

CEQ's Proposed Guidance on NEPA Climate Reviews Replaces Obama's

In 1970, the Council on Environmental Quality's first annual report recognized that "man may be changing his weather." At the time, the mean level of atmospheric carbon dioxide was 325 parts per million, a significant increase over pre-industrial amounts. CO₂ levels have skyrocketed since then, reaching a record high of 405 ppm in 2017, higher than at any point over the last 800,000 years.

Federal agencies make thousands of decisions every year with implications for greenhouse gas emissions. Yet, as we near the 50th anniversary of NEPA, the question of how exactly federal agencies should address climate change in their environmental reviews is as controversial as ever. The Obama administration grappled with the issue, producing draft

NEPA GHG guidance in 2014. After extensive comments and much further internal debate, a final guidance document was released in 2016. Met with applause in

certain quarters, it was criticized by others as going too far, or not far enough.

President Trump withdrew the Obama guidance by executive order in March 2017. Two years later, CEQ published a new "Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions." The new draft is much shorter than its predecessor, 9 pages as opposed to 34, but how different is it in substance? What are the key takeaways for practitioners?

One noticeable difference is that the 2016 guidance minced no words in acknowledging that "it is now well established that rising global atmospheric GHG emission concentrations are significantly affecting the Earth's environment." It declared that "climate change is a fundamental environmental issue, and its effects fall squarely within NEPA's purview." The 2019 draft, by contrast, omits such statements, pro-

viding little context on the nature of the challenge posed by climate change or why it is critical for agencies to address planetary effects.

In substance, however, the 2019 draft — terse as it is — may be less of a departure than one might think. Like its predecessor, the new draft recognizes GHG emissions as an important component of environmental review and that "comparing alternatives based on potential effects due to GHG emissions . . . can help agencies differentiate among alternatives."

Both documents recommend that agencies use GHG emissions in their NEPA reviews as a proxy for climate effects. Both suggest that agencies apply the statute's "rule of reason" in identifying direct and indirect effects and in

tailoring their analyses proportionally to the scale of the proposed project.

At the same time, neither document says much about whether an EIS accompany-

ing approval of an energy project, such as a pipeline or a liquified natural gas terminal, must analyze "upstream" or "downstream" GHG emissions — an issue that has produced conflicting results in the courts.

While both documents allow agencies to use available tools and methodologies to quantify projected emissions, they acknowledge that it would be appropriate to forego quantification if available information is unreliable, so long as they provide a reasoned explanation. Both documents also make clear that NEPA does not require cost-benefit analysis, and explain that tools such as the Social Cost of Carbon that attempt to monetize the incremental value of reducing GHG emissions, are primarily intended for rulemaking rather than environmental impact reviews. Finally, while the 2014 draft guidance had included a numerical threshold

Greenhouse gas reviews will only be adjudicated in piecemeal fashion



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above which a more robust analysis would be required, both the 2016 and 2019 documents eschew thresholds.

Of course, there are major differences too. The new draft makes no mention of mitigation, an issue that was centrally addressed in the 2016 guidance. The 2019 draft does not address whether agencies need to consider alternatives that generate lower emissions or reduced climate impacts. And in a somewhat cryptic statement, it suggests that agencies need not study indirect climate effects where there is merely a "but for" causal connection with the proposed action.

Perhaps most significantly, the new draft is silent on the need to assess the impacts of climate change on the proposed action. By contrast, the 2016 guidance recognized that "NEPA review should consider an action in the context of the future state of the environment," and extensively discussed how agencies should evaluate how adaptation and resilience might be integrated into the proposed action.

As CEQ finalizes its draft, one thing is for sure: the new guidance document will not be the end of the story. All indications are that it will raise as many questions as it answers, and that agencies will be wise to proceed cautiously. The document will be subject to change or rescission in a future administration, does not carry the force of a regulation, and is not binding on or enforceable in the courts. As with other NEPA issues, the law will continue to develop on a case-by-case, project-by-project basis.