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Draft NEPA Guidance Requires Agencies to Consider Both GHG Emissions and the Impacts of Climate Change on Proposed Actions

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Developments in Federal
and State Law

Michael B. Gerrard
Editor

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DRAFT NEPA GUIDANCE REQUIRES AGENCIES TO CONSIDER BOTH GHG EMISSIONS AND THE IMPACTS OF CLIMATE CHANGE ON PROPOSED ACTIONS

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the impacts of climate change when conducting reviews under the National Environmental Policy Act (NEPA).¹ The CEQ's new guidance does not impose any new legal requirements on federal decision-makers, but it does clarify how federal agencies should consider the effects of GHG emissions and climate change in a manner consistent with their preexisting obligations under NEPA. It is significantly more detailed than the draft guidance released by CEQ in February 2010, and unlike its predecessor, it applies to all proposed federal agency actions that are subject to NEPA, including land and resource management actions. CEQ is accepting comments on the draft guidance through March 25, 2015.²

The guidance directs agencies to consider the potential effects of a proposed action on climate change, using projected GHG emissions as a proxy for those effects. Consistent with its earlier guidance, CEQ identifies a reference point of 25,000 metric tons of carbon dioxide equivalent (CO₂-e) annually as a threshold below which a quantitative analysis of GHG emissions is not recommended unless it can be easily accomplished. However, CEQ does not specify whether agencies should consider both direct and indirect emissions when applying this benchmark.

On December 24, 2014, the Council on Environmental Quality (CEQ) released revised draft guidance on how federal agencies should evaluate greenhouse gas (GHG) emissions and

¹ Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (Dec. 24, 2014).

² Comments can be submitted online at CEQ, *Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts*, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>.

The guidance also directs agencies to consider the implications of climate change itself on the proposed action, including potential adverse environmental effects that could result from drought or sea level rise. According to CEQ, such considerations are squarely within the realm of NEPA and will enable the selection of smarter, more resilient actions.

In New York, the revised draft guidance will affect projects reviewed under NEPA, such as highway, transit, and other infrastructure projects that receive federal funding. Environmental impact statements prepared under New York's "little NEPA," the State Environmental Quality Review Act (SEQRA), will continue to draw on guidance finalized by the Department of Environmental Conservation (DEC) in 2009.³

In general, the DEC guidance is less detailed and more limited in scope than the proposed federal guidance. For example, the DEC guidance concerns only the consideration of climate change impacts in an environmental impact statement (EIS). The DEC guidance expressly states that it does not establish either "when the scope of an EIS should include energy use or GHG emissions" or "a threshold for the determination of significance under SEQR."⁴ (As discussed below, the former issue is one that the proposed federal guidance directly confronts.) The DEC guidance also expressly places the issue of how sea level rise and other climate change impacts will affect a given project—another subject that the federal guidance addresses in some detail—outside the DEC guidance's scope.⁵

BACKGROUND

The National Environmental Policy Act (NEPA), enacted in 1970, requires federal agencies to review the impacts of proposed actions and prepare an EIS for any action that has a significant effect on the environment.⁶ The dual purpose of NEPA is to ensure that agencies take a "hard look" at the potential consequences of their activities and disclose this information to the public. Many states have enacted laws with similar requirements, which are sometimes referred to as "little NEPAs." New York, for example, introduced its State Environmental Quality Review Act (SEQRA) in 1975.⁷

Although climate change emerged as a major policy issue in the early 1990s, federal and state agencies have only recently

begun to integrate climate change considerations into their environmental review procedures and documents. The methodologies for evaluating issues relating to climate change and the depth of the analysis can vary substantially, depending on the jurisdiction, the lead agency, and the type of action being reviewed. Some of the key questions confronting agency decision-makers in this context include:

- (1) How much effort should be made to predict the GHG emissions from a particular action, given that the emissions from that action will only constitute a tiny proportion of total global emissions?
- (2) To what extent should the agency consider "upstream" or "downstream" emissions, such as emissions from the transport and burning of coal from a federally permitted mine?
- (3) Do NEPA and state counterparts require or authorize agencies to consider the impact of climate change on the action?

Uncertainty about these issues has impeded the development of uniform methodologies for assessing actions in the context of climate change, and has also led to litigation over the adequacy of EIS documents prepared under federal and state law.

CEQ, the agency responsible for overseeing the implementation of NEPA, first addressed these issues back in 1997, when it developed draft guidelines for addressing climate change in the context of NEPA review.⁸ The 1997 draft guidance specified that federal agencies should consider two aspects of global climate change in NEPA documents: (1) the potential for federal actions to influence global climate change by generating or sequestering GHG emissions, and (2) the potential for global climatic change to affect federal actions (e.g., feasibility of coastal projects in light of projected sea level rise).⁹

As such, the 1997 draft guidance reflected CEQ's understanding that agencies should evaluate the *relationship* between a proposed action and climate change, as opposed to merely evaluating the impact of a proposed action on climate change. CEQ's interpretation accords with the text of NEPA, which requires agencies to consider: (i) the environmental

³ See DEC, ASSESSING ENERGY USE AND GREENHOUSE GAS EMISSIONS IN ENVIRONMENTAL IMPACT STATEMENTS (July 15, 2009), http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf [hereinafter DEC GUIDANCE].

⁴ DEC GUIDANCE, *supra* note 3, at 1.

⁵ DEC GUIDANCE, *supra* note 3, at 4. Nonetheless, the impacts of climate change on proposed projects and the readiness of the proposed projects for climate change are increasingly receiving attention in SEQRA reviews. See Ethan I. Strell, *New York Environmental Impact Statements Beginning to Address Climate Resiliency*, 25 ENVTL. L. IN N.Y. 205 (Oct. 2014) (describing how environmental reviews under SEQRA are beginning to systematically consider climate change impacts on proposed projects). The enactment of the Community Risk and Resiliency Act in September 2014 codified the requirement to consider sea level rise and other climate change-related impacts for many types of projects in New York State. See Laws of N.Y., ch. 355 (2014); see also Michael B. Gerrard, *New Statute Requires State Agencies to Consider Climate Risks*, N.Y.L.J., at 3 (Nov. 13, 2014).

⁶ NEPA, 42 U.S.C. §§ 4321–4370h.

⁷ SEQRA, N.Y. ENVTL. CONSERV. LAW art. 8.

⁸ KATHLEEN A. MCGINTY, COUNCIL ON ENVTL. QUALITY (CEQ), DRAFT GUIDANCE REGARDING CONSIDERATION OF GLOBAL CLIMACTIC CHANGE IN ENVIRONMENTAL DOCUMENTS PREPARED PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) [hereinafter 1997 DRAFT GUIDELINES].

⁹ 1997 DRAFT GUIDELINES, *supra* note 8, at 5.

impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁰

CEQ also noted that the NEPA process was an "excellent mechanism for consideration of ideas related to global climate change."¹¹ However, the agency suggested that analyzing GHG emissions and carbon sinks at the project level "would not provide meaningful information in most instances" and thus "[e]fforts would be better spent in assessing federal programs which may affect emissions or sinks of these gases."¹²

The 1997 draft guidance was circulated for agency review but never finalized, and ultimately had very little impact on agency practice. In the absence of clear federal standards for evaluating climate change impacts under NEPA, the courts developed their own interpretation of what the statute required.¹³ The most noteworthy opinion came in 2008, when the Ninth Circuit held that the National Highway Transportation Safety Administration (NHTSA) was required to consider the "incremental impact" of increased GHG emissions from Corporate Average Fuel Economy (CAFE) standards for light trucks.¹⁴ That same year, the International Center for Technology Assessment, the Natural Resources Defense Council, and the Sierra Club petitioned CEQ for new regulations and guidance on how climate change should be addressed in NEPA analysis.¹⁵

In February of 2010, CEQ released a more formal and detailed draft guidance document which received considerably more attention from agencies and the public than the 1997 draft.¹⁶ The 2010 draft guidance once again instructed agencies to consider both the contribution of a proposed action to global GHG emissions and the impact of climate change on the action. However, unlike its predecessor, the 2010 draft guidance clearly contemplated the analysis of climate change for project-level as well as programmatic actions, and it advised agencies to consider quantifying GHG emissions if the proposed action would be reasonably anticipated to cause direct emissions of at least 25,000 metric tons per year (tpy) of CO_{2-e}. This was the same threshold that EPA had applied for reporting and permitting requirements under the Mandatory GHG Reporting rule and the proposed Tailoring Rule.¹⁷ The 2010 draft guidance applied to all actions except for federal land management actions.¹⁸

The 2010 draft guidance was not finalized, but nonetheless appears to have influenced agency practice in a meaningful way: climate change received significantly more attention in federal EISs between 2010 and 2015, and the depth and quality of the analysis appear to have improved over the years.¹⁹ However, there is still considerable variation in how different agencies address climate change, and how courts have interpreted NEPA requirements in this context.²⁰ Although courts may require agencies to discuss climate change in their NEPA documents, they lack a conclusive set of interagency standards for evaluating the adequacy of this discussion. For these reasons, many stakeholders (including federal regulators) continued to pressure CEQ for final guidance on the scope of agency obligations to address climate change under NEPA.²¹

¹⁰ 42 U.S.C. § 4332.

¹¹ 1997 DRAFT GUIDELINES, *supra* note 8, at 1.

¹² 1997 DRAFT GUIDELINES, *supra* note 8, at 5 (emphasis omitted).

¹³ See, e.g., *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003); and *Mid-States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003).

¹⁴ *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

¹⁵ PETITION REQUESTING THAT THE COUNCIL ON ENVIRONMENTAL QUALITY AMEND ITS REGULATIONS TO CLARIFY THAT CLIMATE CHANGE ANALYSES BE INCLUDED IN ENVIRONMENTAL REVIEW DOCUMENTS (Feb. 28, 2008), available at <http://www.icta.org/doc/CEQ%20Petition%20Final%20Version%202-28-08.pdf>.

¹⁶ CEQ, DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS (Feb. 18, 2010) [hereinafter 2010 DRAFT GUIDANCE].

¹⁷ 2010 DRAFT GUIDANCE, *supra* note 16, at 1, 3.

¹⁸ CEQ's rationale for this exemption was as follows: "Land management techniques, including changes in land use or land management strategies, lack any established Federal protocol for assessing their effect on atmospheric carbon release and sequestration at a landscape scale." 2010 DRAFT GUIDANCE, *supra* note 16, at 4.

¹⁹ These observations are based on a research project currently underway at the Sabin Center for Climate Change Law, entailing the review of climate change considerations in federal EISs prepared between 2009 and 2014. The Sabin Center has already published a database and assessment of federal EISs from 2009 and 2012. See PATRICK WOOLSEY, WHITE PAPER ON THE CONSIDERATION OF CLIMATE CHANGE IN FEDERAL EISs, 2009–2011 (Sabin Center for Climate Change Law ed., 2012); Sabin Center for Climate Change Law, *Database of Climate Change-Related Impacts in Federal EISs under the National Environmental Policy Act (NEPA)*, available at <http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center>.

²⁰ *Compare* *High Country Conservation Advocates v. U.S. Forest Service*, — F.Supp.3d —, 2014 WL 2922751 (D. Colo. June 27, 2014) (holding that BLM's NEPA analysis of climate change impacts was inadequate, and that the EIS must provide a justification for not using the social cost of carbon as a protocol to evaluate impacts), *with* *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, No. 3:12-cv-02271-HZ (D. Or. Dec. 9, 2014) (holding that NEPA did not require the Forest Service to evaluate the impact of forest thinning on climate change because the federal government had not identified a specific protocol for quantifying such impacts).

²¹ See, e.g., PRESIDENT'S STATE, LOCAL AND TRIBAL LEADERS TASK FORCE ON CLIMATE PREPAREDNESS AND RESILIENCE: RECOMMENDATIONS TO THE PRESIDENT (Nov. 2014), available at http://www.whitehouse.gov/sites/default/files/docs/task_force_report_0.pdf.

KEY ELEMENTS OF THE 2014 REVISED DRAFT GUIDANCE

The latest draft guidance from CEQ provides a more detailed and nuanced description of how federal agencies should address climate change in NEPA reviews. Consistent with its earlier guidance, CEQ is directing all federal agencies to consider two types of issues when assessing the relationship between climate change and a proposed action:

- (1) The potential effects of a proposed action on climate change as indicated by its GHG emissions;
- (2) The implications of climate change for the environmental effects of a proposed action.

CEQ notes that agencies will continue to have “considerable discretion” when determining the appropriate level (broad, programmatic, or project-specific) and type (quantitative or qualitative) of analysis required to comply with NEPA. However, agency discretion is not boundless and cannot be used as a justification for ignoring issues or conducting a cursory analysis of climate change considerations. At minimum, NEPA and its implementing regulations require that these issues be discussed in sufficient detail to support a rational choice between the proposed action and any reasonable alternatives or mitigation measures.

The guidance instructs agencies to apply a “rule of reason” when deciding how to analyze these issues, taking into account the availability of information, the usefulness of that information to the decision-making process and the public, and the extent of the anticipated environmental consequences.²² In applying this rule, agencies should aim to ensure that “the level of effort expended in analyzing GHG emissions or climate change effects is reasonably proportionate to the importance of climate change related considerations to the agency action being evaluated.”²³

Unlike its predecessor, the revised draft guidance applies to all proposed federal agency actions, including land and resource management actions. CEQ exempted land and resource management activities from the 2010 draft guidance because there was no “established Federal protocol for assessing their effect on atmospheric carbon release and sequestration at a landscape scale.”²⁴ But in the revised rule, CEQ recognizes that standards for such analysis have indeed emerged, and directs agencies to consider both carbon emissions and sequestration when evaluating GHG emissions from land management activities.

The revised draft guidance also departs from the 2010 draft guidance insofar as it does not differentiate between an agency’s obligation to analyze direct and indirect emissions. Whereas the 2010 guidance instructed agencies to conduct a quantitative analysis if an action’s *direct* emissions exceeded the 25,000 tpy threshold, the 2014 guidance is silent on whether agencies should include indirect emissions when applying that benchmark. The guidance is quite clear, however, that agencies should give due consideration to indirect emissions, including any upstream or downstream emissions that have a “reasonably close” causal relationship to the proposed action.²⁵

1. Assessing the Impact of the Proposed Action on Climate Change

The revised draft guidance instructs all federal agencies to consider the extent to which a proposed action and its reasonable alternatives contribute to climate change. Due to the challenge of attributing specific climate impacts to any single action, CEQ recommends that agencies use projected GHG emissions as a proxy for assessing a proposed action’s potential climate change impacts. When appropriate, CEQ also notes that agencies may choose to discuss potential changes in carbon sequestration and quantify the net effect of a proposed action, accounting for both GHG emissions and sequestration.²⁶

Threshold for Quantifying GHG Emissions

The guidance sets forth a reference point of 25,000 metric tons of CO_{2-e} annually as a threshold below which quantification of GHG emissions is not recommended unless it can be easily accomplished.²⁷ This threshold is not meant to be a substitute for an agency’s determination of significance under NEPA, but merely a benchmark for when a quantitative analysis of GHG emissions may help a decision-maker choose between the action and any reasonable alternatives or mitigation measures. As mentioned above, unlike the 2010 guidance, which instructed agencies to evaluate the action’s contribution to climate change if the action’s *direct* emissions exceeded this threshold, the revised guidance does not specify whether indirect emissions should also factor into the calculation of annual emissions.

Although CEQ’s proposed benchmark is expressed in terms of *annual* GHG emissions, the guidance instructs agencies to account for “both the short- and long-term effects and benefits based on what the agency determines is the life of a project and the duration of the generation of emissions.”²⁸ The guidance

²² 79 Fed. Reg. 77,802, 77,803 (Dec. 24, 2014).

²³ CEQ notes that this concept of “proportionality” is “grounded in the fundamental purpose of NEPA to concentrate on matters that are truly significant to the proposed action.” *Id.* at 77,826; *see also* 40 C.F.R. § 1500.4(b), 1500.4(g) and 1501.7.

²⁴ 2010 DRAFT GUIDANCE, *supra* note 16, at 4.

²⁵ 79 Fed. Reg. at 77,825.

²⁶ 79 Fed. Reg. at 77,825.

²⁷ 79 Fed. Reg. at 77,827–28.

²⁸ 79 Fed. Reg. at 77,826.

also clarifies that the proportion of global anthropogenic GHG emissions that can be attributed to a particular action should not be used as a proxy for determining whether to evaluate GHG emissions from the action. CEQ explains:

... many agency NEPA analyses to date have concluded that GHG emissions from an individual agency action will have small, if any, potential climate change effects. Government action occurs incrementally, program-by-program and step-by-step, and climate impacts are not attributable to any single action, but are exacerbated by a series of smaller decisions, including decisions made by the government. Therefore, the statement that emissions from a government action or approval represent only a small fraction of global emissions is more a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate impacts under NEPA.²⁹

Finally, the guidance recommends that the agency's determination regarding the depth and type of analysis (e.g., quantitative or qualitative) should be informed by the tools and information available to conduct that analysis. Federal agencies should typically disclose quantitative estimates of GHG emissions associated with a proposed action when quantification tools or methodologies are readily available and this information would help the decision-maker and the public evaluate the proposed action in light of reasonable alternatives and mitigation opportunities.³⁰

Direct and Indirect Effects

The revised draft guidance instructs agencies to assess both direct and indirect climate change effects, taking into account both the proposed action and any "connected" actions, so long as these effects are "reasonably foreseeable." Specifically, the NEPA analysis should account for emissions from activities that have a "reasonably close causal relationship" to the Federal action, including those that occur as a predicate for the agency action (upstream emissions) and as a consequence of the agency action (downstream emissions).³¹ For example, the guidance notes that the NEPA analysis for a proposed open pit mine could include the reasonably foreseeable emissions from

different components of the mining process, such as clearing land for extraction, building access roads, transporting the extracted resource, refining or processing the resource, and consuming the resource. This last item is especially significant. It means, for example, that the NEPA analysis of a coal mine would include the GHG emissions from the combustion of the coal in power plants.

Alternatives and Mitigation Measures

The guidance specifies that agencies should compare the levels of GHG emissions attributed to the proposed action and reasonable alternatives "if a comparison of these alternatives based on GHG emissions, and any potential mitigation to reduce emissions, would be useful to advance a reasoned choice among alternatives and mitigations."³² For mitigation measures, the guidance recommends that agencies carefully evaluate the quality of mitigation opportunities based on their permanence, verifiability, enforceability and additionality.³³ If mitigation measures are adopted to support a Finding of No Significant Impact (FONSI) or Record of Decision (ROD), the guidance instructs federal agencies to adopt an appropriate monitoring program for ensuring that emissions reductions actually occur.

2. Assessing the Impact of Climate Change on the Proposed Action

The revised draft guidance further specifies that federal agencies should consider "the ways in which a changing climate over the life of the proposed project may alter the overall environmental implications of such actions."³⁴ Such impacts may include "more frequent and intense heat waves, more severe wildfires, degraded air quality, more heavy downpours and flooding, increased drought, greater sea-level rise, more intense storms, harm to water resources, harm to agriculture, and harm to wildlife and ecosystems."³⁵ Agencies need not undertake exhaustive research on these impacts for a specific action, but rather may summarize and incorporate by reference the relevant scientific literature.³⁶ The timeframe for this analysis should reflect the projected duration of the action and its impacts.

²⁹ 79 Fed. Reg. at 77,825.

³⁰ 79 Fed. Reg. at 77,827.

³¹ 79 Fed. Reg. at 77,825-26; *see also* 40 C.F.R. § 1508.25 (actions are connected if they automatically trigger other actions which may require EISs, cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification); 40 C.F.R. § 1508.8 (defining "direct effects" as those that are caused by the action and occur at the same time and place, and "indirect effects" as those are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable, such as growth inducing effects).

³² 79 Fed. Reg. at 77,828.

³³ 79 Fed. Reg. at 77,828.

³⁴ 79 Fed. Reg. at 77,825.

³⁵ 79 Fed. Reg. at 77,825. The process of analyzing these impacts is sometimes referred to as "reverse environmental impact assessment." *See, e.g.,* Michael B. Gerrard, *Reverse Environmental Impact Analysis: Effect of Climate Change on Projects*, N.Y.L.J. (Mar. 8, 2012).

³⁶ 79 Fed. Reg. at 77,830.

The guidance highlights several examples of situations where an agency should assess the implications of climate change for a proposed action, including:

- Future projections of rainfall and snow packs should be assessed when reviewing a proposed action that requires water withdrawals from a stream or river.
- Future projections of sea level rise, storm patterns, and storm surge should be assessed when reviewing a proposal for a coastal infrastructure project.

CEQ notes that “[s]uch considerations are squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilient actions.”³⁷ In doing so, agencies can select alternatives that are more resilient to the effects of a changing climate, and thus “avoid the environmental and, as applicable, economic consequences of rebuilding should potential climate change impacts such as sea level rise and more intense storms shorten the projected life of the project.”³⁸

3. Additional Guidance for Federal Agencies

In addition to the two key issues discussed above, the revised draft guidance also highlights some general considerations for federal agencies as they implement CEQ’s recommendations:

- *Disclose assumptions* – Throughout the guidance, CEQ emphasizes the importance of disclosing assumptions relating to the quantification of GHG emissions, the evaluation of climate impacts, and all other matters relating to the relationship between the project and climate change. For example, when using climate modeling information, agencies “should consider their inherent limitations and uncertainties and disclose these limitations in explaining the extent to which they rely on particular studies or projections.”³⁹
- *Use existing informational tools* – CEQ notes that federal agencies are expected to make decisions using current scientific information and methodologies, but

NEPA does not require these agencies to conduct original research to fill scientific gaps. Rather, the guidance advises agencies “to use existing information and tools when assessing future proposed actions.”⁴⁰ For example, CEQ recommends that agencies conducting a cost-benefit analysis use the federal social cost of carbon to assign a monetary value to emissions generated or avoided by the project.⁴¹

- *Provide a frame of reference* – The guidance recommends that federal agencies provide a frame of reference for both the decision-maker and the public when discussing GHG emissions and climate-related impacts. Specifically, agencies can incorporate by reference any applicable emissions standards developed by federal, state or local regulators and discuss how the proposed action will contribute to or interfere with the attainment of those standards.
- *Programmatic EIS analysis* – The guidance encourages federal agencies to use programmatic EIS analysis to ensure that GHG emissions and climate-related impacts are discussed at a level that is most useful for decision-makers and the public. CEQ identifies some examples of project- or site-specific actions that can benefit from a programmatic NEPA review, including constructing transmission towers, conducting prescribed burns, approving grazing leases, granting a right-of-way, authorizing leases for oil and gas drilling, authorizing construction of wind turbines, and approving hard rock mineral extraction.⁴²

The goal of these recommendations is to make the NEPA efficient and useful for decision-makers and the public.

CONCLUDING REMARKS

The revised draft guidance is not legally binding, but it does reflect CEQ’s interpretation of NEPA and provide a tentative benchmark for assessing an agency’s compliance with the statute and implementing regulations. CEQ notes that the guidance should “reduce the risk of litigation driven by uncertainty in the assessment process as it will provide a clear expectation of what agencies should consider and disclose.”

³⁷ 79 Fed. Reg. at 77,828–29. In addition, the draft guidance notes that “climate change adaptation and resilience . . . are important considerations for agencies contemplating and planning actions with effects that will occur both at the time of implementation and into the future.” *Id.*

³⁸ 79 Fed. Reg. at 77,829.

³⁹ 79 Fed. Reg. at 77,830; *see also* 40 C.F.R. §§ 1502.21, 1502.22.

⁴⁰ 79 Fed. Reg. at 77,824.

⁴¹ 79 Fed. Reg. at 77,827. This aspect of the guidance accords with a recent decision from the District Court of Colorado, holding that BLM had violated NEPA by failing to consider the costs of GHG emissions from a coal mining lease modification when the federal government had provided a clear protocol for conducting this analysis: the social cost of carbon. *High Country Conservation Advocates v. U.S. Forest Service*, — F.Supp.3d —, 2014 WL 2922751 (D. Colo. June 27, 2014). For additional information about the case, see Ellii Cho, *Judge Endorses Use of the Social Cost of Carbon in NEPA Analysis*, CLIMATE LAW BLOG, July 21, 2014, <http://blogs.law.columbia.edu/climatechange/2014/07/21/judge-endorses-use-of-the-social-cost-of-carbon-in-nepa-analysis/comment-page-1/>.

⁴² 79 Fed. Reg. at 77,830.

and recommends that agencies apply the guidance without waiting for the publication of a final version.⁴³

It is possible that the guidance will increase the time and resources required to complete environmental review of certain projects, but any impacts on time and cost will probably be small for most actions (when compared to the total costs and time spent on the review process). In some circumstances, the guidance may actually help an agency avoid project delays by minimizing uncertainty and controversy associated with an action. Perhaps the bigger concern for project developers is the possibility that agency decision-makers will more closely scrutinize the relationship between a proposed action and climate change and reject proposals because the climate impacts outweigh the action's benefits, or because the proposal is not resilient in the face of climate change. The guidance may also provide a stronger basis for private litigants to challenge federal agency actions based on a failure to properly consider climate change in NEPA documents. Finally, the guidance may also serve as a catalyst for similar developments at the state level.

Jessica Wentz joined the Sabin Center for Climate Change Law at Columbia Law School in September 2014 as an Associate Director and Postdoctoral Fellow. Jessica's research focuses on the development of innovative legal mechanisms to improve environmental outcomes and promote climate justice in the U.S. and abroad. Her work at the Sabin Center spans a variety of topics, including domestic regulation of greenhouse gas emissions under the Clean Air Act, requirements for disclosing of climate change impacts in environmental assessment documents, and opportunities to create a multilateral instrument to address climate-induced displacement and migration. Prior to joining the Sabin Center, Jessica was a Visiting Associate Professor and Environmental Program Fellow at the George Washington University Law School. She is a 2012 graduate of Columbia Law School, where she was awarded the Alfred A. Forsyth Prize for "dedication to the advancement of environmental law." She also has a B.A. in international development from the University of California, Los Angeles.

LEGAL DEVELOPMENTS

AIR QUALITY

State Supreme Court Upheld DMV's Revocation of Vehicle Inspection Licenses

The Supreme Court, Bronx County, denied an Article 78 petition that sought to stay and annul the revocation of a company's Public Inspection Station License and the company owner's Certified Motor Vehicle Inspector's License. An administrative law judge (ALJ) had determined that petitioners had used a substitute vehicle for 17 inspections during emissions testing. The Department of Motor Vehicles (DMV) Appeals Board

affirmed the ALJ's imposition of \$5,950 penalties on both the company and its owner and the revocation of their licenses. Quoting from the Clean Air Act and its regulations, the court affirmed the DMV Appeals Board's determinations. The court noted that the owner was not relieved of responsibility for the violations even if a "faithless employee" had used his certification card without permission. The court also said that the penalties did not shock its sense of fairness (since the minimum penalty per violation was imposed) and had a rational basis. Nor did imposition of the fines, combined with revocation of the licenses, amount to an impermissible double penalty. *Car Factory, Inc. v. New York State Department of Motor Vehicles*, 2014 N.Y. Misc. LEXIS 5561 (Sup. Ct. Bronx County Dec. 16, 2014).

ENERGY

Federal Court Upheld BLM's Redaction of Coal Lease Records

The federal district court for the Southern District of New York concluded that the United States Bureau of Land Management (BLM) had a logical or plausible justification for redacting information in response to a Freedom of Information Act (FOIA) request for records regarding coal leases in the Powder River Basin in Montana and Wyoming. The plaintiff, Natural Resources Defense Council (NRDC), sought information and analysis documents used to estimate the fair market value of tracts offered for lease. BLM's appraisals of fair market value—which provide the minimum value for a lease sale—are confidential. The court noted that for the vast majority of lease sales there is only one bid so that BLM's estimate "effectively supplies the sole price competition." The court previously ruled that BLM could not invoke FOIA exemptions for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" or for "geological and geophysical information and data, including maps, concerning wells" to justify redaction. In the previous ruling, however, the court concluded that FOIA Exemption 5 for inter-agency or intra-agency memorandums or letters, which incorporates a qualified privilege for confidential commercial information, applied to quantitative information such as BLM's pricing model and its fair market value estimates. This privilege protects the government from being placed at a competitive disadvantage. In the earlier decision, the court said that it lacked sufficient information to determine whether information regarding BLM's "qualitative reasoning process" could be redacted. The court therefore asked BLM to submit supplemental declarations to enable the court to make this determination. The court's review of the declarations submitted by the government convinced it that disclosure of the redacted qualitative information would harm the government "by allowing bidders to approximate the Government's confidential floor price with

⁴³ 79 Fed. Reg. at 77,284.