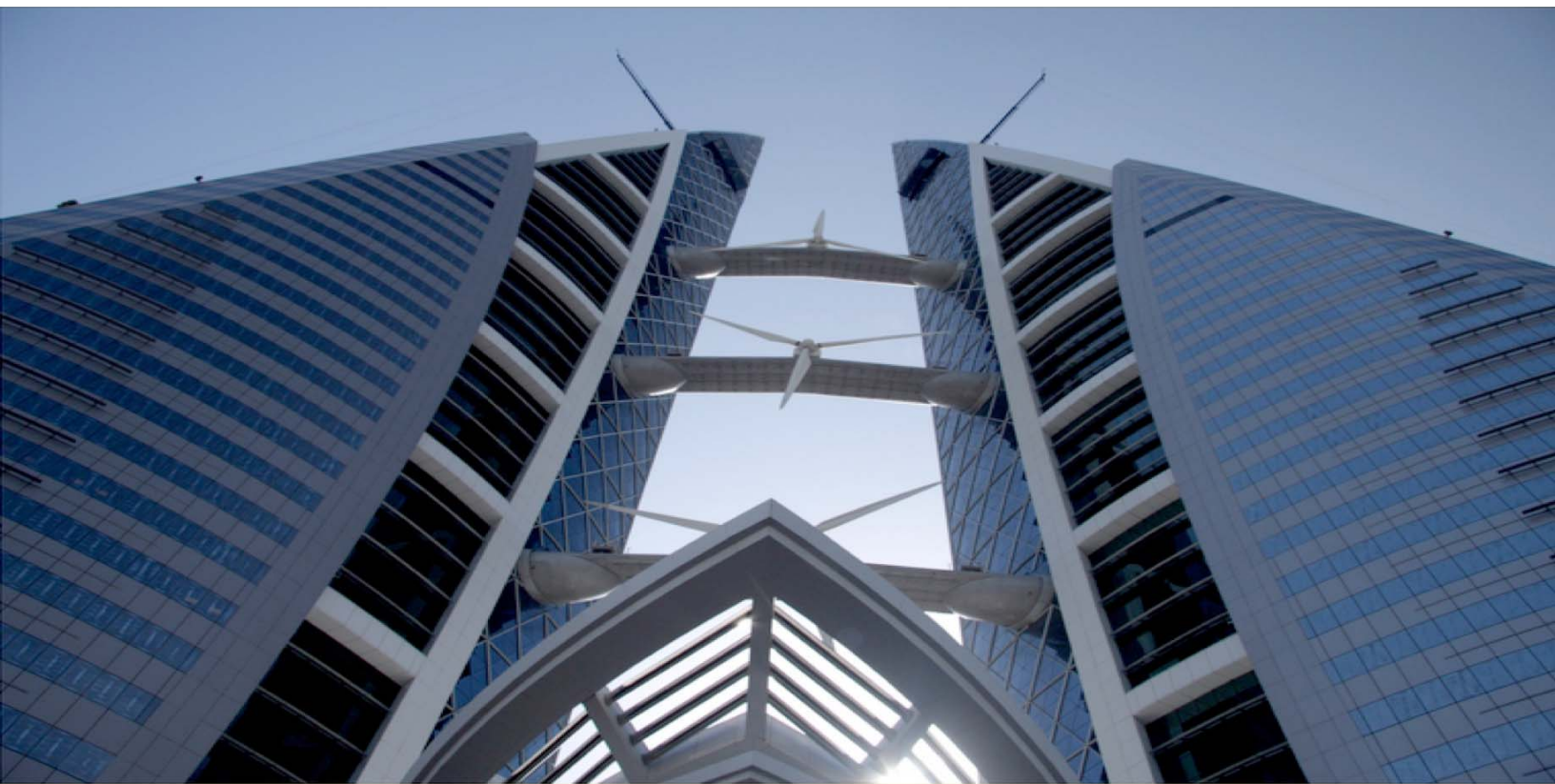


# Snapshot

Climate Change & Environmental Impact Statements



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# Snapshot

## Climate Change & Environmental Impact Statements

All levels of government — federal, state and local — are beginning to consider climate change in the environmental review process, and all three seem on the verge of making it mandatory for almost all projects that require an environmental impact statement (EIS).

This is good news for proponents of environmentally sound development. If sound rules are adopted, applicants and approving agencies would be required to consider systematically — and perhaps quantitatively — the greenhouse gas (GHG) implications of projects they are considering, of feasible alternatives, and of mitigation measures. Consideration would also be required of the impacts of climate change on projects, such as rising sea and groundwater levels.

Almost every project that would emit significant amounts of GHGs and that is otherwise already subject to one of the environmental review laws would probably already be subject to EIS requirements because of other impacts. Thus adding a climate change section to the EIS scope of work would only slightly increase the cost of EIS preparation, at least once standard assessment procedures have been adopted. But the added public benefits could be considerable, as a project's climate significance would be injected into the decision-making process.

### Federal

In 1997, the Council on Environmental Quality (CEQ), the White House office charged with implementing the National Environmental Policy Act (NEPA), circulated a draft guidance document requiring consideration of climate change under NEPA. The guidance was never adopted. However, beginning in 2003, federal courts began halting some federal actions where GHGs had not been examined as part of the NEPA process. In one of the most important of these cases, in 2007 the U.S. Court of Appeals for the Ninth Circuit annulled the average fuel economy standards for light trucks, in part because no EIS had been prepared. The court declared, “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”

In early 2008, several environmental groups filed a formal petition with CEQ asking it to issue formal guidance on climate change and NEPA. (I was *pro bono* counsel to the Natural Resources Defense Council in that petition.)

Then in 2009, shortly after the Obama Administration took office, two federally-owned corporations — the Overseas Private Investment Corporation and the Export-Import Bank — agreed to settle a lawsuit that Friends of the Earth had brought against them for failing to consider climate change in their decisions to help finance U.S. involvement in energy projects abroad. The two entities agreed not only to include climate change in their future EISs, but also to take substantive actions to reduce GHG impacts and finance energy efficiency measures.

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### States

About twenty states have their own equivalents of NEPA. The first state to take serious action on climate change under its law was Massachusetts, which in April 2007 required GHG analysis under the Massachusetts Environmental Policy Act. Two months later King County, Washington (which includes Seattle) took similar action. But the state that has surged far ahead is California, whose attorney general, Jerry Brown, began sending stern letters to various municipalities and project applicants demanding consideration of climate issues under the California Environmental Quality Act (CEQA). These initiatives resulted in several prominent settlements under which detailed CEQA analysis was conducted, and substantive measures to reduce GHG impacts were adopted.

The California Legislature adopted a statute in 2006 requiring issuance of formal guidance on how this analysis should be done, and meanwhile several non-governmental organizations formulated their own guidance. These requirements continue to be controversial in California, with important voices in the Legislature seeking their repeal, but so far without success.

New York State has been late to the game, but it is finally taking action. The text of the State Environmental Quality Review Act (SEQRA) provides that EISs should discuss the “effects of the proposed action on the use and conservation of energy resources, where applicable and significant,” and should also consider a project’s effect on air pollution. (The U.S. Supreme Court ruled in 2007 that GHGs are air pollutants.) In February 2008, New York officials included detailed climate-related requirements in the scoping document for certain actions at the state-run Belleayre Mountain Ski Center and for the Belleayre Resort at Catskill Park.

On March 11, 2009, DEC issued a draft guidance on the consideration of climate change in EISs where DEC itself is the lead agency. (DEC is seldom the lead agency, but this guidance is likely to be picked up by other agencies.) The guidance requires EISs to consider direct emissions of GHGs (stack and fugitive emissions from on-site combustion or industrial processes, and emissions from fleet vehicles associated with the project), as well as indirect emissions of GHGs (from off-site energy plants supplying energy used by the project, from vehicle trips to and from the project site during its operation, and from generation, transportation, treatment and disposal of wastes generated at the site). The guidance also calls for projections of the reduction in GHG emissions that would result from mitigation measures, and quantification of reductions in GHG emissions that would result from mitigation measures considered and rejected.

Disappointingly, the guidance does not require an analysis of the effect of climate change on projects. However, the New York State Sea Level Rise Task Force may adopt this as a recommendation.

The guidance only concerns consideration of GHGs in actions that are already undergoing the EIS process. DEC is currently drafting revisions to its Environmental Assessment Form that will require a look at GHGs before a decision is made on whether to require an EIS.

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### City

The New York City Office of Environmental Coordination is well along in revising its comprehensive City Environmental Quality Review (CEQR) Technical Manual. The target date for completion is fall 2009. It will contain a chapter on climate change, which will spell out the required analysis of the action's GHG emissions and its adaptation to climate change.

Already, many EISs prepared under both SEQRA and CEQR are looking at climate change issues, perhaps as a precaution against judicial challenges. So far no court in New York has ruled on whether this analysis is required, but such a ruling would not be difficult to envision in an appropriate case.

The EIS process has already proven itself to be a useful forum for considering energy use and other green building issues. For example, the Lower Manhattan Development Corporation and the Port Authority were co-lead agencies for the preparation of an EIS under both NEPA and SEQRA for the redevelopment of the World Trade Center. (I was environmental counsel to Silverstein Properties in that process.) The EIS process led to the development of a set of sustainable design guidelines, and ultimately to the commitment to build to LEED Gold levels.

If and when consideration of GHGs becomes mandatory as part of the NEPA, SEQRA and CEQR projects, proponents of green building practices will have an excellent platform for the consideration, analysis, disclosure and hopefully adoption of measures to minimize GHG emissions and to prepare projects and sites for the climate change that will inevitably occur in the coming decades.

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