

Lessons from the EU: Evaluating CEQ’s Recent Guidance on the Consideration of the Effects of Climate Change on Federal Actions Subject to NEPA

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I. INTRODUCTION

The Council on Environmental Quality (“CEQ”) recently issued guidance¹ to assist federal agencies in their consideration of the effects of greenhouse gas (“GHG”) emissions and climate change when evaluating proposed federal actions under the National Environmental Policy Act (“NEPA”) and the CEQ regulations implementing the procedural provisions of NEPA (“CEQ regulations”).²

The non-legally binding guidance aims to provide a common assessment framework for agencies to improve clarity, consistency, and efficiency when analyzing the effects of climate change through the environmental impact assessment process, while also providing for agency discretion to tailor individual NEPA reviews to their “unique circumstances and authorities.”

CEQ’s guidance relies on current NEPA principles and other considerations of GHG emissions and climate change. However, instead of “expand[ing] the range of federal agency actions that are subject to NEPA” or requiring new NEPA implementing procedures, the guidance only recommends that agencies review current procedures and update only if deemed “necessary or

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1. Final Guidance for Fed. Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 81 Fed. Reg. 51,866 (Aug. 1, 2016).

2. 40 C.F.R. pts. 1500–1508.

appropriate to facilitate” analysis of GHG emissions and climate change.

The analysis recommended by CEQ is two-fold: (i) “[t]he potential effects of a proposed action on climate change”, and (ii) “[t]he effects of climate change on a proposed action.” This field report will discuss and evaluate the former focus of CEQ’s guidance with comparisons to the EU’s analog, with particular focus on the recent amendments to the EU’s Environmental Impact Assessment (“EU EIA”).³

II. NEPA AND THE EU EIA

NEPA requires public dissemination of information on the significant environmental effects of proposed federal agency actions, and requires federal decisionmakers to take this information into account.⁴ The goal is to use information generation as a means to improve the environmental outcomes of federal agency actions through more rigorous and transparent analysis and review of reasonable alternatives and mitigation measures.⁵ Similarly, the EU EIA requires Member States to conduct assessments of significant environmental effects of projects within Member States “likely to have significant effects on the environment,” before their authorization.⁶

CEQ’s guidance thus seeks to adapt NEPA to address the increasingly well-established evidence that “rising global atmospheric GHG emission concentrations are significantly affecting the Earth’s climate” in an effort to further uncover “practicable opportunities to reduce GHG emissions.” NEPA’s underlying “rule of reason” principle and the “concept of proportionality” apply to the guidance—i.e., that the extent of analysis should be commensurate with the impact on GHG emissions.

3. Council Directive 2014/52, 2014 O.J. (L 124) 1–18 (EU).

4. 40 C.F.R. § 1500.1(b).

5. *Id.* § 1500.1(c).

6. Council Directive 2014/52, 7.

III. EVALUATING CEQ'S RECOMMENDATIONS

A. A Predictivist Approach?

CEQ recommends the use of “projected GHG emissions associated with proposed actions as a proxy for assessing proposed actions’ potential effects on climate change in NEPA analysis.”

CEQ provides that the best reasonably available “tools, methodologies and data inputs” are to be utilized in quantifying the projected “reasonably foreseeable direct and indirect” GHG emissions of a project. Where a quantitative analysis is unavailable or overly speculative, agencies are to conduct a qualitative analysis⁷ as well as explain their basis for not choosing the quantitative method. The division between actions requiring quantitative or qualitative assessments is to be coordinated between agencies and CEQ, although the definition of “significance” of a proposed action remains within the ambit of the agencies’ discretion.⁸

This predictivist and reductionist analytical framework instilled through a “quantitative-first” approach lacks regulatory creativity and experimentation beyond the “quantitative-based command-and-control model.”⁹ Although CEQ does not mandate that the alternative or mitigation measure with the lowest net level of emissions be chosen, the qualitative analysis of the significance of the proposed action could potentially be more useful in explaining the links between the proposed action and GHG emissions and should accompany the quantitative analysis where possible.

The explicit favoritism for a quantitative approach is not seen in the EU EIA, which instead adopts a requirement for authorities to prove the links between the factors involved in the environmental impact assessment and the provision of development consent through a “reasoned conclusion” on the proposed action’s effects, which is distinct from the examination of assessment itself.¹⁰ Like the EU, CEQ could have instead adopted a rebuttable presumption that both quantitative and qualitative analyses are required, with

7. While quantitative accounting tools provide estimates of GHG emissions, qualitative analyses allow reliance on sector-specific descriptions of GHG emissions based on the category of federal agency action that is the subject of the NEPA analysis.

8. See 40 C.F.R. § 1508.27.

9. J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 988 (1997).

10. Council Directive 2014/52, 7.

the burden placed upon agencies to give an explanation when seeking to only use the quantitative approach.

B. Limiting Terms—A Potential Use of the Precautionary Approach?

CEQ does not require a separate cumulative effects analysis for GHG emissions since the effects analysis of GHG emissions is “essentially a cumulative effects analysis . . . subsumed within the general analysis . . . of climate change impacts.” Nevertheless, under the guidance, activities with a “reasonably close causal relationship”¹¹ to the federal action as a predicate or a consequence should be taken into account in the analysis of effects on climate change in NEPA. Consideration of effects on GHG emissions should also include both “short- and long-term adverse and beneficial effects” based on reasonable foreseeability.

The extension of NEPA principles to analyzing a broader temporal scope of a proposed action’s effects on GHG emissions is commendable, with not only increased information to decisionmakers and the public, but also a more realistic view of the continuous role human development plays in GHG emissions. However, CEQ could have introduced a precautionary approach in estimating GHG emissions alongside the “rule of reason” and “proportionality” principles. The precautionary approach requires that the absence of scientific consensus on whether an action has a risk of harm to the environment, be resolved in favor of the environment; in other words, the approach places the burden of proof that an action is not harmful to the environment on those seeking to take that action.

There is a risk that limiting terms (i.e., NEPA’s “reasonably close causal relationship” or “reasonable foreseeability”) could filter out borderline “unreasonably close” or “unreasonable” considerations that include real concerns with effects on GHG emissions too complex to understand due to our poor understanding of causal pathways, ecosystem resilience, and ecosystem interrelationships.¹²

11. See 40 C.F.R. § 1508.25(a) (“Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously, or; (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.”).

12. OLIVIA WOOLLEY, ECOLOGICAL GOVERNANCE: REAPPRAISING LAW’S ROLE IN PROTECTING ECOSYSTEM FUNCTIONALITY 54-56 (2014).

The EU EIA also faces a similar problem with its overly-versatile usage of the term “significant” without any autonomous EU definition, unlike NEPA’s version of “significant.”¹³

For example, the EU EIA’s term “significant” is used to describe the threshold required of a project’s effects on the environment for a project to fall under the EU EIA’s scope. However, this general threshold of “significance” is undefined across the various different stages of the EU EIA process: the screening stage where a prediction is made about the likely effects of a project on the environment (articles 2 and 4); the consultation stage where experts and non-expert groups, including statutory consultees, participate in the assessment process (articles 5, 6, and 7); and the decisionmaking stage where authorities are required to take into account environmental information provided by developers before granting developmental consent (articles 8 and 9).

Thus, NEPA’s limiting terms should be defined using a precautionary approach to avoid offering agencies too much discretion and to reduce misguided interpretations of the considerations required in assessing the relationships between GHG emissions and projects.

C. Information Flow Reduced—A Bad Thing?

CEQ has stated three distinct methods agencies may use to reduce the burden of the additional information requirements when considering GHG emissions and climate change effects. First, agencies should consider whether to “incorporate by reference GHG analyses from other programmatic studies, action specific NEPA reviews, or programmatic NEPA reviews to avoid duplication of effort” as well as engage other agencies and stakeholders in an effort to locate such relevant materials. Second, agencies should utilize information currently available and need not initiate new research to support their NEPA analyses. Third, agencies may decide the appropriate geographic level of NEPA review—e.g., programmatic (landscape-scale) decisions, or tiered project- or site-specific level—so as to create a “basic framework analysis,” avoiding duplication of analytical efforts for each tiered decision.

The EU EIA, however, moves in a different direction, with recent amendments mandating higher information standards—primarily

13. See 40 C.F.R. § 1508.27.

in the “screening” stage, where developers may seek an opinion from the national authority as to whether their proposed action falls within the EU EIA’s scope.¹⁴

In addition to efficiency and economy, CEQ’s approach could be useful in achieving a broader goal of streamlining and integrating analyses across similar types of projects and decisions. This direction adopted by CEQ allows for the substantive integration of analyses. On the EU’s side, such integration—e.g., of the EU’s Environmental Impact Assessment and the EU’s Strategic Environmental Assessment (which extends the environmental impact assessment “upwards” into plans and programs, rather than projects¹⁵)—would present a greater obstacle due to the continued development of the two independent and separate tracks of assessments.

Nevertheless, the lack of safeguards surrounding CEQ’s reduction in information gathering is worrying. Since environmental law decision-making relies heavily on information (e.g., societal behavior, ecological systems, and the success of laws), the increased amount and design of information flow is important to efficiently acquire and utilize such information to make better laws.¹⁶ Yet, CEQ’s guidance could seemingly allow for outdated information to be used through incorporation by reference. Moreover, agency discretion regarding decisions to use available information could result in a stagnation of environmental research as agencies would primarily rely on cost- and time-saving banks of current information.

IV. CONCLUSION

A closer look at the CEQ guidance and the EU’s analog shows that the steps taken by CEQ are reminiscent of the current status quo in environmental law: predictivist, efficient, and cost-focused, and lacking a precautionary approach. However, CEQ’s guidance still provides a firm foundation in NEPA for the consideration of the effects on GHG emissions and climate change of a proposed action—with more detailed recommendations targeted at climate change than the EU EIA. Moreover, the development of a “tiered

14. Council Directive 2014/52, 15.

15. Council Directive 2001/42, 2001 O.J. (L 197) 30 (EC).

16. Ruhl, *supra* note 9, at 983.

framework” to analyze the effects on GHG emissions could potentially provide a foundation for ecological case law.