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May 24, 2010

Council on Environmental Quality  
ATTENTION: Ted Boling, Senior Counsel  
722 Jackson Place, N.W.  
Washington, D.C. 20503  
[GCC.guidance@ceq.eop.gov](mailto:GCC.guidance@ceq.eop.gov)

**BY E-MAIL**

RE: Comments on Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions under the National Environmental Policy Act

Dear Mr. Boling:

We appreciate the opportunity to comment on the Council on Environmental Quality's draft guidance on "Consideration of the Effects of Climate Change and Greenhouse Gas Emissions" under the National Environmental Policy Act (NEPA), 75 Fed. Reg. 8046 (Feb. 23, 2010). The Southern Environmental Law Center (SELC), a nonprofit organization working to protect the health and environment of the Southeast, offers the following comments to supplement other, more comprehensive comments we are submitting jointly with a number of other conservation organizations.

SELC works in six states: Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia. If these six states were viewed as a country, it would rank seventh in the world for its contribution to global warming. With the South's high concentration of coal-burning power plants, rapid growth, and high rates of driving, the South is disproportionately contributing to climate change. And with our extensive, vulnerable coastline, we stand to suffer disproportionately the effects of climate change as well.

We welcome CEQ's effort to provide guidance on the consideration of climate change and greenhouse gas (GHG) emissions. This effort is long overdue and greatly needed. In addition to the points raised in the comments we are jointly submitting with other conservation groups, we would like to emphasize the importance of guidance and oversight regarding the critical interconnections between transportation, land use, climate change and GHG pollution.

#### Greater Emphasis on Transportation

We urge CEQ to place a greater emphasis on transportation in the guidance document and in additional instruction and collaboration with federal agencies on particular projects and on agency implementation procedures. Transportation is scarcely mentioned in the draft guidance

document; yet its contribution to climate change is enormous, accounting for almost 30% of GHG pollution nationwide and a higher percentage in a number of our states. It is also the fastest growing source of GHG emissions in our region. Yet NEPA analyses of transportation projects in our region routinely ignore the GHG impacts of proposals. For example, the Tier I Environmental Impact Statement for the I-81 Corridor Improvement Study in Virginia examined a proposal to double the size of I-81 for 325 miles through Virginia, and would have enormous impacts on traffic, driving, and air emissions—among other things—yet it failed to consider the GHG emissions likely to result from the proposal. The same flawed approach is being applied to NEPA reviews for other proposed highway projects in our region, including a number of major metro area beltway projects that would contribute to even higher per capita driving, and consequent transportation emissions, in our region.

### Agency Responsibility to Consider Impacts on Climate

The draft guidance document states that “where a proposed Federal action that is analyzed in an EA or EIS would be anticipated to emit GHGs to the atmosphere in quantities that the agency may find meaningful, it is appropriate for the agency to quantify and disclose its estimate of the expected annual direct and indirect GHG emissions in the environmental documentation for the proposed action” (Draft Guidance, p. 2). As the conservation group comments we are jointly submitting clearly point out, this does not provide useful clarity or guidance to the agencies.

Leaving it to the agencies to determine whether GHG emissions should be considered, based on what they believe to be meaningful quantity of emissions, is inadequate. This is particularly a problem in the transportation arena, where agencies—at least in our region—have used flawed models or misused models to underestimate the amount of emissions that would result from a project, and have at times asserted that a new or expanded highway will have minimal or no air quality impacts because the additional capacity will relieve congestion and thus reduce emissions. These analyses and claims often slight or ignore factors such as induced travel demand and emission rates at higher speeds which would show increased emissions from a preferred highway alternative if they were considered adequately. It seems likely that agencies are likely to similarly—and erroneously—conclude that GHG emissions resulting from proposed highway projects will be minimal and that no GHG analysis is needed if the CEQ draft guidance standard is adopted.

Not only will construction of a new or expanded highway result in additional GHG emissions, but such projects are also likely to destroy carbon sinks by paving over forests and farmland. The Southeast has been developing land at a faster rate than any other region in the country. However, NEPA documents evaluating proposed highway projects in the Southeast have a history of inadequately considering the indirect impacts of various alternatives on land use even though federal regulations clearly recognize that “Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate...”<sup>1</sup> The Tier I EIS mentioned above on a proposal to double the size of Interstate-81 for 325 miles, for example, only spends about half of one page on this issue, simply concluding: “Generally, potential indirect impacts to land use would be limited

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<sup>1</sup> 40 C.F.R. § 1508.8(b).

because the “Build” concepts would not be creating a new transportation facility on a new location, but would be implementing improvements to an existing facility” and suggesting that where increased development pressures might occur, “local governing bodies control the land use within their jurisdictions. As such, any induced development would be regulated by the localities in the study area...” And in a North Carolina case involving a proposed beltway,<sup>2</sup> a court found that FHWA, NCDOT et al. failed to account for the foreseeable "growth inducing effect" of the project and thus "neglected a statutory duty under NEPA."<sup>3</sup> As the court noted in that case, "Defendants fail to present any definitive evidence to support their claim that development would occur to the same extent or at the same rate absent construction of the [Project]."<sup>4</sup> Again, it is likely that leaving it to agencies to determine whether GHG impacts should be considered is inadequate.

For similar reasons, we are concerned about the references in the draft guidance document to a 25,000 metric ton of direct CO<sub>2</sub>-equivalent GHG emissions “indicator” of significance (Draft Guidance, p. 3). Although the draft guidance document states that CEQ is not suggesting the 25,000 ton figure as a threshold for determining significant effects that should be analyzed, as the comments we are filing jointly with other groups note, this figure is likely to have the effect of discouraging agencies from considering emissions of less than 25,000 tons and thus may also result in agencies failing to consider adopting alternatives or mitigation measures for such projects. In addition, a fixed threshold—or the perception of a fixed threshold—will increase the temptation to further manipulate the traffic modeling for a project to ensure that the threshold is not reached to avoid any GHG analysis. This is certainly likely to occur with the preparation of NEPA documents for highway projects in the Southeast. As a result, we urge CEQ to delete discussion of the 25,000 ton figure.

Instead, CEQ should instruct agencies that where a proposed federal action is likely to produce GHG pollution or destroy carbon sinks, agencies must analyze and disclose direct GHG emissions and indirect impacts and the loss of carbon sinks regardless of the level of emissions. CEQ also should consider including specific mention of highway construction or expansion in the guidance document as an example of a type of project for which analysis and disclosure is almost always warranted. We also urge CEQ to be more vigilant in monitoring and working with agencies to address the improper use of models and assumptions to underestimate air emissions, as well as the failure of agencies to adequately consider the indirect land use impacts of proposed road projects.

### Alternatives and Mitigation

We applaud CEQ’s call in the draft guidance document for greater development and assessment of the climate impacts of alternatives, as well as possible measures to mitigate the climate change impacts of projects. This would be a significant step forward since, as noted above, many NEPA documents in our region pertaining to major transportation projects have failed to consider GHG emissions and impacts at all.

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<sup>2</sup> N.C. Alliance for Transp. Reform v. DOT, 151 F.Supp.2d 661 (M.D.N.C. 2001).

<sup>3</sup> *Id.* at 697.

<sup>4</sup> *Id.* at 696.

There is ample room to improve agency consideration of alternatives to ensure that more informed decisions are made that can greatly reduce climate change impacts. There is no shortage of better alternatives to many of the major highway projects recently proposed in the Southeast, yet NEPA documents have consistently failed to adequately assess these alternatives. The I-81 Tier I EIS, for example, failed to consider the rail alternatives that could offer the greatest improvement to traffic in the corridor by handling a significant portion of the long distance freight traffic the document shows is a primary factor leading to the need for improvements; the EIS failed to consider any interstate rail improvements, arbitrarily rejecting consideration of improvements that extend even one inch beyond Virginia's borders. Agencies in our region have a similarly poor track record of considering transit and transportation demand management/transportation system management (TDM/TSM) alternatives, and alternatives to integrate transportation and land use planning such as targeting future development to transit stations—alternatives which a growing body of research indicates can result in significant reductions of GHG pollution. Combinations of alternatives such as these are often given short shrift as well, even though NEPA requires lead agencies to consider reasonable alternatives even if they achieve, only partially, the objectives of a proposed action.<sup>5</sup>

We request that CEQ to expand and strengthen the discussion of alternatives analysis in the guidance document, to include examples of transportation alternatives in this discussion, and to require an agency to explain the reasons for rejecting alternatives that produce fewer GHG emissions in selecting a preferred alternative. Although it is outside the scope of this guidance document, we also urge CEQ to increase its efforts to review and improve agency practices in considering alternatives to building new and expanded road projects.

Similarly, discussion of mitigation steps is frequently minimal in NEPA documents pertaining to transportation proposals in the Southeast. We encourage CEQ to expand and strengthen the discussion of the need to analyze mitigation measures and to document the steps agencies plan to take to avoid, minimize or mitigate GHG emissions or damage to carbon sinks. In addition, we request that CEQ offer specific mitigation measures agencies should consider in NEPA documents pertaining to road construction or expansion projects.<sup>6</sup>

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<sup>5</sup> See e.g., Natural Resources Defense Council v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) (stating that an agency may not “disregard alternatives merely because they do not offer a complete solution to the problem”); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1542 (11th Cir. 1990) (“discussion of alternatives that would only partly meet the goals of the highway project may allow the decision-maker to conclude that meeting part of the goal with less environmental impact may be worth the trade-off with a preferred alternative that has a greater environmental impact”).

<sup>6</sup> See, Massachusetts Executive Office of Energy and Environmental Affairs, MEPA Greenhouse Gas Emissions Policy and Protocol (2010), *available at* <http://www.env.state.ma.us/mepa/downloads/RevisedGHGPolicy.pdf>.

Thank you for your consideration of these comments. Please contact us if you would like additional information on any of these points or to discuss any of these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Trip Pollard". The signature is stylized and written in a cursive-like font.

Trip Pollard  
Senior Attorney  
Land and Community Program Leader