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Council on Environmental Quality Seeks Public Comment on Draft NEPA Greenhouse Gas Emission Guidance

The Council on Environmental Quality has published Draft Guidance to federal agencies to evaluate the effects of greenhouse gas emissions under the National Environmental Policy Act. The Draft Guidance is largely consistent with the approach taken by the Federal Energy Regulatory Commission in recent natural gas infrastructure orders. Comments are due on July 26, 2019.

INTRODUCTION

On June 26, 2019, the Council on Environmental Quality (“CEQ”) published new draft guidance to clarify the scope of review federal agencies should undertake when considering the effects of greenhouse gas (“GHG”) emissions under the National Environmental Policy Act (“NEPA”) and related regulations.¹ The Draft Guidance is intended to replace CEQ’s prior GHG-related guidance, which was adopted in 2016 and later rescinded pursuant to an Executive Order in 2017.² The Draft Guidance is largely consistent with the approach taken by the Federal Energy Regulatory Commission (“FERC”) in recent natural gas infrastructure orders.

CEQ’S DRAFT GUIDANCE

NEPA is a procedural statute that requires federal agencies to analyze the environmental impacts of any major federal action significantly affecting the quality of the human environment.³ Although NEPA does not mandate any particular substantive outcomes, it requires an agency to consider the direct and reasonably foreseeable indirect effects of a proposed action.⁴

The Draft Guidance states that “[a] projection of a proposed action’s direct and reasonably foreseeable indirect GHG emissions may be used as a proxy for assessing potential climate effects.”⁵ While direct effects are caused by an action and occur at the same time or place, indirect effects are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable. Thus, the proposed guidance suggests that quantification of emissions is sufficient to meet an agency’s obligation to assess effects of emissions.

CEQ suggests that agencies should attempt to quantify potential emissions if the level of potential emissions are “substantial enough to warrant quantification” and if it is practicable based on available data and tools.⁶ To the extent an agency determines quantification would be impracticable or overly speculative, the agency should provide an explanation for its determination not to quantify emissions. Additionally, if an agency opts not to quantify emissions due to a lack of reasonably available

data or tools, the agency should undertake a qualitative analysis of potential emissions, which may use sector-specific emissions data.

If available, agencies may also reference local, regional, national, or sector-wide emission estimates or inventories to provide context for the proposed action's emissions. When coupled with a qualitative discussion of the effects of GHG emissions based on literature review, this approach would also satisfy the agency's cumulative impacts analysis requirement. A separate analysis of cumulative impacts—*i.e.*, impacts resulting from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions—would not be required.

The Draft Guidance would clarify agencies are not required to adopt new NEPA procedures or to undertake new research or analysis to evaluate GHG emissions or climate impacts; rather, agencies may rely on existing information, data, and tools, including pre-existing programmatic analyses.

The Draft Guidance suggests that agencies consider the potential effects of GHG emissions in their comparisons of reasonable alternatives to the proposed project. The Draft Guidance further indicates that agencies should describe the affected environment to enable comparisons between the current and reasonably foreseeable future state of the environment as affected by the proposed action and reasonable alternatives.

The Draft Guidance specifically confirms that agencies are not required to use the Social Cost of Carbon tool or other methodologies designed to monetize the costs and benefits of a project. CEQ further notes it is permissible for an agency to monetize certain effects that are more amenable to a cost-benefit analysis while declining to monetize other effects, such as GHG emissions; however, the agency should explain its decision to monetize only some effects.

ANALYSIS

FERC's analysis of the GHG emissions associated with natural gas pipelines and liquefied natural gas terminals has come under increasing scrutiny over the past few years. Decisions by the U.S. Court of Appeals for the

District of Columbia Circuit have raised questions regarding the adequacy of FERC's evaluation of climate effects. For example, in *Sierra Club v. FERC*, the court vacated FERC's approval of a natural gas pipeline project and directed FERC either to include a quantitative estimate of downstream GHG emissions or to explain in greater detail why it could not do so in its NEPA review on remand.⁷ More recently, in *Birckhead v. FERC*, the court left FERC's NEPA review intact but expressed concerns over the agency's failure to obtain additional information regarding a project's upstream and downstream effects, including GHG emissions.⁸

Meanwhile, the members of the current four-person Commission have split over the extent of review required when evaluating a project's GHG emissions. As discussed in an earlier [client alert](#),⁹ in recent natural gas infrastructure orders, FERC has disclosed the emissions that may result from a project,¹⁰ but has concluded that it cannot determine a project's incremental GHG-related physical impacts or whether the project's contribution to climate change will be significant.¹¹

In concurring opinions, Commissioner LaFleur has gone a step beyond quantifying the estimated emissions of a project and advocated development of a framework to evaluate the *significance* of such emissions.¹² Commissioner LaFleur has also disagreed with FERC's practice of omitting GHG emissions from its cumulative impacts analysis. Commissioner Glick has released sharp dissents that criticized FERC's alleged failure to satisfy NEPA and the Natural Gas Act by inadequately analyzing climate impacts.¹³ Commissioner Glick has urged the Commission to establish a methodology such as the Social Cost of Carbon tool to consider the significance and potential harm of GHG emissions. According to Commissioner Glick, it is arbitrary and capricious for FERC to monetize certain aspects of a project (*e.g.*, socioeconomic benefits), and not others (*e.g.*, the harms of climate change).

CEQ's proposal largely conforms with the approach taken in FERC's recent decisions. Although the Draft Guidance encourages the quantification of potential GHG emissions, it defers to the agency as to whether and when quantification is practicable. The Draft Guidance states that quantification of emissions is a suitably "proxy for assessing potential climate effects" and responds to Commissioner LaFleur's concerns regarding an analysis of

cumulative impacts of GHG emissions. The Draft Guidance does not incorporate or otherwise address Commissioners LaFleur's or Glick's calls for a significance evaluation, and moreover, reiterates that agencies are not required to develop new methodologies or undertake new analyses or research when assessing potential GHG emissions. Consistent with FERC's position in recent decisions, CEQ confirms that agencies are not required to employ the Social Cost of Carbon tool or similar methodologies to evaluate GHG emissions and affirms the appropriateness of monetizing some but not all of a project's effects.

As the Draft Guidance would not constitute binding regulation, CEQ notes that its application in a particular case would depend on the facts and circumstances.¹⁴

CONCLUSION

CEQ requests public comment on the Draft Guidance by July 26, 2019.

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1. Council on Environmental Quality, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, Draft Guidance, 84 Fed. Reg. 30097 (June 26, 2019) ("Draft Guidance").

2. *Id.*

3. 42 U.S.C. § 4332(2)(C) (2018).

4. 40 C.F.R. § 1508.8 (2019).

5. Draft Guidance at 30098.

6. *Id.*

7. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

8. *Birkhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019).

9. *FERC Commissioners Approve the Venture Global Calcasieu Pass LNG Export Project but Signal Divisions in Approaches to Evaluating GHG Emissions* (Mar. 2019), available at blankrome.com/publications/ferc-commissioners-approve-venture-global-calcasieu-pass-lng-export-project-signal.

10. *See Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 at P 112 (2019) ("Venture Global") ("The final EIS estimated that operation of the Calcasieu Pass LNG terminal, including the terminal power plant facility, may result in emissions of up to 3,906,336 metric tons per year of carbon dioxide equivalent (CO₂e). . . . The direct operational emissions of the LNG terminal could potentially increase CO₂e emissions based on the 2016 levels by 0.07 percent at the national level."). *See also Port Arthur LNG, LLC*, 167 FERC ¶ 61,052 at P 137 (2019); *Driftwood LNG, LLC*, 167 FERC ¶ 61,054 at P 99 (2019) ("The final EIS estimated that operation of the projects . . . may result in direct and indirect emissions of up to 10,641,908 tons per year of [CO₂e].").

11. *See Venture Global* at P 113.

12. *Id.* (LaFleur, Comm'r, concurring).

13. *Id.* (Glick, Comm'r, dissenting).

14. Draft Guidance at 30097, n.1.