

**NEW FEDERAL AND STATE GUIDANCE CALL FOR CLIMATE CHANGE IMPACT
REVIEWS FOR DEVELOPMENT PROJECTS**

If you are considering a project that would require federal funding, approval or land, or that involves development in the state of New York, it is now likely that you would be required to evaluate the project's potential climate change impacts under the National Environmental Policy Act ("NEPA") or State Environmental Quality Review Act ("SEQRA").¹ Recently proposed guidance under NEPA ("NEPA Guidance") from the White House Council on Environmental Quality ("CEQ") and guidance adopted under SEQRA ("SEQRA Guidance") by the New York State Department of Environmental Conservation ("NYSDEC") both require that climate change be considered for a wide array of public and private development projects. On the federal level, this may include the development of oil and gas fields, lumber operations, electricity transmission lines, gas pipelines, power plants, and renewable energy projects. In New York, affected projects range from large retail stores, factories, office buildings, and residential developments to landfills, roads, and mines.²

Will This Affect You?

Yes, more than ever, as the new NEPA and SEQRA Guidance call not only for the analysis of climate change impacts but also provide a benchmark by which environmental reviews can be evaluated for their sufficiency by agencies and courts. The environmental review process can take several years, entail significant expenses, and lead to litigation with interested parties over whether environmental evaluations were sufficiently prepared and administered.³ Often parties opposed to a project use the process as a tool to stop or delay development. In the climate change context, more than a dozen lawsuits have been filed since 2003, alleging that project proponents failed to consider climate change under NEPA. For example, in 2007 environmental groups brought suit alleging a failure to properly account for the impacts of greenhouse gas emissions ("GHGs") from new coal-fired power plants that were to be built by private

¹ Known generally as "environmental review statutes," NEPA and SEQRA are intended to ensure that, prior to governmental approval of a project, proponents have assessed potential impacts. NEPA covers a range of "major federal actions" that include not only projects conducted by federal agencies but also private undertakings that involve federal funding, approvals, or land. As federally funded projects have become more prevalent under the American Recovery and Reinvestment Act of 2009, NEPA has grown in prominence. SEQRA has an even broader expanse than NEPA, effectively operating as a statewide land-use planning statute that requires evaluation of potential impacts of private and public projects.

² Some other states besides New York that have such environmental review statutes (so-called "little NEPAs"), in varying forms, include California, Massachusetts, and Washington.

³ Once it is determined that certain impacts are "significant," proponents are required to analyze such and consider alternatives and mitigation actions through preparation of a detailed study known under both NEPA and SEQRA as an Environmental Impact Statement ("EIS"). Litigation often focuses on whether it was properly determined that an EIS was not needed or whether the EIS is sufficiently detailed.

developers and utilities using federal funding. Therefore, it is important that developers consider all relevant factors during the environmental review process, an area in which Willkie is experienced and can help you prepare environmental reviews and address any agency concerns or legal challenges.

When to Evaluate Climate Change Impacts.

While neither the NEPA Guidance nor SEQRA Guidance provides a bright-line rule for when climate change should be considered, any project that includes significant on-site sources of GHGs, large energy consumption, or that would induce a substantial increase in vehicular traffic, should consider assessing GHG emissions.

The NEPA Guidance states that a quantitative and qualitative assessment of GHG emissions may be meaningful when: (1) a proposed action is reasonably anticipated to cause direct annual emissions of 25,000 metric tons or above, or (2) when a long-term action has annual emissions of less than 25,000 metric tons but may have a meaningful cumulative impact. The NEPA Guidance also provides several examples of agency action that may warrant a GHG analysis: “approval of a large solid waste landfill, approval of energy facilities such as a coal-fired power plant, or authorization of a methane venting coal mine.” Meanwhile, the SEQRA Guidance provides no direction for making a determination about whether a project’s GHG emissions are “significant” and warrant inclusion in an Environmental Impact Statement (“EIS”). Rather, the SEQRA Guidance provides a detailed framework for analyzing GHG emissions and energy usage in an EIS after the significance determination has already been made.

How to Discuss Climate Change Impacts in an EIS.

Once a project proponent determines that GHG emissions warrant description in an EIS, the following should be considered: (1) the potential effect of the project on climate change, (2) the impact of climate change on the project, and (3) ways of mitigating both. Whereas the NEPA Guidance falls short on providing much detail on how to analyze and discuss GHG emissions, the SEQRA Guidance presents a detailed framework for doing so. On the other hand, while the SEQRA Guidance declines to describe how to evaluate the effects of climate change on a project, the NEPA Guidance offers very useful guideposts in this arena. Therefore, read together, these two guidance documents could provide a useful overall handbook on evaluating climate change generally:

1. **Projected GHG Emissions and Energy Usage.** As both guidance documents make clear, the first step a project proponent should take is to *quantify* a project’s GHG emissions and energy use. The SEQRA Guidance breaks down in detail the types of emission sources to analyze as follows:
 - **Direct Emissions - On-Site Stationary and Mobile Sources:** Examples include on-site combustion of fossil fuels (for example, for heat), methane emissions from landfills and any emissions from vehicles or mobile equipment used by or at the site.

- **Indirect Emissions - Off-Site Stationary and Mobile Sources:** This category includes off-site stationary sources used by the subject site, such as electric utility plants and the combined emissions from sources such as commuting employees, residents, suppliers/vendors, customers/users of the site, and transportation of waste from the site.
 - **Construction and Products Emissions:** The SEQRA Guidance calls for only a *qualitative* discussion of construction emissions (such as types of energy sources to be used), unless the construction phase or the extraction/production of materials or fuels is likely to be a significant fraction of the total emissions from the project. *See also* NYSDEC's 2010 SEQR Handbook at 121. Also, an evaluation of emissions from the use of products produced or sold at the project site is not required under the SEQRA Guidance, unless that product is fuel.
 - **Others:** If there are any additional significant sources of GHG emissions that fall outside the above categories, the SEQRA Guidance calls for their quantification. For example, deforestation that results in the removal of a significant carbon sink or subsurface disturbance of a potential site for geological sequestration of CO₂ may require analysis.
2. **Effects of Climate Change on the Project.** Climate change's impacts on the proposed project could include: how a structure's integrity may be exposed to a risk of floods, storm surges, or higher temperatures; how a natural resource, ecosystem, or human community may have increased vulnerability to climate change due to the project; and how the environmental impacts of the proposed project may be magnified by climate change. As discussed in the NEPA Guidance, a proposed project's sensitivity, location, and projected lifespan will determine the degree of consideration that climate change's potential impacts should receive. For example, long-term projects located in coastal areas would be expected to consider the effects of predicted rates of sea level rise.
 3. **Climate Change Mitigation and Project Alternatives.** Examples of ways to mitigate a project's impact on climate change are enhanced energy efficiency, lower GHG-emitting technology, renewable energy use, planning for carbon capture and sequestration, and capturing or beneficially using fugitive methane emissions. The NEPA Guidance also calls upon project proponents to evaluate the quality of any mitigation measures - looking to their permanence, verifiability, enforceability, and additionality. Likewise, the SEQRA Guidance calls for a quantitative comparison of projected GHG emissions or reductions from each alternative or mitigation measure and the reasons behind why any such measure may have been rejected. The SEQRA Guidance also gives preference to *on-site* GHG emissions reductions, with particular emphasis on influencing project design and maximizing energy efficiency, rather than off-site action such as the purchase of carbon credits. Examples include steps to minimize internal travel distances, reduce fuel costs, install on-site alternative energy sources, utilize energy-efficient designs, select recycled construction materials, and encourage mass transit or walking to the site. *See* 2010 SEQR Handbook at 122.

Meanwhile, facilities located in coastal areas or that are particularly prone to flooding or severe weather may be expected to evaluate climate change adaptation and monitoring measures. These could include hardening a facility against hurricanes, providing onsite back-up power, or establishing emergency preparedness procedures.

Steps Going Forward.

It is expected that federal, state, and local agencies nationwide will look to these guidance documents as a benchmark for evaluating GHG and energy use impacts for a broad array of projects. As a result, the analysis of GHG emissions and energy usage will likely become the norm for nearly every “major federal action” and large commercial or public project in New York and elsewhere. Undoubtedly, both guidance documents will also continue to evolve. The NEPA Guidance is still in draft form and will likely undergo revisions prior to finalization. Additional guidance from New York State is expected through the long-awaited general overhaul of SEQRA’s Environmental Assessment Form and a report from the New York State Sea Level Rise Task Force, both anticipated in the next year. Navigating the evolving requirements of federal and state environmental review statutes will require close attention to these developments, coordination with lead governmental agencies, and the support of qualified technical and legal professionals with experience in such matters.

* * * * *

If you have any questions regarding this memorandum, please contact E. Donald Elliott (202-303-1120, delliott@willkie.com), Bret C. Cohen (202-303-1153, bcohen@willkie.com), Kevin J. Klesh (212-728-8520, kklesh@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

May 19, 2010

Copyright © 2010 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York’s Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.