

Updates

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Administration Issues Draft Guidance on Greenhouse Gas Emissions Evaluation Under NEPA

The Council on Environmental Quality published [draft guidance](#) June 26, 2019, on how to assess greenhouse gas emissions under the National Environmental Policy Act, the law that requires environmental impact assessment for projects that receive federal funding or federal approvals (the "Draft Guidance").

There are three notable aspects of the Draft Guidance. First, it borrows much of its substance from previous CEQ guidance on this topic issued under the Obama administration. Second, it omits the lengthy acknowledgment and discussion of climate change that was included in the Obama guidance. Third, it lacks any definitive guidance to agencies on how to address GHG emissions and climate change in a NEPA analysis.

CEQ will accept public comments on the Draft Guidance until July 26, 2019.

Background

Over the past decade, a body of federal jurisprudence has developed requiring federal agencies to evaluate a proposed action's GHG emissions as part of the NEPA process and to consider how climate change may affect a project. Under the Obama administration, CEQ issued a [guidance memorandum](#) (the "Obama Guidance") to federal agencies on how to assess GHG emissions and the effects of climate change in environmental reviews under NEPA. The Obama Guidance was [rescinded](#) in April 2017 pursuant to Executive Order 13783. The new Draft Guidance is intended to replace the Obama Guidance.

What's the Same

The Draft Guidance mirrors many aspects of the rescinded Obama Guidance in substantial part, albeit with less detail:

- **Assessing Direct and Indirect GHG Emissions.** Both guidance documents:
 - Suggest that agencies use estimated GHG emissions as a proxy for assessing a project's potential effects on climate change;
 - Recommend quantifying a project's reasonably foreseeable direct and indirect GHG emissions when practicable based on available information and tools;
 - Urge agencies to disclose the assumptions, inputs and level of uncertainty associated with their analysis;
 - Suggest that when quantification of GHG emissions is not practicable, agencies should provide a qualitative analysis and explain the reasons why a quantitative analysis is not warranted; and
 - State that analysis of GHG emissions (as with any environmental impact analyzed under NEPA) should be proportional to their significance, deferring to agencies' expertise and experience in determining how to analyze particular environmental impacts.
- **No Separate Cumulative Impact Analysis.** Neither guidance would require separate analysis of cumulative GHG emissions impacts. They acknowledge that, because GHG emissions by nature contribute cumulatively to global climate change, the cumulative effects of a project's GHG emissions will be reflected in the direct and indirect effects analysis.
- **Existing Research and Tiering.** Both guidance documents state that NEPA does not require agencies to undertake new research or analysis of potential climate change impacts and that agencies may summarize or incorporate by reference scientific literature and prior studies. Both also encourage agencies to rely on

programmatic analyses and tiering when appropriate.

- **Cost-Benefit Analysis.** Both emphasize that NEPA does not require agencies to monetize costs and benefits of a proposed action. Accordingly, neither guidance suggests that agencies use measures of the social cost of carbon in their evaluation of climate change impacts. But if an agency does use a monetary cost-benefit analysis, both guidance documents suggest it should incorporate by reference or append the analysis to the NEPA document and disclose the assumptions and levels of uncertainty associated with the analysis. If the agency monetizes some but not all GHG-related impacts, the agency should explain its rationale for doing so.

What's New

Despite the many similarities with the Obama Guidance, there are a few key areas where the Draft Guidance breaks new ground:

- **Effects of Climate Change on a Proposed Action.** Perhaps the biggest difference in the Draft Guidance is its treatment of climate change impacts on a project. The Draft Guidance states that "[w]hen relevant, agencies should consider whether the proposed action would be affected by foreseeable changes to the affected environment under a reasonable scenario." This single sentence contrasts sharply with the Obama Guidance, which devoted an entire section to explaining how agencies should consider the effects of climate change on a proposed action.
- **Alternatives Analysis.** Both guidance documents recognize that agencies are not required to give greater weight to GHG emissions than to other environmental impacts when they consider alternatives. The Draft Guidance adds that agencies may find it helpful to compare alternatives based on GHG emissions "along with other potential effects and economic and technical considerations." It then cites to 40 C.F.R. § 1502.16(e), which specifies that the alternatives analysis must include discussions of "[e]nergy requirements and conservation potential of various alternatives and mitigation measures." This may be a nod to agencies pursuing energy projects (such as mining, oil and gas extraction, pipelines or export terminals) with measurable upstream and downstream GHG emissions.
- **New Agency Procedures.** The Draft Guidance states that agencies do not need to expand the range of federal actions subject to NEPA or develop new NEPA implementing procedures for evaluating the impacts of GHG emissions. This differs from the Obama Guidance, which urged agencies to develop agency-specific practices. Several agencies, such as the [Forest Service](#), have previously done so.
- **Social Cost of Greenhouse Gases.** The Draft Guidance makes clear the administration's view that the prior administration's work in estimating the social cost of GHGs is no longer relevant to a NEPA analysis. It directs that when cost-benefit analyses incorporate the social cost of GHGs, they "should focus on the impacts that accrue to citizens and residents of the United States."

What's Gone

- **Acknowledgement of Climate Change.** Whereas the Obama Guidance included a lengthy background discussion of climate change science and referred to various sources of climate change research, the Draft Guidance does not mention "climate change" and only twice refers to evaluation of a project's "potential climate effects." Along these lines, the Draft Guidance also omits discussion of resilience and adaptation as well as references to climate-related health impacts. Thus, while the Draft Guidance largely mirrors the Obama Guidance in recommending that agencies estimate a project's GHG emissions as a proxy for assessing potential climate effects, it does not explain why agencies should evaluate GHG emissions and potential climate effects in the first place.
- **Consistency With Climate Change Laws and Policies.** The Obama Guidance urged agencies to discuss a proposed project's consistency with relevant laws, policies or plans for GHG emissions reductions or

climate change adaptation. No similar instruction is in the Draft Guidance.

- **Other Omissions.** The Draft Guidance no longer discusses scoping, climate-related mitigation measures, biogenic sources of carbon, and impacts on minority, low-income and vulnerable communities.

Implications

In substance, the Draft Guidance does not provide much actual new guidance to agencies. On the issue of indirect effects, for example, it largely restates the existing legal standard articulated by federal courts without providing direction on when and how to consider a project's upstream and downstream GHG emissions. It also declines to explain when and how agencies should consider the effects of climate change on a proposed action.

The Draft Guidance is not binding on federal agencies and does not alter any existing obligation to consider GHG emissions and the effects of climate change in their NEPA reviews. Nevertheless, courts may give some deference to the Draft Guidance, as they did with the Obama Guidance. *See, e.g., WildEarth Guardians v. Jewell*, No. 1:16-CV-00605-RJ, 2017 WL 3442922 (D.N.M. Feb. 16, 2017); *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013). Agencies will still need to consider whether and how to address climate change in NEPA documents in light of the evolving jurisprudence on this topic. On this point, several courts have held or presumed that NEPA requires federal agencies to consider GHG emissions and the effects of climate change in an environmental impact analysis. *See, e.g., Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 2:14-cv-00226-APG-VCF, 2017 WL 3667700 (D. Nev. Aug. 23, 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1192 (D. Colo. 2014).

Of much more significance than the Draft Guidance will be CEQ's [forthcoming revisions to the NEPA regulations](#). Those regulations set out the specifics of NEPA compliance and have remained essentially unchanged since 1980. CEQ is expected to release its proposed revisions to the NEPA regulations this summer.

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