DIALOGUE

# AMENDING THE NEPA REGULATIONS


## SUMMARY

The Joe Biden Administration has proposed reversing a number of the Donald Trump Administration's changes to the National Environmental Policy Act (NEPA) regulations by again requiring federal agencies to evaluate the direct, indirect, and cumulative environmental impacts of projects under environmental review. On April 20, 2022, the first phase of those amendments was finalized, and on April 21, the Environmental Law Institute hosted a panel of experts to explore the changes to NEPA implementation, and how they might impact climate change policy and environmental justice. Below we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.



**Jim McElfish** (moderator) is Director of the Sustainable Use of Land Program and Senior Attorney at the Environmental Law Institute.
**Kym Hunter** is a Senior Attorney and Government Accountability Regional Leader at the Southern Environmental Law Center.
**Tanya C. Nesbitt** is a Partner at Marten Law LLP.
**Suzi Ruhl** is Director of Policy at the Elevate Policy Lab and Senior Research Scientist at the Yale Child Study Center, School of Medecine.


**Jim McElfish**: I think we hit the jackpot in terms of both panelists and timing today. You all enrolled to discuss where we're headed with National Environmental Policy Act (NEPA)[1] regulations. As most of you know, Phase 1 of the Joe Biden Administration's NEPA regulations were issued on April 20, 2022.[2] I look forward to hearing from our panelists on this important topic.

We'll begin with Kym Hunter, a senior attorney at the Southern Environmental Law Center, where she acts as lead attorney on one of the cases now before the U.S. Court of Appeals for the Fourth Circuit challenging the former administration's NEPA regulations.[3] Kym has vast experience in litigation against the government, representing citizen groups and community organizations.

She'll be followed by Tanya Nesbitt with Marten Law LLP. Tanya's an experienced litigator with a long career at the U.S. Department of Justice in natural resources-related work, where she was involved with NEPA and all of its applications through public lands and resources decisions. Of course, as a private practitioner, she will likely have some things to say about permitting and opportunities for both industry and government in the transition to other forms of energy permitting.

Suzi Ruhl, an attorney and epidemiologist, wears both a legal hat and a public health hat. Many years ago, she founded an organization called the Legal Environmental Assistance Foundation, a leading litigating and advocacy organization in the Southeast. She also spent many years at the U.S. Environmental Protection Agency (EPA) with its environmental justice program, and led an interagency effort on applying NEPA to make environmental justice practice more effective across the entire federal family. Suzi is currently with the Yale School of Medecine and Yale School of Public Health, where she's leading some very interesting efforts dealing with improving public health and environmental justice.

I want to say a few words to set the stage. As you know, when we talk about NEPA, most of us have really been talking about the NEPA regulations that were first adopted in interim form in 1971.[4] But the ones we've come to know and use are the 1978 regulations,[5] which stood until 2020 as our touchstone for defining a cumulative impact, a significant impact, public participation, a finding of no significant impact, and so on. Those NEPA regulations stood as a monument of the 1970s on how to think futuristically and adaptively.

In 2020, the Donald Trump Administration's Council on Environmental Quality (CEQ) proposed and finalized wholesale revisions to those regulations.[6] The 2020 regulations made numerous changes dealing with which effects would be considered, setting time limits and page limits with more specificity than the 1978 regulations, providing that project proponents could themselves prepare the environmental documents, establishing rebuttable presumptions, and so on. These changes were pretty drastic. Some were welcomed across the spectrum of NEPA practitioners.

1. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
2. 87 Fed. Reg. 23453 (Apr. 20, 2022).
3. Wild Va. v. Council on Env't Quality, No. 21-01839 (4th Cir. Aug. 2, 2021).
4. 36 Fed. Reg. 7724 (Apr. 23, 1971).
5. 43 Fed. Reg. 55978 (Nov. 29, 1978).
6. 85 Fed. Reg. 43304 (July 16, 2020).

Others were the subject of great controversy, and led to at least five federal lawsuits.

The Biden Administration decided that it preferred a different approach—probably one resembling the 1978 regulations. But it also wanted to consider some of the lessons learned in the past 50 years in terms of streamlining federal permitting, federal decisionmaking, public participation, integration of public participation, technology, and the like. So, rather than revert directly to the 1978 regulations, the Administration decided to pursue a two-phase approach.

Phase 1 was a revision of certain Trump Administration regulations that were found to be particularly problematic. That phase was completed with the issuance of the final rule on April 20, 2022. The second phase will deal with a broader array of issues. It will be launched sometime later this summer, and presumably finalized over the course of the next year.

The Phase 1 rulemaking essentially did four things. First, it reverted the "purpose and need" requirements of NEPA to the 1978 regulations. In defining the purpose and need for the action, which defines the scope of the analysis and the range of alternatives, the Phase 1 rule removes the deference to the applicant's purpose, which the Trump Administration had included. It also reverted to the "reasonable" range of alternatives under the 1978 regulations. In considering a range of alternatives, the agency is not limited to alternatives that are specifically within its own authorities or purview.

The second and most significant thing that the Phase 1 rule did was restore the direct references to the types of effects or impacts that need to be considered in the analysis. What it restored was the 1978 rule's reference to "direct impacts," "indirect impacts," and "cumulative impacts"—all of which are features of the analysis that NEPA practitioners have become accustomed to, but have also been the source of a great deal of contention.

Cumulative impacts were a particular focus of the Phase 1 rulemaking, in part because "cumulative impacts" is where a lot of analyses of the issues of climate change and greenhouse gas analysis have been carried out. The entire edifice of federal NEPA practice in the environmental justice field has been founded on review of cumulative impacts to low-income and minority communities, for whom, under executive orders, the effect of "disproportionately high and adverse impacts" are to be considered.[7] NEPA cumulative impacts analysis is a way in which those disproportionately high and adverse impacts have been assessed, so the return of the 1978 approach to understanding effects or impacts is a major event.

The last two outcomes of the Phase 1 rulemaking are procedural changes. The Phase 1 rule says that federal agencies have until September 2023 to adopt their own NEPA procedures. This is important because these are the procedures that the agencies themselves, together with CEQ review and subject to public comment, apply to their own NEPA practice. The Biden Administration had earlier issued an interim rule extending the deadline to September 2023, but using the vehicle of the Phase 1 approach in this notice-and-comment rulemaking, they finalized that date as the current deadline.

The other procedural change that happened is that the agency procedures are free to be more adaptive and to go above the requirements of the CEQ regulations. The Trump Administration rule essentially established the CEQ rules as a ceiling, rather than a floor. And the Biden Administration said, no, we want the agencies to have broader flexibility subject to public comment, subject to CEQ review, but broader flexibility in deciding what procedures are appropriate for the agencies.

**Kym Hunter**: I'm speaking today as a representative of the Southern Environmental Law Center. We work in six states throughout the Southeast. I lead all of our NEPA work. In 2019 and 2021, we heard that finally we would see the Trump Administration's proposed cuts to NEPA, which had long been anticipated. We jumped into action and started talking across our program areas about what these cuts were going to mean, what the changes would mean, and what was going to look different—for forests, coasts, and environmental justice issues like concentrated animal feeding operations (CAFOs). We spent a significant amount of time compiling comments for the Trump Administration and explaining in great detail, with reams and reams of attachments, about how, in the real world, these changes were going to impact environmental outcomes and the opportunity for communities to participate in the process.

We had significant concerns about nearly every one of the changes. It was a full 66 pages of redlined edits to these long-standing NEPA regulations. As part of that rulemaking process, my core team submitted the documents to CEQ, outlining and supporting our concerns with very real evidence, including technical and scientific papers on exactly how this would impact outcomes. I think it took them four or five hours to submit this material.

Lo and behold, when the final rule was published, when we looked at responses to comments, it did not seem to us like any of the concerns that we had raised had been given much thought. We didn't see much of a response to how these tremendously significant changes to the rule would lead to detrimental on-the-ground outcomes.

We were part of the national conversation on how to challenge this. I think the whole environmental law community was united in the stance that a challenge needed to be filed very quickly. As Jim mentioned, there were five. I led the one in the Southeast that was filed within the Western District of Virginia initially, then appealed to the Fourth Circuit. The litigation represents 17 environmental groups, including national groups like the National Trust for Historic Preservation and Defenders of Wildlife, as well as local groups like the Alabama Rivers Alliance. It's a diverse group with inter-

7. Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).

ests ranging from wildlife, air, water, species, and historic preservation.

I believe we were the only group that also decided to quickly move for a preliminary injunction to try to stop the rule from going into effect. It was a bit of a crazy time. Not only did we have to pull all of these briefs together in short order, but we also went through three different judges within the first week of the case, because I don't think anybody wanted to be greeted with these hundreds and hundreds of pages or make a quick decision about this monumental environmental law that had been on the books since 1970.

We finally got to our final judge and submitted our briefs in support of a preliminary injunction. What the other side said was, well, nothing's really going to change very quickly. There's no need for a preliminary injunction right now. One great thing we got out of filing was that the Administration was forced to make some concessions, or at least forced to put out statements saying that they weren't going to do anything immediately.

For example, one of our big concerns has always been about Farm Service Agency loans, and that those would no longer be considered "major federal actions" and thus exempted from NEPA review.[8] As a result of our litigation, the Administration put out a memorandum saying that at that time those loans would in fact still be subject to NEPA.

I'm not sure that's consistent with law. That's a point that we went on to argue in the litigation. But by pushing forward, we felt pretty good that we were changing the conversation and making sure that the Administration wasn't rushing to implement those new NEPA regulations, particularly retroactively, which they could have done, per the rule, to projects that were already on the books. I think the aggressiveness of our litigation helped slow that rule a little bit.

As for our previous concern that those regulations could be applied retroactively to every project in the country, that particular change has not happened. We did not get a preliminary injunction, but we pushed on with our litigation on a fairly aggressive schedule.

When I was in court arguing this, on the other side of the case was a gentleman who was later involved in the January 6, 2021, insurrection at the U.S. Capitol. He made bizarre statements about how this NEPA change was just "rules about rules." It wasn't going to change anything—this was just a rule. The agencies were going to have to implement their own rules, so nothing was going to change until that next step happened.

Now of course, as Jim mentioned at the outset, that wasn't true. What this rule did was set a ceiling. It didn't matter what other agencies' specific regulations said; CEQ had very clearly set a ceiling. Unfortunately, even though we disagreed, that's what the judge heard—that it was just rules about rules and nothing's going to change for a long time. Ultimately, the judge said it didn't seem like this case was ripe.

This was all happening around the time the Biden Administration came into office. As Jim said, the new Administration wanted to take a different approach, and quickly issued statements within our litigation saying that they were no longer going to be defending the rule on the merits and that they had serious concerns about both the substance and the legality of this rule.[9] They did not file any additional briefings supporting the rule. But the Biden Administration has continued to argue that groups like mine do not have standing to challenge this rule, and that the rule is not ripe.

The Administration has also sought to stay a lot of this litigation, saying that doing so would allow them to go through these Phase 1 and Phase 2 processes. We haven't agreed with this approach because we're concerned about what is happening in the interim. These rules don't get fixed very quickly. As Jim mentioned, we still haven't even seen a draft Phase 2 rule. So, it's always been our approach to continue pushing forward in this litigation. We filed an appeal of that decision on ripeness and standing in the Fourth Circuit that has now been fully briefed, and is awaiting argument later this year.[10]

It has been somewhat disappointing to see the Administration still take the approach that groups like ours do not have standing to bring these types of claims. But our groups include people working on important environmental justice issues, including small communities who are very personally impacted by the rule because they're so resource-starved. Without NEPA, it would be very hard for them to do their jobs.

I got a lot of questions yesterday about how we feel about Phase 1. As I always say, generally our stance has been that we would rather not go through this new rulemaking process. We would have preferred that the Administration had conceded, perhaps as part of litigation or another process, that the Trump Administration rule was illegal—substantively because it's inconsistent with the NEPA statute, but also procedurally because of the way that the rulemaking was done.

As I mentioned, none of these concerns that environmental communities raised were addressed. I think we have nine different *State Farm*[11] claims in our litigation. To date, the Biden Administration is not defending that process. Again, we would rather go back to that baseline, to allow the possibility of this great new CEQ under the direction of my former colleague, Brenda Mallory, to go ahead and make some thoughtful changes from that baseline.

We're concerned about leaving this Trump Administration rule that was not promulgated in a legal way. It has substantive illegalities in place as a kind of baseline

8. *See* 85 Fed. Reg. 1684, 1709 (Jan. 10, 2020).

9. Declaration of Matthew Lee-Ashley at 3, Wild Virginia v. Council on Environmental Quality, 544 F. Supp. 3d 620 (2021) (No. 3:20-CV-00045).

10. Wild Va. v. Council on Env't Quality, No. 21-01839 (4th Cir. Aug. 2, 2021).

11. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 13 ELR 20672 (1983).

for additional change. One thing that we're particularly concerned about is if these rules—the Phase 1 rule or the Phase 2 rule that's coming later—are challenged successfully, we'll go back to the Trump rule rather than going back to the 1978 baseline.

As Jim mentioned, there were great revisions in that Phase 1 rule. Of course, we all want to go back to a situation where it is very clear that direct, indirect, and cumulative effects need to be studied, and that reasonably foreseeable future effects need to be studied and disclosed. But there are still an awful lot of harmful provisions from the Trump Administration left in place at this time. That includes the requirement to study all reasonable alternatives, including alternatives that might be within the jurisdiction of another agency.

We here, particularly in eastern North Carolina, have CAFOs, factory farms all over, normally adjacent to disenfranchised communities, historically Black communities. Those are no longer subject to NEPA, at least according to the rule. So, that's a big concern for us, that a lot of different projects just aren't going to get any NEPA review at all.

One of the things that I get the most questions about from my colleagues is, what do we do about significance factors when we're deciding between an environmental assessment and an environmental impact statement (EIS)? Those significance factors were eliminated by the Trump Administration rule. They were replaced with some sort of new test, but that has not been tested in court. It's very confusing right now, in terms of regulatory certainty, about what we're even supposed to be asking agencies to look at in terms of significance factors. We're concerned about that.

One last thing that I'm concerned about as a litigator is that the Trump Administration made all these attempts to keep people out of court. I don't think those actions stand up under the Administrative Procedure Act (APA) or otherwise. For example, there is an exhaustion requirement included in the rule—that if you have not raised an issue and comment in a very detailed and specific way, you would be barred from raising that issue in court. That's something that is still within the text of the rule. I don't think it has been challenged yet, and it's really problematic and very chilling.

For some of the small communities that we represent, if they open a regulation book right now and look at what NEPA requires, it expects a lot of them during that comment process. And that's really concerning to me. We had amicus briefs submitted in our case on that point, including from a historically Black community in Virginia, explaining how the uncertainty about what NEPA actually requires right now—and whether agencies on the ground are requiring that or not, and whether people will be kept out of court or not—disenfranchises communities that had previously relied on this important tool for public comment and public disclosure.[12]

We are strongly advocating that all of these things get fixed as quickly as possible. In the meantime, we'll continue to make those arguments in court.

**Tanya Nesbitt**: I am an attorney at Marten Law, where I litigate Clean Water Act (CWA)[13] and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[14] cases. Before Marten, I was a trial attorney in the Environment and Natural Resources Division at the U.S. Department of Justice, where I litigated public lands matters involving NEPA as well as other federal statutes. My interest in NEPA is strong, both professionally and personally.

I grew up in Miami, Florida, where I experienced the impacts of climate change very acutely. I am distressed that my hometown may be underwater in 30 years. I want it to still be there, and I want to ensure that we have a process to build the infrastructure to sustain the changes that the earth is experiencing.

I should start off by saying that CEQ in some ways has an impossible task in front of them. I understand that they are a short-staffed agency. This is a very highly technical, complex topic. I do not envy them. So, my criticism of them should be couched in those parameters, understanding the challenges in front of them.

That being said, the question I had for the revisions to the first phase was whether CEQ was focused on implementation or interpretation. In many ways, I feel that just going back to the 1978 regulations does not fix a lot of the problems with NEPA interpretation. However, I understand that the Administration's agenda, which focuses on climate change, environmental justice, and energy, warrants that implementation should be the Administration's first focus.

Notwithstanding, I think they received some criticism that the piecemeal process wasn't the best approach. Perhaps they should have done a one fell swoop that gave greater emphasis on climate and environmental justice first. But if the focus is implementation, the Administration probably should focus on and have a stronger interest in ensuring that proposals aren't mired in NEPA compliance burdens. I think that's where the Trump Administration's criticisms have some legs and warrant deeper consideration.

For example, it would be important for CEQ to identify and regularly collect data on metrics that convey relevant information on the state of NEPA implementation. Right now, many of the existing reports consistently lack data. There's inconsistent governmentwide reporting that is a barrier to effectively understanding the NEPA process over time, from start to finish.

CEQ, for example, does publish reports on topics like the timelines for completion of EISs. But there's no indication that the reports have meaningfully contributed to CEQ's understanding of NEPA practice and where it's

12. Memorandum in Support of Motion for Preliminary Injunction or Stay, Wild Virginia v. Council on Environmental Quality, 544 F. Supp. 3d 620 (2021) (No. 3:20-CV-00045).
13. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
14. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

headed. We need to know what problem we need to solve before we look at what we're going to change about the 2020 regulations. There are some valid criticisms that the agency hasn't done that effectively yet. CEQ needs to evaluate, for example, why EISs are substantially delayed, and then determine what we can do to produce a better outcome.

The concern about delays and excessive documentation is valid. For example, from 2010 to 2018, the median time it took an agency to complete an EIS was 3.5 years, and the average was 4.5 years.[15] CEQ should also consider mitigation of the consideration of inconsequential analysis—like cumulative impacts. Jim and Kym both mentioned that. Cumulative review is going to be very important when we talk about things like the human environment, demographic shifts, the increased role of technology in building infrastructure, and extreme weather patterns. But how can we cull it down so that we're only prioritizing things that are significant, rather than nonsignificant impacts that perhaps warrant only a brief discussion?

I think there's some irony that for a statute that's primarily focused on process, I am critiquing the process that went in evaluating what needs to change from the 2020 regulations. But for Phase 2, it would be good for them to be more mindful and perhaps collect more data to inform the changes they institute.

With respect to climate change, I believe that the social cost of carbon is going to be a key tool to the fight.[16] Louisiana and nine other states that focus on oil and gas production sued to block the use of the interim social cost of carbon metric. Their complaints were that the metric basically increased the cost of producing energy, and increased the regulatory cost for the states.

The case eventually went up to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit basically tossed the case out and said neither sufficient harm nor standing had been demonstrated, and denied a hearing. Louisiana Attorney General Jeff Landry says the fight is not over. He's willing to take this up to the U.S. Supreme Court. It will be interesting to see if we receive more instruction from the Supreme Court on how to incorporate the tool into NEPA analysis.[17]

If the Biden Administration does move to increase the social cost of carbon, that will affect NEPA reviews, because there will be more proposed actions that will require an EIS because a high social cost of carbon would imply that there will be potentially significant environmental impacts. Second, it could affect the reasonable alternatives analysis because more weight would have to be given to the consideration of alternatives to lower the social cost of carbon.

Then again, the industry folks could come back and say, well, that's just more red tape. These additional analyses are going to further delay the process and permitting. Industry has consistently complained about the rabbit hole of "reasonable alternatives analysis," and how it takes up hundreds of pages of an EIS and is too burdensome.

I think with the war in Ukraine and oil prices soaring, the Administration is facing some pressure to lower gas prices and to encourage more domestic oil production. We saw that the moratorium on oil and gas leasing has been lifted.[18] We see that those oil and gas-related cases will raise a lot of issues related to climate or environmental justice.

There's one pending now in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in relation to the creation of a rail line connecting the Uinta Basin with the national rail network.[19] The Seven County Infrastructure Coalition developed a proposal to build an 85-mile rail line. The line would provide shippers with an alternative method of oil transportation rather than using trucks, which apparently is the only option currently available.

Obviously, the use of railroads for oil transportation would be less emissions-intensive than using trucks. The Surface Transportation Board did a final EIS and selected the rail line as the alternative. A group of plaintiffs led by the Center for Biological Diversity filed suit in the D.C. Circuit under NEPA alleging that the rail line project would likely significantly increase oil production in the region and that in the future, more greenhouse gas emissions would result from the presence of the rail line. Additionally, the rail line runs through the region where the Ute Indian Tribe lives, and has some cacti that are of cultural significance to the tribe. The petitioners have argued that the tribe would be disproportionately and directly impacted by greenhouse gas emissions in the region due to the construction of the rail line.

This legal challenge is ongoing, and the petitioners remain steadfast in their assertions that the Surface Transportation Board inadequately addressed the environmental justice concerns, even though there was consultation between the Surface Transportation Board and the Ute Tribe as part of the analysis. A programmatic agreement was achieved that would focus on how cultural resources would be protected, but the petitioners are saying that that's not enough.

I share Kym's concern that there is not enough uniform guidance on what these environmental reviews are supposed to look like, when they're supposed to start, when consultation is supposed to occur, who's supposed to be included, and how to develop holistic, specific, and measurable goals, particularly in the context of phased review. With the Administration contemplating larger

15. Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018) (2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.
16. Pamela King, *Louisiana Plans Supreme Court Plea Over Social Cost of Carbon*, E&E News (Apr. 14, 2022), https://www.eenews.net/articles/louisiana-plans-supreme-court-plea-over-social-cost-of-carbon/.
17. On May 26, the Court issued an emergency order denying Louisiana's and other states' application to vacate the Fifth Circuit's stay of the Western District of Louisiana's ruling that had enjoined federal agencies from implementing interim estimates on the social cost of greenhouse gas emissions. Louisiana v. Biden, No. 21A658, 52 ELR 20065 (U.S. May 26, 2022).
18. Heather Richards & Emma Dumain, *3 Things Are Clear About Biden's Latest Move on Oil Leasing*, E&E News (Aug. 17, 2021), https://www.eenews.net/articles/3-things-are-clear-about-bidens-latest-move-on-oil-leasing/.
19. Center for Biological Diversity v. Surface Transp. Bd., No. 22-1020 (D.C. Cir. Feb. 11, 2022).

infrastructure projects, the question arises: At what level or phase are we going to have to consult about many of these issues related to climate and environmental justice? I think the agency has its work cut out in providing a lot of clarity there.

Another area to address is the data collected by the 2016 Federal Interagency Working Group on Environmental Justice. It's unclear whether the work of that NEPA committee is being consistently implemented across agencies in their environmental reviews. I think, before the agency starts with its work on Phase 2, it would be important to collect that data to see where the agencies are now and where we need to go in that process. But like I said, it's a lot of work for an agency (CEQ) that's overburdened. I understand the administrative challenges going forward. So it's a good first step with Phase 1, but I think there's still considerable work to be done.

**Suzi Ruhl**: I'm a Senior Research Scientist with the Yale School of Medicine. It's kind of fortuitous being a lawyer in a school of medicine. I'm also the director of policy for the Elevate Policy Lab, which is with the Yale School of Public Health. The reason I emphasize these fields is that I think a lot of us here have approached NEPA as lawyers. We know that while we can reach a certain level of progress, we also need other allies and other professionals who provide essential clinical and research expertise to address real people, in real time and in real-world contexts.

I joined the work at Yale to support its focus on the individual, the family, the mothers, and the children in healthcare and prevention. The Yale health team effort realizes that the context in which the people they serve as healthcare providers is limited when you don't consider the impact of place-based factors, such as the stressors and the social determinants of health. Having left EPA, and after having had the absolute joy of working with 17 different federal departments on the report "Promising Practices for EJ Methodologies in NEPA Reviews,"[20] it's great to be here today.

I want to emphasize an additional lens for thinking about where we are today with NEPA and EJ given its important history and trajectory over time. Again, from a legal perspective and from a health/technical perspective, NEPA practice is multidimensional.

We've talked about the importance of those legal challenges. Thank you, Kym. I'm coming from having founded a public interest law firm, so I'm thrilled that you're working at that baseline. I think that's so important. And Tanya, your work from legal challenges to rulemaking is so important to set that stage.

What I want to concentrate on are environmental reviews. I am also excited to see in the Phase 1 rule the lifting of the ceiling on individual federal agencies doing their own procedures beyond CEQ regulations for NEPA reviews. That's vitally important because our experience with the Federal Interagency Working Group on Environmental Justice showed there is solid interest across the federal family in doing the most effective decisionmaking possible to enable the most informed decisions, especially with respect to environmental justice.

There are different dimensions of environmental justice. We have situations where there are very controversial projects with huge impacts to communities of color and low-income and tribal, Indigenous populations. This relates to "whether" a project should proceed.

But we don't often focus on the role of NEPA as it relates to the "how." For projects going forward—a lot of transportation projects, port expansions, and so on—there is a robust opportunity to strengthen the understanding of the impacts through analysis and consideration of alternatives. In the world of mitigation, we've got some great examples where environmental justice communities have been able to leverage millions of dollars to address core needs in their communities through the NEPA process and effectively move the process and project forward.

Just as we apply NEPA to better understand impacts, it's also important to understand adverse conditions in a COVID-affected world. We have the data, we know the figures and the cost, and we know who has borne that cost from a health, life, economic, and social mobility perspective of COVID. It is people of color and people of low wealth who have borne that cost.

We also have a much better understanding now of the associations between an individual's and a community's status and environmental exposures on health, including the effects on their economic ability to thrive. And we know it's not just about the polluted environment. It's also about the built environment and the lack of access to resources.

Putting all of this together, the Biden Administration is carrying forward methodologies and the approaches identified by the NEPA Committee of the Federal Interagency Working Group on Environmental Justice established by Executive Order No. 12898.[21] That started with 12 and ended up with 200 NEPA and environmental justice practitioners involved in trying to find the most effective, efficient, and consistent approaches to ensuring that environmental justice was considered in NEPA reviews. What we have done is lay out an approach to problem solving when it comes to informed decisionmaking on proposed federal actions that withstands legal vulnerability. Now, we are seeing that individual agencies are applying the Administration-wide effort of "Promising Practices" to the specific aspects of their agency decisionmaking. Once again, that provision within the Phase 1 rule is very powerful in that regard.

As we developed the Promising Practices report, the Environmental Law Institute was very involved in helping to translate this work from a community engagement perspective. I can't overemphasize the excitement that I have

20. Federal Interagency Working Group on Environmental Justice & NEPA Committee, Promising Practices for EJ Methodologies in NEPA Reviews (2016) [hereinafter Promising Practices].

21. Exec. Order No. 12898, 3 C.F.R. 859 (1994).

now for this report. What I want to do now is whet your appetite with the importance of some of these provisions. I'm going to give you a series of three appetizers, based on how you can start the NEPA analysis by considering the components of Promising Practices.

First, obviously, a key point is how to define the footprint upon which you're going to do the NEPA analysis. Because we were able to bring in NEPA practitioners and environmental justice practitioners across 17 different federal departments, we had a depth of knowledge on how you can be more effective in that analysis. We know that the communities' conditions, their characteristics, and their locations influence NEPA review boundaries. As Tanya mentioned, with some tribal issues, there are cultural impacts and there are also spiritual impacts. Sometimes those impacts are contiguous to the project and sometimes, they're not.

Within Promising Practices, we lay out some of the conditions from which you can get to informed decisionmaking more effectively and more consistently—especially if you pay attention to evidence-based data that includes lived experience data. It is important, for example, to look deeper under the umbrella of disease disparities. For example, you need to pay attention to heightened adverse conditions of certain populations, such as the rates of air pollution that are two or three times higher in Black and brown communities than in white communities, and the impact on children and mothers in these communities.

It's important to realize the socioeconomic vulnerabilities that come from the proposed project; for example, impacts on subsistence fishing that is used as a dietary staple. Promising Practices lays out these menus of topics that can be evaluated to increase the understanding of the potential impacts, alternatives, and mitigation measures.

A powerful consideration that came out of the NEPA Committee was that when we think about locations, we tend to think of exposure to pollution and exposure pathways for chemical contaminants, radiological contaminants, or biological contaminants. That is one cluster of locational factors. But it's also important to look at some of those other factors related to the resurrected focus in the Phase 1 rules of the "human environment." That encompasses aesthetic, historic, cultural, and other factors.

The takeaway from Promising Practices on defining the affected environment is realizing that sometimes, after you've done this analysis, you will see that the footprint may be larger, or smaller, or shaped differently than you expected. It may not be a concentric circle. Often, you may need a different affected environment depending on the resources that are affected. Going back to Promising Practices and the appetizers I mentioned, there's a lot of great information that needs to be refreshed with the changing rules, but it's still very relevant.

Second, in analyzing NEPA and environmental justice, one of the pillars of this analysis is NEPA, and the other pillar is Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.[22] The Executive Order references disproportionately high and adverse impacts. To give a more precise quote, it states that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[23]

We spent a lot of time confronting the distinction between Disproportionately High and Adverse Impacts (DHAIs) and significance. The very important conclusion is that an environmental justice analysis is not limited to EISs where you meet the significance test per NEPA. It is also applicable to environmental assessments and categorical exclusions. The NEPA Committee also emphasized that the outcome of a DHAI finding is not that the project will not go forward—it's that you will need to amplify your analysis of those key conditions that are uniquely affecting that impacted population.

Once again, there's growing information on health effects, from physical health to mental health effects. This information drills down to particularly vulnerable subpopulations within communities of color and low-income communities. And it can help us understand relationships between project and impact, whether it's causal or correlative. We now have an opportunity to apply this information to environmental reviews in the implementation of the current Phase 1 regulations as it relates to individual agencies, and as we move forward in the Phase 2 regulations.

The third point is that we don't always consider the full range of mitigation measures provided by NEPA. The list of these mitigation measures, at the very top, could include avoiding the impact by not taking action—the "no action" alternative. This gives momentum through NEPA to take part in the engagement process from a multistakeholder perspective.

There are also important opportunities to minimize the impact, rectify and reduce the impact, and reconcile with compensation. Like I said, there are some great examples within the environmental justice arena documenting that NEPA can address the "how" as opposed to the "whether" of proposed federal projects, leaving room for multistakeholder collaboration, driven by the impacted community, to achieve environmentally just decisionmaking in a more efficient, effective, and consistent manner.

The American Rescue Plan has provided billions of dollars that directly confront challenges to the well-being of these communities, such as housing, healthcare, food, and transportation.[24] NEPA provides a very important table and a very strong structure to lay out the issues that relate to the assessment of impacts and the balance of burdens and benefits, alternatives, mitigation, and everything in between, so that we can have more informed decisionmak-

22. *Id.*
23. *Id.*
24. Pub. L. No. 117-2, 135 Stat. 4 (2021).

ing on proposed federal actions affecting communities of color and low-wealth communities.

We have to remember all those dimensions, including the ones that Kym and Tanya have talked about, because that is the framework and the architecture. But although the money is here and the money is going to be spent, we need to make sure that it gets to those communities that are in the greatest need. I have always believed that NEPA provides us the framework to do so. I hope that we'll see a lot more activity and engagement at the agency level, in addition to the CEQ level, to achieve the objectives of environmental justice.

Putting these points together, people who are bearing the burden of the pollution, disease, poverty, and crime are now living in a period of unprecedented authority and appropriations through the Administration's Executive Orders that highlight the importance of racial equity, environmental justice, and climate. These authorities and resources can better serve these communities if NEPA is applied appropriately.

**Jim McElfish**: We've received a number of questions from the audience. The first is, does the Phase 1 rule affect or deal with the ability of agencies to adopt other agencies' categorical exclusions? That was an innovation of the Trump Administration rule. Kym, I think that's one of the things you may have looked at in your litigation.

**Kym Hunter**: No. The Phase 1 rule doesn't speak to that at all.

**Jim McElfish**: My assumption is, because of the silence of the Phase 1 rule, that that is still part of the existing adopted Trump Administration rules that remain in effect until they're changed—if at all—by the Phase 2 rule.

Another for Kym. What will happen to the litigation now that the Phase 1 rule is completed? Does it get litigated? What happens to your case and the other cases?

**Kym Hunter**: I certainly got this question a lot yesterday. I don't think it affects our case. Certainly, the government had previewed within the litigation the fact that this rule was coming and made some claims about mootness.

Our response to that is the case is not mooted until we are made whole. While there are all of these things outstanding, for example the Farm Service Agency loans that are still not subject to NEPA, our case is certainly not moot. It would be the government's burden to argue that it was.

That's where our litigation is. Will Phase 1 be litigated by someone else? I guess we'll have to wait and see. But that's certainly been part of our goal—making sure that if Phase 1 or if Phase 2 is litigated successfully, we would return to a 1978 baseline rather than a Trump Administration 2020 baseline.

**Jim McElfish**: Does anyone on the panel want to prognosticate about whether the Texas or Louisiana attorney general might litigate the Biden Administration Phase 1 rule in the district courts—in the Fifth Circuit perhaps?

**Tanya Nesbitt**: It's likely that there will be litigation on the final rulemaking. I think there was a lot of criticism in the comments to the proposed notice of rulemaking, that the agency had not sufficiently explained its basis for even endeavoring to issue regulations. I haven't had a chance to digest the entire final rule yet, but I expect that it addresses three things: the purpose and need statements, the agency NEPA procedures, and the effects or impacts.

**Kym Hunter**: I think it's going to be a challenging claim to bring, certainly for that type of *State Farm* claim, because the Trump Administration's justification for making those changes in the first place was so slim. This all gets wrapped up together. When you're going back to something that has been in place for a long time, I think it's harder, as a plaintiff challenging that, to make the case that that was insufficiently studied. Because we're not looking at changes that people can't anticipate—we're looking at a change to what has been the law for a long time.

**Jim McElfish**: Is there consideration for how agencies and project proponents can provide greater clarity to communities early in the process, perhaps even before official scoping? Does Promising Practices[25] speak to that or should we look for changes in federal practice?

**Suzi Ruhl**: That's a great question. Promising Practices directly speaks to that because our first section is on meaningful engagement. The collective position is that, even before scoping, the purpose and need statement is where you want to have that robust interaction with the community. I would give a shout out to the Federal Highway Administration Virtual Public Involvement programming on this. They've done important work on reaching out to communities through a lot of innovative measures.

During COVID, we've seen advances in telehealth, so I think there are more standardized methodologies for achieving that engagement. It's something that, if you pay attention to it at the front end, you're going to have a payback at the back end.

**Jim McElfish**: One question relates to the infrastructure legislation that incorporates some of the timing and matters that were in or addressed in part by the Trump Administration rule. Where do the panelists see things going in terms of timing and some of those innovations that might or might not be retained by the current Administration?

**Suzi Ruhl**: It's very interesting. The rush to judgment was a big concern. That's a huge concern within the environmental justice community—not only having the seat at the table to talk, but having the time to prepare your comments. That's a real challenge to meaningful engagement.

I'll give an example of transportation. Transportation is such an impediment to the well-being of communities, especially communities of low wealth. There's an impor-

25. Promising Practices, *supra* note 20.

tant need to build out transportation projects in a way that addresses the people who are directly affected.

In order to mitigate the construction impacts of a transportation project, you should know who is impacted and what their conditions are. At the same time, in the design of the project, you want to make sure that you're addressing the people who are directly affected. For example, the light rail needs to have rail stops in the community that it's going through.

The clash between the infrastructure law[26] and the desire to have a thoughtful NEPA process generates an opportunity to have a significantly enhanced discussion of the facts, data, and what's happening in the community so that you can better meet the time line. Instead of fueling the controversy, fuel the common ground.

**Jim McElfish**: Are agencies currently directed to adopt or to carry out the 2020 Trump Administration rule? Is there anything preventing them from doing so?

**Kym Hunter**: I can start to answer this. The law states that for projects that began after September 14, 2020, agencies must use the 2020 Trump Administration rule. Otherwise, according to the statements in my litigation, there has been oral guidance given to agencies that they should to the extent possible follow the spirit of the 1978 regulations.

I think that's just one area where there's huge uncertainty. As someone who litigates projects under NEPA all the time, it's not very comforting to hear that these agencies have been given informal oral guidance that they're supposed to do things in the spirit. That's not something you can take to court.

In some places, I don't think there is any discretion. One area we've seen a lot of wiggle room is, what does it mean that a project began after September 14, 2020? I think that isn't clearly defined. A lot of agencies have said that scoping or some aspects of this project began earlier, so we can still apply the 1978 regulations.

But at least in our attempts to get clearer answers on this, it seems like CEQ doesn't know exactly how many projects are using the 2020 regulations. It's not clear. I don't think there's consistency across agencies. You also have quasi-agencies like the Tennessee Valley Authority, which is probably not going to follow broad guidance from the Biden Administration. And then you've got states with delegated NEPA responsibilities that might be going about things in their own way. That's all to say, it's a bit of a mess right now.

**Tanya Nesbitt**: That's going to be a problem for the Administration, with this agenda where you have large infrastructure projects with perhaps several agencies involved, and a lead agency. That creates potential for conflicts and, more so, inconsistent results and inconsistent analyses. That could eventually create differences in law in different parts of the country that may not be desirable.

As I mentioned earlier, it's incumbent on the Administration to do a review on the state of where we are with current NEPA implementation before we try to envision what would work in Phase 2.

**Jim McElfish**: Another question touches on that issue as well. The U.S. Department of Energy is coming out with regulations on carbon capture and storage. How will the NEPA regulations interact with that, and will environmental justice be built into that in some meaningful way?

**Suzi Ruhl**: Regulation of carbon capture and storage has numerous connections to environmental laws and regulations. For example, the Safe Drinking Water Act's (SDWA's)[27] underground injection control regulations relate to protection of underground sources of drinking water, which have implications for populations relying on private wells that are often low-income. NEPA may also come into play if there is a nexus to a federal action, such as federal funding or actions on federal lands. There are clearly implications for the human health impacts of these practices, and thus ample opportunity to raise environmental justice issues.

**Jim McElfish**: A commenter indicates that the Lumbee Tribe of North Carolina has passed a resolution or ordinance requiring advanced consultation on various activities. That raises the broader question of, do the NEPA regulations have anything more to say about Native American communities and/or consultation that's meaningful? I know that the Trump Administration rules were explicit about including Native American communities where original regulations had been silent in some ways. But is there anything we should be looking for or paying attention to for American Indian tribes and similar communities?

**Kym Hunter**: Certainly that was, from our perspective, the one positive change in the 2020 regulations that we would want to see replicated in some way. If we went back to 1978 and started from scratch, that would be one positive step in the right direction.

The Lumbee Tribe is not yet a federally recognized tribe. Thus, being even more expansive to include outreach to tribes more generally could be a way to improve even further.

**Tanya Nesbitt**: There needs to be some uniformity as to when this consultation is supposed to occur, particularly for phased review projects if you're doing a programmatic EIS. Also, the scope and the degree of the consultation is still overbroad and particularly inconsistent across federal agencies. That's something that CEQ is going to, hopefully, address in its next round.

**Suzi Ruhl**: With Promising Practices, because of factors associated with government-to-government consultations,

26. Pub. L. No. 117-58, 135 Stat. 429 (2021).

27. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.

we did not specifically address that component. But what we did address are some of the unique sensitivities and the needs of Indigenous populations, and we made sure to address that from the spiritual and cultural perspectives.

**Jim McElfish**: Here is a related question on the Phase 2 process. Could the panelists speak to potential perils or opportunities to leverage Phase 2 rulemaking to deliver on environmental justice via post-NEPA decision monitoring, mitigation, enhanced mitigation, assessment of actual impacts, or if mitigation required at the time of the decision is insufficient? NEPA has not been very good at looking backwards or assessing how we did. Do we have an opportunity to be more effective with Phase 2?

**Kym Hunter**: I see two structural perils. One, of course, is that this is being subjected to challenge. If you try to do too much in Phase 2, that's certainly perilous. But then there's also where we're coming from, which is, what if this is a mixed bag? Our litigation is still ongoing on that.

Then, potentially all of Phase 2, which is built on this framework of something that is an illegal baseline, is also in peril. Again, I'll go back to this process being concerning. Of course, I'm very excited about the opportunity for this Administration to take meaningful steps on environmental justice within NEPA. But I'm concerned about the way that we have gotten there, and that structurally we may be in a bad place to do that.

**Suzi Ruhl**: I would respond by bifurcating the question. The delineation of the opportunities to strengthen the mitigation component and monitoring component is excellent. This is going back to points made about the urgent need for more program evaluation of NEPA.

Given the original intent of NEPA and Executive Order No. 12898, we cannot shy away from addressing gaps, especially when the science has advanced to inform those gaps in the Phase 2 rules. We do need to be mindful that there are real people, right now, who are going to suffer consequences if we do not get it right. At the end of the day, it's about the people who are bearing the burdens and who are denied services and resources. They cannot be ignored in decisionmaking on federal actions.

**Tanya Nesbitt**: The question is equally apropos to climate analysis as well. We have parts of the country now that are dealing with extreme weather that they weren't dealing with maybe a few decades ago. Mitigation, monitoring, and implementation will be key to any analysis. How we build or rebuild infrastructure to be sustainable—that is going to be a key question. As demographics shift for any number of reasons, those are going to be key areas to drill down on.

**Kym Hunter**: I'm concerned that there's opportunity for that even within the existing regulation that we're not using. I'm in court right now, litigating a case on North Carolina's Outer Banks, where our primary claim is that the Federal Highway Administration used 10-year-old projections of sea-level rise.[28] That's an issue when there's a little barrier island that's about to fall into the ocean. The Biden Administration is still in court defending use of that data and refusing to order a supplemental EIS. So, if we can't even do it right with the laws that we have, with this great administration, we're starting from a bad place.

**Suzi Ruhl**: One additional point. We're finding benefits that are not being captured and measured regarding climate measures, such as weatherization and energy efficiency. NEPA provides that window to do full-cost accounting for adverse and beneficial impacts to the environment and human environment.

**Jim McElfish**: A practice question: How should members of the public capture the ongoing regulatory uncertainty issue, or deal with it when they submit comments on environmental assessments and EISs going forward?

**Kym Hunter**: That's a great question. Maybe someone needs to do a lot of interviews and a study and submit them all, because it would be great to get the record on that in a very concrete way. This is less on regulatory uncertainty, but on uncertainty from a community standpoint. We've tried to do this through a declaration—testimony of groups who are right now looking at the NEPA regulations and not fully understanding how they're supposed to submit comments, what they can comment on, or what will be considered. I think it is really important to get those stories on the record because they're real stories about real people who have relied on this law forever—and now don't really know what it does for them.

**Jim McElfish**: I would add, at least reading the rules as they have been in effect since 2020, to put everything possible into the comments and the possible alternatives and issues. Given that the rebuttable presumption created by the Trump Administration rule is still in the rules today,[29] communities would be well-served to not overlook anything they might want to have looked at later.

**Tanya Nesbitt**: Especially considering the exhaustion requirements that are particularly stringent, you don't want to leave anything out. That sort of documentary evidence and testimony is critical.

**Jim McElfish**: One of the commenters observed that there's always been some APA-type exhaustion requirement regarding raising an issue in order to litigate it, but this has made it much more rigid and explicit, I think.

28. Press Release, Southern Environmental Law Center, Conservation Groups Continue Fight Against Unnecessary $500 Million Mid-Currituck Bridge (Jan. 31, 2022), https://www.southernenvironment.org/press-release/conservation-groups-continue-fight-against-unnecessary-500-million-mid-currituck-bridge/.
29. 40 C.F.R. §1505.2(b) (2020).

**Suzi Ruhl**: We do know that in 40 C.F.R. Part 124, there are requirements in the permitting under the Resource Conservation and Recovery Act (RCRA),[30] SDWA, CWA, and the Clean Air Act (CAA)[31] that state you have to get your comments in the administrative record in order to be able to appeal. That's not anything new.

What I want to add is, even in the academic setting, there is a huge increase in recognition of experts with lived experience. Whether you call it a story or an anecdote, lived experience is gaining power in terms of being sustained as an evidence-based approach. People should not shy away from telling their story and providing input as a lived experience expert because that can have weight in decisionmaking.

**Jim McElfish**: There is an interesting question that tees off of the environmental justice screening tool. There has been criticism recently from some quarters of the Administration about its not including race as a specific component of that tool. The question is, could the NEPA regulations specifically incorporate a definition of "environmental justice" that includes race among a series of factors, and therefore make it possible to include race because it would be *one of many non-determinative factors* to be evaluated? What do you think of the questioner's idea?

**Tanya Nesbitt**: I think it's great. It would be great to get more succinct definitions. Previously, the analysis mostly focused on socioeconomics. But I am not aware of a NEPA case that overturned an EIS on those grounds. Clearly, these definitions, and the intersection of all the factors that I believe Suzi talked about and how vulnerable communities are affected by pollution, and climate change, and extreme weather, need to be defined in a way that actually captures the people who are in the crosshairs. I don't think a definition that just relies on socioeconomic factors is going to do all of that work.

**Suzi Ruhl**: It's a head-scratcher when you look at Executive Order No. 12898 and Executive Order No. 13985,[32] Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. And then you have Executive Order No. 14008,[33] Tackling the Climate Crisis at Home and Abroad, with its Justice40 Initiative where they're defining the beneficiaries to include race as a factor. It's a real head-scratcher at best as to why race was left out. I think, like Tanya said, the question is great. NEPA certainly provides space in that window. I'm a big advocate for having NEPA applied effectively, efficiently, and consistently on funding decisions to make sure money gets to the people it's intended to get to.

**Jim McElfish**: I want to give each panelist a chance to mention any other takeaways that you want to leave with the audience.

**Kym Hunter**: As Tanya mentioned, we not only have to think about how under-resourced CEQ is, but also all of these other agencies. To me, that's always been the crux of any of these issues. With whatever regulations we have in place, we're only going to have a good review if we have enough agency personnel wanting to do good analysis across all of these agencies. We'll continue to push for that important baseline, but my number one push is to just get these places staffed up because this work is so important.

**Tanya Nesbitt**: My takeaway would be that we have to resist the dichotomy that suggests we can't have a robust energy agenda while also thinking about things like climate change and vulnerable communities. It's going to take us more work to do that, and to do it mindfully. But I believe there is some middle ground to be reached with industry groups and the environmentalists. I believe that we can have NEPA work in a way that is not unnecessarily or needlessly burdensome, but does consider things in a mindful way and relies on data that is science-driven, and that thinks about the communities that are vulnerable and going to be affected by proposed projects, and that considers the impacts projects will have on our environment in the longer term. So, while there is some tension, I think with more work, we can get to a better place with NEPA.

**Suzi Ruhl**: It's baseball season. People should play in all ballparks with respect to the work that they're doing with NEPA. Of course, we've got to respect the importance of the legal challenges. We've got to dive in and use what's at the heart of NEPA, which is to make more informed decisions that are going to benefit stakeholders, including the impacted population.

We need to realize that NEPA does set a table. It gives the framework for discussion. It gives the framework for analysis. If we can at least get those subsets of decisions that are going to avoid the "whether" and address the "how," I think we can make a lot of progress in helping communities achieve health and well-being.

30. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
31. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
32. Exec. Order No. 12898, 3 C.F.R. 859 (1994); Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).
33. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021).