

# White House Issues Draft Guidance on Considering Climate Change in NEPA Documents

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Last week, the White House Council on Environmental Quality ("CEQ") released new draft guidance to "modernize and reinvigorate" the National Environmental Policy Act ("NEPA").<sup>1</sup> In two memoranda, the CEQ outlined proposed changes for the preparation of NEPA analyses, including considering and evaluating greenhouse gas ("GHG") emissions and climate change<sup>2</sup> and increasing the evaluation and monitoring of mitigation measures.<sup>3</sup>

NEPA is our nation's charter for the protection of the environment.<sup>4</sup> NEPA's twin goals are to foster informed decision-making and to promote informed public participation in government decisions affecting environmental quality. NEPA requires the preparation of an Environmental Impact Statement ("EIS") for any major federal action significantly affecting the quality of the human environment.<sup>5</sup> When the significance of the effects of a proposed agency action is uncertain, an agency may prepare an environmental assessment ("EA") to determine whether an EIS is necessary. Completion of an EA results in the issuance of a Finding of No Significant Impact ("FONSI") or a decision to prepare an EIS. CEQ's guidance suggests changes to what these NEPA documents must include to present adequate evaluation of the effect of a federal action on the human environment.

### Consideration of GHG Emissions and Climate Change

The draft guidance outlines two ways in which federal agencies should consider climate change issues under NEPA. First, where a proposed federal action would be reasonably anticipated to emit GHGs into the atmosphere in quantities that the agency preparing the NEPA document finds may be "meaningful," the agency should quantify and disclose its estimate of the expected annual direct and indirect GHG emissions. Specifically, where a proposed action is anticipated to cause direct emissions of 25,000 metric tons or more annually of CO<sub>2</sub>-equivalent GHG emissions, this indicates that a quantitative and qualitative assessment is required together with the consideration of mitigation measures and reasonable alternatives to reduce GHG emissions. For those projects below 25,000 tons per year, long-term emissions should still be examined.<sup>6</sup>

The guidance currently exempts land and resource management actions from this GHG protocol, but it seeks public comment on the appropriate means of assessing the GHG emissions affected by federal land and

resource management activities. CEQ requests comment on land and resource management issues, including how NEPA documents regarding long-range energy and resource management programs should assess climate change impacts, what should be included in specific NEPA guidance for projects applicable to the federal land management agencies, and whether CEQ should recommend any particular protocols for assessing land management practices and their effect on carbon release and sequestration.

Second, lead agencies should determine the effects and impacts of climate change—not only in terms of a project's effects on the environment, but also how climate change can affect the environment of a proposed action. Utilizing scientific assessments of the impacts of global climate change in the US,<sup>7</sup> agencies should now evaluate how projects might be affected by a greater risk of floods or droughts, storm surges, changes in available resources, changes to the ecological environment, and the magnified effects of a proposed project that might be more damaging than prior experience would indicate. Considerations like diminishing water sources for industrial processes, increased vulnerability of specific eco-systems including endangered species, and a rise in sea-levels along coastal barriers will now need to be included in the NEPA analysis as "reasonably foreseeable" future conditions.<sup>8</sup> The impacts of climate change on vulnerable communities should also be evaluated, particularly where observed changes like the melting of permafrost, disappearance of important species of plant life, and the shifting migration patterns of wildlife are already underway.

### **Requirements for Mitigation Measures**

In a second guidance memo, the CEQ proposed that agencies employ a more rigorous approach to the evaluation and monitoring of mitigation measures. Under the new guidance, mitigation measures would now address GHG emissions and climate change and be identified as binding commitments in NEPA documents. To enforce the commitments, each agency would create an internal program to ensure the implementation and effectiveness of the proposed mitigation measures. A substantial mitigation failure, in either implementation or effectiveness, would trigger an agency inquiry into the need for supplementary action. In cases involving an EA with a FONSI based on failed or ineffective mitigation measures, an EIS may have to be developed if the unmitigated impact is significant. Monitoring plans and programs would be described and incorporated by reference in agency decision documents and made available to the public through online or print media.

### **Context and Conclusions**

CEQ's new climate change guidance is consistent with recent positions taken by the courts and the federal agencies. For instance, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*,<sup>9</sup> the Ninth Circuit remanded an EA that failed to adequately consider climate change effects in setting corporate average fuel economy standards for certain new motor vehicles. In *CBD*, the court held that "the fact that 'climate change' is largely a global phenomenon that includes actions that

are outside of the agency's control . . . does not release the agency from the duty of assessing the effects of its actions on global warming. . . . The impact of greenhouse gas emission on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."<sup>10</sup>

In the agencies, the Department of the Interior recognized in promulgating new NEPA regulations in fall 2008 that a need for climate change discussions in NEPA documents could arise in relation to the "consideration of whether there are direct or indirect effects of greenhouse gas emissions from a proposed action, the cumulative effect of greenhouse gas emissions, and the effect of climate change on the proposed action or alternatives."<sup>11</sup>

The CEQ's new guidance is a further step responding to these judicial and executive branch trends, as well as addressing recent petitions to CEQ to amend its NEPA regulations to include climate change effects.<sup>12</sup> Regardless of the ultimate content of CEQ's final guidance, judicial requirements and specific agency NEPA regulations will mandate the consideration of climate change effects and GHG emissions in NEPA documents. The CEQ guidance will provide a backdrop to these issues that will continue to be addressed largely on a case-by-case basis in particular project documents and any subsequent challenges to such NEPA documents.

The CEQ is accepting public comment on the draft guidance through April 14, 2010.

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1. Press Release, Steps to Modernize and Reinvigorate NEPA, Council on Environmental Quality (Feb. 18, 2010), *available at* <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>.

2. Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality on Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf> [hereinafter "CEQ NEPA Climate Change Memo"].

3. Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality on Draft Guidance for NEPA Mitigation and Monitoring (Feb. 18, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-mitigation-monitoring-draft-guidance.pdf>. A third memorandum providing guidance on Categorical Exclusions was also released on the same day but did not address climate change issues. Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality on Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act (Feb. 18, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-categorical-exclusions-draft-guidance.pdf>.

4. 40 C.F.R. § 1500.1(a).

5. 42 U.S.C. § 4332(2)(C).

6. The guidance suggests that 25,000 tons per year "may provide a useful, presumptive, threshold for discussion and disclosure of GHG emissions because it has been used and proposed in rule makings under the Clear Air Act." CEQ NEPA Climate Change Memo at 6.

7. CEQ's guidance offers a list of sources for scientific information on the reasonably foreseeable climate change impacts. CEQ NEPA Climate Change Memo at 8.

8. 40 C.F.R. § 1502.15.

9. 538 F.3d 1172 (9th Cir. 2008).

10. *Id.* at 1217.

11. 73 Fed. Reg. 61,292, 61,293 (Oct. 15, 2008).

12. See International Center for Technology Assessment et al. Petition that CEQ Amend Regulations to Clarify that Climate Change Analyses Be Included in Environmental Review Documents, Feb. 28, 2008.

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