

CLIENT ALERT



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CEQ NEPA GUIDANCE DOCUMENTS AVAILABLE FOR PUBLIC COMMENT

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In connection with the 40th anniversary of the National Environmental Policy Act (“NEPA”), the White House Council on Environmental Quality (“CEQ”) published today in the *Federal Register* three draft guidance documents that: (i) explain when and how an agency should analyze greenhouse gas (“GHG”) and climate change impacts; (ii) promote implementation and monitoring of mitigation commitments, including when mitigation supports Findings of No Significant Impact (“FONSI”); and (iii) clarify how agencies adopt and use categorical exclusions. 75 Fed. Reg. 8046 (Feb. 23, 2010) available at www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%208046.pdf. According to CEQ, these items will “modernize” NEPA and enhance public involvement in, and the transparency of, the NEPA process. A comment period has been established for the draft guidance, with CEQ raising some direct questions for public input. Taken together, these guidance documents represent the biggest developments in NEPA practice in the last 30 years.

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ANALYSIS OF A PROJECT’S POTENTIAL GHG IMPACTS

Perhaps the most anticipated of the three draft guidance items issued by CEQ directs federal agencies to consider GHG emissions and climate change impacts generally when conducting NEPA reviews. Federal agencies had informally asked, and a number of environmental groups had formally petitioned, CEQ for such guidance following a series of federal court opinions holding that agencies must consider GHG emissions and climate change during the environmental review process. *See, e.g., Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2008); *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); and *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003). This CEQ guidance comes on the heels of California’s recent announcement that GHG emissions will constitute a formal component of the environmental review process under that state’s NEPA analog. The federal draft guidance provides some direction on when and how federal agencies must consider GHG emissions, while reserving certain practical issues for further refinement.

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I. Proposed Direction to Federal Agencies

Recent federal court decisions left little doubt that GHG/climate change impacts were just one more of the lengthy list of resources an agency should consider under NEPA. The real question was: “How do we do that?” CEQ’s guidance attempts to strike a balance between the preparation of relatively unhelpful purely quantitative analyses and a more qualitative review stressing the context of a particular agency action. While generally useful, the draft guidance leaves several key questions unanswered, opting instead for a more flexible approach that defers implementation to individual agency discretion.

Specifically, the draft guidance advises agencies to conduct an emissions-related NEPA analysis where that analysis will provide meaningful information to decision-makers and the public -- a hallmark goal of previous CEQ guidance over the years. CEQ proposes a reference point of 25,000 metric tons of GHG emissions per year as a useful indicator that a project may meet the foregoing “meaningful” standard. But the draft guidance also clarifies that the 25,000

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metric tons reference point is neither an absolute standard nor an indicator of a level of emissions that may “significantly” affect the quality of the human environment, as that term is defined in CEQ’s NEPA regulations. Moreover, the guidance encourages agencies to assess project alternatives that may have annual emissions lower than 25,000 metric tons per year. Examples of actions that may warrant a discussion of emissions impacts include approval of a large solid waste landfill, approval of energy facilities such as a coal-fired power plant, and authorization of a methane-venting coal mine.

The draft guidance makes it clear that climate change impacts should be considered throughout the NEPA process. For example, CEQ encourages agencies analyzing the direct effects of a proposed project to quantify cumulative emissions over the life of the project; to discuss measures to reduce emissions, including mitigation measures and the consideration of reasonable alternatives; and to discuss from a qualitative perspective the link, if any, between the project’s GHG emissions and climate change. Importantly, the draft guidance recognizes scientific limits on an agency’s ability to predict climate change effects, and therefore cautions agencies against engaging in speculative analyses or attempting to link a particular project to specific climatological changes. The draft guidance discourages agencies from relying on the 25,000 metric tons reference point for use as a measure of indirect effects (for example, the growth-inducing impacts of a new or improved transportation facility), noting that such an analysis must be bounded by limits of feasibility in evaluating the upstream and downstream effects of federal agency actions. Above all else, the guidance adheres to NEPA’s “rule of reason,” which ensures that agencies determine whether and to what extent to prepare their NEPA analysis based on the usefulness of new information to decision-makers and the public.

With many competing tools available to estimate an action’s GHG emissions, the draft guidance seeks to promote uniformity through the federal government’s assessment of climate change impacts. It proposes that agencies employ, as needed, one of the following three technical documents:

- **for quantification of emissions from large direct emitters:** 40 C.F.R. Parts 86, 87, and 89 (note that applicability tools for determining whether a project exceeds the 25,000 metric ton reference point can be found at <http://www.epa.gov/climatechange/emissions/GHG-calculator/>);
- **for quantification of Scope 1 emissions (*i.e.*, a project’s direct emissions):** GHG emissions accounting and reporting guidance that will be issued under Executive Order 13514 §§ 5(a) and 9(b) (<http://www.ofce.gov>); and
- **for quantification of emissions and removal from terrestrial carbon sequestration and various other types of projects:** Technical Guidelines, Voluntary Reporting of Greenhouse Gases, 1605(b) Program, U.S. Department of Energy (<http://www.eia.doe.gov/oiaf/1605/>).

The draft guidance notes that agencies may also find the following sources useful:

- Renewable Energy Requirements Guidance for EPACT 2005 and Executive Order 13423 (<http://www1.eere.energy.gov/femp/regulations/guidance.html>); and
- United States Environmental Protection Agency Climate Leaders GHG Inventory Protocols (<http://www.epa.gov/climateleaders/resources/inventory-guidance.html>).

Finally, the draft guidance distinguishes between NEPA analysis and Clean Air Act direct reporting of GHG emissions. NEPA does not require the submission of formal reports or participation in reporting programs. Instead, the agency need only consider methodologies relevant to the project and disclose the same to decision-makers and the public. In this regard, the draft guidance underscores NEPA’s commitment to process rather than to a particular outcome.

II. Issues Reserved for Public Comment

CEQ encourages public comment on a number of practical issues not addressed by the draft guidance. For example, CEQ does not propose to make the guidance applicable to federal land and resource management actions, such as the preparation of Forest Plans or Resource Management Plans. Instead, the guidance seeks comment on the appropriate means of assessing GHG emissions affected by such actions. CEQ also seeks recommendations regarding how agencies can tailor their NEPA analyses in proportion to the importance of climate change in the decision-making process. Additionally, CEQ asks whether it should provide guidance to agencies to determine whether GHG emissions are “significant” for NEPA purposes and at what level should GHG emissions be considered to have significant cumulative effects. The public comment period will last for 90 days.

INCREASED IMPLEMENTATION AND ONGOING MONITORING OF MITIGATION COMMITMENTS, INCLUDING FOR A “MITIGATED FONSI”

The second document, “Draft Guidance for NEPA Mitigation and Monitoring,” proposes a “comprehensive approach to mitigation planning, implementation and monitoring.” In terms of relative importance, this document may in time overshadow the more highly anticipated GHG guidance. CEQ perceives a shortfall in agencies’ accountability for mitigation commitments made during NEPA review. Accordingly, the draft guidance lists three broad goals to revamp agency mitigation and monitoring: consideration of mitigation throughout the NEPA process; robust monitoring plans and programs to ensure mitigation implementation and effectiveness; and public transparency of mitigation monitoring reports and documents. An Appendix highlights the U.S. Army’s NEPA regulations as a model for other agencies to follow in reevaluating their respective NEPA mitigation and monitoring policies. After a 90-day comment period, CEQ expects to finalize its guidance “expeditiously.”

Whereas the GHG guidance stresses the more generally accepted “procedural” elements of NEPA review, this guidance has a distinctly “substantive” feel. CEQ sends a strong message that it may not be satisfied with the federal government’s NEPA compliance, particularly in the vast majority of actions that result in a FONSI following the generally less demanding Environmental Assessment (“EA”) process. In many cases, agencies promise to implement mitigation measures, or, beyond that, represent that such mitigation will successfully reduce otherwise significant impacts to insignificant levels. Through this guidance, CEQ tells the federal government: “Show me!”

The draft guidance emphasizes the implementation and ultimate success of mitigation commitments. CEQ calls for formal internal processes and plans to ensure that the planned mitigation is carried out. For example, CEQ posits that projects not move forward unless mitigation commitments are fully funded or the effects of a shortfall are addressed in the NEPA analysis. Agencies are encouraged to include adaptive management in their mitigation commitments in the event of changed circumstances or mitigation failure. The appropriate steps to address a mitigation failure depend on available options and whether there is any remaining federal action. CEQ sanctions agencies’ reliance on outside resources and experts in planning and implementing mitigation measures. CEQ also instructs agencies to clearly state their mitigation goals using “measurable performance standards to the greatest extent possible.” CEQ appears to envision objective criteria and technical parameters by which mitigation success (or failure) may be tangibly measured.

The draft guidance has particular application to projects for which adopted mitigation measures to reduce a proposal’s environmental effects obviate the need to prepare a more detailed Environmental Impact Statement (“EIS”). CEQ reconfirms the vitality of a so-called “mitigated FONSI,” but also expresses a clear preference that such decisions actually play out as predicted. CEQ would require that the mitigation measures be made public and

accompanied by monitoring and reporting. In the most severe of all its recommendations, CEQ proposes that inadequate funding or substantial ineffectiveness of mitigation may actually trigger preparation of a full EIS.

CEQ stresses the need for ongoing mitigation monitoring plans to be included or referenced in agency decision documents. Two separate types of monitoring are discussed. Implementation monitoring determines whether mitigation commitments are being performed. Effectiveness monitoring evaluates whether the implemented mitigation is successful. The adopted monitoring method should also incorporate a system for reporting results. One comprehensive offered example for effective monitoring is an Environmental Management System (“EMS”), such as the standardized ISO 14001 protocols. An EMS provides a systematic framework and steps for a federal agency to plan, monitor, evaluate, and ultimately improve its environmental performance.

Finally, the draft guidance highlights public involvement in mitigation monitoring. The lead agency is responsible for communicating monitoring results to the public. CEQ encourages affirmative disclosure of mitigation and monitoring information as opposed to only in response to formal Freedom of Information Act requests. CEQ encourages agencies to use their Web sites and information technology capabilities to disseminate information. CEQ acknowledges that an agency’s efforts should be “commensurate to the importance of the action and resources at issue”; that is, it appears that an agency need not engage in a full-scale media blitz of information for more routine, non-controversial projects. As with all three guidance documents, these recommendations stress government “transparency” in NEPA decision-making.

DRAFT GUIDANCE FOR CATEGORICAL EXCLUSIONS

The third draft guidance issued by CEQ is entitled “Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act.” Categorical exclusions permit recognized types of actions with insignificant environmental effects to go forward on an expedited basis. Agencies have relied on them since the 1970s as a method to satisfy their NEPA obligations and focus limited resources on proposed projects posing appreciable environmental issues. Citing the expanded number and use of categorical exclusions, as well as previous recommendations of the CEQ NEPA Task Force, the draft guidance provides for the consistent and appropriate development and use of categorical exclusions as well as greater public involvement in the process. As CEQ previously sought public comment on these issues, it has limited the public comment period for its new draft guidance to 45 days.

The draft guidance comprehensively addresses how agencies should: (i) establish categorical exclusions; (ii) use public involvement and documentation to support a proposed categorical exclusion; (iii) apply an established categorical exclusion, and determine when to prepare documentation and involve the public; and (iv) periodically review categorical exclusions’ continued propriety and usefulness. The new guidance applies only to categorical exclusions established by federal agencies pursuant to 40 C.F.R. § 1507.3, as opposed to those enacted by statute. Rather than speaking to the propriety of specific exclusions, the guidance focuses on the basic administrative process governing categorical exclusions generally.

Importantly, the draft guidance fosters the development of new categorical exclusions, tempered only by a concern that agencies follow certain substantive and procedural predicates to ensure that new categorical exclusions are administered to further the purposes of NEPA and its implementing regulations. CEQ sets forth a summary of steps to promulgate new categorical exclusions, reminding agencies that they must afford public notice and comment, consult with CEQ, and obtain a NEPA conformity determination from CEQ. The guidance also encourages agencies to use “the best available scientific and technical information” and to share their experiences with regard to categorical exclusions.

CEQ's draft guidance generally discourages additional paperwork, particularly lengthy documentation, to support an agency's use of an existing categorical exclusion. However, in what CEQ characterizes as a departure from most agencies' routine practices, CEQ encourages agencies to notify the public where appropriate before exercising a categorical exclusion, as well as to publicly disclose categorical exclusion determinations after the fact. These recommendations may derive from the distinct lack of an administrative record in most cases when an agency applies an existing categorical exclusion. Some agencies have adopted so-called "checklists" designed to provide at least some documentation of the process leading to application of a categorical exclusion to a specific proposal for federal action. This guidance seems to endorse that sort of approach, together with an additional layer of public notice in certain circumstances.

Finally, the guidance announces that CEQ will embark on a regular review of agency categorical exclusions, with a special focus on agencies "currently reassessing or experiencing difficulties implementing their categorical exclusions as well as agencies facing litigation challenging their application of categorical exclusions." CEQ intends to provide agencies and the public with more information about the scope of its new review through its Web sites: www.whitehouse.gov/ceq and the significantly revamped www.nepa.gov.

For more information on any of these guidance documents or to obtain assistance in the preparation of comments to the CEQ, please contact Fred Wagner at (202) 789-6041, fwagner@bdlaw.com, Bill Sinclair at (410) 230-1354, wsinclair@bdlaw.com, or James Auslander at (202) 789-6009, jauslander@bdlaw.com.

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