

## Environment Alert

August 3, 2016

### CEQ Instructs Federal Agencies to Consider Climate Change Impacts During NEPA Reviews

On August 2, 2016, the Council on Environmental Quality (CEQ) released a Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act (NEPA) Reviews (“Guidance”). The Guidance is a response to a [2008 petition](#) by several nonprofit organizations requesting to amend CEQ’s NEPA compliance regulations to address the issue of climate change. The Guidance commences from the premise that climate change is a real threat to human health and the environment, and proceeds to set forth how federal agencies should consider climate issues when reviewing proposed projects. The Guidance applies to all new proposed projects; the agency, at its own discretion, may apply it to ongoing projects.

NEPA requires that federal agencies review potential environmental effects of the proposed major federal agency actions (for example, rulemaking or permit issuance). Such review generally involves preparation of an Environmental Assessment (EA) and, when the EA concludes that the proposed action may have impacts, an Environmental Impact Statement (EIS). The “lead agency” prepares the EIS (a voluminous document that identifies the impacts of the project), considers potential alternatives (for example, change of route for a pipeline), and responds to comments submitted by other federal agencies, state and local government bodies, and the public.

NEPA does not contain an exhaustive list of environmental impacts to be considered by the agency. In this respect, the main significance of the Guidance is that it directs federal agencies to consider climate change in their project evaluations. The agencies should address climate change in their NEPA reviews by considering:

- the potential effects of a proposed action and its alternatives on climate change; the Guidance directs the agency to quantify the project’s greenhouse gases (GHG) emissions based on available data (or to conduct a qualitative analysis when such data is not available)
- how changing climate may impact the proposed action (for example, whether the project’s location in a flood-prone area will significantly reduce long-term benefits of the project so as to render it worthless).

What is the effect of the Guidance? Putting aside numerous attacks on its legality<sup>1</sup> and political uncertainty, it is just that—guidance that does not carry the authority of a rule or regulation. Additionally,

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<sup>1</sup> Some state that the Guidance is “illegitimate expansion’ of the key environmental law,” see <http://www.eenews.net/greenwire/2016/08/02/stories/1060041098>, while others doubt its legality due to lack of the

the Guidance sets very few specific rules, giving broad discretion to the agencies to implement it. But more importantly, the Guidance does not establish a particular quantity of GHG emissions as “significantly” affecting the quality of the human environment. For this reason, an agency may be hard-pressed to reject the project over other available alternatives, based solely on climate change concerns. Notably, the Guidance does not require selecting the lowest GHG emissions alternative.

Rather, the Guidance may prove important in considering measures that mitigate environmental impacts of a proposed action. Mitigation is a key component of NEPA that allows avoidance, minimization and compensation for the proposed actions’ adverse environmental effects. GHG mitigation measures could include increased energy efficiency, lower GHG-emitting technology, carbon capture, forest restoration for carbon sequestration, sustainable land management practices, capturing or beneficially using GHG emissions such as methane, and other measures. While it is not required by the Guidance or other laws, we can expect that some agencies may update their NEPA review procedures to facilitate consideration of GHG emissions and climate change. This will provide more clarity about the practical impact of the Guidance.

NEPA has been a powerful arrow in the quiver of parties seeking to delay or block all types of developments of critical infrastructure, such as bridges, highways and electric transmission lines. The requirement that agencies consider the impacts of climate change on their permitting, licensing and similar regulatory actions adds another arrow that project proponents must be prepared to address.

**Contact Information**

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