

Regulatory Divergence May Be New Norm After GHG Guidance

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Since 1997, the White House Council on Environmental Quality has been working to issue guidance on how and when federal agencies should account for the effects of greenhouse gas emissions and climate change impacts under the National Environmental Policy Act.[1] The CEQ released its latest draft on Dec. 18, 2014, and is currently seeking feedback from the public.



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Issuance of the CEQ guidance is not a formal rulemaking process and the guidance will be nonbinding. However, the revised draft guidance states that it will be “effective immediately once finalized” and inevitably will be relied upon by an array of stakeholders. The CEQ’s interpretation of NEPA is given substantial deference,[2] and in some cases, the CEQ guidance has been “adopted” by the courts.[3]



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In response to several requests, the CEQ has extended the time period for the public to submit comments to March 25, 2015. Given the complexity of the guidance and its potential impact on actions subject to NEPA review, this is a prime opportunity for stakeholders to make their positions known on the challenges surrounding climate change impact analysis.



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Quantitative Analysis

Since 2007, there has been a significant uptick in GHG and climate change impact analyses in NEPA documents.[4] Such analyses frequently have been purely qualitative, but the revised draft guidance is likely to raise expectations about what level of analysis is adequate. The revised draft guidance recommends that agencies disclose a proposed action’s emissions — quantitatively — if the emissions are projected to hit a “reference point” of 25,000 metric tons per year or more of CO₂-equivalent.

This requirement will likely require agencies to perform some form of quantitative analysis for all projects going forward. After all, in the absence of such an analysis, it will be difficult for the agency in question to reasonably determine whether emissions from a specific project exceed this reference point. And for projects below the reference point, the revised draft guidance still recommends a quantitative disclosure if it can be “easily accomplished.” The CEQ’s further statement that “GHG estimation tools have become widely available” leaves one to wonder whether any reason exists where a quantitative analysis could not be “easily accomplished.”

As a result, it would seem that the days are numbered for an agency to claim — as the U.S. Forest Service does in its current guidance — that “[i]t is not necessary to calculate GHG emissions for most projects” or that “[w]ithout enough scientific understanding to draw conclusions about the significance of the quantitative results, qualitative discussions about the potential for greenhouse gases sequestered and emitted are more appropriate for disclosing climate change implications.”[5]

For the agencies already using GHG calculators, the revised draft guidance may not cause much of a stir. The CEQ has stated, “The revised draft guidance allows agencies to continue employing protocols that are currently working well.”[6] The CEQ pointed to the U.S. Department of Agriculture’s “COMET-Farm” tool as a good example. For its part, the Bureau of Land Management recently released guidance on three “toolkits” for estimating GHG and climate change impacts under various circumstances.[7]

Indeed, the revised draft guidance gives significant discretion to agencies to proceed appropriately in light of their unique mandates and circumstances. There is, however, concern that this will reinforce divergent practices among agencies. Also, this will leave significant questions unanswered until agencies exercise their discretion, one proposed action at a time.

Significance

In issuing the revised draft guidance, the CEQ stressed that the emission level reference point is not to be used as a measure of significance or to automatically require the preparation of a detailed environmental impact statement. This was a point of confusion when the CEQ issued the previous iteration of the GHG guidance, which said that the reference point was an indicator that the disclosure of impacts may be “meaningful.” Some commenters considered the term “meaningful” to be equivalent to “significant.” Indeed, the Sierra Club made exactly that argument in a challenge to an EIS issued by the Federal Energy Regulatory Commission in 2012. In that case, the Sierra Club argued that a proposed project would emit GHGs at a level much higher than the reference point, and therefore raised a “substantial question” as to whether these emissions would have a significant impact.[8] FERC disagreed and denied the Sierra Club’s request for a rehearing, based on the reasoning that the CEQ eventually “reaffirmed” in the revised draft guidance.

In this regard, it is important to note that the revised draft guidance states that the “CEQ does not expect that an EIS would be required based on cumulative impacts of GHG emissions alone.” Instead, and as is true for any other type of impacts, “significance” should continue to be determined based on context and intensity, using factors set out in CEQ regulations. As a result, the CEQ’s guidance, while helpful, does not dispositively address the issue of whether GHG emissions above or below the reference point are (or are not) significant, and additional challenges over agency determinations on this point should be expected in the future.

Other Open Questions

While the CEQ has stated that the revised draft guidance is intended to promote consistency (and to minimize litigation and project delays), it seems that the need for quantitative analysis and the methods for determining significance remain

open issues. In fact, the CEQ has said it will “welcome” public comments on those issues, as well as several other important ones, including:

- what constitutes a “reasonably thorough discussion of probable environmental consequences,” including both short-term and long-term beneficial and detrimental effects on GHG emissions;
- whether and how to consider GHG emissions and impacts of climate change at the programmatic, project or site-specific level of review;
- whether and how to use life-cycle analyses for GHG emissions;
- how to select the most appropriate protocols for assessing land management practices and their effect on carbon release and sequestration;
- how to address uncertainties associated with climate change projections and species and ecosystem responses; and
- how to assess comparative emissions scenarios associated with alternatives to the proposed action.

These fundamental and significant issues suggest that considerable uncertainty remains in the CEQ’s mind as to the best approach for climate change impact analysis and that this ongoing uncertainty will continue to spark disagreements on these issues between project proponents, federal agencies and other stakeholders.

In addition, highlighting “the difficulties in attributing specific climate impacts to individual projects,” the latest draft of the GHG guidance relies upon a “rule of reason.” This “guidance” will inevitably lead to disputes about what is reasonable. For example, the revised draft guidance recommends that agencies:

- consider “reasonably foreseeable” components of a proposed action and impacts with a “reasonably close causal relationship” to the proposed action;
- consider GHG impacts using “reasonable temporal and spatial parameters”;
- account for a proposed action’s “reasonably foreseeable incremental addition of emissions” when determining whether a proposed action would have a significant impact; and
- use a level of effort to analyze climate change impacts that is “reasonably proportionate” to a proposed action.

The need for mitigation also creates a topic for disagreement and litigation. While the revised draft guidance stresses that agencies need not select “the alternative with the lowest net level of GHG emissions,” it also sets forth a number of mitigation measures for making projects “more resilient to the effects of a changing climate” and states that agencies

“should consider adopting an appropriate mitigation monitoring program.” To the extent that agencies do not implement mitigation measures, it is likely that the guidance will be used as a basis to challenge certain projects. This would represent a departure from NEPA’s “fundamental distinction . . . between a requirement that mitigation be discussed . . . , on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.”[9]

Conclusion

The revised draft guidance is many years in the making. While the current iteration suggests that the CEQ may ultimately settle on broad principles and leave many issues open for interpretation, finalizing the guidance may be important largely for symbolic purposes. For example, after Massachusetts issued an analogous policy in connection with its own environmental impact review statute (MEPA), it concluded that “one of the major successes of the MEPA GHG policy is simply its existence.”[10]

In addition, while the previous version of the guidance specifically did not apply to land and resource management activities, the revised draft guidance has eliminated that carve-out and emphasized that GHG impacts should be part of NEPA analyses for all proposed federal agency actions. The revised draft guidance also includes repeated reminders for federal agencies to provide “reasoned” analysis based on accepted science. Finalizing the guidance will make climate change and GHG impacts an unmistakable part of the conversation when NEPA analyses are conducted.

Because it will be given deference, the CEQ’s guidance is certain to create an additional basis for disputes between federal agencies, project proponents and other stakeholders on the extent to which climate change and GHG emissions should be analyzed under NEPA. As a result, all stakeholders should carefully monitor the CEQ’s continued development of the guidance, as well as actions subsequently taken by specific federal agencies to implement the guidance.

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[1] CEQ issued draft GHG guidance in 1997 and again in 2010. Those guidance documents are available, respectively, at http://www.boem.gov/uploadedFiles/BOEM/Environmental_Stewardship/Environmental_Assessment/ceqmemo.pdf and <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>

[2] See *Andrus v. Sierra Club*, 442 U.S.347, 358 (1979) (the CEQ “was created by NEPA, and charged in that statute with the responsibility ‘to review and appraise the various programs and activities of the federal government in the light of the policy set forth in ... this act ..., and to make recommendations to the president with respect thereto’”).

[3] See, e.g., *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011) (joining at least three other circuits adopting the CEQ guidance as a framework for determining when NEPA analysis must be supplemented).

[4] Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, *U. Colo. L. Rev.* 473, 486 (2010).

[5] U.S. Forest Service, *Climate Change Considerations in Project Level NEPA Analysis* (Jan. 13, 2009), available at http://www.fs.fed.us/emc/nepa/climate_change/includes/cc_nepa_guidance.pdf.

[6] 79 FR 77802, 77806.

[7] See U.S. Bureau of Land Management, *Guidance — Use of Air Emissions Estimating Tools* (Nov. 24, 2014), available online at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2015/IM_2015-020.print.html.

[8] *Sabine Pass Liquefaction LLC*, 148 F.E.R.C. ¶ 61,200 at P 15 (Sept. 18, 2014), available online at <https://www.ferc.gov/whats-new/comm-meet/2014/091814/C-1.pdf>.

[9] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

[10] Comment letter from Ian Bowles, Secretary, Massachusetts Executive Office of Environmental Affairs, to Nancy H. Sutley, Chair, CEQ (May 24, 2010), available online at http://www.whitehouse.gov/files/ceq/mepa_comments_to_ceq_on_draft_ghg_guidance_under_nepa.pdf.