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Salazar Says Draft NEPA GHG Guide Leaves Host Of Unresolved Issues

Former Obama administration Interior Secretary Ken Salazar is warning that the White House's proposed guide for assessing greenhouse gas (GHG) emissions under the National Environmental Policy Act (NEPA) leaves open a host of questions that will prompt agencies to adopt divergent approaches, create inter-agency disputes and drive new litigation over how and when agencies assess projects' impacts.

Salazar together with attorneys Mark Kalpin and H. David Gold — all lawyers at Wilmer Cutler Pickering Hale and Dorr LLP — write in a recent legal analysis first published by Law360 that while the Council on Environmental Quality's (CEQ) draft guidance will eventually prompt agencies to conduct quantitative analyses of projects' GHG impacts, it still leaves open the question of how to conduct such analyses and whether projects' impacts are "significant" and require mitigation.

"While the CEQ has stated that the revised draft guidance is intended to promote consistency (and to minimize litigation and project delays), it seems that the need for quantitative analysis and the methods for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" that will continue to drive disputes, the analysis says.

Although the analysis echoes concerns raised by both industry groups and environmentalists, it likely carries more weight given it is coming from a former top administration official.

At issue is CEQ's revised draft guidance that recommends, among other things, that agencies quantify the GHG emissions from a proposed action if the emissions are likely to hit a "reference point" of at least 25,000 metric tons per year of carbon dioxide equivalent (CO2e). CEQ took comment on the document by March 25.

The threshold is significant because until now agencies have decided at their discretion whether to conduct such analyses. The Forest Service, for example, claims in its guidance that "[i]t is not necessary to calculate GHG emissions for most projects, while the Bureau of Land Management recently released guidance providing staff with toolkits for how to conduct such analysis.

The uncertainty has already drawn litigation from environmentalists, who have sued the Forest Service and other agencies to require them to conduct quantitative analysis — and more particularly, to require they use the administration's "social cost of carbon" (SCC) values to quantify projects costs and benefits.

But without specific requirements, the agencies have already taken divergent approaches. For example, the Forest Service announced April 7 that it will redo NEPA analysis for a proposed Colorado coal leasing project but likely without the SCC analysis.

The agency decided to proceed in this way even though a federal court ruled in *High Country Conservation Advocates, et al. v. United States Forest Service, et al.* that the initial analysis was arbitrary and capricious in part because it omitted quantitative GHG analysis. Several federal agencies immediately sought to blunt the rulings impact by arguing that qualitative analysis of GHGs is sufficient.

Environmentalists have also pointed to inconsistencies within agencies. For example, a BLM field office in Idaho recently conducted a detailed quantitative assessment — using SCC values — to quantify the cost of emissions from a proposed oil and gas leasing project but another BLM office in Utah declined to do such an analysis.

'Days Are Numbered'

But Salazar and the lawyers say the "days are numbered" for a federal agency to resist calculating GHG emissions from projects, despite prior efforts. "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" the 25,000-ton threshold, the attorneys say.

They also note that CEQ's revised guidance finds that GHG estimation tools have become "widely available," which "leaves one to wonder whether any reason exists" for a federal agency to claim such analysis is too difficult. "Finalizing the guidance will make climate change and GHG impacts an unmistakable part of the conversation when NEPA analyses are conducted," they say.

But the attorneys also write that CEQ's guide still gives "significant discretion" on how to calculate GHG emissions, spawning concern that this will reinforce diverse practices among agencies," and leaving several questions on how to implement NEPA GHG reviews in practice, according to the attorneys.

Open questions include whether emissions levels above 25,000 tons per year are automatically deemed "significant" under NEPA, as well as whether emissions below those levels are automatically insignificant.

The definition of significant matters because environmental impacts that rise to the level of "significance" under NEPA preclude a finding of no significant impact for a proposed project, and can trigger requirements for a more in-depth

environmental impact statement (EIS) — including requirements to mitigate GHGs.

CEQ's new draft guide does not automatically require an EIS based on cumulative impacts of GHG and concludes that environmental significance continues to depend on the context and intensity of the impacts using factors already included in CEQ regulations, according to the analysis. But this means that, "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 the attorneys cite include defining a "reasonably thorough discussion of probable environmental consequences"; whether and how to use lifecycle analyses for GHGs; whether and how to analyze GHG emissions and climate impacts at the programmatic, project or site-specific level; and how to analyze comparative emission scenarios related to project alternatives.

The revised guidance also includes a "rule of reason" the attorneys claim is likely to lead to disputes on issues including what components of a proposed action are reasonably foreseeable" and which impacts have a "reasonably close causal relationship to the proposed project."

And they also conclude the guidance appears to remain vague on the need for project mitigation creating an opportunity for "disagreement and litigation" — in part because the guidance calls agencies to consider adopting mitigation efforts but does not require that agencies select project alternatives with the lowest net level of GHGs. — *Doug Obey*
