

## Legal Sidebar

# Legal Status of CEQ's Final Guidance on Climate Change in Environmental Reviews under NEPA

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On August 2, 2016, the Obama Administration issued a final [guidance document](#) “to assist Federal agencies in their consideration of the effects of greenhouse gas (GHG) emissions and climate change when evaluating proposed Federal actions in accordance with the [National Environmental Policy Act](#) (NEPA).” It was issued by the [Council on Environmental Quality](#) (CEQ) and applies to federal actions (including actions receiving federal funding or federal permits) subject to review under NEPA. While most federal agencies already have procedures in place to ensure that they identify GHG emissions associated with their proposed actions, as well as future impacts to those proposed projects that may relate to climate change, the Guidance states that it aims to provide “greater clarity and more consistency” for evaluating climate-related impacts of and to federal actions. The Guidance [follows](#) an initial draft issued in 2010 and a revised draft issued in 2014. As a guidance document, it is not binding on agencies or legally enforceable, but CEQ expects that the Guidance should be applied to all new and, to the extent practicable, currently proposed federal actions subject to review under NEPA.

NEPA requires federal agencies to consider and disclose the potential effects of their actions and decisions on the environment. Agencies implement NEPA through one of three levels of review--a Categorical Exclusion (CE); an Environmental Assessment (EA); or an Environmental Impact Statement (EIS). The level of review will depend on whether the proposed actions may have significant impacts on the environment. (For more background on NEPA, see [CRS Report RL33152, \*The National Environmental Policy Act \(NEPA\): Background and Implementation\*](#).) In the Guidance, CEQ states that “when addressing climate change agencies should consider: (1) The potential effects of a proposed action on climate change as indicated by assessing [direct and indirect] GHG emissions...; and, (2) The effects of climate change on a proposed action and its environmental impacts.”

While the Guidance states that it “is not a rule or regulation, ... does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable,” some courts have referenced agency guidance documents as persuasive authorities. The degree of deference accorded (or not accorded) to agency guidance documents, and the distinction between guidance documents and legislative rules, are discussed in [CRS Report R44468, \*General Policy Statements: Legal Overview\*](#). Notably, even prior to the issuance of CEQ's Guidance or its earlier drafts, courts had faulted federal agencies for insufficiently taking into account climate change in NEPA reviews. For example, in [Center for Biological Diversity v. National Highway Traffic Safety Administration](#), the U.S. Court of Appeals for the Ninth Circuit held that “the impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct,” and remanded an agency action for further NEPA analysis. In light of such precedent, even if courts did not defer to the Guidance itself, agency compliance with the recommendations in the Guidance could shape NEPA litigation.

Some critics of the Guidance have objected to its issuance while the CEQ lacks a Senate-confirmed Chairman or a pending nomination for that position. NEPA established the CEQ within the Executive Office of the President, and appropriations laws have effectively replaced the three-person Council originally established in NEPA with a single Chairman who is authorized to exercise all powers, functions, and duties of the CEQ. However, since the last Senate-confirmed CEQ Chairman, Nancy Sutley, left the position in 2014, CEQ has been led by an Acting Chairman and, since 2015, by Christy Goldfuss serving as Managing Director. Ms. Goldfuss does not appear to be serving as Chairman in an

acting capacity. A nomination for Chairman has not been submitted to the Senate. In this context, the Vacancies Reform Act has been invoked in some arguments against CEQ actions. The Vacancies Reform Act imposes time limits on certain individuals who may serve as an acting officer in a vacant position, unless there is a nomination pending. The Vacancies Reform Act also provides that in general, once its time limits have been exhausted, only the head of the agency may perform any non-delegable function or duty of that office. Moreover, any action taken by any person who is not serving in an acting capacity as provided in the Vacancies Reform Act in the performance of any function or duty of a vacant office “shall have no force or effect” (see [CRS Report RS21412, Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions](#)).

These issues that some have raised regarding CEQ’s leadership may, however, have limited relation to agencies’ implementation of the new Guidance. For the CEQ, even if the Vacancies Reform Act applies to the current situation, it is not clear that NEPA makes particular duties non-delegable by the Chairman. Moreover, to the extent the Guidance is a non-binding and non-enforceable policy document, it may be arguable whether it necessarily would be affected by the Vacancies Reform Act’s denial of legal force or effect to actions taken other than by a Senate-confirmed Chairman or a person acting as provided in the Vacancies Reform Act. The Guidance recommends that agencies use its “common approach” when undertaking environmental reviews as a matter of interpretation of existing laws and regulations.

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