

A Hard Look at the Administration's Revised Guidance for
Greenhouse Gas Emissions and Climate Change under NEPA Law and Practice:
Five Key Things to Fix

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Chairman Bishop, Ranking Member Grijalva, and Members of the Committee:

Thank you for providing me the opportunity and the honor to appear before you today.

The National Environmental Policy Act (NEPA) was signed into law on January 1, 1970 as the first official act of the environmental decade that quickly ushered in the comprehensive laws that since have set the standard for the world in protecting human health and the environment. As it enters middle age forty five years later, NEPA remains the first statute that students learn in their environmental law classes and that other nations replicate as they enact their own environmental regimes. Unlike every other environmental statute, it is a short, simple and straightforward law that may be responsible for more environmental benefits per word of statutory text than any other.

But like most other environmental statutes, NEPA is struggling to apply its 1970s era tools to the emerging environmental challenges of modern times. I believe that NEPA is being stretched to the proverbial breaking point, because it is, like other environmental statutes, being asked to perform functions its authors never intended. And, like most other environmental laws, this challenge is most prevalent when approaching greenhouse gases (GHGs) and climate change impacts.

The subject and timing of today's hearing could not be more important. There is a pressing need to reconcile how federal agencies should assess GHGs in a way that fulfills NEPA's overarching purpose of requiring a hard look at a full range of environmental impacts but also upholds limits against uninformative analysis that risks significant delays, litigation, and cancellation of important projects. No statute is more important to informing decision makers and the public of the environmental consequences of a proposed project. At the same time, NEPA, if pushed outside established limits, can obstruct projects needed to transition the nation to energy independence, realizing a more diverse energy portfolio and infrastructure, and

¹ The views expressed here are that of the author and are not intended to represent the views of Sidley Austin LLP or its clients.

achieving a true manufacturing and economic renaissance associated with affordable and reliable energy.

The question presented here is how to ensure NEPA functions foremost as a shield that ensures sound environmental decision making and not as an obstructionist's sword against energy and infrastructure projects and resource management plans. The answer increasingly hinges on the extent to which GHGs are appropriately addressed in Environmental Impact Statements (EISs) and other NEPA documents. While there is no debate that GHG analysis is relevant to certain projects that have an impact on GHG emissions, the key question is, "What should be the scope and limits of such analysis when there are almost limitless contributors to climate change itself?"

As explained below, properly established guidance from the Council for Environmental Quality (CEQ) can serve a key role in providing the appropriate direction to resolve this question in a way that provides vigorous environmental analysis while preventing unintended consequences of delay and litigation risk. At the same time, for the reasons explained below, the current draft CEQ Guidance suffers from five significant flaws that warrant the draft Guidance being withdrawn pending revision.

Time is of the essence. Although the Guidance is labeled "draft" in form, in function any direction from CEQ can create a *de facto* binding impact on agencies that implement NEPA, and may be cited by opponents before courts as the position of the federal government. The mere existence of such a draft is itself significant enough to cause uncertainty and delays for both federal decision makers and project developers who are impacted by NEPA. Ideally, CEQ should reconsider and withdraw the draft Guidance for the reasons described below, and issue further guidance, following public notice and comment, that address and respond to the issues below in a way that is better reconciled with NEPA case law and past practice.

Background

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth Circuit Court of Appeals. At the Justice Department, I served as the Principal Counsel for Complex Litigation where I was responsible for leading the teams that defended the government's highest profile and most controversial NEPA decisions. I worked closely with the agencies in assessing the

necessary scope of NEPA documents and maintained a 100 percent success rate defending such documents in the courts.

Both in the government and in private practice, I have served as counsel in almost every case addressing climate change and greenhouse gases. Last year, the Supreme Court in *UARG v. EPA* specifically adopted a position advanced by my clients that both affirmed in part and rejected in part the EPA's GHG regulation under the Prevention of Significant Deterioration ("PSD") permitting program. In my current capacity as a private practitioner, I am privileged to work with a number of stakeholders, including private companies and trade associations, environmental organizations, and the government, to develop regulatory solutions that advance environmental protection and address climate change while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls.

Finally, in both my government and private careers, I am very proud of the opportunities I have to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. Recently, I served as one of two vice-chairs in the United States of the International Bar Association's Climate Change Justice and Human Rights Task Force, which released a landmark report regarding international legal mechanisms to address climate change. I am also honored to serve on the American Bar Association's President's Sustainable Development Task Force, Rule of Law Initiative, and as a delegate to the United Nations at the Rio+20 sustainable development conference in Brazil and the World Justice Forum at the Hague.

NEPA and the Need to Assess GHGs in Appropriate Ways

I. NEPA as a Shield to Protect the Environment

While NEPA is unique among environmental laws in that it does not impose substantive requirements on the decision making agency, its reach and influence may be the broadest of any environmental statute. NEPA applies to any federal agency action with a significant impact on the environment. Importantly, NEPA does not mandate any particular outcome or require an agency to select an alternative that has the lowest environmental consequences or GHG emissions. NEPA simply requires that an agency take a "hard look" at the environmental consequences of any major federal action it is undertaking. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Once the procedural elements of NEPA have been satisfied and the environmental

consequences of a proposed action have been given the required scrutiny, an agency may issue its decision relying on the factors and considerations specified in the statute under which it is acting.

When evaluating a proposed agency action under NEPA, an agency can begin by conducting an Environmental Assessment (EA), which is a concise environmental analysis that allows an agency to evaluate the significance of any potential environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.9. If the agency determines that the environmental impacts of a proposed action will not be significant, it can issue a Finding of No Significant Impact (FONSI) and conclude its NEPA obligations. *Id.* §§ 1508.9, 13. However, if an agency determines—either before or after conducting an EA—that a project’s environmental impacts will be significant, it must prepare an EIA that addresses, among other things, “the environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C. § 4332(C).

To complete this analysis, an agency must consider the direct, indirect, and cumulative effects of the proposed action 40 C.F.R. §§ 1508.7, 8. However, the scope of such a review is appropriately limited by the requirement that such effects be “reasonably foreseeable” and, for indirect effects, proximately caused by the proposed action under review. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). In addition, the agency must evaluate mitigation measures which, if implemented, could reduce the environmental impact of the proposed action. *Id.* §§ 1508.20, 25.

The scope of a NEPA analysis is not unlimited, and only that information that is useful to the environmental decision maker need be presented. *See Dep’t. of Trans. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (“Rule of reason” limits agency obligation under NEPA to considering environmental information of use and relevance to decision maker.). For example, an agency need not evaluate an environmental effect where it “has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions.” *Id.* Thus, despite its lack of substantive requirements, these procedural obligations, coupled with opportunities for public involvement, *see* 40 C.F.R. Part 1503, ensure that agencies are fully informed of potential environmental impacts before taking final action with respect to a proposed federal action.

II. NEPA as a Sword to Obstruct Projects

Environmental lawyers most frequently associate NEPA as the bedrock of the American environmental legal regime. Project developers who rely upon federal

action, however, more typically consider NEPA their opponents' most powerful tool of creating uncertainty, delay and risk.

Importantly, the projects challenged under NEPA are among those that are most critical to realizing the goals of pursuing energy independence, a diverse mix of conventional and renewable fuels, and the infrastructure for a modern energy future. NEPA is frequently cited in challenges to energy projects that require permits, licenses, and approvals from the federal government, such as wind and solar farms, oil and gas development on federal lands, pipelines, rail expansions, import and export terminals, and even roads, highways, and bridges. Delays and cancellations to such projects frustrate the Administration's other policy goals, such as the President's Clean Power Plan goal of lowering the GHG footprint of the energy generating sector by 30 percent by 2030. Importantly, these actions also have consequences beyond just the energy sector. The manufacturing renaissance in the United States is dependent on the availability and accessibility of affordable and reliable energy at home. Thus, efforts to frustrate such projects under NEPA have broader impacts on manufacturing and other industrial sectors and—ultimately—the strength of the economy and jobs at home.

At the outset, it typically takes 18 to 42 months to develop a draft EIS, respond to comments and convert that document into a final EIS. In addition, decisions on whether to issue EAs or EISs under NEPA, as well as the substance of the final documents, are subject to judicial review in federal district court. According to CEQ, every year, opponents of a variety of projects that require federal approval bring about 100 new challenges alleging violations of NEPA.

Fortunately the government wins a much higher percentage of NEPA decisions than it loses. However, ultimate victory in the courts alone is a misleading metric. Frequently, an outcome of a project hinges not on just an affirmance by the court, but more importantly the *timing* of such a decision. NEPA litigation in federal district court can take nine to eighteen months or longer. There is then a right to appeal in the courts of appeals, which can add another year to two years for a final decision. And remands to correct information in the record are not uncommon and can add many months to a year of additional delay.

Because many project investors are risk averse, they are frequently unwilling to proceed without the security blanket of a final decision from the federal courts. As a result, project opponents have become skilled over the decades of using NEPA in their arsenal as not only a sword to strike down projects but, just as importantly, a tool to delay final decisions to the point that financing windows close, project investors lose patience, or the risk of litigation itself vacates interest in proceeding

with a project. As a matter of practice the government has responded proactively. Government staff across the agencies increasingly have become skilled at creating “litigation proof” NEPA records that anticipate likely litigation arguments at the earliest stages and address such positions proactively in the administrative record. This has contributed to the successful outcomes in the courts, but has not solved the significant problems associated with delay. Increasingly the bigger threat to projects is not *whether* a NEPA decision will be defended, but *when*.

Ultimately, in order to create such strong records that survive judicial review, there must be clear and strong direction regarding what NEPA requires to be considered as part of the decision making process. Because the assessment of GHGs is in its relative infancy compared to the history of NEPA, we are in a stage where without proper and appropriate guidance, the courts will be providing the direction to the agencies for the first time years after the NEPA documents are finalized, which risks significantly longer delays in the case of a remand. For example, in *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014), the court found that a final EIS was arbitrary and capricious because the agencies failed to properly justify their decision not to apply the draft Office of Management and Budget (OMB) social cost of carbon estimates in assessing climate change impacts. *Id.* at 1191. Significantly, although the court remanded the document back to the agency, the court did not mandate the inclusion of the draft OMB social cost of carbon estimates in NEPA cost benefit analysis and observed that “the agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of GHG emissions from the Lease Modifications.” *Id.* at 1193. This case highlights the challenges that agencies face when addressing novel issues without adequate guidance on how to apply the law.

Because NEPA is strictly a procedural statute, it may seem intuitive to adopt a “more is more” approach to create the most inclusive and expansive documents possible. But such an approach carries two significant risks: (1) adding undue delay to the development of the documents where every week causes larger delays on the timing of finalizing documents and ultimately defending a final decision in the courts; and (2) adding unnecessary information that not only confuses the reader, but more importantly generates additional litigation risks by providing further targets for project challengers, even if such information should not be required in the first instance.

Thus, while guidance can be of paramount help to implementing agencies in defining the approach and scope to NEPA documents, such guidance must be carefully and surgically crafted to advise on what is required under NEPA without creating the risk for superfluous analysis. To require agencies to do more than what is necessary or required will lead to unnecessary delays and introduce significant

litigation risk without better informing decision makers or the public. Overly broad guidance thus runs the risk of jeopardizing projects important and necessary to stronger energy independence, opportunities for renewable energy and a modern infrastructure and, in turn, the manufacturing renaissance in the United States associated with these goals.

III. NEPA as a Vehicle for Assessing GHG Impacts

Congress has yet to pass a law that is specifically drafted to substantively and directly address GHGs or climate change. In the meantime, existing laws such as the Clean Air Act are being put to new and creative service by regulatory agencies to address climate change.

NEPA is no exception. Although Congress has not amended NEPA to address climate change, NEPA's broad language requiring a hard look at impacts of a project, as well as the extensive case law that has evolved over 45 years, makes it clear that assessing GHG emissions is relevant to NEPA analysis for certain projects. For approximately a decade, an assessment of certain projects' GHG emissions have been part of the analysis of environmental impacts when such a project is likely to emit or otherwise impact GHG emissions to a significant extent.

Thus, for certain types of proposed federal actions, quantifying GHG emissions in appropriate and specific circumstances can be an effective tool in comparing various alternatives in a NEPA analysis. However, it is important to remember a fundamental NEPA principle I identified earlier: the statute's goal is to achieve informed decision making on the particular matter pending before the agency; it is not to develop encyclopedic materials on larger issues that should be decided in a broader framework. In order for such an approach to achieve NEPA's primary goal of informing agency decision making, it is critical that the GHG emissions included in the comparison are appropriately limited to those that are closely related to the proposed project and thus are useful to inform the agency's decision. As the causal connection between a proposed action and potential upstream and downstream effects becomes more attenuated, attempts to quantify GHG emissions also become more speculative and uncertain. Without appropriate limits in place, the scope of a NEPA review could become boundless and preclude any meaningful comparison between alternatives.

At the same time, beyond assessing GHG emissions themselves, the unique nature of GHG emissions and climate change presents fundamentally different considerations than any other environmental issue and, in turn, bars a one-size-fits-all approach for all agencies addressing all projects in all situations as CEQ proposes. As CEQ explains in the Revised Draft Guidance, "GHG emissions from an individual

agency action will have small, if any, potential climate change effects. Government action occurs incrementally, program-by-program, and climate impacts are not attributable to any single action, but are exacerbated by a series of smaller decisions, including decisions made by the government.” 79 Fed. Reg. at 77,825. And as the Environmental Protection Agency (“EPA”) stated in its endangerment determination for GHG emissions from mobile sources, “greenhouse gas emissions emitted from the United States (or from any other region of the world) become globally well-mixed, such that it would not be meaningful to define the air pollution as greenhouse gas concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world.” 74 Fed. Reg. 66,496, 66,517 (Dec. 15, 2009). As a result, the GHG concentration at a given location cannot be traced to a specific source or subset of sources, but instead is the product of the incremental contributions of all sources of GHG emissions across the planet.

The global nature of GHG emissions and climate change has important implications for NEPA analyses and the evaluation of the potential environmental effects of a proposed federal action. As CEQ and other federal agencies have recognized:

climate change presents a problem that the United States alone cannot solve. Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change. Other countries would also need to take action to reduce emissions if significant changes in global climate are to be avoided.

Interagency Working Group on Social Cost of Carbon, Technical Support Document: - Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866 at 10 (Feb. 2010). In light of the comparative magnitude of GHG emissions from other sources, it is virtually impossible to isolate and evaluate the climate change impacts of GHG emissions from a single federal action, let alone the incremental differences in climate change impacts between various alternatives.

In recognition of these unique challenges posed by the global nature of GHG emissions and climate change, CEQ has proposed to use GHG emissions as a “proxy for assessing a proposed action’s climate change impacts.” 79 Fed. Reg. at 77,825. It is important to recognize, however, the limitations with respect to establishing a causal link between GHG emissions from a particular source and the environmental and climate change impacts related to such source. Since the proportional and relative emissions from any given project are infinitesimally small, CEQ must ensure that

agencies avoid any temptation to expand the scope of the NEPA review to include other upstream or downstream GHG emissions that lack the requisite causal connection to the proposed action in an effort to artificially increase the significance of a proposed project's climate change impacts. CEQ must take steps to ensure that a NEPA discussion of GHG emissions provides pertinent and helpful information to an agency decision maker rather than simply adding fuel to an ongoing debate about climate change.

Five Ways to Reconcile a Revised CEQ Guidance with NEPA Law and Practice

As described above, I agree with CEQ regarding two overarching assumptions in the draft CEQ guidance: (1) that an assessment of GHG emissions is relevant to NEPA analysis for certain projects; and (2) that appropriately drafted guidance can be an aid to federal decision makers, project developers, interested stakeholders, and the courts. However, although GHG emissions and climate change present distinct challenges from other types of environmental impacts as described above, these distinctions do not excuse CEQ from acting within the bounds of NEPA law and regulations, case law, and past practice. As described below, there are at least five key ways revised guidance should be drafted to ensure that the CEQ directive is fully consistent with NEPA law and practice. In the meantime, CEQ should withdraw the Revised Draft Guidance to avoid confusion and uncertainty to decision makers, stakeholders and the courts in the interim as it considers the comments provided by stakeholders.

1. Any Final Guidance Should Not Expand Consideration of Upstream and Downstream Effects.

At the outset, any final GHG Guidance must be clear that agencies are not required to expand the scope of NEPA analysis to include upstream and downstream effects that are not closely related to the proposed federal action under review. CEQ's current regulations require agencies to consider direct, indirect, and cumulative effects within certain prescribed limits. CEQ cannot use a guidance to effectively amend those regulations by broadening their scope. The Revised Draft Guidance's broad allowance to consider upstream and downstream effects could be construed as expanding the scope of NEPA reviews beyond what is permissible under CEQ's regulations and well-established case law. Further, eliminating agency discretion to determine which potential indirect or cumulative impacts should be considered would, as the Supreme Court recognized in *Andrus v. Sierra Club*, 442 U.S. 347, 355 (1979), "trivialize NEPA."

The purpose of NEPA is to inform agency decision making. To achieve this purpose, it is critical that agencies avoid consideration of potential environmental impacts that are irrelevant to the proposed federal action because they are either too far removed from the proposed federal action or are too speculative in nature. CEQ's regulations address this concern by directing agencies to limit their consideration of cumulative and indirect effects to those that are "reasonably foreseeable." 40 C.F.R. §§ 1508.7, 8. These regulations ensure that agencies will not consider potential environmental effects over which the agency has no control and allows them to avoid unnecessary litigation over hypothetical, tangential, or *de minimis* impacts. Courts interpreting these regulations have adopted a standard based on the tort concept of proximate cause to ensure that a sufficiently close relationship exists between the proposed federal action and the potential environmental impact. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); see also *Public Citizen*, 541 U.S. at 767 (citing W. Keeton, *et al.*, Prosser and Keeton on Law of Torts 264, 274-75 (1983) for proximate cause standard). Thus, for example, an agency need not consider environmental effects of actions over which the agency has no control. *Public Citizen*, 541 U.S. at 770 ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (same). This is a heightened level of causation, and it is not enough that a proposed federal action would be a "but for" cause of the potential impact.

Courts have applied this proximate cause standard in several past cases addressing upstream and downstream impacts that are instructive in the context of GHG emissions. Courts have frequently held that a proposed federal action cannot be considered a proximate cause of an upstream or downstream action if the upstream or downstream action would occur even if the federal action did not occur. For example, courts have held that agencies need not consider the effect of future growth or economic development if the proposed federal action is responding to, rather than inducing, that growth. See, e.g., *Citizens for Smart Growth v. Dep't of Transp.*, 669 F.3d 1203, 1205 (11th Cir. 2012) (no need to evaluate "the project's stimulation of commercial interests in a previously residential area" when "commercial uses in the study area were already being planned or developed"); *City of Carmel-By-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) ("The construction of Hatton Canyon freeway will not spur on any unintended or, more importantly, unaccounted for, development because local officials have already planned for the future use of the land, under the assumption that the Hatton Canyon Freeway would be completed."); *Morongo Band of Mission Indians v. Fed. Aviation Administration*, 161 F.3d 569 (9th Cir. 1998) ("[T]he project was implemented in order to deal with existing problems; the fact that it might also facilitate further growth is insufficient to constitute a growth-

inducing impact under 40 C.F.R. § 1508(b).”). Likewise, in the context of an oil pipeline, a court held that an agency does not need to consider upstream impacts from extracting the oil if the oil would be extracted, transported, and consumed even if the pipeline were not built. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010).

In addition, an agency’s obligation to evaluate indirect and cumulative impacts is limited to those effects which are “reasonably foreseeable.” 40 C.F.R. §§ 1508.7, 1508(b). “‘Reasonable foreseeability’ does not include ‘highly speculative harms’ that ‘distort[] the decisionmaking process’ by emphasizing consequences beyond those of ‘greatest concern to the public and greatest relevance to the agency’s decision.’” *City of Shoreacres*, 420 F.3d at 453 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)) (alteration in original). Applying this standard, the Fifth Circuit affirmed the Department of Transportation’s decision to exclude from its cumulative impacts analysis of a proposed LNG facility the potential environmental effects of other proposed federal projects for which draft EISs had not yet been prepared. *Gulf Restoration Network v. Dep’t of Transp.*, 452 F.3d 362, 370 (5th Cir. 2006). The court explained that the agency was “entitled to conclude that the occurrence of any number of contingencies could cause the plans to build the ports to be cancelled or drastically altered.” *Id.*

As CEQ has recognized, GHG emissions and climate change are difficult to address under NEPA because GHGs are well-mixed, global pollutants emitted by countless sources. As a result the relative and proportional climate change impacts of emissions associated with any given federal action will be infinitesimally small and such impacts are likely to be realized regardless of the project due to other GHG emissions globally. In response, in order to create a larger climate change footprint for a project, some may be tempted to advocate for an expansion of the scope of upstream and downstream emissions under consideration to increase the overall emissions associated with a proposed federal action. That outcome, however, is precisely what CEQ’s own regulations and NEPA case law have sought to prevent.

The Revised Draft Guidance does not do enough to discourage such an expansive approach to addressing upstream and downstream GHGs and climate change impacts. To the contrary, the Revised Draft Guidance includes an example of an open pit mine and suggests that a NEPA review should encompass GHG emissions from every activity beginning with clearing land for extraction and extending to the ultimate use of the resource. These actions strain the concept of proximate cause and could encourage agencies to look too far in their NEPA reviews and project challengers to cite the guidance in litigation when the agencies stay within proper bounds. CEQ should clarify that nothing about GHGs or climate change

alters the limits established in the regulations and caselaw, and that an expanded upstream and downstream assessment for GHGs is neither required nor lawful.

2. Any Final Guidance Should Not Be Applied Across the Board to Diverse Land and Resource Management Actions.

The Revised Draft Guidance departed significantly from CEQ's prior 2010 draft Guidance by proposing to apply the Guidance across the board to land and resource management actions. In doing so, the Guidance fails to fully appreciate that land and resource management actions are inherently diverse, complex and not conducive to a one-size-fits-all approach. Applying the Revised Draft Guidance to all land and resource activities will make an already difficult NEPA review process even worse. The complexity of these actions requires a more tailored approach than the Revised Draft Guidance offers.

Agencies responsible for federal land management are strictly bound by statutory requirements to manage federal land for multiple and diverse uses, many of which have some associated environmental impacts. Relevant statutes here include the Multiple-Use Sustained-Yield Act, National Forest Management Act, Federal Land Policy and Management Act, and Alaska National Interest Lands Conservation Act. A core principle of many of these statutes is the requirement that agencies develop comprehensive resource management plans that then guide agency actions at the site-specific level. Once established, these plans must be revised on a regular basis to reflect changing conditions and changing public needs.

Land and resource management action and decisions are often among the most contentious under NEPA. This is particularly true of comprehensive resource management plans, which, in many cases, are dramatically slowed—if not paralyzed—by NEPA challenges brought by groups who oppose certain uses of federal land. For example, opponents of off-road vehicle use, timber harvesting, and oil and gas development can use the NEPA process and related litigation to stall implementation of otherwise authorized uses with which they happen to disagree.

Given the far-reaching scope of NEPA to diverse actions across the federal government, applying a generic one-size-fits-all evaluation of GHG emissions to the diverse universe of land and resources management actions will only serve to exacerbate these challenges. While uniformity and consistency are laudable goals, they should not be applied indiscriminately to actions that are so fundamentally different. Thus, to the extent that guidance is necessary for addressing GHG emissions from land and resource management actions, such guidance should be done separately for various types of activities in a manner tailored to specific types of land and resource management decisions that agencies face.

3. *Any Final Guidance Should Not Require Agencies to Apply OMB's Draft Social Cost of Carbon Estimates in NEPA Reviews.*

The Revised Draft Guidance also directs agencies to apply OMB's draft Social Cost of Carbon in NEPA reviews when costs and benefits of a proposed federal action are monetized. OMB's draft Social Cost of Carbon estimates are among the least transparent environmental decisions of this Administration, having been formulated in a "black box" interagency process without public input that itself seems to go against every principle of public participation otherwise omnipresent in NEPA and other environmental laws. In substance, the estimates are a work in progress at best and should not be applied in NEPA reviews. To do otherwise would gloss over several critical flaws in this draft metric and apply mere estimates that have not been vetted by the public with a degree of certainty and precision that is deserved. As a result, applying social cost of carbon estimates would fail to provide the transparency on which NEPA is based and would impede rather than promote informed agency decision making.

The OMB's draft Social Cost of Carbon estimates suffer from a number of significant flaws that should exclude them the NEPA process. First, projected costs of carbon emissions can be manipulated by changing key parameters such as timeframes, discount rates, and other values that have no relation to a given project undergoing review. As a result, applying social cost of carbon estimates can be used to promote pre-determined policy preferences rather than provide for a fair and objective evaluation of a specific proposed federal action. Second, OMB and other federal agencies developed the draft Social Cost of Carbon estimates without any known peer review or opportunity for public comment during the development process. This process is antithetical to NEPA's central premise that informed agency decision making must be based on transparency and open dialogue with the public. Third, OMB's draft Social Cost of Carbon estimates are based primarily on global rather than domestic costs and benefits. This is particularly problematic for NEPA reviews because the Courts have established that agencies cannot consider transnational impacts in NEPA reviews. *See NRDC v. NRC*, 647 F.2d 1345 (D.C. Cir. 1981). Fourth, there is still considerable uncertainty in many of the assumptions and data elements used to create the draft Social Cost of Carbon estimates, such as the damage functions and modeled time horizons. In light of the lack of transparency in the OMB's process, these concerns over accuracy are particularly problematic.

The problems associated with the confusion and uncertainty surrounding the draft OMB social cost of carbon estimates to NEPA analyses are readily observable in the *High Country* decision, discussed above. The court found that the final EIS was arbitrary and capricious because the agencies failed to justify their decision not to

apply the draft OMB social cost of carbon estimates. 52 F. Supp. 3d at 1191. Significantly, however, the court did not mandate the inclusion of the draft OMB social cost of carbon estimates in NEPA cost benefit analysis and observed that “the agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of GHG emissions from the Lease Modifications.” *Id.* at 1193. Given the critical flaws and deficiencies in the draft OMB social cost of carbon estimates and the district court’s clear direction that agencies have discretion to exclude the draft OMB social cost of carbon estimates from cost benefit analysis when properly justified, it is critical that CEQ provide guidance to the agencies that explains the deficiencies in the draft OMB social cost of carbon estimates and assists agencies in articulating a reasoned basis for excluding the metric from cost benefit analyses in future NEPA reviews at this time.

Requiring agencies to apply a flawed Social Cost of Carbon estimate is contrary to NEPA’s requirements that agencies must understand and address uncertainty and unknown data points. In fact, 40 C.F.R. § 1502.22, provides a procedure for agencies to address incomplete or unavailable information, directing them to explain the information that is missing and its relevance to the proposed agency action. Directing agencies to apply the OMB’s flawed draft Social Cost of Carbon estimates will give the public a false sense of certainty with respect to those estimates and will prevent them from appreciating the uncertainty related to potential climate change impacts. Thus, until OMB completes a more transparent process that produces a more accurate method of calculating the cost of carbon emissions, CEQ should direct agencies to avoid using the estimates and instead rely on existing CEQ regulations addressing incomplete or unavailable information.

4. Any Final Guidance Should Make Clear that NEPA Does Not Require Adoption of Specific Mitigation Methods.

The Revised Draft Guidance also arguably goes beyond what NEPA requires by suggesting that agencies could be required to adopt GHG mitigation measures as part of their NEPA analyses and subsequent decisions. While evaluation of mitigation measures can be an appropriate part of a NEPA analysis, agencies are under no legal obligation to adopt mitigation measures. To avoid confusion, CEQ should clarify that the guidance’s discussion of GHG mitigation measures is not intended to alter existing NEPA law and regulations for mitigation.

It is well-settled that NEPA does not impose substantive requirements on agency decision making. Instead, as the Supreme Court has explained, NEPA’s “mandate to the agencies is essentially procedural.” *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Consistent with this requirement, CEQ’s

regulations direct agencies consider “mitigation measures (not included in the proposed action” as alternatives in their NEPA analyses. 40 C.F.R. § 1508.25(b)(3). In interpreting NEPA and CEQ’s regulations, courts have frequently confirmed that mitigation measures are an important ingredient of assessment in NEPA analyses, but held that agencies have no substantive obligation to adopt the mitigation measures that they identify.

Mitigation measures do play a central role in “mitigated findings of no significant impact,” or mitigated FONSI. Rather than preparing a full EIS, an agency can conduct a less detailed EA. If the agency concludes after the EA that there will be no significant environmental impact from the proposed action, it can issue a FONSI and conclude its NEPA review; if significant impacts are identified, the agency must prepare an EIS. Agencies can issue a mitigated FONSI with binding mitigation requirements if it determines that including those mitigation measures will avoid any significant environmental impacts.

The Revised Draft Guidance as written creates a risk it could be interpreted by decision makers, project challengers, and courts as crossing the established line between assessing mitigation impacts and requiring agencies to adopt mitigation measures. For example, in discussions of the Record of Decision or ROD that is issued after an EIS, CEQ directs agencies to “identify those mitigation measures [adopted to address climate change] and ...consider adopting an appropriate monitoring system.” Similarly, CEQ directs agencies to evaluate “the permanence, verifiability, enforceability, and additionality” of proposed mitigation measures. 79 Fed. Reg. at 77828. This language is similar to what is required by regulatory agencies in mandatory offset programs for GHGs and other pollutants and, therefore, could be interpreted to include substantive, rather than merely procedural, components. Finally, in comments on the 2010 draft guidance, several commenters urged CEQ to “explicitly acknowledge that adoption of mitigation measures considered under NEPA are not *per se* required, and should not be required under the NEPA statute.” *Id.* at 77,819. EPA declined to do so, creating further uncertainty about the role of mitigation of GHG emissions in NEPA reviews. Statements such as these could be misconstrued as crossing the line to impose substantive requirements as part of a NEPA analysis. CEQ must clarify in any final guidance that NEPA cannot be used to compel an agency to adopt mitigation measures.

5. *Any Final Guidance Should Not Adopt a Presumptive Threshold for Quantifying GHG Emissions in NEPA Analyses.*

In the Revised Draft Guidance, CEQ retains a presumptive GHG emissions threshold of 25,000 metric tons and suggests that agencies should attempt to quantify

GHG emissions if they will exceed that threshold. This presumptive threshold is both contrary to well-established NEPA precedent and without basis in the administrative record.

First, adopting a presumptive threshold such as this is inconsistent with the discretion that agencies are given in conducting NEPA reviews. Rather than providing detailed procedures, NEPA directs agencies to apply the “rule of reason” when determining when and how to do things such as quantifying emissions. Indeed, there are no similar thresholds for quantifying emissions of other pollutants. Further, it is unlikely that CEQ can fully cure this deficiency by adding appropriate disclaimers that the threshold merely is presumptive or illustrative and need not be followed in all cases. As a practical matter, once a quantifiable figure—such as 25,000 metric tons—is provided as guidance, it will likely be applied as a *de facto* standard by many agencies and the courts.

Second, the Revised Draft Guidance does not explain why 25,000 metric tons is an appropriate threshold for NEPA reviews. Instead, the number, which first appeared in the 2010 draft guidance appears to be taken from EPA’s then-proposed regulations for GHG emissions from stationary sources under the PSD permitting program. As an initial matter, that EPA rulemaking served a very different purpose than NEPA review and CEQ offered no explanation as to why the same number is appropriate in each case. Further, in the final Tailoring Rule, EPA substantially increased the emissions thresholds to 100,000 and 75,000 metric tons, casting even more doubt on the appropriateness of a 25,000 metric ton threshold.

Conclusion

CEQ Should Withdraw the Revised Draft Guidance Pending Consideration of Comments

For the reasons above and stated more thoroughly by stakeholders in comments filed in the public record, there is a need for significant revisions before finalizing any guidance. In the interim, although the revised Guidance is labeled “draft,” this is a unique scenario where the existence of a draft can have the effect of influencing decision makers in the interim as if it were a final document. Implementing federal agencies are likely to look to any CEQ direction, whether draft, interim, or final, in assessing how they should approach GHG and climate change analysis in their NEPA documents. Similarly, opponents of projects undoubtedly will cite even a draft CEQ guidance to the courts as carrying weight and relevance. For these reasons, CEQ should withdraw the Draft Revised Guidance while it considers and responds to the filed comments and the input of this Committee.