Climate Change and Environmental Impact Statements
Complying With NEPA and State Requirements for Project Environmental Review

A Live 90-Minute Audio Conference with Interactive Q&A

Today’s panel features:
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Tuesday, August 18, 2009

The conference begins at:
1 pm Eastern
12 pm Central
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Assessing The Environmental Impact of Greenhouse Gas Emissions on Climate Change

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Overview – NEPA

National Environmental Protection Act (NEPA)

• Requires federal agencies
  • “to the fullest extent possible”
  • to prepare a “detailed statement on environmental impact” (EIS)
  • of “major Federal actions significantly affecting the quality of the human environment”

• EIS must
  • provide full and fair discussion of significant environmental impacts
  • **inform decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment**
  • be supported by evidence

• 42 U.S.C. § 4331 et seq.; 40 CFR § 1500 et seq.
Overview – NEPA (cont’d)

NEPA requires analysis of effects

- *caused* by the proposed federal action
- whether *direct* or *indirect*
  - Indirect effects are “later in time or farther removed in distance, but are still reasonably foreseeable”
- *cumulative* impacts must be considered
  - results from the incremental impact when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions
  - can result from individually minor but collectively significant actions taking place over a period of time
NEPA Overview (cont’d)

Federal actions include

- projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies;
- agency rules, regulations, plans, policies, or procedures; and
- legislative proposals

Essential information – even if incomplete – must be included in EIS if overall cost of obtaining info is not exorbitant
Overview – “Little NEPAs”

Many states have adopted their own environmental review statutes, patterned after NEPA. States active in climate change review include

- **New York** – State Environmental Quality Review Act (SEQRA, NY Env. Cons. Laws § 8-101, et seq.)
- **Massachusetts** – Mass Environmental Policy Act (MEPA, M.G.L. c. 30, §§ 61 through 62H, incl.)
- **Washington** – State Environmental Policy Act (SEPA, R.C.W. § 43.21C.010 et seq.)
Overview – Administrative Procedure Act

Environmental review is procedural

- discretion to make environmental policy decisions is vested in lead agencies

- can obtain court review for adequacy, not result
  - court will not substitute its own judgment

- process must comply with applicable regulations and jurisprudence to ensure procedural due process
  - Includes CEQ regulations, APA, and specific agency regulations

- only relief available is “remand” to prepare adequate EIS
Overview – CEQA

CEQA is substantively very similar to NEPA

▪ One major difference is that CEQA requires that all significant adverse environmental impacts must be mitigated or reduced to a level of no significance
  ▪ if mitigation or reduction of adverse impacts is not feasible, lead agency may still approve project subject to a “statement of overriding considerations”
  ▪ Must explain how benefits of project outweigh significant adverse impacts
Review of Climate Change in EISs

Threshold issue: Is climate change a “reasonably foreseeable” impact of greenhouse gas (GHG) emissions?

- Draft Guidance Regarding Consideration of Global Climatic Change in Environment Documents Prepared Pursuant to the NEPA (10/8/97) (CEQ)  

- Petition Requesting CEQ to Amend Regulations to Clarify That Climate Change Analyses Be Included in Environmental Review Documents (2/28/08) (ICTA; NRDC; Sierra Club)  

- Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act (4/24/09)  
Review of Climate Change in EISs


- **California** – OPR Proposed CEQA Guidelines Amendments
The California Approach

CEQA

- Lead agencies must prepare EIR whenever
  - Project may cause significant adverse environmental impact
- Significant impacts must be reduced to level of no significance by modification or mitigation
  - Project may be approved if modification or mitigation is infeasible with “statement of overriding considerations”

GHG analysis

- SB 97 requires rules for GHG analysis in EIRs by 1/1/10 (Pub. Res. Code § 21083.05)
- OPR draft guidelines in rulemaking process currently
The California Approach (cont’d)

OPR draft guidelines

- No major changes to CEQA analysis
- New section on significance analysis
  - May be qualitative or quantitative
  - Confounded by
    - cumulative impact of GHG emissions on climate
    - unsettled state of science
    - relatively small amount of project-specific GHGs
- Lead agencies directed to consider
  - Extent to which project may increase/reduce GHG emissions as compared with current conditions
  - Thresholds of significance
  - Compliance with statewide/regional/local GHG reduction plans
The California Approach (cont’d)

OPR draft guidelines

- New section on tiering and streamlining
  - Emphasis on programmatic approach to GHG emissions
  - Ability to tier onto CEQA-reviewed program
  - May use non-CEQA-reviewed program in cumulative impacts analysis
The California Approach (cont’d)

Wal-Mart Decision

- Failure to adhere to draft guidelines cited as reason for inadequate EIR – opponents claimed not all GHGs analyzed
- Claim of compliance with Climate Action Team strategies inadequate due to lack of substantial evidence
Best Practices/Strategies

- Know your jurisdiction: Does it require GHG emissions climate change analysis in EIS/EIR
- Be familiar with relevant GHG emissions plans and climate change policies
- Consider GHG analysis early
  - Incorporate design flexibility
  - Assess costs of environmental review with cost of
    - Delay
    - Adverse publicity
    - Serial challenge
Best Practices/Strategies (cont’d)

- Take advantage of tiering/incorporation opportunities
- Concern about climate change is pervasive – consider value of addressing GHGs voluntarily
  - Challenge to adequacy of environmental review of GHGs is common – consider cost of being targeted for environmental activism
- Be wary of “greenwashing”
Climate Change and the Environmental Impact Statement

August 18, 2009

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Background
NEPA and Little NEPAs

  - Requires federal agencies to prepare environmental impact statements for “major Federal actions significantly affecting the quality of the human environment.”
  - Affects private projects that need federal approval.
  - Requires consideration of environmental impacts, alternatives, and mitigation in planning process.

- **State Level – “Little NEPA” Statutes**
  - Over 15 states have such laws.
  - They establish environmental assessment and environmental impact statement requirements for state projects modeled on the federal law.
  - They affect private projects that need state approval.
  - Also require consideration of environmental impacts, alternatives, and mitigation in planning process.
NEPA GHG Litigation - Examples

• *Mayo Foundation v. Surface Transp. Bd.*, 472 F.3d 545 (8th Cir. 2006)
• *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007)
• *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007)
NEPA GHG Litigation

- **Mayo Foundation v. Surface Transp. Bd., 472 F.3d 545 (8th Cir. 2006)**
  - Surface Transportation Board (STB) approved construction of rail line to bring coal from mine in Wyoming to plants in Minnesota and South Dakota.
  - *Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003)* - held EIS was insufficient because it did not consider air emissions and remanded the action.
  - On remand, STB gave minor consideration to air emissions.
  - In Mayo, the 8th Circuit found the new EIS adequately considered emissions.
NEPA GHG Litigation

- **Center for Biological Diversity v. NHTSA, 508 F.3d 508 (9th Cir. 2007)**
  - Public interest groups and states petitioned for review of NHTSA rule setting corporate average fuel economy (CAFE) standards for light trucks.
  - Ninth Circuit held:
    - NHTSA was required to prepare environmental impact statement. The Energy Policy and Conservation Act (EPCA) did not negate NHTSA’s duty to assess environmental impacts, including climate change. Cumulative impact of GHGs is precisely the...
    - NHTSA’s failure to monetize benefits of greenhouse gas emissions reduction was arbitrary and capricious. Uncertainty was not a sufficient excuse.
NEPA GHG Litigation – OPIC, Ex-Im Bank

  - Environmental groups and 4 cities sued the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank (Ex-Im Bank) for granting assistance to private projects that contribute to climate change without complying with NEPA.
  - Court held that OPIC is not exempt for NEPA but denied summary judgment because:
    - Fact issues existed over whether individual projects were “major Federal actions.”
    - Fact issues existed whether individual projects constituted “cumulative actions.”
NEPA GHG Litigation – OPIC, Ex-Im Bank

• Settled in February 2009
  – Export-Import Bank and OPEC must account for their contributions to climate change in accordance with NEPA.
  – Export-Import Bank must (1) account for its carbon dioxide emissions when considering which fossil-fuel projects to insure and (2) develop a climate change policy.
  – OPIC must reduce the greenhouse gas emissions of its major projects by 20% over the next ten years.
NEPA Petition

• On February 28, 2008, the International Center for Technology Assessment (ICTA), NRDC, and Sierra Club filed a formal legal petition with the White House's Council on Environmental Quality seeking to clarify that climate change analyses is to be considered and discussed in all federal environmental review documents for federal projects.
Little NEPAs

• California Developments - CEQA
  – Most active in use of Little NEPA statute to address impact of GHG emissions on global warming.
  – CA AG actions and private actions.

• New York Developments – SEQRA
  – Considered GHG emissions in project review.
  – Issued draft guidelines.
Little NEPAs

• Massachusetts Developments - MEPA
  – Considered GHG emissions in project review.

• Minnesota Developments - MEPA
  – Lower court held MEPA did not require analysis of GHG emissions and mitigation on public projects.
California Environmental Quality Act ("CEQA")

• **CEQA** requires state and local agencies to disclose and evaluate the “significant” environmental impacts of proposed projects and to adopt feasible measures to mitigate those impacts. **CAL. PUB. RES. CODE §§ 21000 et seq.**

• California state regulators have interpreted CEQA as applying to *cumulatively significant impacts* such as increased GHG emissions.

• The **California Attorney General** has prepared numerous comment letters with agencies whose analysis under CEQA failed to properly analyze or mitigate a project’s GHG emissions. The California Attorney General also has sued some of the entities for failing to consider GHG emissions.
Bringing CEQA Actions

• The rules adopted by the California Legislature ensure CEQA challenges are relatively easy to bring
  – Standing requirements are permissive
  – Rules governing exhaustion of administrative remedies are also permissive
  – Petitioners have the option of electing to prepare the record of proceedings as a means of holding down costs
  – Awards of attorneys’ fees are often available to successful petitioners
CEQA – CA AG’s GHG Actions

- August 2007 – Settlement with San Bernardino County (general plan amendment)
- September 2007 – Settlement with ConocoPhillips (proposed refinery expansion in Rodeo)
- December 2007 – Settlement with Port of Los Angeles (GHG source tracking)
- March 2008 – Settlement with Great Valley Ethanol (corn ethanol production plant)
- May 2008 – Settlement San Diego Airport Authority (long-term planning)
- August 2008 – Settlement with Cilion (corn ethanol production plant)
- September 2008 – Settlement with City of Stockton and Sierra Club (City plan)
CEQA - Private GHG Actions

  – No law requires considerations of GHG emissions

  – petition granted

  – petition granted

• Center for Biological Diversity v. Town of Yucca Valley, et al, No. CIVBS800607 (Cal. Super. Ct. - San Bernardino)
  – Approval of Wal-Mart supercenter set aside
CEQA – Regulatory Guidance on Consideration of GHG Emissions

Continuing debate whether CEQA requires consideration of GHG emissions and when they are “significant.”

SB 97 – requires CA Governor’s Office of Planning and Research (OPR) to promulgate CEQA guidelines for mitigation of GHG emissions by July 1, 2009; requires California Resources Board to adopt guidelines by January 1, 2010.

Draft Guidance issued January 8, 2009: OPR issued draft guidance concerning the analysis and mitigation of the potential effects of GHG emissions associated with projects subject to review under CEQA.
OPR’s Guidance on Analysis and Mitigation of GHGs

• Identify all the GHG emission sources
• Calculate / estimate GHG emissions
• Identify mitigation measures and alternative methods / approaches
• Identify preferred mitigation strategies
• GHG emissions do not trump other environmental issues
• The courts look for good faith effort, not perfection
Proposed CEQA Guidelines

• On April 13, 2009, OPR submitted to the Secretary for Natural Resources its proposed amendments to the state CEQA Guidelines for greenhouse gas emissions, as required by Senate Bill 97.
• On July 3, 2009, the Natural Resources Agency (Resources) commenced the Administrative Procedure Act rulemaking process for certifying and adopting these amendments pursuant to Public Resources Code section 21083.05.
• http://www.opr.ca.gov/ceqa/pdfs/PA_CEQA_Guidelines.pdf
CEQA & GHG Emissions: Implications for the Private Sector

• Prepare for extensive coordination with relevant public agencies on plans to calculate and mitigate GHG emissions related to any public project
• Analyze additional costs of possible project delays and/or settlement payouts related to excessive GHG emissions
• Analyze additional costs of project adjustments to mitigate GHG emissions and obtain project approval
• Prepare for possible litigation throughout the EIR process
New York's State Environmental Quality Review Act (“SEQRA”)

• NY Department of Environmental Conservation (DEC) has signaled that it believes the SEQRA regulations provides the tools necessary to address GHGs
  • DEC has considered GHG emissions in evaluating projects under SEQRA
  • E.g., February 2008 - DEC adopted final scoping document for the Belleayre Mountain Ski Area project which requires extensive examination of the production of GHGs from every aspect of the construction and operation of the project.
  • September 9, 2008 - DEC invited informal comments on proposed guidance document on assessing GHG impacts in an EIS.
Massachusetts GHG Emissions Policy and Protocol

• October 31, 2007 – MEPA GHG Policy issued
  – Applied to certain state projects subject to MEPA.
  – Required quantification of emissions and consideration of alternatives.

• August 8, 2008 - Governor Patrick signed the Global Warming Solutions Act of 2008 – requires consideration of GHG emissions impact on climate change in all licensing, permitting, and other administrative decision-making.

• February 2, 2009 – MEPA GHG Policy amended to apply to all projects requiring an EIR.

• Minnesota non-profit challenged Minnesota Steel Project.
• Minnesota Steel Project alleged to increase state’s GHG emissions by 3%.
• Plaintiff alleged that EIS was flawed because it did not look seriously at the project’s global warming implications nor did it look at possible alternatives to reduce global warming.
• The court confirmed that the DNR “did not specifically examine any project alternatives aimed at reducing greenhouse gas emissions or suggest mitigation measures specifically to reduce greenhouse gases.”
• Still, the court ultimately found that the MEPA “does not seem to be up to the task of analyzing how greenhouse gas emissions from projects like MSI should be accounted for on the local, regional, state, national and even global scale.” The environmental study, therefore, was found to be adequate under current law.
• Appeal pending.
Analyzing Climate Change-Related Issues in Environmental Impact Assessments - Select Topics

- Direct operational impacts
- Purchased electricity
- Induced trips
Direct Operational Impacts

• Examples: smoke-stack emissions; methane from dumps, oil and gas wells, mines, agricultural facilities, and wastewater treatment plants; nitrous oxide from agricultural facilities

• Likely was already required but perhaps not for purposes of assessing impacts on global warming
Direct Operational Impacts - Examples

- September 2007 – CA AG Brown’s Settlement of CEQA dispute with ConocoPhillips
  - ConocoPhillips applied to county for approval of refinery expansion
  - EIS contained analysis of GHGs and climate change – ConocoPhillips and County thought it was sufficient given lack of available standards
  - AG disagreed
  - In settlement, ConocoPhillips agreed to offset new GHG emissions of the expansion.
Direct Operational Impacts - Examples

  - The Riverside County Superior Court invalidated an environmental impact report (EIR) for a 1,766-acre residential and commercial project that had been proposed for development near Joshua Tree National Park in Southern California.
  - The Court cited the EIR’s complete failure to analyze the project’s greenhouse gas (GHG) emissions and impact on global warming.
  - Even if impacts are speculative, there must be a meaningful attempt to analyze the impacts.
Direct Operational Impacts - Examples

• *Communities for a Better Env’t v. City of Richmond*, No. NO8-1429 (Cal. Super. Ct. June 4, 2009)
  – Chevron sought to expand crude processing facility.
  – EIS failed to consider direct operational impacts of expansion.
  – City “improperly deferred formulation of greenhouse gas mitigation measures, by simply requiring Chevron to prepare a mitigation plan and submit it to the city.” *Id.* at ¶ 4.
  – The city had made a conclusory statement that there would be no net increase in greenhouse gas emissions, but “did not identify any means of achieving that standard.” *Id.*
  – “Formulation of mitigation measures should not be deferred until some future time.” *Id.*
Direct Operational Impacts - Examples

  – Forest Service and Department of Interior approved expansion of West Elk coal mine in Colorado including mitigation plan for removal of dangerous methane
  – WildEarth Guardians sued defendants for failure to analyze global warming impact of methane venting and alternatives to methane venting
  – Stay likely will be lifted soon because mining company won right to intervene on appeal to the 10th Circuit
Purchased Electricity

• An EIS must consider indirect impacts. 40 C.F.R. § 1502.16.

• Use of electricity generated by a major source of GHG emissions is one such indirect impact.

• MEPA Emissions Quantification Protocol and NY proposed GHG EIS policy also require calculation of indirect emissions from purchased electricity.
Purchased Electricity

• Analysis
  – Estimate electricity demand for the project
    • use of energy modeling software
  – Determine source of electricity (coal, hydro, nuclear, wind, solar, etc.)
  – Determine GHG emissions factor for the electricity source
  – Multiply anticipated electricity usage by emissions factor and determine annual emissions
    • MA has ISO-NE Marginal Emissions Report indicating CO2 emissions levels for various stationary sources
Purchased Electricity

• Alternatives to Consider / Mitigation
  – energy efficient buildings
  – use of energy efficient appliances
  – onsite energy generation
  – waste heat capture
Induced Trips - Overview

• An EIS must consider indirect impacts. 40 C.F.R. § 1502.16.
• One such indirect impact is induced travel.
• Induced travel related to a new project may include increased:
  – car trips by employees and customers
  – car trips by service providers (security, cleaning, etc.)
  – deliveries by truck, freight or other – supplies, raw materials, manufactured goods, mail service
• Increased emissions from this daily traffic
• (Note – some models consider this as direct emissions – e.g. California Climate Action Registry)
Induced Trips

- CEQA state guidelines contemplate consideration of induced trips:
  - “Potentially significant energy implications of a project should be considered in an EIR.”
  - “Project Description may include the following items:”
    - “Total estimated daily trips to be generated by the project and the additional energy consumed per trip by mode.”
  - Appendix F in Title 14, Art. 20
  - further amendments under consideration – change to “vehicle trips” and mandatory inclusion of this issue if it is relevant
Induced Trips

• MEPA Greenhouse Gas Emissions Policy and Protocol requires consideration of indirect emissions from transportation:
  – calculation of net new trips – daily vehicle miles of travel broken down into customer, employee, and truck trips
  – calculate annual vehicle miles traveled (VMT)
  – multiply VMTs by EPA CO2 ratings and obtain annual CO2 emissions

• MEPA protocol has suggested transportation mitigation measures
Related Issue - Induced Traffic

• “Induced traffic is the phenomenon by which increasing roadway capacity also increases the number of drivers using that roadway.” North Carolina Alliance for Transp. Reform, Inc., 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001).

• “There are at least two potential reasons for induced travel. First, by increasing roadway capacity, drivers who would normally take other routes switch to the route with increased capacity. Second, travelers who might not have otherwise driven decide to drive because of the greater convenience resulting from the improved roadway.” Id.
Related Issue - Induced Traffic

  - Not a climate change case per se but court found that an EIS for highway construction was inadequate when it failed to consider induced travel.
  - "Defendants offer no response to the expert opinions submitted by Plaintiffs stating that induced travel may cause considerable increases in traffic. As a result, the court finds that Defendants have failed to justify their omission of any consideration of induced traffic and have violated NEPA by failing to examine an important aspect of the project's environmental effects."
Related Issue - Induced Traffic

• Has been considered for many years because induced development had other environmental impacts in addition to climate change

• See also cases cited in Keith Bartholomew, 36 Fordham Urb. L.J. 159, 205 n.244 & n.255 (2009).
Induced Trips - Suggestions

- Are the trips really “new”?
  - assess trip length, access to transit, land use patterns
  - some mixed-use and transportation-oriented projects can actually reduce the number of vehicle miles traveled
Climate Change and the EIS - Trends

• States are using existing authority under little NEPA statutes to regulate climate change where other efforts to regulate have failed.

• Failure to analyze GHG emissions and climate change in state and federal EISs can lead to project delays, rejection, or litigation.

• Certain states will require extensive consideration of alternatives or mitigation.

• Other states may follow suit.
Climate Change and the Environmental Impact Statement

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Purpose of the Environmental Impact Statement (EIS)

- 40 CFR 1502.1 - EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”

- An EIS must—
  - discuss direct, indirect and cumulative impacts
  - “rigorously explore and objectively evaluate all reasonable alternatives”
  - identify (but not mandate) mitigation measures.

- Uncertainty regarding impacts is no excuse for non-disclosure.
Purpose of the EIS

- Obligation to analyze GHG emissions and climate change—a “reasonably foreseeable” impact
  - CEQ Draft Guidance - “Climate change is ‘reasonably foreseeable’ impacts of emission of greenhouse gasses, as that phrase is understood in the context of NEPA and the CEQ regulations.”
  - State and local policy statements and regulatory requirements
  - Multiple court decisions
  - Petition Requesting that CEQ Amend its Regulations to Clarify that Climate Change Analyses be included in Environmental Review Documents
Construction Impacts and GHG Emissions

- Construction impacts are generally analyzed in an EIS.
  - Typical impacts: relatively minor and temporary (e.g., noise, traffic, dust)
  - Climate change impacts: more difficult to assess and extend beyond construction

- As analyses of GHG impacts from project operations become more prevalent, so will analyses of climate change implications of project construction.
Construction Impacts and GHG Emissions

- What are the impacts that EISs will analyze?
  - Emissions from operation of construction equipment
  - Energy use required to construct the project
  - Taken to an extreme . . .
    - Fabrication of construction materials (i.e., cement)
    - Extraction of raw materials
    - Required ongoing maintenance

- Discussion of corresponding mitigation could follow
  - Construction with low-impact materials (renewable and natural, locally sourced)
  - Use of low-impact construction techniques
  - Use of hybrid, electric or bio-fuel in construction equipment

- Current efforts
  - Transportation planning organizations are attempting to quantify GHG emissions associated with construction and maintenance of transportation facilities.
Climate Change Effects on the Project

- Potential impacts of climate change on projects could include—
  - rising sea and groundwater levels
  - temperature and rainfall shifts
  - reduced snowpack/permafrost
  - increased flooding
  - water shortages.

- Could influence project decision-making—
  - selection of a particular siting alternative
  - design of the project
  - materials used for construction
  - cost.
Climate Change Effects on the Project

- Practice is less common than studying impacts of project on climate change, but that may soon change.
  - CEQ Draft Guidance does not require an analysis of the effect of climate change on projects . . . BUT . . .
  - Other agencies are considering these effects:
    - U.S. EPA. Considers climate change impacts on categories of projects outside of NEPA that could inform future NEPA analyses

- Degree and scope of study will vary based upon the type and geographic location of the project
  - Proposed waterfront structure vs. proposed inland roadway
Monitoring/Enforcement of Compliance if Mitigation Is Adopted

- NEPA requires EISs to identify, but not implement, mitigation measures.
  - 40 CFR 1502.16(h) - EIS must discuss “[m]eans to mitigate adverse environmental impacts.”

- Type of mitigation will influence the degree of difficulty in monitoring and enforcement.
  - One-time actions are more easily monitored and enforced (e.g., funding offsite projects that will reduce carbon emissions or purchasing carbon credits)
  - Monitoring and enforcing ongoing mitigation is more difficult (e.g., GHG emissions monitoring).
Monitoring/Enforcement of Compliance if Mitigation Is Adopted

Potential bases for monitoring and enforcing mitigation:

- **NEPA decision document.** ROD or FONSI could include monitoring and reporting requirements, with violations resulting in withdraw of approval.

- **Binding agreement.** Monitoring, enforcement and penalty provisions could be included in a binding agreement that is a condition of approval (e.g., memorandum of agreement).

- **Administration of grant proceeds.** Agency administering funding can monitor and enforce mitigation requirements through the grant administration process.

- **Settlement of lawsuit.** Mitigation obligations resulting from a lawsuit settlement can be monitored and enforced under the watch of a court or attorney general.

- **Other environmental laws.** Mitigation obligations could be monitored and enforced through agreements reached under Section 106 of National Historic Preservation Act or Section 7 of the Endangered Species Act.
Alternatives Mandated if They Lower Climate Change Impacts

  - This is the “heart of the environmental impact statement.” 40 CFR 1502.14.

- NEPA does require that the EIS discuss “[e]nergy requirements and conservation potential of various alternatives and mitigation measures.” 40 CFR 1502.16(e)

- NEPA does not require the federal agency to choose any particular alternative, including one with lower (or the lowest) GHG emissions.
Alternatives Mandated if They Lower Climate Change Impacts

- Emerging practice at EPA - incorporating GHG-related alternatives in EISs.
  - In June 2007, EPA criticized a draft EIS for a mining project for not analyzing ways to capture methane that would be vented into the atmosphere from a project.

- States with mini-NEPAs could pave the way for alternatives analyses.
  - Massachusetts - *MEPA Greenhouse Gas Emissions Policy* - requires certain projects undergoing review by MEPA to identify measures to “avoid, minimize or mitigate” GHG emissions.

- Courts could require that environmental reviews include alternatives with reduced GHG emissions.
  - *Biological Diversity v. Town of Yucca Valley* - Court ruled that EIR failed to analyze the feasible and environmentally superior green Wal-Mart Supercenter alternative.

May 12, 2009 11:40 AM in Global Regulation » International Law and Policy » US Law and Policy

Part 4 of this two-part series discussed provisions of the American Clean Energy and Security Act of 2009 (ACESA) introduced by Representatives Waxman and Markey that would require U.S. importers of fossil fuels to hold emissions allowances for downstream greenhouse gas emissions resulting from combustion of the imported fuels. This post addresses Title IV of ACESA, which would potentially impose a second layer of compliance obligations and costs on U.S. importers. Title IV is intended to safeguard the competitiveness of U.S. manufacturing industries vulnerable to "carbon leakage" i.e., the potential shift of emissions-intensive manufacturing from the U.S. to foreign jurisdictions with lower or nonexistent emissions restrictions.

Title IV would establish two mechanisms to safeguard the competitiveness of greenhouse gas emissions-intensive U.S. manufacturing industries in light of carbon leakage. First, Title IV would allocate some emissions allowances to greenhouse gas emissions-intensive and trade-exposed domestic manufacturing industries at no cost. In this way, qualifying U.S. manufacturers would, in principle, maintain their competitive balance vis-a-vis foreign manufacturers even as they are subjected to declining emissions caps. This first mechanism would not impose specific obligations on U.S. importers.

Title IV also provides, however, for a fall-back mechanism, laid out in Sections 412-14, that would restrict imports in the event the free allowance mechanism is found not to adequately safeguard domestic manufacturing industries from carbon leakage. These provisions call for the establishment, after 2017, of an "International Reserve Allowance Program" pursuant to which importers of "covered goods" would be required to surrender, upon importation, "international reserve allowances" in an amount covering the greenhouse gas emissions associated with the manufacture of the imported goods. International reserve allowances would be drawn from an independent allowance pool and could not be used by domestic entities to comply with their domestic cap-and-trade obligations arising under Title III.

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Wal-Mart Case Highlights Importance of Tackling Emissions Issues Early

By Jeffrey M. Judd

On May 14, Wal-Mart's plans to build a "Super-center" near Joshua Tree National Forest were put on hold when — for the first time ever — a California Superior Court ruled that the environmental impact report inadequately assessed the effect of project-generated greenhouse gases. The Wal-Mart ruling demonstrates how pervasive global climate issues have become and provides a timely lesson on the analysis of project-generated greenhouse gases under the California Environmental Quality Act.

Since 1970, governmental agencies responsible for approving projects must complete a full environmental impact report whenever the project may cause a significant adverse environmental impact. CEQA requires that any significant adverse environmental impacts be reduced to a level of no significant consequence, by project modification or mitigation. In those cases where mitigation or modification is not feasible, the lead agency may still approve the project by explaining how the project's benefits outweigh its adverse impacts in a "statement of overriding considerations." At every stage of the environmental review process the lead agency has discretion to make environmental policy judgments. A reviewing court cannot substitute its judgment for the agency's; the report must demonstrate, however, that the agency's analysis and conclusions are well-reasoned and based on available scientific information and other credible evidence.

Wal-Mart project opponents criticized the draft report on multiple grounds, including the failure to identify and adequately analyze and mitigate impacts from project-generated greenhouse gases. The lead agency arranged for written responses to these critiques to be published in a "final" environmental impact report. The final report was adopted, and the project approved on the basis of a statement of overriding considerations.

The final report estimated project-generated greenhouse gases of 7,500 metric tons annually, but rather than undertake a quantitative analysis, it approached the significance question qualitatively. Project-generated greenhouse gas emissions were deemed not significant because the project purportedly "complied" with the governor's statewide strategies for reducing greenhouse gas emissions. Environmental organizations challenged this analysis, and the court found the final report inadequate for a variety of reasons, including the failure to adhere closely to draft guidelines — currently the subject of a pending rulemaking — for analyzing greenhouse gases under CEQA.

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Although the Wal-Mart ruling was unprecedented, in many respects it was inevitable. The analysis of greenhouse gas emissions under CEQA has in recent years been addressed repeatedly by the California Legislature, the governor, the attorney general, environmental activists and land use professionals. For some time, the question whether greenhouse gas emissions should be analyzed under CEQA was submitted within the broader debate about the whether reliable scientific data had established a causal link between greenhouse gas emissions and global climate change. That debate became irrelevant in 2007, however, when the California Legislature enacted Senate Bill 97, SB 97, codified as Public Resources Code Section 21083.05, mandated that the Governor's Office of Planning and Research prepare guidelines that specifically address the analysis under CEQA of project-related greenhouse gas emissions.

The Office of Planning and Research released an initial draft of the greenhouse gas guidelines for public review in January 2009. After months of public comment, the office submitted slightly revised guidelines to the California Natural Resources Agency. The agency commenced the rulemaking process on July 3, and the public comment period is scheduled to close Aug. 20. The guidelines are expected to be enacted by the Jan. 1, 2010, statutory deadline.

The guidelines take the approach that greenhouse gas analysis does not require a wholesale change to CEQA, and the majority of changes simply make express throughout the CEQA Guidelines, 14 California Code of Regulations sections 15000-15387, the mandate to analyze greenhouse emissions in environmental impact reports. The guidelines include two entirely new sections: One discusses how a lead agency should go about determining whether greenhouse gas emissions cause significant impacts, and the other new section addresses tailing and streamlining the greenhouse gas impacts analysis.

The most difficult task lead agencies will face, at least initially, is to determine whether project-generated greenhouse gas emissions will cause "significant" adverse impacts. Complicating this analysis are the absence of established regulatory standards, the relatively small amount of greenhouse gas emissions that any single project is likely to generate, the cumulative effects of climate change and the developing and controversial state of climate science. The greenhouse gas guidelines discuss many options, but provide little concrete direction. For example, either quantitative or qualitative greenhouse gas significance assessments may be found acceptable. Lead agencies should consider the extent to which a project may increase or reduce greenhouse gas emissions as compared with existing conditions, any thresholds of significance the lead agency deems appropriate for the project and the extent to which the project complies with existing statewide, regional or local plans to reduce or mitigate greenhouse gases. A lead agency is thus expected to select a method to determine the significance of project-generated greenhouse gases, so long as
it adequately explains its reasoning, based on substantial evidence. Until generally accepted standards are developed, some courts may require environmental impact reports to examine a wide array of guidance and policy documents and provide a reasoned, evidence-based explanation as to why the lead agency has deemed certain greenhouse gas policy documents to be most relevant to the study project and how the project relates to such policies.

The new provision for tiering and streamlining, Section 15183.5 of the guidelines, outlines several methods to simplify analysis of the impact of project-generated greenhouse gas emissions. To the extent a programmatic approach to greenhouse gas emissions has been adopted following CEQA review—such as in a general plan, a long-range development plan or a separate plan to reduce greenhouse gas emissions—project-specific review may rely on such plan’s underlying report. Environmental impact report proponents should be aware of general plans, development plans, specific greenhouse gas reduction plans, and other programs that have jurisdiction over the project, and be prepared to include in the record a discussion of such plans. Greenhouse gas policy documents that have not been reviewed under CEQA may be used in the cumulative impacts analysis, but simply referring to such a plan and asserting that the project complies will not by itself suffice. At a minimum an environmental impact report must provide a reasoned, evidence-based analysis that explains why the lead agency finds a non-CEQA greenhouse gas-reduction plan to pertain to the project under review.

The Wal-Mart final environmental impact report attempted to base its greenhouse gas impacts analysis on the governor’s greenhouse gas strategies, a high-level strategy document adopted without CEQA review. The Wal-Mart court found the analysis inadequate because it was not supported by substantial evidence. The court could ultimately find a proffer of evidence demonstrating compliance with the governor’s strategies adequately addresses CEQA’s greenhouse gas emissions analysis requirement. During the time the Wal-Mart environmental report is being revised and re-circulated for public comment, however, developments in climate-change policy, science or the law may uncover new issues that project opponents will raise. The rapid evolution of climate-change policy and science thus increases the possibility of serial challenges to environmental impact reports.

While the guidelines make clear that reports must include greenhouse gas emissions analysis, they do little to clarify precisely what will be required for an analysis to be found adequate. Although a growing number of cities and counties are adopting climate-change and greenhouse gas-reduction plans, to date relatively few have been reviewed under CEQA. Until more CEQA-reviewed greenhouse gas-reduction plans are adopted and before specific approaches to greenhouse gas emissions analysis become generally accepted, project opponents will continue to challenge the approval of specific projects by focusing on greenhouse gas emissions analysis. Because being targeted for environmental activism can adversely affect a project’s budget, timing, and public perception, project stakeholders should consider early in the development cycle how CEQA greenhouse gas emissions analysis may affect the entitlements process. Addressing greenhouse gas issues early will maximize the opportunities to reduce delay, incorporate design flexibility and avoid unnecessary transaction costs.

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