

D I A L O G U E

NAVIGATING NEPA 50 YEARS LATER: THE FUTURE OF NEPA

SUMMARY

The National Environmental Policy Act (NEPA) plays a crucial role in the authorization and approval of more development projects than any other federal law. Proponents believe NEPA protects communities and the environment from potentially detrimental projects, while critics counter the Act prevents timely review of important infrastructure projects. At a NEPA 50th Anniversary conference on December 17, 2019, the Environmental Law Institute hosted a panel that looked toward the Act's near and distant future, exploring recent permitting developments, the project approval process, collaboration with regulatory agencies, legislation that may affect NEPA, and issues related to greenhouse gas emissions. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Seema Kakade (moderator) is Assistant Professor of Law and Director of the Environmental Law Clinic at the University of Maryland Francis King Carey School of Law.

David Bancroft is Executive Director of the International Association for Impact Assessment.

Oliver A. Houck is a Professor of Law at Tulane University Law School.

Viktoría Seale is Chief of Staff and General Counsel at the White House Council on Environmental Quality.

Seema Kakade: I'm excited about this panel because we have three phenomenal people whom I'm going to introduce briefly. And I'm going to speak about what I do with respect to the National Environmental Policy Act (NEPA)¹ as well.

The panelists for today include David Bancroft, who is executive director of the International Association for Impact Assessment (IAIA). David's profile is pretty amazing; he has some tremendous experience on energy projects in lots of countries, looking at a variety of issues with respect to environmental review, and is the author of the book *Obama Green*.²

We also have Oliver Houck, who is a professor at Tulane University Law School, a very accomplished academic who is extremely well published. A lot of his course work focuses on ecology and the law.

Finally, we have Viktoría Seale. Viktoría is general counsel with the White House Council on Environmental Quality (CEQ), and has a background focused mostly on the small business area. She formerly served

as counsel for the U.S. House of Representatives Small Business Committee and held a number of roles at the Heritage Foundation.

We're going to cover a few things on this panel today. We're going to be talking about recent legislation that may affect NEPA, including the Title 41 of the Fixing America's Surface Transportation Act (FAST-41)³ project approval process going forward, and environmental issues like climate change, as well as the role of states. There is a lot going on with state environmental reviews and also at the international level.

I'm going to talk about what we do in the legal education setting. There are 40 to 45 environmental law clinics at various law schools around the country. Several of us environmental law clinic directors work on NEPA. We represent community groups. We represent nonprofit organizations, the ones that are commenting often on NEPA processes. I want to spend a few minutes on some of the things I am seeing with respect to the community perspective on NEPA, particularly in the past few years, as I've been working directly with our communities in Maryland, and what I'm hearing from my clinic colleagues on the issues that they're seeing.

One of the things that I've noticed is the number of different groups out there that are really interested in the NEPA process. For a long time, I had this perception that it was mostly environmental groups. I certainly do get calls from environmental groups, from the "Big Green" that we talk about all the time, like Sierra Club and Natural Resources Defense Council, and the local chapters of those big green groups. But I am increasingly getting calls from other groups as well who want to be involved in the NEPA process—smaller environmental groups, watershed groups

1. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209. *Editor's Note:* Seema Kakade has represented the U.S. Department of Energy and currently represents clients of the Environmental Law Clinic on NEPA matters.

2. DAVID B. BANCROFT, *OBAMA GREEN: ENVIRONMENTAL LEADERSHIP OF PRESIDENT OBAMA* (Create Space 2011).

3. 42 U.S.C. §4370m.

for example, and increasingly civil rights groups. I've been pretty amazed by the number of phone calls I'm getting from civil rights groups wanting to participate.

Some of the groups I get calls from have little or no experience with NEPA. I want to highlight that: when you're thinking about who is commenting on your project or if you're at a federal agency, who is actually out there that might be interested in commenting or attending a public hearing. The groups are pretty varied. My sense is that that trend may continue, particularly if we see things with respect to infrastructure.

Infrastructure is affecting a lot of people. Even though we often think of NEPA as public land issues, natural resource issues, and ecology issues, I see an increase in the number of NEPA projects that are affecting people in urban environments much more so. Particularly with infrastructure and communities that are very concerned about the impacts that some of the more urban-oriented projects are going to have on their homes, on their health, and on the amount of traffic that they experience on a day-to-day basis. These are the kinds of impacts that I hear about quite frequently from community groups and particularly groups that are focused on the civil rights area, if there is a particular community that has a history of having undue burden and undue exposure to their community or a history of feeling that they have not been treated fairly on a number of other tangentially related issues like housing. These issues come up a lot in the civil rights context and I think they are coming up much more, and thus dealing much more with NEPA.

I think a lot of the clinics in this space and in groups that really focus on communities, like community law centers or other pro bono legal advice centers, focus on NEPA. We actually explain what NEPA does do and what it doesn't do. That takes time, so we do a lot of client counseling with groups. A lot of groups really do not understand what NEPA is supposed to do. They don't understand the process oriented with NEPA. They think that if they comment and the comment is lengthy and involved—some of these groups pour their hearts into the comment process—that they will get a response. Not just a general response, but a specific response. That can be tough to walk back and explain what it is that NEPA really involves.

I say that because I think a lot of folks are spending a lot of time and energy working on NEPA. I encourage you to take a community perspective once in a while to understand that you are not the only one spending time on the NEPA process. The people who are really worried that a project is going to be impacting their lives are also spending a lot of time on NEPA. And this is not their full-time job. They have normal lives. They have normal jobs. Yet, there is a huge thing that is happening in their neighborhood. They have to attend public hearings and figure it out in the evenings and on the weekends and try to understand if their comment is worth it, if they should be spending all this time. For example, if I read a document and there is a study attached to it, am I going to understand the study or do I need to hire an expert?

We, as clinics, often look for experts that will provide pro bono technical assistance to be able to help a community group understand what the air pollution impact study or the noise vibration study or any number of other studies actually mean, so that the community can meaningfully comment. People are pouring themselves into these comments. So, when they comment and they don't feel their comment is heard or sometimes they feel like they put in a great, really important comment and the project was still picked or they didn't stop the project, that can be really confusing for people because they don't necessarily know what NEPA means. I think it is important to be reminded of this every now and then.

I just talked about the need for experts. We spend a lot of time with experts in helping community groups connect with somebody who can help them understand what their review process looks like. If you've got a very large study that's pretty technical, do you need to have your own study? How do you point out miscalculations? Are there miscalculations? If the study was based on something that was done 20 years ago, is that okay? Is that not okay? These kinds of conversations and working with multiple languages when we are talking to technical experts is a really in-depth process and it's an important one that is happening all the time.

The other thing that we work on is developing comments that may help one community group connect with another. You'll often see coalitions of groups within environmental communities, within local neighborhood associations. There might be two or three neighborhood associations that need to figure out how to work together. Do they file comments together? Do they file them separately?

I get a lot of questions such as, well, maybe if we put in three comments or three different neighborhood associations with three comments, then somebody will actually pay attention; if we just put in one, it's not as meaningful. Those are the kinds of questions that I get from folks a lot, and we spend time trying to figure out whether they want to put in as a coalition or not and getting people on the same page to do that, just like federal agencies need to get on the same page, and how the concurrence is processed and go through all of that. Often the commenters are going through the same thing.

The other thing that I want to point out that I think is really great about clinics and the work that we're doing is that our staff are the students. For example, I have 12 students in my clinic this year. They are there for the full year. These are the students who will be coming to the federal agencies to do NEPA or be in-house at energy companies who actually push forward NEPA. So, I think a lot of us as clinic directors are focused on helping train our future lawyers who will be doing NEPA work. That is the future of NEPA. In my view, it's the students that will be doing it after us or with us fairly soon.

David Bancroft: Many of you may not have heard of IAIA. Our vision is for a just and sustainable world for people and the environment. We provide an international forum to advance the best practices and innovation in

all forms of impact assessment, and we advocate for its expanded use for the benefit of society and the environment. We cover the entire host of impact assessment tools from strategic impact assessment, environmental impact assessment, and health impact assessment. If it's an impact assessment, it falls within the jurisdiction of our membership and their practice.

We were founded in 1981. We have about 5,000 members internationally, in 125 countries, and we have about 18 branches on an international level. Members are private companies, civil society, consultants, development agencies, financial institutions, academia, and government—a host of folks dealing in impact assessment around the world.

Today, we're here for grandpa NEPA's birthday. Grandpa NEPA is 50. Throughout my career, I've heard a number of different perspectives on NEPA. Some say there's not much to it, that it's not very groundbreaking or revolutionary. Or they're sort of neutral. Some folks say it doesn't do enough, that we need to protect more. It really doesn't have teeth to it. Then we have other folks who feel that it's doing too much.

I was at a conference a couple of weeks ago and a federal official says, NEPA, it's where projects go to die. That was the message. We've heard a bit of that with the length of time it takes to do assessments and impact statements, or the length of the documents themselves. In some ways, those may be a symptom of a thought process. At first, some folks say this in a little different way, but there is also a group of folks that say we need to focus on results and not process. It's a good thought if you get the result that you want, but process is important. Process is where you learn what people's needs are. You have a dialogue. You build trust.

When you look at the length of documents or at the length of time, has that time been devoted to the areas where it really would benefit? We can say, oh, it takes 3.6 years. It takes 4.6 years. But were those years dedicated to the topics that really should have been in the participatory process of reaching out, communication, and stakeholder engagement? Those take time and need to start toward the beginning of the process. These are some of the challenges that I think NEPA is looking toward over the next 50 years.

There are also some 21st-century concerns that we may not be addressing. I mean, we're talking about a law. We're talking about regulations. Some of them go back decades. Are they really focused? Are they really tailored to address things like climate change, indigenous people, cultural heritage, gender, and emerging technologies? Grandpa NEPA was very prolific. One hundred countries around the world have their versions of NEPA laws. Not only have their laws been spawned from NEPA, but they have grandchildren laws that spawned from NEPA as well. What can we learn when we look around the world, looking at multilateral banks, looking at countries, looking at states within the United States, looking at cities? There are cities around the world and in the United States that have their own impact assessment laws.

We can look at a number of different ones. I'm going to focus on one of them, and that's one out of the World Bank. In 2018, they adopted an environmental and social framework.⁴ There are 10 different environmental and social standards. As we're looking at NEPA and where it's going, should some of these be touchstones for us? Should they be things that we consider?

Looking at risk management and responsibly assessing, managing, and monitoring environmental and social risks associated with each stage of a project is very similar to a lot of the environmental work that we're doing today within NEPA.

We also have labor and working conditions to promote sound worker management relationships. This is getting a little beyond what we consider to be the role of NEPA in the United States. Resource sufficiency and pollution prevention bring in another element of management that we really want within our institutions, but maybe we're not quite there yet.

In addition, there is an entire discipline looking at health impacts, looking at the human population and the human risks and the human health aspects of projects. Land acquisition restrictions, land use, looks at involuntary resettlement. It looks at where we're going to put infrastructure, where people may be moving. It may be less of an issue in the developing world, but it may not be depending on the type of projects that we're talking about. As for biodiversity, conservation, and sustainable management of natural resources, this hits very, very hard into the traditional environmental aspect.

We need to make sure that we foster full respect for human rights, dignity, aspirations, cultural identity, and natural resource-based livelihoods. One thing that we don't look at much is traditional knowledge. We send scientists. We send social scientists. We send experts. But what about the indigenous people themselves? Many times, they have expertise for that area, for that land, far beyond the consultants who are sent in there. Having respect for that knowledge is another key element that we should be looking at. Closely aligned with indigenous people is the cultural heritage of areas—some of the biological aspects of that, some of the architectural aspects, some of the remains of civilizations. We need to have respect for the cultural heritage aspect, and how we do that assessment in the area is key to developing that relationship and trust.

There are public-private partnerships (P3s) and different financing mechanisms. This is an area where the multilateral banks could bring some texture into the discussion. They've been doing these sorts of processes and funding for decades. If we want to bring that element into NEPA, there may be some lessons there.

Stakeholder engagement and information is the area where we see a lot of impact assessment work really falter. That involves reaching out to the constituents that are very definitely going to be impacted by the project itself.

4. WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK (2016), available at <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf>.

I mentioned climate change. We know that we really need to move to a low-carbon economy. Many of the deadlines are 2040, 2050.⁵ When you look at what's happening on an international level, the European Union has included the climate change aspect in many of its laws. But there is a recent transportation project in Germany.⁶ There were 2,000 comments on assessment. All 2,000 were dismissed. There is a court case going on in Germany right now. How can it be, 2,000 comments, and not one of them would be considered to be relevant to this highway project that is happening?

Others are saying this is a good goal. We need low-carbon technologies. This is something we need to streamline. We need to cut some of the red tape. We need to move this forward. And as positive as low-carbon technologies are, there are other impacts that come from there as well. So, I think we need to look and we need to balance. Are these procedures in which we want to bring on low-carbon but maybe overlook some of the other impacts? Is that a good direction for us to be going?

California and New York have adopted laws that require climate change assessment, but they've done it for both the public *and* the private sectors.⁷ This is an area that we may want to look at. But are there private funding elements to this, again getting back to some of the P3 elements?

I mentioned indigenous peoples. One of the first impact assessments I worked on was back in the 1970s. It was sort of the aftermath of a Cochiti Tribe project done by the U.S. Army Corps of Engineers in New Mexico; within a 55,000-acre reservation, 11,000 acres were covered by a flood control dam and a reservoir that decimated their farming economy. It brought one million people in for recreation from Albuquerque and Santa Fe every year. There was that aspect of how they would do law enforcement with one million people coming onto the reservation per year. On top of that, the reservation put blockages where folks could get to their sacred sites or some of their religious sites.

This is something not quite 50 years ago, but it was very early in my career. We're seeing the Monacan Indian Nation in Virginia right now. There is a water infrastructure project going on in Virginia that is very contentious. But almost 50 years later, we are still dealing with bringing the entire aspect of indigenous peoples into recognition within some of our impact assessments.

There have been a number of aspects even within some of the multilateral banks. There is the Tata Mundra coal-fired plant in India. It was a high-risk project. It affected local communities, giving them jobs, but it really affected

the water, drinking water, and irrigation. It contaminated crops, and fish laid out to dry. The air pollutant levels are high and there is a rise in respiratory problems. There is a lawsuit that went to the U.S. Supreme Court.⁸

Interlocking with indigenous peoples is how we assess cultural heritage, which has always been a bit of a tricky situation. There are not a lot of standards. Right now, we are working with three other organizations on an international level to put together standards for how one does an assessment on cultural heritage. The organizations are the International Council on Monuments and Sites, the International Centre for the Study of the Preservation and Restoration of Cultural Property, and the International Union for Conservation of Nature.

The issue of gender is an area that I don't think NEPA has really tackled very heavily. Say we have a major infrastructure project. There's an influx of workers that usually come in from outside the area. Typically, those are men. What happens when you have an influx of men into an area whether they're building a power plant, whether they're doing a mine, or what have you? Usually, there's an uptick in domestic violence. Also, there is an increase in sexually transmitted diseases. These are impacts that happen within the development of projects that may not be traditionally looked at in the United States. They happen just the same, but we don't like to talk about it as much.

Then, there are emerging technologies. There are ways that technologies are affecting us and affecting societies. We often talk about projects. We talk about programs. We talk about policies. We talk about planning. But the "P" we don't talk about is products. There are a number of effects that these technologies are going to have on society. This typically has not been on a regulatory side within CEQ, but it definitely does affect society. Is this something we should be looking at, the impacts of biotechnology, nanotechnology, cyber technology, and artificial intelligence?

As a side note, many of you may remember that there was on the policy side an Office of Technology Assessment within the U.S. Congress until 1995. The U.S. Government Accountability Office is now recreating that, so there will be some ability within the United States to look at this at least on a policy level.

But there also can be a good side of technology—with the amount of remote-sensing data, the amount using satellites, using drones, using boats—being able to get into areas that are inaccessible. All of that data can be pulled together into visual streams, into virtual reality, so that when you want to engage with stakeholders you can show them more than you could before. There are new ways in which you can talk about your projects. You don't have to just do it using black ink on white paper or using a Power-Point presentation. You can actually take them there; you can take them to remote sites. They can actually look at a picture of a landscape, with that pipeline superimposed, to see what it would look like.

5. *Roadmap 2050: A Practical Guide to a Prosperous, Low Carbon Europe*, <https://www.roadmap2050.eu/> (last visited Feb. 24, 2020).

6. Thomas B. Fischer, *Editorial—Evolution, Revolution, Climate Change and Current EIA*, 37 *IMPACT ASSESSMENT AND PROJECT APPRAISAL* 369-70 (2019).

7. California Governor's Office of Planning and Research, *CEQA and Climate Change*, <http://opr.ca.gov/ceqa/climate-change.html> (last visited Feb. 24, 2020); NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER'S POLICY CLIMATE CHANGE AND DEC ACTION (2015), available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/new_york_state.pdf.

8. *Jam v. Int'l Finance Corp.*, 139 S. Ct. 759, 49 ELR 20033 (2019); see also *Jam v. Int'l Finance Corp.*, No. 15-612, 50 ELR 20041 (D.D.C. Feb. 14, 2020).

The same can be done with plants or a large facility; they can be placed on the land. You can see what it looks like. You can even put on the virtual reality goggles and give people a tour. Folks who have never seen a plant now have a sense of what's going to be potentially their future. That's going to be right on their doorstep.

Being able to scope out assessments, looking at the baseline data, looking at data analysis—wouldn't it be better for both folks in the private sector and in the agencies that are looking at these huge databases to be able to use artificial intelligence to boil the data down much more than they can today? They can use their human skills, their human abilities, to reach out and do this communication and this stakeholder outreach. This is a tremendous tool. We have a small window into it today because we're looking at the next 50 years. This will be something that will become more common.

Talking about the future of competency and certification, who does these environmental impact statements? What are their qualifications? Who in the United States can do them? Well, there are a number of countries around the world that are starting to put together certifications to say, okay, you actually have the skills and abilities to do this type of work. So, as we look forward to NEPA and accountability and the federal agencies, I think this is the type of professionalism that we're looking for as well.

Oliver A. Houck: Because we are a very diverse group here, I wonder whether we have a common idea about NEPA. NEPA was not intended to be descriptive. It wasn't intended to be a set of reports. It wasn't intended to describe the impacts of the project. That was part of it. But its real design was to modify them to get a better environmental result, and that would mean changing what agencies do and how they do it. How well this is working is not measured by how fast it gets done, or what the best financial option is. It's what's the best environmental result is.

I'd like to talk about two futures: the one that has potential to lead to better results and the one that we're facing and living in right now, which is a little different. First of all, if one wanted to make NEPA a more effective tool for environmental results, it would seem to me that the first step would be to apply it more plainly and openly to all planning decisions. Plans are actions. Plans determine everything that follows.

But when we come to transportation planning, which takes place with metropolitan planning organizations and the rest, all funded by the federal government and leading to projects that will be colossally funded by the federal government, none of that gets NEPAed. NEPA comes in later with what they call "project location," which, in my neck of the woods, means an Interstate 10 upgrade from Bonnabel Blvd. to the airport. What does that tell you? Zero. By the time NEPA comes in, it's virtually useless.

The same thing happens with forest planning. The plans are mandatory. This is the law. They've gone through Administrative Procedure Act review. But the U.S. Forest Service does not do the impact statement until a particular timber sale. Once again, that's a little late. For NEPA

to work, NEPA has to apply at the time when the major options are on the table. In the highway context, that would be the transportation needs, the transportation modes, and the transportation corridors. The same should apply to all resource management agencies including National Forest Plans. They're all off-system now, so let's get them on. All of these, by the way, can be done by Executive Orders and regulations. Nothing I talk about here would require an act of Congress, which is simply a crapshoot. So, planning is a problem.

Another problem is mitigation. NEPA clearly wanted mitigation to happen. Section 102(2)(C)(ii) says that the impact statement must describe those impacts *that cannot be avoided*. Now, what does that mean to us? Didn't Congress assume that, if it could be avoided, it *would* be? There is every reason for CEQ simply to require mitigation as part of the plan of the project. This too can be done under the current regulations or by Executive Order.

Yet another problem is how the impact statement, once written, absolutely disappears. It's done. It's now a dead document. The project might not turn out like that at all. It may have tremendously adverse consequences that were either denied or downplayed or accidental. But with the project done, there's no monitoring to see what has happened that would instruct us for the future. Or remedy the harm. Why do we not require it?

Lastly, is the substance of the Act. I think this is the most important and the most underlooked area. When Congress passed NEPA, they added the §102(2)(C) impact statement process as an afterthought procedure. The main game for Congress, where they put much of their effort and much of their legislative history, was in the §101(b) principles of NEPA. Then we come to §102(1), which requires agency decisions to conform to these principles. That's what Congress hung its hat on. The impact statement was simply to be proof it happened. A real NEPA process would not let the procedure swallow the substance.

I'd like to close with the observation that I think I may belong on a different panel here because I think the future of NEPA is where it's going now, which is not where it has been. That was alluded to, but now there are a series of Executive Orders and of course legislation, including the FAST-41 process, which is delegation of the whole process to the states. In the state I come from (and you could name your own), that would be a disaster. What's lacking here is federal responsibility for what federal agencies do. Without such a responsibility and a federal judiciary to enforce it, NEPA would have died a long time ago.

But the more ominous thing to me, that I am so interested in hearing about from Viktoria, is the process under these Executive Orders of "speaking with one voice," putting all of NEPA under a single dominant agency that really controls the shots. It includes the scope of alternatives on down, and then produces a single document, a record of decision, which consolidates the views of all other agencies.

So, what agency will dominate? It will be the proponent agency, right? It will be the Federal Highway Administration. It will be the U.S. Bureau of Mines. This will be whatever. But it won't be an environmental agency. They

also sit in the room. They're listed as attending. But the concern is that through this one-voice process the other voices get squashed and we'll never know it. To be sure, it's more efficient, but so is a monarchy. It's the exact antithesis of transparency.

Years back, there were proposals to put all environmental agencies in one grand department . . . speaking for all. What a terrible idea. What a terrible idea if you have one environmental voice in America. Luckily, that idea never flew. But this one record of decision smells like it, quacks like it, and may fly like it; and if so, unless you want to reduce NEPA to a veneer of paper over foregone conclusions, beware of it.

Viktoría Seale: I can't think of a better introduction than that. And maybe I'll bring some optimism to my portion of the discussion. I should note that before coming to CEQ, I worked for most of my career on a statute that was actually modeled on NEPA, which is the Regulatory Flexibility Act,⁹ trying to do something similar for small businesses in the context of rulemakings. They're both very interesting statutes. It's a pleasure to get to serve in the role that I do currently and to be amongst many former CEQers who have led the way in the implementation of this important statute.

I think many of the panelists aptly identified that the future in a lot of ways is now. I think that vision to a certain extent had been laid out by Congress in the various statutes that have been enacted in recent years. In this Administration, implementation of NEPA is very much being guided through Executive Order No. 13807.¹⁰ As you know from the title of the Executive Order, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, it's really aimed at making the decision process more efficient and more effective. It's particularly focused on major infrastructure projects, which we've heard from panelists are some of the most difficult projects to move forward. Of course, the intent with the Executive Order is to move the process forward so that it's beneficial for the economy, society, and the environment.

I want to touch on the policy that's set forth in the Executive Order. I think it's important because it really sets the stage for how this Administration is looking at NEPA. We're focused on safeguarding our communities and maintaining a healthy environment, ensuring that there's informed decisionmaking concerning the environmental impacts of a project, developing infrastructure in an environmentally sensitive manner, providing transparency and accountability, being good stewards of public funds, and avoiding duplicative and wasteful processes. I think we can all agree that that's something we can do a better job on as government.

We need to conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner. I think no matter whether you're a

project proponent or a member of the public or frankly another agency that's working with another one, knowing how the process is going to unfold is helpful. There is an effort to speak with a more coordinated voice across the federal government and then make goals in a timely way with the goal of making decisions and completing the federal environmental review and authorization process within two years.

I'll briefly touch on a few other aspects of the Executive Order. There were a number of duties that were assigned to both CEQ and the Office of Management and Budget (OMB), sometimes in consultation with the Federal Permitting Improvement Steering Council (Permitting Council) under the Executive Order. Section 4 of the Executive Order addresses accountability. It specifically established a cross-agency priority goal on infrastructure permitting modernization. It also required OMB to establish a performance accountability system to track major infrastructure projects.

Section 5 of the Executive Order was really focused on process enhancements. It set forth the One Federal Decision policy¹¹ and directed OMB and CEQ to establish a framework for that policy. It also required infrastructure projects to be tracked on the Permitting Dashboard.¹² Originally, that was very much geared toward FAST-41 and some transportation projects. Now other projects are being added to it as well. Section 5 also directed CEQ to publish an initial list of actions that it would take to enhance and modernize the federal environmental review and authorization process, which included looking at issuing regulations, guidance, and directives.

In September 2017, CEQ issued the initial list of actions.¹³ There were a number of things that CEQ included on there, but I'll highlight three main areas: the One Federal Decision framework that I mentioned before, that we would be reviewing our existing regulations to identify potential updates for clarification, and that we might issue additional guidance as needed.

The framework memorandum was issued by CEQ and OMB in March 2018.¹⁴ It included as an appendix to that a memorandum of understanding (MOU) that outlined the roles and responsibilities for federal agencies and the processes they should follow to implement the One Federal Decision policy. That MOU was then subsequently signed by a number of departments, including Interior, Agriculture, Commerce, Housing and Urban Development, Transportation, Energy, Homeland Security, the Corps of Engineers, EPA, the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the Permitting Council.

11. *Id.*

12. *Permitting Dashboard: Federal Infrastructure Projects*, <https://www.permits.performance.gov/> (last visited Feb. 24, 2020).

13. CEQ, Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43226 (Sept. 14, 2017).

14. Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (Apr. 9, 2018) available at <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

9. 5 U.S.C. §§601 et seq.

10. Executive Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).

I'm going to discuss in more depth the key elements of the MOU. A permitting timetable is one of the major elements. This is with cooperating agencies working with the lead agency developing a timetable with the key milestones for the authorizations. There's a lead agency commitment to work together to come up with a permitting timetable and if any issues are identified early on, to elevate and timely resolve them. The permitting timetable should also generally cover a two-year period, from getting notice of intent to the record of decision within two years.

Another part of the MOU was the concurrence points. The idea behind this is, as the process moves forward, at key intervals, for the lead federal agency to request concurrence to cooperating agencies on the purpose and need statement, the range of alternatives, and the preferred alternative.

Another element that Oliver previously mentioned was the idea behind a single environmental impact statement and a single record of decision when appropriate. Again, the idea behind this is better coordination and reducing duplication, making sure that there's one document that addresses the various statutory requirements of all agencies involved.

I mentioned earlier issue resolution. Again, the idea that issues that arise shouldn't just sit there and wait and wait for resolution, but there should be an elevation process. When issues are identified, they're elevated appropriately and resolved in a timely way. One final note on the MOU, which I think is very important, is that it was designed to coordinate the agency processes but ensure that every agency's statutory authority is preserved. Their ability to comply with NEPA and other operating statutes is not affected.

Moving on to other activities CEQ has advanced as a result of the list of initial actions we identified, we are considering updates to the CEQ regulations, recognizing that this rulemaking process and comprehensive review of the regulations have not been undertaken in more than 40 years. The regulations had only been amended in one substantive way, and then one other time in a very minor way. We thought it was appropriate to get early public comment and input on that process, so we issued an advance notice of proposed rulemaking.¹⁵ It asked a number of questions, providing opportunity for comment. We received more than 12,500 comments. We have submitted a draft notice of proposed rulemaking to OMB for interagency review.¹⁶

Another product that we have put together, to both help agencies and help the public and the practitioners and

others, is a categorical exclusion list.¹⁷ This is a comprehensive list of all federal agencies' categorical exclusions. If any of you have ever tried to identify a particular categorical exclusion at a certain agency, they sometimes can be difficult to find. So, CEQ worked with the agencies to try to identify all of the current categorical exclusions. We've put them in one list. It's a searchable database. It's developed as a resource to assist the agencies as they review their own categorical exclusions, as well as a tool for the public to be aware of what categorical exclusions are available for tribes, project applicants, and others.

When it comes to categorical exclusions, it is a level of NEPA review. Categorical exclusions obviously have to be developed in consultation with CEQ. We review them. They're published for comment before they're adopted. Obviously, their application after that is evaluated on an individual basis, but they are subject to a public process. We would encourage stakeholders and agencies to still refer back to the agency that they're looking at for their actual regulations to make sure that the categorical exclusions are up-to-date.

In addition, to implement Executive Order No. 13807, we've issued several guidance documents. The first two deal with a topic that Oliver mentioned, which is assignment or delegation of agencies' NEPA responsibilities. The first guidance document¹⁸ on this we issued with OMB. It relates to states' seemingly full responsibilities under the Surface Transportation Project Delivery Program. The states include Alaska, California, Florida, Ohio, Texas, and Utah currently.

The second guidance document¹⁹ that we issued is related to responsible entities that are assuming responsibilities from the Department of Housing and Urban Development. Both of these guidance documents explain how Executive Order No. 13807 has to apply to the entities assuming these NEPA responsibilities. Basically, those assuming those responsibilities should seek to meet the two-year goal, develop a permitting timetable, coordinate development of a single environmental impact statement and a single record of decision, and ensure that the process is in place to elevate issues for timely resolution. The guidance also makes it clear that the states and the responsible entities aren't subject to OMB's accountability system.

Although it's not really an outgrowth of the Executive Order No. 13807 process, I will briefly touch on our draft NEPA greenhouse gas guidance.²⁰ I know that's a topic of interest to folks here. As you may know, we issued draft guidance for public comment in June 2019. It seeks to provide succinct practical direction to agencies as they

15. CEQ, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (June 20, 2018).

16. The proposed rule was released in January 2020. CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020). For a more comprehensive assessment of the proposed rulemaking, see JAMES M. MCELISH, JR., ENVIRONMENTAL LAW INSTITUTE, PRACTITIONER'S GUIDE TO THE PROPOSED NEPA REGULATIONS (2020), <https://www.eli.org/sites/default/files/eli-pubs/practitioner-guide-proposed-nepa-regulations-2020.pdf>.

17. *Categorical Exclusions*, <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html> (last visited Feb. 24, 2020).

18. Guidance on the Applicability of E.O. 13807 to States With NEPA Assignment Authority Under the Surface Transportation Project Delivery Program (Feb. 26, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/02/m-19-11.pdf>.

19. Guidance on the Applicability of E.O. 13807 to Responsible Entities Assuming Department of Housing and Urban Development Environmental Review Responsibilities (June 28, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-20.pdf>.

20. CEQ, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019).

consider greenhouse gas emissions as part of their NEPA review. We received more than 6,000 comments by the end of August, and we're currently reviewing and evaluating those comments.

Seema Kakade: I'd like to open the floor to questions.

Audience Member #1: Two questions. I'm following up on Oliver's point about how lead agencies can potentially end up dominating the process under the One Federal Decision approach. That ended up sometimes being the result prior to One Federal Decision, but it appears that approach may have intensified that reality in that cooperating agencies are supposed to be able to weigh in meaningfully if they have jurisdiction by law or special expertise. It has now essentially been left to the lead agencies to decide and to tell cooperating agencies whether they think that those cooperating agencies have jurisdiction by law or special expertise, which frequently rubs the cooperating agencies the wrong way.

I'd be interested to hear your perspectives on how you might be able to address that and to make sure that those voices aren't lost in the mix, and that the lead agency doesn't end up becoming essentially the only agency and that the cooperating process doesn't become sort of a checkbox and not a meaningful part of the process.

My other question is if we could talk a little bit more about climate change and the process of, particularly going forward into the future, how we're going to be addressing that under NEPA since NEPA does seem to be one of the few federal legal tools that's able to address that. And resiliency in particular; I know some of the previous panelists in this series talked about looking at not just what project impacts are on climate change, but what the impact of climate change will be on projects and how those projects will be resilient and sustainable into the future. I'd particularly be interested in hearing about how the CEQ greenhouse gas guidance applies to that issue.

Viktorina Seale: With regards to your first question on lead and cooperating agencies and their roles, I think one of the things that CEQ has always encouraged agencies to do is to get together early and have those conversations about who's involved with a particular project and what's going to be required. We hope that the process of developing the timetable and ensuring that there's those early conversations will help to ensure that agencies are clear about what their roles and responsibilities are and that the cooperating agencies are able to give appropriate input into the process of developing the environmental impact statement.

Every project is different. Obviously, it involves different folks. But CEQ has been working quite diligently. There is one thing I didn't touch on in my presentation on implementation of Executive Order No. 13807, and I mean beyond the documents that I discussed. CEQ has had regular working group meetings with all the agencies who are working to implement the Executive Order, trying to sort through issues where agencies are confronting a particular challenge when it comes to figuring out how to

work through the process. So, we are very much focused on ensuring that there is collaboration that is happening at a high level, and that agency employees are hopefully going back to their respective agencies and sharing that dialogue with their colleagues.

Your second question has to do with how CEQ's draft NEPA greenhouse gas guidance addresses climate resiliency and how that should be looked at going forward. It is draft guidance, drafted for public comment to seek input from folks. As I think others have noticed or noted, one of the challenges with NEPA is the variety of projects and variety of agencies and statutory authorities that we're dealing with. Each project is going to be different. But obviously, when it comes to evaluation of alternatives in any project, should there be issues that a particular agency is dealing with, I think that generally the NEPA process and the evaluation of alternatives would bring out some of those issues—for example, looking at where to build a new bridge and perhaps it's near an area where there's been some coastal erosion.

What the guidance says is where greenhouse gas emissions are quantifiable and it's practicable to quantify the emissions, that should be done. If it's not practicable, if it would be too speculative, then the guidance says that agencies can provide a qualitative assessment and explain why they think it's not practicable to quantify. I hope that's helpful.

Seema Kakade: One of our online participants asked how many multiagency records of decision have been issued to date? How many of them are within a two-year time frame? Are there any major issues that you want to address within that process?

Viktorina Seale: I need to turn to my colleague Ted Boling on the details of how many records of decision have been issued.

Ted Boling: The Leavitt Project is a U.S. Department of the Interior project that is one. Mind you, Executive Order No. 13807 was signed August 15, 2017. So, it applies to projects for notices of intent issued after that date. We've got a building sphere of projects that have actually run through not even the full two years.

Seema Kakade: We have time for one last question.

Audience Member #2: Just a follow-up on the greenhouse gas question: do you have a time line for the policy coming out?

Viktorina Seale: We do not, but we are evaluating those comments. As anybody who has worked with or at CEQ knows, we're a small staff. But we are actively evaluating those comments and we'll decide how to proceed as we move forward into the new year.