



April 10, 2023

Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Docket No. CEQ-2022-0005, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change

Today I respectfully offer comments on the White House Council on Environmental Quality's (CEQ) Jan. 9 interim guidance regarding consideration of greenhouse gas (GHG) emissions as part of National Environmental Policy Act (NEPA) reviews. For the following reasons, **ARTBA recommends CEQ rescind this guidance.**

CEQ's Interim Guidance Should be Classified as a Proposed Rule

CEQ has issued recommendations on how NEPA reviews should consider GHG emissions as "interpretive guidance." This action far exceeds the parameters of interim guidance by enacting new NEPA requirements that would take effect immediately and without consideration of input from the regulated community. CEQ attempts to mitigate the impact of its proposal by declaring that it "does not substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable." However, recent guidance by the Federal Highway Administration (FHWA) proves otherwise.

On Dec. 16, 2021, FHWA issued a [memorandum](#) entitled "Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America." The document outlined FHWA's preferences for projects being funded under the Infrastructure Investment and Jobs Act (IIJA). Critics of the memorandum objected, contending it constituted a rule. The nonpartisan Government Accountability Office (GAO) considered the matter and concluded "that where an agency describes actions the regulated community could take to ensure compliance with the law, such a statement is a rule."¹ FHWA subsequently issued a [superseding memorandum](#) to revise and clarify its policy in this regard

Here, the same logic applies. CEQ has issued "guidance" which describes additional requirements agencies should take to ensure compliance with NEPA, which is already a burdensome process. Specifically, the guidance states, "NEPA reviews should quantify proposed actions' GHG emissions, place GHG emissions in appropriate context and disclose relevant GHG emissions and relevant climate impacts and identify alternatives and mitigation measures to avoid or reduce GHG emissions." Even if the steps are classified as "recommendations," agencies may still view them as de-facto requirements. Additionally, if the so-called

¹ GAO Decision in the Matter of "Federal Highway Administration-Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America," File No. B-334032, p. 4 (Dec. 15, 2022).

“recommendations” are not followed, they may provide fodder for groups who seek to derail projects through litigation.

CEQ’s Interim Guidance Requires Agencies to Speculate on Future Events

CEQ instructs agencies to consider both “direct” and “indirect” GHG emissions during project reviews. While “direct effects” are straightforward emissions attributable directly to the project itself, “indirect effects” are speculative in nature. CEQ defines “indirect effects” as those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” However, CEQ does not quantify the terms “later in time,” “farther removed” or “reasonably foreseeable.” They remain vague and subject to interpretation, potentially leading to increased costs, delays and litigation.

Further, consideration of “indirect effects” requires project sponsors to speculate on future impacts of a transportation project outside of their control, like development that might occur well after a project is completed. CEQ provides no limits on what could be considered an “indirect effect,” nor does it suggest how agencies might conduct this type of analysis. Rather, CEQ suggests if an agency cannot derive an adequate range of GHG emissions, then it “provide a quantitative analysis and its rationale for determining that a quantitative analysis is not possible.” Thus, one analysis, though impossible to carry out, somehow results in yet another analysis, inevitably expanding the time it takes to complete NEPA reviews.

CEQ’s Interim Guidance Improperly Relies on the Social Cost of Carbon

CEQ relies on the Social Cost of Carbon (SCC) to quantify the benefits of its proposal. The SCC, which 13 federal agencies including the U.S. Department of Transportation (U.S. DOT) developed in 2010, is “an estimate of the monetized damages associated with an incremental increase in carbon in any given year.” ARTBA has repeatedly raised concerns about the SCC as an analytical tool and whether its methods have undergone an adequate notice and comment process in prior agency rulemakings. While CEQ may disagree with these concerns, such issues should be fully resolved before using the SCC as justification for this interim guidance.

CEQ’s Interim Guidance Will Likely Delay Many Investments in Our Nation’s Infrastructure

President Biden and Congress authorized an historic investment in our nation’s infrastructure through passage of the IIJA. The law’s intended benefits include timely delivery of projects to communities across the country. Notably, the IIJA seeks to complete the NEPA process for a project within two years². CEQ’s guidance directly conflicts with this objective by adding new requirements to the current NEPA process. This could exacerbate project delays, diluting the value of the IIJA’s investments in many cases, without demonstrable environmental benefits.

² Sec. 11301, Codification of One Federal Decision

In conclusion, ARTBA urges CEQ to reconsider this interim guidance for the aforementioned reasons, including its conflict with the IIJA's infrastructure investments.

Thank you for considering the views of the transportation construction industry on this important matter. We remain available for a continued dialogue on these issues at any time.

Sincerely,

A handwritten signature in black ink, reading "Nick Goldstein". The signature is written in a cursive, flowing style.

Nick Goldstein
Vice President of Regulatory & Legal Issues