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Council on Environmental Quality Releases Two NEPA Guidance Documents

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Late last month, the President's Council on Environmental Quality (CEQ) released two important guidance documents related to the implementation of the National Environmental Policy Act (NEPA). One was revised draft guidance regarding the consideration of greenhouse gas (GHG) emissions and climate change in NEPA reviews (Draft Climate Change Guidance),¹ which supersedes the draft guidance on this topic that the CEQ issued in 2010.² The CEQ is accepting public comments on the Draft Climate Change Guidance until February 23. The other was Final Guidance on Effective Use of Programmatic NEPA Reviews (Programmatic NEPA Guidance),³ which was originally issued in draft form in August 2014.⁴ Both of these guidance documents are part of the Administration's effort to modernize federal agency implementation of NEPA to improve the transparency, involvement of the public, and efficiency of environmental reviews.

Draft Climate Change Guidance. The Draft Climate Change Guidance provides direction to agencies on how NEPA analyses should consider both the impacts of proposed agency actions on climate change and the effects of climate change on the environmental consequences of proposed agency actions. This draft guidance is relevant to all NEPA analyses, not just those associated with projects with the potential to emit GHGs. The key elements of the Draft Climate Change Guidance include:

Considering the Effects of GHG Emissions and Climate Change

- CEQ recommends that agencies use projected GHG emissions and potential changes in carbon sequestration and storage (e.g., changes in vegetation) as the proxy for assessing a proposed action's potential climate change impacts, in light of the difficulty of attributing specific climate impacts to individual projects.
- The draft guidance criticizes the current practice of many agencies of concluding that a proposed action's GHG emissions are not significant or do not merit detailed consideration because the emissions from the proposed action will have small, if any, potential climate change effects. The fact that emissions from a government action or approval represent only a small fraction of global emissions reflects the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate

impacts under NEPA.

- CEQ recognizes the concept of proportionality in addressing GHG emissions; i.e., agencies should be guided by the principle that the extent of the analysis should be commensurate with the quantity of projected GHG emissions. If an agency concludes an evaluation of the effects of GHG emissions from a proposed federal action would not be useful in the decision-making process and comparison of alternatives, it should document the rationale for its decision.
- NEPA's traditional consideration of context and intensity when assessing "significance" also applies to weighing the significance of climate change impacts.
- Consideration of a proposed action's direct and indirect climate change impacts should include emissions from activities that have a reasonably close causal relationship to the federal action, including those that are the predicate to the agency action (upstream actions) and those that are the consequence of the agency action (downstream actions).
- While the NEPA analysis must consider the cumulative impacts on climate change, CEQ does not expect that an EIS would be required based on cumulative impacts of GHG emissions alone.
- An agency's consideration of GHG emissions is not limited to fossil fuel sources. The analysis must also take into account biogenic sources of carbon emissions from land-management activities (such as prescribed burning, timber-stand improvements, fuel-load reductions, scheduled harvesting, and grazing), carbon sequestration potential, and the net change in carbon stocks that are relevant in light of the proposed actions and time-frames under consideration.
- CEQ encourages agencies to incorporate by reference larger-scale analyses of climate impacts from GHG emissions that have already been prepared to support policy or programmatic decisions, as well as applicable agency emissions targets such as federal, state, tribal, or local goals for GHG emission reductions to provide a frame of reference.
- An agency's analysis of climate change impacts may be qualitative or quantitative; the type of analysis to use should be informed by the tools and information available. The Draft Climate Change Guidance establishes a reference point of 25,000 metric tons of CO₂-e emissions on an annual basis, below which a quantitative GHG emissions analysis is not warranted, unless quantification below that reference point is easily accomplished.

Considering the Effects of Climate Change on the Environmental

Consequences of a Proposed Action

- The analysis of impacts on the affected environment should focus on those aspects of the human environment that are impacted by both the proposed action and climate change. As examples, the Draft Climate Change Guidance notes that a proposed action may require water from a stream that has diminishing quantities of available water because of decreased snowpack in the mountains, or add heat to a water body that is exposed to increasing atmospheric temperatures.
- CEQ explains that the expected lifespan of the proposed project defines the temporal bounds for the future state of the environment, and cautions that agencies should remain aware of the evolving body of scientific information and its clarification of climate impacts at a more localized level.
- Climate change effects should be considered in the analysis of projects that are located in areas that are considered vulnerable to specific effects of climate change, such as increasing sea level or other ecological change, within the project's anticipated useful life.

Programmatic NEPA Guidance. CEQ's new programmatic NEPA guidance is intended to encourage a more consistent and efficient approach to programmatic NEPA review by clarifying when and how federal agencies should use programmatic environmental analyses. Programmatic NEPA review adds value by addressing the general environmental issues relating to broad decisions, such as establishment of programs, policies, or plans, which can then be used to frame the scope of subsequent site- and project-specific actions and incorporated into tiered environmental reviews. Key provisions of the guidance are as follows.

- **Programs or Projects Warranting Programmatic Review**—The guidance clarifies that programmatic NEPA review can be useful for an agency to analyze "a large or multi-faceted action without becoming immersed in all the details of future site- or project-specific proposals."⁵ In this situation, a programmatic NEPA review allows the agency to focus its impact analysis and decision-making at the appropriate level. Programmatic review is generally appropriate for the following actions:
 - Adopting official policy, such as rules and agency-wide policy;
 - Adopting formal plans, such as strategic plans linked to agency resource allocation or for groups of related projects;
 - Adopting agency programs, such as a new agency mission or initiative; and
 - Approving multiple actions, such as a several similar actions in a region or a suite of ongoing, proposed, or reasonably

foreseeable actions that share common geography or timing.

A programmatic document can be prepared to support both program-level and site-specific decisions, so long as the document addresses both the broad impacts of the program decision and includes sufficient detail to inform the site-specific decision. The NEPA document should clearly set out the decisions supported by the document.

- **Scope of Alternatives**—As the guidance notes, alternatives in programmatic NEPA documents necessarily reflect the level of the federal action under consideration. Alternatives should be considered at a programmatic level "to support focusing future decisions and eliminating certain alternatives from detailed study in subsequent NEPA reviews."⁶ "Alternatives need not consider every specific aspect of a proposal but rather should be detailed enough to make a reasoned choice between programmatic directions."⁷
- **Scope of Appropriate Impact Analysis**—The guidance explains that the level of detail in the impact analysis for a programmatic action should be appropriate to the level of the decision. The guidance states that "[b]ecause impacts in a programmatic NEPA review typically concern environmental effects over a large geographic and/or time horizon, the depth and detail in programmatic analyses will reflect the major broad and general impacts that might result from making broad programmatic decisions."⁸ "Impacts can often be discussed in a broad geographic and temporal context with particular emphasis on cumulative impacts. Those impacts can often be shown in a meaningful way by displaying a range of potential effects."⁹ The CEQ's guidance on the scope of impact analyses is helpful to clarify that federal agencies should consider the impacts as relevant to the level of agency commitment of resources.
- **Collaboration, Public Involvement, and Coordination with Other Environmental Reviews**—Given the broad level of many programmatic decisions, they may involve jurisdictional complexities that require close collaboration with other federal, state, local, and tribal governments. The guidance encourages early coordination between agencies. Programmatic NEPA review also allows the public to "see the big picture early" and participate in program-level decision-making that may guide future policy.¹⁰ Further, the action agency should consider whether programmatic compliance could be achieved under the Endangered Species Act, National Historic Preservation Act, and other laws through programmatic agreements. Where the agency determines programmatic review under other laws is not appropriate, it should clarify its intention to defer other environmental review or consultation requirements for consideration at the site- or project-specific level.

- Programmatic Environmental Assessments (EA) v. Environmental Impact Statements (EIS)—A programmatic environmental assessment (PEA) may be appropriate when the program-level decision will not result in significant impacts. For example, a PEA may be used to articulate a standard suite of mitigation measures for similar projects. Subsequent site-specific projects may require an EA or EIS depending on their potential for significant impacts.
- Monitoring and Mitigation for Programmatic Decisions—The guidance on monitoring and mitigation is helpful to articulate the differences between measures that might be required as the result of programmatic as opposed to site-specific NEPA review. Monitoring and mitigation at the programmatic level should reflect the scale of the decision. As the CEQ states, broad programmatic planning presents a unique opportunity for agencies to take a look at the big picture and devise a monitoring and mitigation framework, possibly using adaptive management, that can then be tailored to the site-specific situations presented during future tiered decision-making.¹¹ This is the appropriate approach for program-level decisions, which can set out a suite of potential mitigation and monitoring measures to be considered as future projects are proposed.
- Addressing New Project Proposals During Programmatic NEPA Review—The guidance clarifies that project-level decisions can be made while programmatic analysis is being undertaken. Such interim actions can proceed if they meet the requirements of 40 C.F.R. § 1506.1(c), i.e., the action is justified independently of the program, the action is accompanied by its own NEPA compliance, and the action will not prejudice the ultimate program decision.
- Tiered NEPA Reviews—Programmatic NEPA review may defer some decisions to the project-specific level and use tiering to incorporate by reference analyses from the programmatic document into the tiered document. The level of tiered review—whether an EA or EIS—depends on whether the tiered action will cause new significant impacts that were not already considered and addressed in the programmatic review. If there are no new significant impacts, an EA is appropriate.
- Supplementation of Programmatic NEPA Documents—The guidance clarifies when supplementation may be required for programmatic NEPA documents. If the programmatic document will not provide the basis for future tiered decision, no supplementation may be required. However, if new information is relevant to a future decision for which the agency intends to rely on the programmatic NEPA review, it must review the information to determine "if it has any potential effect on the content of the original programmatic review, either in terms of: (a) the accuracy of the previously

analyzed impacts; or (b) the feasibility of the alternatives presented or their comparative analysis."¹² If the agency determines supplementation is needed, supplementation can be accomplished by supplementing the programmatic document, or, if the new information's effects are limited to potential impacts or alternatives associated with the tiered, project-level decision, then the tiered analysis can address the new information without supplementing the program document.

¹79 Fed. Reg. 77,802 (Dec. 24, 2014).

²75 Fed. Reg. 8046 (Feb. 23, 2010).

³79 Fed. Reg. 76,986 (Dec. 23, 2014). The Programmatic NEPA Guidance is available at

http://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf.

⁴79 Fed. Reg. 50,578 (Aug. 22, 2014).

⁵Programmatic NEPA Guidance at 13.

⁶*Id.* at 22.

⁷*Id.* at 31.

⁸*Id.* at 23.

⁹*Id.* at 33.

¹⁰*Id.* at 25.

¹¹*Id.* at 35.

¹²*Id.* at 44.

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