

White House Announces New Guidance on Evaluating Greenhouse Gas Emissions

Alert

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By Brittany Barrientos, Aimee Davenport, Susan Ebner, Caleb Hall and Kristen Ellis Johnson

On January 6, 2023, the White House's Council on Environmental Quality (CEQ) announced new interim guidance for evaluating greenhouse gas (GHG) emissions and climate change under the National Environmental Policy Act (NEPA). [CEQ published the guidance in the *Federal Register*](#) on January 9, 2023, and it is immediately effective for all federal agencies. Nevertheless, the agency is taking comments on the guidance until March 10, 2023 and may revise the guidance thereafter. The guidance's impact will extend beyond federal projects, though, and include private projects with a sufficient federal nexus.

NEPA'S GENERAL ENVIRONMENTAL REVIEW REQUIREMENTS

NEPA requires the federal government to analyze the potential effects of agency actions on the natural and human environment. A federal agency action subject to NEPA review involves direct department actions such as constructing a highway, providing funding for projects conducted by non-governmental entities, managing federal lands, and approving permits for private projects. The type of NEPA review depends on the size and scope of a proposed action. Major federal actions require the development of an environmental impact statement. Agencies may also conduct environmental assessments and categorical exclusion determinations for activities with smaller impacts. In any case, a NEPA analysis should identify and assess the direct and indirect effects that a proposed federal action will have on the environment and consider appropriate mitigation measures.

NEPA's environmental review requirements are procedural, and the existence of adverse impacts do not themselves forestall a federal decision when appropriate mitigation measures are implemented. However, NEPA's reviews can be time consuming, financially burdensome, and may disclose sensitive information to the public. Evaluating GHG emissions in the NEPA process could add to these delays and expenditures.

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ANALYZING GREENHOUSE GAS EMISSIONS UNDER NEPA

CEQ's guidance directs agencies to quantify the reasonably foreseeable gross GHG emission increases or decreases for proposed federal actions. This quantification must be compared to the emissions that would result from no federal action being taken or any reasonable alternatives over their projected lifetime. Agencies are directed to identify and evaluate project alternatives with the fewest resulting GHG or the greatest net climate benefits, although the guidance does not mandate that any one alternative be selected over another.

GHG data should be calculated to determine direct and indirect emissions per CEQ's guidance. Direct GHG emissions will be relatively easy to determine for smokestacks and other visibly apparent GHG sources. However, calculating indirect GHG will involve consideration of land use changes, changing behavioral patterns, and other foreseeable emissions from a project. CEQ has not identified a "significant" emissions threshold, resulting in a broader scope of potential GHG for consideration.

The guidance also notes that emissions should be reflected in terms of carbon dioxide-equivalence (CO₂-e). Federal projects or decisions may accordingly have greater overall GHG emissions portfolios if the relevant emissions are determined to have larger global warming potential than carbon dioxide. Specifically, the use of an equivalence factor will be relevant when addressing the climate change impacts of methane and nitrous oxide sources.

CEQ's guidance further states that, when "helpful," NEPA environmental reviews should detail how a proposed federal action undermines or improves the ability for government entities to meet relevant climate change goals. In making that determination, CEQ directs agencies to apply a "rule of reason" when construing "science-based GHG reduction policies" and assessing covered projects. The guidance refers to the United Nations' Framework Convention on Climate Change, as well as United States' commitments under the Paris Climate Accord, as areas for consideration in making these assessments and ultimate determinations.

CEQ GUIDANCE GIVES EXPLICIT PREFERENCE TO CERTAIN INDUSTRIES

The guidance will impact all projects with a federal nexus, but language in the *Federal Register* reflects that certain industries will not be subject to increased scrutiny. CEQ's published notice states that:

"Absent exceptional circumstances, the relative minor and short-term GHG emissions associated with construction of certain renewable energy projects, such as utility-scale solar and offshore wind, should not warrant a detailed analysis of lifetime GHG emissions."

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Presumably, the rationale underlying this exclusion is that renewable energy projects will produce little emissions over the life of the assets. It also conversely implies that federal agencies should take a harder look at their decisions involving fossil fuel resources. For example, Federal Energy Regulatory Commission proceedings for natural gas pipelines must still evaluate and document all foreseeable and cumulative GHG figures.

INFRASTRUCTURE INVESTMENT AND JOBS ACT AND INFLATION REDUCTION ACT

The interim guidance specifically calls for the use of these environmental assessments in identifying and carrying out projects under the Infrastructure Investment and Jobs Act and the Inflation Reduction Act. Given the time required to conduct some NEPA assessments, environmental reviews will undoubtedly add to the duration of funding timeframes.

PUBLIC COMMENTS ACCEPTED UNTIL MARCH 2023

CEQ is accepting public comments on its guidance through March 10, 2023. Federally regulated industries, entities, and individuals subject to federal contracts should review the guidance and consider its impacts on future projects. If there are concerns with the implementation of the guidance as it is currently written, such as the standards and costs of compliance, comments should be submitted. Affected businesses should also reevaluate their environmental compliance protocols in light of this guidance.

CONTACTS

Brittany Barrientos

Aimee Guzman Davenport

Susan Warshaw Ebner

Kristen Ellis Johnson

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