

August 9, 2019

Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

<https://www.regulations.gov>

Attn: Docket No. CEQ-2019-0002

RE: Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions

The [Environmental Protection Network](#) (EPN) is an organization comprised of over 450 EPA alumni volunteering their time to protect the integrity of the U.S. Environmental Protection Agency (EPA), human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current Administration efforts to undermine public health and environmental protections.

We are pleased to submit the following comments in response to the Council on Environmental Quality's (CEQ) draft Guidance developed to assist federal agencies in their consideration of greenhouse gas (GHG) emissions when evaluating proposed major federal actions in accordance with the National Environmental Policy Act (NEPA) and the CEQ Regulations for Implementing the Procedural Provisions of NEPA.

Overall Context and Observations

- Climate change is a significant and growing threat to the human and natural environment.
- Federal courts have rejected federal agencies' NEPA analyses when they failed to address climate change and GHGs resulting in project delays and investment uncertainty.
- Infrastructure and the built environment must be planned and constructed to be resilient to withstand climate extremes—happening now and in the future—or risk wasting public and private funds with potential risk to lives and loss of the productive harmony between nature and the human environment—the central theme of NEPA.
- Federal agencies need clear guidance to meet their NEPA obligations for efficient realization of NEPA's goals and obligations.

Any reading of the draft Guidance would lead one to conclude that instead of guiding federal agencies how best to address the question of GHG emissions it is a litany of possible excuses for agencies to use to avoid considering them. The admonition in NEPA to consider ways to avoid adverse impacts in the first instance is turned on its head here and becomes instead the rationale to avoid addressing GHG emissions. As a result, this "guidance" fails to address the underlying concern with GHG emissions—their contribution to climate change—and the effects of climate change on proposed actions, particularly on infrastructure investment. The proposed justification for the Guidance is based upon a false premise of the purpose of

NEPA and the processes agencies must undertake. It does so at the expense of federal agency compliance with NEPA. Federal agency obligations are to future generations and include consideration of:

- alternatives,
- ways to avoid adverse effects and enhance beneficial impacts,
- both short- and long-term impacts, and
- irrevocable and irreversible loss of natural resources.

NEPA was best designed for the complex interplay between humans and nature that is posed by the threat of climate change. The draft, however, reduces NEPA to a procedural nicety, with limited obligations to consider GHGs in their proper context. By avoiding “climate change” and federal agency obligations under NEPA, the Guidance is counterproductive and will lead to further litigation, increased costs, and delay of important infrastructure projects. The proposed Guidance is inconsistent with the original intent of NEPA. We call upon CEQ to consider these comments.

Specific Comments

The draft Guidance is presented in three sections, A, B, and C, with an introductory paragraph. For ease of reference, we will number the paragraphs in each section.

A. NEPA analyses:

Paragraph 1:

Federal agencies are directed to “not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment.” However, science informs us that **ANY** additional CO₂ emissions will contribute to global warming and should be avoided if feasible to do so.

Paragraph 2:

A focus on GHG emissions, without the context of climate change, will not satisfy NEPA obligations of federal agency officials, leading to more successful court challenges, more delays and uncertainty. As noted in the draft Guidance, “A projection of a proposed action’s direct and reasonably foreseeable indirect GHG emissions may be used as a proxy for assessing potential climate effects.” We believe this can best be done within the purview of a federal agency, its policies and practices in implementing regulations, subject to public review and critical scientific scrutiny. Further, the impact of a changing climate will also affect the feasibility of a proposed project, and this needs to be given greater emphasis and must be addressed.

Paragraph 3:

Agencies should be clearly directed to quantify GHG emissions. There are many tools to provide a basis for quantification. The draft Guidance is too weak and equivocal in addressing quantification of GHG emissions. For example, the Guidance indicates that agencies should only “**attempt** to quantify...” when “the amount of those emissions is **substantial enough** to warrant quantification” and when “it is **practicable** to quantify them using **available data** and GHG quantification tools.” and to consider “whether quantification would be **overly speculative**.”

Further, the following paragraph includes more language providing excuses for not doing quantifications, for example, not having to do so when GHG emissions are **impractical or speculative**. The draft Guidance proceeds to elaborate on the use of qualitative analysis, thus further diluting the direction that

federal agencies should be given regarding quantification. While the Guidance requires justification when quantification is deemed to be impractical or speculative, this entire approach provides a weak excuse for failing to quantify GHG emissions given the available tools and NEPA approach that already offers agencies a way to document effects when quantification is not possible. By presenting a series of excuses for not quantifying emissions, the draft is counterproductive and will lead to further confusion and failure to meet an obvious obligation.

The draft Guidance ignores the requirement that is clearly set out in the CEQ regulations for implementing the procedural provisions of NEPA at 40 C.F.R. section 1502.22(a). This regulation addresses information relevant to reasonably foreseeable adverse impacts that is incomplete, but is essential to a reasoned choice among alternatives. If the overall costs of obtaining such information are not "exorbitant," the agency shall include the information in the environmental impact statement. This regulation therefore directs agencies to take far more account of GHG emissions to meet NEPA obligations than is currently recognized by the draft Guidance.

Paragraphs 4 and 5:

The reference to sector-specific descriptions of GHG emissions for the category of federal action that is the subject of the NEPA analysis is misplaced, used here only as a possible rationale for avoiding having to address GHG emissions if the relevant sector's contribution is found to be insignificant. This ignores the potential for actions that individually have low GHG emissions to help reduce climate impacts if there are feasible means of reducing GHG emissions. The Guidance fails to recognize that federal agencies are permitted under NEPA regulations to create categorical exclusions and mitigated Findings of No Significant Impact (FONSI's). The Guidance should encourage federal agencies to carry out a sector-specific analysis not only to help quantify contributions of GHG emissions but, more importantly, to identify opportunities to avoid and mitigate or offset these emissions so that agency responses to individual projects can reference the analysis and both serve to avoid unnecessary work to carry out the analysis for individual projects and decisions but also to result in positive outcomes. This should be done, however, in agency regulations and policy and not on a case-by-case basis as suggested here.

Paragraph 7 and end of paragraph 5:

The last sentence of the final paragraph states, "Agencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature." Given the dramatic changes we have seen in climate, it might well be necessary to update information on expectations for weather patterns, especially since we are seeing 500- and 1,000-year flooding recurring more frequently than even once in 50 years. Also, while referencing existing science is not on its face an unreasonable approach to climate change as a concern, given the denial of climate change and lack of acceptance of the science, it behooves CEQ to be more explicit about these references to the science, and the Guidance should offer more direction in that regard.

Paragraph 6:

This paragraph contains a disturbing misrepresentation of NEPA obligations. It is not a matter of finding differences among alternatives "helpful." Under NEPA, the agencies are obligated to consider alternative ways to avoid adverse impacts and enhance beneficial ones. Given the need to substantially reduce GHG emissions, it is essential that alternatives be considered and evaluated on the basis of both the production and type of GHGs and their impacts on climate.

Paragraph 7:

We take issue, again, with how the draft Guidance mischaracterizes how NEPA works. NEPA applies to all federal agency decisions and actions, subject to analysis that justifies categorical exclusions with criteria whose applicability is tested against an actual potential application, as well as FONSI with mitigation to prevent significant impacts. In regard to GHG emissions, it would be possible for federal agencies to efficiently address their NEPA obligations to future generations in regard to climate change and to adopt practices and policies that AVOID net increases in GHG or offset those potential increases, and they should be directed to carry out the appropriate analyses and policy prescriptions. The federal government should act as a leader for private sector actors, state, local and tribal governments to follow suit.

Further, the draft Guidance states out of context that “NEPA does not require agencies to adopt mitigation measures.” This ignores NEPA’s requirement to consider “alternatives” when there is controversy. While it does not require any specific mitigation actions in that sense, it does implicitly require that they be considered, including as alternatives. And NEPA does require that agencies take a hard look at steps in the first instance to AVOID, especially in cases such as climate change for which contributions to CO2 are permanent and irrevocable.

B. Considerations Relating to the Affected Environment

This section of the Guidance merely restricts consideration of the impact of “foreseeable changes to the affected environment under a reasonable scenario.” At this moment, communities are experiencing flooding, drought and fires that are more frequent and extreme by orders of magnitude over past experiences. Depending upon the nature of the proposed project, federal agencies might well need to undertake new analysis of potential changes to the affected environment in the proposed action area and beyond it, if relevant. Reference to the proposed action area would appear to be too narrowly defined if referencing, for example, a watershed. There is no mention of adaptation to the predicted changes in the affected environment, nor to resilience to a changing climate. Referencing appropriate scientific literature and summarizing it as proposed might not be sufficient when making sizeable investments in infrastructure planning. Certainly, the rule of reason applies here, and federal agencies do not need this kind of unhelpful guidance when reason would dictate that new information is required for sound decision-making.

C. Use of Cost-Benefit Analysis

We have no problem with the suggestion in the draft Guidance that agencies are not required to monetize the social cost of carbon when analyzing proposed projects. However, we do believe that comparison of alternatives, including the no-action alternative and alternatives with offsets and mitigation to GHG emissions, should be required. As noted above, this serves as a surrogate to examining effects on climate change and the cost of those effects on society and our economy.

Summary: Why CEQ Should Go Back to the Drawing Board

This draft Guidance encourages agencies to diminish the importance of a project’s greenhouse gas emissions by:

1. Failing to ensure federal agencies quantify direct and indirect GHG emissions, providing instead a litany of reasons for avoiding doing so and offering only weak direction to do so. Tools are readily available to quantify GHG emissions without suggesting, as the Guidance does, that this may be too impractical or speculative.

2. Comparing GHG emissions to national or sector-wide emissions as is suggested in the draft ignores the fact that numerous activities contribute to this problem and these individually modest contributions collectively contribute to impending catastrophe. The fact that a single project did not alone cause and cannot alone fix climate change is not a basis to evade NEPA's obligation to rigorously consider its contribution. Indeed this is the very reason agencies are required to consider cumulative impacts.
3. Offering that NEPA does not require mitigation, when it decidedly requires consideration of alternatives to avoid and, if not possible, mitigate adverse impacts and enhance beneficial impacts, sets the wrong tone—avoiding obligations under NEPA rather than embracing its purposes. NEPA is designed to improve federal decision-making and action on behalf of the nation and future generations. By merely quantifying emissions and not proposing and considering actions to ameliorate them, this draft trivializes that responsibility.
4. Failing to address the need to design and plan for significant climatic changes by building in resilience and adapting to extreme weather in federally funded and supported projects. The draft merely provides the rationale federal officials might use to ignore trends and avoid taking steps to ensure that existing research can be relied upon for decision-makers.

In closing, we urge CEQ to go back to develop guidance that will be helpful to federal agencies and not lead them to roadblocks when they fail to address their responsibilities under NEPA and indeed to the American people. We recognize the challenge of developing guidance for federal agencies to consider GHG emissions and climate change to meet their NEPA obligation, as evidenced by the very lengthy and participatory process CEQ went through to develop the previous version. This poor draft Guidance is no better than no guidance, and guidance is needed. Albeit imperfect, the previous Guidance still provided a sensible means of focusing the analytical work agencies must do to comply with NEPA in a practical manner. EPN recommends that CEQ reinstate the previous Guidance until a substitute can be developed.

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cc:
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