

## CEQ Issues Draft NEPA Guidance on Consideration of the Effects of Climate Change and Green House Gas Emissions

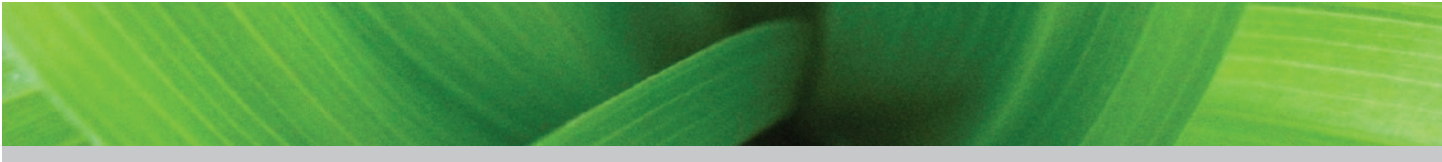
On February 18, 2010, the Council on Environmental Quality (“CEQ”) released, for public review and comment, a draft “Guidance Memorandum” on the consideration of greenhouse gas (“GHG”) emissions and climate change impacts as part of compliance with the National Environmental Policy Act (“NEPA”). The draft Guidance Memorandum was published in the Federal Register on February 23, 2010 (*75 Fed. Reg. 8046*). NEPA requires federal agencies to review the environmental effects of proposed federal actions that are considered major federal actions significantly affecting the quality of the human environment. The NEPA review process, through the development of either an environmental assessment or a more detailed environmental impact statement, is often a critical element dictating the timing and completion of federal permitting and authorization decisions. The Guidance Memorandum addresses two related issues:

- The treatment of GHG emissions that may directly or indirectly result from the proposed federal action; and
- The analysis of potential climate change impacts upon the proposed federal action.

Earlier this year, CEQ Chairwoman Nancy Sutley said that, while NEPA “cannot be used to regulate greenhouse gas emissions,” the Act “compels Federal agencies to consider environmental effects before undertaking significant actions or policies” and “CEQ sees no basis for excluding greenhouse gas emissions from that consideration.” Increasingly, the consideration of GHG emissions and the potential effects of climate change has been incorporated into NEPA reviews of proposed federal actions. However, the federal agencies have limited guidance and policies regarding when and how such analyses should take place. This draft Guidance Memorandum provides formal guidance from CEQ to the federal agencies on the treatment of GHG emissions and climate change impact issues within the NEPA process. All federal agency actions requiring NEPA review, except federal land and resource management activities, are covered by this guidance. As the agency charged with overseeing federal agencies’ implementation of NEPA, CEQ’s guidance likely will be afforded deference.

### OVERVIEW OF CEQ DRAFT GUIDANCE MEMORANDUM

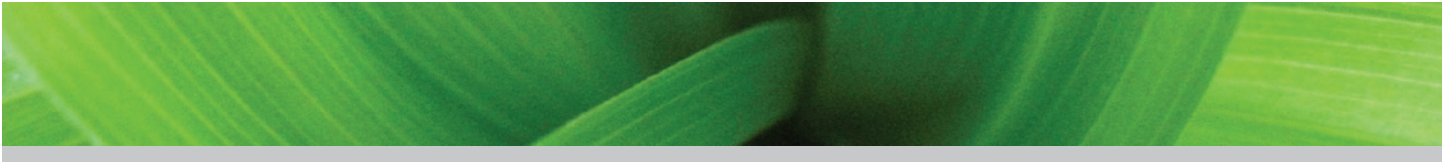
CEQ’s guidance lays out a framework for identifying those instances where potential GHG emissions or climate change impacts rise to a level of significance requiring “meaningful” consideration in the NEPA process. In those instances where detailed consideration is required, CEQ directs that such consideration include the quantification and disclosure of GHG emissions over the life of the project. Similarly, the NEPA review must assess climate change impacts on the project as well as how the proposed action might add to, modify or mitigate those climate change impacts. In addition, CEQ advises federal agencies to “consider opportunities to reduce GHG emissions caused by proposed Federal actions and adapt their actions to climate change impacts.” Such efforts should be conducted within the NEPA review of particular projects and, more broadly, within the agency’s NEPA implementation procedures.



The draft Guidance Memorandum proposes several key elements for the examination of GHG emissions and climate change impacts:

- First, the initial scoping phase within the NEPA process should consider the extent of potential GHG emissions from the proposed action over the life of the project and the likely climate change impacts within the foreseeable future. For GHG emissions, this would include projecting direct GHG emissions from the proposed federal action on an annual basis.
- CEQ identifies a “reference point” of 25,000 metric tons of direct CO<sub>2</sub>-equivalent GHG emissions as an “indicator” that the proposed federal action’s anticipated GHG emissions warrant detailed consideration in a NEPA review. For indirect GHG emissions (i.e., GHG emissions that have a causal nexus to, but are not directly emitted by, or the direct result of, the project), CEQ does not propose a reference point indicating when such indirect emissions are significant and cautions that any consideration of indirect GHG emissions needs to recognize the limits of feasibility in evaluating upstream and downstream effects of proposed federal actions.
- Detailed consideration of direct GHG emissions would entail the (1) quantification of cumulative GHG emissions over the life of the project; (2) discussion of measures to reduce GHG emissions, including consideration of reasonable alternatives; and (3) qualitative discussion of the link between such GHG emissions and climate change.
- For the review of climate change impacts, CEQ directs that the potential for climate change is reflected in the foreseeable future baseline (i.e., projections of the future climate conditions under a “no action” situation), as well as in the analysis of the effects of the proposed project on such future climate conditions.
- CEQ proposes that the sensitivity, location, and timeframe of a proposed action be considered in determining when climate change impacts should be subject to detailed consideration in the NEPA review. Specifically, CEQ advises that climate change effects should be considered in the analysis of projects that are designed for long-term utility and located in areas considered vulnerable to specific effects of climate change within the project’s anticipated lifetime—such as long-term development of transportation infrastructure on a coastal barrier island.
- In addition to including projections of future climate conditions within the baseline and alternatives analyses of proposed projects, CEQ underscores the need for agencies to consider adaptation measures and monitoring as elements of the federal agency action.

CEQ’s draft Guidance Memorandum includes cautions and limitations. A “rule of reason” should continue to govern the identification and review of environmental effects, so that any analysis of GHG emissions and climate change impacts is useful, relevant to the action under review, and limited to the consequences of actions over which the federal agency has control or authority. CEQ also cautions federal agencies from attempting to link specific climatological changes or impacts to a particular proposed federal action. Moreover, CEQ recognizes the limitations of climate change modeling and any application of global climate change models to regional, state or localized analyses. In particular, CEQ recommends disclosure of the limitations and variability of any climate models used in the NEPA analysis and notes that global climate change models require downscaling and bias removal before use in any regional or local impact studies.



## REQUESTS FOR PUBLIC COMMENT AND OPEN ISSUES

CEQ has announced a ninety-day comment period for the draft Guidance Memorandum, with public comments due no later than May 24, 2010. Further, CEQ has identified specific questions for public review and comment. While largely directed toward developing further guidance on the treatment of GHG emissions for federal land and resource management actions, CEQ also seeks comments on the identification of any GHG emissions threshold amount for determination that the potential GHG emissions are “significant” under NEPA and whether a separate threshold should be set for determining whether GHG emissions have significant cumulative effects.

## IMPLICATIONS

The draft Guidance Memorandum identifies several examples of proposals for federal agency action that could warrant discussion of GHG emissions or climate change impacts, and possible measures to mitigate project-related impacts in any applicable NEPA review: 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. Given the linkage of CEQ’s guidance to the mandatory GHG reporting rule thresholds, it is likely that sources expected to meet the reporting requirement thresholds will likewise be considered to trigger a need for detailed consideration in the NEPA review.

In addition to the public comment questions posed by CEQ, significant questions undoubtedly will arise with respect to the procedures envisioned by CEQ for GHG emissions and climate change analyses, and the feasibility of quantifying GHG emissions and climate change impacts as contemplated by CEQ. The issuance of this guidance will have other consequences as well. Federal agencies will have to independently address the extent to which their own NEPA implementing regulations or policies will need to be updated. Moreover, in some instances, federal agency permitting programs may require modification to anticipate the need for GHG emissions and climate-related information in permit application requirements.

### FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly assists clients with issues related to NEPA compliance, GHG emissions, and climate change. For more information on how the Guidance Memorandum affects your project or for assistance with NEPA compliance matters, please contact Joe Nelson, Sam Kalen, Jon Simon or any member of Van Ness Feldman’s Environment practice at (202) 298-1800.

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