Environmental Update

February 2023

New CEQ Guidance Takes Most Significant Action on GHG Emissions Since 2016

In early January, the Council on Environmental Quality (CEQ) published interim guidance (2023 Interim Guidance) instructing federal agencies on how to assess the effects of greenhouse gas (GHG) emissions and climate change when evaluating major federal actions under the National Environmental Policy Act (NEPA). NEPA is a federal procedural statute that requires agencies to assesses the environmental impacts of decisions that may significantly impact the human environment. The 2023 Interim Guidance is effective immediately. CEQ has chosen to simultaneously undertake a public comment period that closes on March 10, 2023, following which it will either revise the 2023 Interim Guidance in response to public comment received or finalize its current guidance as is.

The 2023 Interim Guidance directs agencies to "quantify proposed actions' GHG emissions, place GHG emissions in [the] appropriate context and disclose relevant GHG emissions and relevant climate impacts, and identify alternatives and mitigation measures to avoid or reduce GHG emissions." Federal agencies will now be expected to analyze GHG emissions and their effects throughout the life of a proposed project. This is the most significant action CEQ has taken on GHG emissions since 2016.

NEPA GHG Emissions Guidance Under Prior Administrations

The 2023 Interim Guidance builds upon CEQ's 2016 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 (2016 GHG Guidance). Issued during the Obama administration, the 2016 GHG Guidance represented the culmination of over six years of efforts to modernize NEPA reviews and provide the public with predictability and certainty on how federal agencies would quantify potential climate impacts and, in turn, compare alternatives and consider mitigation measures. The 2016 GHG Guidance contained the following instructions:

- Federal agencies should analyze and quantify GHG emissions in their consideration of a major federal action when available methodology and data exists.
- Agencies should draw upon their prior expertise to determine whether to perform the quantitative and qualitative GHG emissions analysis at a broad, programmatic or project or site-specific level.
- Agencies should prioritize mitigation measures that would promote climate resiliency.
- Agency decision-making should rely upon the best available science.

The Trump administration rescinded the 2016 GHG Guidance in 2019 and issued in its place draft guidance that did not require federal agencies to weigh impacts attributable to GHG emissions more significantly than other environmental impacts. The draft guidance also notably discouraged agencies from developing agency-specific practices to evaluate GHG emissions and advised that estimating the social costs of GHG was no longer relevant to a NEPA analysis.

President Biden rescinded the 2019 draft guidance shortly after taking office in 2021 and directed CEQ to begin revisions to other Trump-era revisions to NEPA. CEQ has chosen to undertake this review in phases, with Phase 1 completed on April 20, 2022. We envision that a long-awaited Phase 2 will include additional regulations to modernize NEPA to address climate change and environmental justice.

Some Key Provisions of CEQ's 2023 Interim Guidance

- The 2023 Interim Guidance revives the controversial and often-litigated social costs of carbon GHG analysis, an estimate that allows "monetization (presented in U.S. dollars) of the climate change effects from the marginal or incremental emission of GHG emissions, including carbon dioxide, methane, and nitrous oxide." CEQ reasons that expressing climate effects in metric tons can be difficult to understand and too abstract for the public, instead opting to translate metric dollars into the familiar currency of U.S. dollars for the three GHGs that represent more than 97% of U.S. GHG emissions. CEQ has included the tool to assist agencies and the public in making more informed selections of alternative actions.

- CEQ is directing agencies to consider the reasonably foreseeable (both direct and indirect) emissions associated with a proposed action and reasonable alternatives. Direct effects include the "reasonably foreseeable effects that are caused by the action and occur at the same time and place." On the other hand, "[i]ndirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action." CEQ encourages agencies to rely upon the best available information, which may require requesting the appropriate data from project proponents. If the relevant information is not available, agencies should use their best effort to formulate a range of potential direct and indirect emissions.

- For proposed actions increasing the supply of oil, natural gas, or renewable energy generation and involving potential changes to the energy mix, federal agencies are encouraged to conduct a substitution analysis of how a proposed action and its alternatives will impact the resulting source. This is particularly useful for actions related to the extraction, transportation, refining, combustion, or distribution of fossil fuels. Ultimately, the guidance states that an agency's NEPA analysis should be guided by a rule of reason such that its level of effort should be proportionate to the potential GHG impacts. The analysis for projects with few emissions or an overall reduction in GHG emissions should be less detailed than those with larger emissions.

- The Biden administration is extending its focus on environmental justice into the 2023 Interim Guidance by including reminders and recommendations to federal agencies on how to incorporate these considerations into their NEPA analyses on climate change. One such reminder is that people of color and populations with low incomes are often most at risk for the environmental hazards driven by climate change. Another equally important fact is that these same communities often face barriers that prevent them from engaging on these issues. To combat these challenges, CEQ encourages agencies to engage these communities in the scoping and project planning process to best understand their climate-related vulnerabilities. Agencies should also continue to use NEPA tools like foreseeable effects, reasonable alternatives, and other mitigation measures to avoid climate-related impacts to these communities. Agencies also can consider whether climate-related risks disproportionately affect certain communities by analyzing cumulative effects, which are effects that result from the incremental effects of the proposed action when added to the effects of other past, present, and reasonably foreseeable actions, irrespective of the agency or individual undertaking such actions.

- The 2023 Interim Guidance encourages agencies to provide tiered GHG emissions aggregate analyses for long-range energy, transportation, resource management, or similar programs. These analyses can start with a broad programmatic NEPA document, which can then be incorporated by reference into future NEPA analyses conducted at the project level. CEQ provides a few examples of project-specific actions that could tier to a programmatic NEPA review, including construction of transmission lines; construction of wind, solar, or geothermal projects; approval of grazing leases; and granting of rights-of-way. CEQ also believes that programmatic NEPA reviews can serve as an efficient barometer to measure the performance of broad-scale government efforts to adopt sustainable practices like GHG admissions avoidance.

Implications

The 2023 Interim Guidance is a major step in meeting the Biden administration's stated commitment to combat the effects of climate change through the analysis of the environmental impacts of GHG emissions. Though the guidance does not alter NEPA's legal requirements, as with prior CEQ climate guidance, courts will rely upon it and provide it some deference as part of an analysis of whether an agency's decision was reasonable.

The Biden administration intends to use the 2023 Interim Guidance to achieve the dual purpose of pollution reduction and reduced litigation risk for federal actions related to the Bipartisan Infrastructure Law and the Inflation Reduction Act. The guidance will create increased burdens and scrutiny for project proponents that will likely result in more data collection and extensive NEPA reviews, which will include more robust alternatives analysis and create lengthier wait times for agency adjudications.

FOR MORE INFORMATION

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