CEQ's Climate Guidance Walks a Tightrope on the Energy Transition

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IN its long-awaited guidance on the National Environmental Policy Act and climate change, the Council on Environmental Quality opens by warning that "the United States faces a profound climate crisis and there is little time left." But in other contexts, the administration acknowledges that addressing the climate crisis will require massive investments in new infrastructure to facilitate the transition to a lower carbon energy system. And many stakeholders believe that one of the primary obstacles to this energy transition is a slow, balkanized, and inefficient environmental review and permitting process. Practitioners are busy sorting out whether CEQ's new guidance will help or hinder this infrastructure build-out.

The new interim guidance, issued January 2023, instructs agencies on how to analyze greenhouse gas emissions and climate change impacts under NEPA. CEQ opened a comment period, where it will consider suggested modifications, but the guidance is effective immediately. It will apply to all future projects, but not to projects approved in the past, and agencies have discretion with respect to currently pending decisions.

This is the fifth version of the guidance issued since 2010

The purpose of the guidance is to improve consistency across federal agencies, as they grapple with the difficult questions that have arisen in analyzing and disclosing the climate change-related impacts (and benefits) of federal agency permitting and funding decisions. It addresses many hot button questions.

For example, when should agencies quantify the GHG emissions associated with a project? Unlike previous guidance, which gave agencies discretion, CEQ now recommends that agencies should routinely quantify the direct and indirect GHG emissions of the proposed action and any reasonable alternatives, including the no-action alternative. It explains further that agencies should disclose both "gross" and "net" GHG emissions.

What is the scope of the GHG analysis? The new guidance clarifies that indirect emissions include both upstream and downstream emissions, and recommends that analysis of fossil fuel projects should include all downstream GHG emissions.

What role should the Social Cost of GHG play in NEPA review? The SC-GHG is a metric for monetizing the climate change-related societal impacts of GHG emissions on a dollar-per-ton basis. Unlike previous guidance, which opined that the SC-GHG is not appropriate in NEPA, or left this issue to agency discretion, CEQ now encourages agencies to use the SC-GHG "in most circumstances."

May agencies rely on economic "substitution analysis" in assessing energy projects? CEQ supports the use of such tools—albeit with certain caveats—through which agencies assess how increasing the supply of a particular energy resource could affect availability and use of other energy resources. This can happen when one energy source produces GHG emissions, but will displace a higher-emitting source in the market.

Is there a numeric threshold for "significance"? CEQ did not provide a bright line rule for when a project is considered to have significant impacts. Instead, the council encourages agencies to explain the significance of anticipated GHG emissions by providing contextual comparisons. For example, agencies may explain how the proposed action and alternatives will help meet or detract from governmental and international climate goals.

The guidance also encourage agencies to "mitigate GHG emissions to the greatest extent possible"; clarifies that agencies can use programmatic NEPA analyses to facilitate more efficient project-specific reviews; and, importantly, instructs agencies to consider the nexus between climate impacts and environmental justice.

CEQ seems to acknowledge the need for streamlining projects necessary to the energy transition by suggesting that a detailed analysis of lifetime GHG emissions is not required for projects that principally serve to reduce emissions or that will result in a net reduction, with only short-term or minor increases—citing offshore wind as an example. But CEQ only scratches the surface of the energy transformation envisioned by the administration—and by Congress in the Inflation Reduction Act—which will require massive investments in electric vehicles, hydrogen hubs, carbon capture and sequestration sites, sustainable aviation fuel and other biofuels, renewable natural gas, geothermal energy, and more.

Developing these clean energy technologies at scale will require vast new networks of transmission lines and pipelines, not to mention electric charging stations, biofuel delivery infrastructure, expansion of public transportation, development of battery and other energy storage systems, and the mining of critical minerals.

Practitioners will be awaiting "Phase Two" of CEQ's proposed changes to its NEPA regulations to see if these issues will be addressed further.