



COLUMBIA LAW SCHOOL

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Mr. Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews

Dear Mr. Greczmiel,

The Sabin Center for Climate Change Law is pleased to submit these comments in support of the Council on Environmental Quality (CEQ)'s "Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews." We believe that the promulgation of this guidance will advance consistency in NEPA disclosures, ensure that federal agencies are accountable for the full range of the environmental consequences associated with their decisions, and ultimately improve the quality of federal decision-making. Although these disclosures do not trigger a substantive obligation to reduce greenhouse gas (GHG) emissions or adapt to climate change, they provide federal agencies with valuable information that they can use in making decisions. Equally important, these disclosures are necessary to facilitate meaningful participation in federal decision-making processes.

These comments are divided into three sections. First, we describe how the proposed guidance comports with both NEPA and national climate policy. Second, we explain why the proposed guidance is necessary to promote consistency in agency practice. Third, we offer two recommendations on how CEQ could modify the final guidance to further clarify agency obligations under NEPA.

I. The Proposed Guidance is Consistent with NEPA and National Climate Policy

The proposed guidance is consistent with NEPA as well as national policy objectives on climate change mitigation and adaptation. Numerous courts have agreed that the disclosure of GHG emissions and related impacts is appropriate (and even compelled) under NEPA.¹ However, there are still uncertainties about the proper scope of this analysis. The proposed guidance reaffirms the basic rule that agencies address climate-related considerations and provides clarity on specific areas of uncertainty, such as the proper threshold for quantifying GHG emissions and the proper scope of indirect effects analysis. In particular, we believe that the following elements of the guidance (i) provide much needed clarification on an agency's obligation to discuss climate change during NEPA reviews, and (ii) reflect a reasonable and prudent interpretation of federal law and policy.

Agencies Should Assess Downstream and Upstream Emissions – The CEQ proposal directs agencies to assess GHG emissions from any activity that has a “reasonably close causal relationship” to the federal action, including “those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emission).”² For example, an EIS for open pit mine may need to address emissions from the following activities: clearing land for the extraction, building access roads, operating the mine, transporting the extracted resource, refining or processing the resource, and using the resource (such as burning mined coal in an electric generating plant).³

This is consistent with existing CEQ regulations, which require agencies to consider direct, indirect and cumulative impacts accruing from the proposed action as well as connected and cumulative actions.⁴ Notably, the regulations *already* require agencies to review impacts from “connected actions that are closely related to the proposed action” and define connected actions as those that “automatically trigger other actions; or cannot or will not proceed unless a previous or simultaneous action is taken; or are interdependent parts of a larger action and depend on the larger action for justification.”⁵ The regulations also specify that “growth inducing

¹ See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal. 2003); *High Country Conservation Advocates v. United States Forest Serv.*, No. 13-CV-01723-RBJ, 2014 WL 2922751 (D. Colo. June 27, 2014).

² 79 Fed. Reg. 77,825-26.

³ 79 Fed. Reg. 77,826.

⁴ 40 C.F.R. §§ 1508.7, 1508.8, 1508.25.

⁵ 40 C.F.R. §§ 1508.25(a)(1) and 1508.25(a)(1)(iii).

effects” and changes in the “pattern of land use, population density or growth rate” are some of the indirect effects that must be analyzed under NEPA.⁶

CEQ’s interpretation of NEPA is also consistent with federal case law. The courts have consistently held that NEPA requires consideration of indirect impacts that are “reasonably foreseeable” and have a “reasonably close causal relationship” to the proposed action.⁷ Applying this standard, federal courts have remanded EISs for failing to address GHG emissions from connected actions and induced growth.⁸

Finally, the direction that agencies account for any reasonably foreseeable downstream and upstream emissions is consistent with national climate policy. Since 2009, President Obama has repeatedly called upon federal agencies to disclose and reduce GHG emissions.⁹ Last week, President Obama issued an executive order directing federal agencies to reduce GHG emissions by 40% by 2025.¹⁰ In addition, one pillar of the President’s Climate Action Plan is to “lead international efforts to combat global climate change and prepare for its impacts,”¹¹ and the President has established a nationwide emissions reduction goal of 26-28% below 2005 levels by 2025.¹² Achieving these goals will require comprehensive action to reduce GHG emissions

⁶ 40 C.F.R. § 1508.8(b). *See also* Barnes v. U.S. Dep’t of Transp., 655 F.3d 1124, 1136-39 (9th Cir. 2011) (even if the stated purpose of the project is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects falling under the purview of 40 C.F.R. § 1508.8(b)).

⁷ Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983); Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004).

⁸ Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003) (cannot approve project (280 miles of new rail line and upgrade to nearly 600 miles of existing rail) without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption); Barnes v. U.S. Dep’t of Transp., 655 F.3d 1124, 1136-39 (9th Cir. 2011) (even if the stated purpose of the project is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to an additional runway as growth-inducing effects falling under the purview of 40 C.F.R. § 1508.8(b)); Border Power Plant Working Grp. v. Dep’t of Energy, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal. 2003) (EIS must consider GHG emissions from power plant that would be connected to transmission line project); High Country Conservation Advocates v. United States Forest Serv., No. 13-CV-01723-RBJ, 2014 WL 2922751 (D. Colo. June 27, 2014) (agency did not take a “hard look” at how GHG emissions from Colorado Roadless Rule because it failed to disclose: (1) GHG emissions from operation of mines that would occur pursuant to the rule, (2) GHG emissions from combustion of coal that would be mined).

⁹ *See, e.g.*, Exec. Order 13,514, Federal Leadership in Environmental, Energy, and Economic Performance (Oct. 5, 2009); Exec. Order 13,653, Preparing the United States for the Impacts of Climate Change (Nov. 1, 2013); Exec. Order: Planning for Federal Sustainability in the Next Decade (Mar. 19, 2015).

¹⁰ Exec. Order, Planning for Federal Sustainability in the Next Decade (Mar. 19, 2015).

¹¹ EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 5 (June 2013).

¹² The Administration has stated that it will submit this to the UNFCCC as the U.S. “Intended nationally Determined Contribution” no later than the first quarter of 2015. *See* Fact Sheet: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation, <https://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>.

across all sectors, including those sectors which are implicated in the analysis of upstream and downstream emissions from federal actions.

Agencies Should Consider the Effects of Climate Change on the Environmental Consequences of a Proposed Action – CEQ properly directs agencies to consider the effects of climate change when assessing the current and expected future state of the affected environment and when analyzing the impacts of a proposed action. CEQ is correct in noting that such considerations are “squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilience actions.”¹³ CEQ also directs agencies to “remain aware of the evolving body of scientific information and its clarification of climate impacts at more localized level.”¹⁴

This aspect of CEQ’s guidance is consistent with federal law and policy. It would be impossible for an agency to accurately characterize the “environmental impact of the proposed action” without accounting for the impact of climate change on the affected environment and the environmental consequences of the action.¹⁵ Moreover, NEPA expressly requires agencies to assess “the relationship between local short-term uses of man’s environment and the maintenance an enhancement of long-term productivity” in an EIS.¹⁶ An assessment of whether an action is resilient in the face of climate change would fit squarely within the purview of this mandate. Such an assessment would also accord with the congressional policy underlying NEPA (“to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans”)¹⁷ and the overarching direction that federal agencies “use all practical means... to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”¹⁸

In addition, this direction is consistent with current national policy on climate change adaptation. For example, one pillar of the President’s Climate Action Plan is to prepare the U.S.

¹³ 79 Fed. Reg. 77,828-29.

¹⁴ *Id.* at 77,828.

¹⁵ 42 U.S.C. § 4332(2)(C)(i) (requiring agencies to assess the “environmental impact of the proposed action”). *See also* 40 CFR § 1502.15 (requiring EISs to include a description of the environment of the area(s) to be affected).

¹⁶ 42 U.S.C. § 4332(2)(C)(4).

¹⁷ 42 U.S.C. § 4331(a).

¹⁸ 42 U.S.C. § 4331(b)(3).

for the impacts of climate change.¹⁹ In furtherance of this objective, Executive Order (EO) 13,653 directs federal agencies to enhance climate change preparedness and awareness through: (1) engaged and strong partnerships and information sharing at all levels of government; (2) risk-informed decision-making and the tools to facilitate it; (3) adaptive learning, in which experiences serve as opportunities to inform and adjust future actions; and (4) preparedness planning.²⁰ EO 13,653 further clarifies that agencies should “reform policies and Federal funding programs that may... increase the vulnerability of natural or built systems, economic sectors, natural resources, or communities to climate change related risks.”²¹

Many projects subject to NEPA will themselves have negative environmental impacts if they are adversely affected by future climate change in certain ways. For example, if sea level rise or extreme inland precipitation cause or worsen flooding at a hazardous waste management facility, a chemical storage facility, or a nuclear power plant, dangerous materials could be released into the environment. If climate change significantly reduces the useful life of a project subject to NEPA or requires extensive repairs (as with a flooded airport, transit system, or housing project), the character and benefits of the project may be much different than those anticipated in an EIS that was prepared without consideration of these issues. Thus sound impact analysis requires consideration of the future conditions in which the facility will operate. Likewise, if wildfires or extreme winds cause severe damage to a forest area, management plans for that area will become obsolete; consideration of such eventualities in advance will aid in the identification of ways to reduce such impacts.

II. The Proposed Guidance is Necessary to Promote Consistency in Agency Practice

The proposed guidance represents an important step forward in advancing consistency in NEPA disclosures. This is extremely important because the current practices and methodologies used to evaluate climate change and GHG emissions are remarkably varied (making it difficult for agencies, the public, and courts to compare climate impacts across projects or confirm that a particular action is or should be reviewed under NEPA).

The Sabin Center conducted a survey of 227 federal EISs prepared between January 2009 and December 2011. This survey revealed “disparate treatment of climate change impacts in

¹⁹ EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 5 (June 2013).

²⁰ Exec. Order 13,653, Preparing the United States for the Impacts of Climate Change (Nov. 1, 2013).

²¹ *Id.* at § 2(ii).

federal EISs, with significant variation correlating with state, agency and project type.”²² In particular, we found significant variation in “the methods used to calculate emissions and assess their significance, the types of indirect impacts addressed and the extent to which the impacts of climate change on the project are included.”²³ The Sabin Center is conducting a follow-up assessment of EISs prepared between 2012 and 2014, and our preliminary findings suggest that agency treatment of climate change remains quite varied in the absence of binding guidance on this topic.²⁴

There has also been some variation in how courts have interpreted NEPA requirements in this context.²⁵ Although courts may require agencies to discuss climate change in their NEPA documents, they lack a conclusive set of interagency standards for evaluating the adequacy of this discussion. Most also lack the technical expertise to adequately interpret NEPA without external standards to guide their analysis (because such interpretations typically involve a highly technical assessment of environmental and physical processes associated with a proposed federal action). For example, determining whether an agency has adequately evaluated the “reasonably foreseeable” indirect impacts of a proposed action requires an in-depth assessment of connected actions and potential impacts, their foreseeability, and their proximity to the proposed action.

CEQ is better situated than the courts to determine the appropriate scope of NEPA review in this context. The agency has been tasked with overseeing the implementation of NEPA by gathering information on environmental trends and conditions, reviewing and appraising federal programs for compliance with NEPA, and developing environmental policies.²⁶ Thus, many

²² See PATRICK WOOLSEY, WHITE PAPER ON THE CONSIDERATION OF CLIMATE CHANGE IN FEDERAL EISs, 2009-2011 (Sabin Center for Climate Change Law ed., 2012); Sabin Center for Climate Change Law, *Database of Climate Change-Related Impacts in Federal EISs under the National Environmental Policy Act (NEPA)*, available at <http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center>.

²³ *Id.* at 17.

²⁴ The Sabin Center plans to publish a database and accompanying report on the 2012-2014 EISs later this year.

²⁵ Compare *High Country Conservation Advocates v. U.S. Forest Service*, --- F.Supp.3d --- (2014 WL 2922751) (U.S. District Court, D. Colorado, June 27, 2014) (holding that BLM’s NEPA analysis of climate change impacts was inadequate, and that the EIS must provide a justification for not using the social cost of carbon as a protocol to evaluate impacts), with *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, No. 3:12-cv-02271-HZ (U.S. District Court, D. Oregon, Dec. 9, 2014) (holding that NEPA did not require the Forest Service to evaluate the impact of forest thinning on climate change because the federal government had not identified a specific protocol for quantifying such impacts).

²⁶ 42 U.S.C. § 4344.

stakeholders (including federal regulators) have expressed support for the publication of final guidance on the scope of agency obligations to address climate change under NEPA.²⁷

III. Recommendations for Final Guidance

For the reasons stated above, the Sabin Center supports the finalization of CEQ's Revised Draft Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews. Although we support the finalization of this guidance in its current form, we would also like to highlight two modifications that CEQ could include to provide greater clarity on several issues.

Indirect Emissions Should Be Expressly Included in Quantification Threshold – The guidance sets forth a reference point of 25,000 metric tons of CO_{2-e} annually as a threshold below which quantification of GHG emissions is not recommended unless it can be easily accomplished.²⁸ Unlike the 2010 draft guidance, which instructed agencies to evaluate the action's contribution to climate change if the action's *direct* emissions exceeded this threshold, the revised guidance does not specify whether indirect emissions should also factor into the calculation of annual emissions.

We recommend that CEQ amend the draft guidance to specify that agencies should consider *both* direct and indirect emissions when applying the 25,000 tons-per-year threshold. This would provide greater clarity to federal decision-makers, ensure uniform application of the guidance, and reduce the opportunity for agencies to circumvent the guidance (e.g., by avoiding quantification by overlooking indirect GHG emissions, even when these emissions are significant). This instruction would also be consistent with the implementing regulations of NEPA, which require agencies to assess both the direct and indirect emissions of a project, as well as CEQ's direction that agencies should assess emissions from any activities that have a "reasonably close causal relationship to the Federal action" such as those activities that are either a predicate for or a consequence of the agency action.²⁹

²⁷ See, e.g., PRESIDENT'S STATE, LOCAL AND TRIBAL LEADERS TASK FORCE ON CLIMATE PREPAREDNESS AND RESILIENCE: RECOMMENDATIONS TO THE PRESIDENT (November 2014), available at http://www.whitehouse.gov/sites/default/files/docs/task_force_report_0.pdf.

²⁸ 79 Fed. Reg. 77,827-28.

²⁹ 79 Fed. Reg. 77,826.

Additional Guidance on Programmatic NEPA Review – The guidance encourages federal agencies to use programmatic NEPA analysis to ensure that GHG emissions and climate-related impacts are discussed at a level that is most useful for decision-makers and the public. CEQ identifies some examples of project- or site-specific actions that can benefit from a programmatic NEPA review, including constructing transmission towers, conducting prescribed burns, approving grazing leases, granting a right-of-way, authorizing leases for oil and gas drilling, authorizing construction of wind turbines, and approving hard rock mineral extraction.³⁰

We encourage CEQ to include stronger language in the final guidance, which clearly recognizes that the programmatic review stage is the most “effective and meaningful decision point” for addressing GHG emissions and climate change impacts on a broad scale. Specifically, the guidance should clarify the circumstances under which programmatic EISs *should* include a comprehensive assessment of these issues (as opposed to merely stating when they *may* include such analysis). This direction would be appropriate for many of the examples that CEQ has already highlighted in the guidance, such as programmatic decisions on oil and gas leasing and other federal land management decisions.

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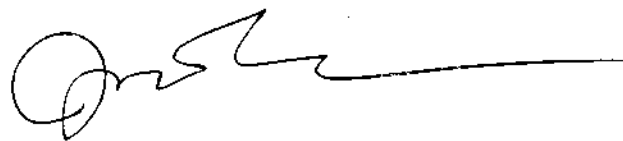
We appreciate your consideration of these issues and look forward to the promulgation of the final guidance on the consideration of GHG emissions and climate change under NEPA. Thank you for your attention to this matter.

Sincerely,



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³⁰ 79 Fed. Reg. 77,830.