May 24, 2010

Submitted Electronically To: GCC.guidance@ceq.eop.gov

The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place NW
Washington, DC 20503

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

Dear Mr. Boling:

The Council on Environmental Quality (CEQ) recently released for comment a draft guidance document on the ways in which Federal agencies can improve their consideration of the effects of greenhouse gas (GHG) emissions and climate change in their evaluation of proposals for federal actions under the National Environmental Policy Act (NEPA) ("draft guidance"). 75 Fed. Reg. 8,046 (Feb. 23, 2010). This letter sets forth the National Mining Association's (NMA) comments on the draft guidance. The draft guidance, by requiring additional unproductive and costly analyses on federal agencies, will result in further delay and complication of an already overloaded bureaucratic process, with little or no identifiable environmental or public health benefit.

I. Introduction

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering, transportation, financial and other businesses that serve the mining industry. NMA members are concerned that the proposals in the draft guidance will add further inefficiencies to the NEPA process, create additional avenues for parties to challenge advantageous projects on Federal land and ultimately raise more questions than they answer.

NMA agrees with the points raised and questions asked by Rep. Joe Barton (R-TX) in his letter on the draft guidance dated March 8, 2010, to CEQ Chair Nancy Sutley. NMA shares Rep. Barton's concerns that the CEQ guidance could impact jobs and the economy by creating unnecessary regulatory uncertainty. Specifically, he raised concerns that the draft guidance creates additional regulatory hurdles under NEPA by requiring agencies to prepare qualitative and quantitative climate change assessments:

> Such assessments would add new and potentially very complex analyses on top of existing requirements including that agencies project and quantify cumulative emissions associated with proposed actions; consider effects of climate change on proposed actions, identify, assess and summarize relevant scientific literature; consider climate models and scenarios; predict and analyze future climate change impacts on proposed new projects; evaluate and disclose scientific uncertainties associated with projections; and consider mitigation measures and reasonable alternatives to reduce action-related greenhouse gas emissions.

Barton Letter at p. 2.

II. CEQ Draft Guidance is Misplaced in the U.S. Climate Debate

Very little is settled regarding future U.S. actions on climate change. Congress is attempting to grapple with legislative solutions to climate change at the same time agencies such as the U.S. Environmental Protection Agency (EPA) are attempting to impose regulatory requirements to address such issues. For example, EPA regulatory programs addressing reporting and control of GHG emissions, to which CEQ refers in the draft guidance, are currently in various stages of promulgation, and all are currently being litigated. The ultimate resolution of these actions is very much in question.

CEQ appropriately identified that issues related to climate change are global in nature. GHGs are emitted in unquantifiable amounts from indeterminable sources around the world. The effects of a particular project on accumulated global concentrations of GHGs are indeed miniscule. CEQ further cautioned federal agencies of the difficulties in ensuring scientific and professional integrity when assessing the impacts of climate change on proposed actions. The effects of climate change are largely speculative and impossible to predict with any amount of accuracy that would justify the time and expense federal agencies will be expected to undertake to comply with this proposed guidance.

NMA is concerned that despite CEQ's qualifications regarding the limitations to the applicability of its guidance, the door to costly and burdensome bureaucratic delay and litigation will be pried open by those interested not in a functional and effective NEPA process, but rather in legal and regulatory delays that will harm industrial and economic production and growth. Given the unresolved status of EPA's climate change regulatory agenda and currently-proposed climate legislation, CEQ's draft guidance is at least pre-mature. Federal agencies and the regulated community alike would benefit if this draft guidance was withdrawn.

Uncertainty surrounds the issue of climate change. Adding new CEQ guidance on top of these ongoing legislative and regulatory efforts engenders a vicious cycle of

uncertainty that will only serve to delay the already burdensome NEPA process. For these reasons, NMA urges CEQ to withdraw this guidance. Instead, our efforts should be collectively focused on ways to make NEPA more effective instead of adding requirements that fall outside the scope of the Act and that would place unnecessary or duplicative burdens on those charged with NEPA compliance. The NEPA process is already extraordinarily time consuming and expensive; additional administrative hurdles, prone to frequent abuse, should not be imposed.

Additionally, legislation (H.R. 5342) recently introduced in the U.S. House of Representatives provides further justification for the above stated concerns relative to NEPA. Specifically, the proposed bill addresses the uncertainties inherent in climate assessments and the need to ensure that the NEPA process does not inappropriately become a means to establish *defacto* climate change policy. NEPA, as a procedural statute, is not an appropriate vehicle for addressing issues related to global climate change. It is premature to use NEPA as a tool to implement climate change decision-making policy that is not yet fully formed.

III. Adding Climate Change Analysis to an Already Over-Burdened NEPA Process is Inefficient and Unwarranted

Many NMA members conduct mineral operations on federal lands and have extensive experience with the NEPA process, especially the project delays and escalating costs associated with NEPA compliance. As such, NMA members are exceedingly interested in and supportive of efforts to make that process more streamlined and efficient. Such streamlining would ensure the flow of minerals to the marketplace; minerals that are vital to maintaining and growing jobs throughout the U.S. economy. CEQ's draft guidance, however, would only serve to further complicate and delay a process that is already in much need of streamlining. The NEPA process is quite simply not the appropriate venue for effectuating resolutions to issues related to climate change.

In NMA members' experience, NEPA improvements are greatly needed. Permitting is unnecessarily cumbersome and inefficient, particularly with regard to meeting timeframes, managing costs and obtaining timely approval of plans of operations. The entire process of finding and permitting a new mineral deposit in the U.S. can take years. Those in the mining and mineral processing industry are not alone in the view that delays in the permitting process are a significant problem. For example, in criticizing the time consuming role of NEPA review in permitting, the National Academy of Sciences (NAS) concluded:

> The permitting process is cumbersome, complex, and unpredictable because it requires cooperation among many stakeholders and compliance with dozens of regulations for a single mine. As a result, there is a tendency for the process to drag on for years, even a decade or more. This drains and diverts the resources of land management agencies that should be managing their full range of responsibilities. It

> is also burdensome to operators and does not provide the best environmental protection. The public, the land management agencies, and the permit applicants would all benefit if the permitting process were conducted more efficiently.

Hardrock Mining on Federal Lands" ("NAS Report") at 122-123.

Further, CEQ's draft guidance is inconsistent with the purpose of NEPA and U.S. Supreme Court decisions that have clearly determined that NEPA is a purely procedural statute that cannot be used to effectuate substantive constraints on approval of any given project.

IV. CEQ's Guidance on Evaluating GHG Emissions Fails to Connect to Any Useful Policy Objective

In the context of its discussion of the proposed indicator of 25,000 metric tons per year (tpy) of direct annual emissions of CO_2-equivalent, CEQ indicates that proposed actions that will result in GHG emissions at or above that level warrant a "quantitative and qualitative assessment." CEQ appropriately goes to some length to emphasize that this number is not a "threshold of significant effects," but does reference the U.S. Environmental Protection Agency's (EPA) GHG Reporting Rule as support for that level as an indicator of significant effects. 74 Fed. Reg. 56,260 (Oct. 30, 2009). CEQ does not pay adequate heed to the arbitrariness of 25,000 tpy of CO_2-equivalent.

EPA has previously stated that the purpose of the GHG Reporting Rule is "to support analyses of future policy options." 74 Fed. Reg. 16,448 at 16,468 (Apr. 10, 2009). As an example, EPA referred to emission thresholds under certain CAA programs, such as the Prevention of Significant Deterioration (PSD) and Title V permitting programs. *Id*. EPA noted that "[a] major source for PSD is defined as any source that emits or has the potential to emit either 100 or 250 tons per year of a regulated pollutant, dependent on the source category." *Id.* EPA then recounted its analysis of the effect of a possible application of PSD requirements to emissions of GHG under those existing thresholds:

> [I]f the 100 and 250 tons per year thresholds were applied in the context of GHGs, the Agency estimates the number of PSD permits required to be issued each year would increase by more than a factor of 10 (*i.e.*, more than 2,000 to 3,000 permits per year). The additional permits would generally be issued to smaller industrial sources, as well as large office and residential buildings, hotels, large retail establishments, and similar facilities.

Id.

In the preamble of the GHG Reporting Rule, EPA did not explain what, if any, specific nexus it believed may exist between any given monitoring and reporting threshold established in that rulemaking and any possible future application of PSD requirements to GHG emissions. Nonetheless, Administrator Lisa Jackson told the Senate Appropriations Committee on May 13, 2009 -- after publication of the proposed rule -- that EPA's reason for proposing a 25,000-ton threshold is that that is the level EPA would use for "enforcement" of any future PSD requirements. Bureau of National Affairs, Daily Environment Report, "Climate Change: EPA to Target Greenhouse Gas Sources Emitting More Than 25,000 Tons a Year," May 14, 2009.

According to that report, the Administrator testified that "EPA would use 25,000 tons as the target for enforcement [under PSD] because the agency planned to monitor emissions from sources above that level." The report quoted the Administrator as saying that, "[a]s we do in other regulatory programs, we would start with the biggest sources before we would look to smaller ones."

EPA has recently finalized a suite of regulations designed to control GHG emissions from all sources, including stationary sources subject to PSD requirements. In its final so-called PSD "tailoring" rule (announced May 13, 2010), EPA raised the thresholds of the PSD and Title V programs applicable to GHGs to 75,000 and 100,000 tpy respectively, rather than the 25,000 tpy identified in the proposed rule. Additionally, EPA indicated that although it intends to institute a phased approach in order to address GHG emissions from stationary sources under the PSD program and will assess lowering the thresholds over time, it will not consider applying PSD permitting requirements to sources that have the potential to emit less than 50,000 tpy.

Thus, to the extent the Administrator's Senate testimony on the GHG Reporting Rule indicated that EPA had proposed the 25,000-ton level for mandatory GHG monitoring and reporting because the Administrator intended that level to have some significance in the future under the PSD program, any such rationale (a) appears to be highly questionable as a legal matter, and (b) is wholly undisclosed in EPA's published statement of basis for the proposed monitoring and reporting rule.

NMA recognizes that although the Tailoring Rule contemplates a source's "potential to emit," the GHG Reporting Rule and CEQ's proposed guidance document address "direct" emissions. This distinction, however, does little to explain the relevance or usefulness of a 25,000 tpy level in the CEQ guidance.

In light of the Administrator's Congressional testimony and the recently finalized Tailoring Rule, therefore, CEQ should reconsider its decision to provide any guidance on an appropriate indicator of GHG emissions that warrant quantitative or qualitative analysis. The 25,000 tpy level, although popularly adopted by both Congress and administrative agencies in various proposals over the course of the past several months, is wholly unrelated to any relevant environmental or human

health related impact, is arbitrary, and is entirely not useful to federal agencies analyzing the environmental impacts of proposed actions.

This confusion will be further aggravated by CEQ's call in the draft guidance for federal agencies to analyze GHG emissions associated with energy use and mitigation opportunities to compare alternative actions. Courts have routinely and resolutely interpreted NEPA as a procedural law, and have uniformly refused to impose mitigation requirements on agencies. As such, any final guidance should clarify that, although some discussion of mitigation measures is necessary to a fair evaluation of environmental impacts, agencies need not develop or evaluate specific mitigation plans prior to approving a particular project.

V. CEQ's Guidance for Considering Projected Climate Change Effects on Proposed Actions is Speculative and Unfounded

In addition to requiring Federal agencies to undertake speculative analyses of a proposed project's effects on climate change in the NEPA review, CEQ also outlines guidance that calls for review of the direct and indirect effects of climate change on a proposed agency action. While it is certainly appropriate for agencies in the NEPA process to consider how future identifiable impacts may affect a project during its life, the draft guidance goes too far. CEQ expects an already-beleaguered permitting process to now require the following from Federal agencies: identification and assessment of relevant scientific literature; consideration of climate models and scenarios; prediction and analysis of future climate change impacts on proposed new projects; evaluation and disclosure of scientific uncertainties associated with climate projections; and consideration of mitigation measures and reasonable alternatives to greenhouse gas emissions.

Federal agencies are mandated to use the best available science when evaluating environmental impacts. The Administration continues to rely on the conclusions of the Fourth Assessment Report of the International Panel on Climate Change (IPCC), yet CEQ itself recognizes that the science of climate change is rapidly developing. Many of the conclusions in the Fourth Assessment Report have not utilized science published and peer-reviewed after 2006. Climate science is constantly evolving and scientific debate pertaining to future impacts of climate change is consistently reconsidered.

Additionally, there are inherent and unique difficulties associated with analyzing upstream and downstream "indirect" and "associated and related" environmental effects. Current NEPA guidance requires analysis of impacts, or indirect effects, to the extent they are "reasonably foreseeable," beyond the immediate effect of a major action. The problem is that climate consequences themselves do not satisfy traditional standards of what is reasonably foreseeable. If we accept by fiat that such consequences are "reasonably foreseeable," independent of any science that answers "cause" and "effect" in a quantitative manner, the range of what "might" constitute an indirect effect becomes infinite. In traditional NEPA analysis, indirect

effects that have a relatively low likelihood of occurring can be excluded from an analysis. Considering as an indirect effect the endpoint effects of climate change (or even more vaguely the endpoint effects of increased GHG emissions), unsupported by data upon which to reasonably determine relative likelihood, could result in an assumption that all consequences may lead to an effect-worthy analysis.

Suppose, for example, that a major action has the incidental and hitherto un-noteworthy indirect effect of leading more people to choose paper bags over plastic bags at their local supermarket. Are the impacts on climate change reasonably foreseeable? The answer under the draft guidance would seem to be "yes" (or more precisely, there would be no way to prove the answer is "no"). Therefore, an adequate NEPA review would need to include an analysis of the impacts, which could very well remain unanswered after years of study and millions of dollars in cost.

Other federal agencies are already discovering the relative futility of undergoing climate change analyses in federal programs. CEQ is undoubtedly aware that the National Highway Traffic Safety Administration (NHTSA) recently completed the NEPA process in connection with its recently finalized Corporate Average Fuel Economy (CAFE) Standards for light duty motor vehicles. The final EIS (FEIS) was released Feb. 23, 2010. The purpose of that document was to analyze and disclose the impacts of the CAFE standards, which represent the largest federal initiative to date to control GHG emissions. The FEIS projects that in the year 2100, the new standards will result in annual reductions of 3.9 to 9.1 percent.

The FEIS concluded, however, that the effects on climate change resulting from these projected reductions are "too small to address quantitatively in terms of their impacts on health, society, and the environment." Further, "[g]iven the enormous resource values at stake, these distinctions could be important, but they are too small for current quantitative techniques to resolve." NHTSA FEIS Summary at 16-17.

In Appendix G attached to the FEIS, NHTSA described EPA's analysis of climate change consideration in conjunction with the Endangered Species Act (ESA). Specifically, the FEIS states the following:

> EPA … stated that the climate change research community has not yet developed tools specially intended for evaluation or quantifying end-point impacts attributable to the emissions of GHGs from a single source, and that EPA was not aware of any scientific literature regarding the climate effects of individual, facility-level GHG emissions. …There is thus limited scientific capability in assessing, detecting, or measuring the relationship between single-source emissions of GHGs

> and any localized impact on a listed species, its habitat or its members for ESA purposes.

Appendix G at 4.

> EPA's conclusion that any such potential effects would be so small as to be beyond physical measurement or detection in the habitats of listed species and outside the scope of any potential effect on such species/habitat identified in the scientific literature that EPA reviewed. NHTSA has determined that the same conclusion applies to changes in GHG emissions associated with the CAFE standards.

Appendix G at 6.

Both the environmental benefits and detriments of a changing climate are difficult to predict, yet CEQ is asking Federal agencies to do so in NEPA analyses. It is not hyperbole to say that CEQ is asking federal agencies to conduct a task already identified by NHTSA and EPA to be too attenuated and difficult to be justified in conjunction with what is, in effect, the only regulatory program for GHGs that has been finalized to date. Not only will this result in additional delay of the NEPA process, but will result in speculative and inaccurate modeling that will have direct impacts on approval of specific projects. Use of such modeling results will serve only to expand the potential for appeal and litigation of associated federal decisions. NEPA serves a specific purpose, but asking federal agencies to make permitting decisions based on ever-developing climate science falls outside of that purpose.

Sincerely,

Benjamin L. Brandes
Director, Air Quality