



ALERTS

Deja Vu All Over Again – CEQ Restores Science To Federal Decision-Making

January 9, 2023

Highlights

The CEQ has issued a new interim NEPA Guidance for consideration of climate change and GHG emissions when agencies evaluate major federal actions

This interim guidance replaces and updates the CEQ's 2016 guidance on these issues that was revoked by the prior administration and reinstates use of best practices for analysis grounded in science and agency experience

While the updated interim guidance is effective immediately, the CEQ is receiving public comments until Mar. 10, 2023. The CEQ will then either revise the guidance in response to public comments or finalize the interim guidance

On Jan. 6, 2023, the White House Council on Environmental Quality (CEQ) [released](#) updated interim guidance on consideration of greenhouse gas emissions and climate change “to help Federal agencies better assess and disclose climate impacts as they conduct environmental reviews, delivering more certainty and efficiency in the permitting process for clean energy and other infrastructure projects.” The [interim guidance](#), published in the Federal Register Jan. 9, 2023, is intended “to assist

RELATED PEOPLE



Bruce White

Partner
Chicago

P 312-214-4584
F 312-759-5646
bruce.white@btlaw.com

RELATED PRACTICE AREAS

Environmental

Federal agencies in their consideration of the effects of greenhouse gas (GHG) emissions and climate change when evaluating proposed major Federal actions in accordance with the National Environmental Policy Act (NEPA).”

The new interim guidance was directed by Executive Order 13990, [Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#), and “advances President Biden’s commitment to restore science in Federal decision making, fight climate change, and build resilient infrastructure.” The interim guidance updates and replaces the CEQ’s 2016 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, highlighting best practices for analysis grounded in science and agency experience.” 88 Fed Reg, at 1198. (The 2016 Guidance had been withdrawn by the prior administration.)

It also builds on the administration’s [Permitting Action Plan](#), to strengthen and accelerate federal permitting and environmental review and ensure infrastructure projects are delivered on time, on task and on budget. The CEQ further notes that this updated guidance is also consistent with Executive Orders 13990, 14008 and 14057, which set forth commitments to: address climate change; direct that federal infrastructure investment reduce climate pollution; and require that federal permitting decisions consider the effects of GHG emissions and climate change. 88 Fed Reg at 1198, fn 19

The interim guidance explains how NEPA and best practices should be applied by federal agencies to their climate change analyses by:

- “Recommending that agencies leverage early planning processes to integrate GHG omissions and climate change considerations into the identification of proposed actions, reasonable alternatives (as well as the no-action alternative) and potential mitigation and resilience measures;
- Recommending that agencies quantify a proposed action’s projected GHG emissions or reductions for the expected lifetime of the action, considering available data and GHG quantification tools that are suitable for the proposed action;
- Recommending that agencies use projected GHG emissions associated with proposed actions and their reasonable alternatives to help assess potential climate change effects;
- Recommending that agencies provide additional context for GHG emissions, including through the use of the best available social cost of GHG (SC-GHG) estimates, to translate climate impacts into the more accessible metric of dollars, allow decision makers and the public to make comparisons, help evaluate the significance of an action’s climate change effects, and better understand the tradeoffs associated with an action and its alternatives;
- Discussing methods to appropriately analyze reasonably foreseeable direct, indirect, and cumulative GHG emissions;
- Guiding agencies in considering reasonable alternatives and mitigation measures, as well as addressing short- and long-term

climate change effects;

- Advising agencies to use the best available information and science when assessing the potential future state of the affected environment in NEPA analyses and providing up to date examples of existing sources of scientific information;
- Recommending agencies use the information developed during the NEPA review to consider reasonable alternatives that would make the actions and affected communities more resilient to the effects of a changing climate;" 88 Fed Reg at 1198

The CEQ also highlighted the need to account for environmental justice considerations in assessing the effects of climate change arising from federal projects:

"Numerous studies have found that environmental hazards (including those driven by climate change) are more prevalent in and pose particular risks to areas where people of color and low-income populations represent a higher fraction of the population compared with the general population. The NEPA process calls for identifying potential environmental justice-related issues and meaningfully engaging with communities that proposed actions and reasonable alternatives (as well as the no-action alternative) may affect.

Agencies should be aware of the ongoing efforts to address the effects of climate change on human health and vulnerable communities. Certain groups, including children, the elderly, communities with environmental justice concerns, which often include communities of color, low-income communities, Tribal Nations and Indigenous communities, and underserved communities are more vulnerable to climate-related health effects and may face barriers to engaging on issues that disproportionately affect them. CEQ recommends that agencies regularly engage environmental justice experts and leverage the expertise of the White House Environmental Justice Interagency Council to identify approaches to avoid or minimize adverse effects on communities of color and low-income communities." 88 Fed Reg at 1211

The CEQ was also careful to expressly acknowledge that the interim and final guidance are not binding and do not establish enforceable obligations:

"This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable. The use of non-mandatory language such as "guidance," "recommend," "may," "should," and "can," describes CEQ policies and recommendations. The use of mandatory terminology such as "must" and "required" describes controlling requirements under the terms of NEPA and the CEQ regulations, but this document does not affect legally binding requirements." 88 Fed Reg at 1197, fn. 4.

While the updated interim guidance is effective immediately, the CEQ is receiving public comments for 61 days until Mar. 10, 2023. The CEQ will then either revise the guidance in response to public comments or finalize the interim guidance.

For more information, please contact the Barnes & Thornburg attorney

with whom you work or Bruce White at 312-214-4584 or bwhite@btlaw.com.

© 2023 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.