

Committee on Natural Resources

Rob Bishop, Chairman
Hearing Memorandum

September 19, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff—Sean Stewart (x6-9837)

Hearing: Full Committee Oversight Hearing on “*The Impacts of the Obama CEQ’s Final Guidance for GHG Emissions and the Effects of Climate Change*”

The Committee will hold a full committee oversight hearing to receive testimony on the Obama CEQ’s Final Guidance for GHG Emissions and the Effects of Climate Change on **September 21, 2016 at 10:00AM in room 1334 Longworth House Office Building**. The hearing will focus on likely impacts of the Final Guidance on a host of American economic and energy-related projects, permitting and activities.

Policy Overview

- The National Environmental Policy Act of 1969 (NEPA), requires federal agencies to take a “hard look” at the environmental consequences of their actions.¹ This includes a requirement that a detailed Environmental Impact Statement (EIS), be prepared for **all major federal actions** that significantly impact the human environment. According to a recent Government Accountability Office (GAO) report, federal agencies conduct several thousand NEPA reviews annually, impacting a huge number of activities, though the real cost and time associated with these NEPA reviews is not actually measured or tracked.²
- The Obama Administration’s Council on Environmental Quality (CEQ), seeking to alter how greenhouse gas (GHG) emissions are considered in NEPA environmental reviews, recently published sweeping *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*.³
- The Final Guidance establishes projected GHG emissions as a proxy for assessing a proposed action’s potential climate change impacts.⁴ The Guidance requires that agencies assess the effects of a proposed action on GHG emissions and the effects of climate change on a proposed action.⁵
- Despite concerns raised by many, the Final Guidance allows for the use of the Social Cost of Carbon (SCC) in NEPA reviews,⁶ ignoring the SCC’s incompatibility with Office

¹ 42 U.S.C. § 4331.

² See: General Accounting Office Report 14-370 (2014) <http://www.gao.gov/assets/670/662546.pdf>

³ 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, 81 FR 51866-51867 (Aug 5, 2016).

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 33.

of Management and Budget (OMB) Circular A-4, a guide for agencies when conducting cost-benefit analysis.⁷

- The Final Guidance makes minor changes to the Revised Draft Guidance such as eliminating the threshold set in the Revised Draft Guidance. It eliminates reference to “upstream” and “downstream” emissions, yet retains similar concepts, using the conventional terms “direct” and “indirect.” It also retains the “lifecycle analysis” concept.⁸

Invited Witness

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

Background

Enacted in 1970, The National Environmental Policy Act (NEPA) declared a national public policy regarding the environment and was intended to increase awareness regarding the effects of federal actions on the environment.⁹ NEPA requires federal agencies to take a hard look at the environmental impacts of literally any action that has a federal nexus, including actions requiring a federal permit, license, or funding. The heart of the NEPA process is the EIS, a lengthy and intensive process by which the agency conducts a thorough analysis of all the environmental impacts for every federal action that significantly impacts the quality of the human environment.¹⁰ The NEPA process can be very expensive and time consuming for private entities seeking permits. According to a GAO report, the average time to complete an EIS under NEPA was over 4 ½ years.¹¹ In addition, NEPA has become a magnet for litigation, with many NEPA-related lawsuits against the federal government filed or open each year.

NEPA created the Council on Environmental Quality (CEQ) within the Executive Office of the President.¹² In 1979, CEQ issued regulations that established the procedural requirements of NEPA and helped create the intensive NEPA process in effect today. Individual agencies are charged with implementing their own agency-specific processes that incorporate CEQ and NEPA regulations.

⁷ Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866* (Washington, D.C.: February 2010).

⁸ 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, 81 FR 51866-51867 (Aug 5, 2016).

⁹ 40 C.F.R. § 1502.

¹⁰ *Id.*

¹¹ See p. 14, GAO Report: “National Environmental Policy Act: Little Information Exists on NEPA Analyses” <http://www.gao.gov/assets/670/662546.pdf>

¹² 40 C.F.R. § 1502.

CEQ publishes formal Guidance documents from time to time to “provide... Federal agencies a common approach for assessing their proposed actions...” and to “improve efficiency and consistency of reviews of proposed Federal actions for agencies, decision makers, project proponents and the public.”¹³ CEQ Guidance does not go through the official rulemaking process nor does it change or modify any CEQ regulation. However, agencies are expected to adopt the Guidance as they promulgate their own regulations and NEPA processes and the Guidance can be used in litigation. 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.

After releasing Draft Guidance in 2010, followed by a Revised Draft Guidance in 2014, and after accepting public comment, CEQ finalized their Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change on August 1, 2016. The Final Guidance changes the way in which agencies are required to consider GHG emissions in NEPA reviews. As currently implemented by CEQ regulations, NEPA requires that an agency consider all environmental impacts of federal actions.¹⁴ This would include a NEPA analysis of GHG emissions to the extent that a federal action’s emissions have an impact on the environment by contributing significantly to global climate change. However, due to the inherent global nature of climate, “climate impacts are not attributable to any single action,”¹⁵ and it is impossible to demonstrate any direct correlation between an individual project and global climate.

NEPA and CEQ regulations require that there be a causal relationship between the federal action and the environmental impacts, and that environmental effects be “reasonably foreseeable.”¹⁶ The Supreme Court has interpreted this to be stronger than a “but, for” relationship and similar to proximate cause in tort law.¹⁷

An agency is also bound in its NEPA analysis by the jurisdictional limitations of the agency’s authorizing statute.¹⁸ Because emissions from a single “government action represent[s] only a small fraction of global emissions,”¹⁹ a single project will have *no measurable impact* on global emissions. As a result of these legal limitations and the “global nature”²⁰ of climate, many agencies to date have reached the simple conclusion in their NEPA reviews that “GHG emissions from... [their project] will have small, if any, potential climate change effects.”²¹ CEQ’s Final Guidance alters the way agencies must incorporate GHG emissions analysis into NEPA reviews, forcing a much more intensive examination of global climate change.

¹³ 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, 81 FR 51866-51867 (Aug 5, 2016).

¹⁴ 40 C.F.R. § 1502.

¹⁵ 79 Fed. Reg. at 77825.

¹⁶ 40 C.F.R. § 1508.8(b).

¹⁷ U.S. Dep’t of Transp. V. Public Citizen, 541 U.S. 752, 767 (2004).

¹⁸ *Id.* at 752, 770 (2204).

¹⁹ 79 Fed. Reg. at 77825.

²⁰ *Id.* at 77823.

²¹ *Id.* at 77825.

CEQ's Guidance "[r]ecommends that agencies use projected GHG emissions... as a proxy for assessing potential climate change effects..."²² Like the previous Draft Guidance, the Final Guidance requires a two-pronged analysis that agencies must consider when addressing climate change. "[W]hen addressing climate change agencies should consider (1) The potential effects of a proposed action on climate change as indicated by assessing GHG emissions..., includ[ing]...carbon sequestration...; and, (2) The effects of climate change on a proposed action..."²³ In other words, rather than measuring the impacts of their action on the environment as mandated by NEPA, CEQ now requires that an agency quantify their GHG emissions and measure the impacts of *global climate change* on the proposed federal action.

The Final Guidance includes extensive provisions for studying mitigation measures and alternatives that mitigate GHG emissions. Agencies are required to "compare the anticipated levels of GHG emissions from each alternative – including the no-action alternative – and mitigation actions..."²⁴ Given the global nature of climate change, mitigation measures and alternatives will likely have no measurable impact on global GHG emissions or global climate. They could, however, have a *significant* impact on the proxy measurement of GHG emissions and enormous influence on agencies and decision makers.

The Revised Draft Guidance released in 2014 expanded 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. The Final Guidance retains the 2014 Revised Draft Guidance language and opts for a one-size-fits-all approach by extending the requirements to all federal activities, including Land and Resource Management Actions.²⁵

Although de-emphasized from the Revised Draft Guidance, the Final Guidance still allows for the use of the **Social Cost of Carbon** (SCC) in NEPA reviews²⁶, a metric that fails to comply with current OMB requirements for cost-benefit analysis laid out in OMB Circular A-4²⁷, a document that provides guidance to agencies on acceptable practices for conducting a cost-benefit analysis. In the Final Guidance, CEQ names OMB Circular A-4 as a reference for agencies.²⁸ However, OMB Circular A-4 requires the use of a discount rate of 7 percent and requires that domestic costs be reported separately from global costs, requirements that the SCC

²² 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, 81 FR 51866-51867 at 4 (Aug 5. 2016).

²³ *Id.*

²⁴ 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, 81 FR 51866-51867 at 15 (Aug 5. 2016).

²⁵ 79 Fed. Reg. at 77827.

²⁶ 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, 81 FR 51866-51867 at 33 (Aug 5. 2016)

²⁷ Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866* at 18 (Washington, D.C.: February 2010).

²⁸ 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, 81 FR 51866-51867 at 33 (Aug 5. 2016).

estimates simply choose to ignore.²⁹ Despite this contradiction, the SCC is included in the Final Guidance as an acceptable method of cost-benefit analysis.³⁰

There are a few notable changes in the Final Guidance. For example, in the Revised Draft Guidance, CEQ established 25,000 metric tons of carbon emissions on an annual basis as a reference point at which an agency would be expected to include a quantitative analysis of GHG emissions in their NEPA reviews. The Final Guidance, however, eliminates this threshold and “does not establish any particular quantity of GHG emissions as ‘significantly’ affecting the quality of the human environment or give greater consideration to the effects of GHG emissions and climate change over other effects on the human environment.”³¹

In addition, the Revised Draft Guidance stated that agencies should include upstream and downstream impacts in their analysis. The Final Guidance eliminates reference to “upstream” and “downstream” emissions, but retains similar concepts through using the conventional terms “direct” and “indirect” effects and retains the “lifecycle analysis” concept in the original Revised Draft Guidance.³²

²⁹ Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866* at 18 (Washington, D.C.: February 2010).

³⁰ 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, 81 FR 51866-51867 at 33 (Aug 5, 2016).

³¹ *Id.* at 9-10.

³² *Id.* at 16 n.42.