

NEPA AND CLIMATE CHANGE: THE LONG AND WINDING ROAD TO CLARITY ON ANALYSIS REQUIREMENTS

By Michael D. Smith

Some federal agencies have been considering climate change impacts in many of their NEPA analyses for well over a decade now, but there remains substantial uncertainty concerning how to scope such analyses and how much detail to go into for NEPA reviews on this topic. A substantial contributor to this uncertainty is the somewhat convoluted history of climate change impacts assessment guidance for NEPA practitioners issued by the White House Council on Environmental Quality (CEQ). The good news is there may be some clarity regarding direction and guidance for these analyses coming in the near future, as explained below.

In 2016, after six years of deliberation and input and two draft versions, CEQ finalized their guidance document *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*. The 34-page document was quite detailed and directed federal agencies to quantify the direct and indirect GHG emissions of a proposed action for most actions (for smaller actions CEQ recommended that a qualitative analysis be provided) and weigh climate change impacts in considering alternatives and in analyzing mitigation strategies. The guidance also advised agencies for the first time to consider applying the Interagency Working Group's (IWG) Social Cost of Carbon (SCC) tool to quantify the costs of increased GHG emissions associated with proposed actions in NEPA reviews. In addition, the guidance directed agencies to consider what some term "reverse" impact assessment in relation to climate change – providing analyses where relevant of the effects of climate change *onto* their action and to the resources their action was affecting.

During the Trump Administration, in response to direction in a presidential executive order, CEQ withdrew the 2016 Climate Change Guidance in April 2017, and later replaced it with a new draft GHG guidance in June 2019 titled *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*. The draft guidance recommended a much narrower approach to considering GHG emissions in NEPA review than the 2016 guidance. The quantification of GHG emissions from a proposed action was limited to when "the amount of those emissions is substantial enough to warrant quantification" and "it is practicable to quantify them using available data and GHG quantification tools." The guidance also recommended that an agency consider whether quantifying GHG emissions would be "practicable" and "overly speculative" and to explain the basis for such a conclusion. In addition, the guidance had no discussion on whether climate change effects on federal actions and/or resources affected by federal actions needed to be addressed in NEPA reviews.

However, the document remained in draft form as the prior administration never finalized it. Meanwhile, federal courts continued issuing decisions ruling that some federal agency NEPA reviews inadequately analyzed climate change impacts, especially for projects with more substantial levels of GHG emissions such as fossil energy projects including oil and natural gas pipelines, oil and gas leasing and production, and coal mining.

More recently, the change in presidential administrations early this year has quickly led to significant actions and changes related to environmental and climate change policy. In a Federal Register notice published on February 19, 2021, the Council on Environmental Quality (“CEQ”) formally rescinded the 2019 draft GHG guidance issued by the Trump Administration. The rescission of the 2019 draft guidance was ordered by President Biden’s Executive Order (EO) 13990 on *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, which was signed on President Biden’s first day in office on January 20, 2021.

In addition to directing CEQ to rescind its prior guidance, EO 13990 set forth numerous other directives implementing the administration’s new climate change policy, including an order reinstating the Interagency Working Group (the group had been disbanded in the Trump Administration) to develop an updated SCC valuation to better quantify the economic harms associated with the emission of carbon dioxide and other GHGs. Under the order, the IWG was directed to publish its new interim SCC value within 30 days of the Order and publish a final SCC value by January 2022. This development is particularly important in relation to GHG analysis in NEPA reviews, as several federal courts in recent years have ordered federal agencies to include the SCC metric as a proxy for “end-state” climate change effects that stem from GHG emissions caused by a federal action.

CEQ’s notice rescinding of the 2019 draft guidance also importantly states that in the interim period until new guidance is provided, federal agencies “should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 CEQ Guidance.” Thus, the notice’s language clearly affords agencies permission and flexibility to use the 2016 GHG Guidance for current NEPA reviews.

As directed by EO 13990 and indicated in their February 19 notice, CEQ is expected to review and update the 2016 GHG Guidance this year. As part of its ongoing review of prior Administration policies, the White House has also committed to evaluating CEQ’s revised 2020 NEPA Regulations developed in the previous administration that went into effect in September, 2020, and CEQ is likely to undertake a new rulemaking to reverse and revise those regulations. It is reasonable to expect that CEQ may address climate change impact analysis in their new rulemaking.

In addition to these more NEPA-specific actions, on January 27, 2021 President Biden signed EO 14008 on *Tackling the Climate Crisis at Home and Abroad*. The EO has a broad scope, addressing foreign and domestic policy by establishing policies and

directives for almost every federal agency and touching upon nearly all sectors of the economy. The Order also specifically directs federal agencies to use every tool at their disposal to address the climate crisis. The language in this order and other early Biden Administration announcements suggest that going forward agencies will be directed in future revisions to regulations and guidance to explicitly link social equity and environmental justice concerns with climate change impact analyses.

As a result of all these recent administration actions, NEPA practitioners should expect both substantial changes and ultimately better direction on how to address climate change in their NEPA reviews in the coming months.