
White House Issues Final Guidance on Climate Change Impact Analysis

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On August 1, 2016, the White House Council on Environmental Quality (CEQ) released its final guidance on how and when federal agencies should consider the direct and indirect impacts from climate change, including from greenhouse gas (GHG) emissions, in environmental reviews conducted under the National Environmental Policy Act (NEPA).¹ The final guidance is the culmination of an effort that began in 1997, and refines draft guidance that was released by CEQ in 2014. While not a product of formal rulemaking and so not a binding regulation, the final guidance may still be influential. Agencies historically give CEQ interpretations of NEPA considerable deference,² and a number of courts have considered CEQ guidance when determining whether an agency's NEPA analysis must be supplemented.³

In most respects, the final guidance does not plow new ground, but instead reaffirms that GHG emissions and climate change are among the many types of environmental impacts to be considered when evaluating a proposed action (and alternatives to that action) under NEPA. Like the draft version, the final guidance confirms that the well-established “rule of reason” and the principle of “proportionality” govern what degree of analysis of GHG emissions and climate change will be required with respect to a particular proposal, and allows each federal agency to utilize its own expertise in assessing impacts and mitigation options. In this regard, the final guidance does not establish any threshold of “significance” for GHG emissions (which would be used to determine whether an environmental impact statement must be prepared under NEPA), and instead allows agencies to make this determination in accordance with their applicable regulations and agency precedent.

Given that the final guidance reinforces the use of traditional NEPA procedures and precedent, but then suggests additional guidelines for analyzing GHG emissions and climate change, all stakeholders will be able to find language in the final guidance that supports their own arguments as to why a more or less thorough analysis of GHG emissions and climate change is appropriate for a particular project. The guidance is effective immediately, and CEQ encourages agencies to use it for all new proposed agency actions for which NEPA review is required, and to consider whether to apply it to any NEPA review that is already underway.⁴

Quantitative Analysis

While agencies have increasingly accounted for GHG emissions and climate change in their NEPA reviews,⁵ they often have done so qualitatively. Like the 2014 draft guidance, the final guidance calls for a quantitative analysis of GHG emissions—with GHG emissions serving as a “proxy” for potential effects on climate change.⁶ Unlike the 2014 draft, the final guidance does not propose a minimum 25,000-metric-ton threshold for such a quantitative analysis. Instead, it calls for quantification in all cases except where “tools, methodologies, or data inputs are not reasonably available.”⁷ While the final guidance confirms that agencies need not conduct new research on climate change or develop additional quantification tools, this exception will likely be of little consequence, as CEQ elsewhere provides that “[q]uantification tools are widely available, and are already in broad use in the Federal and private sectors, by state and local governments, and globally.”⁸

The final guidance provides a link to tools currently used by various federal agencies and the private sector, and endorses the methodologies presented in CEQ's own “2012 Guidance for Accounting and Reporting GHG Emissions.”⁹ Beyond these references and citations, CEQ does not prescribe any more concrete guidance for how agencies should calculate GHG emissions, but it nevertheless anticipates that an agency will almost certainly have the wherewithal to use some existing mechanism to quantify the GHG emissions of a project or other federal action.

The need for quantitative analysis also seems inherent in the final guidance's discussion of alternatives to a proposed action. The final guidance states that an alternatives analysis should compare GHG emissions of a proposed action with alternatives. In this regard, although the final guidance confirms that the federal agency should select a “range of reasonable alternatives consistent with the level of NEPA review (e.g., EA or EIS) and the purpose and need for the proposed action,”¹⁰ it elsewhere suggests that the agency should also consider reasonable alternatives “to reduce action-related GHG emissions.”¹¹ A comparison based on something other than the quantity of emissions may be vulnerable to characterization as apples-to-oranges.

The final guidance advises against an approach that frames GHG emissions as a share of emissions in a given sector or region. Instead, CEQ encourages that “[w]hen considering GHG emissions and their significance, agencies should use appropriate tools and methodologies for quantifying GHG emissions and comparing GHG quantities across alternative scenarios.”¹² In other words, it is not enough to say the project will have a negligible effect on sector-wide, nationwide, or worldwide emissions; rather, the relative level of GHG emissions—serving as a proxy for climate change effects—should be assessed within the context of the proposed action and the alternatives under consideration, including the no-action alternative.¹³

CEQ has anticipated in the final guidance that opponents may argue that a quantification of GHG emissions for any single project is unnecessary because of the negligible effect any single project has on global climate change. CEQ turns the argument on its head to say that this is the very reason the guidance is necessary, as it illustrates the unique challenge posed by GHG emissions. This is consistent with the Ninth Circuit's holding that “[t]he impact of greenhouse gas emissions on

climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”¹⁴

Mitigation

The final guidance states that it “do[es] not require the decision maker to select the alternative with the lowest net level of emissions.”¹⁵ However, it endorses as “an important component of the NEPA process” consideration of any “mitigation measures that reduce or mitigate GHG emissions.”¹⁶ The final guidance also encourages agencies to “identify those mitigation measures that the agency commits to take, recommends, or requires others to take” in the final agency decision and to provide for “monitoring to ensure that mitigation is carried out.”¹⁷

Impacts of Climate Change on Proposed Actions

The final guidance also calls for agencies to consider how climate change could affect proposed actions. Such impacts could include “increasing sea level, drought, high intensity precipitation events, increased fire risk, and ecological change.”¹⁸ The final guidance suggests that certain types of projects, like developments in floodplains, on coastal barrier islands, or near the coastline, could be especially vulnerable to such impacts, and asserts that agencies should identify opportunities for adaptation, “ultimately enabling the selection of smarter, more resilient actions.”¹⁹

Finally, in something akin to requiring an analysis of a never-ending series of “what if” scenarios, the final guidance suggests that “considering climate change preparedness and resilience can help ensure that agencies evaluate the potential for generating additional GHGs if a project has to be replaced, repaired, or modified.”²⁰ In other words, after assessing the effects of a project on climate change, agencies must assess the effects of climate change on the project in order to determine whether climate change will, in turn, cause the project to have additional, previously unaccounted-for impacts on climate change.

Rule of Reason and Proportionality

The final guidance confirms that “[t]he rule of reason and the concept of proportionality caution against providing an in-depth analysis of emissions regardless of the insignificance of the quantity of GHG emissions that would be caused by the proposed agency action.”²¹ While this statement provides agencies some leeway to engage in less robust analysis where GHG emissions are minor, it neither removes the expectation that there will be some level of analysis, nor provides more concrete guidance than the sentence quoted above regarding when the standard is relaxed and what level of analysis is then appropriate.

Implications

- When the draft guidance was issued, we predicted that the days were numbered for federal agencies to avoid including a quantitative analysis of GHG emissions in their NEPA reviews.²² The final guidance confirms that those days are now over. All or nearly all NEPA analysis will now include a quantitative assessment of direct and indirect GHG emissions associated with the proposed action.

- Despite the nonbinding nature of the guidance, it seems likely to play a role in NEPA litigation going forward. The guidance reaffirms that climate change impacts must be given a “hard look” under NEPA, just as more localized impacts to water, air, and other resources are. Even though the final guidance stresses that agencies need not give greater consideration to the effects of GHG emissions and climate change over other effects on the human environment, NEPA challenges going forward are likely to feature an attack on the sufficiency of the analysis of climate change impacts. In addition, specific suggestions in the final guidance regarding mitigation, among other things, create new standards susceptible to legal challenge, either by an aggrieved project proponent who believes these new standards lack a basis in law, or by an opponent to a proposed action who feels the new guidance was ignored in the course of approving a federal action.
- The guidance also calls on agencies to assess the impacts that climate change could have on proposed projects. This will be especially important for projects in areas that are at greater risk from climate change impacts such as sea level rise, drought, high-intensity precipitation events, and increased fire risk. Those projects may face greater scrutiny as to whether they are sufficiently “resilient” to potential impacts.

Conclusion

With the release of its final guidance, CEQ has completed its decades-long effort to provide guidelines for the consideration of climate change, including GHG emissions, in the NEPA process. While the guidance is not binding, it will influence how NEPA analysis is conducted moving forward. In nearly all cases, agencies will need to quantify the direct and indirect GHG emissions associated with a proposed action and its alternatives. They will also likely give greater attention to the effects of climate change on the proposed action, accounting for the action's resiliency, and may be quicker to impose climate change-related mitigation measures. The guidance will also provide a basis for stakeholders to challenge specific NEPA analyses to the extent that agencies do not sufficiently account for climate change impacts.

¹ Available [here](#) [hereinafter, CEQ Guidance].

² See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

³ See, e.g., *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011).

⁴ CEQ Guidance, at 33.

⁵ See Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, U. Colo. L. Rev. 473, 486 (2010).

⁶ CEQ Guidance, at 10-13.

⁷ *Id.* at 13.

⁸ *Id.* at 12.

⁹ *Id.* at 12 fns. 28-29, 31.

¹⁰ *Id.* at 15.

¹¹ *Id.*

¹² *Id.* at 11.

¹³ *Id.* at 15.

¹⁴ *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. Cal. 2008).

¹⁵ CEQ Guidance, at 15-16.

¹⁶ *Id.* at 18-19.

¹⁷ *Id.* at 19-20.

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 22.

²⁰ *Id.* at 25.

²¹ *Id.* at 12.

²² Mark Kalpin, Ken Salazar, and H. David Gold, [Regulatory Divergence May Be New Norm After GHG Guidance](#) (Mar. 24, 2015).

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