CEQ ISSUES FINAL GREENHOUSE GAS GUIDANCE DIRECTING FEDERAL AGENCIES TO CONSIDER CLIMATE CHANGE IN THEIR NEPA REVIEWS

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Energy Alert

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On August 2, 2016, the White House Council on Environmental Quality ("CEQ") published a final version of its guidance to federal agencies requiring the consideration of greenhouse gas ("GHG") emissions[1] and effects on climate change when evaluating potential impacts of a federal action under the National Environmental Policy Act ("NEPA").[2] CEQ explains that it does not expect the Final Guidance to be applied to federal actions for which a NEPA review has been concluded or actions for which a final environmental impact statement or environmental assessment has been issued. As discussed in greater detail below, although the Final Guidance is not legally binding on federal agencies, various aspects of the document have the potential to delay permitting timelines as agencies determine whether and how to incorporate the Final Guidance into their reviews and very likely will add to the level of review that agencies undertake.

The Final Guidance substantively addresses a number of topics, modifying CEQ's earlier approach on a number of points. Four of the most significant topics are discussed in more detail below, namely:

1. CEQ's continuing position that federal agencies should include consideration of GHG emissions and climate change impacts in NEPA alternatives analyses;
2. CEQ's elimination of its 25,000 ton per year CO2-equivalent emissions threshold for triggering the guidance and replacement requirement that agencies instead consider the direct and indirect effects of all actions;
3. CEQ's clarification on the inclusion of GHG emissions from direct and indirect effects in a NEPA analysis; and
4. CEQ's reduced emphasis on the cost-benefit analysis and social cost of carbon.

Understanding the scope and limitations of this Final Guidance is critical for all entities whose interactions with federal agencies implicate NEPA, including energy production and infrastructure developers, users of federal lands for timber or livestock grazing, and investors in these activities. Furthermore, it is critical that project developers and permit applicants understand how the Final Guidance may affect their specific projects because although the Final Guidance purports to apply to agencies government-wide, federal agencies likely will apply the directives of the Final Guidance on a project-by-project basis. Therefore, the Final Guidance may have different implications for a particular project as compared with the implications for the project developer's industry as a whole.

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BACKGROUND

Congress enacted NEPA in 1970 to require federal agencies to prepare a detailed statement regarding the environmental impacts of and alternatives to "major Federal actions significantly affecting the quality of the human environment."[3] The CEQ serves to coordinate the implementation of NEPA across all federal agencies. To fulfill this coordination role, CEQ promulgates regulations for implementing NEPA, which agencies must follow, and issues guidance documents, such as the Final Guidance, which agencies consider as they meet their obligations under NEPA. CEQ's guidance documents do not carry the force and effect of federal law, but in practice agencies generally defer to CEQ's guidance as appropriate. Likewise opponents of an agency's action point to guidance documents as evidence that the agency did not meet its NEPA obligations.

CEQ has considered issuing guidance documents regarding GHG emissions and climate change for more than a decade. In February 2010, CEQ issued its first draft guidance on the subject.[4] Following public comment and input, CEQ issued a revised draft guidance document in December 2014.[5] Federal agencies and interested private entities filed additional public comments on the revised draft guidance. CEQ incorporated this extensive feedback into its Final Guidance.

FINAL GUIDANCE ADJUSTS CEQ'S EARLIER APPROACH BUT DIRECTS AGENCIES TO CONSIDER CLIMATE CHANGE IN NEPA REVIEWS

As noted above, CEQ made numerous adjustments between its draft proposals and the Final Guidance. We highlight three notable differences between the 2014 Draft and the Final Guidance below. However, it is important to note that although CEQ made a number of substantive changes, the overall thrust of the Final Guidance remains that federal agencies should consider GHG emissions and potential climate change impacts as part of their NEPA analyses.

CEQ Maintains that NEPA Requires Federal Agencies to Consider GHG Emissions and Climate Change Impacts Among Project Alternatives

Most importantly, CEQ confirms its view that federal agencies should consider GHG emissions and the possible climate impacts of their actions. To assist federal agencies in making a "reasoned choice between no action and other alternatives" and to compare mitigation measures, the Final Guidance suggests that agencies should use GHG emissions as a "proxy" for the potential impacts on global climate change.[6] The Final Guidance focuses on the importance of including GHG emissions in the comparison of different project alternatives, including the "no action" alternative.[7] The Final Guidance extends this concept of comparing the relative GHG emissions among project alternatives to the consideration of relative GHG emissions of alternative impact mitigation strategies, as described below.

The Final Guidance also reiterates that federal agencies should not ignore GHG emissions from individual projects on the basis that the subject federal action represents a miniscule fraction of overall global GHG emissions,[8] a position on which some federal agencies previously have relied. CEQ states that the fact that a single emission source represents a small percentage of global emissions is a statement about the nature of climate change.[9] By dismissing one project's GHG emissions as insignificant compared to global emissions,

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CEQ argues that agencies ignore data that may be useful in analyzing alternative actions and mitigation scenarios.

CEQ's Final Guidance also highlights the importance of mitigating the impacts from GHG emissions. Similar to the 2014 Revised Draft, the Final Guidance encourages federal agencies to ensure that any mitigation measures are "additional, verifiable, durable, enforceable, and will be implemented."[10] CEQ further encourages federal agencies to consider enhanced energy efficiency, lower GHG-emitting technology, carbon capture, sustainable land management practices, and beneficially using some GHG emissions such as methane as mitigation measures.[11]

CEQ Removes Static Threshold for GHG Emissions that Mandate Assessment under NEPA

In its 2014 Revised Draft, CEQ stated that federal actions that lead to emissions of 25,000 metric tons of CO2-equivalent or more should warrant a quantitative analysis of GHG emissions associated with project alternatives and mitigation measures.[12] However, CEQ removes this static threshold from its Final Guidance, stating that the guidance "does not establish any particular quantity of GHG emissions as 'significantly' affecting the quality of the human environment."[13]

In lieu of a hard and fast threshold for including emissions in a NEPA analysis, CEQ encourages federal agencies to evaluate GHG emissions and climate change issues just as they would with other "reasonably foreseeable" impacts from the proposed federal action. CEQ also states that federal agencies should not give GHG emissions and climate change impacts more weight than other assessed impacts. CEQ emphasizes that the "rule of reason" and proportionality inherent in NEPA and related federal jurisprudence should "caution" agencies against "providing an in-depth analysis of emissions regardless of the insignificance of the quantity of GHG emissions."[14]

Permitting timelines and other federal activity may face delays as federal agencies grapple with applying this guidance, particularly applying a rule of reason to limit the depth of an agency's review of relatively small GHG emissions. Because environmental opponents could challenge an agency's determination that a certain GHG emissions level is insignificant, agencies likely will work through this issue slowly and deliberately to ensure that their determinations will withstand judicial scrutiny. Moreover, by eliminating the 25,000 ton per year CO2-equivalent emissions threshold, the Final Guidance may in fact expand the universe of projects that will be covered by the guidance.

CEQ Suggests that Federal Agencies Should Include GHG Emissions from Direct and Indirect Effects of the Federal Action Under Review

Although the 2014 Revised Draft strongly suggested that it may be appropriate for agencies to consider both the upstream and downstream impacts of a project, CEQ's Final Guidance drops its reference to consideration of upstream and downstream impacts and instead provides additional clarity on how an agency should consider the GHG emissions from direct and indirect effects of the agency's action. In CEQ's view, agencies should quantify direct and indirect GHG emissions, including "reasonable projections and assumptions," for the reasonably foreseeable direct and indirect effects of the action.[15] CEQ uses the production of a fossil fuel, like coal, as an

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example, describing the exploration and production of the resource as the direct effects of the action and the impacts from combustion of the fuel as reasonably foreseeable indirect effect.

This analysis highlights the inherent tension in deeming any climate change impact as reasonably foreseeable. As the Final Guidance notes, one of CEQ's goals is to assist federal agencies in considering the reasonably foreseeable effects of their actions.[16] However, CEQ also recognizes that the impacts of climate change on the human environment are not attributable to any single action.[17] Therefore, the Final Guidance offers seemingly contradictory conclusions: a project's GHG emissions have reasonably foreseeable impacts on the global climate, but the nature of climate change renders the precise impact from a particular action impossible to reasonably foresee. CEQ does not resolve this contradiction, leaving it to agencies applying NEPA to consider this question.

As noted, CEQ's analysis of indirect effects under NEPA focuses on "reasonable foreseeability." However, federal courts have explained that in order to qualify as an indirect effect under NEPA, two elements must be satisfied. First, the alleged effect must be reasonably foreseeable and second, the federal agency's action must be the legally relevant cause of the alleged effect. In several recent cases appealing approvals of liquefied natural gas export terminals, a federal appellate court held that if another agency has authority over a connected necessary action, such as the issuance of a license to export the hydrocarbon commodity, then the upstream production of the commodity would not qualify as an indirect effect of the approval for construction of the export terminal under NEPA.[18] The court reasoned that the other agency's authority would sever the causal connection. Despite the Final Guidance, energy companies and others who operate under the jurisdiction of multiple agencies likely will seek clarity on which agency has authority to consider what impacts as "indirect effects" under NEPA, through administrative inquiry or litigation, to ensure that a NEPA analysis considers indirect effects that are both reasonably foreseeable and for which there is a sufficient causal connection.

CEQ De-emphasizes Cost-Benefit Analysis and "Social Cost of Carbon"

Finally, CEQ also adjusts its previous approach under the 2014 Revised Draft to de-emphasize the reliance on cost-benefit analyses and the Social Cost of Carbon (SCC) analytical tool. Although the Final Guidance refers to both cost-benefit analysis and the SCC, it makes clear that "NEPA does not require monetizing costs and benefits."[19] In fact, the Final Guidance explains that federal agencies should not use a monetary cost-benefit analysis when they are also considering important qualitative issues.[20] As in the 2014 Revised Draft, CEQ suggests appending a cost-benefit analysis to the NEPA document. For example, an agency could incorporate an administrative rulemaking's cost-benefit analysis to a NEPA review by reference, if appropriate.

CEQ also de-emphasizes the utility of the SCC analytical tool. In the 2014 Revised Draft, CEQ highlighted the SCC as a useful tool for NEPA analyses that monetizes costs and benefits. In contrast, the Final Guidance makes only a passing reference to the SCC in a footnote as a tool developed for federal rulemakings that can provide useful information in a NEPA review.[21] The body of the Final Guidance, however, emphasizes that an agency should disclose the assumptions, alternative inputs, and levels of uncertainty inherent to such an analysis.[22] Therefore, although the Final Guidance suggests that agencies may use the SCC beyond the rulemaking context for which it was developed, CEQ makes clear that NEPA does not require a monetized cost-benefit analysis and that agencies should describe the limitations of all models that purport to monetize the impacts of GHG emissions.

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IMPLICATIONS

As noted above, CEQ's guidance documents do not carry the force and effect of law. Despite its limited legal authority, the Final Guidance may serve to expand a reviewing agency's role under NEPA. Although CEQ repeatedly references the discretion of the federal agencies, federal agencies will look to this Final Guidance for instruction on how to meet their respective obligations under NEPA.

Federal agencies likely will attempt to comply with CEQ's guidance, though we expect that given the discretion that CEQ affords agencies in the Final Guidance, agencies' implementation of the guidance is likely to be inconsistent. These agencies will delay completion of their NEPA reviews to resolve any confusion arising out of CEQ's directives. Despite the agencies' efforts to comply, litigation is likely and it is possible that industry, environmental interest groups, or both will point to the Final Guidance to argue in a federal court appeal that an agency has or has not complied with NEPA.

Notes:

[1] CEQ defines GHGs as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, and sulfur hexafluoride.

[2] Christina Goldfuss, Chair, Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" (Aug. 1, 2016 ("Final Guidance").

[3] 42 U.S.C. § 4332(C).

[4] Nancy H. Sutley, Chair, Council on Environmental Quality, "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions" (Feb. 18, 2010)

[5] Council on Environmental Quality, "Draft Guidance" (Dec. 18, 2014), For more information regarding the 2014 revised draft guidance, please see our legal alert entitled "Greenhouse Gases and Environmental Review: CEQ's Expansive View on how NEPA Treats GHGs" (Feb. 18, 2015), http://www.klgates.com/greenhouse-gases-and-environmental-review-ceqs-expansive-view-on-how-nepa-treats-ghgs-02-18-2015/ ("2014 Revised Draft").

[6] Final Guidance at 10.

[7] *Id.* at 3 ("Identifying important interactions between a changing climate and the environmental impacts from a proposed action can help Federal agencies and other decision makers identify practicable opportunities to reduce GHG emissions, improve environmental outcomes, and contribute to safeguarding communities and their infrastructure against the effects of extreme weather events and other climate-related impacts.").

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.* at 19.

[11] *Id.*

[12] 2014 Revised Draft at 18.

[13] Final Guidance at 9–10.

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[14] *Id.* at 12.

[15] *Id.* at 16.

[16] Final Guidance at 2.

[17] Final Guidance at 11–12.

[18] *Sierra Club v. FERC*, No. 14-1275, slip op. at 17–18 (D.C. Cir. Jun. 28, 2016) (upholding the Federal Energy Regulatory Commission's approval of a liquefied natural gas export facility because federal law entrusts oversight of export of the natural gas commodity itself to a separate agency, the U.S. Department of Energy, which therefore severs the causal chain between the export facility and any increased natural gas production).

[19] Final Guidance at 32.

[20] *Id.*

[21] *Id.* at n.86.

[22] *Id.* at 33.

KEY CONTACTS



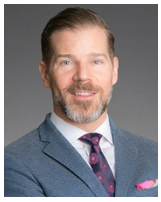
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