



LEGAL SERVICES

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May 24, 2010

**Via U. S. Mail and email to
GCC.guidance@ceq.eop.gov**

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

Dear Mr. Boling:

Allegheny Energy, Inc. (Allegheny) appreciates the opportunity to provide comments on the Council on Environmental Quality's "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions."¹ The draft guidance sets out broad principles to be followed by federal agencies conducting analyses under the National Environmental Policy Act (NEPA) for assessing the direct and indirect effects of greenhouse gas (GHG) emissions from a proposed federal agency action. Further, the draft guidance also addresses the consideration of the impacts of future climate change on a proposed federal agency action, as well as the manner in which such impacts could be minimized or avoided.

In issuing this draft guidance, CEQ invited comments on "when and how Federal agencies must consider the impacts of proposed Federal actions on global climate change, as well as the expected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." Allegheny appreciates the opportunity to comment on these issues as well as specific elements of the draft guidance.

While the draft provides many necessary clarifications as to how GHG emissions should be considered under NEPA, additional revisions are necessary to ensure that any such analysis is appropriately focused and consistent with the structure and scope of NEPA. Specifically, Allegheny recommends that CEQ expand on the discussion of the limitations of climate change science and clarify that global models cannot be applied to individual project emissions. In addition, the CEQ should provide additional guidance on the outer bounds of the causation inquiry that should be conducted when assessing the indirect GHG emissions associated with a proposed project. Finally, the CEQ should revise the draft guidance to clarify that when the

¹ 75 Fed. Reg. 8046 (Feb. 23, 2010).

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causation inquiry is properly documented, remote and de minimis GHG emissions can be removed from consideration under NEPA pursuant to existing NEPA procedures. Each of these recommendations is further discussed below.

Allegheny supports, and urges CEQ's adoption of, the comments and recommendations submitted by the Edison Electric Institute (EEI). In particular, Allegheny agrees that CEQ and the federal agencies undertaking NEPA analyses should not equate individual GHG emissions, even at or above 25,000 tons per year as a "significant effect" warranting preparation of an environmental impact statement. In fact, the adoption of specific emissions level as even an "indicator" level is problematic as it, implicitly or explicitly, may be interpreted as a benchmark of significance. There is no basis for such a generic conclusion.

1. The Guidance Memorandum Must be Modified to Further Recognize and Expand Upon the Limitations of Global Emissions Models When Applied to Individual Projects.

In the February proposed guidance, CEQ noted that "[t]here are limitations and variability in the capacity of climate models to reliably project potential changes at the regional, local, or project level, so agencies should disclose these limitations in explaining the extent to which they rely on particular studies or projections." The guidance continues, stating that some global climate models "require downscaling and bias removal" before they can be used to accurately assess the impact of GHG emissions at the local or regional level. CEQ must further expand upon and clarify its discussion on this matter. Particularly, any guidance should make clear that global models are unsuitable for use in evaluating the impacts of GHG emissions from an individual project. Even among the scientific communities, uncertainties remain about the accuracy and reliability of both long- and short-term climate models. Given these doubts, the guidance should caution and fully explain that current climate science is limited and existing models may not be able to accurately predict or reflect the effects of GHG emissions from an individual project. The guidance also should reaffirm that any climate change modeling conducted as part of the NEPA process should not—and cannot—be used to link specific changes in climate or environmental impacts to an individual project.

In this regard, other recent federal guidance concludes that analyses of potential climate change impacts from individual federal actions is speculative. The Environmental Protection Agency (EPA), which has expertise in modeling air emissions and their impacts, reached this conclusion in an October 3, 2008 letter from the Assistant Administrator for Air and Radiation:

GHG emissions from single sources are small relative to aggregate emissions, and GHGs, once emitted from a given source, become well mixed in the global atmosphere and have a long atmospheric lifetime. The climate change research community has not yet developed tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single

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source, and we are not aware of any scientific literature to draw from regarding the climate effects of individual, facility-level GHG emissions.²

Further, an October 3, 2008 Opinion of the Solicitor of the Department of the Interior also concluded that the best available science cannot link particular climate change impacts to a particular project's GHG emissions:

[T]he requisite causal connections cannot be made between the emissions of GHGs from a proposed agency action and specific localized climate change as it impacts listed species or critical habitat. Given the nature of the complex and independent processes active in the atmosphere and the ocean acting on GHGs, the causal link simply cannot currently be made between emissions from a proposed action and specific effects on a listed species or its critical habitat.³

Recommendation: CEQ's guidance should note that to the extent potential climate change issues are addressed in NEPA documents, they should be analyzed in a qualitative nature only, and not quantitatively. Moreover, CEQ should make clear that application of global models to forecast or assess potential environmental impacts of GHG emissions from a specific federal agency action is not appropriate. The following revisions to a portion of the guidance memorandum reflect this recommendation:

On pages 2 and 3 of the draft guidance, the discussion should be modified as follows:

...Many projects and programs proposed by the Federal government have the potential to emit GHGs. Accordingly, 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 finds may be meaningful, it is appropriate for the agency to ~~quantify and disclose its estimate of the expected annual~~ analyze the direct and indirect GHG emissions in the environmental documentation for the proposed action. In light of the present limitations of climate change modeling on a global, rather than project-specific basis, while quantification or estimates of direct and indirect GHG emissions for an individual project, in some circumstances, may be feasibly developed, they should only be employed as an indicator of effects and analysis of GHG emissions should remain a qualitative analysis for purposes of the NEPA review. In all instances, it is inappropriate

² Letter from Robert J. Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation, EPA, to H. Dale Hall, Director, FWS and James Lecky, Director, Office of Protected Resources, National Marine Fisheries Service, *Endangered Species Act and GHG Emitting Activities*, at 4 (Oct. 3, 2008).

³ Memorandum from the Solicitor, DOI, to the Secretary, DOI, *Guidance on the Applicability of the ESA's Consultation Requirements to Proposed Actions Involving the Emission of GHGs* (Opinion M-37017), at 6 (Oct. 3, 2008), available at <http://www.doi.gov/solicitor/opinions/M-37017.pdf>.

for agencies to use a global model to forecast or assess potential environmental impacts of GHG emissions from a specific federal agency action.

...

In the agency's analysis of direct effects, [where potential GHG emissions are determined to potentially exceed 100,000 metric tons per year of CO₂]⁴ it would be appropriate to: (1) quantify cumulative qualitatively consider and analyze the potential 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. However, 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 to understand. If developed on a project-specific basis, any The estimated level of GHG emissions can serve as a reasonable proxy for assessing an input into the qualitative assessment of potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives.

CEQ also will need to make conforming edits to recognize the employment of a qualitative analysis of GHG emissions. As an example, on page 5 of the draft guidance, the discussion should be modified as follows:

...As proposed in draft guidance above, for Federal actions that require an EA or EIS the direct and indirect GHG emissions from the action should be considered in scoping and, to the extent that scoping indicates that GHG emissions warrant consideration by the decision maker, quantified-qualitatively analyzed and disclosed in the environmental document. 40 CFR 1508.25. In assessing direct emissions, an agency should look at the consequences of actions over which it has control or authority. *Public Citizen*, 541 U.S. at 768. When a proposed federal action meets an applicable threshold for quantification and reporting and analysis, as discussed above, CEQ proposes that the agency should also consider mitigation measures and reasonable alternatives to reduce action-related GHG emissions. Analysis of emissions sources should take account of all phases and elements of the proposed action over its expected life, subject to reasonable limits based on feasibility and practicality.

⁴ As noted above, Allegheny endorses EEI's comments in support of the removal of the "indicator" threshold of 25,000 metric tons per year of CO₂. If, however, CEQ retains an indicator threshold for analysis, such level should be no less than 100,000 metric tons per year.

2. The Final GHG Guidance Should Expand and Clarify its Guidance to Agencies on When and How to Assess Indirect GHG Emissions.

The draft NEPA guidance on GHG emissions states that the 25,000 ton GHG emissions threshold triggering NEPA consideration should not include indirect emissions, noting that the analysis of such indirect emissions should be limited by “feasibility in evaluating upstream and downstream effects.” This single statement, while providing appropriate guidance, must be further clarified. Particularly, it is not merely the “feasibility” of making evaluation of upstream and downstream effect. CEQ should clarify its guidance memorandum to note the inherent limitations in addressing GHG emissions in the context of indirect effects analyses. Specifically, CEQ should clarify that only those indirect emissions that are reasonably foreseeable⁵ as a result of the project and meet the necessary level of significance should be considered; emissions that are theoretical or otherwise not dependent upon the proposed action for their occurrence should be eliminated from the analysis.

To comply with NEPA in cases in which adverse environmental impacts are not likely or uncertain, expensive and time-consuming studies are not necessary so long as the EIS identifies areas of uncertainty. Thus, in the final guidance, CEQ should clarify that the federal agencies must recognize and discuss the known uncertainties of GHG emissions and, as the ability to quantify emissions or accurately assess the link between emissions and climate effects decreases, federal agencies should rule out such GHG emission issues from more detailed consideration. Moreover, the final guidance document must make clear that analysis of GHG emissions must conform to existing case law, which requires a close causal relationship between the proposed action and the environmental effects considered in the NEPA analysis.⁶

Recommendation: CEQ should clarify its discussion of indirect emissions. On page 3 of the draft guidance, the discussion should be modified as follows:

⁵ . See, e.g., *EDF v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980) (citing *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)). See also *Izaak Walton League v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981).

⁶ See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) and *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004)(citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-275 (5th ed. 1984)). The NEPA regulations first require an in-depth causation inquiry examining the overall contribution of the activity to the environmental effects of the project. If the causation inquiry is appropriately and adequately documented and concludes that expected environmental effects associated with one aspect of the activity are *de minimis*, then the NEPA regulations allow that element of the project to be excluded from consideration. Allegheny notes that, on page 3 of the draft guidance, CEQ states that “[m]any agency NEPA analyses to date have found that GHG emissions from an individual agency action have small potential effects. Emissions from may proposed Federal actions would not typically be expected to produce an environmental effect that would trigger or otherwise require a detailed discussion in an EIS.” Allegheny agrees with this observation and supports its retention in any final guidance.

... CEQ does not propose this reference point for use as a measure of indirect effects, the analysis of which must be bounded by limits of existing climate change models and feasibility in evaluating upstream and downstream effects of Federal agency actions. Federal agencies must ensure that any indirect emissions analyses is limited to those effects that are reasonably foreseeable to occur, have a clear causal connection to the project and are of a magnitude of significance warranting analysis. Indirect emissions that are theoretical or otherwise not dependent upon the proposed action for their occurrence should be eliminated from detailed consideration.

3. The CEQ Guidance Should Confirm that Traditional NEPA Procedures to Exclude Factors from Consideration Based on Incomplete or Unavailable Information Apply to the Analysis of GHG Emissions.

Federal agencies may exclude from detailed consideration matters that are not “essential to a reasoned choice among alternatives” analyzed in the EIS. Further, if information relating to a potential impact is unavailable, uncertain or the overall costs of obtaining relevant data are exorbitant, the agency is not required to engage in costly and time-consuming attempts to produce such data.⁷ Rather, the agencies can and should proceed with an acknowledgement of the unavailability or uncertainty of data regarding a particular impact or effect. Given the present state of knowledge and modeling of climate change matters, it is reasonable to expect that, in many cases, information on the effect of a project’s GHG emissions may be unavailable, uncertain and/or present exorbitant costs in the production of analyses.

Recommendation: The final CEQ guidance on the analysis of GHG emissions under NEPA should make clear that NEPA regulatory provisions regarding incomplete or unavailable information should be appropriately utilized in addressing any analysis of GHG emissions. Clarification of this matter can be accomplished through the inclusion of the following statement as part of the Section titled “WHAT DEPARTMENTS AND AGENCIES SHOULD CONSIDER AS PART OF THEIR GHG EVALUATION”:

CEQ reminds federal agencies that NEPA regulations address the circumstance where data on a potential adverse effect is unavailable, uncertain or the overall costs of obtaining relevant data will be exorbitant. 40 C.F.R. §1502.22. As discussed in Section IV of this guidance, the science of climate change is still developing. It is expected that federal agencies may not always be able to obtain appropriate information regarding the effect of GHG emissions from a specific federal agency action. In those instances, the agency should proceed with an acknowledgement of the unavailability or uncertainty of data regarding a particular impact or effect. It is not compelled by this guidance or

⁷ See 40 C.F.R. § 1502.22(a).

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NEPA to undertake studies or analysis that require exorbitant expenditures or are not essential to a reasoned choice among alternatives.

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Allgheny appreciates the opportunity to provide feedback on the Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions.

Sincerely,

A handwritten signature in blue ink that reads "Randall B. Palma". The signature is written in a cursive style with a large initial "R".

cc: Nancy Sutley
Chair, Council on Environmental Quality