American
Fuel & Petrochemical
Manufacturers

1800 M Street, NW
Suite 900N
Washington, DC
20036

202.457.0480 office
202.844.8474 direct
Rmoskowitz@afpm.org

August 26, 2019

Council on Environmental Quality
730 Jackson Place, NW,
Washington, DC 20503

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS' (AFPM) COMMENTS ON THE COUNCIL ON ENVIRONMENTAL QUALITY'S DRAFT NATIONAL ENVIRONMENTAL POLICY ACT GUIDANCE ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS
Docket No. CEQ-2019-0002

I. INTRODUCTION

It is widely recognized that "infrastructure projects in the United States have been routinely and excessively delayed by agency processes and procedures" involving the National Environmental Policy Act ("NEPA"), which have "increased project costs and blocked the American people from the full benefits of increased infrastructure investments."[1] Although NEPA and the Council on Environmental Quality's ("CEQ's") implementing regulations direct agencies to produce concise and straightforward environmental analyses that are not to be "encyclopedic" or even exceed 300 pages,[2] it is not atypical for agencies to produce environmental impact statements ("EISs") that exceed 10,000 pages.[3] For these and other reasons, recent presidential administrations—both Republican and Democratic—have issued executive orders in efforts to restore order and reason to the NEPA process by encouraging agencies to adopt methods for streamlining their reviews.[4]

---

[1] Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 30, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 24, 2017) ("More efficient and effective Federal infrastructure decisions can transform our economy.").

[2] 40 C.F.R. §§ 1500.4(b), 1502.7.

[3] *Compare See Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir. 1973) (upholding an FAA EIS totaling only 46 pages) *with* O'Hare Modernization Final Environmental Impact Statement, https://www.faa.gov/airports/airport _development/omp/eis/feis/ (2005 FAA EIS containing over 10,000 pages).

[4] *See, e.g.*, Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (President Trump directive); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (same); Exec. Order No. 13,604, 77 Fed. Reg. 18,885 (Mar. 22, 2012) (President Obama executive directive); Exec. Order No. 13,274, 67 Fed. Reg. 59,449 (Sept. 18, 2002) (President George W. Bush directive).

However, addressing inefficient agency processes and procedures alone will not solve the current systemic issues with NEPA implementation. To do that requires addressing the greater causes—the organizations who have used NEPA litigation as a tool to stifle the development of energy infrastructure projects. NEPA claims in these lawsuits are easily alleged because of ambiguous statutory and regulatory standards and are nearly impossible to dismiss for the same reason. Recognizing this reality, agencies and project applicants have expanded the scope and depth of their NEPA analyses as protective measures against these routine lawsuits.[5] Thus, while it is true that "the Federal Government, as a whole, must change the way it processes environmental reviews,"[6] it also must take action to prevent these dilatory lawsuits by eliminating uncertainty in the law.

Uncertainty about when and how agencies should address greenhouse gas emissions under NEPA continues to undermine the timely development of beneficial infrastructure to the detriment of the American public. CEQ's past guidance ("2016 Guidance")[7] in this area missed the mark by, among other things, encouraging speculative analyses, and rightly has been withdrawn.[8] Now—to replace the flawed 2016 Guidance and to resolve NEPA uncertainty—CEQ has published its "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions" ("Draft Guidance").[9] The American Fuel & Petrochemical Manufacturers ("AFPM") supports CEQ's effort to reduce uncertainty in this area and appreciates the opportunity to comment on the Draft Guidance. AFPM's comments explain how CEQ can further improve upon the Draft Guidance as applied to specific types of projects that AFPM members have extensive expertise and experience: pipelines and other energy infrastructure conveyances.

II. AFPM'S INTEREST IN THE DRAFT GUIDANCE

AFPM is a national trade association representing nearly all U.S. refining and petrochemical manufacturing capacity. AFPM's mission is to advocate for public policy that benefits its members, consumers, and the nation at-large. AFPM accomplishes this mission, in part, by participating in the process of developing federal regulations to ensure that policy decisions are fully informed and fulfill legal requirements without compromising practicality.

AFPM member companies support over three million jobs nationwide and are integral to economic and national security. Not only do AFPM's members produce the gasoline, diesel, and jet fuel that drive the modern economy, but they also manufacture the chemical building blocks comprising millions of products that make modern life possible—from clothing to lifesaving medical equipment and smartphones. To receive necessary materials and to move their essential products to satisfy growing demand, AFPM members depend on the timely development of, and enhancements to, transportation infrastructure like pipelines and rail. These transportation infrastructure projects, similar to the refineries and petrochemical facilities owned and operated

[5] *See* 40 C.F.R. § 1508.25 (defining scope to consist "of the range of actions, alternatives, and impacts to be considered in an environmental impact statement").
[6] 82 Fed. Reg. at 40,463.
[7] "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" (CEQ Aug. 1, 2016) ("2016 Guidance").
[8] 82 Fed. Reg. 16,576 (April 5, 2017).
[9] 84 Fed. Reg. 30,097 (June 26, 2019).

by AFPM members, are subject to multiple layers of federal, state, and local regulation, covering both construction and operation. At the federal level, the long and costly permitting processes for these projects typically trigger NEPA review.

AFPM members are leaders in community and human safety, as well as environmental responsibility. AFPM members support robust NEPA analyses of infrastructure projects to ensure the lawful consideration of related environmental impacts. This includes direct and reasonably foreseeable indirect greenhouse gas emissions from these projects. But like the analysis of other environmental effects, consideration of greenhouse gas emissions must be appropriately tailored to the circumstances of a particular project, based on scientifically sound information, and grounded in the law. The comments below identify how the Draft Guidance can better accomplish this while also ensuring timely project development and avoiding redundant analyses.

III. COMMENTS

Changes in CEQ regulations and guidance documents provide unique opportunities for the CEQ to improve the NEPA process by, among other things, reducing uncertainty and ensuring that agencies properly analyze potential impacts of proposed actions. In 2016, CEQ issued guidance concerning federal agency consideration of greenhouse gas emissions in NEPA analyses.[10] The 2016 Guidance, however, neither eliminated uncertainty nor promoted efficiency in conducting NEPA reviews. Instead, that guidance encouraged expansive agency reviews of potential greenhouse gas emissions and climate impacts, even where such analyses would contribute little to the ultimate goal of the NEPA EIS requirement—*i.e.*, identifying and analyzing *significant* environmental impacts associated with a proposed project.[11] Most problematic, in addressing the scope of the proposed action, the 2016 Guidance stated that "NEPA reviews for proposed resource extraction and development projects typically include the reasonably foreseeable effects of various phases in the process, such as clearing land for the project, building access roads, extraction, transport, refining, using the resource, disassembly, disposal, and reclamation."[12] In other words, the 2016 Guidance impermissibly stretched the boundaries of what could reasonably be considered indirect effects of a proposed project.

In 2017, CEQ appropriately withdrew the 2016 Guidance.[13] Consistent with the spirit of that initial action, CEQ now plans to replace the 2016 Guidance with the Draft Guidance. AFPM supports CEQ's plan and objective to address NEPA problems project applicants are facing. But

[10] *See generally* 2016 Guidance.

[11] The 2016 Guidance stated that agencies should not decline to consider the potential greenhouse gas emissions from a proposed federal action on the ground that the emissions would represent only a small fraction of global emissions and recommended that agencies quantify projected direct and indirect GHG emissions. 2016 Guidance at 11. Indeed, the 2016 Guidance declined to even specify a particular quantity of greenhouse gas emissions that would be considered "significant" for purposes of NEPA review and used this uncertainty to suggest that all greenhouse gas emissions are significant because of their cumulative global impact. *Id.* at 11 ("[I]ndividual sources of emissions each make a relatively small addition to global atmospheric GHG concentrations [but] collectively have a large impact.") (emphasis added).

[12] 2016 Guidance at 14.

[13] 82 Fed. Reg. at 16,576-77.

there is much more that needs to be done and, to that end, AFPM urges the CEQ to revise the Draft Guidance in accordance with the recommendations set forth in these comments and update its regulations to address these issues in a more durable manner.[14]

A. Consideration of Greenhouse Gas Emissions in NEPA Analyses

In contrast to the 2016 Guidance, the Draft Guidance reinforces the prudent limits on the scope of NEPA reviews that the law demands when analyzing greenhouse gas emissions from a particular project and acknowledges the global nature of GHG emissions. In particular, the Draft Guidance stresses that agencies should analyze reasonably foreseeable environmental consequences of major federal actions, but should not consider impacts that are remote or speculative.[15] The Draft Guidance also emphasizes not only that the impacts of a proposed action should be discussed proportional to their significance, but also that agencies should attempt to quantify emissions only where the level of emissions is substantial enough to warrant the effort. AFPM supports these changes, which are fully consistent with NEPA regulations and case law and which will better promote an efficient use of agency resources that will focus on impacts determined to be significant.

However, AFPM believes the Draft Guidance should go further in providing instruction for determining the proper scope of greenhouse gas emissions that agencies consider in completing their analyses. The sparse case law in this area, especially for midstream infrastructure projects like pipelines, often simply misses the mark. Providing meaningful limiting principles would not only help agencies produce concise, legally defensible environmental analyses and preserve resources, it would help ensure courts reach sound decisions.

1. CEQ should provide additional guidance on the scope of greenhouse gas emissions agencies must consider

NEPA requires agencies to consider the direct and reasonably foreseeable indirect effects of a proposed action. AFPM agrees with CEQ that NEPA only requires agencies to "analyze reasonably foreseeable environmental" effects caused by proposed actions and "should not consider those that are remote or speculative."[16] This is well-established law.[17] AFPM also recognizes that determining what is within the scope of an agency's NEPA analysis (*e.g.*, what constitutes an "indirect effect") is done on a case-by-case basis and falls within the discretion of the agency based on its experience and expertise.[18] Nevertheless, CEQ can and should propose general directives in this area to increase uniformity of practice and NEPA compliance.

---

[14] AFPM's comments focus primarily on the application of NEPA analyses to energy transportation infrastructure projects, such as pipelines.

[15] Draft NEPA Guidance, 84 Fed. Reg. at 30,097-98.

[16] *See id.*

[17] *See, e.g.*, 40 C.F.R §§ 1508.7–1508.8; *Dep't of Transp. v. Public Citizen*, 541 U.S. 756, 767 (2004); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016).

[18] *See Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (rejecting claim that "emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project").

There are several points CEQ should clarify or address. First, agencies should not be analyzing impacts that fall outside the scope of their respective statutory purview or are subject to a separate federal permitting process that limits any impacts to acceptable levels. The final guidance should expressly state that agencies are not required to consider upstream or downstream greenhouse gas emissions if the agency has no jurisdiction to act on those effects, even when those effects otherwise would have a sufficient causal connection to the proposed action and would be reasonably foreseeable. Existing case law confirms this principle.[19]

Second, as CEQ acknowledges, agencies also should not consider effects that are otherwise causally remote from the proposed action or speculative.[20] The Draft Guidance correctly observes that for NEPA to require consideration of an effect, there must be more than "but for" causation; there must be a reasonably close causal relationship between an environmental effect (*e.g.*, increased atmospheric concentrations of greenhouse gases) and the alleged cause (*i.e.*, the proposed action).[21] The final guidance should expressly provide that, as with other NEPA considerations, agencies are to use their experience and expertise to determine whether sufficient causation exists between an effect and the proposed action and whether the effect is reasonably foreseeable. Recent case law would support including these directives in the final guidance.[22] CEQ should consider additional ways to solidify these principles, such as proposing an objective interpretation of the regulatory term "reasonably foreseeable" and providing examples in the guidance, including examples limiting the forecasted period based on the degree of uncertainty of the forecast. As CEQ considers these recommendations, it should determine that analyses and projections of potential effects must be limited to the period when future conditions are reasonably predictable.

Third, CEQ should clarify that, although courts have recognized that NEPA calls for case-by-case determinations,[23] the statute does not preclude agencies from adopting and applying general policies in this area. Some agencies have already taken this approach. The Federal Energy Regulatory Commission ("FERC"), for instance, has done this with respect to NEPA analyses for midstream infrastructure and indirect effects related to greenhouse gas emissions. After careful consideration based on analyses of numerous pipeline projects, reviews of studies, and other efforts, FERC has concluded that pipeline projects typically do not produce indirect effects related to upstream or downstream greenhouse gas emissions.

For upstream emissions, FERC has explained that "environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated

---

[19] *See, e.g.*, *Public Citizen*, 541 U.S. at 770; *Birckhead*, 925 F.3d at 519; *Sierra Club*, 827 F.3d at 47; *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955-56 (D.C. Cir. 2016).

[20] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.

[21] *Public Citizen*, 541 U.S. at 767.

[22] *See Birckhead*, 925 F.3d at 517–18, 520–21 (affirming FERC's decision that upstream and downstream greenhouse gas emissions were not indirect effects because of a lack of sufficient causation and reasonable foreseeability); *Tennessee Gas Pipeline Co.*, 163 FERC ¶ 61,190, PP 56–66 (2018).

[23] *See, e.g.*, *Birckhead*, 925 F.3d at 519 (citation omitted).

by CEQ regulations."[24] FERC similarly has recognized that, typically, downstream greenhouse gas emissions from midstream infrastructure will not constitute an indirect effect because, in most instances, it will not be possible to identify where and what the end use of the natural gas will be or what volume of natural gas ultimately will be shipped through the pipeline.[25] FERC's general policies in this area are consistent with the case-by-case requirement courts have established under NEPA because FERC considers projects on an individual basis and thereby allows for exceptions.

Not only are FERC's policies lawful, they are well-informed. Natural gas, like other resources (*e.g.*, crude oil), is a global commodity that will come to market even in the absence of a given pipeline project.[26] Moreover, given the way the natural gas market is structured today—particularly with the development of secondary markets—in many if not most cases a pipeline operator will not know the ultimate destination of transported gas nor its end use. In fact, while electricity generation is a major use for natural gas, a significant portion of the nation's natural gas supply is used for industrial purposes that do not involve combustion (*e.g.*, fertilizer manufacturing, chemical feedstocks, etc.).[27]

Thus, FERC generally cannot establish a sufficient causal link between changes in downstream greenhouse gas emissions and a particular pipeline project.[28] Further, even assuming there was some link, FERC could not develop reliable projections of the theoretical change given the numerous and constantly changing variables involved. It follows that downstream greenhouse gas emissions typically are not indirect effects of new pipeline projects and therefore do not require either quantitative or qualitative consideration in NEPA analyses. In practice, then, NEPA analyses of greenhouse gas emissions for pipeline projects—including quantification consistent with the approach discussed below—typically should be limited to those emissions directly attributable to the development and operation of the pipeline in the project area.

---

[24] *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, P 59 (2018).

[25] *See id.* at P 62; *id.* at 3 (LaFleur, dissenting) ("[T]he majority has decided as a matter of policy to remove, in most instances, any consideration of upstream or downstream impacts associated with a proposed project.").

[26] *See, e.g., Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, P 41 ("Production and end-use combustion of natural gas will likely occur regardless of the Commission's approval of the New Market Project."); *id.* at P 60 (stating that the fact that natural gas infrastructure is a part of supply chain to bring gas to market does not mean that approval of a particular pipeline project will cause or induce the effect of additional shale gas production); *id.* at P 63 ("Companies will continue to negotiate for and find natural gas supplies; end use consumption of natural gas will occur regardless of whether the project before us is approved."); *id.* at P 66 ("The Commission has found that downstream local distribution companies will continue to negotiate for and find natural gas supplies.").

[27] *See, e.g.*, U.S. Energy Information Agency, Use of Natural Gas, *available at* https://www.eia.gov/energyexplained/index.php?page+natural_gas_use. It should be noted that the same is true of crude oil, which can find its way to refineries and subsequently to various end-use markets through a variety of means.

[28] The D.C. Circuit has recognized that there is typically an insufficient causal connection between FERC's authorization of midstream projects and greenhouse gas emissions that may result from upstream production activities or downstream end-use activities over which FERC has no authority. *See, e.g.*, *Sierra Club*, 827 F.3d at 47; *Sierra Club*, 827 F.3d at 68; *EarthReports, Inc.*, 828 F.3d at 952; *cf. Sierra Club v. FERC*, 867 F.3d 1357, 1380 (D.C. Cir. 2017) (identifying an exceptional circumstance).

Because FERC's general policies are lawful and reasonable, the final guidance should expressly recognize them as examples of how agencies can use their expertise to adopt and apply general approaches in NEPA analyses to streamline reviews. Validating FERC's approach in the final guidance also would help resolve any lingering uncertainty in this area and reduce the likelihood of additional project delays from pending and future litigation. In fact, CEQ should expand on FERC's approach in its final guidance to acknowledge much broader influence of trade and global commerce.

Oil and natural gas are essential global commodities. They are freely traded and are in high demand around the globe. As such, the construction of an individual energy infrastructure project will not materially impact the global demand for these energy commodities or their ultimate downstream uses. For these types of energy infrastructure projects (*e.g.*, oil and gas pipelines), NEPA GHG analysis should not focus on the downstream use of the commodity, but rather the specific emissions associated with the project. If a proposed pipeline is not built (the no action alternative), other transportation modes will be used to bring these essential commodities to market. The primary differences in GHG emissions from the proposed project and the no action alternative would be the additional emissions resulting from alternative modes of transportation (*e.g.*, railroads, barges, supertankers).

2. CEQ should clarify that agencies have wide discretion when deciding on what information to request from project applicants regarding potential indirect effects

Like other aspects of NEPA, the scope of information an agency requests from a project applicant largely is committed to the discretion of that agency.[29] Copious amounts of potentially relevant information exist and could theoretically be sought by an agency, especially where the agency must consider broad factors like the "public interest."[30] But NEPA analyses "are not uncabined" and must be focused.[31] It follows that corresponding information requests should be equally focused.

"'The NEPA process involves an almost endless series of judgment calls,' and '[t]he line-drawing decisions necessitated by [that process] are vested in the agencies.'"[32] Agencies, therefore, use their expertise to determine what information could be helpful and whether expending resources in an effort to obtain that information would be worthwhile. Some courts have sought to override agency discretion in this area by adopting broad judicial constructs in *dictum*. One court has stated, for example, that "an agency must use its best efforts to find out all

[29] *See Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (confirming that determinations about what constitutes an indirect effect is "a task assigned to the special competency of the appropriate agencies"); *see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376–77 (1989) (requiring courts to "defer to the informed discretion of the responsible federal agencies" about whether certain information was a "significant effect" (internal quotation marks and citation omitted)).
[30] *See, e.g.*, 15 U.S.C. § 717f.
[31] *Sierra Club*, 827 F.3d at 50; 40 C.F.R. §§ 1500.4(b), 1502.1, 1502.7.
[32] *Duncan's Point Lot Owners Ass'n Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) (citation omitted).

that it reasonably can."[33] But this assertion is completely unbounded and has no legal basis in NEPA or otherwise. Additionally, accepting these judicial constructs counterproductively would incentivize agencies to expend resources on gathering, reviewing, and analyzing additional information merely as a defensive measure. This would further lengthen the NEPA process and resulting analyses. In the final guidance, CEQ should reemphasize the limited nature of NEPA review and the need for agencies to use their expertise and discretion to determine what information collection NEPA requires.

3. CEQ should not only adopt a uniform approach for the analysis of greenhouse gas emissions but also ensure that the approach is as streamlined as possible

AFPM supports a uniform, streamlined method for considering greenhouse gas emissions in NEPA reviews, but only when those emissions are either direct or indirect effects. A uniform approach should promote agency consistency, which, in turn, would reduce litigation risk and increase certainty in business planning. Moreover, if structured and executed properly, a uniform approach would provide opportunities for agencies to streamline NEPA considerations.

a. Proxy approach and agency discretion

The Draft Guidance's proposed method is consistent with existing law. This method allows for agencies to use a projection of a proposed action's direct and reasonably foreseeable indirect greenhouse gas emissions as a proxy for assessing the action's potential climate effects.[34] First, this general proxy approach for assessing potential climate effects is lawful and agencies have been employing it for some time.[35] Second, directing agencies to quantify greenhouse gas emissions where practicable and beneficial or, where that is not the case, to provide for a qualitative analysis also comports with court decisions.[36] And third, courts and agencies have accepted NEPA analyses comparing emission quantifications with relevant inventory information and providing a general qualitative summary of the effects of emissions as sufficient for NEPA's cumulative effects requirements.[37] NEPA requires nothing more "because current climate science is uncertain

[33] *Birckhead*, 925 F.3d at 520 (citations omitted). These statements in *Birckhead* are *dictum* because the court concluded it lacked jurisdiction to address this issue. *Id.*

[34] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.

[35] *See, e.g.*, *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 35-36 (D.C. Cir. 2014); *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 35 (D.C. Cir. 2014).

[36] *See, e.g., Sierra Club*, 867 F.3d at 1374-75.

[37] *See, e.g., Citizens for a Healthy Cmty. v. BLM*, 377 F. Supp. 3d 1223, 1238–39 (D. Colo. 2019) (finding the Bureau of Land Management and the Forest Service's cumulative impact analysis sufficient when the EIS estimated the project's GHG emissions, compared project emissions with statewide emissions levels, performed a regional cumulative impacts analysis, and provided a qualitative analysis of climate change impacts); *W. Org. of Res. Councils v. BLM*, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) ("The agency [BLM] used GHG emissions as a proxy for the consideration of global climate change effects."); *PennEast Pipeline Company*, 162 FERC ¶ 61,053, P 209 (2018) (Order Issuing Certificates) (noting that after FERC estimated the project's emissions, the Commission compared the emissions to regional and national GHG emissions).

(and does not allow for specific linkage between particular GHG emissions and particular climate impacts)."[38]

Related to the question of whether quantifying greenhouse gas emissions would be practicable and beneficial, CEQ should reiterate that agencies have broad discretion in making these judgment calls.[39] Doing so would help ensure that courts do not improperly interfere with agency discretion by making these calls themselves.

When an agency determines that quantification of greenhouse gas emissions would be practicable and meaningfully inform the agency's decision, agencies should streamline the quantification of emissions and corresponding analysis. For example, the court in *Allegheny Defense Project v. FERC* recently held that agencies can consider not only emissions from a project, but may also streamline its review of impacts by considering how the project will offset other emissions that are not directly associated with the project.[40] There, both FERC and the court agreed that demand for fuels would offset emissions that would occur but-for the project, such that the project's emissions would not appropriately represent the net environmental impact from emissions. The final guidance should acknowledge that where there are reasonably foreseeable offsetting greenhouse gas emissions, there may be no net adverse environmental impact associated with the greenhouse gas emissions from the planned project.

AFPM appreciates that the Draft Guidance identifies a wide variety of tools available to agencies for streamlining these considerations.[41] AFPM recommends, however, that instead of simply saying agencies "can" use these tools, the final guidance should direct agencies to systematically consider whether using any of these tools would accelerate their analyses. If agencies determine that these tools would accelerate their analyses, then the final guidance should direct agencies to use the relevant tools. By including these requirements, CEQ will increase efficiency in NEPA reviews.

As indicated, AFPM agrees that agencies should not be required to quantify greenhouse gas emissions where doing so would be impracticable or speculative.[42] Although CEQ should not place limits on when quantification would be impracticable, speculative, or based on insubstantial emissions, the CEQ should consider including examples. Having these reference points would instill confidence in agencies wishing to limit their analyses for these reasons. CEQ should adopt this and any other recommendations that would help streamline the NEPA process and ensure that agencies do not expend their limited resources developing needless analyses.

---

[38] *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 35 (D.D.C. 2014).
[39] *Duncan's Point Lot Owners Ass'n Inc.*, 522 F.3d at 376 (citation omitted).
[40] *See Allegheny Defense Project v. FERC*, No. 17-1098, at 7-8 (D.C. Cir. Aug. 2, 2019).
[41] Draft NEPA Guidance, 84 Fed. Reg. at 30,098 (referencing preexisting plans, inventories, incorporation by reference, research, etc.).
[42] *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996) ("NEPA does not require the government to do the impractical.") (citing *to Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)).

Regardless of whether they provide solely a qualitative analysis or also provide a quantitative analysis, CEQ correctly provides that "[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature."[43] NEPA only requires that agencies ensure the scientific integrity of their analyses, identify any methodologies used, and "make explicit reference" to the sources they used.[44] An agency is only required to "support its conclusions with [existing] studies that the agency deems reliable"[45]—it does not have to undertake new research.

b. Alternatives and mitigation

AFPM agrees that in NEPA analyses agencies can, like any other effect, differentiate reasonable alternatives based on potential effects from greenhouse gas emissions.[46] This is consistent with the Draft Guidance's earlier statement that agencies "need not give greater consideration to potential effects from GHG emissions than to other potential effects."[47] As with other NEPA considerations, agencies retain discretion to decide how they will present and use information related to potential effects from greenhouse gas emissions.

CEQ correctly acknowledges that "NEPA does not require agencies to adopt mitigation measures."[48] Indeed, with respect to mitigation, all NEPA requires is that an agency discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[49] The U.S. Supreme Court has expressly rejected the proposition that NEPA requires action to be taken to mitigate adverse effects of major federal actions.[50] Any other conclusion impermissibly would transform NEPA from a purely procedural statute to one that includes substantive requirements.[51] For these reasons, AFPM respectfully requests that CEQ amend its provision in the Draft Guidance on this topic to not only state that NEPA does not require agencies to adopt mitigation measures, but also that NEPA provides no legal basis for agencies to adopt mitigation measures.

B. Considerations Relating to the Affected Environment

CEQ correctly acknowledges that agencies can only consider a "reasonable scenario" when considering potential effects on a proposed project due to foreseeable changes to the affected environment.[52] CEQ should clarify that the lead agency should use its experience and expertise to determine when, if at all, such a consideration would be appropriate. AFPM also agrees that, consistent with NEPA's "rule of reason" and other standards, "agencies need not undertake new

---

[43] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.
[44] 40 C.F.R. § 1502.24.
[45] *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012).
[46] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.
[47] *Id.*
[48] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.
[49] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).
[50] *Id.*
[51] *Id.* at 350–51 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (same).
[52] Draft NEPA Guidance, 84 Fed. Reg. at 30,098.

research or analysis of potential changes to the affected environment in the proposed action area and may summarize and incorporate by reference appropriate scientific literature."[53]

C. Use of Cost-Benefit Analyses

AFPM generally supports the use of cost-benefit analyses ("CBAs") in agency decision-making processes.[54] CBAs, for example, are an important part of the rulemaking process because they promote the efficient allocation of societal resources by balancing costs and benefits associated with a proposed regulation. But unlike regulations, NEPA analyses do not authorize agency action, are narrowly focused on a discrete set of alternatives, and are ancillary to the broader agency action for which they are completed. For these reasons, while AFPM generally supports CBAs, it believes they are more appropriately conducted at the regulatory review level than in NEPA analyses.

CEQ should maintain its provisions confirming NEPA does not require agencies to monetize the costs and benefits of a proposed action.[55] Courts have recognized and applied this provision in CEQ's NEPA regulations.[56] From this well-established principle, it follows that NEPA does not require agencies to use cost metrics in NEPA analyses.[57] In particular, as the Draft Guidance rightly recognizes, "an agency need not weigh the effects of the various alternatives in NEPA in a monetary cost-benefit analysis using any monetized Social Cost of Carbon (SCC) estimates and related documents [] or other similar cost metrics."[58]

The 2016 Guidance likewise recognized that NEPA does not require the monetization of costs and benefits. However, that Guidance indicated that agencies might conclude that monetization is appropriate in a particular case and promoted the use of SCC as a "harmonized, interagency metric."[59] In light of this prior endorsement of the flawed SCC approach, AFPM recommends that CEQ now go one step further and affirmatively state that agencies should not use the SCC. The Draft Guidance correctly acknowledges that the highly uncertain SCC estimates "were not intended for socio-economic analysis under NEPA or decision-making on individual actions, including project-level decisions."[60] But the SCC has many other flaws. For instance, the outcomes from the SCC easily can be manipulated by changing various data inputs, including

---

[53] *Id.*

[54] CBA requirements were established under Executive Orders 12291 and 12866 and are guided by Office of Management and Budget ("OMB") Circular A-4, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act. Since its introduction, numerous other executive orders have updated and provided guidance on the CBA process.

[55] 40 C.F.R. § 1502.23 ("[T]he weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis"); Draft NEPA Guidance, 84 Fed. Reg. at 30,098.

[56] *See, e.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1214 (9th Cir. 2004); *Sierra Club v. Sigler*, 695 F.2d 957, 978 (5th Cir. 1983).

[57] *See EarthReports, Inc.*, 828 F.3d at 956 (holding that an agency's decision not to use the social cost of carbon analysis was reasonable).

[58] 84 Fed. Reg. at 30,098–99. The Social Cost of Carbon (SCC) is an estimate of the value associated with an incremental decrease in carbon dioxide emissions. Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment, 79 Fed. Reg. 17,726, 17,729 (Mar. 28, 2014).

[59] 2016 Guidance at 33 n. 86.

[60] Draft NEPA Guidance, 84 Fed. Reg. at 30,099.

timeframes and discount rates. As a result, each agency could adjust parameters as it saw fit, potentially eliminating both consistency in analysis and a true comparison of one output to another. Stated another way, if agencies used different parameters, comparisons of their SCC outputs could be misleading and would hinder accurate agency or public understanding.

Several SCC flaws and deficiencies are of particular relevance in the context of a NEPA review. First, the SCC is fundamentally flawed because it focuses only on narrow impacts and omits critical benefits, including, for example, the value of pipelines bringing fossil fuels to market and the essential products those fuels provide (*e.g.*, lifesaving medical equipment). Second, the goal of this concept—projecting costs to society for carbon-emitting activities—can be manipulated by simply changing relevant timeframes, adjusting discount rates, and analyzing selected risks. Thus, the outcome of a SCC analysis would have less to do with the possible environmental impacts of a proposed action than with the assumptions of the agency that performs the analysis. As a result, rather than informing agency decision-making, the inclusion of SCC estimates may instead be used to hinder targeted projects.

For these reasons, CEQ should expressly direct agencies not to use the SCC in NEPA analyses.

D. Other Considerations

Presently, CEQ is developing a proposed rule that will overhaul its existing regulations implementing NEPA, which have only been subject to one minor amendment since their adoption forty years ago.[61] CEQ has not yet submitted its proposed rule to the Office of Management and Budget for interagency review. To the extent that CEQ is not already planning on codifying the fundamental principles set forth in the Draft Guidance, AFPM respectfully requests that it do so. Additionally, AFPM urges the agency to codify AFPM's recommended changes set forth in these comments. Codification is necessary to prevent the principles contained in the Draft Guidance from being repealed without process by future administrations and thereby recreating needless uncertainty on this issue.

IV. CONCLUSION

AFPM thanks CEQ for its time, continued efforts to improve the NEPA process, and consideration of these comments on the Draft Guidance. AFPM understands the need for complete environmental analyses that adequately consider the potential climate effects from greenhouse gas emissions resulting from proposed actions. The Draft Guidance accomplishes this, but still has room for improvement, as detailed above. Consistent with its past comments to CEQ, AFPM encourages the agency to continue to proactively improve the NEPA process by, among other things, increasing agency accountability, reducing costs and time associated with environmental reviews, and providing predictability in review schedules. AFPM shares CEQ's commitment to environmental stewardship and, based on this shared commitment, submits these comments and

[61] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018) (advance notice of proposed rulemaking); Docket No. CEQ-2018-0001.

will continue to look for opportunities to work together with CEQ on this and other issues in the future.

Respectfully submitted,

Richard Moskowitz
General Counsel