

ENVIRONMENTAL UPDATE

CEQ's Proposed New Draft Guidance for Assessing Climate Impacts in Federal Actions Subject to NEPA: Five Things You Need to Know

On December 18, 2014, the White House Council on Environmental Quality (CEQ) issued a second draft guidance intended to provide direction on how Federal agencies should address the effects of greenhouse gas (GHG) emissions and climate change as those agencies satisfy their duties under the National Environmental Policy Act (NEPA) when preparing an Environmental Impact Statement (EIS) or an Environmental Assessment (EA), and when considering the use of Categorical Exclusions. The proposed guidance is open to comment for 60 days; it supersedes an earlier draft guidance issued by CEQ in February, 2010.

The proposed guidance is especially important in the energy sector. Many types of Federal actions involve the management of federal and tribal land and resources, and could qualify, in the words of NEPA, as "major federal actions significantly affecting the quality of the human environment," thereby triggering the need to prepare an EIS. Also, many energy projects, including infrastructure improvements, may require federal permits, approvals or funding from federal agencies, and thereby require the preparation of an EIS or EA. In both cases, this guidance is likely to expand the scope of any EIS or EA prepared for a wide scope of energy-related projects.

Below are the five key highlights from CEQ's proposed guidance:

1. **NEPA analysis for GHGs and climate change impacts follows principle of proportionality.** The draft guidance directs agencies to, "consider the extent to which a proposed action and its reasonable alternatives contribute to climate change through GHG emissions and take into account the ways in which a changing climate over the life of the proposed project may alter the overall environmental implications of such actions." CEQ expressly warns agencies that their NEPA duties are not satisfied by recitations in EISs or EAs that emissions resulting from a government action or approval represent only a small fraction of global emissions and therefore require no further analysis. Instead, agencies are to follow a principle of proportionality: the extent of analysis of GHG emissions should be commensurate with the quantity of proposed GHG emissions.
2. **The scope of the proposed guidance now includes land and resource management actions.** In the original 2010 draft guidance, CEQ expressly excluded Federal land and resource management actions from the proposed scope of the guidance. In the latest draft, that exclusion no longer applies. As a result, this guidance would be applicable to a much wider range of federal actions including coal, oil, gas and other leasing proposals on federal and tribal lands as well as Federal activities on the Outer Continental Shelf, timber management, grazing, and other Federally-permitted actions. In sum, the full range of "major federal

actions significantly affecting the quality of the human environment” as described in section 102(2)(c) of NEPA would be subject to this guidance. Thus, the impacts of GHG emissions resulting from direct federal actions, from federal funding, and from federal licensing and permitting must be assessed as prescribed in this guidance.

3. **NEPA’s scope of impacts or effects that must be addressed now includes an array of upstream and downstream effects, cumulative impacts and all other reasonably foreseeable events that are “causally” related to the proposed action.** NEPA always has required Federal agencies to consider the direct, indirect and cumulative impacts of proposed actions. See, 40 C.F.R. §§ 1508.7, 1508.8. NEPA also requires consideration of “connected actions” which CEQ defines as those that automatically trigger other actions which may require an EIS, that cannot or will not proceed unless other actions are also taken, or are interdependent parts of a larger action. Based on these broad, long-standing definitions, CEQ now believes that the application of these NEPA regulations to climate change and GHG emissions means that an EIS or EA must include a discussion of emissions from other activities that have a reasonably close causal relationship with the proposed action and are either “upstream” or “downstream” from the proposed action. CEQ gives the example of a proposed open pit mine that requires some form of federal approval. Under this guidance, the EIS would include a discussion of GHG emissions from land clearing, access road construction, transporting the extracted resource, refining or processing the resource and, importantly, “*using the resource.*” After considering these impacts, an agency must also address GHG emissions and climate change in terms of the cumulative impact of the proposed action which is the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of which agency or entity undertakes such other action.
4. **Agencies should consider the Federal social cost of carbon metric whenever a cost-benefit analysis is required to accompany an EIS or EA.** The guidance recognizes that a monetary cost-benefit analysis is appropriate only in some actions subject to NEPA. Where such analysis is required, CEQ states that it should be incorporated by reference or appended to the EIS/EA. Also, CEQ suggests that agencies use the Federal Social Cost of Carbon (SCC) to monetize the cost of GHG emissions. The SCC is a controversial metric developed by OMB and other federal agencies to estimate the benefits of rulemakings by calculating the costs of climate change-related damages that are avoided by reducing GHG emissions. In the NEPA context, the SCC could be used to argue that both the direct emissions from the project under review (for example, emissions from mining coal under a federal lease) and the indirect emissions (such as those from power plants which burn the coal as fuel) create a significant “social cost” related to climate change impacts.
5. **The Guidance requires Federal agencies to consider mitigation techniques, including alternatives and monitoring, to assess the effectiveness of reducing GHG emissions.** To describe a Federal agency’s duties to mitigate for GHG emissions under NEPA, this document draws upon the CEQ guidance of January 14, 2011, on the general subject of mitigation. Although the Supreme Court has held that NEPA does not command an agency to mitigate the impacts of proposed action, see, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, (1989), CEQ has required agencies to discuss issues involving mitigation in an EIS, and to take steps to assure that mitigation used to justify the use of an EA rather than an EIS will be carried out as provided in any Finding of No Significant Impact. Here, the CEQ draft guidance

states that agencies may need to consider alternatives to the proposed action that may reduce or mitigate GHG emissions and climate change effects. Agencies are directed to evaluate the quality of the mitigation measures under discussion for permanence, verifiability, enforceability and additionality. Finally, CEQ also states that where “mitigation measures are designed to address the effects of climate change, the agency’s final decision should identify those mitigation measures and the agency should consider adopting an appropriate mitigation monitoring program.”

Other aspects of this latest proposed guidance do not vary significantly from the earlier 2010 version of this guidance. CEQ continues to propose a reference point of 25,000 metric tons per year of CO₂ emissions as a threshold for conducting a quantitative analysis. In addition, CEQ has not made material changes to its earlier proposed statement that agencies consider the effects of climate change on the environmental consequences of a proposed action. To accomplish this, agencies should describe the current and future state of the environment without the proposed action in terms of the reasonably foreseeable affected environment, based on available climate change information, including observations, interpretive assessments, predictive modeling, scenarios and other empirical evidence. The bounds of this analysis are determined by the lifetime of the proposed project.

CEQ will accept public comments for 60 days after the proposed guidance is published in the Federal Register. There are no present plans to hold a public hearing on the subject.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work, or

Roger R. Martella
Partner
+1.202.736.8097
rmartella@sidley.com

David T. Buente Jr.
Partner
+1.202.736.8111
dbuente@sidley.com

Peter R. Steenland
Counsel
+1.202.736.8532
psteenland@sidley.com

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