

## CLIENT ALERT

### NEPA Review and Climate Change – Proposed Guidance Aims to Define Federal Agency Duties and Discretion

July 3, 2019

On Wednesday, June 26, 2019, the Federal Register published the White House Council on Environmental Quality’s (CEQ) proposed National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas (GHG) Emissions. If adopted, the guidance would fill a void created by the rescission of the Obama-era NEPA guidance on climate change in March 2017 by President Trump’s “Promoting Energy Independence and Economic Growth” executive order.

NEPA requires federal agencies to conduct a review of potential environmental impacts before approving major federally funded, licensed, or permitted projects. The proposed guidance is intended to streamline GHG analysis as part of the NEPA permitting process by relaxing the review criteria that agencies were directed to follow under the Obama-era guidance. Although the new guidance still instructs agencies to consider GHG emissions, it appears to give agencies more discretion in determining to what extent they do so.

Perhaps most notable are the provisions on quantifying GHG emissions. Under the proposed guidance, agencies are instructed “to attempt” to quantify projected GHG emissions “when the amount of those emissions is substantial enough to warrant quantification.” What constitutes “substantial enough” emissions is left to the agencies’ discretion. In making the determination of whether or not to quantify GHG emissions, CEQ also instructs agencies to consider whether quantifying a project’s projected GHG emissions “would be practicable and whether quantification would be overly speculative.” However, if an agency decides that quantification would be impractical or overly speculative, the agency should offer an explanation for its decision.

In addition to limiting quantification requirements, the proposed guidance contains further limiting instructions with regard to weighing the impact of GHG emissions. For example, under the proposed guidance, agencies should only assess GHG effects “when a sufficiently close causal relationship exists between the proposed action and the effect”; a “‘but for’ causal relationship is not sufficient.” In addition, CEQ instructs agencies that they need not give the analysis of the potential impacts of GHG emissions any more weight than other potential effects of a proposed project.

The proposed guidance differs from the rescinded Obama-era guidance in several additional key ways. For example, while it encourages agencies to consider potential alternative project plans and to compare alternative GHG emissions, the proposed guidance squarely states that “NEPA does not require agencies to adopt mitigation measures.” Conversely, the previous guidance listed several specific GHG emission-reducing mitigation measures and instructed agencies to “consider the potential for mitigation measures . . . when those measures are reasonable and consistent” with the proposed action. Additionally, although neither the previous nor proposed guidance requires agencies to conduct a monetized cost-benefit analysis, the proposed guidance note that if an agency decides to do so, the Social Cost of Carbon (SCC) is not meant to be used in such an analysis. In contrast, the previous guidelines stated that the SCC could be used for developing a quantifiable cost-benefit analysis.

The proposed guidance is not “law”; it is suggestive only. If implemented, however, it should not only help facilitate agencies’ consideration of GHG emissions as part of NEPA review, but also fill a perceived regulatory gap that some courts themselves have been filling on their own (with inconsistent results) over the last few years in the absence of regulatory guidance. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (requiring FERC to consider GHG emissions from natural gas flowing through pipelines under NEPA review); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017) (rejecting argument that GHG emissions from coal combustion need not be assessed because lease approval would not affect coal combustion nationwide).

CEQ is currently seeking public comment on the proposed guidance until July 26, 2019.

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