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CEQ Issues Measured Final Guidance for Federal Agencies in their Consideration of GHG Emissions in NEPA Reviews

On Aug. 1, 2016, the Council on Environmental Quality (CEQ) issued its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act (NEPA) Reviews. CEQ issued the guidance in an endeavor “to provide greater clarity and more consistency in how agencies address climate change in the environmental impact assessment process.” While this Alert focuses on NEPA reviews performed by the Federal Energy Regulatory Commission (FERC) of natural gas pipeline and liquefied natural gas projects, it is also instructive to companies contemplating the construction or financing of any major energy or infrastructure project.

Must NEPA Analyses Take into Account Greenhouse Gas (GHG) Emissions from Upstream Production and Downstream Consumption Sources?

Perhaps most notably, the CEQ’s Final Guidance removed the most controversial aspect of the Draft Guidance which was its explicit instruction that agencies’ NEPA analyses take into account GHG emissions from *upstream* and *downstream* sources. Specifically, the CEQ’s Draft Guidance of 2014 required that agencies’ NEPA analyses account for GHG “emissions from activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as *upstream emissions*) and as a consequence of the agency action (often referred to as *downstream emissions*).” In FERC Staff’s Feb. 23, 2014, Comments on the Draft CEQ Guidance, Staff argued it was important “that the Revised Draft Guidance *not direct agencies* to expand their NEPA analyses to consider the impacts of wide-ranging upstream and downstream activities that are neither causally related to the proposed action nor reasonably foreseeable.” FERC Staff further stated that, although the Revised Draft Guidance “encourages agency consideration of both upstream and downstream emissions, FERC Staff *does not* interpret this language to require consideration of life-cycle GHG emissions associated with natural gas production or consumption in all cases where FERC is reviewing applications for natural gas pipelines and liquefied natural gas (LNG) facilities.”

Presumably, FERC Staff's concern was heard by the CEQ as the Final Guidance removes the requirement that agencies' NEPA analyses take into account GHG emissions from *upstream* and *downstream* sources. Specifically, the language in the Final Guidance is, "[a]ctivities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for a proposed agency action or as a consequence of a proposed agency action, should be accounted for in the NEPA analysis." The CEQ's Final Guidance seems consistent with FERC's prior findings that the impacts of future gas production are not sufficiently causally linked to LNG projects under consideration, as discussed in our [July 2015 GT Alert](#). While proponents of FERC review of natural gas production and consumption emissions may continue to rely on the Final Guidance's references to "predicates for" and "consequences of" agency actions, the removal of the specific references to upstream and downstream emissions and the continuing requirement for a "reasonably close causal relationship" should be sufficient for FERC to continue to conclude in most cases that an examination of emissions from production sources and downstream consumption need not be analyzed under NEPA.

Quantitative Analyses

The Final Guidance also eliminates the reference to a proposal in the 2014 Draft Guidance that suggested use of a threshold of 25,000 metric tons of CO₂ equivalent for determining which projects should have quantitative analysis of GHG emissions. Specifically, in the 2014 Draft Guidance, CEQ provided a reference point of 25,000 metric tons of CO₂ emissions on an annual basis, below which a GHG emissions quantitative analysis would not be warranted unless quantification below that reference point is easily accomplished. CEQ stated in the Draft Guidance that "[t]his [wa]s an appropriate reference point that would allow agencies to focus their attention on proposed projects with potentially large GHG emissions."

In its Final Guidance, CEQ recommends more generally that agencies quantify a proposed agency's action's projected direct and indirect GHG emissions. The Final Guidance noted that "[a]gencies" should be guided by the principle that the extent of the analysis should be commensurate with the quantity of projected GHG emissions and take into account available data and GHG quantification tools that are suitable for and commensurate with the proposed agency action." In a measured statement, the Final Guidance notes: "[t]he rule of reason and the concept of proportionality caution against providing an in-depth analysis of emissions regardless of the insignificance of the quantity of GHG emissions that would be caused by the proposed agency action." Rather, the Final Guidance advises agencies to quantify projected greenhouse gas emissions of proposed federal actions when the necessary quantification tools, methodologies, and data inputs are available. The Final Guidance further notes that "[w]hen an agency determines that quantifying GHG emissions would not be warranted because tools, methodologies, or data inputs are not reasonably available, the agency should provide a qualitative analysis and its rationale for determining that the quantitative analysis is not warranted." In a nod of deference to the agencies' expertise, the CEQ notes that "[t]he determination of the potential significance of a proposed action remains subject to agency practice for the consideration of context and intensity."

Cumulative Effects

In a brief reference to cumulative effects, the Final Guidance merely notes that "for most Federal agency actions CEQ does not expect that an EIS would be required based *solely* on the global significance of cumulative impacts of GHG emissions, as it would not be consistent with the rule of reason to require the preparation of an EIS for every Federal action that may cause GHG emissions regardless of the magnitude of those emissions." In other words, for the purposes of NEPA, "the analysis of the effects of GHG emissions is essentially a cumulative effects analysis that is subsumed within the general analysis and discussion of climate change impacts." As such, "direct and indirect effects analysis for GHG emissions will adequately address the cumulative impacts for climate change from the proposed action and its alternatives and a separate cumulative effects analysis for GHG emissions is not needed."

Alternatives

The Final Guidance suggests that in its alternatives analysis, agencies should consider alternatives that mitigate GHG emissions. Specifically, “[a]gencies should consider reasonable alternatives and mitigation measures to reduce action-related GHG emissions or increase carbon sequestration in the same fashion as they consider alternatives and mitigation measures for any other environmental effects.” The CEQ reiterated, however, that neither NEPA, the CEQ Regulations nor their Final Guidance require “the decision maker to select the alternative with the lowest net level of emissions.”

In a final nod to agency deference, the CEQ also notes that “[a]gencies should make decisions using current scientific information and methodologies... CEQ does not expect agencies to fund and conduct original climate change research to support their NEPA analyses or for agencies to require project proponents to do so.”

The Final Guidance directs that agencies should apply this guidance to “all new proposed agency actions when a NEPA review is initiated,” but that “[a]gencies should exercise judgment when considering whether to apply this guidance to the extent practicable to an on-going NEPA process.”

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