



May 24, 2010

The Honorable Nancy Sutley
Chairwoman
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Comments of American Petroleum Institute, American Chemistry Council, National Association of Manufacturers and National Petrochemical Refiners Association on the Council on Environmental Quality's Draft NEPA Guidance Documents

Dear Ms. Sutley:

The American Chemistry Council (ACC), American Petroleum Institute (API), the National Association of Manufacturers (NAM) and the National Petrochemical & Refiners Association (NPRA) (collectively "Commentors") are pleased to submit these comments on the Council on Environmental Quality's (CEQ) (1) Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Draft Climate Change Guidance) and (2) Draft Guidance for NEPA Mitigation and Monitoring (Draft Mitigation Guidance), both issued on February 18, 2010.

ACC is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a \$689 billion enterprise and a key element of the nation's economy.

API is a national trade association that represents all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

NPRA is a national trade association comprised of more than 450 companies, including virtually all US refiners and petrochemical manufacturers that supply consumers with a wide

variety of products and services used daily in homes and businesses. These products include: gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the chemicals that are “building blocks” in making everything from plastics to clothing to medicine to computers.

Activities by Commentors’ members often require permits, licenses or approvals from federal agencies and, hence, may be subject to review under the National Environmental Policy Act (NEPA). Commentors and their members therefore have a strong interest in ensuring that the agencies implement NEPA and achieve its goals effectively and efficiently.

Commentors support CEQ’s effort to provide guidance to federal agencies on how they should address and consider climate change and greenhouse gas (GHG) emissions, as well as best practices concerning the use and implementation of mitigation measures under NEPA. Commentors, however, have significant concerns about the two draft guidance documents. In particular, Commentors are concerned that the draft guidance documents attempt to read into NEPA substantive mandates for federal agencies to mitigate environmental consequences and even control GHG emissions. NEPA carries no such substantive mandate and does not provide agencies with free-standing authority to impose whatever conditions or controls they might deem appropriate. Rather, “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (hereinafter *Methow Valley*) (citing *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); and *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)). Any suggestion to the contrary in the draft guidance documents runs counter to this well-established doctrine and should be removed.

Of equal concern is the Draft Climate Change Guidance’s proposal to treat GHG emissions in a fundamentally different manner from all other environmental issues confronting federal agencies. There is no need to create special rules for GHG emissions, including the establishment of a “quantitative threshold” for when they should be quantified or considered. Indeed, the only unique aspect of GHG emissions associated with major federal actions – that existing science is unable to demonstrate that such emissions are the “proximate cause” of any impacts to lands or resources managed by the federal government – counsels *against* the use of any quantitative threshold and a heightened focus on GHG emissions. Consideration of GHG emissions should be governed by the same “rule of reason” applicable to other air emissions or water discharges associated with major federal actions.

With these general precepts in mind, Commentors provide more detailed comments below regarding the two draft guidance documents.

I. Comments On The Draft NEPA Guidance On Consideration Of The Effects Of Climate Change And Greenhouse Gas Emissions

A. NEPA Does Not Empower Agencies To Control Or Limit GHG Emissions.

1. NEPA's Scope Is Limited

A fundamental tenet of NEPA is that it is only a procedural statute. NEPA does not mandate any particular outcome or require an agency to select an alternative that has the fewest environmental consequences or even the lowest GHG emissions. NEPA simply requires that an agency give a “hard look” to the environmental consequences of any major federal action it is undertaking. *See Methow Valley*, 490 U.S. at 350-51; *Kleppe*, 427 U.S. at 410, n.21 (Agency is to take a “hard look” at the environmental consequences). Once the procedural elements of NEPA have been satisfied and the environmental consequences given the required hard look, an agency may issue its decision relying on the factors and considerations specified in the statute under which it is acting.

An important corollary to NEPA's lack of a substantive mandate is that the scope of the environmental information that must be addressed in an EIS or EA is constrained by the agency's substantive authority, as defined by the statute governing the agency's action. This means that only that information that is useful to the environmental decisionmaker 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 decisionmaker. 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”); *N.J. Dep't. of Env't'l. Protection v. U.S. Nuclear Reg. Comm'n.*, 561 F.3d 132, 139-40 (2d Cir. 2009) (NRC's lack of control over airspace meant it did not need to consider under NEPA the effects of airborne terrorist attack in nuclear plant relicensing); *Ohio Valley Env't'l. Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) (scope of environmental analysis under NEPA is limited to those environmental consequences caused by and subject to the jurisdiction of permitting agency); *NRDC v. U.S. Army Corps of Engineers*, 2010 U.S. Dist. LEXIS 30954 (N.D. Ohio 2010) (In permitting coal-to-gas facility, NEPA did not require Corps of Engineers to evaluate GHG emissions but rather only those impacts within the jurisdiction of the agency's permitting authority under section 404 of the Clean Water Act); *Quechan Indian Tribe v. U.S. Dept. of Interior*, 547 F. Supp. 2d 1033 (D. Ariz. 2008) (In the context of a land transfer, Bureau of Reclamation need not consider impacts of refinery to be constructed on transferred land because it has no authority to prevent the environmental impacts of the refinery). *See also* 40 C.F.R. § 1500.1(c) (“NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action”).

Another inherent limitation of NEPA is found in the threshold issues of proximate causation and reasonable foreseeability. In *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 774 (*PANE*), the Supreme Court held that NEPA should be “read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate

cause from tort law." This proximate causation requirement was emphasized again by the Court in *Dep't. of Trans.*, 541 U.S. at 767:

Respondents must rest, then, on a particularly unyielding variation of “but for” causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. As this Court held in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983), NEPA requires “a reasonably close causal relationship” between the environmental effect and the alleged cause. The Court analogized this requirement to the “familiar doctrine of proximate cause from tort law.” *Ibid.* . . . 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.

Moreover, even when an effect might meet this proximate cause standard, an agency must only evaluate those significant effects which are “reasonably foreseeable.” *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st Cir. 1999). An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Gulf Restoration Network v. Dep't. of Transp.*, 452 F.3d 362, 368 (5th Cir. 2006) (citations omitted). Where information about impacts is too indefinite, unclear, or speculative to be of use to the decisionmaker at the time of decision, there is no need to include it in the environmental analysis. *See, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992) (An environmental effect would be considered “too speculative” for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker) (citation omitted); *see also Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (Agency not obligated to perform an analysis if the results cannot be described “with sufficient specificity to make its consideration useful to a reasonable decision-maker”); *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n.*, 685 F.2d 459, 476 (D.C. Cir. 1982) (*rev'd* on other grounds, *Baltimore Gas & Electric Co.* 462 U.S. 87).

Applying the “reasonable foreseeability” standard, courts have found, for example, that growth inducing effects from highway construction or other types of projects must be considered. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975 (port and causeway); *Florida Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298 (biotechnology park); *Mullin v. Skinner*, 756 F. Supp. 904 (E.D. N.C. 1990) (bridge to barrier island). In these circumstances, the potential impact and its relationship to the federal action are clear and unmistakable. In contrast, in cases where the impact is too remote or uncertain and not clearly connected to the federal action, it need not be considered. *See, e.g., Trout Unlimited v.*

Morton, 509 F.2d 1276) (second home development and land use changes that might be induced by dam and reservoir); *Env't'l Def. Fund, Inc. v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123 (5th Cir. 1974) (immigration that might be induced by waterway). The impact to climate or the environment from GHG emissions associated with individual federal actions is clearly speculative and not “reasonably foreseeable,” and thus need not be considered under NEPA.

2. The Draft Climate Change Guidance Does Not Properly Reflect NEPA’s Limited Scope

The Draft Climate Change Guidance, in passing, purports to recognize the limited scope of NEPA. It properly describes climate change as a global issue, both in terms of possible effects and the vast number of GHG emission sources thought to contribute to climate change. *See* Draft Climate Change Guidance at 2. The draft Guidance appropriately continues that NEPA documents should reflect this global context and be realistic in focusing on ensuring that “useful information is provided to decision makers for those actions that the agency finds are a significant source of GHGs.” *Id.* Commentors agree with these sentiments.

Commentors also agree with CEQ’s recommendation that the “rule of reason” should govern the analysis of GHG emissions and climate change, just as it does with all other environmental issues and effects that must be analyzed under NEPA. *See id.* at 2. The draft correctly notes that “agencies should recognize the scientific limits of their ability to accurately predict climate change effects, especially of a short-term nature, and not devote effort to analyzing wholly speculative effects.” *Id.* Thus, in the scoping process, agencies can “set reasonable spatial and temporal boundaries for this assessment and focus on aspects of climate change that may lead to changes in the impacts, sustainability, vulnerability and design of the proposed action and alternative courses of action.” *Id.* Commentors agree that these are helpful concepts which should help to focus the scope of NEPA analyses to provide useful information to decisionmakers and the public.

The remainder of the Draft Climate Change Guidance, however, ignores these statements and NEPA’s limited scope. Instead, the core of the draft Guidance suggests that NEPA actually carries a substantive mandate to limit GHG emissions. This is reflected in the draft Guidance’s call for agencies to quantify GHG emissions above a presumptive threshold level of 25,000 MT of GHG emissions per year. *Id.* at 3. It is also reflected in the draft Guidance’s conclusion that “it would be appropriate [for an agency] to: (1) quantify cumulative emissions over the life of the project; (2) discuss measures to reduce GHG emissions, including consideration of reasonable alternatives; and (3) qualitatively discuss the link between such GHG emissions and climate change.” *Id.* The draft Guidance goes on to state that when GHG emissions are quantified, the agency should consider measures to mitigate GHG emissions, and identifies “mitigation” options for GHG emissions to include “enhanced energy efficiency, lower GHG-emitting technology, renewable energy, planning for carbon capture and sequestration, and capturing or beneficially using fugitive methane emissions.” *Id.* at 6.

These suggestions are all misplaced. They are premised on the mistaken notion that NEPA provides agencies authority to regulate and mitigate GHG emissions. As discussed

above, NEPA provides no such substantive authority. Power to limit GHG emissions, if it exists, must be found in another statute. Outside of the Clean Air Act, however, there is no federal law providing agencies with authority over GHG emissions. Moreover, given the nature of GHG emissions and global climate change, based on the limits of current science, no individual action can be viewed as proximately causing climate change or environmental impacts; any effect is the result of the entirety of natural and anthropogenic emissions of GHGs worldwide. Not only is science unable to determine the effect on the global climate from a single major federal action, it lacks any ability to link GHG emissions associated with that action to specific effects on the resources or lands that agencies manage.

In the absence of some specific legal authority to limit GHG emissions or establish national energy policy, it would be inappropriate and *ultra vires* for an agency to select an alternative based on its assessment that the alternative would emit less GHGs than some other alternative. For example, BLM is charged with managing specific federal lands under the Federal Land Policy and Management Act (FLPMA). It is conceivable that some BLM activities could result in GHG emissions. Science does not permit us to directly and proximately link the emissions from a particular BLM action to any environmental impacts to the lands BLM is responsible for managing. The most that could be said about those GHG emissions is that they contribute some small amount to global GHG emissions which could result in changes to the global climate. BLM, however, is not charged with managing the global climate, establishing national energy policy or ensuring that there are no impacts to the broader global climate from its activities. Accordingly, BLM, and all other federal agencies with similarly limited jurisdictions, are not authorized to select an alternative based on its lower GHG emissions because that lower emission option cannot be said to have fewer or more acceptable impacts to the lands it manages. Decisions regarding climate change impacts from major federal actions are not the province of most federal agencies.

For the same reasons that the Endangered Species Act (ESA) can not be used to limit GHG emissions, NEPA is not an appropriate tool for this purpose. As the Secretary of Interior explained when issuing his decision to list the polar bear as “threatened,” not only does the ESA not authorize the Fish and Wildlife Service to require GHG emission controls, regulation was not warranted given the lack of any demonstrable link between a project involving GHG emissions and harm to polar bears. *See* 73 Fed. Reg. 28299-28300 (May 15, 2008). Secretary Salazar stated that “the Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice.” *See* <http://www.fws.gov/news/newsreleases/showNews.cfm?newsId=20FB90B6-A188-DB01-04788E0892D91701>. Similarly, NEPA does not provide federal agencies with any authority to limit GHG emissions, and climate science is simply not able to demonstrate any causal connection between emissions from a particular project or action and adverse environmental consequences. Under these circumstances, NEPA cannot and should not be used as a backdoor vehicle to seek limits on GHG emissions or require associated actions intended to address the impacts of climate change.

For all these reasons, CEQ should revise its draft Guidance to reinforce and make explicit the fundamental precepts of NEPA – its limited scope, its non-substantive focus and its inherent proximate cause requirements. These considerations all factor against quantifying GHG emissions for major federal actions. Identifying GHG emissions, when the agency lacks authority to mitigate them and when they cannot be scientifically linked to specific environmental impacts to lands and resources managed by federal agencies, would be a wasteful and meaningless exercise. It will force agencies to engage in speculative analyses of no value to the decisionmaker or the public.

B. CEQ Should Not Adopt A Presumptive Threshold For GHG Quantification, And The Proposed 25,000 Metric Ton Threshold Is Inappropriate.

As explained above, Commentors believe that quantification of GHG emissions of major federal actions will serve no value given that agencies' lack authority to do anything with that information and their inability to link the data to any ascertainable environmental impact under their control without engaging in rampant speculation. Notwithstanding this, the Draft Climate Change Guidance proposes a "presumptive threshold" for reporting and quantifying GHG emissions of 25,000 MT annually. *See* Draft Climate Change Guidance at 3. Even if quantification were appropriate, CEQ should not adopt this proposed threshold.

First, Commentors believe that the adoption of any threshold is both unnecessary and inconsistent with prior NEPA practice. There is no established "threshold" for reporting or quantifying emissions or discharges of other, more traditional, pollutants, and there is nothing unique about GHG emissions that requires CEQ to establish such a uniform threshold for all federal agencies. Commentors believe that CEQ should refrain from establishing a quantitative threshold and instead, consistent with prior practice, allow agencies to apply the "rule of reason" to govern when they should consider GHG emissions.

Indeed, requiring quantification of GHG emissions above a certain threshold has the potential to duplicate analyses being done by state or federal (EPA) agencies which may be evaluating GHG emissions under their statutory authorities. EPA is in the process of developing a regulatory program under the Clean Air Act regarding GHG emission (as CEQ acknowledges in its reference to EPA's Endangerment Finding). Just as CEQ has not established a quantitative threshold for other permitted air emissions and water discharges regulated under federal environmental laws, there is no need to do so for GHG emissions because of the overlap with EPA and state regulatory programs regarding GHG emission. Any NEPA review of GHGs would add nothing to and would be redundant of EPA and state permitting and GHG emission control efforts.

A qualitative rule of reason threshold also has several advantages over a uniform quantitative threshold. It will help to prevent the NEPA process getting bogged down in trying to model GHG impacts that are essentially meaningless in the context of an individual action. It will also minimize the potential for disputes regarding the validity of an agencies' quantitative analysis.

Second, the rationale for the proposed threshold of 25,000 MT is flawed. The Draft Guidance states that this level was selected because it is consistent with EPA's use of that threshold for GHG emission reporting under the CAA. *Id.* EPA's rationale for selecting the 25,000 MT, however, is not relevant to the issue of whether (and if so, when) GHG emissions from a major federal action should be quantified and evaluated under NEPA. EPA selected this level for several reasons, but primarily because "it sufficiently captures the majority of GHG emissions in the U.S., while excluding smaller facilities and sources." 74 Fed. Reg. 16467 (Apr. 10, 2009). EPA also sought to harmonize its reporting level with those used by states and regional GHG programs. Thus, EPA's purpose in selecting 25,000 MT as the reporting threshold was to ensure that it captured most larger GHG emitters but, at the same time, avoid imposing the burden of quantifying and reporting GHG emissions on too many smaller emitters.

These considerations are irrelevant in the NEPA context. NEPA's primary goal is to ensure that the environmental consequences of major federal actions are considered. Ensuring a proper balance between capturing enough emissions and avoiding too great a burden for purposes of reporting scheme, as EPA has attempted to do, is an entirely different goal from ensuring that environmental consequences are properly evaluated. Indeed, EPA never intended or implied that this threshold was relevant to an analysis of environmental consequences. Accordingly, CEQ's suggestion that the 25,000 MT is a proper threshold under NEPA has no rational basis.

Not only is there no reason to apply EPA's reporting threshold to NEPA analyses, EPA's reporting threshold does not fit very well in the NEPA context. EPA's threshold is generally a per facility emission threshold and cannot easily or rationally be expanded to provide major federal actions which potentially involve multiple facilities or other actions extending over a large geographic areas.

Third, if CEQ persists in retaining a threshold, the proposed threshold is far too low given the lack of any link between the proposed threshold and impacts on climate or the environment. If a presumptive threshold is to be adopted – and Commentors urge CEQ not to adopt such a threshold – it must be based on some scientific basis that links the amount of emissions to environmental impacts to resources under the management or control of the federal agency, thereby warranting a quantitative analysis. The fundamental problem with CEQ's proposal is that there is no scientifically supportable threshold for determining when quantification of GHG emissions would be relevant and important. GHG emissions in and of themselves are not an environmental consequence. Rather, it is the potential effect of those emissions on climate that is the environmental consequence of interest. But, as CEQ itself recognizes, one is not able to link direct emissions from most projects to specific environmental or climate change impacts: "it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand." Draft Climate Change Guidance at 3.

For these reasons, there is *no* scientifically-relevant threshold that can rationally be selected for the purpose of determining when GHG emissions should be quantified under NEPA.

C. CEQ Should Not Reference EPA's Methodologies For Quantifying Emissions

As noted above, Commentors believe that NEPA does not require, nor is appropriate to require, agencies to quantify GHG emissions associated with major federal actions. Commentors' concern regarding this issue are exacerbated by various technical issues associated with the methodologies identified in the draft Guidance to quantify GHG emissions.

CEQ identifies several documents and sources to assist agencies in quantifying GHG emissions, including EPA's GHG reporting rule, Executive Guidance 13514, and DOE's voluntary GHG reporting program. *See* Draft Climate Change Guidance at 4. CEQ also recommends engaging in interagency consultation where no existing protocols exist. *Id.*

Many of the protocols identified in the referenced documents are expensive and difficult to implement, and their use will not improve the types of environmental analyses required by NEPA for all the reasons previously stated. Moreover, the EPA methodologies that are referenced are intended for operating facilities with monitored operations and emissions. They are not appropriate for estimating projected emissions from new projects or broad programs. In short, these methods cannot be used to quantify emissions associated with new major federal actions for NEPA purposes.

In this regard, Commentors concur with CEQ's statement "[l]and management techniques, including changes in land use or land management strategies, lack any established Federal protocol for assessing their effect on atmospheric carbon release and sequestration at a landscape scale." The absence of any such methods leads Commentors to recommend that agencies not be required to quantify GHG emissions associated with land management and resource management actions. This conclusion is consistent with the well-established principle that programmatic statements need not engage in site-specific analyses. *See, e.g., Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008) (programmatic state in bird depredation program need not consider site-specific effects of individual depredations); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003) (management plan for a park).

D. CEQ Should Clarify That Indirect GHG Emissions Do Not Need To Be Considered

The draft guidance is silent about whether, how, and under what circumstances agencies must evaluate "indirect" GHG emissions, *i.e.*, emissions not directly resulting from a major federal action but that may be "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Cf.* 40 C.F.R. § 1508.8(b). CEQ should clarify that agencies need not evaluate such "indirect GHG emissions."¹

¹ As explained previously in section I.A, NEPA also does not require consideration of "indirect impacts" from GHG emissions because such impacts are not the proximate result of a project's GHG emissions, are too speculative and are not reasonably foreseeable.

NEPA requires consideration of “indirect effects” (limited, of course, to those non-speculative environmental consequences that are proximately caused by a major federal action). “Indirect” GHG emissions are not truly “indirect effects” of an action. An emission is not an effect – any resulting harm to the environment is the environmental consequence of interest to an agency. Yet, applying the concept of “indirect effects,” CEQ should advise agencies that they need not consider “indirect” GHG emissions unless those emissions (1) bear “a reasonably close causal relationship” to the major federal action being reviewed, (2) are “reasonably foreseeable” and (3) are not speculative. Thus, the issue of whether to consider “indirect emissions” should be governed by the same test applicable to “indirect effects.” This clarification will allow agencies to expend their resources wisely and focus their analysis without speculating about potential indirect emissions not clearly associated with or caused by the major federal action being reviewed.

E. CEQ Should Clarify That Transnational Impacts Should Not Be Evaluated

The draft Guidance should reaffirm that NEPA does not require consideration of international and global impacts of GHG emissions, consistent with established law that agencies are only required to examine impacts within the United States. This conclusion also is supported by CEQ’s recognition that agencies are unable to link direct emissions from federal action to specific environmental or climate change impacts: “it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand.” Draft Climate Change Guidance at 3.

The rule regarding consideration of international impacts under NEPA was established by Executive Order 12114, which limits the scope of an EIS to the sovereign territory of the United States. The Executive Order was confirmed in *Natural Resources Defense Council v. Nuclear Regulatory Comm.* 647 F. 2d 1345 (D.C. Cir. 1981), where the court upheld an EIS that did not address impacts outside the United States. Other federal courts have been unanimous in declining to require an EIS to study any impacts beyond those set in E.O. 12114. *Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006) (NEPA does not apply to impacts in Mexico of actions to a canal located solely in the United States); *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D. D.C. 2003) (NEPA does not apply extraterritorially in areas under the sovereign control of another nation).

The impacts of climate change are no different from other environmental impacts that agencies have long considered. Although climate change impacts may be global in nature, the only impacts that NEPA requires an agency to consider are those within the United States. CEQ should confirm this long-standing law.

F. Comments On Issues Specifically Identified By CEQ

Commentors provide the following comments on the specific issues listed at the end of the Draft Climate Change Guidance. Most of these questions focus on how resource agencies, such as BLM and MMS, should address GHG emissions and climate change in their planning

and permitting activities. As a general matter, Commentors believe that additional and specific guidance on these points is unnecessary. The resource agencies already have well-developed protocols and considerable expertise in NEPA matters. Moreover, these existing practices are well adapted to addressing the wide variety of actions they take. A one-size-fits all solution is not appropriate or workable. For that reason, Commentors believe that any guidance provided by CEQ should be very general and leave to the discretion of the resource agencies how best to address these issues. This broader, more general approach is clearly preferable to overly prescriptive and specific guidance.

Underlying Commentors views on these issues is the basic point raised above – that there is nothing so unique about GHG emissions or climate change impacts that requires CEQ to establish special approaches or procedures different from those that agencies already have in place to address other emissions and other impacts to the environment. Existing law and CEQ regulations provide sufficient guidance on GHG emission and climate change impact issues.

1. *How should NEPA documents regarding long-range energy and resource management programs assess GHG emissions and climate change impacts?*

Long-range energy and resource management program planning activities are first guided by the terms and mandates of the applicable resource management statutes, such as FLPMA. Any NEPA analysis of GHG emissions and impacts from long range energy projects and programs should continue to be conducted through a tiered approach based on the extensive program and NEPA experience and existing regulations and guidance.

2. *What should be included in specific NEPA guidance for projects applicable to the federal land management agencies?*
3. *What should be included in specific NEPA guidance for land management planning applicable to the federal land management agencies?*
4. *Should CEQ recommend any particular protocols for assessing land management practices and their effect on carbon release and sequestration?*

No specific guidance on these issues is necessary. Commentors recommend general guidance on these issues for both project and program analysis to ensure that agencies have some level of consistency, especially with respect to appropriately applying NEPA's "rule of reason." Given the wide range of projects and programs facing federal agencies, however, it is appropriate to afford resource agencies sufficient flexibility and discretion to develop specific protocols that build on both their existing procedures and experience.

5. *How should uncertainties associated with climate change projections and species and ecosystem responses be addressed in protocols for assessing land management practices?*

Commentors believe that existing CEQ regulations provide sufficient guidance on how agencies should deal with the uncertainties of climate change impacts. *See, e.g.*, 40 C.F.R. §§ 1502.22 (incomplete or unavailable information) and 1502.24 (methodology and scientific accuracy). Speculation should be avoided. There is nothing unique about these uncertainties, and agencies have long had to address impacts which are uncertain in scope and extent.

6. *How should NEPA analyses be tailored to address the beneficial effects on GHG emissions of Federal land and resource management actions?*

No special guidance needs to be developed with respect to beneficial impacts. For the reasons explained above, it generally is not possible for an agency to associate any impacts – beneficial or harmful – with GHG emissions from any major federal action.

II. Draft Guidance For NEPA Mitigation And Monitoring

The Draft Mitigation Guidance suffers from some of the same problems as the Draft Climate Change Guidance. Most importantly, it reflects CEQ's attempt to attach substantive requirements to NEPA's procedural framework. The Draft Mitigation Guidance should be revised to reflect NEPA's proper role in agency decisionmaking.

In *Methow Valley*, 490 U.S. at 351-52, the Supreme Court noted the importance of discussing mitigation in sufficient detail to ensure adequate consideration of the environmental consequences associated with the agency action. The Court held, however, that NEPA does not require an agency to prepare a detailed mitigation plan before it acts. To require such a plan, the Court continued, would be inconsistent with NEPA's procedural mechanisms. *See also Laguna Greenbelt, Inc. v. U.S. Dep't. of Transp.*, 42 F.3d 517 (9th Cir. 1994) (NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA only requires discussion of sufficient detail to ensure consideration of environmental impacts). Courts have applied this concept to mitigated FONSI's. *E.g., Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140 (9th Cir. 2000) (rejecting argument that EA and FONSI require detailed and binding mitigation measures).

Despite this well-settled principle, the Draft Mitigation Guidance appears to suggest that NEPA requires agencies to prepare detailed and binding mitigation programs before they act and also to minimize the environmental consequences of their actions. This is reflected in several aspects of the draft guidance. First, the draft guidance states that mitigation actions identified and adopted by an agency should be enforceable and binding and that mitigation failure should be addressed if further federal action remains. *See* Draft Mitigation Guidance at 2. It is true that existing CEQ regulations state that "mitigation . . . established in the environmental impact statement or during its review and committed as part of the decision shall be implemented" for direct federal actions (as opposed to permitting or licensing decisions). The draft Guidance,

however, goes too far, by calling for detailed mitigation plans and for revisiting agency decisions based on post-decision mitigation monitoring in both direct federal action and permitting and licensing decisions. The draft guidance's suggestion that NEPA carries substantive weight runs counter to the Supreme Court's guidance in *Methow Valley* that "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." 490 U.S. at 353 n.16. While there may be instances where detailed mitigation plans are warranted, *Methow Valley* makes clear that NEPA does not require such detailed plans in all instances (and clearly not in permitting and licensing decisions).

Second, the Draft Mitigation Guidance provides that the goals of any mitigation measures be measurable and that monitoring be adopted to achieve these measurable goals. Draft Mitigation Guidance at 3-4. It also sets out in significant detail methods that should be included to ensure implementation of mitigation. *Id.* This is contrary to CEQ's existing regulations, which state that an agency, for direct federal actions, "may provide for monitoring to assure their decisions are carried out and should do so in important cases." The draft Guidance, however, suggests that monitoring be employed in all cases, not just "important cases" and not just for direct federal actions, but also in permitting and licensing actions. If CEQ desires to modify its regulations, it must undertake notice and comment rulemaking; it may not modify a regulation through a guidance document. The requirement for detailed monitoring plans also is contrary to the Court's decision in *Methow Valley*.

Third, the draft Guidance repeatedly cites as exemplary the Army Corps of Engineers' mitigation regulations, as well as the 2008 Compensatory Mitigation rule promulgated by EPA and the Corps. This reference is misplaced. Unlike NEPA, the Section 404(b) Guidelines have substantive requirements to (1) avoid adverse impacts to the extent feasible, (2) minimize adverse impacts that cannot be avoided, and (3) mitigate remaining adverse impacts. NEPA contains no such substantive requirements. As a result, the case study comparison to the Corps Section 404 Guidance is misleading absent recognition that NEPA contains no such substantive requirements. In short, the type of mitigation required by NEPA as described by *Methow Valley* and its progeny is not the same as that required under the section 404 of Clean Water Act.

These aspects of the draft Guidance need to be modified to make them consistent with *Methow Valley* and remove the suggestion that NEPA carries any substantive mandates.

Commentors are also concerned about the draft Guidance's statement that the results of mitigation monitoring be made public. CEQ's regulations currently state that such information should be made available upon request. 40 C.F.R. § 1505.3(d). In contrast, the draft Guidance states that agencies have an affirmative duty to make the information public, potentially increasing the burden upon federal agencies. In any event, this statement is inconsistent with CEQ's existing regulations. CEQ may not modify its regulations through guidance, but must undertake a full rulemaking process.

*

*

*

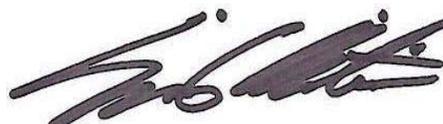
*

Commentors thank the CEQ for the opportunity to present comments on the draft guidance documents. If you have any questions about these comments, please do not hesitate to contact any of the signatories to these comments.

Respectfully Submitted,



Lorraine Krupa Gershman, P.E.
Director, Regulatory and Technical Affairs
American Chemistry Council
(703) 741-5219
Lorraine_gershman@americanchemistry.com



Erik Milito
Director of Upstream
American Petroleum Institute
(202) 682-8037
militoe@api.org



Bryan L. Brendle
Director, Energy and Resources Policy
National Association of Manufacturers
(202) 637-3176
bbrendle@nam.org



David N. Friedman
Senior Director, Regulatory Affairs
National Petrochemical & Refiners Association
(202) 457-0480
dfriedman@npra.org