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WHITE HOUSE: Head-scratching begins over NEPA guidance

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Federal officials and outside experts this week began to grapple with concerns raised by draft guidelines requiring federal agencies to consider climate change during environmental analyses of proposed projects.

Under the draft guidance released last month by the White House Council on Environmental Quality, agencies will have to consider greenhouse gas emissions and climate change effects when carrying out National Environmental Policy Act reviews. CEQ is accepting public comment on the proposal through May 24.

Ted Boling, CEQ senior counsel, described the draft guidance as an attempt by the council to explain to all federal agencies at a general level how they should analyze the effects of greenhouse gas emissions and climate change when they prepare documents describing the environmental effects of proposed federal actions.

The new document builds on previous CEQ guidance and case law that addressed climate change in the NEPA process, Boling said in separate calls on the issue this week with Law Seminars International and the Environmental Law Institute.

"It stands as just a broad confirmation that climate change is an issue that falls within the scope of NEPA," Boling said.

Agencies will need to look at emissions that may be produced by projects such

as a landfill or coal-fired power plant. They also must consider climate change effects on projects -- for example, whether plans for infrastructure along the coast would need to change due to projected sea level rise.

CEQ has been asked for guidance informally by federal agencies and formally in a petition filed in 2008 by three groups calling for CEQ to amend NEPA regulations to address climate change. The petition was filed by the Sierra Club, Natural Resources Defense Council and International Center for Technology Assessment.

But Boling said the draft guidance is not directly responsive to that petition and CEQ did not agree that it needed to amend its regulations to address climate change. Rather, CEQ decided to issue guidance with more specifics on how agencies can do a "good job" of addressing climate change issues in their NEPA documents, he said.

William Malley, a partner at Perkins Coie LLP who works on NEPA issues, said the draft guidance does not provide real clarity for preparers of NEPA documents about what should or should not be done, but rather leans toward allowing agency discretion and case-by-case differences.

"My take on the draft guidance is that CEQ is not satisfied to have greenhouse gas emissions remain a cumulative impacts issue," Malley said on the Environmental Law Institute call. "CEQ is saying our vision is more than that, it's not a back-of-the-book issue, it's actually something we want to bring it into your

discussion of alternatives, into your discussion of direct and indirect impacts, and into your discussions of mitigation."

25,000 tons

CEQ also attempts to provide some practical tools for agencies, Boling said. The draft guidance says that if a proposed action would cause direct emissions of 25,000 metric tons or more of greenhouse gas emissions annually, agencies should consider it "an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public."

That level was taken from a rule proposed by U.S. EPA in October to require facilities that release more than 25,000 tons of greenhouse gases a year to account for their emissions when obtaining clean air permits.

Boling said the 25,000-ton threshold is not intended to be a bright line setting out when action is needed but rather "a framework for thinking about at what level are we talking about greenhouse gas emissions that warrant some consideration in the environmental document."

"This is adamantly, explicitly not a threshold of significance," Boling said.

He added that some projects may not meet the 25,000-ton level annually but do warrant consideration over their lifetime of emissions.

Critics say including the number but not allowing it to be a trigger point may be problematic. William Snape, senior counsel with the Center for Biological Diversity, said the document

is “a little contradictory” on how it is dealing with the limit and urged CEQ to better define how it is using the figure. Indirect greenhouse gas emissions could completely outweigh the direct emissions, Snape noted.

Snape on the Law Seminars International call described the overall document as “constructive, uncertain and timid.”

But Malley said it might be “perfectly fine” for the guidance not to address the 25,000-ton limit more directly, in order to allow more agency discretion. That also will ensure there is no “safe harbor” or threshold under which NEPA documents won’t have to deal with climate change issues, he said.

“The answers may be too variable,” Malley said. “I would say that it may well be that the right approach is to leave it unanswered, at least not answered in a

concrete way of here’s a certain number of tons per year.”

But for complex projects, calculating greenhouse gas emissions for each alternative may be complicated and technically challenging, possibly providing a target for litigation, Malley added.

Boling said it remains an “open question” how well the figure would work for mobile sources or transportation planning and that CEQ looks forward to public input on the issue.

Land management

The draft guidance does not apply to land and resource management actions, such as oil and gas drilling on public lands, although it does seek public comment on the appropriate means of assessing that issue. Boling said CEQ decided not to address the topic because

land management techniques lack any established federal protocols.

“Lacking a readily available tool, we did throw out questions,” Boling said.

But Snape disagreed with the decision, saying it leaves a “huge swath” not covered by the proposal. He said the guidance should cover federal land management issues and argued that agencies including the Minerals Management Service and Bureau of Land Management already know how to calculate and incorporate the issue.

Likewise, Noah Matson of Defenders of Wildlife said, land and resource management absolutely needs to be included by CEQ even if it is in separate guidance. He said federal protocols exist that likely would provide useful guidance. “I think it’s doable,” Matson said on the Environmental Law Institute call.