secure the full resources required for this landmark proj-

(maintaining an ArcGIS map of Alaska’s at-risk communities according to the University of Alaska Fairbanks 2019 *Statewide Threat Assessment* report).

5. Robin Bronen et al., *Usteq: Integrating Indigenous Knowledge and Social and Physical Sciences to Coproduce Knowledge and Support Community-Based Adaptation*, 43 POLAR GEOGRAPHY 188, 189 (2019); F. Stuart Chapin III et al., *Alaska*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES 514, 534 (Jerry M. Melillo et al. eds., U.S. Global Change Research Program 2014):

[L]ack of sea ice causes storms to produce larger waves and more coastal erosion. An additional contributing factor is that coastal bluffs that were “cemented” by permafrost are beginning to thaw in response to warmer air and ocean waters, and are therefore more vulnerable to erosion. Standard defensive adaptation strategies to protect coastal communities from erosion such as use of rock walls, sandbags, and riprap have been largely unsuccessful.

6. See *infra* Section I.D.1.

7. See, e.g., Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 447 (2018) (discussing climate justice—the field that attends to the direct relationship between social inequality and environmental degradation resulting from climate change):

This climate destabilization would have significant implications for the law, generally, and the civil and political rights of all of us, particularly the most vulnerable. In the United States, the field of climate justice has been concerned with the most vulnerable, as it explores the intersection of race, poverty, and climate change.

8. Rantanen et al., *supra* note 3; U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), CLIMATE ADAPTATION ACTION PLAN 5, 6 (2021), <https://www.epa.gov/system/files/documents/2021-09/epa-climate-adaptation-plan-pdf-version.pdf>:

Alaskan landfills situated on melting permafrost are contaminating local water supplies and threatening the health of ecosystems and communities. Climate impacts can increase the amount of debris sent to landfills and can also encroach on the landfills. Climate change is expected to produce more frequent and powerful natural disasters, which will increase the amount of disaster-related wastes.

9. See *infra* notes 15-20 and accompanying text.

10. See *infra* note 64 and accompanying text; see generally Mary Jo T. Greipp, *Post-Fort Gratiot Landfill Regulation: Solid Waste Disposal and the Dormant Commerce Clause*, 2 WIDENER J. PUB. L. 781 (1993) (discussing the judiciary doctrine and case law restricting local governments’ ability to regulate waste management).

11. In 2015, the Alaska Department of Environmental Conservation (ADEC) Waste Erosion Assessment and Review (WEAR) Project inventoried more than 700 eroding landfills and contaminated sites in 124 rural Alaska communities. SOLID WASTE PROGRAM, ADEC, WASTE EROSION ASSESSMENT AND REVIEW (WEAR) FINAL REPORT i, v, vi (2015), <https://dec.alaska.gov/eh/solid-waste/wear-project/>.

12. See generally Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179 (2020); see also *infra* note 42 and accompanying text.

13. E-mail from Don Antrobus, prior Village Infrastructure Protection Program Manager, Denali Commission, to author (Nov. 14, 2024, 12:51 HST) (on file with author) (“The Commission received roughly \$25 [million] from congress intended to jumpstart the process. This amount was a fraction of the total amount that was needed to complete the relocation but enough to make some concrete progress and move people out of Newtok to a safer location.”).

ect inadvertently establishes a “feed it to the ocean” federal policy, now influencing the scoping and funding schemes for similar statewide tribal RMP projects.¹⁴

A. Newtok Settlement and Relocation Project Development

People often question why we chose to live in these places. What many do not realize is these places were chosen for us.¹⁵

Most Alaska Native groups have only transitioned within the past century from an adaptive mobility lifestyle that is nomadic with seasonal subsistence resources, to what has been coined as the “persistent village.”¹⁶ Congressionally mandated child attendance at the Bureau of Indian Affairs’ (BIA’s) schools built along Alaska’s western coast and riverbanks caused much of the Alaska Native population to consolidate and settle in their current locations.¹⁷ Unfortunately, the locations chosen for “settled” villages were largely determined by ease of access for federal or third-party entities, rather than traditional ecological knowledge of long-term habitability.¹⁸

As late as 1936, the Newtok village site served only as the community’s winter residence.¹⁹ Around 1950, Newtok villagers relocated and “settled” at the current, eroding site because it was the farthest point up the Ninglick River that BIA would navigate to barge and off-load school building materials.²⁰ By 2010, Newtok included 72 households.²¹

In 2016, the population was 372, with 96% identified as American Indian/Alaska Native.²²

The Ninglick River has eroded the coast at rates of up to 100 feet per year—totaling more than 4,000 feet since Newtok’s settlement—reaching the sewage disposal site, landfill, barge landing, and boat dock by 2017.²³ Relocation was recommended to Newtok in a 1984 river erosion assessment.²⁴ The tribe began intensively evaluating relocation sites in 1994.²⁵

After years of planning, the U.S. Congress authorized a land exchange in 2003 between the Newtok Native Corporation and the U.S. Department of the Interior (DOI) to facilitate a new village site at Mertarvik, located nine miles away across the Baird Inlet on Nelson Island.²⁶ In April 2018, the Commission finalized its record of decision (ROD) for the final environmental impact statement (EIS), which outlined development plans for new critical infrastructure at Mertarvik to replace the at-risk facilities in Newtok.²⁷ In 2019, 120 Newtok residents relocated to Mertarvik.²⁸

Mertarvik’s development occurred in multiple phases, creating the critical infrastructure in place today.²⁹ Throughout its phased development, Newtok’s relocation efforts have been marked by a contentious leadership transition,³⁰ multiple iterations of community layout

14. For purposes of this Article, *feed-it-to-the-ocean* policy refers to the choice to exclude decommissioning infrastructure designed to be replaced by an Alaska tribal RMP project from the scope of the environmental review. See *infra* Section I.D.3.

15. ANTHC, *supra* note 4, at 16 (quoting Clarence Daniel, community development division director, Association of Village Council Presidents, born and raised in Tuntutuliak, Alaska-Bethel Census Area).

16. Gigi Berardi, *Schools, Settlement, and Sanitation in Alaska Native Villages*, 46 *ETHNOHISTORY* 329, 330 (1999).

17. Other historical driving factors vary for permanent village settlements across Alaska. Trading posts, the discovery of gold, and the institutionalization of schools, for example, affected the social, political, economic, spiritual, cultural, and locational redefinition of the Gwich’in people in the Alaskan Yukon. Charlene Barbara Stern, *From Camps to Communities: Neets’ąjį Gwich’in Planning and Development in a Pre- and Post-Settlement Context* 27, 87-88 (May 2018) (Ph.D. dissertation, University of Alaska Fairbanks) (Scholarworks@UA).

18. See *id.*; DENALI COMMISSION, *RECORD OF DECISION: MERTARVIK INFRASTRUCTURE DEVELOPMENT, NELSON ISLAND, ALASKA* 163 (2018), <https://www.denali.gov/wp-content/uploads/2018/10/Final-Mertarvik-EIS-Complete-with-Signed-ROD-April-2018.pdf> (including the final environmental impact statement (EIS)).

19. DENALI COMMISSION, *supra* note 18, at 162. In Yup’ik, Newtok is written as *Niutgaq*, which translates to “rustling of grass.” *Id.*

20. *Id.* at 162-63.

The USGS [U.S. Geological Survey] first reported the village of Newtok in 1949, when the community moved from Old Kealavik (*Kayalivik* or *Keyaluvik*), a winter village located to the west of Newtok, to a site across the Newtok River from the current village location. . . . The traditional seasonal settlement pattern was retained into the 1960s, with most of the community summering in fish camps on Nelson Island and wintering at Newtok. By the 1970s, Newtok residents began to be more sedentary; the development of the current village community with a school, health clinic, airstrip, and modern housing encouraged a year-round population at Newtok.

21. *Id.* at 163.

22. *Id.* Here, the term “Alaska Natives” is used to cover all Indigenous peoples of Alaska; but Newtok is predominantly Yup’ik. See University of Alaska Fairbanks, Alaska Native Language Archive, *Indigenous Peoples and Languages of Alaska*, <https://www.uaf.edu/anla/collections/map/> (last visited Jan. 17, 2025).

23. ARCTIC SLOPE CONSULTING GROUP, *NEWTOK TRANSPORTATION PLAN* vi (2001); NEWTOK VILLAGE COUNCIL, *NEWTOK TO MERTARVIK RELOCATION* 2 (2017).

24. WOODWARD-CLYDE CONSULTANTS, *NINGLICK RIVER EROSION ASSESSMENT* add. (1984), https://www.commerce.alaska.gov/web/Portals/4/pub/Ninglick_River_Erosion_Assessment_Addendum_November_29_1984.pdf (“[R]elocating Newtok would likely be less expensive than trying to hold back the Ninglick River.”). Three years after the 1984 assessment, Newtok invested \$750,000 into sandbag revetment protection that ultimately failed to slow the rate of erosion. GAO-04-142, *supra* note 4, at 34.

25. DENALI COMMISSION, *supra* note 18, at 20.

26. *Id.* at 29-30; Alaska Native Village and the Interior Department Land Exchange, Pub. L. No. 108-129, 117 Stat. 1359 (2003) [hereinafter *Newtok Land Exchange*].

27. See DENALI COMMISSION, *supra* note 18, at 1:

The Final Environmental Impact Statement (FEIS) assessed the potential environmental impacts of constructing critical infrastructure at a new community site at Mertarvik. Included in the analysis was a solid waste landfill; wastewater collection system and treatment lagoon; bulk fuel farm and fuel dispensing facility; power house and power distribution system; telecommunications building; water well field, treatment plant, storage tank, and distribution lines; housing; school; all associated connecting roads and trails; and a new airport runway, taxiway and apron.

28. ANTHC, *supra* note 4, at 31.

29. As of 2023, Mertarvik has 28 homes, an evacuation center, barge landing, rock quarry, runway, landfill, diesel power plant, bulk fuel tank farm, water treatment plant, interim schoolhouse, interim clinic, and small general store. *Id.* (“Three critical projects are remaining for the substantial completion of the Newtok relocation: a school, sufficient housing, and community water and sewer systems. Housing is the highest priority, with an additional 49 housing units (estimated at \$22 million) required to relocate the entire population.”).

30. See *Newtok Vill. v. Patrick*, 21 F.4th 608 (9th Cir. 2021); see *infra* text accompanying note 59.

plans,³¹ and various state and federal assistance programs.³² Excluding decommissioning, the total costs for Newtok's infrastructural projects are now estimated at nearly a quarter-billion dollars (in 2024 dollars),³³ roughly half of the Commission's initial estimates and 10 times its initial congressional funding.³⁴

B. Denali Commission's Purpose and Power

In 1998, Congress established the Denali Commission as part of a series of regional federal commissions formed to promote partnerships between federal, state, and local governments to specifically address the lack of infrastructure, poverty, and unemployment in rural areas.³⁵ Immediately after becoming the first sitting president to visit an Alaska community above the Arctic Circle, in 2015, President Barack Obama designated the Denali Commission as the lead coordinator for the federal effort to build Alaska Native climate resilience.³⁶ The Commission did not receive

any new funding with this new assignment or the power to lead and coordinate federal assistance.³⁷

Congress materializes policies and assigns statutory biases in executive agencies through statements of purpose and prioritization in its legislative establishment, or in the structured role of the body itself. The Denali Commission's primary statutory mandate prioritizes economic and infrastructural development in rural communities.³⁸ While it is also tasked with a "Special Function" to support "Demonstration Health Projects" aimed at addressing environmental risks to sanitation health, this secondary function emphasizes protecting "drinking water supplies," and notably omits any reference to subsistence resources.³⁹ Thus, as this Article shows, the Commission's delegated purpose establishes a bias that is too narrow to exclusively manage the diverse array of needs in Alaska's tribal RMP projects.⁴⁰

C. Contextualizing the Injury: Alaska Natives' Legal and Toxic Landscape

This section provides a brief overview on Alaska Native rights, delegated authorities in Newtok's relocation, and other contributing factors that make up the legal landscape for Alaska tribes' RMP projects. This Article focuses exclu-

31. See Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs, *Newtok Planning Group—Community Layout Planning*, <https://www.commerce.alaska.gov/web/dkra/PlanningLandManagement/NewtokPlanningGroup/CommunityLayoutPlanning.aspx> (last visited Jan. 17, 2025).

32. The barge landing in 2006 was the first infrastructural development in Mertarvik, funded by a \$2-million grant match between the U.S. Department of Commerce's Economic Development Administration and the state of Alaska. *Id.* at 32.

33. BIA, INFORMATIONAL REPORT: THE UNMET INFRASTRUCTURE NEEDS OF TRIBAL COMMUNITIES AND ALASKA NATIVE VILLAGES IN PROCESS OF RELOCATING TO HIGHER GROUND AS A RESULT OF CLIMATE CHANGE app. C, at 7 (2020):

The total cost of development in Mertarvik to date is between \$60 and \$70 million. . . . The total estimated remaining need for the relocation, excluding the airport, is \$85 million. . . . The State of Alaska Department of Transportation will relocate the airport due to erosion—a \$40 million effort that will take place in several years.

The total estimated cost of the Mertarvik development project in 2024 dollars is approximately \$243 million. Adjusted for inflation, from 2017 to 2024, the total costs increase the reported "\$70 million" to approximately \$90 million; the "\$85 million" remaining estimate to \$104 million; and the "\$40 million" airport estimate to \$49 million.

34. See DENALI COMMISSION, *supra* note 18, at 1 ("The cost of building an entire community is daunting; early estimates suggest that roughly \$120 million will be needed for development of all community infrastructure."); E-mail from Don Antrobus, *supra* note 13.

35. DENALI COMMISSION, DENALI COMMISSION STRATEGIC PLAN FY 2024-2028, at 8 (2024), https://02e11d.a2cdn1.secureserver.net/wp-content/uploads/2024/03/FY-24-28-Strategic-Plan-FINAL_v21.pdf; Denali Commission Act of 1998, Pub. L. No. 105-277, div. C, tit. III, 112 Stat. 2681-637 (codified as amended at 42 U.S.C. §3121 note); JULIE M. LAWHORN, CONGRESSIONAL RESEARCH SERVICE, IF11140, FEDERAL REGIONAL COMMISSIONS AND AUTHORITIES: OVERVIEW OF STRUCTURE AND ACTIVITIES 1 (2024), <https://crsreports.congress.gov/product/pdf/IF/IF11140/47>.

36. See Denali Commission Fiscal Year 2016 Draft Work Plan, 81 Fed. Reg. 24570 (Apr. 26, 2016); Fact Sheet, The White House, President Obama Announces New Investments to Combat Climate Change and Assist Remote Alaskan Communities (Sept. 2, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/02/fact-sheet-president-obama-announces-new-investments-combat-climate>.

In 2015, President Obama simultaneously issued an Executive Order forming the Arctic Executive Steering Committee (AESC) to coordinate federal policy and collaborate diverse stakeholders. Exec. Order No. 13689, 80 C.F.R. 4191 (1985-2016), *reprinted as amended* in 15 U.S.C. §1401 (2015). While the Order advocates for holistic agency coordination and tribal consultation, it provides inadequate protection of Alaska Native health. First, the AESC focuses on guidance rather than project management. Second, its Executive Order structure makes it vulnerable to adminis-

trative changes, as demonstrated during the first Donald Trump presidency. See GAO-22-104241, *supra* note 4, at 26-29 n.43:

The Community Resilience Working Group was created under the Arctic Executive Steering Committee, which was established by executive order in 2015 and operated for several years prior to becoming dormant because of changing administration priorities. When the steering committee was inactive, the working group continued to meet informally. The steering committee was reinstated in 2021.

Third, the president cannot impose a policy that conflicts with an agency's statutory purpose, such as the Denali Commission's focus on fostering economic and infrastructural development in rural Alaska, as outlined in this section.

37. GAO-22-104241, *supra* note 4, at 29-30 n.44; Rachel Waldholz, *Obama Brought Attention to Threatened Arctic Villages, but Little Funding So Far*, ALASKA PUB. MEDIA (Dec. 19, 2016), <https://alaskapublic.org/news/2016-12-20/obama-brought-attention-to-threatened-arctic-villages-but-little-funding-so-far> (quoting Joel Neimeyer, co-chair of the Denali Commission: "All of Alaska now knows the Commission has this assignment. . . . My concern is, if in future appropriations there are no funds for this effort, that's immaterial to rural Alaska. They're still going to come to us and say, 'this is your assignment. See it through.'"); see GAO, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 42 (2009) ("Denali Commission officials stated that significant staffing and funding increases would be needed for the commission to take the lead role for village relocations in addition to its existing responsibilities.").

38. See Denali Commission Act of 1998 §302 (as amended 2022), <https://02e11d.a2cdn1.secureserver.net/wp-content/uploads/2022/03/Denali-Commission-Act-updated-March-2022.pdf>.

39. "Demonstration Health Projects" illustrate "the value of adequate health facilities and services to the *economic development* of the region," and address "deficiencies in solid waste disposal sites which threaten to contaminate rural drinking water supplies." *Id.* §307(c), (d) (emphasis added).

40. See also Lyla June Johnston, *Architects of Abundance: Indigenous Regenerative Food and Land Management Systems and the Excavation of Hidden History* 283-84 (Dec. 2022) (Ph.D. dissertation, University of Alaska Fairbanks) (Scholarworks@UA) ("The implication here is that until industrial society amends its principles and values (*and corresponding goals*), we will not achieve the level of sophistication, sustainability, and success of IRED [Indigenous regenerative ecosystem design] cultures.") (emphasis added).

sively on domestic law, and thus dedicates subsection 2 of this section to proof of injury.⁴¹

1. Federal Indian Law Overview for Alaska Tribes' RMP Projects

President Obama's 2015 assignment to the Denali Commission strengthened the role of this statutory body in fulfilling federal obligations aligned with the federal-tribal trust relationship, securing tribal lands for Alaska Natives' use and occupation.⁴² The federal-tribal land-based trust responsibility requires the federal government to protect subsistence practices when addressing environmental threats to Alaska Natives. This requirement is explicitly affirmed in the Newtok Land Exchange: "residents of the Village of Newtok, Alaska, shall retain access rights to subsistence resources on those Newtok lands as guaranteed under section 811 of ANILCA [Alaska National Interest Lands Conservation Act], and to subsistence uses, such as traditional subsistence fishing, hunting, and gathering."⁴³

Even the seemingly expansive state and federal definitions of "subsistence uses"⁴⁴ fall short of fully encompassing

the intricate way Alaska Natives are tied to their natural ecosystems and generational livelihoods, as reflected in their values of communal land use, sacred balance, and living reciprocity with the environment.⁴⁵ Within the legal framework, subsistence rights are deeply intertwined with Alaska Native self-determination, land ownership, trust relations, and tribal sovereignty—not separate from them.⁴⁶ Upholding subsistence rights is a primary way for the federal government to honor tribal sovereignty, ensuring Alaska Natives' long-term health and cultural identity by protecting the ecosystems sustaining their livelihood.⁴⁷

41. Under domestic law, establishing standing or liability generally requires evidence of injury or the risk thereof. In contrast, international law allows for remedies based on breaches of obligations without necessitating proof of harm. While a detailed analysis lies beyond the scope of this Article, it is worth noting that international law treats the contamination of Indigenous food sources as a human rights violation, extending beyond the limited framework of transboundary marine pollution. *See* United Nations Convention on the Law of the Sea arts. 194, 207, Dec. 10, 1982, 1833 U.N.T.S. 397; International Covenant on Economic, Social, and Cultural Rights art. 12, Dec. 19, 1966, 993 U.N.T.S. 3.

42. Organic Act of May 17, 1884, §8, 23 Stat. 24 (allowing Congress to control future tribal title rights to land while restricting federal interference with tribal "possession of any lands actually in their use or occupation"); *see* Fact Sheet, The White House, *supra* note 36. While a detailed analysis of federal trust duties is outside the scope of this Article, Congress has arguably affirmed the federal trust relationship for Alaska Native village relocations. *See* Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 FORDHAM ENV'T L. REV. 10, 42 (2013) (highlighting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9626(b) (2018), which authorizes the permanent relocation of tribes and villages threatened by hazardous waste contamination, as evidence of this trust responsibility); Robert J. Martin, *The Village of Kivalina Is Falling Into the Sea: Should CERCLA Section 9626(B) Be Available to Move the Village From Harm's Way?*, 2 ENV'T & EARTH L.J. 1, 20 (2012); *but see* Arizona v. Navajo Nation, 599 U.S. 555, 567 (2023) (holding that treaty language establishing a "permanent home" for the Navajo did not impose an affirmative obligation on the United States to secure water for the tribe). Courts have also been reluctant to acknowledge enforceable federal trust obligations under the Indian Health Care Improvement Act of 1976 (IHCA), 25 U.S.C. §1602 (2010). *See* Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986, 999 (D.S.D. 2020), *aff'd*, 9 F.4th 1018 (8th Cir. 2021); *but see* Lauren E. Schneider, *Trust Betrayed: The Reluctance to Recognize Judicially Enforceable Trust Obligations Under the Indian Health Care Improvement Act (IHCA)*, 52 LOY. U. CHI. L.J. 1099, 1103-05, 1120-21 n.97 (2021) (arguing for a federal obligation to provide health care services under the federal-tribal trust doctrine, as expressed through IHCA legislation).

43. Newtok Land Exchange, *supra* note 26 (citations omitted and emphasis added).

44. 16 U.S.C. §3113 (1980) (ANILCA):
[T]he term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft

articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

see also ALASKA STAT. §16.05.940(34) (2023). ANILCA imposed a federal obligation to balance conservation with subsistence rights, ensuring rural residents, particularly Alaska Natives, could continue traditional uses of federal lands while protecting designated wilderness areas. *See generally* Thomas F. Thornton et al., *Alaska Natives and the State's Political Economy: Changing Power Relationships*, in ALASKA POLITICS AND PUBLIC POLICY: THE DYNAMICS OF BELIEFS, INSTITUTIONS, PERSONALITIES, AND POWER 300-03 (Clive S. Thomas et al. eds., 2016).

45. *See* DENALI COMMISSION, *supra* note 18, at 169; Elizabeth Barrett Ristorph, *Alaska Tribes' Melting Subsistence Rights*, 1 ARIZ. J. ENV'T L. & POL'Y 47, 49-50 (2010); Adam Weymouth, *When Global Warming Kills Your God*, ATLANTIC (June 3, 2014), <https://www.theatlantic.com/national/archive/2014/06/when-global-warming-kills-your-god/372015/>:

"If Yup'ik people do not fish for King Salmon, the King Salmon spirit will be offended and it will not return to the river." A Yup'ik fisherman who is a sincere believer in his religious role as a steward of nature, believes that he must fulfill his prescribed role to maintain this "collaborative reciprocity" between hunter and game. Completely barring him from the salmon fishery thwarts the practice of a real religious belief. Under Yup'ik religious belief, this cycle of interplay between humans and animals helped perpetuate the seasons; without the maintaining of that balance, a new year will not follow the old one.

(quoting a trial brief).

46. As Inupiaq leader, William Hensley, states:
Basically, we did not fight for the land because it represented capital, or because it represented money, or because it represented business opportunities. We fought for the land because it represents the spirit of our people. It represents your tribes and it represents your ancestors and it represents that intimate knowledge of the land that your people grew up on for ten thousand years. And when we fought for the land we were fighting for survival as people with an identity—people with a culture.

ALEXANDRA J. McCLANAHAN, SAKUUKTUGUT 15 (Anchorage: The CIRI Foundation 2006).

47. The federal obligation and failed approach of its subsistence trust duty has been recognized by DOI and congressionally. *See* Subsistence Management Regulations for Public Lands in Alaska; Rural Determination Process, 80 Fed. Reg. 68249 (Nov. 4, 2015) ("On October 23, 2009, Secretary of the Interior Salazar announced the initiation of a Departmental review of the Federal Subsistence Management Program in Alaska . . . information indicated a broad dissatisfaction with the current rural determination process."); *Subsistence: Hearing Before the Committee of Energy and Natural Resources to Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act*, S. HRG. 113-118, 113th Cong. 4 (Sept. 19, 2013) (statement of Alaska Senator Lisa Murkowski) ("We recognize in Alaska that the Federal Government fails to prioritize land-management decisions for subsistence to ensure healthy and abundant populations for consumption."). "Food sovereignty" is a corollary term for subsistence rights. *See* Alexandra Fay, *True Co-Management: Critical Approaches to Indigenous Food Sovereignty*, 41 YALE L. & POL'Y REV. 233, 235, 239 (2022) (quoting LA VIA CAMPESINA, FOOD SOVEREIGNTY, A MANIFESTO FOR THE FUTURE OF OUR PLANET (2021)); International Whaling Commission, *Description of the USA Aboriginal Subsistence Hunt: Alaska*, <https://iwc.int/alaska> (last visited Jan. 17, 2025).

Access to subsistence resources has become a critical battleground for asserting tribal self-determination.⁴⁸ As experts in their own culture and traditions, Alaska Natives swiftly discern when government actions infringe upon their subsistence rights; however, for technical projects requiring extensive agency coordination, such as water treatment and power plant designs, tribes often depend on and defer to consultant and agency expertise throughout the project's life cycle, from scoping to operations.⁴⁹ While governmental assistance is crucial for navigating technical complexities, federal aid itself can threaten Alaska Native self-determination when agency control overshadows tribal sovereignty and violates tribal rights.⁵⁰

In 2018, the Newtok Village Council (NVC) signed a resolution selecting the Alaska Native Tribal Health Consortium (ANTHC)⁵¹ as the “overall manager” for the relo-

cation.⁵² The Denali Commission is also a federal partner with ANTHC's Division of Environmental Health and Engineering, including the Center for Environmentally Threatened Communities (CETC).⁵³ Despite ANTHC's unique role with both NVC and the Commission, this does not diminish the Commission's statutory duty to deliver federal government services while adhering to principles of the federal-tribal relationship, including respect for tribal sovereignty.⁵⁴ In other words, no partnership allows the Commission to detach from its congressional mandate.

Additionally, the intricate relationship between tribal sovereignty, federal trust duties, self-determination, and intergovernmental regulatory obligations underscores the need for effective cross-cultural communication to support meaningful tribal participation.⁵⁵ This communication should precede direct tribal engagement in critical decisionmaking and include necessary accommodations—such as translators and multiple meetings—to align with federal tribal consultation directives designed to meet tribes' specific needs.⁵⁶ Further, the variation in tribal and

48. See, e.g., Native American Rights Fund, *Hunting and Fishing Rights (Katie John v. Norton)*, <https://narf.org/cases/katie-john-v-norton/> (last visited Jan. 17, 2025). Katie John's case centers on the legal battle to secure the subsistence fishing rights of Alaska Natives, highlighting the intersection of Indigenous rights and federal authority over natural resources. As Anna Hoffman, Co-Chair of Alaska Federation of Natives (AFN), states:

The rural priority is a necessity, not a luxury. Those of us who live in rural Alaska continue to do so because of the direct proximity to fish and wildlife . . . This federal protection for rural Alaskans [ANILCA Title VII], secured by Alaska Native leaders decades ago, is the source of our nourishment physically, emotionally, culturally, and spiritually. This is our way of life; it is our existence.

Press Release, AFN, Federal Judge Allows AFN to Intervene in Case Challenging Katie John (Oct. 12, 2023), <https://www.nativefederation.org/2023/10/federal-judge-allows-afn-to-intervene-in-case-challenging-katie-john/>. See also *Bobby v. State of Alaska*, 718 F. Supp. 764, 770 (D. Alaska 1989) (“It is entirely clear that Congress understood that there would be state regulation of subsistence uses and made provision for the same in ANILCA.”).

49. The 1961 “duck-in” protest in Utqiagvik (formerly known as Barrow) was a powerful act of civil disobedience in which 138 Inupiat hunters, facing criminalization under federal hunting bans, publicly presented their harvest to game wardens in solidarity, highlighting the unjust restrictions that prevented Alaska Native communities from accessing critical subsistence resources during the only time they were available. See Alex DeMarban, “We Got It Wrong”: Governments Apologize to Alaska Natives for Banning Migratory Bird Harvests, *ANCHORAGE DAILY NEWS* (Sept. 13, 2018), <https://www.adn.com/alaska-news/rural-alaska/2018/09/13/we-got-it-wrong-governments-apologizes-to-alaska-natives-for-banning-migratory-bird-harvests/>. Designing a filter for a community water treatment plant (WTP) is a good example for how an engineer's design consideration impacts a WTP operator's subsistence lifestyle. If the filters are designed for automatic backwashing, the operators will have less hands-on interaction with the system, a lowered ability to troubleshoot system failures, and less hours to apply for their salary. However, requiring an operator to backwash demands their time and requires that they stay inside and near the WTP, which greatly impacts their ability to hunt and subsist.

50. See *infra* Section II.E. Although beyond the scope of this Article, the federal funding framework for Alaska tribal RMP projects also contains a significant systemic inequity. See GAO-22-104241, *supra* note 4, at 68-75; ANTHC, *supra* note 4, at 3 (“Inequitable regulatory barriers and program design have disadvantaged Alaska Native villages from relevant federal programs. . . . Federal agencies, particularly those with staff and leadership outside Alaska, regularly fail to design programs to be equitable, in part due to a lack of knowledge of rural Alaska.”); see also Robin Bronen, *Climigration: Creating a National Governance Framework for Climate-Forced Community Relocation*, 45 N.Y.U. REV. L. & SOC. CHANGE 574, 590, 602, 607 n.219, 610 (2022).

51. ANTHC is a nonprofit tribal health organization that serves more than 180,000 Alaska Native and American Indian people living in Alaska with health care facilities and services, as well as rural sanitation engineering and construction through the Division of Environmental Health and Engineering. GAO-22-104241, *supra* note 4, at 4.

52. Press Release, Denali Commission, ANTHC Chosen as Project Manager for Newtok Village Move, Next Phase of Project Advances Quickly (June 11, 2018), <https://denali.gov/wp-content/uploads/2019/01/ANTHC-chosen-as-project-manager-for-Newtok-village-move1.pdf>.

53. GAO-22-104241, *supra* note 4, at 4 (“The Consortium also runs the Center for Environmentally Threatened Communities, which supports rural Alaska communities that are threatened by erosion, flooding, and thawing permafrost by helping them secure federal assistance and build capacity through training and technical assistance.”). CETC is now housed under ANTHC's newly formed Climate Initiatives Program, who also recently partnered with the National Oceanic and Atmospheric Administration (NOAA). See ANTHC, *Climate Initiatives*, <https://www.anthc.org/what-we-do/climate-initiatives/> (last visited Jan. 17, 2025); *infra* notes 91-92 and accompanying text; Denali Commission, *Village Infrastructure Protection*, <https://www.denali.gov/programs/village-infrastructure-protection/> (last visited Jan. 17, 2025).

54. Although tribes may “authorize” extensive sovereign rights and responsibilities to another “Indian tribe, inter-tribal consortium, or tribal organization,” NVC only authorized ANTHC to manage the project, without relinquishing their tribal authority. See Press Release, Denali Commission, *supra* note 52; 25 U.S.C. §5381(b) (quoting Chapter 46, Indian Self-Determination and Education Assistance, Subchapter V, Tribal Self-Governance—Indian Health Service); see also Denali Commission, *About Us*, <https://www.denali.gov/about/> (last visited Jan. 17, 2025); Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (concurring opinion) (“[The] Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution envisioned.”).

55. As explained by Rev. Dr. Michael Oleksa:

I came to the conclusion that, the people in my village . . . felt that way. That every time they went to that school, and every time they went to that clinic, and every time they were taken to court, they were the victims of continuous racism, discrimination, and prejudice. And I came to the conclusion that, on the part of the authorities, there was no conscious determination or effort to discriminate or to display prejudice, but that *we were miscommunicating* and the end result of this communication is indistinguishable. . . . Those of us that have authority . . . need to be more sensitive to this because it doesn't feel like we're powerful, but in fact, in this relationship, we are. And we don't want to abuse that power and continue to send messages that aren't really true about us, and about our system and about our own society. But it happens you see, *and it happens in the best of intentions*.

Austin Public Schools, 2017 *Hornel Foundation Gifted and Talented Symposium: Rev. Dr. Michael Oleksa*, YouTube (June 20, 2017), [https://www.youtube.com/watch?v=i9tJtrmkU1s\(transcribed\)](https://www.youtube.com/watch?v=i9tJtrmkU1s(transcribed)) (starting at 21:00 through 26:00) (emphasis added).

56. See Section II.E. Once the opportunity for meaningful consultation has formed, Robin Bronen offers a framework with clear criteria for local governments and steps for implementing agencies to respect Alaska tribes

municipal governance across Alaska creates overlapping authorities, complicates communication, diversifies interests in the decisionmaking, and, more importantly, challenges agencies' understanding and ability to engage.⁵⁷ Although outside the scope of this Article, intratribal disputes between village entities increases challenging dynamics for Alaska Natives, particularly in dealing with the present-day land ownership stratagem⁵⁸ as well as the concept of tribes-within-tribes.⁵⁹

while engaging in their RMP projects. Bronen, *supra* note 50, at 621 ("The governance framework needs to standardize the relocation decision-making process so that community residents and their local governing entities understand the criteria needed to document that relocation is warranted and initiate the process."); *see also* INUIT CIRCUMPOLAR COUNCIL, CIRCUMPOLAR INUIT PROTOCOLS FOR EQUITABLE AND ETHICAL ENGAGEMENT 14 (2022), <https://iccalaska.org/wp-icc/wp-content/uploads/2022/06/EEE-Protocols-LR-1.pdf>.

57. There are many different names for Alaska Native village's tribal government—Tribal, Traditional, IRA (Indian Reorganization Act), or Village councils—and their operations vary across the state. The Alaska Native Claims Settlement Act (ANCSA) created regional and village native corporations, further complicating tribal governance. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§1601-1629a (2004)). As the Executive Director of the Mother Kuskokwim Tribal Coalition states: Beyond displacement, ANCSA transformed our cultural and economic landscape. It entrusted the remaining 11 percent of lands to for-profit Alaska Native Corporations (ANCs). This altered our traditional values centered around mutual care and respect for nature, and became values folded at the mercy of profit-driven native corporations. We find ourselves caught between our roles as Tribal members and corporate shareholders, often forced to prioritize the latter. It's a confusing world here in Alaska.

Sophie Swope, *ANCSA at 52: A Legacy of Loss and Adaptation for Alaska Native Communities*, ICT (Dec. 18, 2023), <https://ictnews.org/opinion/anca-at-52-a-legacy-of-loss-and-adaptation-for-alaska-native-communities>.

And the municipal local governance landscape involves organized and unorganized boroughs, with about half of the villages also being incorporated cities. *See* Thomas A. Morehouse et al., *Alaska's Urban and Rural Governments*, in DEPARTMENT OF INDIAN AFFAIRS & NORTHERN DEVELOPMENT 30 (1980); Alaska Municipal League, *About*, <https://www.akml.org/about/> (last visited Jan. 17, 2025). Not to mention the many tribal health organizations, coalitions, and consortiums. In one small village, it is common to have a tribal office, city office, and regional corporation office. Which entity is responsible for waste management, water, sewer, power? Good question.

58. *See* Sophie Swope, *supra* note 57. Alaska Native tribal land dispossession is similarly oppressive, yet uniquely complex, in comparison to Indigenous peoples' history in the lower 48 states and Hawaii. Specifically, the rapid incorporation of Alaska Natives into "the mainstream of the American free market economy and its values" through the stock ownership and corporate structure of ANCSA—an intent clearly expressed in the testimony of Douglas Jones, a member of Alaska's U.S. Senate staff during consideration and passage of ANCSA:

[T]he possibility of alienating as the attorneys say, assets into non-Native hands was exactly the possibility that we had in mind. . . . It's got nothing to do with I don't think, cultural traditions and this and that, but in part of one's life, it's important to be like everyone else. . . . [B]usiness as usual, in my view is one of the goals of what we were trying to do.

DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS*, UNIV. OF ALASKA PRESS 88-89 (3rd ed. 2012); *see also* DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 958-60 (7th ed. 2017).

59. *See* Newtok Vill. v. Patrick, 21 F.4th 608, 611-12 (9th Cir. 2021): [BIA] chose to recognize the New Council as Newtok's governing body. But the BIA strictly limited this recognition to Indian Self-Determination and Education Assistance Act (ISDEAA) contract-related purposes addressing relocation and other tribal services underwritten by federal funds. . . . [A]s currently pleaded, we will not cross the federal-tribal boundary and inject the federal court into these intratribal conflicts. Doing so would risk eroding tribal sovereignty and potentially open the door to federal courts becoming a forum to adjudicate every intratribal dispute[.]

Regardless of the dimensions discussed above, Alaska Natives depend on the health of their subsistence resources as part of their traditional use of land. As presented at the cellular level in the following subsection, Alaska Native health is directly impacted by contamination of their subsistence ecosystem. CEQ is empowered to both investigate and guide the federal NEPA approach to adequately protect this reciprocal relationship between Alaska Natives and their subsistence lands.⁶⁰

2. Newtok's Toxic Waste-Erosion Sites: Vector Transport and Bioaccumulation in Subsistence Resources

In this Article, "toxic" encompasses all persistent, bioaccumulative, and toxic chemicals regulated under the Toxic Substances Control Act (TSCA), as well as plastic polymers, which are currently exempt under TSCA regulations.⁶¹ Including plastic polymers in the definition of "toxic" reflects concerns over bioaccumulation and biomagnification of microplastics and nanoplastics in natural ecosystems, and aligns with a scientific consensus on plastic pollutants' serious disruptive effects on bodily functions, particularly within the endocrine and neurological systems.⁶²

(citations omitted) (dismissing a challenge to the NVC's tribal representative authority by the displaced Newtok Traditional Council for lack of federal question jurisdiction); *see also* E-mail from Gavin Dixon, prior Newtok Relocation Project Manager, ANTHC, to author (Mar. 7, 2024, 09:56 HST) (on file with author):

We often assume a Tribal government is working [within] the bounds of the tribal community as defined by Federal Government, and in practice, sometimes there are divisions within the Tribe that may or may not have access to the formalized/westernized power of the Tribal Council, and the empowered council may not always act in the best interest of the western definition of the Tribe and instead act to support their own internal definitions.

60. *See infra* Part .
61. This definition aligns with calls to revoke outdated toxicological procedures rooted in the conventional theory that contaminants should be modeled as individual molecules as tested on animals, rather than their interactive behavior in the environment. *See* Swati D.G. Rayasam et al., *Toxic Substances Control Act (TSCA) Implementation: How the Amended Law Has Failed to Protect Vulnerable Populations From Toxic Chemicals in the United States*, 56 ENV'T SCI. & TECH. 11969, 11969 (2022):

We find EPA's risk evaluations underestimated human health risks of chemical exposures by excluding conditions of use and exposure pathways; not considering aggregate exposure and cumulative risk; not identifying all potentially exposed or susceptible subpopulations; and not quantifying differences in risk for susceptible groups; not addressing data gaps; and using flawed systematic review approaches to identify and evaluate the relevant evidence.

See, e.g., Sijoon Lee et al., *Toxicity Study and Quantitative Evaluation of Polyethylene Microplastics in ICR Mice*, 14 POLYMERS 402 (2022) (presenting the lethal dose (LD₅₀) of clean microplastic in mice rather than evaluating its adsorption and absorption potential effect on toxicity within a natural environment); *but see* Britta R. Boechler et al., *Microplastic Occurrence and Effects on Commercially Harvested North American Finfish and Shellfish: Current Knowledge and Future Directions*, 5 LIMNOLOGY & OCEANOGRAPHY LETTERS 113, 117-18 (2019) (calling for more thorough research); *see also* UNEP Dec. BC-14/12, Amendments to Annexes II, VIII, and IX to the Basel Convention, U.N. Doc. UNEP/CHW.14/28 (May 11, 2019) (declaring plastic wastes as hazardous, subject to international prior informed consent procedure).

62. Plastic does not molecularly degrade but fragments into microplastics and nanoplastics, which act like magnets, adsorbing pollutants common to rural

Toxic pollution already poses a disproportionate health risk to Alaska Native communities,⁶³ and is worsened by regulatory exemptions for landfill protection measures and the federal “feed it to the ocean” policy.⁶⁴ Edda Mutter notes that a “knowledge gap associated with waste-related pollutants in rural Alaska could obscure potential threats to human and environmental health.”⁶⁵

Mutter’s research, published just before the Denali Commission became the lead coordinator for tribal climate resilience, reveals alarming health impacts from waste sites in rural Alaskan and Arctic communities, including gender

Alaska landfills, thereby increasing toxicity and posing risks to aquatic ecosystems. Mary Ellen Ternes, *Plastics: Global Outlook for Multinational Environmental Lawyers*, 35 NAT. RES. & ENV’T 36, 38 (2020); ELIN ANDERSSON, SWEDISH UNIVERSITY OF AGRICULTURAL SCIENCES, MICRO PLASTICS IN THE OCEAN AND THEIR EFFECTS ON THE MARINE FAUNA 5-6 (2014), <https://core.ac.uk/download/pdf/42951402.pdf>. Additionally, plastics are manufactured with harmful additives and monomers, such as bisphenol A (BPA), organotoxins, and phthalates linked to reproductive toxicity, mutagenicity, and carcinogenicity. Boechler et al., *supra* note 61.

63. See, e.g., Global Atlas of Environmental Justice, *Toxic and Abandoned Formerly Used Defense Sites (FUDS) on St. Lawrence Island, Alaska*, <https://ejatlas.org/print/formally-used-defense-sites-in-alaska> (last updated Apr. 25, 2023):

The [Department of Defense] policy had been to leave the contamination in its place and relied on signs and fences to prevent exposure to toxic chemicals within the site. . . . Over time these hazardous chemicals have leaked into the soil and watershed. . . . There are approximately twenty-four FUDS located in the Norton Sound region.

Georgina Fernandez, “Toxic Soup”: Experts Break Down Waste Management Struggles Faced by Rural Communities, KTUU (Apr. 12, 2024), <https://www.alaskanewsresource.com/2024/04/12/toxic-soup-experts-break-down-waste-management-struggles-faced-by-rural-communities/>.

64. “Feed-it-to-the-ocean policy” is a term coined for this Article. See *supra* note 14. Under the Land Disposal Program Flexibility Act of 1996, the state of Alaska exempts rural Class III landfills from certain EPA standards, such as liners, leachate collection, and groundwater monitoring. Pub. L. No. 104-119, 110 Stat. 830; Alaska: Tentative Determination and Final Determination of Full Program Adequacy of the State of Alaska’s Municipal Solid Waste Landfill Permit Program, 65 Fed. Reg. 453 (Jan. 5, 2000); 40 C.F.R. §258 (2024).

Although outside the scope of this Article, the state’s regulatory standards for Class III landfills, unique to Alaska rural villages, are wholly inadequate to protect Alaska Native subsistence communities, particularly those threatened by climate change from the devastating impacts to sanitation health and contamination of subsistence resources. See ALASKA ADMIN. CODE tit. 18, §60.390, Solid Waste Management—Closure Standards for a Class III [Municipal Solid Waste Landfill] (as amended through Oct. 1, 2023) (requiring a two-foot soil cap without alternative closure requirements for an environmentally threatened landfill). A critical example is the old landfill in Shishmaref that was “capped and closed” by ADEC in 1990 and has eroded into the Chukchi Sea for more than a decade. ADEC, *Solid Waste Information Management System (SWIMS): Shishmaref Closed Landfill*, <https://dec.alaska.gov/Applications/EH/SWIMS/ModFacility.aspx?siteId=3632> (last updated May 3, 2024) (“Located approximately 1.25 miles west of the community directly north of the current landfill. At the high tide line & eroding as of 2014 site visit.”). Additionally, honey-bucket sewage lagoons in villages like Shishmaref pose significant health risks due to their proximity to the shoreline and subsistence resources. In July 2024, I personally walked Shishmaref’s coastline for the second time since October 2019, passing drying seal and fish meat hanging on tribal members’ family racks along the way to this erosion site and the adjacent honey-bucket lagoon. See *infra* notes 84, 89, and accompanying text.

65. Edda A. Mutter, *Assessment of Contaminant Concentrations and Transport Pathways in Rural Alaska Communities’ Solid Waste and Water Sites 19-20*, abstract (May 2014) (Ph.D. dissertation, University of Alaska Fairbanks) (Scholarworks@UA) (exposing significant risks and documented health effects associated with waste management practices in Alaska by challenging historical perceptions of permafrost impermeability and highlighting the worsening toxicity to water resources caused by permafrost degradation).

imbalances, low birth weights of offspring, elevated contaminant levels in pregnant women, and forced changes in subsistence practices.⁶⁶ The Inuit Circumpolar Council (ICC) also highlights concerns of the impact of persistent organic pollutants (POPs) on their people:

The Inuit dependence on marine mammals, seals, whale and walrus for much of their nutritional intake makes persistent organic pollutants especially harmful. POPs are lipophilic meaning they accumulate in the fat of animals including people; POPs accumulate in the colder regions of the world, they are toxic and as the name implies, they persist in the environment for a very, very long time. Levels of concern of many of these chemicals are found in the blood and breast milk of Inuit globally.⁶⁷

Toxins from waste-erosion sites move through surface water, groundwater, soil, and air, persisting through biological transformations that enable bioaccumulation and biomagnification in subsistence ecosystems.⁶⁸ As plastic particulates and other toxins traverse through these ecosystems’ trophic levels, they pose a significant threat to the subsistence resources essential to Newtok and Mertarvik, particularly herring and other marine life.⁶⁹ Newtok,

66. *Id.* at 21 (reporting on findings from a study performed by Central Council of Tlingit and Haida Indian Tribes of Alaska) (“Due to concerns over solid waste contamination, 57% of the respondents changed their subsistence practices (hunting, fishing, and gathering foods), and 52% changed their cultural/traditional activities (performing ceremonies, making baskets and other art/tools, and making traditional medicine)”).

67. ICC, *Persistent Organic Pollutants (POPs)*, <https://www.inuitcircumpolar.com/icc-activities/environment-sustainable-development/persistent-organic-pollutants-pops/> (last visited Jan. 17, 2025); see *infra* note 69 and accompanying text. The ICC represents approximately 180,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia). ICC, *Home Page*, <https://www.inuitcircumpolar.com/> (last visited Jan. 17, 2025).

68. Mutter, *supra* note 65, at 16, 22, 52 (citing MING-HO YU, ENVIRONMENTAL TOXICOLOGY: BIOLOGICAL AND HEALTH EFFECTS OF POLLUTANTS (2d ed. 2005)); see WASTE PROGRAMS SUB-WORKGROUP WORK TEAM 1, A REPORT TO THE INFRASTRUCTURE TASK FORCE: OVERCOMING BARRIERS TO SUSTAINABLE WASTE MANAGEMENT IN TRIBAL COMMUNITIES 3 (2019), https://www.epa.gov/sites/default/files/2019-12/documents/itf_work_team_1_report_aug_2019.pdf (“Traditional hunting, fishing, cultural and subsistence practices expose tribal communities to additional risks from bioaccumulation of toxins in plants and wildlife.”); *infra* note 69.

69. Toxic substances like toxin-adsorbed plastic particulates are feasted on by the lowest trophic level species such as zooplankton, phytoplankton, and bivalves. Boechler et al., *supra* note 61, at 115. Herring, crabs, and other forage fish ingest toxic-fed lower trophic organisms while also consuming toxic particulates. See Michaela E. Miller et al., *Bioaccumulation and Biomagnification of Microplastics in Marine Organisms: A Review and Meta-Analysis of Current Data*, 15 PLoS ONE e0240792 (2020). These toxins bioaccumulate in the digestive tract or fatty tissue, disrupting endocrine systems and biomagnifying as energy stored in fat fuels higher trophic organisms, including humans. *Id.*

The residents of Newtok and the Nelson Island area, known as the Qaluyaarmiut or “dip net people,” primarily rely on aquatic subsistence resources, including marine bird eggs, waterfowl, kelp, herring, blackfish, pike, salmon, whitefish, seals, and other marine mammals, with inland resources consisting of moose, musk ox, caribou, berries, goose grass, and other greens. DENALI COMMISSION, *supra* note 18, at 157-58, 162. Archaeological evidence indicates that the earliest site in the Yukon-Kuskokwim Delta, dating back 3,000 years, points to summer subsistence focused on riverine resources. *Id.* Herring is a staple fish for Nelson Islanders, with traditional subsistence uses differing based on the oil and fat content of the harvest. Madonna L. Moss et al., *The Historical Ecology of Pacific Herring: Tracing Alaska Native Use of a Forage Fish*, 8 J. ARCHAEOLOGICAL SCI. 504, 506 (2016). Nelson Island streams—where Mertarvik is located—are too

situated along the Ninglick River below Baird Inlet and upstream of the Bering Sea, faces persistent risks from its landfill waste-erosion site.

During agency review of the Newtok-Mertarvik final EIS, the U.S. Fish and Wildlife Service (FWS) warned the Denali Commission that pollutants from Newtok's landfill could extend beyond downstream ecosystems, even affecting the upriver location of the relocated village site of Mertarvik.⁷⁰ This communication emphasizes the broader implications, as the Bering Sea plays a critical role in supporting subsistence and commercial fishing for nearby villages and the state of Alaska. It also highlights the Commission's acknowledgment of potential long-term consequences of its scoping decisions on Newtok villagers.

D. Tribal RMP Projects, Backhaul, and Future Funding in Alaska

If we cannot get this right, what happens to the rest?⁷¹

Standing on Newtok's eroding shoreline, Romy Cadiente, former relocation coordinator for the NVC, made the above statement to underscore the immediate environmental threat facing many Alaskan villages.⁷² Addressing active and future waste-erosion sites is critical for land use and generational health. Yet, full-scale waste removal is consistently excluded from funding requests and cost estimates when defining RMP project scopes for Alaska's tribal communities.

1. RMP Overview: Climate Adaptation Responses

The impacts of erosion, flooding, and permafrost degradation on infrastructure prompts three primary types of climate adaptation responses: protect-in-place, managed retreat, or relocation.⁷³ First, protect-in-place strategies aim to minimize climate change impacts while maintaining community infrastructure in its current location. These responses may involve structural adaptations, such as elevating buildings and fortifying shorelines, or mechanical interventions like implementing floodplain management ditches.⁷⁴ Second, in its broader sense, managed retreat involves phased relocations of people, assets, and infrastructure to a safer location within or adjacent to the current site as a response to imminent hazards.⁷⁵ Third, relocation often entails the complete movement of an entire commu-

nity from the current community location to safer ground and is also typically implemented in phases.⁷⁶

In 2023, the University of Hawaii at Mānoa's Institute for Sustainability and Resilience published two reports examining policy and regulations of sea-level rise adaptive managed retreat along Hawaii's sandy shorelines. One report highlights that sea-level rise responses thus far prioritizes in-place (as-disaster-strikes) adaptation over retreat due to the short-term economic benefits and a general reluctance to supporting retreat measures.⁷⁷ The other report emphasizes that assumptions regarding debris removal is the main driver for differing cost comparisons.⁷⁸ Both findings are equally relevant to historical approaches and current funding proposals for Alaska's RMP projects.⁷⁹

2. Backhauling Rural Alaska Landfills

Backhauling in rural Alaska is a complex logistical and transactional process involving the collection, transportation, and processing of materials from remote areas to more accessible hubs.⁸⁰ Its success relies on site-specific factors, with primary determinants including barge access and available monofill land.⁸¹ In 2021, the National Fish and

76. *Id.* Both managed retreat and relocation approaches may be either proactive, reactive, or a hybrid of both. Proactive retreat or relocation is planned and coordinated, which may either occur concurrently near-termed (i.e., "all-at-once"), or triggered by a predetermined condition, like a certain date or newly reached erosion line (i.e., "threshold-based"); whereas reactive retreat is triggered by a natural disaster event that requires a faster evacuation response. RACHAEL HAN ET AL., UNIVERSITY OF HAWAII AT MĀNOA INSTITUTE FOR SUSTAINABILITY AND RESILIENCE, A STUDY OF SHORELINE REGULATIONS AND MANAGED RETREAT FOR HAWAII—A COST ANALYSIS FOR PAUMALŪ, O'AHU 6, 11 (2023), https://www.researchgate.net/publication/370603122_A_Study_of_Shoreline_Regulations_and_Managed_Retreat_for_Hawaii_A_Cost_Analysis_for_Paumalu_Oahu (distinguishing adaptation-response subcategories to refine policy analysis).

77. *Id.* ("[R]esearch has noted that retreat could affect community cohesion positively or negatively depending on the tools used to enact retreat and if retreat is coordinated or piecemeal.")

78. Renee O. Setter et al., *Managing Retreat for Sandy Beach Areas Under Sea Level Rise*, 13 SCI. REPS. 11920 (2023), available at <https://www.nature.com/articles/s41598-023-38939-4>.

79. Historically, Federal Emergency Management Agency (FEMA) disaster declarations have been the primary means for Alaska's environmentally threatened communities to secure federal disaster relief funding for the as-disaster-strikes approach. Bronen, *supra* note 50, at 589-90. However, Newtok's 2018 request for a presidential disaster declaration was unexpectedly denied following President Obama's establishment of the AESC and Denali Commission assignment. *Id.* at 590 n.103. See Fact Sheet, The White House, *supra* note 36; Ashley Rawlings, *Erosion-Induced Community Displacement in Newtok, Alaska and the Need to Modify FEMA and NEPA to Establish a Relocation Framework for a Warming World*, 5 SEATTLE J. ENV'T L. 199, 219 (2015) (suggesting amendments to FEMA standards under the Stafford Disaster Relief and Emergency Assistance Act like a cost-sharing exception).

80. Equipment is crucial to the process. Ideally, monofill land would be accessible by an existing road system, but this is rarely the case for most Alaskan villages. As a result, the more viable option is often to excavate and backhaul waste via barge, which can require a variety of equipment depending on barge access. The final destination of backhauled waste requires a contractually willing third-party recipient, typically located in Anchorage or Seattle. EPA ENVIRONMENT FINANCIAL ADVISORY BOARD, REVENUE OPTIONS FOR A WASTE BACKHAUL SERVICE PROGRAM IN RURAL ALASKA 1 (2019), https://www.epa.gov/sites/default/files/2019-12/documents/revenue_options_for_a_waste_backhaul_service_program_in_rural_alaska.pdf.

81. The state of Alaska permits monofills—excavated pits designed for the disposal of a single waste type, such as sewage sludge or solid waste—and provides requirements for consolidation, coverage, and monitoring processes, and restricting their placement in wetland regions. See ALASKA ADMIN.

small to support many salmon, but the location and rocky shoreline are excellent spawning habitats for herring. *Id.* at 505-06.

70. Letter from Mitch Ellis, Acting Chief of Refuges, FWS, to Donald Antrobus, Program Manager, Denali Commission (June 26, 2017), in DENALI COMMISSION, *supra* note 18; see also DENALI COMMISSION, *supra* note 18, at 176 ("The current unpermitted landfill is across the Newtok River from the village, and is accessible only by boat at high tide.")

71. VICE, *supra* note 1.

72. See *supra* note 4 and accompanying text.

73. BIA, *supra* note 33, at 3, 7.

74. *Id.* at 2-5, 7.

75. *Id.* at 7.

Wildlife Foundation funded a \$2.1-million backhaul project for Newtok's landfill waste-erosion site.⁸² Due to the project's limited scope and despite removing 33 standard CONEX shipping containers of waste, more than 90% of the landfill remains.⁸³ Continued use of the unpermitted landfill by villagers complicates backhauling and landfill closure efforts.⁸⁴

In 2022, Delta Backhaul began removing one million pounds of waste from a 1-acre section within a 6.5-acre open dump site in Kivalina, an environmentally threatened Native village situated on a narrow sandbar.⁸⁵ The project cost \$2.5 million, which includes shipping (\$1.3 million) and landfill remediation (\$1.2 million).⁸⁶ Delta Backhaul estimates that an additional 10 million pounds of waste removal would achieve 85% landfill clearance at a total cost of around \$25 million in 2022 dollars, with anticipated heightened inflation pushing the estimate to \$31 million (2024 dollars).⁸⁷

Kivalina, similar to Newtok in population and remoteness, likely offers a cheaper scenario for landfill decommissioning due to easier barge access.⁸⁸ Decommissioning all

of Newtok's infrastructure—landfill, bulk fuel tank farm, school, housing, and communal infrastructure—reasonably costs at least 1.5 times more than the \$31 million estimate to solely decommission Kivalina's landfill, or a minimum \$47 million.⁸⁹

3. Following the Commission's Lead: New Project Proposals Perpetuating Decommissioning Deficiencies

Federal frameworks for RMP projects in Alaska's environmentally threatened communities are taking shape, as demonstrated by the \$74.9-million "Stronger, Together" project funding to the ANTHC⁹⁰ and federal partnership with the National Oceanic and Atmospheric Administration (NOAA).⁹¹ This programmatic funding initiative aims to transform the disaster management of these communities by establishing risk assessments, expanding technical assistance, and fostering knowledge-sharing networks.⁹² However, these efforts risk mirroring decisions set by the Denali Commission's leadership over Newtok's relocation that harm tribal sovereignty and threaten subsistence-based long-term health.

A recent report by ANTHC on federal funding frameworks for Alaska tribes' RMP projects omits decommissioning costs from their estimates, whether in full or as

CODE tit. 18, §60.315 (as amended through Oct. 1, 2023); *see also id.* tit. 18, §60.310. Arctic wetlands are described as patchy or extensive, occurring across continuous and discontinuous permafrost, with surface water connections that are seasonally dynamic or remain subsurface, interacting with unique ice formations like pingos, ice-wedge polygons, taliks, thermokarsts, and kettle holes. Hanna N. Kreplin et al., *Arctic Wetland System Dynamics Under Climate Warming*, 8 WIREs WATER e1526, at 2-3 (2021), <https://doi.org/10.1002/wat2.1526>; *but see* Sackett v. Environmental Prot. Agency, 598 U.S. 651 (2023) (asserting that a wetland must have continuous surface connection to water—a scientifically erroneous limitation exemplified by Arctic wetlands).

82. Telephone Interview with Elizabeth Wulbrecht, Project Manager, ANTHC (Feb. 23, 2024) (notes on file with author); *see* ANTHC, *supra* note 4, at 52 ("The National Fish and Wildlife Foundation (NFWF)/National Oceanic and Atmospheric Administration (NOAA) National Coastal Resilience Fund (NCRF) Program can fund the decommissioning of buildings, but not the construction of new infrastructure."); *see* R. ELIOT CRAFTON, CONGRESSIONAL RESEARCH SERVICE, R44740, NATIONAL FISH AND WILDLIFE FOUNDATION (NFWF): HISTORY, FUNCTION, AND FUNDING (2017).

83. The scope included cleaning up white goods, scrap metal, a hazardous waste shed, and minor amounts of trash along the edge of the actively eroding landfill. Telephone Interview with Elizabeth Wulbrecht, *supra* note 82.

84. Telephone Interview with Rebecca Colvin, Solid Waste Program Coordinator, ADEC (Mar. 1, 2024) (notes on file with author) ("It is going to take a number of years to engage in the landfill closure process of relocating communities because people don't want to move."); *see also supra* note 64.

85. The Native village of Kivalina is situated on a 500-foot-wide sandbar between the Chukchi Sea of the Arctic Ocean and the Kivalina Lagoon and is undergoing phased relocation to a site now accessible by a new seven-mile road that ends at a new school.

86. Telephone Interview with Doug Huntman, Owner and Operator, Delta Backhaul (Feb. 23, 2024) (notes on file with author):

Landfill waste was shipped to Seattle using an Alaska Marine Lines landing craft, and Republic was contracted to pick it up and deposit it in a Washington-based landfill. An excavator loaded mixed waste into about 100 five-cubic-yard super sacks that were then staged on Kivalina's banks. The remaining five and a half acres of waste were consolidated, compacted, and left in place with 20 inches of compacted soil on top to avoid erosion.

87. *Id.* ("It was shocking to see the amount of waste still remaining after removing one million pounds. One hundred percent removal is highly unlikely, but 85 to 90 is achievable.").

88. The Newtok landfill is located across the Newtok river, which freezes over in the winter and, in the summer, is in melted wetland along a shallower tidal coastline than Kivalina. The logistics of a full-scale Newtok landfill decommissioning project might include accessing the melted landfill with a 40-foot landing craft and smaller equip-

ment, or accessing it when the river is frozen with heavier equipment and staging the waste along the Ninglick River shoreline for barging away, likely to Seattle.

Id.

89. Honey-bucket sewage lagoons are another significant and overlooked toxic waste site, posing health risks to Alaska Natives and their subsistence resources beyond the already observed detriment to sanitation health. *See* ALASKA DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT, SHISHMAREF STRATEGIC MANAGEMENT PLAN 17 (2016), https://www.commerce.alaska.gov/web/Portals/4/pub/1_Shishmaref_SMP_September_2016.pdf (explaining the honey-bucket system in the Alaska Native village of Shishmaref):

Plastic buckets are used as toilets, typically lined with a plastic bag and a toilet seat attached to the top. Once the container is filled, the plastic bag is closed and the bucket is transported to a waste site near the community where it is emptied. The waste may be disposed of in sloughs, beaches, rivers, tundra ponds, or sewage lagoon by way of four-wheeler or snow machine. Shishmaref does not have a truck pick-up service for waste disposal. One of the greatest problems associated with honey buckets is the public health risk.

See also Robin Bronen & F. Stuart Chapin III, *Adaptive Governance and Institutional Strategies for Climate-Induced Community Relocations in Alaska*, 110 PNAS 9320, 9323 (2013) ("A 2006 public health assessment found that sanitation conditions in Newtok were 'grossly inadequate for public health protection.' Between 1994 and 2004, 29% of Newtok's children were hospitalized with lower respiratory tract infections."). For example, the Alaska Native village of Shishmaref continues to use a honey-bucket lagoon that is situated fewer than 100 feet away from the encroaching shoreline and less than a half-mile from the shoreline drying racks for fish, seal, and other subsistence resources. *See* aerial images taken on July 10, 2024 (on file with author). The honey-bucket lagoon is destined to a fate similar to that of the adjacent old village landfill. *See* ADEC, *supra* note 64.

90. *See supra* note 52 and accompanying text.

91. NOAA Office of Coastal Management, *Stronger, Together: Expanding Climate Adaptation Technical Assistance for Frontline Alaska Native Communities*, <https://coast.noaa.gov/states/stories/alaska.html> (last modified Jan. 17, 2025).

92. *Id.*

an appropriate fraction.⁹³ ANTHC's *Unmet Needs* report (UNR) estimates that \$4.3 billion (in 2020 dollars) will be needed over the next 50 years for proactive environmental threat mitigation in Alaska's tribal communities.⁹⁴ The UNR does not provide an itemized cost estimate in Appendix A: Methodology for Cost Estimates. Instead, Appendix A states that Newtok cost data is used as a "baseline" to scale other communities' RMP cost estimates by comparative population and location factors.⁹⁵ Notably, decommissioning is not mentioned in Appendix A.

Upon further inquiry, ANTHC affirms that "[d]ecommissioning was included in the cost estimates for communities expected to relocate. For Newtok, the estimate was \$10.6 [million] for EIS, assessment, and cleanup."⁹⁶ Most of this amount is attributed to the EIS and assessments, with less than \$3 million allocated for actual cleanup.⁹⁷ This minimal allocation—about 6% of the minimum \$47-million estimate to adequately decommission a village relocation project⁹⁸—effectuates underfunded and bifurcated RMP efforts.

Using Newtok as a baseline means that Alaska tribes' RMP projects are subject to the same agency decisions made in Newtok; most critically here, the Denali Commission's scoping decision to exclude decommissioning in their EA process.⁹⁹ Using Newtok as a baseline leads to neglecting and misrepresenting the urgent need to decommission replaced infrastructure risking contamination of subsistence resources.¹⁰⁰ ANTHC's omission of decommissioning in their proposed cost estimate reveals the influence of the Denali Commission's scoping decisions and compels the need for CEQ to emphasize agency prioritization for mitigating pollution of subsistence resources.

In light of the above criticism, the UNR marks ANTHC's first step in offering recommendations to mitigate the inequitable funding barriers faced by Alaska tribes' RMP projects.¹⁰¹ The adequacy of their cost esti-

mate should not detract from the value of their recommendations for local, risk-based prioritization within a single-source funding model and a whole-of-government framework.¹⁰² However, excluding decommissioning as an essential element of RMP projects in rural Alaska does compromise the effectiveness of their framework that aims to ensure both the immediate safety and long-term health of subsistence communities.¹⁰³

II. Anti-Pioneering: NEPA Segmentation and Decommissioning Neglect in Newtok

In 2018, the Denali Commission completed the ROD for the final EIS, titled "Mertarvik Infrastructure Development—Nelson Island, Alaska."¹⁰⁴ By excluding "Newtok" or "Relocation," the title alone strategically reflects the project's scope. This part examines how the Commission navigated environmental review project scoping and consultative processes while excluding decommissioning in Newtok. It sets the stage for Part III's suggestion that CEQ issue guidance recognizing decommissioning as a "connected" action under NEPA for Alaska tribes' RMP projects. This policy decision is supported by not only scientific evidence of substantial health risks linked to environmental quality, but also federal Indian law principles including the federal duty to prevent environmental and climate injustices.

A. NEPA Overview

NEPA applies to major federal actions that "significantly impact" the human environment, requiring an EIS when such impacts are likely.¹⁰⁵ The EIS process includes public engagement over a comprehensive environmental review document that evaluates the potential environmental effects of the proposed action, reasonable alternatives, and mitigation measures. An EA is used when there is uncer-

93. ANTHC, *supra* note 4, app. A, at 108.

94. By comparison, allocation of mitigation funding could potentially avert emergency response and recovery costs of approximately \$25.8 billion. *Id.* at 3.

95. *Id.* app. A, at 108.

96. E-mail from Max Neale, Senior Program Manager, ANTHC's CETC, to author (Feb. 9, 2024, 07:19 HST) (on file with author).

97. The total project cost for FEMA's 13-home project was \$3 million (in 2017 dollars)—acquiring and demolishing houses. *See* Letter from Mark Carey, *infra* note 118. Without access to project cost data, I conservatively apply about one-third of the total project cost (\$900K) to decommissioning. Adding this to \$2.1 million for the minor cleanup of Newtok's landfill equates to a total of \$3 million. *See* Telephone Interview with Elizabeth Wulbrecht, *supra* note 82.

98. *See supra* notes 85-89 and accompanying text.

99. *See infra* Section II.C.

100. Allocating \$47 million to the 12 villages that might relocate suggests a minimum \$564 million gap from ANTHC's UNR initial \$4.3 billion proposal. GAO-22-104241, *supra* note 4, at 52 ("We selected 12 Native villages that we had reported in 2009 were imminently threatened and were likely to fully relocate[.]"). However, this does not include decommissioning within all 72 high-risk villages that also need managed retreat and protect-in-place solutions. *See id.* at 5 n.12.

101. *See* ANTHC, *supra* note 4, at 1, 7.

The purpose of this report is to help improve the effectiveness of federal and state government support for Alaska communities to address climate and environmental threats. Legislative and programmatic changes are needed to remove barriers faced by small

rural communities and to create more effective and equitable systems to deliver resources and services. The intended audience for this report is the U.S. Congress, the White House, and federal and state agency leadership and program managers.

Id. at 1.

102. *Id.* at 5.

103. *See id.* at 14-15, 30 (acknowledging the role of subsistence in Alaska Native communities but not explicitly connecting the risk to subsistence resources with the lack of planning and funding to decommission Newtok) ("[I]t is still uncertain whether there will be sufficient funding to provide for the safe and successful relocation of the remainder of the people living in Newtok prior to its loss to erosion. In addition, there is no plan or funding to decommission the old village site.") (emphasis added).

104. RODs contain the final EIS and all supporting documents, including relevant communications and reports.

105. 40 C.F.R. §1508.1(w) (2024); 40 C.F.R. §1501.3 (2024) (determining the appropriate level of NEPA review based on whether the activity is a major federal action defined under §1508.1(w)). Statutory edits have been made since the Denali Commission's final EIS of the Newtok-Mertarvik relocation project. However, none of the changes to the definition of "major Federal action" would change the determination that federal assistance in relocating Newtok is a major federal action. *Compare* 40 C.F.R. §1508.18(4) (2010), *with* 40 C.F.R. §1508.1(w)(v) (2024).

tainty about the need for an EIS.¹⁰⁶ Agencies may also avoid an EIS by issuing a finding of no significant impact that explains why no significant effects are expected based on the context and intensity of the project's impact.¹⁰⁷ All Alaska tribal RMP projects are likely to trigger NEPA, requiring an EA or EIS unless a categorical exclusion (CATEX) applies.¹⁰⁸

CATEXs are regulated by CEQ and are intended to streamline the NEPA process for “a category of actions which do not individually or cumulatively have a significant effect on the human environment,” of which agencies must provide documentation justifying its use.¹⁰⁹ As suggested in Part III, CEQ should follow the Federal Emergency Management Agency's (FEMA's) assessment in their Newtok housing relocation project, rejecting any potentially applicable exclusions from absolving their duty to decommission abandoned infrastructure.

Despite NEPA's intent to foster harmony between people and their environment, its procedural nature is influenced by agency priorities, which easily favors predictability over conscionable decisionmaking.¹¹⁰ Subject to CEQ guidelines, agencies evaluate whether their actions trigger NEPA review and have discretion in determining the scope and depth of analysis, including connected actions, alternatives, impacts, and assessment metrics in policy decisions.¹¹¹

Although agencies' actions are subject to judicial review, once the procedural obligation to consider the impacts with appropriate consultation has been met, the agencies are likely still able to choose the less environmentally protective alternative.¹¹²

B. FEMA Designates Decommissioning in Newtok as a “Connected Action”

The Denali Commission's ROD does not include a CATEX application for demolition or decommissioning because the Commission did not assume the duty to decommission in the first place, nor did they have the power to delegate it.¹¹³ However, the ROD references FEMA's earlier “Pioneering Phase” project, which involved a 13-home relocation from Newtok to Mertarvik under a buyout program.¹¹⁴ FEMA's selected scope for their project's environmental review directly contrasts the Commission's later decision that decommissioning in Newtok is “not connected” to the development of replacement infrastructure in Mertarvik.¹¹⁵

During this pioneering phase, FEMA questioned the applicability of their N3 CATEX: *Federal Assistance for Property Acquisition and Demolition* to waive demolition of the existing 13 homes.¹¹⁶ Under FEMA's Hazard Miti-

106. The Commission operated under a regulation with slightly different language during their environmental review of the Newtok-Mertarvik relocation project; however, the requirement to perform an EIS is required under both versions. Compare 40 C.F.R. §1508.1(j) (2024), with 40 C.F.R. §1508.9 (2010).

107. 40 C.F.R. §1501.6(a)(1) (2024) (reviewing geographical scope—national, regional, or local—and relevant resources, with “significance” often hinging on local effects for site-specific actions). The Commission operated under the same regulatory language at the time of their review. Compare 40 C.F.R. §§1508.25, 1508.27 (2010), with 40 C.F.R. §1508.3 (2024) (“Agencies shall analyze the intensity of effects considering . . . (vii) The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders.”).

108. When applying for a CATEX, agencies must provide concise supporting documentation citing the specific CATEX used, describing why its application is appropriate, and explaining that there are no relevant extraordinary circumstances. City of Burien v. Federal Aviation Admin., No. 18-71705 (9th Cir. Nov. 27, 2019) (holding that “the FAA [Federal Aviation Administration] acted arbitrarily and capriciously by failing to consider all ‘reasonably foreseeable’ future actions . . . in its analysis of whether a cumulative impacts extraordinary circumstance existed”).

109. 40 C.F.R. §1508.4 (2010). For example, CATEXs are commonly granted for FAA actions, such as the 2017 Shishmaref Airport Erosion Control project. See FAA, DOCUMENTED CATEX: SHISHMAREF AIRPORT EROSION CONTROL, NFAPT00370, ARP SOP No. 5.1 (2017), <https://dot.alaska.gov/nreg/shishmaref-airport/files/shish-catex.pdf>.

110. *Defend H20 v. Town Bd. of the Town of E. Hampton*, 147 F. Supp. 3d 80, 115 (E.D.N.Y. 2015) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (discussing themes of predictability and conscionability in law). NEPA's congressional statement of purpose is:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. §4321 (1994).

111. 40 C.F.R. §1501.3 (2024); U.S. EPA, *National Environmental Policy Act Review Process*, [https://www.epa.gov/nepa/national-environmental-policy-](https://www.epa.gov/nepa/national-environmental-policy-act-review-process)

act-review-process (last updated July 15, 2024); see Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287, 10299 n.168 (Apr. 2015), <https://www.elr.info/articles/elr-articles/administering-national-environmental-policy-act> (“NEPA's authors deliberately chose the statute's approach and preferred that action agencies themselves internalize its policy and values as opposed to delegating the authority to check their actions to some other, ex post regulator.”).

112. See 5 U.S.C. §706, Administrative Procedure Act (1966) (outlining the judicial review requirement for agency actions); Colburn, *supra* note 111, at 10296-97 n.131 (quoting Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 COLO. L. REV. 473, 475 (2010)) (“[A]gencies are largely free to pursue less environmentally protective alternatives so long as they have met their procedural obligations to consider the impacts.”); but see *Env't Def. Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289, 298 (8th Cir. 1972) (“The procedures included in §102 of NEPA are not ends in themselves. They are intended to be ‘action forcing.’ The unequivocal intent of NEPA is to require agencies to consider and give effect to environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.”) (citations omitted).

113. See *supra* note 37; *infra* note 125.

114. FEMA, *Environmental Assessment Scoping Summary, Newtok Relocation Project—Pioneering Phase* (2016), in DENALI COMMISSION, *supra* note 18; see generally Bronen, *supra* note 50, at 608-14 (criticizing the FEMA buyout program as ineffective and inequitable for Alaska Natives).

115. DENALI COMMISSION, *supra* note 18, at 23.

116. U.S. DEPARTMENT OF HOMELAND SECURITY, INSTRUCTION MANUAL 023-01-001-01, REVISION 01, IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) A-23 to A-24 (2014), https://www.fema.gov/sites/default/files/2020-07/fema_dhs_instruction-manual_023-01-001-01.pdf:

Federal assistance for the acquisition of properties and the associated demolition and removal when the acquisition is from a willing seller, the assistance is solely for the purposes of financial compensation for the acquisition, and the land is deed restricted to open space, recreational, wildlife habitat, or wetland uses in perpetuity. This CATEX covers actions associated with the determination of program eligibility. This CATEX does not cover Federal assistance actions that involve acquisition for the purpose of construction or development at a site in the acquired property. The use of eminent domain is explicitly excluded from the CATEX.

(emphasis added).

gation Assistance Grant Program, the “purpose of construction or redevelopment” carries more significance than geographic continuity of the land.¹¹⁷ In other words, the N3 CATEX could not be used to avoid including decommissioning within the EA even when new housing is built at a separate site. Therefore, regardless of whether the NVC preferred relocation or buyout of the houses, the replacement nature of the project obliged FEMA to include housing demolition within their EA.¹¹⁸ FEMA later endorsed this approach when advising the Denali Commission, reasserting that decommissioning activities in Newtok are “connected actions” to the development project in Mertarvik and should be included in its EA.¹¹⁹

Despite FEMA’s interest in serving as a cooperating agency¹²⁰ for the Commission’s project, the Federal Aviation Administration was the only cooperating agency involved in development of the EIS.¹²¹ In its ROD, the Commis-

sion explained how FEMA’s submitted correspondence and scoping materials from their housing project were “inadvertently omitted” from both the draft and final EIS, and only amended to the final EIS within the ROD after final approval.¹²² Although the Commission claims to have “considered” FEMA’s submissions in the draft EIS, omitting the material from public and interagency review suggests an attempt to sidestep FEMA’s scope determination, including decommissioning, and underscores an opacity in the EA process that warrants closer scrutiny of the classification of Newtok’s decommissioning as a separate action under NEPA.¹²³

C. Improper Segmentation: The Commission’s Declaration of Separate Action

FEMA’s \$3-million housing relocation project cost was nominal compared to the escalating expenses of the Denali Commission’s extensive relocation development project.¹²⁴ Accordingly, while FEMA classified Newtok housing demolition as a connected action to Mertarvik housing construction, the Commission treated the decommissioning of Newtok’s essential infrastructure and its replacement in Mertarvik as separate actions during the environmental review scoping process—asserting that no artificial division or improper segmentation occurred.¹²⁵

NEPA requires agencies to assess the significance of project components as an integrated whole, avoiding improper segmentation and considering “reasonably foreseeable” links between actions, such as logistical or temporal connections that affect the project’s overall success.¹²⁶ In terms of overall success, the Commission states that the purpose

117. See FEMA, ACQUISITION-DEMOLITION: INFORMATION REQUIRED FOR ENVIRONMENTAL REVIEW (2022), https://www.fema.gov/sites/default/files/documents/fema_chn-acquisition-demolition-job-aid.pdf.

118. See Letter from Mark Carey, FEMA Mitigation Division Director, to Joel Neimeyer, Federal Co-Chair, Denali Commission (Mar. 31, 2017), in DENALI COMMISSION, *supra* note 18:

On October 26, 2016, the Newtok Village Council notified AK DHS&EM [Alaska Division of Homeland Security and Emergency Management] that its preferred project was a buyout of homes in lieu of relocation and requested AK DHS&EM change the grant scope. On February 1, 2017, the Newtok Village Council submitted a revised grant application to AK DHS&EM for *acquisition and demolition* of 13 homes, with about a \$3,000,000 project cost. . . . After reviewing the Notice of Intent for the [Commission’s] EIS, FEMA provides the following initial comments regarding alternatives and issues that should be included in the scope of the EIS: The scope of the Proposed Action Alternative should include a description of anticipated decommissioning activities in Newtok; to include demolition, dismantling, and disposal of infrastructure and housing; environmental remediation; and land restoration. *These activities are a connected action to the relocation.* Articulate any unknowns. Outline a description of the Mertarvik development and Newtok decommissioning schedule, to include potential interim or temporary measures in light of the urgency for action.

Id. (emphasis added).

119. *Id.*

120. Under NEPA, cooperating agencies—federal, state, tribal, or local entities with jurisdiction or expertise—are required to engage early in the process, participate in scoping, and contribute to environmental analyses upon request. See 40 C.F.R. §1501.8 (2024). Cooperating agencies have seemingly little authority in selecting critical project elements. *Id.* §1501.8 (b)(1)-(3). Lead agencies are responsible for involving cooperating agencies early, developing schedules for environmental reviews, and notifying responsible agencies of any anticipated delays for timely resolution. *Id.* §1501.7. Disagreements between joint lead agencies are resolved through requests or, if necessary, involvement of CEQ. *Id.* §§1504.1-3 (Dispute Resolution and Pre-Decisional Referrals).

121. See Letter from Mark Carey, FEMA Mitigation Division Director, to Don Antrobus, Village Infrastructure Protection Program Manager, Denali Commission (Apr. 3, 2018), in DENALI COMMISSION, *supra* note 18 (providing comment on the final EIS):

The document does not accurately reflect that FEMA expressed interest in being a cooperating agency though mentioned multiple times to the Denali Commission prior to sending any official invitations. . . . The document does not provide sufficient analysis on the connected actions of decommissioning that will occur as a result of the transition to Mertarvik. . . . The first bullet paragraph [on EIS, page 13] is inaccurately stated. FEMA’s letter dated March 31, 2017, requests Cooperating Agency status. The Denali Commission response to that request was for FEMA to reconsider the request to be a Cooperating Agency given the limited analysis to be provided for decommissioning activities in Newtok. Even though FEMA did not respond to that reconsideration, the Denali Commission made

an assumption that FEMA did not want to be a Cooperating Agency anymore and consequently no longer corresponded with FEMA during development of the draft Environmental Impact Statement.

Id.; see DENALI COMMISSION, *supra* note 18, at 2, 24 (discussing FWS’ serving as a consultative rather than cooperating role after learning decommissioning would not be included in the scope of the EIS; and the issue that FEMA was not “afforded an opportunity to participate as a Cooperating Agency as desired.”).

122. DENALI COMMISSION, *supra* note 18, at 24 (“No substantive issues identified in the FEMA scoping Summary would have resulted in additional changes to the Final EIS. The substantive comments provided in that letter were raised during the Commission’s scoping process. It was *considered* in the [draft] EIS and is included in the administrative record.”) (emphasis added).

123. *Id.*

124. See *supra* notes 27, 34-35, and accompanying text.

125. DENALI COMMISSION, *supra* note 18, at 23:

The Commission determined that, with the exception of some actions regarding the deactivation of Newtok airport, decommissioning activities at Newtok were *not a connected action* (as defined by NEPA) to proposed infrastructure development at Mertarvik. As discussed in Section 5.23.4 of the final EIS, potential decommissioning activities at Newtok are not being triggered by the proposed development and are *wholly independent* of the larger effort to provide a new community site for the people of Newtok. The Commission consulted with CEQ regarding this determination that decommissioning of Newtok is not a connected action. *Although it is not the role of CEQ to approve or endorse the Commission’s approach*, the consultation did not identify any significant concerns or inherent conflicts with NEPA.

(emphasis added); 40 C.F.R. §1501.3(b) (2024).

126. 40 C.F.R. §1508.1(i) (2024).

of this project “is to provide the people of Newtok with a place to live that allows them to keep their community and way of life within their traditional lands, while also providing the necessary infrastructure for a safe, sustainable, and healthy existence.”¹²⁷

NEPA interprets actions as “connected,” mandating comprehensive review, when project components (1) automatically trigger other actions that may require NEPA review; (2) cannot or will not proceed without prior or simultaneous completion of related actions; or (3) are interdependent parts of a larger initiative, deriving their justification from the overarching project.¹²⁸ The U.S. Court of Appeals for the Ninth Circuit uses an “independent utility” test to determine whether actions require consideration under a single EIS based on the proposed actions’ direct,¹²⁹ indirect,¹³⁰ and cumulative effects.¹³¹ Under the test, actions are “connected” if they are “inextricably intertwined,” meaning one would not exist without the other.¹³²

Improper segmentation occurs when agencies divide a federal action into smaller components to minimize the appearance of an overall impact, thereby avoiding comprehensive NEPA review.¹³³ In this case, while facilitating the development of Mertarvik for Newtok’s relocation, the Commission arguably segmented the NEPA process by limiting the EIS scope to construction activities.¹³⁴ This approach isolates the project’s interdependent purpose of relocating infrastructure from a threatened site to a safe location, ensuring unpolluted subsistence resources

and securing Newtok’s “way of life within their traditional lands.”¹³⁵

Under the Ninth Circuit’s independent utility test, determining whether decommissioning Newtok’s infrastructure is connected to development in Mertarvik depends on whether each action stands alone. The Commission argues that decommissioning would be desirable regardless of Mertarvik’s development, suggesting independent utility.¹³⁶ Yet, the Commission concedes in the ROD that “the proposed development at Mertarvik may nonetheless affect the timing and prioritization of proposed decommissioning activities at Newtok,” and acknowledges in an interagency letter that “[f]uture decommissioning of Newtok is reasonably foreseeable However, details on the scope, timing, and funding of decommissioning are unknown and cannot be analyzed in a meaningful way at this time[.]”¹³⁷

The success of the Commission’s project relies on the timely decommissioning of Newtok’s replaced infrastructure. Punting decommissioning planning off to an uncertain future under an unidentified entity reduces efficiencies through piecemeal funding and missed logistical coordination opportunities, while also endangering community safety and subsistence practices by increasing environmental and public health risks.¹³⁸ Therefore, the Ninth Circuit may require a more comprehensive EIS that includes cleanup planning to adequately address potential health and environmental/climate justice impacts.¹³⁹ The court could find that the Commission’s scoping decision under-

127. DENALI COMMISSION, *supra* note 18, at 1.

128. 40 C.F.R. §1501.3(b) (2024); *see id.* §1508.25(a) (2010), <https://www.ecfr.gov/on/2020-09-13/title-40/chapter-V/part-1508/section-1508.25> (controlling authority at the time of the Commission’s ROD); *see also* 23 C.F.R. §771.111(f) (2018) (requiring Federal Highway Administration NEPA scope evaluation of actions to “(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope[.]”) (emphasis added).

129. A direct effect is caused by the action, occurring at the same time and place. *Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F.3d 754, 763 (9th Cir. 1996) [hereinafter *IE v. FS*]; 40 C.F.R. §1508.1(i)(1) (2024).

130. An indirect effect is caused by the action, either later in time or farther removed in distance, but still reasonably foreseeable. *Inland Empire Pub. Lands Council*, 88 F.3d at 763; 40 C.F.R. §1508.1(i)(2) (2024).

131. 40 C.F.R. §1508.1(i)(3) (2024):

Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from actions with individually minor but collectively significant effects taking place over a period of time.

Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt., 399 F. Supp. 3d 888, 916-17 (9th Cir. 2019) (citing *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006)).

132. *Id.*; 40 C.F.R. §1501.3(b) (2024).

133. *See* National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35462 (May 1, 2024) (to be codified at 40 C.F.R. pts. 1500-1508) (“CEQ proposed these changes because this longstanding principle from the 1978 regulations—that agencies should not improperly segment their actions—is relevant not only when agencies are preparing EISs, but also when agencies determine whether to prepare an EA or apply a [CATEX].”).

134. *See* DENALI COMMISSION, *supra* note 18, at 9 (“[T]he Commission identified and adopted all practicable mitigation measures presented in the FEIS to avoid or minimize environmental harm accruing to construction of the infrastructure elements identified in the selected alternative.”) (emphasis added).

135. *Id.* at 1.

136. *See id.* at 23, 183, 186.

137. Letter from Joel Neimeyer, Denali Commission Federal Co-Chair, to Participating and Cooperating Agencies (May 19, 2017), in DENALI COMMISSION, *supra* note 18. The final EIS states:

Some of the structures and abandoned equipment at Newtok will remain after the community relocates to Mertarvik, and some of these areas, such as the landfill, wastewater treatment lagoon, airport runway, and other non-movable structures, could contribute to pollution of the Baird Inlet area as erosion allows the Ninglick River to move through the old village site. Some residents may choose to remain at the original town site and continue to use some of these facilities until forced to leave by erosion. Cleanup and environmental restoration of the village of Newtok would rest with the community and with federal and state agencies. No cleanup plans for Newtok have been developed. There is not enough information about who would move, what would remain, ownership, and other issues to formulate a cleanup plan at this time.

DENALI COMMISSION, *supra* note 18, at 184 (emphasis added); *but see* Letter from Mitch Ellis, *supra* note 70:

[T]here should be sufficient information about decommissioning for both agencies and the general public to find, or determine if there even is, an answer to the question, “What is the process, and who are the responsible parties, for planning, funding, and implementing a decommissioning effort at Newtok before erosion and/or storm surges render such efforts irrelevant?”

(emphasis added).

138. *See* Letter from Brian McCaffery to Donald Antrobus, *infra* note 150 and accompanying text (summarizing the active health threat to Newtok residents under the Commission’s decision to separate decommissioning planning in its environmental review).

139. *See supra* note 70 and accompanying text; Burkett, *supra* note 7; *but see* *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 28 F.4th 19, 34 (9th Cir. 2022) (holding two permitted activities were not connected to each other based on reliance of approval) (“[Oregon Coast Range] permits are not ‘connected’ to the broader experiment because the experiment would proceed without the permits.”).

mines NEPA's objective of ensuring federal agencies take a "hard look" at interconnected environmental effects.¹⁴⁰ Such segmentation could be held in conflict with the project's purpose and impede federal commitments to secure tribal subsistence land use.

Rather than waiting for judicial determination, CEQ should make an expert assessment and clarify the appropriate scope for rural Alaska RMP projects to ensure full NEPA compliance. The guidance proposed in Part III would necessitate an agency's scoping justification to go beyond "no one raised their hand."¹⁴¹ It aims to improve interagency coordination and tribal consultation, ensuring meaningful participation and aligned goals for a more consistent and collaborative review process.

D. Interagency Cooperation Under NEPA and the Demand for a Plan

Managing environmental quality under NEPA relies on effective interagency coordination, especially when federal actions affect tribal lands.¹⁴² NEPA encourages collaboration and early consultation with agencies and other key stakeholders to gather a comprehensive understanding of potential environmental impacts.¹⁴³ However, NEPA's mandate for coordination merely requires that agencies consult with those who have jurisdiction or expertise in the project and consider their input without enforcing consent or consistency across agencies.¹⁴⁴

In the ROD, the Commission asserts unilateral authority when classifying decommissioning in Newtok as a

separate action from construction in Mertarvik.¹⁴⁵ During agency review, FEMA,¹⁴⁶ the U.S. Department of Agriculture (USDA) Rural Development,¹⁴⁷ FWS,¹⁴⁸ and the U.S. Environmental Protection Agency (EPA) all contested the Commission's decision to exclude decommissioning. EPA noted that decommissioning Newtok infrastructure would likely be triggered by Mertarvik development, while identifying the minimum decommissioning likely required by affirmative federal law prior to interagency or tribal consultations (i.e., airport construction and housing buyouts).¹⁴⁹ FWS strongly warned of the risks to fish, wildlife, and subsistence resources if Newtok's abandoned infrastructure remained unaddressed, and recommended a particularized analysis to estimate cumulative impacts.¹⁵⁰

The Commission had an exclusive meeting with CEQ to discuss decommissioning Newtok's infrastructure—an engagement later scrutinized by FWS in written correspondence for the Commission's lack of transparency and its undisclosed details.¹⁵¹ However, NEPA does not obligate

140. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

141. See DENALI COMMISSION, *supra* note 18, at 13:

[FWS] provided a letter discussing resources that may be damaged if contaminants are released from Newtok, and several nexuses between decommissioning and legal authorities, but acknowledged that the [FWS] does not expect to conduct any decommissioning activities. No such requirements were identified by other agencies either. Therefore, the Commission was unable to identify any agency specific regulatory requirements connecting decommissioning with the proposed construction of infrastructure in Mertarvik.

(citation omitted); E-mail from Don Antrobus, *supra* note 13 ("Decommissioning was not 'ignored.' It was addressed and determined not to be a connected action. Part of the determination was a 'survey' of other agencies to determine if they had either funding or authority to address decommissioning. None did.").

142. See Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43, 47-48 (1990).

143. Appropriate consultation timing occurs when affected agencies are informed about the proposed action early enough to identify, evaluate, and provide feedback regarding the potential project impacts to their specific interests. *Id.* at 47; 40 C.F.R. §1502.4(b) (2024). Furthermore, lead agencies must consult with "any Federal agency which has jurisdiction by law or special expertise with the environmental impact involved" prior to making a detailed statement of significant impacts occurring under their project. 42 U.S.C. §4332(2)(C) (2023). This statement would then "be made available to the President, the [CEQ] and to the public[.]" *Id.* This process would have been the appropriate route had the Commission included full-scale decommissioning within its EIS and still not included it within its proposed alternative.

144. Keiter, *supra* note 142, at 48; see 40 C.F.R. §1501.9(c) (2024) (advising agencies on guidelines for public and government engagement, particularly to outreach and notification); 40 C.F.R. §1503.4(a) (providing multiple ways for an agency to fulfill its requirement to "respond to" and "consider" individual or group substantive comments).

145. See DENALI COMMISSION, *supra* note 18, at 23.

146. See Letter from Mark Carey, *supra* note 118.

147. See Letter from Renee Johnson, Acting State Director, USDA, to Joel Neimeyer, Federal Co-Chair, Denali Commission (Apr. 6, 2017), in DENALI COMMISSION, *supra* note 18 ("[USDA Rural Development] feels that the decommissioning of the Newtok facilities is a connected action and should be evaluated in the EIS.").

148. Letter from Mitch Ellis, *supra* note 70:

[T]he whole rationale behind the move to Mertarvik is the rapid erosion of the river bank on the south side of the village. As Hobbit pointed out in their reports, that rate of erosion threatens to tap some potential sources of contamination and pollution and carry them into the river before steps have been taken to mitigate that risk.

(referencing a report concerning 22 contamination sites in Newtok, HOBBIT ENVIRONMENTAL CONSULTING CORP., NEWTOK ENVIRONMENTAL SITE INVENTORY AND ASSESSMENT PROJECT, PART III: HAZARDOUS SUBSTANCE CLEAN UP PLAN 15 (2016)).

149. Letter from Molly Vaughan, EPA Environmental Review and Sediment Management Unit, to Christopher Floyd, U.S. Army Corps of Engineers NEPA Coordinator (Apr. 4, 2017), in DENALI COMMISSION, *supra* note 18.

150. Letter from Brian McCaffery, FWS Natural Resource Planner, to Don Antrobus, Program Manager, Denali Commission's Environmentally Threatened Communities (June 12, 2017), in DENALI COMMISSION, *supra* note 18:

Threats to these resources are both physical and administrative. The three Hobbit reports clearly summarize a host of potential threats to refuge resources. Several particular aspects of Newtok's location increase the potential pollution/contamination risks (i.e., physical threats) resulting from inappropriate, inadequate, or ill-timed decommissioning/cleanup activities. These aspects include a) Newtok's location on a tidal river with regular current flow both upriver and downriver from the village, b) the ongoing rapid erosion at the site, c) Newtok's vulnerability to extreme storm-surge and flooding events, and d) the risk of permafrost degradation. Administrative threats were actually summarized by Mr. Neimeyer [Commission federal co-chair] when he noted in his letter that "Decommissioning scope, timing, and funding are speculative at this point, and [t]here is no federal agency with the express authority to decommission a town site." Ideally, that magnitude of uncertainty could be reduced by an analysis in the EIS which integrates the information in the Hobbit reports with agency-specific responses to Mr. Neimeyer's letter in May.

(referencing HOBBIT, *supra* note 148).

151. Letter from Mitch Ellis, *supra* note 70:

This "vacuum at the top" was made abundantly clear in Mr. Neimeyer's memo Although not stated explicitly in Mr. Neimeyer's memo, the Denali Commission seems to have concluded (in consultation with CEQ) that the development of Mertarvik and the decommissioning of Newtok are not connected actions in the

agencies to provide detailed explanations beyond what is required in the ROD, likely justifying the nondisclosure of CEQ's consultation.¹⁵²

The Endangered Species Act (ESA) complements NEPA by requiring interagency coordination to prevent harm to listed species.¹⁵³ The Commission reports an informal consultation with FWS and the National Marine Fisheries Service (NMFS) in the ROD for assessing ESA-listed species that could be affected by the project.¹⁵⁴ However, by treating Newtok's decommissioning as a separate action, the impact assessment was intentionally limited to construction activities at Mertarvik. This allowed the Commission to classify the project's impact on endangered species as "MINOR" or "LESS THAN SIGNIFICANT," while labeling the "no action" alternative as having "no impact."¹⁵⁵ Had decommissioning been included within the assessment's scope, the analysis would have accounted for the perpetuation of toxic waste and erosion issues in Newtok, likely revealing significant impacts to endangered marine life and necessitating a cleanup plan coordinated with FWS and NMFS.¹⁵⁶

Unfortunately, NEPA and the ESA lack a dedicated funding mechanism for implementing mitigation measures. In balancing the immediate human emergency in Newtok, the Commission made a feed-it-to-the-ocean policy choice that proliferates in future project proposals.¹⁵⁷ While this decision was made in the context of urgent needs, it stands in contrast to the goals of NEPA, the ESA, and Alaska tribes' RMP projects, which aim to ensure health, safety, and longevity to displaced and environmentally threatened rural Alaskan communities.¹⁵⁸ CEQ may provide clarification on the appropriate scope for Alaska tribal RMP projects to achieve regulatory compliance, comprehensive review, and consistency across agencies.

context of NEPA. If that inference is correct, it would be *helpful to have the Denali Commission spell that out explicitly* for the cooperating and consulting agencies.

(emphasis added); see DENALI COMMISSION, *supra* note 18, at 23.

152. If President Obama advised CEQ directly on the scope selection, the Commission's reason for omitting an explanation could also be one of executive privilege. However, such speculation is beyond the scope of this Article.

153. 16 U.S.C. §1536 (1988); *id.* §1531. Under the ESA, formal consultation begins with a biological assessment of the project's impact on endangered species. 50 C.F.R. §402.02 (2024) (defining biological assessment).

154. DENALI COMMISSION, *supra* note 18, at 107, 204; see 16 U.S.C. §1536(a) (2) (1988); 50 C.F.R. §402.01(b) (2024) (dividing ESA administrative authority between FWS and NMFS).

155. DENALI COMMISSION, *supra* note 18, at 204.

156. See Letter from Brian McCaffery to Donald Antrobus, *supra* note 150 and accompanying text (discussing potential threats to refuge resources related to decommissioning); 16 U.S.C. §§1532-1533. "MAJOR impacts" are labelled under the No Action Alternative for "Community and Culture," "Socioeconomic," "Subsistence Resources & Practices," "Public Health & Safety," and "Public Services & Utilities." DENALI COMMISSION, *supra* note 18, at 204. This recognizes why Mertarvik is being developed—catastrophic collapse of Newtok's infrastructure leads to major disruption to the community's health, safety, and way of life. However, the Commission fails to link any connection to such categories when taking a "feed-it-to-the-ocean" approach to decommissioning.

157. DENALI COMMISSION, *supra* note 18, at 186 ("[T]he Denali Commission has limited the scope of the proposed action in this EIS to the development of new village infrastructure at Mertarvik, giving priority to promoting a solution to the human emergency faced by the Newtok community."); see *supra* Section I.D.3.

158. See *supra* notes 110, 127, 153, and accompanying text.

E. Tribal Consultation: Did Newtok Participate in Project Scoping?

The federal obligation to consult with tribes stems from a long-standing fiduciary duty, yet formal tribal consultation policies are relatively recent and less codified.¹⁵⁹ This often leads to conflicts between policies and the substantive and procedural demands of federal agencies.¹⁶⁰ While guided by presidential directives¹⁶¹ and the United Nations' consultation principles,¹⁶² tribal consultation requirements grant agencies broad discretion, resulting in inconsistent practices and dissatisfaction among tribal and federal participants.¹⁶³

As presented in the previous section, NEPA's procedural requirements likely enabled the Commission to disregard interagency scoping requests to include decommissioning. However, this section argues that the Commission's project scoping process violates tribal consultation requirements.

Without a specific tribal consultation policy, the Denali Commission follows the federal government's general framework, which emphasizes open and timely collaboration to ensure meaningful engagement on matters affecting tribal lands, resources, and welfare.¹⁶⁴ The final EIS for the Newtok-Mertarvik relocation project claims "full compliance" with Executive Order No. 13175, Consultation and Coordination With Indian Tribal Governments, stating that "this [Executive Order] is *not truly relevant* to

159. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."); *Seminole Nation v. United States*, 316 U.S. 286, 295 (1942) ("The argument for the Government, however sound it might otherwise be, fails to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards.").

160. Kekuk Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 Wyo. U.S. Rev. 397, 458 (2022) (acknowledging the newness of tribal consultation policies and often conflicts with long-established missions of federal agencies, as defined in their organic acts).

161. See Exec. Order No. 13175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000); Exec. Order No. 13084, Consultation and Coordination With Indian Tribal Governments, 63 Fed. Reg. 27655 (May 19, 1998); Exec. Order No. 12875, Enhancing the Intergovernmental Partnership, 58 Fed. Reg. 58093 (Oct. 28, 1993); see also Memorandum on Government-to-Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004); Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 9, 2009).

162. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (articulating the principle of free, prior, and informed consent as a safeguard for Indigenous rights in decisions affecting their lands, territories, and resources); U.S. STATE DEPARTMENT, ANNOUNCEMENT OF U.S. SUPPORT FOR UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2011).

163. See Monte Mills & Martin Nye, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 49, 88-89 (2021) (providing core principles to reversing historical tribal exclusion for tribal co-management of federal public lands); see also Stark et al., *supra* note 160, at 444 (discussing how current federal land management laws and policies perpetuate the historical "physical exclusion of Native peoples from federal lands," thereby frustrating the potential for federal-tribal relations and failing to provide meaningful processes for tribes to assert their governance, knowledge, and management of lands and resources, even when federal officials may now be "willing partners").

164. Exec. Order No. 13175, *supra* note 161; see GAO, GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR INFRASTRUCTURAL PROJECTS app. III, at 82-86 (2019).

the proposed action, as the project is essentially that of the Tribal entity [NVC], with the [Denali Commission] acting as a *facilitator*.¹⁶⁵ This “facilitator” role frames a specific agency-tribal relationship as cooperative federalism; but, it cannot justify the claim that tribal consultations are “not truly relevant”—a position quite contradictory to, for example, the Indian Health Service’s policy on meaningful tribal engagement.¹⁶⁶

In their evaluation of environmental justice within the final EIS, the Commission both acknowledges the importance of Newtok’s subsistence lifestyle while contradicting FWS’ warning about the risk of contamination to Newtok’s subsistence resources in deciding to separate decommission planning of Newtok’s existing infrastructure.¹⁶⁷ The Commission also reveals in the final EIS that “Newtok residents have stated that they do not expect the proposed project to cause long-term changes to their subsistence practices.”¹⁶⁸ However, the Commission’s statement culminated from one public scoping meeting with the Newtok community—facilitated by the Commission and ANTHC project managers—which excluded community discussion on decommissioning and the risk of toxic contamination and bioaccumulation in both Newtok and Mertarvik.¹⁶⁹

In a letter sent to participating agencies, the Commission suggests that tribal self-determination supports their rationale to segment the project scope: “The Village of Newtok has not expressed a desire to decommission the Newtok townsite.”¹⁷⁰ Yet, aside from the NVC’s preference to decommission 13 houses rather than relocate them in the FEMA buyout project, the ROD lacks official statements made by the NVC or other village representatives either supporting or objecting to the exclusion of decommissioning Newtok facilities.¹⁷¹ This calls into question

how the Commission evaluated Newtok’s purported disinterest in decommissioning.

In sum, the Commission’s “facilitator” stance, the lack of an open forum discussion on decommissioning with the Newtok community, and the absence of an official statement made by NVC on the project scope all raise doubts about whether the community had a meaningful opportunity to protect their interests, alongside inseparable concerns of environmental/climate justice. Although asking tribal community members who are already facing imminent threats to shelter and sanitation health to also consider the impacts on their multigenerational food security is an unjust and inequitable false choice that must be avoided, failing to adequately facilitate that conversation in a respectful and comprehensive manner is even worse, as it undermines the community’s right to self-determination and perpetuates both their dependence on and deference to agency decisions. Meaningful consultation not only fosters trust but also drives governmental action to secure adequate funding through congressional advocacy, helping prevent such dilemmas from arising in the first place.

III. CEQ Guidance on Decommissioning as a “Connected Action” for Alaska Native RMP Projects

The Denali Commission’s environmental review scoping process set a precedent for future RMP projects, enabling toxic waste-erosion sites to persist and threaten the contamination of subsistence resources essential to Alaskan tribes. To address this issue, CEQ should issue guidance clarifying that decommissioning qualifies as a “connected action” under NEPA for RMP projects in Alaska Native villages.¹⁷² Such guidance may persuade federal leading and cooperating agencies, federally partnered tribal organizations, and other stakeholders to operate from a shared understanding of the protections and intended outcomes afforded to RMP projects.¹⁷³

Subject to the recent ruling by the U.S. Court of Appeals for the District of Columbia Circuit, CEQ possibly lacks authority to *mandate* a specific scope for an EA,¹⁷⁴ but its

165. DENALI COMMISSION, *supra* note 18, at 208 (emphasis added).

166. INDIAN HEALTH SERVICE, TRIBAL CONSULTATION POLICY §11.A.1 (2006), <https://www.ihs.gov/IHM/circulars/2006/tribal-consultation-policy/> (emphasizing that joint federal-tribal workgroups “do not take the place of Tribal consultation”); see also *supra* note 50 and accompanying text.

167. DENALI COMMISSION, *supra* note 18, at 169 (“Subsistence constitutes a way of life, intricately connected to culture and traditions, maintains physical health and community and cultural structure[.]”). The Commission assesses environmental justice based on Exec. Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and EPA 2017 guidance. *Id.* at 191–94.

168. DENALI COMMISSION, *supra* note 18, at 192.

169. See Telephone Interview with Gavin Dixon, prior Newtok Relocation Project Manager, ANTHC (Feb. 23, 2024) (notes on file with author); see *supra* notes 70, 141, and accompanying text. There is no public presentation or discussion of decommissioning reported in the public scoping meeting held in Newtok on March 22, 2017; however, a subsequent agency scoping meeting held in Anchorage one week later largely focused on decommissioning. DENALI COMMISSION, *supra* note 18, at 11–12. Ironically, a Newtok local provided a written comment from the community meeting indicating what they value and what they expect is a mutual priority: “Liked the things you guys thought and asked before making the place, thinking of the animals and the land resources [a]nd asking about what the other people think.” *Id.* at 11.

170. Letter from Joel Neimeyer, *supra* note 137.

171. Letter from Mark Carey, *supra* note 118; see INDIAN HEALTH SERVICE, *supra* note 166, §10.A.1 (asserting a tribal consultation policy that requires holding consultation sessions to “solicit official Tribal comments and recommendations on policy and budget matters affecting the Indian Tribe(s)”) (emphasis added).

172. 40 C.F.R. §1501.3(b) (2024).

173. Agencies’ ability to both interpret and perform their statutory role is now a mere matter of persuasion rather than control over judicial review. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2259 (2024) (overturning the doctrine of *Chevron* deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

174. See CEQ, Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025); see also *Marin Audubon Soc’y v. Federal Aviation Admin.*, No. 23-1067, 2024 WL 4745044, at *6 (D.C. Cir. Nov. 12, 2024) (holding a separation-of-powers issue for CEQ to have authority over agencies without an established “nexus between the regulations and some delegation of the requisite authority by Congress”). On January 31, 2025, the D.C. Circuit denied a petition for rehearing on banc. A statement by Chief Judge Srikanth Srinivasan and joined by Judges Patricia Millett, Cornelia Pillard, Robert Wilkins, J. Michelle Childs, Florence Pan, and Bradley Garcia concurred in the denial: “The panel unanimously ruled in favor of the challenge in this case on an entirely separate ground (one that the parties did raise and brief), meaning that the panel majority’s rejection of the CEQ’s authority to issue binding NEPA regulations was unnecessary to the panel’s disposition.”

research and guidance on environmental quality still plays a crucial role in facilitating meaningful interagency consultations and influencing court determinations on an arbitrarily selected scope of environmental review.¹⁷⁵ Since its establishment under NEPA, CEQ has been a controversial figure of the “administrative state” and a pivot point in the federal government’s balance of power.¹⁷⁶ Courts debate its regulatory function, with some denying it outright authority and others asserting that its interpretations of NEPA should be given substantial deference.¹⁷⁷

CEQ’s enabling statute gives weight to the validity of its authority to interpret NEPA and guide agencies¹⁷⁸—roles it has consistently fulfilled.¹⁷⁹ While NEPA is goal-oriented and does not grant CEQ authority to dictate specific outcomes, CEQ retains the autonomous ability to influence federal environmental policy by recommending actions, resolving agency disputes, and advising the president.¹⁸⁰

(internal citations omitted). *See also* *Iowa v. Council on Env’t Quality*, No. 1:24-cv-00089 (D.N.D. Feb. 3, 2025) (holding NEPA did not give CEQ authority to issue binding regulations); Colburn, *supra* note 111, at 10296 (“The orthodoxy today is that NEPA’s substantive weight is to be given by—and only by—the multitude of responsible officials taking the government’s myriad actions.”); *see, e.g.*, CEQ, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (stating the legal effect of published guidance on environmental justice):

The guidance interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898. It does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court against the United States, its agencies, its officers, or any other person.

175. *See* 5 U.S.C. §706 (1966) (Administrative Procedure Act).
176. Colburn, *supra* note 111, at 10298 (“Administration after administration, the White House offices that review agency rulemakings demonstrate that a single bureau sitting at such an apex attracts vitriol, the impugning of its motives, and worse.”).
177. *Id.* at 10296; *compare* *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (“CEQ’s interpretation of NEPA is entitled to substantial deference.”), *with* *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (“[T]he Council’s function is in no way regulatory. Its purpose is to take information and to coordinate the reporting of governmental activities so as to aid the policy makers.”).
178. NEPA establishes CEQ with purpose-driven statutory authority to “formulate and recommend national policies” that advise agencies on the potential impacts of their actions on the quality of the environment. 42 U.S.C. §4344 (1970). *See supra* note 110 (stating NEPA’s congressional purpose); *see also* 40 C.F.R. §1500.1 (2024).
179. *See, e.g.*, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) (discussing environmental justice concerns of climate change to Tribal Nations and providing guidance on quantifying and reducing greenhouse gas emissions during NEPA review); Statements on Proposed Federal Actions Affecting the Environment, 36 Fed. Reg. 7724 (Apr. 23, 1971) (revised in 1973 (38 Fed. Reg. 20549 (Aug. 1, 1973)) (codified at 40 C.F.R. §1502)) (advising on cumulative impacts analysis) (“[T]he effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.”).
180. Message of the President, 42 U.S.C. §4321, at 5521 (July 9, 1970), <https://www.govinfo.gov/content/pkg/USCODE-2018-title42/pdf/USCODE-2018-title42-chap55.pdf>:

Essentially, the Council is a top-level advisory group (which might be compared with the Council of Economic Advisers), while the EPA would be an operating, “line” organization. The Council will continue to be a part of the Executive Office of the President and will perform its overall coordinating and advisory roles with respect to all Federal programs related to environmental quality.

Id.; *see also* 40 C.F.R. §1504.3(i) (2024) (stating that the CEQ referral process is not subject to judicial review, only subsequent agency actions, because the process is seen as voluntary by the agency submitting

Regardless of its capacity to control versus persuade, CEQ should take an active role in ending the federal “feed it to the ocean” policy that continues to pollute Alaska Native land, water, and subsistence resources. The urgency of this issue cannot be overstated. As these RMP projects advance,¹⁸¹ CEQ has an opportunity to advocate for stronger, more effective disaster management support for environmentally threatened Alaska Native communities.

IV. Conclusion

The Denali Commission’s segmented approach to Newtok’s relocation set a dangerous precedent, jeopardizing Alaska Natives’ subsistence resources and revealing critical issues in interagency cooperation and inadequate tribal consultation. As evident in ANTHC’s recent cost estimation methodology, the Commission indoctrinated a “feed it to the ocean” policy approach in future RMP project funding proposals by treating the decommissioning of infrastructure at the environmentally threatened site as a separate action from the development of its replacement.

This Article recommends that CEQ issue immediate NEPA guidance clarifying that decommissioning is a “connected action” to be included within the scope of environmental review for all Alaska tribal RMP projects. Such guidance will help prevent and expose unilateral agency decisions that undermine federal environmental standards, disrupt agency collaboration, and neglect tribal self-determination as well as land use obligations.

Clear agency guidance is needed to prevent past missteps and strengthen protections for Alaska Native subsistence resources. In alignment with ANTHC’s recent recommendations to remove barriers to equitable funding for Alaska tribes’ RMP projects though local, risk-based prioritization within a single-source funding model and a whole-of-government framework, this Article seeks to ensure federal actions meet the full needs of Alaska’s environmentally threatened communities.

to CEQ); *but see* *Marin Audubon Soc’y v. Federal Aviation Admin.*, 121 F.4th 902, 908 (D.C. Cir. 2024) (threatening the validity of NEPA implementing regulations, including 40 C.F.R. §§1500-08) (“CEQ traces its rulemaking authority not to legislation but to an Executive Order of the President. But ‘an executive order is not “law” within the meaning of the Constitution.’”) (quoting *California v. EPA*, 72 F.4th 308, 318 (2023)).

181. *See supra* notes 90-92 and accompanying text.