

CEQ's Interim Guidance on GHG and Climate Change: Considerations for FERC-Regulated Natural Gas Infrastructure Developers

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The Council on Environmental Quality (CEQ) recently issued interim "National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas (GHG) Emissions and Climate Change" (the "**Interim Guidance**") to assist federal agencies in analyzing greenhouse gas and climate change effects of their proposed actions under NEPA.¹ While subject to change following a public comment period that closes on March 10, 2023, the Interim Guidance is effective immediately.

The Interim Guidance has significant implications for natural gas infrastructure regulated by the Federal Energy Regulatory Commission (FERC), including interstate pipelines seeking certifications under Natural Gas Act (NGA) section 7, and natural gas imports and exports as well as liquefied natural gas (LNG) terminals seeking authorizations under section 3. FERC approvals are "federal actions" subject to NEPA review. The sufficiency of FERC's NEPA review for natural gas infrastructure projects has been the subject of prolific litigation, coupled with internal upheaval over the agency's own policies and deliberative processes. Indeed, FERC issued its own "Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews" in February 2022 (the "**Draft Policy**") stating that projects with the potential to emit more than 100,000 tons/year GHG emissions are significant and require staff to conduct an Environmental Impact Statement (EIS).² It is unclear if and when the Draft Policy will be finalized. As yet, FERC has declined to follow it as part of its NEPA reviews of gas infrastructure projects. One argument against implementing the Draft Policy was that it was proposed before CEQ, the federal agency with statutory authority to implement NEPA, issued its own guidance. With publication of the Interim Guidance, FERC will need to consider if and how it integrates the CEQ's proposals into its own decision making, and any impact this will have on the finalization of the Draft Policy.

Below are five key considerations for FERC-regulated natural gas infrastructure stakeholders:

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1) The significance of a “significance threshold” for GHG emissions.

From a NEPA perspective, an agency “finding of no significant impact” or “FONSI” is the gold standard for a federal action. FERC typically will not authorize a natural gas project found to significant impact the environment unless the project developer agrees to mitigating measures to reduce the project’s environmental impact. With very minimal exceptions, FERC has authorized natural gas infrastructure projects without making a significance determination related to a project’s reasonably foreseeable GHG emissions’ contribution to climate change.

FERC-watchers expected this to change when FERC released the Draft Policy that set a significance threshold of 100,000 metric tons per year of carbon dioxide equivalent (CO₂e) GHG emissions or more based upon a “full burn” analysis (i.e., at 100 percent utilization). The proposal was widely criticized. Since FERC deemed the threshold to be a draft and demoted it from a policy to a proposal in March 2022, FERC orders have declined to characterize emissions as significant or insignificant. FERC notes instead that it is “conducting a generic proceeding to determine whether and how” it will conduct significance determinations going forward.

The Interim Guidance suggests that federal agencies should not let any particular quantity of GHG emissions drive NEPA review. Indeed, the guidance explicitly chooses not to establish a threshold for emissions “as ‘significantly’ affecting the quality of the human environment.” Instead, it recommends that agencies focus on (1) quantifying a proposed action’s reasonably foreseeable GHG emissions whenever possible, (2) disclosing and providing context for GHG emissions and climate impacts associated with a proposed action and alternatives and (3) analyze reasonable alternatives, including those that would reduce GHG emissions relative to baseline conditions, while identifying available mitigation measures. Of course, the devil is in the details, including whether the social cost of greenhouse gas emissions (SC-GHG) is a necessary or appropriate tool for providing context under the second step.

2) Quantifying a proposed federal action’s GHG emissions.

FERC practice already quantifies a natural gas project’s estimated GHG emissions, at both the construction and operation levels. For natural gas pipeline project operations, FERC uses a “full burn” analysis that assumes the facilities will be operated at maximum capacity for 365 days/year, 24 hours/day. This scenario assumes all natural gas transported through the facilities is combusted, thereby accounting for all downstream GHG emissions. FERC considers the end-use of the natural gas, including the combustion to produce energy as a reasonably foreseeable indirect effect.³ FERC typically does not consider upstream emissions to be a reasonably foreseeable effect of a natural gas pipeline project. However, the Draft Policy suggested that upstream emissions could be considered as such on a case-by-case basis.

The Interim Guidance acknowledges the “full burn” assumption as one way an agency can provide an upper bound estimate of GHG emissions. However, the Interim Guidance would have agencies go further to include an emissions calculation of reasonable alternatives to provide additional context. It also wants agencies to disclose the information and any assumptions used in the analysis and explain any uncertainty. In addition, the Interim Guidance suggests that upstream production may be a reasonably foreseeable indirect effect of natural gas pipeline infrastructure,

stating in a footnote that “natural gas pipeline infrastructure creates the economic conditions for additional natural gas production and consumption, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change.” While FERC has resisted quantifying emissions from upstream production, the Interim Guidance provides a pathway for it to reconsider this position.

3) Disclosing and contextualizing emissions in light of recommendations to use the Social Cost of GHG Emissions.

The SC-GHG is one tool that has been used to assign a monetary value to the climate change impacts associated with the incremental increases in GHG emissions of a project or, in the NEPA context, a proposed federal action. Recent FERC practice is to include SC-GHG calculations in a project’s NEPA document, but to not rely on it and characterize it in FERC orders. This practice is not without controversy. Critics, which include at least one sitting FERC commissioner, argue that the SC-GHG may play a useful role in agency rulemakings, but was not developed for project-level reviews, and that it is inappropriate for FERC to use the tool at all. FERC itself has stated that the SC-GHG is not useful for project-level analyses because there are no criteria identifying what monetized values are significant for NEPA purposes, and FERC was unable to identify any either.⁴ To date, the federal courts have not held that FERC must rely on the results of the SC-GHG methodology when deciding whether to approve a project.

The Interim Guidance does not distinguish between rulemakings and adjudications in its discussion of the SC-GHG. Instead, it recommends that agencies use the tool, in most circumstances, and apply the best available estimates of the SC-GHG to the incremental metric tons of each individual type of greenhouse gas emissions expected from a proposed action and its alternatives. It argues that doing so will “help decision makers and the public understand proposed actions’ potential GHG emissions and climate change effects.” CEQ states that the public may not appreciate the significance of climate change impacts without such an assignment of monetary value. While use of the SC-GHG may not be necessary in all circumstances, CEQ elaborates on what would be insufficient in the NEPA context—which is to provide simple statement that emissions from a proposed federal action represent only a small fraction of global or domestic emissions. The Interim Guidance also offers other examples that an agency may use to provide context for the federal action’s estimated greenhouse gas emissions.

It remains to be seen whether FERC will begin to rely more on the SC-GHG in its decision making processes. However, the Interim Guidance’s strong endorsement of the SC-GHG may make it more difficult for FERC to demure on whether to rely upon the tool in future decisions.

4) The role of clean energy alternatives.

A hallmark of NEPA analysis is for agencies to identify and assess reasonable alternatives to the proposed action that will avoid or minimize effects on the human environment, including the so-called no-action alternative. FERC NEPA documents traditionally have not considered clean energy projects to be reasonable alternatives to natural gas infrastructure.

The Interim Guidance would not expressly require FERC to change this practice, or to find a lower emission energy source, such as a solar panel array, to be a reasonable alternative to a natural gas pipeline. It does stress the “urgency of the climate crises,” however, and recommend that agencies use the NEPA process to inform decisions that align with national climate change commitments and goals. It also asks agencies to identify the alternative with the lowest net GHG emissions or the greatest net climate benefits among the alternatives assessed. While acknowledging that NEPA does not mandate that agencies adopt proposals that avoid, minimize or mitigate the adverse effects of GHG emissions on climate change, the Interim Guidance makes normative judgments that may encourage federal agencies implementing NEPA to pit traditional fossil fuel-based energy projects against renewable energy projects, or some combination. As a result, the Interim Guidance may result in projects with fewer estimated emissions that have a smoother glide path through the NEPA review process.

Adoption of the Interim Guidance at FERC could drive the natural gas industry towards adding lower carbon adaptations to projects. The industry already is focused on incorporating carbon capture sequestration into LNG terminal projects, making pipeline compressor stations electric-powered, blending more hydrogen into the natural gas stream, and partnering with renewable natural gas producers. These types of projects, which remain few and far between, may become the standard bearers for “reasonable alternatives” that enable a project navigate the NEPA review process.

5) The intersection of climate change and environmental justice.

The Interim Guidance strongly links climate change and environmental justice, two issues that were at the center of some of President Biden’s initial Executive Orders (E.O.), such as “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” (E.O. 13990) and “Tackling the Climate Crisis at Home and Abroad” (E.O. 14008). One of the Interim Guidance’s key goals is for agencies to better understand and address the effects of climate change on vulnerable communities as one way to respond to environmental justice concerns, which it states will be disproportionately impacted by climate change. It states that the NEPA process calls for identifying potential environmental justice-related issues and meaningfully engaging with communities that the federal action and its alternatives may affect.

Traditionally, FERC placed little emphasis on environmental justice in the NEPA review, although it was included as one aspect of the agency’s socio-economic impacts analysis. The Biden-Harris administration has changed this significantly through executive orders and the ascension of FERC’s recent Chairman Richard Glick. In the past two years, FERC created a Senior Counsel position for Environmental Justice and Equity and opened an Office of Public Participation, which can assist members of environmental justice communities with participation in FERC proceedings. The most notable nod to environmental justice is found the Draft Certificate Policy Statement, which would have taken environmental justice impacts beyond NEPA to be part of FERC’s NGA “public interest” review. That proposal, however, has yet to be implemented at FERC.

Environmental justice remains an important issue at FERC, and will be so even if the Draft Policy is never finalized. Indeed, the Interim Guidance provides FERC with a blueprint for elevating environmental justice further, during the NEPA process, without making it a key element of NGA “public interest” review.

For a more detailed overview of the Interim Guidance, please refer to Akin Gump's related [blog post](#). Akin Gump is skilled at helping clients craft thoughtful and impactful responses to public comments and has a robust and growing climate change and energy regulation practice. Clients interested in engaging on the new guidance are encouraged to contact the authors of this alert.

¹ 88 Fed. Reg. 1196 (Jan. 9, 2023).

² *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, *deemed draft*, 178 FERC ¶ 61,197 (2022). FERC simultaneously issued a revision to its Policy Statement on Certification of New Interstate Natural Gas Facilities as a companion order to the Draft Policy. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107, *deemed draft*, 178 FERC ¶ 61,197 (2022) ("[Draft Certificate Policy Statement](#)").

³ FERC practice does not consider the end-use of LNG transported from FERC-authorized export facilities in light of court precedent deeming that to be outside the scope of FERC's NEPA obligations.

⁴ See *Tenn. Gas Pipeline, Co., LLC*, 181 FERC ¶ 61,051, at PP 37, 75 (2022); See *Gulf South Pipeline, LLC*, 181 FERC ¶ 61,145, *partial concurrence and dissent of Comm'r Danly* (2022).

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