

Committee on Natural Resources
Rob Bishop, Chairman
Hearing Memo

May 11, 2015

To: Natural Resource Committee Members

From: Majority Committee Staff
Subcommittee on Energy and Mineral Resources

Hearing: *“The Obama Administration’s CEQ Recently Revised Draft Guidance for GHG Emissions and the Effects of Climate Change.”*

The Committee on Natural Resources full committee hearing will take place on **Wednesday, May 13, 2015 at 10:00 a.m. in room 1324 of the Longworth House Office Building.** The hearing will focus on President Obama’s CEQ Recently Revised Draft Guidance for GHG Emissions and the Effects of Climate Change.

Policy Overview

- The National Environmental Policy Act of 1969 (NEPA), mandates federal agencies to take a “hard look” at the “environmental consequences” of their actions.¹ This includes a requirement that a detailed statement of environmental impacts be prepared for all major federal actions, called an “Environmental Impact Statement” (EIS)². According to a recent GAO Report, federal agencies are conducting several thousands of NEPA reviews annually on impacting a huge number of activities, though the real cost and time associated with these NEPA reviews is actually not measured or tracked.³
- The Obama Administration’s Council on Environmental Quality, (or CEQ), has sought to force consideration of greenhouse gas (GHG) emissions through NEPA environmental reviews, and is now seeking to formalize federal agencies’ compliance through CEQ-direct guidance. In December 2014, CEQ released a 31-page Revised Draft Guidance document to “provide Federal agencies direction on when and how to consider the effects of greenhouse gas (GHG) emissions and climate change in their evaluation of all proposed Federal actions...”⁴

¹ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983).

² U.S. Congressional Research Service, *The National Environmental Policy Act: Background and Implementation*, Summary, November 16, 2005, Linda Luther.

³ <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=319306>

⁴ Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate change in NEPA Reviews, 79 Fed. Reg. 77801, 77823 (Dec. 24 2014).

- The Draft Guidance:
 - Requires federal agencies to “use the projected GHG emissions... as the proxy for assessing a proposed action’s potential climate change impacts.”⁵
 - Establishes 25,000 metric tons of CO2 emissions as a reference point at which disclosure of future projected GHG emissions would be triggered.⁶ An agency may also be required to disclose even below 25,000 metric tons “if it is easily accomplished.”⁷
 - Instructs agencies to include “direct, indirect, and cumulative effects,”⁸ “regardless of the ability to control or regulate those effects.”⁹ This would include all upstream, downstream, and cumulative impacts.¹⁰
 - Instructs agencies to include a controversial measurement of the “Social Cost of Carbon” into their analyses.
 - Applies to **all federal actions**, including land and resource management actions, including transportation, energy, forestry, and a host of other economic activities.
 - Requires that agencies consider the implications of climate change on the environmental effects of the proposed project.¹¹
- While CEQ states its Revised Draft Guidance “is not a rule or regulation... and is not legally enforceable,”¹² nevertheless, federal agencies are “encouraged” to apply the guidance “to **all new agency actions moving forward and, to the extent practicable, to build its concepts into currently on-going reviews.**”¹³ (Emphasis added). An agency who does not apply the Revised Draft Guidance can face pressure from other agencies to do so in the environmental review process. Furthermore, if litigation ensues, the guidance may be used to show that an agency failed to properly consider environmental impacts.
- The CEQ Guidance, as written, is likely to result in significant increased costs, delays, and uncertainty for a host of economic and energy-related activities nationwide. The Guidance has already generated a number of comments from those who may be adversely impacted by NEPA review delays and costs.

⁵ *Id.* at 77825.

⁶ *Id.* at 77827-28.

⁷ *Id.* at 77828.

⁸ *Id.* at 77825.

⁹ *Id.* at 77825 n. 24.

¹⁰ *Id.* at 77825-26.

¹¹ *Id.* at 77824.

¹² *Id.* at 77823 n. 4.

¹³ *Id.* at 77831.

Witnesses Invited

Panel I

The Honorable Christy Goldfuss
Managing Director
Council on Environmental Quality
The White House
Washington, DC

Mr. Roger R. Martella Jr.
Partner
Sidley Austin LLP
Washington, DC

Mr. John Christy
Professor of Atmospheric Science and State Climatologist
National Space Science and Technology Center
University of Alabama
Huntsville, Alabama

Mr. Ray Clark
President
Rivercrossing Strategies, LLC
Birmingham, Alabama

Hearing Focus

This hearing focuses on the CEQ's 31-page Revised Draft Guidance released for public comment in December of 2014. This Revised Draft Guidance provides instructions and guidance for agencies on the inclusion of GHG emissions into NEPA reviews.

NEPA requires that a federal agency take a "hard look" at the environmental impacts of all federal actions that significantly impact the environment.¹⁴ Currently, if a federal action's GHG emissions are deemed to significantly impact the environment or measurably contribute to global climate change, those emissions are currently required to be included in any NEPA review. However, many agencies to date that have included GHG emissions into their NEPA reviews have concluded that "GHG emissions from an individual agency action will have small, if any, potential climate change effects."¹⁵ As a means to require agencies comprehensively consider GHG emissions, the Obama Administration's CEQ has released a Revised Draft Guidance that provides instructions on including GHG emissions into NEPA reviews.

¹⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

¹⁵ 79 Fed. Reg. at 77825.

New Two-Pronged GHG Analysis Required

The Revised Draft Guidance requires an agency to make a two-pronged analysis when considering GHG emissions. The first requirement is that an agency quantitatively analyzes GHG emissions by using “the projected GHG emissions... as... [a] proxy for assessing a proposed action’s potential climate change impacts.”¹⁶ It establishes a reference point of 25,000 metric tons of CO₂ emissions, at which point a quantitative analysis of the projected GHG emissions would be expected.¹⁷ It also makes clear, however, that even below that level, a quantitative analysis is required if it can be “easily accomplished.”¹⁸

In conducting an analysis of GHG emissions, the Revised Draft Guidance requires that an agency include upstream, downstream, and cumulative impacts into its GHG emissions analysis.¹⁹ An agency also must “incorporate by reference applicable agency emissions targets such as applicable Federal, state, tribal, or local goals for GHG emissions reductions to provide a frame of reference...”²⁰ It also suggests that agencies include the “Social Cost of Carbon” to monetize costs and benefits, a highly controversial and subjective measurement established by a working group named a few years ago by CEQ.²¹ In addition, the guidance also establishes a one-size-fits all approach by extending the original draft guidance to include Land and Resource Management Actions.²²

The second requirement is that the agency must include the implications and possible impacts of climate change generally on the environmental effects of a proposed action.²³ An agency does not have to show a causal relationship or direct link from the federal action and global climate change. Instead, agencies should consider the impacts of global change and all the environmental consequences climate change may or may not have on their proposed action. CEQ gives the example of a project that uses water from a stream that may possibly have diminished water capacity due to decreased snow pack in the mountains as a result of global climate change.²⁴

Although the draft guidance is, by CEQ’s own admission, mere guidance and non-binding²⁵, agencies are expected to adopt the draft guidance into their NEPA guidelines and regulations. An agency who does not apply the Revised Draft Guidance can face pressure from other agencies to do so in the environmental review process. Furthermore, if litigation ensues, the guidance may be used to show that an agency failed to properly consider environmental impacts.

¹⁶ *Id.*

¹⁷ *Id.* at 77827.

¹⁸ *Id.* at 77828.

¹⁹ *Id.* at 77825-26.

²⁰ *Id.* at 77827.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 77824.

²⁴ *Id.* at 77828.

²⁵ *Id.* at 77823 n. 4.

Background

The National Environmental Policy Act of 1969 (NEPA)

In 1970, NEPA declared a national public policy regarding the environment and to increase awareness regarding the effects of federal actions on the environment.²⁶ The stated goals of NEPA are to:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.²⁷

NEPA is generally considered to be mostly a procedural statute.²⁸ In other words, aside from taking a hard look²⁹ at the environment, it does not force any action beyond complying with the procedural requirements of the law. It does not require the elevation of environmental concerns over any other.³⁰ Once the procedural requirements of NEPA have been satisfied, the law requires no further action. The Supreme Court has explained that “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”³¹

In addition to declaring a national policy on the environment, NEPA also created the CEQ within the Executive Office of the President. In 1979, CEQ issued regulations that helped establish the intensive NEPA process in effect today. These regulations established the procedural requirements of NEPA and included: requiring agencies to conduct a scoping process, requiring an EIS be conducted in draft and final stages, determining the criteria of what constituted a “federal action,” defining the roles of “lead agencies” and “cooperating agencies,” and defining the public’s role and public comment process.

²⁶ 42 U.S.C. 4321.

²⁷ 42 U.S.C. 4331.

²⁸ U.S. Congressional Research Service, *The National Environmental Policy Act: Background and Implementation*, November 16, 2005, Linda Luther.

²⁹ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983).

³⁰ *Id.*

³¹ *F. Dale Robertson vs Methow Valley Citizens Council*, 490 U.S. 332 (1989).

Individual agencies are charged with creating their own, agency-specific, regulations and processes for implementing CEQ regulations, within the parameters of their own jurisdiction, to implement the NEPA process. However, agency regulations are bound by the CEQ regulations.

The NEPA Process

The heart of the NEPA process is the Environmental Impact Statement (EIS). The preparation of an EIS is a lengthy and intensive process by which the agency conducts a thorough analysis of all the environmental impacts of a federal action. An EIS is only required if the federal action has a “significant environmental impact.”³² CEQ regulations require an EIS be done in parts, with a draft EIS released and available for public comment and a subsequent final EIS released that addresses all substantive comments, after which the agency releases a Record of Decision.³³

If an agency is unsure if the action will have a significant impact on the environment, the agency can first conduct an Environmental Assessment (EA) to determine if the federal action will have a significant impact. If the agency, after completing an EA, reaches the conclusion that the federal action will not significantly impact the environment, the agency can release a Finding of No Significant Impact (FONSI). Alternatively, the agency can continue with an EIS. Agencies also can work with CEQ to create a category of actions that are conducted often by the agency and have been found to generally not impact the environment in any significant way. These actions are then categorically excluded from the requirement of conducting an EIS in what is known as a Categorical Exclusion (CatEx).³⁴

CEQ’s Draft Guidance

In 2010, the Obama Administration’s CEQ released Draft Guidance on implementing GHG emissions into their NEPA reviews. This Draft Guidance was available for public comment and provided guidelines, instructing agencies on how to incorporate GHG in all NEPA reviews. The original 2010 Draft Guidance provided an exemption for land and resource management actions.³⁵

In December 2014, CEQ released a Revised Draft Guidance. Notably, the Revised Draft Guidance expanded the original draft guidance to cover **all federal actions**, including land and resource management actions.³⁶ The Revised Draft Guidance states that its purpose is to “provide Federal agencies direction on when and how to consider the effects of greenhouse gas emissions and climate change in their evaluation of all proposed Federal actions” in accordance with NEPA and the CEQ Regulations.³⁷

³² U.S. Congressional Research Service, *The National Environmental Policy Act: Background and Implementation*, CRS-17, November 16, 2005, Linda Luther.

³³ 40 CFR Parts 1500-1508.

³⁴ 40 CFR Parts 1500-1508.

³⁵ 79 Fed. Reg. at 77803.

³⁶ *Id.* at 77827.

³⁷ *Id.* at 77823.

The Revised Draft Guidance did not go through the official rulemaking process nor does it change or modify any CEQ regulations. The Guidance, in a footnote, states that “[t]his guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is *not legally enforceable*... This document *does not establish legally binding requirements* in and of itself. [emphasis added]”³⁸

However, agencies are expected to adopt the Guidance as they promulgate their own regulations and NEPA processes. An agency who does not apply the Revised Draft Guidance can face pressure from other agencies to do so in the environmental review process. Furthermore, if litigation ensues, the guidance may be used to show that an agency failed to properly consider environmental impacts. In effect, whether adopted through agency regulations by individual agencies or adopted through the courts, the Guidance will have the practical effect of a properly promulgated and binding rule.

CEQ’s Revised Draft guidance states that agencies must consider both “the potential effects of a proposed action on climate change *as indicated by its GHG emissions* [emphasis added],”³⁹ and the implications of climate change generally on the environmental effects of the proposed project⁴⁰ in their NEPA reviews:

NEPA and CEQ Regulations require that an agency, as it conducts their NEPA reviews, consider all the environmental impacts of federal actions, including direct, indirect, and cumulative impacts.⁴¹ Therefore, GHG emissions, to the extent that a federal action’s emissions have an impact on the environment by contributing significantly to global climate change, are theoretically already required under current NEPA requirements. Of concern, however, CEQ regulations require that there be **a causal relationship between the federal action and the environmental impacts and that the environmental effects be “reasonably foreseeable.”**⁴²

The Supreme Court has interpreted this to be a stronger relationship than a “but, for” relationship and similar to proximate cause in tort law.⁴³ An agency is under no obligation to include actions beyond their ability to control⁴⁴ or beyond the sovereign jurisdiction of the United States.⁴⁵ An agency is bound in its NEPA analysis by the jurisdictional limitations of the agency’s authorizing statute.⁴⁶ In addition, information that is not useful to a decision maker because of the statutory limitations of their discretion also need not be included in a NEPA

³⁸ *Id.* at 77823 n. 4 (emphasis added).

³⁹ *Id.* at 77824.

⁴⁰ *Id.*

⁴¹ *Id.* at 77825.

⁴² 40 C.F.R. § 1508.8(b).

⁴³ *U.S. Dep’t of Transp. V. Public Citizen*, 541 U.S. 752, 767 (2004).

⁴⁴ *Id.* at 770.

⁴⁵ *Natural Resources Defense Council v. Nuclear Regulatory Comm.* 647 F. 2d 1345 (D.C. Cir. 1981).

⁴⁶ *U.S. Dep’t of Transp. V. Public Citizen*, 541 U.S. 752, 770 (2004).

analysis.⁴⁷ The Supreme Court has held that the federal agency must have the ability to measure some level of control over the effects.⁴⁸

The difficulty with requiring agencies to include GHG emissions in NEPA reviews is that “climate impacts are not attributable to any single action.”⁴⁹ To date, many agencies, as they have incorporated GHG analysis into their NEPA documents, have reached the conclusion that “GHG emissions from... [their project] will have small, if any, potential climate change effects.”⁵⁰ This is due to the “global nature”⁵¹ of climate change and the fact that emissions from a “government action or approval represent only a small fraction of global emissions.”⁵² *In other words, a single project will likely have no measurable impact on global emissions.*

CEQ’s Revised Draft Guidance establishes a proxy in which agencies will study the impacts the action will have on *GHG emissions* rather than on the environment: “In light of the difficulties in attributing specific climate impacts to individual projects, CEQ recommends agencies use the projected GHG emissions... as... [a] proxy for assessing a proposed action’s potential climate change impacts.”⁵³ In other words, instead of measuring the impacts of their actions on the environment, which, with regards to climate change, would be “small, if any,”⁵⁴ an agency instead must measure the amount of CO₂e emissions.

An agency is also required to include the federal action’s upstream, downstream, and cumulative effects in these analyses.⁵⁵ This means that agencies must include into their analysis the proposed action **and any action that is “connected” to the project.**⁵⁶ They must include any activity that occurs as a predicate or consequence of the agency action.⁵⁷ This quantitative analysis provides agencies with a specific measurement with which they must assess damages to the environment that may come from climate change, despite the lack of any causal relationship between their actions and global climate change. The potential costs and delays associated with this additional requirement would be enormous.

According to the Revised Draft Guidance, 25,000 metric tons of CO₂e on an annual basis is a good reference point at which an agency would be expected to include a quantitative analysis of GHG emissions into their NEPA review.⁵⁸ Below 25,000 metric tons, CEQ states that quantitative analysis “is not warranted unless... easily accomplished.”⁵⁹ CEQ does not cite any empirical evidence or justification for the appropriateness of 25,000 metric tons specifically. Revised Draft Guidance merely states that “[t]his is an appropriate reference point that would

⁴⁷ *Id.*

⁴⁸ *Sierra Club v. Hodel*, 8480F. 2d 1068, 1089 (10th Cir. 1988).

⁴⁹ 79 Fed. Reg. at 77825.

⁵⁰ *Id.*

⁵¹ *Id.* at 77823.

⁵² *Id.* at 77825.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 77826.

⁵⁶ *Id.* at 77825.

⁵⁷ *Id.* at 77826.

⁵⁸ *Id.* at 77827.

⁵⁹ *Id.* at 77827-28.

allow agencies to focus their attention on proposed projects with potentially large GHG emissions.”⁶⁰

Agencies must use all available tools, when appropriate, to monetize the cost of the project’s CO₂e emissions.⁶¹ The guidance recommends that the “Social Cost of Carbon” be incorporated into their GHG emissions analysis. The draft guidance states that the Federal social cost of carbon “...offers a harmonized interagency metric that can provide decision makers and the public with some context for meaningful NEPA review,”⁶² and provides for agencies to include the Social Cost of Carbon in any NEPA document where it is appropriate to consider costs and benefits. Agencies must also “incorporate by reference applicable agency emissions targets such as applicable Federal, state, tribal, or local goals for GHG emissions reductions to provide a frame of reference.”⁶³

The Revised Draft Guidance also includes guidance on studying alternatives and mitigation measures in NEPA reviews. Given the “global nature”⁶⁴ of climate change, mitigation measures and alternatives would presumably have no measurable impact on global CO₂e emissions or global warming. It could, however, have a significant impact on the proxy measurement of CO₂e emissions and, therefore, could potentially have enormous influence on agencies and decision makers.

The Revised Draft Guidance expands the original Draft Guidance released in 2010 by extending the guidance to include Land Management Actions. The 2010 Draft Guidance seemed to recognize the complex nature of Land and Resource Management Actions and acknowledged this by exempting these actions from the Draft Guidance requirements. However, the Revised Draft Guidance opts to take a one-size-fits-all approach by extending the requirements to all federal activities, including Land and Resource Management Actions.⁶⁵

In addition to analyzing the impacts of a proposed project’s impact on GHG emissions, the draft guidance requires that agencies study the effects of climate change on the environmental consequences of the project.⁶⁶ An agency need not show a direct link between their project and global climate change. Instead, the Revised Draft Guidance requires that all projects consider the potential or any hypothetically possible impacts from global climate change and the impact they may have on their proposal.⁶⁷ For example, the Draft Guidance explains that “a proposed action may require water from a stream that has diminishing quantities of available water because of decreased snow pack in the mountains” and despite the lack of any causal relationship, the decreased snow pack in the mountains must be considered in the agencies NEPA documents.⁶⁸ Or, as another example, a project built on a shoreline would have to include an analysis of the impacts that a rise in sea levels would have on the project.

⁶⁰ *Id.* at 77828.

⁶¹ *Id.* at 77827.

⁶² *Id.*

⁶³ *Id.* at 77826.

⁶⁴ *Id.* at 77823.

⁶⁵ *Id.* at 77827.

⁶⁶ *Id.* at 77824.

⁶⁷ *Id.* at 77828.

⁶⁸ *Id.*