

Evaluating Greenhouse Gas Emissions and Climate Change During the NEPA Process

by Kenneth J. Warren / *The Legal Intelligencer*

The National Environmental Policy Act (NEPA) of 1969 established an innovative process to protect the environment and the natural world. NEPA requires all federal agencies to consider the environmental effects of major actions they propose to undertake and to evaluate alternative actions with less adverse environmental impact. By introducing environmental considerations into the agency planning process and providing opportunities for public participation, NEPA seeks “to create and maintain conditions under which man and nature can exist in productive harmony.”

A key step in the NEPA process is preparing an environmental impact statement (EIS). When proposing a major federal action that will significantly affect the quality of the human environment, the agency must develop a detailed statement on the environmental effects of its proposed action and any alternatives to the proposed action. As a procedural statute requiring federal agencies to take a hard look at environmental issues, NEPA does not alter the elements of the substantive statutes agencies administer. Agencies may undertake projects notwithstanding their environmental effects, as long as they articulate a reasoned explanation.

At the time of NEPA’s enactment, climate change was not perceived as a serious environmental threat. More recently, scientific evidence has shown that greenhouse gas (GHG) emissions cause adverse environmental impacts, including global warming, sea level rise and climate disruption. In response, federal agencies have included an examination of the environmental consequences of a proposed project’s GHG emissions as an element of their EISs.

This analysis has proven difficult. NEPA directs agencies to consider the reasonably foreseeable effects of their actions. Even if the GHG emissions from constructing and implementing the project itself can be quantified, changes in emissions from third-parties affected by the project may be speculative.

Over the past decade, agencies have faced shifting guidance on how to assess impacts from GHG emissions. The White House Council on Environmental Quality (CEQ) develops guidelines for NEPA reviews. During the Obama administration, CEQ promulgated guidance requiring federal agencies to consider the GHG emissions and climate change impacts caused by their actions. Various guidance and regulations during the Trump administration narrowed NEPA reviews. The pendulum swung back when President Joe Biden entered office in 2021 and issued executive orders underscoring the importance of assessing GHG impacts when performing an EIS. In response, on April 20, 2022, CEQ issued a first phase of regulations and on July 31 proposed additional amendments to the NEPA regulations which include provisions on climate and environmental justice. In addition, on Jan. 9, 2023, CEQ published and made immediately effective the interim NEPA guidance on consideration of greenhouse gas emissions and climate change (guidance).

The guidance requires federal agencies to quantify the reasonably foreseeable direct and indirect GHG impacts of their proposed actions and reasonable alternatives. These impacts include upstream and downstream impacts and gross, net, and cumulative GHG changes. The guidance also cites a “rule of reason” allowing less detailed analyses for renewable energy projects and other projects where the burden of a full NEPA review would not be proportional to the adverse environmental impacts from the proposed project. This reduced burden for renewable energy projects minimizes opportunities to utilize NEPA challenges to delay these projects.

The 2023 guidance instructs federal agencies to utilize other existing Biden administration policies, goals and commitments in their climate change evaluation. Federal agencies must use procedures established by the Biden administration to quantify the estimated social cost of GHGs or the damages from increased GHG emissions. They must also evaluate the project’s impact on the nation’s climate goals. Adaptation and mitigation measures to manage or reduce climate risks must be considered, including minimizing adverse impacts to environmental justice communities and vulnerable populations.

As evidenced by the policy shifts between administrations, the scope of mandatory NEPA reviews of climate impacts is controversial. Some stakeholders such as fossil fuel generators and transporters view the current NEPA requirements as unduly delaying and impeding major infrastructure

projects critical to energy development. Other stakeholders view NEPA as an important tool to protect vulnerable communities and the environment from climate change and to encourage our nation's transition to renewable energy sources. These divergent views have stimulated litigation often focused on identifying the GHG effects that are reasonably foreseeable and therefore must be evaluated.

In *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152 (D.C. Cir. 2023), environmental organizations and a county challenged an EIS issued by the Surface Transportation Board and a biological opinion issued by the Fish and Wildlife Service. The board relied on the EIS to exempt from the board's formal application process a railway's project to construct and operate a new rail line. The primary purpose of the project was the transport of waxy crude oil produced in the Uinta Basin of Utah.

The court noted that under the then-effective NEPA regulations, an agency must evaluate the cumulative impacts and the direct and indirect impacts of a proposed action. The EIS estimated potential carbon emissions from the project to reach nearly one percent of total U.S. emissions. Construction, operation, and maintenance of oil wells and combustion during end use of the oil transported by the railway were among the GHG impacts identified in the EIS. The board, however, contended it was not required to consider specific GHG emissions from oil combustion because it could not regulate or mitigate their impacts.

The court disagreed with the board's decision not to take a hard look at the environmental effects of increased oil drilling and refining, including combustion of the oil. The court emphasized the board's failure to analyze the potential effect of these activities on the geographic areas where the oil would be refined, including environmental justice communities. The court also chastised the board for failing to take a hard look at the effects of additional train traffic on the environment. In the court's view, reasonably foreseeable effects such as increased accidents, wildfires, and pollution of water resources neighboring the rail lines were not adequately examined.

The court distinguished the facts of *Eagle County* with those of *Center for Biological Diversity v. FERC*, 67 F.4th 1176 (D.C. Cir. 2023). In *FERC*, emissions related to a natural gas pipeline were not reasonably foreseeable because customers were not under contract, state regulatory approval had not

been issued, and subsidiary pipelines had not been proposed and built. In contrast, *Eagle County* involved a known quantity of oil transmitted to specific regions containing known refineries. These facts would enable the board to reasonably foresee GHG emissions and their impacts. The *Eagle County* court concluded that the board's failure to consider the GHG and other environmental impacts was arbitrary and capricious.

For similar reasons, the court also concluded that the biological opinion issued by the Fish and Wildlife Service was inadequate. The service adopted the board's delineation of the project's action area which excluded downline waterways. Neither the board nor the service provided record evidence to contradict the assertion that fuel or lubricant leaks from additional train traffic would foreseeably cause adverse impacts on protected species near the downstream rail line. Absent this record evidence, the biological opinion violated the Endangered Species Act and the EIS could not rely upon it. Accordingly, the court vacated the EIS and biological opinion.

Eagle County illustrates the importance of thoroughly examining GHG emissions and climate change impacts during preparation of an EIS. Where an agency has facts available from which it can reasonably forecast GHG impacts, courts are willing to find both direct and indirect GHG impacts to be "reasonably foreseeable" and require their inclusion in an EIS. We are likely to see more rigorous evaluations of GHG impacts in response to judicial decisions, CEQ guidance and upcoming final CEQ Phase 2 NEPA regulations.

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