United States Senate
WASHINGTON, DC 20510

March 25, 2015

Christy Goldfuss
Managing Director
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

Re: Comments on Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews

Dear Ms. Goldfuss,

In October 2009, April 2013, and May 2014, several of us communicated to your predecessors our deep concerns regarding guidance under development by the Council on Environmental Quality (CEQ) regarding the applicability of the National Environmental Policy Act (NEPA) to global climate change.

Principal among these concerns is the fact that global climate change falls outside the scope of NEPA. Rather than address our concerns, you published a second draft guidance on December 24, 2014, that goes even further than the draft issued in February 2010 by suggesting that agencies must evaluate global climate change, not only when carrying out projects and issuing permits, but also when managing federal lands. As a result, the draft guidance now would be applicable to coal, oil, gas and other leasing proposals on federal and tribal lands; federal activities on the Outer Continental Shelf; timber management and grazing on federal lands; and even highway projects.

We are deeply disappointed that the Administration is continuing down a path that is both illegitimate and irresponsible. For the reasons set forth below, we once again urge you to withdraw this draft guidance. Failure to do so will paralyze agency action, including actions needed to create jobs and grow our economy, by requiring endless and meaningless analyses and creating new opportunities for litigation to delay and block important projects.

First, climate change is not a direct or indirect effect of a federal action. "Direct effects" are "caused by the action and occur at the same time and place." 40 CFR 1508.8(a). "Indirect effects," are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* 1508.8(b). The Supreme Court has stated that, in order for an indirect effect to be "caused by the action," there must be "a reasonably close causal relationship," like proximate causation. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767

(2004). A single project is not the proximate cause, or even the "but for" cause, of global climate change or its effects. The draft guidance claims that "[e]nvironmental outcomes will be improved by identifying important interactions between a changing climate and the environmental impacts from a proposed action." But, as no such interaction can be identified, requiring a climate change analysis of proposed agency actions is an illegitimate expansion of NEPA.

Second, greenhouse gas (GHG) emissions cannot be used as a surrogate for climate change. The draft guidance states that: "In light of the difficulties in attributing specific climate impacts to individual projects, CEQ recommends agencies use the projected GHG emission and also, when appropriate, potential changes in carbon sequestration and storage, as the proxy for assessing a proposed action's potential climate impacts." The guidance also makes the unsupported statement that "It is now well established that rising global atmospheric GHG emission concentrations are significantly affecting the Earth's climate." Contrary to this assertion, what is well established is the growing discrepancy between climate model predictions and observations. Even the Intergovernmental Panel on Climate Change (IPCC) acknowledges this in its 2013 report, conceding that: "Almost all [climate model] historical simulations do not reproduce the observed recent warming hiatus" and suggesting that the difference "could be caused by some combination of (a) internal climate variability, (b) missing or incorrect radiative forcing, and (c) model response error." This statement is an admission that the projections of the climate models cannot reliably demonstrate the effect of GHG emissions on the global climate, and certainly do not demonstrate the proximate effect that is necessary for a NEPA analysis. Accordingly, the emissions analysis recommended in the draft guidance fails to meet the definition of "effects" under 40 CFR 1508.8 and its use would fail to requirement of 40 CFR 1502.24 that an agency "insure the professional integrity, including scientific integrity, of the discussions and analysis in environmental impact statements," underscoring the illegitimacy of requiring such a climate change analysis under NEPA.

Third, the draft guidance greatly expands the scope of "connected actions" that require evaluation. Under CEQ's regulations, an action is connected only if it is automatically triggered, is contingent on other actions, or is an interdependent part of another action. 40 CFR 1508.25. Indirect actions must be reasonably foreseeable. 40 CFR 1508.8. Under the draft guidance, however, there is no limit on "connected" or "indirect actions" requiring analysis. This will require a limitless analysis of activities that are "upstream" or "downstream" from the proposed action. CEQ gives the example of a proposed open pit mine. Under the draft guidance, a federal agency approving such a mine would have to develop an environmental impact statement (EIS) that includes a discussion of GHG emissions from land clearing, access road construction, transporting the extracted resource, refining or processing the resource and using the resource. Attempts to meet this mandate will be very difficult, irresponsibly wasting agency resources and engendering litigation. Further, an analysis of activities, such as resource extraction or combustion, that will take place with or without the federal action is not required under NEPA. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (upstream effects associated with oil production need not be considered when evaluating a pipeline project because the oil would be produced and transported with or without the project). *See also City of Carmel-By-The-Sea*, 123 F.3d 1142, 1162 (9th Cir. 1997) (no need to consider development that was already planned); *Morongo Band of Mission Indians v. Fed. Aviation Administration*, 161

F.3d 569 (9th Cir. 1998) ("[The fact that [the project] might also facilitate further growth is insufficient to constitute a growth-inducing impact under 40 C.F.R. § 1508(b).").

Fourth, the draft guidance fails to provide any geographic limit on the so-called connected actions. In March 2013 the Senate unanimously passed an amendment to a proposed budget resolution for fiscal year 2014, to exclude from NEPA analysis GHG emissions produced outside of the U.S. by exported products, with all Senators agreeing that this limitation is found in current law. By failing to include this limitation in the draft guidance, CEQ is once more irresponsibly creating uncertainty and setting up lawsuits that could block exports, damaging our economy.

Fifth, the draft guidance undercuts agency discretion to decide an EIS is not needed. The guidance directs agencies "to consider whether the reasonably foreseeable incremental addition of emissions from the proposed action, when added to the emissions of other relevant actions, is significant when determining whether GHG emissions are a basis for requiring preparation of an EIS." However, the draft guidance also says that "diverse individual sources of emissions each make relatively small additions to global atmospheric GHG concentrations that collectively have a huge impact." As a result, while the draft guidance pays lip service to the concept of proportionality and Congressional intent that NEPA focus only on matters that are truly important to a decision on a proposed action, this statement takes away any agency discretion to conclude that an EIS is not necessary and irresponsibly sets up a lawsuit if an agency attempts to make such a determination.

Sixth, by prohibiting agencies from stating the obvious truth, that individual agency actions could have only a small, if any, effect on the global climate, the draft guidance sends agencies down the rabbit hole of meaningless analyses for each and every action they may take. The draft guidance establishes a reference of 25,000 tons per year as a threshold for a quantitative analysis. However, there is no threshold for a qualitative analysis of GHG emissions, irresponsibly wasting resources and creating even more litigation opportunities.

Seventh, the draft guidance illegitimately equates policies and goals with impacts on the human environment. The draft guidance suggests that agencies refer to federal, state, tribal, or local goals for GHG emission reductions when evaluating environmental impacts of a project, and even uses as an example a goal adopted by the California legislature. NEPA requires an evaluation of environmental impacts. Under this provision, NEPA would be illegitimately expanded to include agency policies and political agendas.

Eight, the draft guidance illegitimately suggests that use of the Administration's "social cost of carbon" is appropriate for a NEPA analysis. Section 102(2)(B) of NEPA references economic and technical considerations so many NEPA analyses include cost and benefit information. The draft guidance suggests that agencies use the Administration's "social cost of carbon" (SCC) when presenting such information. As noted above, agencies must "insure the professional integrity, including scientific integrity, of the discussions and analysis in environmental impact statements." 40 CFR 1502.24. The Administration's SCC fails to meet this standard. The Office of Management and Budget's (OMB) own information quality

guidelines require influential scientific information to be peer reviewed. As estimates that are being used to support policies that have billions of dollars of impact to the nation's economy, the SCC is clearly influential scientific information. However, the final SCC estimates have never been subject to peer review and no sensitivity analyses were ever performed on the numerous assumptions that were used as inputs to the models. Accordingly, the SCC does not meet OMB's standards for information quality and therefore does not meet the NEPA standard of scientific integrity. Further, as CEQ concedes in the draft guidance, the SCC was developed for analyzing the costs and benefits of rulemakings, not individual projects. Such information cannot be considered meaningful to a NEPA analysis. Finally, the SCC runs counter to Section 101(a) of NEPA, which delineates such policy under the Act "fulfill the social, economic, and other requirements of present and future generations of *Americans*" (emphasis added). However, the SCC estimates are based on global rather than domestic benefits, so application of the SCC in NEPA analysis would fail to review impacts on Americans.

Ninth, the draft guidance illegitimately suggests that mitigation is required under NEPA. NEPA does not command an agency to mitigate the impacts of proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). While prior CEQ guidance has discussed circumstances where an agency relies upon mitigation to make a Finding of No Significant Impact, the draft guidance goes beyond this context. In fact, the revised draft emphasizes mitigation, stating that: "by statutes, Executive Orders, and agency policies, the Federal Government is committed to the goals of energy conservation, reducing energy use, eliminating or reducing GHG emissions, and promoting the deployment of renewable energy technologies that are cleaner and more efficient." This inappropriately opens the door for claims that mitigation is required by law.

Tenth, there is no basis in NEPA for the requirement in the draft guidance that agencies consider the impact of projected changes in climate on a project. NEPA requires only an evaluation of the environmental impacts of a project. There is no requirement to evaluate the impact of the environment on a project. Thus, the suggestion that an agency must, for example, evaluate projections of sea level rise, as part of a NEPA analysis is unfounded. This analysis is outside the scope of NEPA.

Eleventh, the draft guidance undercuts the existing categorical exclusions by requiring that these too include an analysis of aggregate GHG emissions and climate change impacts. Actions subject to categorical exclusions are by definition actions that do not have a significant impact on the environment or are emergency actions that must be completed quickly. Requiring GHG emissions evaluations of such actions once again invites lawsuits that will slow the delivery of projects that categorical exclusions are intended to streamline.

Twelfth, the draft guidance mischaracterizes EPA's endangerment finding by citing that document to support a claim that: "Adverse health effects and other impacts caused by elevated atmospheric concentrations of GHGs occur via climate change." Contrary to this assertion, EPA found that "[n]one of these [climate-related] human health effects are associated with direct exposure to greenhouse gases." 74 Fed. Reg. 66496, 66527 (Dec. 15, 2009). Further, as noted above, none of the alleged indirect effects of carbon dioxide meet the proximate causation standard of NEPA.

renewable energy entrepreneurs, and harm the American consumer. This action is illegitimate, irresponsible and invalid.

For all of the reasons stated above, we strongly encourage you to withdraw the draft guidance.

Sincerely,