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Climate Change and NEPA: Recent Developments

The National Environmental Policy Act (NEPA), enacted in 1970, sets out a national environmental policy and requires that federal agencies consider the effects of their activities on the environment prior to undertaking certain proposed agency actions. The White House Counsel on Environmental Quality (CEQ) recently announced several initiatives seeking to incorporate climate change considerations into federal agency reviews under NEPA. This announcement prompted a legislative proposal to prohibit federal agencies from considering greenhouse gas (GHG) emissions during a NEPA review of proposed agency actions.

The NEPA Certainty Act, introduced on April 20, 2010 by a group of seven Republican senators, states that NEPA should not be used "to document, predict, or mitigate the climate effects of specific Federal actions." If passed, this act would prohibit consideration, as part of a NEPA review, of the climate change effects of a proposed federal project's design or environmental impacts, or of mitigation or adaptation measures. To access the proposed NEPA Certainty Act, click here.

This proposed legislation responds to CEQ's February 2010 draft guidance addressing GHG emissions under NEPA. If finalized in its current form, this guidance will instruct federal agencies on when and how to consider GHG emissions from, and the effects on climate change of, proposed agency actions in NEPA analyses. Concurrently, CEQ proposed new NEPA environmental mitigation requirements and revised guidance for the application of categorical exclusions to NEPA.

Considering the Effects of Greenhouse Gas Emissions and Climate Change

The intent of CEQ's February 18, 2010 draft guidance is to provide federal agencies with methods for analyzing GHG emissions and the climate change effects of proposed agency actions under Section 102 of NEPA. It advises federal agencies to consider direct and indirect GHG emissions from proposed agency actions, provided that these emissions are "meaningful" to decision makers and the public. The proposed threshold for meaningful direct GHG emissions is 25,000 metric tons or more of CO2-equivalent - the same threshold used by the EPA in recent GHG-related Clean Air Act rulemakings.

Once a federal agency determines there will be meaningful, direct GHG emissions, the guidance as proposed concludes that "it would be appropriate to: (1) quantify cumulative emissions over the life of the project; (2) discuss measures to reduce GHG emissions, including consideration of reasonable alternatives; and (3) qualitatively discuss the link between such GHG emissions and climate change." To assist agencies in quantifying cumulative GHG emissions, the draft guidance identifies a number of federal protocols for quantitative analyses, including the EPA's Mandatory Reporting of Greenhouse Gases Final Rule. Examples given in the draft guidance of projects deserving of this analysis include solid waste landfills and coal-fired power plants.

The draft guidance also addresses when federal agencies should consider risks to proposed agency actions due to climate change. It says, "Climate change can increase the vulnerability of a resource, ecosystem, or human community, causing a proposed action to result in consequences that are more damaging than prior experience with environmental impacts might indicate." Accordingly, federal agencies should consider how climate change effects on the environment, or climate change-related threats to a resource, an ecosystem, or a community, will factor into NEPA Environmental Assessments and Impact Statements for proposed agency actions. The draft guidance emphasizes NEPA's "rule of reason" and encourages agencies

to keep their analyses proportional to the anticipated effects. CEQ discourages "useless bulk and boilerplate documentation, so that the NEPA document may concentrate attention on important issues."

To access the climate change draft guidance, click here. CEQ is soliciting public comment on its draft guidance; the comment period ends May 24, 2010.

Other NEPA Proposals from CEQ

CEQ recently published draft guidance on mitigation measures necessary to support a "Finding of No Significant Impact" (FONSI) under NEPA. Where an environmental assessment of a proposed agency action yields a FONSI that depends on mitigation measures, the draft guidance advises that those measures be monitored, reported, and made public. To access the mitigation draft guidance, click here.

The comment period ends May 24, 2010. CEQ has also revised earlier draft guidance clarifying categorical exclusions from NEPA review. To access this revision, click here.
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The comment period for the revised guidance closed on April 9, 2010.