

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

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

Dear Mr. Boling:

The Western Business Roundtable appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ) "Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions." (*75 Fed. Reg. 8046, February 23, 2010*)¹

CEQ's stated intent in issuing the Guidance is to determine "when and how Federal agencies must consider the impacts of proposed Federal actions on global climate change, as well as the expected environmental effects from climate change that may be relevant to the design of the proposed Federal action."²

The Roundtable watched with interest, CEQ's methodical, multi-year inter-agency initiative focused on improving the efficiency of the federal NEPA process. That initiative -- which drew heavily on the input from career professionals in the federal agencies -- resulted in CEQ regulations (*40 CFR 1507.3*) that require federal agencies to adopt procedures as necessary to supplement CEQ's National Environmental Policy Act (NEPA) regulations. The effort culminated in 2007, when federal land management agencies formalized the overhaul of their NEPA procedures.³

ABOUT THE ROUNDTABLE

The Western Business Roundtable (Roundtable) is a broad-based coalition of companies doing business in the Western United States. Our members are engaged in a wide array of enterprises, including: manufacturing; retail energy sales; mining; electric power generation and transmission; energy infrastructure development; oil and gas exploration development, transportation and distribution; and energy services. We work to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common-sense, balanced approach to conservation and environmental stewardship.

¹ Our comments also pertain to the memorandum from Nancy H. Sutley, CEQ Chair, to Heads of Federal Departments and Agencies, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010) (hereinafter referred to as "Guidance").

² *75 Fed. Reg. 8046, February 23, 2010*

³ <http://edocket.access.gpo.gov/2007/pdf/e7-15746.pdf> and <http://edocket.access.gpo.gov/2007/pdf/e7-15867.pdf>

Revisions to the NEPA process have very real implications for Roundtable members, many of whom are involved in energy and natural resource development activities on the vast swathes of federal lands in the West. Our members have extensive experience with the NEPA process including, unfortunately, the project delays and escalating costs associated with compliance under the Act.

ROUNDTABLE POSITION ON CEQ'S DRAFT NEPA GUIDANCE REGARDING CLIMATE CHANGE IMPACTS

The Guidance's stated purpose is to affirm the applicability of NEPA to greenhouse gases (GHG) and climate change impacts and require agencies to consider such impacts when carrying out analyses and other evaluative processes required under the Act.

The Roundtable has long supported efforts to reform NEPA to make it more efficient. We fear that the pending Guidance moves away from that focus and will result in increased delays, confusion and an ever more byzantine regulatory process, exactly at a time when regulatory efficiency is crucial if job-creating projects are to move forward throughout the West.

Ranking Minority Member of the House Energy and Commerce Committee, Congressman Joe Barton, stated the issue well:

*“Given the evolving, complex, controversial, uncertain and global nature of climate science, we have significant concerns that layering more analyses and requirements contemplated in the draft guidance will further delay the NEPA process, increase overall permitting and project costs, lead to protracted litigation, and adversely impact new energy and other infrastructure development in the United States.”*⁴

We are particularly concerned about the expansive and burdensome analytical process CEQ suggests federal agencies must engage in under the Guidance. Asking agencies to delve into broad, and seemingly untethered, inquiries into possible climate impacts, in the context of evaluating individual projects and activities on the ground, is destined to grind the NEPA process to a complete halt. As Congressman Barton put it:

*“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.”*⁵

ROUNDTABLE SPECIFIC CONCERNS WITH CEQ'S PROPOSED GUIDANCE

- **CEQ Is Putting the Regulatory Cart Before the Horse**

⁴ Letter from Congressmen Joe Barton and Michael Burgess to Nancy Sutley, Chair, CEQ, March 8, 2010, page 2.

⁵ Id.

In multiple contexts, the Roundtable has cataloged our concerns regarding the Administration's push to use climate change as the justification for a broad expansion of federal regulatory authority, based primarily on qualitative, predictive modeling of possible future climate impacts.⁶ This proposed CEQ Guidance is just the latest example of the Administration getting the "cart before the horse" by moving forward with climate-related regulations, when the fundamental questions of whether and how GHG emissions should be treated have yet to be settled.

With all due respect to agencies of the federal government: your responsibilities are to implement policies, **not** to establish them. Congress, states, local governments and the public are in the midst of a spirited discussion about fundamental, threshold questions relating to climate change: if GHG emissions should be regulated; what the framework of such regulation should be; how the profound economic trade-offs involved should be balanced; and, importantly, the timeline for institution of any policy decisions to respond to climate change. Though agencies, especially the Environmental Protection Agency (EPA), have been aggressive in asserting unilateral GHG controls, its programs are already being litigated, even as they are being promulgated.

Moving forward, prematurely, under NEPA is particularly inappropriate. The Act is a procedural statute. It is not intended to impose substantive requirements on federal agencies or project proponents. Rather, its purpose is to assure that agencies follow a process to take into consideration environmental impacts of their actions.

Senators Jim Inhofe (R-OK) and John Barrasso (R-WY), in their October 22, 2009 letter to CEQ, put the issue succinctly:

⁶ **Roundtable Comments, EPA GHG Endangerment Finding:**

http://docs.westernroundtable.com/air/2010/WBRT_EPA_GHG_CAA_Rulemaking_FINAL.pdf (74 Fed. Reg. 18886, April 24, 2009);

Roundtable Comments, EPA GHG Tailoring Rule:

Rulehttp://docs.westernroundtable.com/air/2010/WBRT_Comments_EPA_GHGTailoring_Rule_FINALSUBMIT.pdf (74 Fed. Reg. 55292, October 29);

Roundtable Comments, USFWS Climate Strategic Plan, Five-Year Action Plan:

http://docs.westernroundtable.com/public_lands/2010/WBRT_USFWSClimatePlan_FINAL.pdf (November 23, 2009);

Roundtable Comments, USFS NOI to Prepare EIS Associated With Revised Forest Planning Rule:

http://docs.westernroundtable.com/public_lands/2010/Comments_USFSPlan_final_Signed.pdf (74 Fed. Reg. 67167, February 16, 2010);

Roundtable Comments, EPA Draft Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change:

http://docs.westernroundtable.com/public_lands/2010/WBRT_EPAVulnerabilityFramework_FINALLINKED.pdf (74 Fed. Reg. 61671, November 25, 2009)

Roundtable Comments: . CEQ Draft NEPA Guidance Categorical Exclusions:

http://docs.westernroundtable.com/public_lands/2010/WBRT_comments_NEPA_CEGuidance_4-9-10_FINALLINKED.pdf

(75 Fed. Reg. 8045, February 23, 2010)

“NEPA, of course, is a bedrock environmental statute, which requires federal agencies to consider how their action could significantly impact the environment. It is not an appropriate tool to set global climate change policy. Any attempt to regulate greenhouse gas emissions must be debated on its merits and not regulated under laws that were never intended for such purposes.”⁷

Here, the question of specific climate change-caused environmental impacts is still very much unsettled. Thus, the state-of-play is not such that federal agencies have any definitive direction to apply in doing analysis under NEPA.

- **Climate “Science” is Unsettled**

“Federal agencies must ensure the scientific and professional integrity of their assessments of the way which climate change is affecting or could affect environmental effects of the proposed action.” (Guidance, page 2, referencing 40 CFR 1502.24)

The record of what passes for science in the climate arena is murky. Much of the so-called data that federal regulators -- including EPA, the Department of the Interior, the Department of Agriculture and the U.S. Fish and Wildlife Service -- have depended on, to-date, have been predictive models, many from the United Nations’ Intergovernmental Panel on Climate Change (IPCC). We have detailed our concerns regarding the Administration’s push to use climate change as the justification for a broad expansion of federal regulatory authority, based primarily on qualitative, predictive modeling of possible future climate.⁸

The Roundtable is hardly alone in this concern. There are a number of bipartisan efforts in Congress challenging federal agencies’ efforts to regulate on this basis, as well as a burgeoning suite of litigation.

- **Quantifying “Causal” Climate Impacts at the Project Level is Currently Infeasible**

As noted above, the fundamental questions regarding how to quantify and evaluate impacts of climate change at the macro-level have not yet been resolved. Even if they had, analyzing those impacts at the project-level, as called for under NEPA, is unrealistic.

GHG emissions differ from traditional pollutants regulated under various environmental statutes. There is little relationship between GHG emissions from a project in a particular spot and the possible environmental effects of climate change at that location (i.e. a “causal link.”) Further, as recent controversies over modeling have shown, future climate conditions cannot be predicted, much less quantified with certainty, even at a global level.

In its proposed Guidance, CEQ concedes some very important points:

- It acknowledges 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

⁷ Letter from Senators James Inhofe and John Barrasso to Nancy Sutley, CEQ Chair, October 22, 2009, page 1.

⁸ See our various comments to agencies, linked in footnote 6.

GHGs are indeed miniscule. CEQ further cautions federal agencies of the difficulties in ensuring scientific and professional integrity when assessing the impacts of climate change on proposed actions. (*Guidance, page 2*)

- It acknowledges the scientific limits of federal agencies' abilities to accurately predict climate change effects. (*Guidance, pages 3 and 8*)
- It concedes that there is no way to link climate change or environmental impacts thereof to a particular project or its emissions: "*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 understand.*" (*Guidance, page 3*)
- It affirms that it is not currently "*possible to quantify with great specificity (i.e. geographic) the various health effects from climate change.*" (*Guidance, page 11*)
- It recognizes that the Supreme Court has stated that the obligation of an agency to discuss particular effects turns on "*a reasonably close causal relationship between the environmental effect and the alleged cause*" (*Guidance, page 7, quoting Dep't of Transp. v. Public Citizen, 541 U.S. 752, 767 (2004)*).

There is much uncertainty regarding climate change, and to incorporate that uncertainty in the NEPA process would unduly burden federal agencies. As the 9th Circuit Court of Appeals put it in *Lands Council v. McNair*:

*"...none of NEPA's statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS. After all, to require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose."*⁹

- **Quantification of Emissions as a Proxy for Impacts Does Not Satisfy NEPA's "Hard Look" Test**

"The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives." (*Guidance, page 3*)

NEPA requires that federal agencies take a "hard look" at the potential environmental consequences of the proposed action, and in doing so carefully consider "*detailed information concerning significant environmental impacts.*"¹⁰ However, they are "*not require[d] to do the impractical.*"¹¹ The agency must link the effects of a proposed action (and alternatives) with

⁹ 494 F.3d 771 (9th Cir. 2007)

¹⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed. 2nd 351 (1989)

¹¹ *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996).

specific environmental consequences – a general discussion of an environmental problem (e.g., climate change) across a large area does not satisfy NEPA.¹² Likewise, simply reporting an area or an amount of a resource impacted also does not satisfy this requirement.¹³

However, the Guidance takes exactly that approach. CEQ mandates the reporting of GHG emissions, weighing of alternatives, and describing mitigation measures to lessen their impact on the environment. At the same time, the Council clearly recognizes that it is not currently scientifically possible to analyze the direct, indirect and cumulative effects of GHG emissions on the environment, particularly at the project level. (*Guidance, page 3*) Given this fact, the reporting of emission levels is not useful and cannot serve as a proxy for an analysis of the impacts of GHG emissions on the environment.

- **Basing Regulatory Trigger on Arbitrarily Defined Level of Direct Emissions Suspect Under NEPA**

“If a proposed action would be reasonably anticipated to cause direct emissions of 25,000 metric tons or more of CO₂-equivalent GHG emissions on an annual basis, agencies should consider this as an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public.” (Guidance, page 3)

CEQ’s attempt to contort NEPA to meet the Administration’s regulatory goals leads to other problems. In an effort to give federal agencies some point of reference from which to evaluate climate impacts, the Guidance suggests a “reference point” of direct emissions of 25,000 metric tons of carbon dioxide (CO₂) equivalent as a threshold above which an analysis of GHG effects may be warranted.

The threshold level of direct GHG emissions chosen by CEQ is arbitrary, from an environmental impact perspective. 25,000 metric tons per year of CO₂ equivalent simply does not constitute a significant environmental effect. In fact, 25,000 tons represents only 5/100,000th of 1 percent (0.0000005) of the 49 billion tons of global GHG emissions in 2004. Even EPA’s so-called “tailoring” rule, issued on May 13, 2010, will apply 75,000 and 100, 000 tons per year as the minimum levels for triggering air permitting requirements.

- **The “Rule of Reason” vs. “Qualitative” Evaluations**

“In the agency’s analysis of direct effects, it would be appropriate 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.” (Guidance, page 3)

CEQ’s approach relative to “qualitative” evaluations is among the most troubling aspects of the Guidance. As discussed above, CEQ acknowledges that there is no demonstrable causal relationship between individual projects or activity’s GHG emissions and climate change impacts.

¹² *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 997 (9th Cir. 2004) and *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept of Interior*, 588 F.3d 718 (9th Cir. 2009).

¹³ *Id.*

Despite this fact, CEQ views as appropriate the use of qualitative evaluations in determining impacts and in developing reasonable alternatives under NEPA. (*Guidance, page 3*)

Qualitative evaluations are essentially experts' subjective judgments. They should not take the place of real, quantifiable science for decision making under the operation of that Act. The Guidance suffers from the same flaw that much of the Administration's work in the climate regulatory realms has: a lack of both reliable, quantifiable scientific data on which to base regulations.

NEPA is intended to provide decision makers with specific information about the environmental impacts of particular projects. The courts have long applied a "rule of reason" to NEPA analysis, which holds that agencies are not required to engage in speculation. Thus, the "rule of reason" must apply when effects from an individual project proposal cannot be readily ascertained and the value (if any) of the alternatives is remote and speculative.¹⁴ CEQ's current regulations adopt these same principles.¹⁵

- **Problems with "Vulnerability" Analyses**

"Climate change can affect the environment of a proposed action in a variety of ways...Climate change can increase the vulnerability of a resource, ecosystem or human community, causing a proposed action to result in consequences that are more damaging than prior experience with environmental impact analysis might indicate." (Guidance, Page 6)

"Agencies should consider the specific effects of the proposed action (including the proposed actions effects on the vulnerability of the affected ecosystem), and the implications for the environment to adapt to the projected effects of climate change." (Guidance, Page 7)

As already noted, in the draft Guidance, CEQ correctly concedes that there is no way to link climate change or environmental impacts thereof to a particular project or its emissions. (*Guidance, page 3*) CEQ also concedes that it is not currently "*possible to quantify with great specificity (i.e. geographic) the various health effects from climate change.*" (*Guidance, page 11*) Yet, the Council expects federal agencies to evaluate ecosystem and species vulnerabilities.

The Roundtable is extremely concerned regarding a growing body of regulatory declarations seeking to justify unilateral agency regulations/actions based on predicted future impacts to so-called "vulnerable" species and ecosystems. Throughout these declarations, "vulnerability" is a vaguely defined term and explanations of the statutory authorities that justify regulations remain unexplained. We discussed this issue in detail, in the context of related comments to U.S. Fish and Wildlife Service and the EPA.¹⁶

¹⁴ *National Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) and *Public Citizen*. 541 U.S. at 767-68)

¹⁵ 40 C.F.R. §§ 1500.4(f)-(g), 1501.7 and 1508.25

¹⁶ **Roundtable Comments, EPA Draft Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change:**

In a nutshell, our concerns are:

- Agencies are getting far ahead of Congress and the American people on climate.
- The justification for such actions lacks definition or statutory authority.
- The approach is premised on predictive modeling and subjective judgments by “experts,” not empirically sound scientific data.
- The approaches, as defined, are inherently biased. They all focus on predictions of negative impacts from climate change. While that is certainly a possibility, it is hardly the whole story. The actual scientific record shows very clearly that species have adapted to changes in our climate much larger than those predicted by the climate models, and have done so for many hundreds of millions of years.¹⁷
- **Guidance Fails to Balance Environmental and Human Health and Welfare Concerns**

NEPA was enacted to “*promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man*”.¹⁸ Thus, NEPA requires federal agencies to balance protection of the environment against the needs of people. Because neither of the purposes is stated as predominant over the other, it is logical to conclude that NEPA envisions a balancing test, whereby any imposition of standards, denial of permits, or other regulatory actions taken on behalf of the environment must be balanced against the impacts (including health and economic) of those actions on the people affected. It is notable that the Guidance does not clearly indicate how the second purpose of the balancing test is to be effectuated by the agencies.

Agencies can balance those equities only by conducting a full, transparent and rational cost/benefit analysis which takes into account both environmental concerns and the economic and other issues that impact citizens’ welfare. The Guidance fails to provide a framework for such an analysis. The suggestion that agencies gauge impacts through “qualitative” evaluations is fundamentally at odds with a true cost-benefit model. Further, CEQ itself affirms that it is not currently “*possible to quantify with great specificity (i.e. geographic) the various health effects from climate change.*” (Guidance, page 11)

CONCLUSION

http://docs.westernroundtable.com/public_lands/2010/WBRT_EPAVulnerabilityFramework_FINALLINKED.pdf
(74 Fed. Reg. 61671, November 25, 2009)

Roundtable Comments, USFWS Climate Strategic Plan, Five-Year Action Plan:

http://docs.westernroundtable.com/public_lands/2010/WBRT_USFWSClimatePlan_FINAL.pdf (November 23, 2009)

¹⁷ *Global Warming and Species Extinction: Prospects for the Future*, Doctors Craig and Sherwood Idso, The Science and Public Policy Institute

¹⁸ NEPA Section 2, 42 U.S.C. Sec. 4321

For the many reasons discussed in these comments, the Roundtable believes that CEQ's proposed Guidance is premature. We recommend the Council to withdraw the proposal.

On behalf of the many member organizations of the Western Business Roundtable, thank you for the opportunity to provide input on this issue, the impacts of which are so linked with the economic vitality of the West.

Sincerely,

A handwritten signature in black ink that reads "Holly Propst". The signature is written in a cursive, slightly slanted style.

Holly Propst
General Counsel / Director of Policy
Western Business Roundtable