

## Greenhouse Gas/Carbon Regulation

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On February 18, 2010, the White House released draft guidance advising federal agencies on how and when to include greenhouse gas and climate change effects in agency analyses under the National Environmental Policy Act (NEPA). When it is finalized, the draft guidance will affect Warner clients whose projects, including roads, energy facilities, federal environmental permits, and landfill projects, require federal approval or funding.

NEPA is a federal statute that imposes procedural obligations on federal agencies to consider the environmental impacts of proposed actions before proceeding. Under NEPA, a federal agency must prepare an Environmental Impact Statement whenever a major federal action significantly affects the quality of the human environment. While NEPA does not impose substantive obligations to protect the environment, it is not a toothless tiger. In fact, NEPA's procedural provisions are often invoked by project opponents in an effort to delay or prevent the project, or both—even when the project involves a seemingly small federal handle, such as limited federal funding or permitting authority.

The White House claims that the proposed guidance is not an attempt to "regulate" greenhouse gases. Yet the guidance explicitly affirms NEPA's applicability to greenhouse gas emissions and climate change impacts. It explains that federal agencies must analyze the environmental impacts of greenhouse gas emissions and climate change when they consider the environmental effects of proposed actions. The proposed guidance sets a presumptive threshold of 25,000 metric tons of carbon dioxide equivalent emissions to trigger quantitative and qualitative analysis of greenhouse gas emissions and climate change, but it also recommends that agencies consider the greenhouse gas emissions and climate change impacts of smaller projects.

At bottom, the draft guidance proposes to require agencies to consider opportunities to reduce a project's greenhouse gas emissions and climate change impacts. If an agency determines that NEPA consideration of climate issues is appropriate under the guidance, then the agency will be required to identify and evaluate alternative actions that would result in fewer greenhouse gas emissions and that would mitigate potential impacts on climate change.

Because both the law and science in this area are constantly and rapidly developing, the proposed guidance is likely to change significantly before it is made final. And the White House and federal agencies will continually revise the final guidance as necessary to reflect future developments in the law, policy, and science regarding climate change. The White House will receive comment on the proposed guidance until May 17, 2010.



The attorneys in Warner's Corporate Sustainability and Climate Group are available to answer your questions about the draft guidance. Please contact Scott Watson ([swatson@wnj.com](mailto:swatson@wnj.com), 616.752.2465), Dan DeWitt ([ddewitt@wnj.com](mailto:ddewitt@wnj.com), 616.752.2208), or Dan Ettinger ([dettinger@wnj.com](mailto:dettinger@wnj.com), 616.752.2168) for assistance.