

SEPTEMBER 2021

VOL. 21-8

PRATT'S

# ENERGY LAW

## REPORT



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ISBN: 978-1-6328-0836-3 (print)  
ISBN: 978-1-6328-0837-0 (ebook)  
ISSN: 2374-3395 (print)  
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]  
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY  
LAW REPORT 4 (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# FERC and CEQ Prepare to Tackle Key NEPA-GHG Issues

*By Ethan G. Shenkman, Sandra E. Rizzo, and Emily Orler\**

*The authors explain that stakeholders interested in how climate change is addressed in the context of the National Environmental Policy Act should closely follow developments from the Council on Environmental Quality and the Federal Energy Regulatory Commission.*

Two federal agencies are gearing up to release new policies, ostensibly to bring long-awaited clarity and predictability on one of the thorniest issues in National Environmental Policy Act (“NEPA”) practice—the assessment and mitigation of greenhouse gas (“GHG”) emissions. The Council on Environmental Quality (“CEQ”) and the Federal Energy Regulatory Commission (“FERC”) have both announced their intention to change policy direction from the Trump Administration, and FERC has already begun implementing its strategy.

## **WHAT IS CEQ’S PLANNED STRATEGY?**

In the coming months, the CEQ will reveal its plan for revising the NEPA regulations and guidance for analyzing GHG emissions. The CEQ announced in the Spring 2021 Unified Regulatory Agenda that it will be undertaking a two-phased approach for revising the CEQ’s NEPA implementing regulations that were finalized by the Trump Administration in July 2020 (“2020 Rule”). In phase 1, “narrow changes” will be proposed in July, and in phase 2, “broader changes” will be proposed in November 2021.<sup>1</sup> The CEQ will also be issuing a notice related to the GHG emissions guidance in September 2021.<sup>2</sup> Indeed, these will be among the highest priority items for the CEQ’s chair, Brenda Mallory. CEQ should be able to proceed with its strategy without the intervention of the courts, as the U.S. District Court for the Western District of Virginia’s dismissed a challenge by conservation groups to the 2020 Rule on

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<sup>1</sup> See Office of Management and Budget, Office of Information and Regulatory Affairs (“OIRA”), *National Environmental Policy Act Implementing Regulations Revisions—RIN: 0031-AA05*; OIRA, *National Environmental Policy Act Implementing Regulations Revisions—RIN 0331-AA07*.

<sup>2</sup> See OIRA, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change—RIN 0331-AA06*; see also CEQ’s rescission of Trump’s proposed NEPA climate guidance (Mar. 31, 2021).

grounds of standing and ripeness on June 21, 2021,<sup>3</sup> and the four other challenges to the 2020 Rule have been stayed.

## HOW HAS FERC ALREADY BEGUN IMPLEMENTING ITS STRATEGY?

Under the leadership of new Chair Richard Glick, FERC is wasting no time in charting its own course on the GHG emissions impacts of natural gas projects. In February 2021, FERC issued a Notice of Inquiry (“NOI”) seeking input on some of the same NEPA/GHG issues that CEQ must address, among other issues, with the intent of updating FERC’s 1999 policy statement on the certification of new interstate natural gas transportation facilities (the 1999 Certificate Policy Statement).<sup>4</sup> As of June 2021, FERC has received over 150 comments on the NOI.

In the NOI, FERC posed a series of questions relating to how it should determine whether a proposed natural gas project meets the public convenience and necessity test under Section 7 of the Natural Gas Act. Among other things, FERC sought input on how it should consider impacts to environmental justice communities. FERC also raised fundamental questions about the evaluation of GHG emissions impacts and alternatives under NEPA. For example, FERC sought feedback on the:

- Scope of GHG emissions impact assessment (e.g., whether and how to consider upstream and downstream impacts);
- Calculation of a project’s carbon footprint (e.g., whether and how to determine if a project’s GHG emissions may be offset by reduced GHG emissions from the project’s operations, such as displacing more carbon-intensive fuel sources);
- Assessment of the “significance” of a project’s carbon footprint;
- Appropriate use of the social cost of carbon in NEPA analysis; and
- Whether FERC has authority to impose mitigation for GHG emissions and if so, which GHG emissions should be mitigated and how.

In the meantime, in March 2021, FERC issued an order approving the Northern Natural’s South Sioux City to Sioux Falls A-line Replacement project. In that order, the Commission established new precedent for how it will

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<sup>3</sup> *Wild Virginia v. Council on Env’t Quality*, No. 3:20CV00045 (W.D. Va. June 21, 2021).

<sup>4</sup> FERC, *Certification of New Interstate Natural Gas Facilities*, 86 Fed. Reg. 11,268 (Feb. 24, 2021), <https://bit.ly/2SAZa2b>; see also *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000).

assess the significance of a natural gas project's GHG emissions impacts.<sup>5</sup> In addition, following a June 2021 decision by the U.S. Court of Appeals for the D.C. Circuit vacating FERC approval of the Spire STL Pipeline, there is new urgency to issue a revised Certificate Policy.<sup>6</sup>

### WHAT ARE THE KEY ISSUES TO WATCH?

Two of the more important questions that both FERC and CEQ will be addressing, which have widespread implications, are:

- How should the “significance” of GHG emissions be measured?
- What is the appropriate use of the “social cost of carbon” metric in NEPA reviews?

“Significance” is a key NEPA concept because it determines the type of documentation required to support a project, such as a Categorical Exclusion, Environmental Assessment, or Environmental Impact Statement, and whether mitigation must be considered. Until recently, FERC has questioned whether there is a reliable, objective means of determining the “significance” of GHG emissions.<sup>7</sup> Chairman Glick, while a commissioner, vigorously argued that “significance” can be measured objectively, and as chairman, signaled that he intends to modify FERC's position in his direction.<sup>8</sup>

In its first project-specific foray into the “significance” of GHG emissions since Chairman Glick took the helm, FERC suggested that it would be fruitful to compare the project's GHG emissions to (1) total national GHG emissions (i.e., 5.903 billion MT CO<sub>2e</sub> in 2018), and (2) total emissions in the relevant state. FERC further suggested that it could compare the project's emissions to a state's GHG emissions reduction targets. FERC's exploration of this issue has widespread implications because CEQ previously has refrained from establishing a GHG emissions-specific test for “significance.”<sup>9</sup>

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<sup>5</sup> *Northern Natural Gas Company*, 174 FERC ¶ 61,189 (Mar. 22, 2021).

<sup>6</sup> *Env't Def. Fund v. Fed. Energy Regul. Comm'n*, No. 20-1016 (D.C. Cir. June 22, 2021).

<sup>7</sup> See, e.g., *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 67 (2018) (finding that the commission “cannot make a finding whether a particular quantity of greenhouse gas emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change” because there is “no standard methodology” to make such a determination).

<sup>8</sup> *Northern Natural Gas Company*, 174 FERC ¶ 61,189, at P 33 (Mar. 22, 2021).

<sup>9</sup> CEQ, *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* 11, 13 (Aug. 1, 2016), <https://bit.ly/2SxMgSm> (“When considering GHG emissions and their significance, agencies should use appropriate tools and methodologies for quantifying GHG



In the NOI, FERC proposed a variety of potential methods for measuring significance of GHGs, including by: (1) comparing a project's GHG emissions to various policy-based metrics (e.g., carbon budgets in international agreements and state or regional GHG emissions reduction targets), and/or (2) assessing the project's potential impacts on climate change indicators (e.g., ocean acidification, sea-level rise, or storm events).

Other federal and state and local agencies with NEPA-like statutes have been grappling with this question of significance. In California, for example, agencies established "significance" tests based on bright-line numeric values,<sup>10</sup> efficiency metrics (e.g., percent reduction from "no action" or "business as usual" alternatives),<sup>11</sup> and compliance with GHG reduction plans (e.g., cap-and-trade).<sup>12</sup>

The "social cost of carbon" ("SCC") is an estimate of the monetized damages caused by GHG emissions; it was developed for use in agency rulemaking processes to inform cost-benefit analysis. Environmental interest groups have advocated that it also should be used in NEPA reviews. Other parties, and some courts, have questioned whether a tool developed mainly for regulatory cost-benefit analysis is appropriate in the NEPA context, and cautioned that reliance on the SCC metric could skew the results of environmental impact assessments if not applied carefully.

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emissions and comparing GHG quantities across alternative scenarios. . . . The determination of the potential significance of a proposed action remains subject to agency practice for the consideration of context and intensity, as set forth in the CEQ Regulations."); *see also* CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions* (June 26, 2019; rescinded Feb. 19, 2021), <https://bit.ly/3dqaMfy> (not addressing significance); CEQ, *Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews* (Dec. 24, 2014), <https://bit.ly/3AdeEKq> (clarifying that the proposed and later abandoned 25,000 MT CO<sub>2</sub>e/year reference point for quantitative disclosure was "not a substitute for an agency's determination of significance").

<sup>10</sup> *See, e.g.,* Bay Area Air Quality Management District, *CEQA Air Quality Guidelines* (May 2017), <https://bit.ly/3hfhFBz> (establishing a significance threshold of 10,000 metric tons per year ("MT/yr") of CO<sub>2</sub>e for stationary sources).

<sup>11</sup> *See, e.g.,* *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 228 Cal. Rptr. 3d 23 (Cal. 1st Dist. Ct. App. 2015), *as modified on denial of reh'g* (Feb. 17, 2016) (finding that calculating an efficiency metric by comparing the project's GHG emissions to a hypothetical business-as-usual scenario can be appropriate, but that it was not appropriate to then compare that project-specific efficiency metric to statewide GHG reduction targets).

<sup>12</sup> *See* 14 CCR § 15064.4; *see, e.g.,* *Ass'n of Irrigated Residents v. Kern Cty. Bd. of Supervisors*, 225 Cal. Rptr. 3d 463 (Cal. 5th Dist. Ct. App. 2017) (upholding a finding that a refinery modification project would have less than significant GHG emissions based on compliance with California's cap-and-trade program).

FERC and other federal agencies generally have declined to use the SCC in NEPA reviews. They have asserted that (1) cost-benefit analysis is not required under NEPA, and (2) even where the agencies are analyzing the socioeconomic benefits of a proposal to monetize values, the SCC still is not an appropriate tool for project-specific analysis.<sup>13</sup> The D.C. Circuit and other courts generally have upheld agency decisions not to use the SCC so long as the agency justified that decision.<sup>14</sup> Whereas the Trump CEQ rejected use of SCC in NEPA reviews,<sup>15</sup> the Obama CEQ characterized it as an optional tool.<sup>16</sup>

The Biden-Harris Administration has already taken action to re-integrate the SCC into federal decision-making.<sup>17</sup> Through Executive Order 13990, President Biden re-established the Interagency Working Group on the Social Cost of Greenhouse Gases (“SC-GHG”), which has already published a set of interim social costs. Importantly, in comments submitted to FERC, CEQ notes that

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<sup>13</sup> See, e.g., *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (explaining that the SCC is not appropriate for project-level NEPA review because: “(1) EPA states that ‘no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations’ and consequently, significant variation in output can result; (2) the tool does not measure the actual incremental impacts of a project on the environment; and (3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews.”) (footnotes omitted).

<sup>14</sup> Compare *Appalachian Voices v. Fed. Energy Regulatory Comm’n*, No. 17-1271 (D.C. Cir. Feb. 19, 2019) (finding that the agency adequately documented in the record its decision not to apply the SCC); *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1196 (D. Mont. 2020), appeal dismissed, No. 20-35410 (9th Cir. June 25, 2020) (same), with *WildEarth Guardians v. Bernhardt*, No. CV 17-80-BLG-SPW (D. Mont. Feb. 3, 2021) (affirming an earlier decision finding the agency’s decision not to use SCC arbitrary and capricious because it quantified the benefits of the project and failed to provide an explanation of why SCC was not an appropriate tool for calculating the costs of the project’s GHG emissions).

<sup>15</sup> CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions* (June 26, 2019; rescinded Feb. 19, 2021), <https://bit.ly/35ZzMWT> (“SCC estimates were developed for rulemaking purposes to assist agencies in evaluating the costs and benefits of regulatory actions, and were not intended for socio-economic analysis under NEPA or decisionmaking on individual actions, including project-level decisions.”).

<sup>16</sup> CEQ, *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* 32 (Aug. 1, 2016), <https://bit.ly/2UcsyFD> (“[T]he Federal social cost of carbon (SCC) estimates the marginal damages associated with an increase in carbon dioxide emissions in a given year. Developed through an interagency process committed to ensuring that the SCC estimates reflect the best available science and methodologies and used to assess the social benefits of reducing carbon dioxide emissions across alternatives in rulemakings, it provides a harmonized, inter-agency metric that can give decision makers and the public useful information for their NEPA review.”) (emphasis added).

<sup>17</sup> See *Identifying the means to an end: The role of the social cost of carbon* (Apr. 28, 2021).

“estimates of the SC-GHG can be a useful measure to assess the climate impacts of GHG Emission changes for Federal proposed actions”—signaling that SC-GHG may be included in CEQ’ forthcoming guidance.<sup>18</sup>

In the NOI, FERC sought input on a number of important questions about the SCC, including:

- Whether there is a statutory basis for its use;
- Which discount rate should be applied;
- Whether and how the SCC is relevant to analyzing the “significance” of a proposed project;
- The extent to which the SCC is relevant to determining a project proponent’s mitigation obligations; and
- Whether there are alternatives to the SCC.

The answers to these questions will have national implications.

#### **HOW WILL THESE EFFORTS INTERSECT?**

CEQ and FERC will need to grapple with many of the same questions relating to NEPA and GHG emissions. Will FERC’s process get ahead of CEQ and potentially create precedent for other agencies? Or will FERC’s answers to these thorny questions be understood as specific to FERC’s unique circumstances and statutory scheme? Will CEQ be able to craft government-wide guidance that answers these and other questions for agencies with diverse missions and authorities? Or will agencies follow FERC’s lead and establish agency-specific guidance/rules? Stakeholders interested in how climate change is addressed in the NEPA context will want to follow developments in both agencies closely.

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<sup>18</sup> See <https://bit.ly/3donPOo>.