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Climate Change and Sustainable Development Practice Group

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CEQ Draft Climate Change Guidance May Have Effect on Large Development Projects

On February 18, 2010, the White House Council on Environmental Quality (CEQ) issued draft guidance "for public consideration and comment" with regard to Federal agency consideration of greenhouse gas (GHG) emissions and climate change in evaluation of proposals for Federal actions under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. [http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf] Significantly, the term "Federal actions" includes Federal permitting of funding of private projects as well as solely governmental activities. 40 C.F.R. 1508.18(a). This draft guidance reinforces statements made by CEQ that "it is appropriate and necessary to consider the impact of significant Federal actions on greenhouse gas emissions and the potential for climate change to affect Federal activities evaluated through NEPA." "No Basis for Excluding Climate Impacts From NEPA Reviews, CEQ Says," N.Y. Times online "Greenwire, published: January 15, 2010. [http://www.nytimes.com/gwire/2010/01/15/15greenwire-no-basis-for-excluding-climate-impacts-from-ne-77722.html] Entities that may be affected by the rule may wish to consider commenting on it to EPA. CEQ will receive public comment on the guidance document until May 24, 2010.

It is already well established for projects that require any Army Corps of Engineers or EPA permitting, including those that involve wetlands, dredge and fill, and stormwater permitting to consider the effects of the projects on GHG emissions in their NEPA submissions.[1] CEQ's proposed guidance, if adopted, would help agencies to "analyze the environmental effects of GHG emissions and climate change when they describe the environmental effects of a proposed agency action." For projects that estimate "direct emissions" of at least 25,000 metric tons per year ("tpy") of CO_2-equivalent GHG, the guidance advises agencies to compile "a quantitative and qualitative assessment" to assist decision makers and for those decision makers to consider "measures to reduce GHG emissions, including consideration of reasonable alternatives." This 25,000 tpy standard, however, is not firm, and agencies may find that GHG emissions of less than 25,000 tpy may warrant further quantitative and qualitative evaluation and suggestions for reduction and reasonable alternatives.

What this signals to private enterprises caught in the NEPA process because of funding and permitting is a need for closer scrutiny of methods to reduce GHG emissions and to consider alternative strategies that will not produce emissions nearing the 25,000 tpy standard. Those entities should make it quite clear to the consultants who prepare their environmental impact statements and environmental assessments that the scope of their work will include this additional scrutiny.

Neither the guidance, nor the EPA Greenhouse Gas Reporting rule from which the guidance adopted the 25,000 tpy threshold define the term "direct emission," although EPA limits the reporting requirement of its rule to "stationary fuel combustion sources"

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If you have any questions about this update, please do not hesitate to contact:

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About the Climate Change and Sustainable Development Group

Committed to meeting client needs as they are affected by a rapidly changing environment, Wiggin and Dana's Climate Change and Sustainable Development Practice Group advises clients reacting to new mandates for change. In particular, the Practice Group advises with regard to the adoption of environmentally-desirable business practices, emerging business opportunities, and litigation associated with climate change and sustainable development. As a firm, Wiggin and Dana is committed to reducing the environmental impact of its offices. Wiggin and Dana's Green Team is implementing a plan to achieve the firm's goal of creating an environmentally sustainable workplace.

(and these sources include both combustion sources, e.g. boilers and furnaces, and non-combustion sources such as fugitive emissions from fuel storage tanks, gas transportation lines, gas flaring and venting, and heating/air conditioning/ventilation - "hvac" systems). The EPA reporting rule would not extend to certain "mobile sources."[2] On the other hand, EPA apparently includes mobile sources such as the trucks and other vehicles that are "owned or leased" by a regulated entity as "direct" emission sources.[3] All other "company related mobile source emissions, including employee commuting, employee travel, and upstream/downstream third party transpiration emissions" do not constitute "direct" emissions.

Both the published sources for EPA's interpretation of "direct" emissions referred to in the text above at footnotes 2 and 3 are based on the Greenhouse Gas Protocol (GHG Protocol) developed by the World Resources Institute (WRI) and the World Business Council for Sustainable Development (WBCSD). The GHG Protocol categorizes direct emissions as those that arise directly from a company's interested or controlled sources. Hence a cautious interpretation of the guidance would project that real estate development projects and built installations that emit 25,000 tpy of carbon dioxide or other greenhouse gas may be affected by the need to undertake broader NEPA analysis. This would probably apply to industrial parks and office complexes, hospitals, universities, and other large installations whose combined stationary and owned/leased mobile sources would likely meet the threshold.[4]

In conclusion, private sector projects that require Federal permitting and that estimate generating 25,000 tpy of GHG emissions will likely be subject to more rigorous review of their proponents' efforts to limit emissions, consider alternatives with lower emissions, or both. That 25,000 tpy threshold although limited to "direct emissions" includes owned and leased vehicles operated by the business, as well as its stationary sources.

Interested in learning more? Contact Barry Trilling at 203.363.7670 or btrilling@wiggin.com.

[1] See, e.g., Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008) (proposed federal action to set corporate average fuel economy standards (CAFÉ) would have a direct effect on GHG emissions); Border Power Plant Working Group v. Dep't of Energy, 230 F. Supp. 2d 997 (S.D. Cal. 2007) (GHG emitted from power turbines must be considered in NEPA analysis);

[2] See EPA Publication 430-K-08-003, Climate Leaders Greenhouse Gas Inventory Protocol Core Module Guidance [CLGGIPCMG} "Direct Emissions from Stationary Combustion Sources," [PDF]

[3] See EPA Publication 430-K-08-003, CLGGIPCMG "Direct Emissions from Mobile Combustion Sources," nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1004N8Y.txt

[4] According to Fred Taylor, a professional engineer and licensed environmental professional at Conestoga Rovers and Associates, an internationally recognized and "well respected" engineering, environmental consulting, construction firm, 25,000 tpy of CO_2 comprises an amount equivalent to consumption of 337,290 MMBTU per hour or about 250,000 gallons of fuel oil per year, or the equivalent of driving approximately 95 million miles in a standard-size automobile. In addition to such obvious fuel users as cement kilns, electric utilities, and oil and gas facilities, one could expect that rate of consumption/emissions at major manufacturing facilities to exceed the 25,000 tpy threshold. Emissions from certain other types of large facilities such as hospitals, college/university campuses, shopping centers and malls, and mixed use development facilities also could be above the threshold. A typical Walmart, for example, uses 1 MW hr of power in a year which is roughly four times the threshold; but there are huge variations facility to facility. The CEQ guidance does not address the methodology of estimating/calculating the emissions and whether independent verification of the emission estimates is needed, as it is in some jurisdictions such as in California.