

**MEMORANDUM**

TO: Greg Bertelsen  
Mary Martin

FROM: Roger Martella  
Joel Visser

RE: Initial Assessment of CEQ NEPA Guidance Regarding Association Comments

DATE: August 3, 2016

---

On August 2, 2016, the Council on Environmental Quality (“CEQ”) issued *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* ([https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa\\_final\\_ghg\\_guidance.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf)). The Associations submitted detailed comments on the CEQ’s revised draft guidance in 2015 requesting a number of changes to the guidance to make it easier to implement and to ensure that it the final guidance would be consistent with both the National Environmental Policy Act (“NEPA”) and CEQ’s implementing guidelines.

Below is a brief summary of how, if at all, the final guidance differs from the draft guidance on each of the substantive issues on which the Associations commented. This summary is based on a preliminary review of the final guidance, and we anticipate providing a more detailed assessment once we have had an opportunity to study the final guidance in more detail. In short, while CEQ made several modest and semantical changes to address some of the stated concerns, there is little substantive difference between the draft and final guidance documents on most of the key issues raised by the Associations. As a result, many of the concerns that the Associations articulated with respect to the draft guidance remain.

Issue	Proposal	Final
<p><b>Guidance should not be applied to ongoing NEPA reviews.</b></p> <p>No significant change.</p> <p>CEQ does not require application to ongoing NEPA reviews, but continues to expresses a preference for doing so.</p>	<p>“The revised draft guidance will be effective immediately once finalized for newly proposed actions ....”</p> <p>“Agencies are encouraged to apply this guidance to all new agency actions moving forward, and, to the extent practicable, to build its concepts into currently on-going reviews.” <i>Id.</i> at 77,831.</p>	<p>“Agencies should apply this guidance to all new proposed agency actions when a NEPA review is initiated.”</p> <p>“Agencies should exercise judgment when considering whether to apply this guidance to the extent practicable to an on-going NEPA process.”</p> <p>“Agencies should consider applying this guidance to projects in the EIS or EA preparation stage if this would inform the consideration of differences between alternatives or address comments raised through the public comment process with sufficient scientific basis that suggest the environmental analysis would be incomplete without application of the guidance ....”</p>
<p><b>Inclusion of upstream and downstream emissions.</b></p> <p>Some changes, but limited practical impact.</p> <p>CEQ eliminates all references to “upstream” and “downstream” emissions but appears to retain similar concepts through the use of the conventional NEPA terms “direct” and “indirect” effects. CEQ also cites heavily to the existing NEPA regulations, suggesting that the guidance is consistent</p>	<p>CEQ references the “rule of reason” and concept of proportionality as guiding principles.</p> <p>CEQ references NEPA requirements to address direct, indirect, and cumulative impacts and the need to include all “reasonably foreseeable” effects.</p>	<p>CEQ references the “rule of reason” and concept of proportionality as guiding principles.</p> <p>CEQ references NEPA requirements to address direct, and indirect impacts and the need to include all “reasonably foreseeable” effects. Final guidance states that a separate evaluation of cumulative impacts is not necessary (page 17).</p>

<p>with existing NEPA regulations and case law. In short, it appears CEQ is interested in retaining the lifecycle analysis concept from the proposed guidance to some extent, but has edited the semantics of the approach to try to heed more closely to the established NEPA lexicon.</p> <p>This interpretive gloss nonetheless seems to extend beyond the case law. Thus, while the language arguably conforms more closely to the semantics of existing NEPA regulations on the surface, the guidance continues to take an expansive approach toward interpreting the scope of a NEPA review, particularly for federal actions that involved the extraction of fossil fuels, which calls into question the same legal issues identified in the comments.</p>	<p>“In addition, emissions from activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions) should be accounted for in the NEPA analysis”</p> <p>“NEPA analysis for a proposed open pit mine could include the reasonably foreseeable effects of various components of the mining process, such as clearing land for the extraction, building access roads, transporting the extracted resource, refining or processing the resource, and using the resource.”</p>	<p>No reference to “upstream” or “downstream” emissions: “Activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for a proposed agency action or as a consequence of a proposed agency action, should be accounted for in the NEPA analysis.”</p> <p>“NEPA reviews for proposed resource extraction and development projects typically include the reasonably foreseeable effects of various phases in the process, such as clearing land for the project, building access roads, extraction, transport, refining, processing, using the resource, disassembly, disposal, and reclamation.”</p> <p>CEQ goes on to suggest in a footnote that a lifecycle analysis approach may be appropriate for the extraction of fossil fuels: “Where the proposed action involves fossil fuel extraction, direct emissions typically include GHGs emitted during the process of exploring for or extracting the fossil fuel. The indirect effects of such an action that are reasonably foreseeable at the time would vary with the circumstances of the proposed action. For actions such as a Federal lease</p>
---	---	---

		sale of coal for energy production, the impacts associated with the end-use of the fossil fuel being extracted would be the reasonably foreseeable combustion of that coal.”
<p><b>Inclusion of transnational impacts</b></p> <p>No change.</p> <p>We urged CEQ to clarify that transnational impacts should not be included in NEPA analyses, but CEQ did not directly address this issue in either guidance. However as discussed below, CEQ continues to support the social cost of carbon metric, which does include transnational impacts.</p>	N/A	N/A
<p><b>Guidance should not be applied to land and resource management actions</b></p> <p>No change.</p> <p>We urged CEQ to exclude land and resource management actions from the guidance (as it had proposed to do in the first draft).</p>	<p>CEQ specified that the draft guidance applies to all agency actions, including land and resource management actions.</p> <p>CEQ includes a specific section to address biogenic CO<sub>2</sub> emissions from land and resource management actions.</p> <p>CEQ includes a section addressing incorporation by reference and reliance on programmatic EISs to inform NEPA analyses for subsequent site specific actions.</p>	<p>CEQ specified that the draft guidance applies to all agency actions, including land and resource management actions.</p> <p>CEQ includes a specific section to address biogenic CO<sub>2</sub> emissions from land and resource management actions.</p> <p>CEQ includes a section addressing incorporation by reference and reliance on programmatic EISs to inform NEPA analyses for subsequent site specific actions.</p>
<p><b>Social Cost of Carbon</b></p> <p>Modest change.</p> <p>CEQ deemphasized the</p>	<p>“Monetizing costs and benefits is appropriate in some, but not all, cases and is not a new requirement”</p>	<p>“NEPA does not require monetizing costs and benefits. Furthermore, the weighing of the merits and drawbacks of the various alternatives need</p>

<p>importance of monetizing costs and benefits in NEPA analyses and only referenced the social cost of carbon in a footnote. Yet, there is still a strong emphasis on agencies explaining why costs and benefits were not monetized or why climate costs and benefits were not included, but agencies do have an out—based on the guidance—to exclude such an analysis if they choose to do so.</p>	<p>“When an agency determines it appropriate to monetize costs and benefits, then, although developed specifically for regulatory impact analyses, the Federal social cost of carbon, which multiple Federal agencies have developed and used to assess the costs and benefits of alternatives in rulemakings, offers a harmonized, interagency metric that can provide decisionmakers and the public with some context for meaningful NEPA review.</p>	<p>not be displayed using a monetary cost-benefit analysis and should not be when there are important qualitative considerations”</p> <p>In footnote: “For example, the Federal social cost of carbon (SCC) estimates the marginal damages associated with an increase in carbon dioxide emissions in a given year. Developed through an interagency process committed to ensuring that the SCC estimates reflect the best available science and methodologies and used to assess the social benefits of reducing carbon dioxide emissions across alternatives in rulemakings, it provides a harmonized, interagency metric that can give decision makers and the public useful information for their NEPA review.”</p> <p>“[I]f an agency chooses to monetize some but not all impacts of an action, the agency providing this additional information should explain its rationale for doing so.”</p>
<p><b>Agencies cannot be compelled to adopt mitigation measures under NEPA</b></p> <p>No change.</p> <p>While CEQ made some minor changes regarding the phrasing of the mitigation</p>	<p>“As Federal agencies evaluate proposed mitigation of GHG emissions or of interactions involving the affected environment, the quality of that mitigation—including its permanence, verifiability, enforceability, and additionality should be carefully evaluated.”</p>	<p>“As Federal agencies evaluate potential mitigation of GHG emissions and the interaction of a proposed action with climate change, the agencies should also carefully evaluate the quality of that mitigation to ensure it is additional, verifiable, durable, enforceable, and will be</p>

<p>guidance, the same ambiguity persists regarding whether CEQ is signaling that under NEPA federal agencies should take affirmative action to mitigate GHG emissions.</p>	<p>“[T]he CEQ Regulations recognize the value of monitoring to ensure that mitigation is carried out as provided in a Finding of No Significant Impact or Record of Decision. In cases where mitigation measures are designed to address the effects of climate change, the agency’s final decision should identify those mitigation measures and the agency should consider adopting an appropriate monitoring program.”</p>	<p>implemented.”</p> <p>“[T]he CEQ Regulations and guidance recognize the value of monitoring to ensure that mitigation is carried out as provided in a record of decision or finding of no significant impact. The agency’s final decision on the proposed action should identify those mitigation measures that the agency commits to take, recommends, or requires others to take. Monitoring is particularly appropriate to confirm the effectiveness of mitigation when that mitigation is adopted to reduce the impacts of a proposed action on affected resources already increasingly vulnerable due to climate change.”</p>
<p><b>CEQ should not adopt a threshold of 25,000 tons per year for GHG emissions</b></p> <p>Significant change.</p> <p>CEQ eliminated any reference to a 25,000 ton per year threshold. Instead, it leaves questions about the significance of GHG emissions and the need to quantify them to the discretion of the federal agencies.</p>	<p>“In considering when to disclose projected quantitative GHG emissions, CEQ is providing a reference point of 25,000 metric tons of CO<sub>2</sub>-e emissions on an annual basis below which a GHG emissions quantitative analysis is not warranted unless quantification below that reference point is easily accomplished.”</p>	<p>“This guidance does not establish any particular quantity of GHG emissions as “significantly” affecting the quality of the human environment or give greater consideration to the effects of GHG emissions and climate change over other effects on the human environment.”</p>
<p><b>Resilience and Adaptation</b></p> <p>Although not a focus of the Associations’ comments, it’s notable that the final guidance</p>		<p>“Climate change effects on the environment and on the proposed project should be considered in the analysis of a</p>

<p>places greater emphasis on analysis of climate change resilience and adaptation for projects in NEPA reviews than the proposal.</p>		<p>project considered vulnerable to the effects of climate change such as increasing sea level, drought, high intensity precipitation events, increased fire risk, or ecological change. In such cases, a NEPA review will provide relevant information that agencies can use to consider in the initial project design, as well as alternatives with preferable overall environmental outcomes and improved resilience to climate impacts.”</p> <p>“ For example, an agency considering a proposed long-term development of transportation infrastructure on a coastal barrier island should take into account climate change effects on the environment and, as applicable, consequences of rebuilding where sea level rise and more intense storms will shorten the projected life of the project and change its effects on the environment.”</p> <p>“In addition, the particular impacts of climate change on vulnerable communities may be considered in the design of the action or the selection among alternatives to assess the impact, and potential for disproportionate impacts, on those communities.”</p> <p>“For example, chemical facilities located near the coastline could have</p>
--	--	--

		increased risk of spills or leakages due to sea level rise or increased storm surges, putting local communities and environmental resources at greater risk. Increased resilience could minimize such potential future effects.”
--	--	--