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May 24, 2010

Honorable Nancy Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, D.C. 20503

RE: Comments on Draft NEPA Guidance On Consideration Of  
The Effects of Climate Change and Greenhouse Gas Emissions

Dear Chairwoman Sutley:

The State of California, acting by and through Attorney General Edmund G. Brown Jr., submits these comments on the draft guidance proposed by the President's Council on Environmental Quality (CEQ) to interpret the obligations of federal agencies under the National Environmental Policy Act (NEPA), 42 U.S.C. 4330, et seq, in determining and disclosing the potential of the projects they undertake, approve, or fund to increase emissions of greenhouse gases (GHGs) and promote global warming.<sup>1</sup> We congratulate CEQ on taking the initiative to issue guidance on this topic that is of such vital importance to the nation.

The federal government has tremendous power to affect climate change, as a regulator, a land owner, and a consumer. The influence of the federal government is especially powerful in the West, where it owns large areas of land in the Western States; for example, approximately 45% of the land in California is in some form of ownership by the federal government.<sup>2</sup> The approach that the federal government takes to managing its lands, and to the many and varied

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<sup>1</sup> The Attorney General submits these comments pursuant to his independent power and duty to protect California's environment and natural resources from pollution, impairment, or destruction, and in furtherance of the public interest. (See California Constitution, article V, section 13, Government Code sections 12511, 12600-12612, and *D'Amico v. Bd. Of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.)

<sup>2</sup> [www.blm.gov/natacq/pls98/98PL1-3.PDF](http://www.blm.gov/natacq/pls98/98PL1-3.PDF)

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regulatory programs it carries out and the consumer choices<sup>3</sup> it makes should all be directed towards the national goal of reducing GHG emissions to limit global warming to no more than two degrees Celsius, as set out by President Obama at the Copenhagen climate summit.<sup>4</sup>

The States have already taken aggressive action to reduce GHG emissions, including such state laws as California's Global Warming Solutions Act of 2006.<sup>5</sup> Many states have joined in regional cap-and-trade programs such as the Western Climate Initiative (WCI) and the Regional Greenhouse Gas Initiative (RGGI) to reduce regional GHG emissions. Slowing or stopping climate change is a central goal for many States, but one in which States need the help and support of the federal government. We believe that NEPA and the environmental impact statements (EISs) and other NEPA decision documents prepared by federal agencies are indispensable tools that these agencies can use to forward both the national GHG reduction goals, and the GHG reduction goals of the States.<sup>6</sup>

### **The Proposal Is Based on Sound Science**

CEQ's proposed guidance is in alignment with the reports and opinions of scientific and regulatory organizations from the International Panel on Climate Change (IPCC) to the California Climate Action Team, that have set out the research showing that human activities are already changing the climate. We note particularly that the National Research Council, the research arm of the National Academy of Sciences (NAS), has just issued a set of reports on climate change. In *Advancing the Science of Climate Change, Report in Brief*, the NAS expresses its belief that "there is a strong, credible body of evidence, based on multiple lines of research, documenting that Earth is warming . . . , and that "[s]trong evidence also indicates that recent warming is largely caused by human activities . . . ." <sup>7</sup> The NAS also concluded "that there is an urgent need for U.S. action to reduce greenhouse gas emissions," and set out

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<sup>3</sup> The Federal government occupies nearly 500,000 buildings, operates more than 600,000 vehicles, employs more than 1.8 million civilians, and purchases more than \$500 billion per year in goods and services. (White House Press Release, October 5, 2009, available at [http://whitehouse.gov/the\\_press\\_office/President-Obama-signs-an-Executive-Order-Focused-on-Federal-leadership-in-Environment-Energy-and-Economic-Performance](http://whitehouse.gov/the_press_office/President-Obama-signs-an-Executive-Order-Focused-on-Federal-leadership-in-Environment-Energy-and-Economic-Performance).)

<sup>4</sup> See, also, Executive Orders 13423 and 13514, setting performance goals for the federal government to limit emissions of greenhouse gases through increased energy efficiency and sustainability.

<sup>5</sup> California Health Safety Code section 38500, et seq., commonly known as AB 32.

<sup>6</sup> CEQ's NEPA Guidelines, at 40 C.F.R. § 1502.16(c) requires federal agencies to discuss in their EISs the extent to which their actions may conflict with state and local land use plans, policies, and controls. This plainly would include state GHG reduction plans.

<sup>7</sup> National Academy of Sciences, *America's Climate Choices, Advancing the Science of Climate Change, Report in Brief*, (May 19, 2010) p. 1, available at <http://americasclimatechoices.org>.

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recommendations for how policy makers and agencies might do so.<sup>8</sup> We ask that these reports be made part of the record here.

### **The Proposal Has a Sound Legal Basis**

The courts have clearly recognized the applicability of NEPA to climate change. In a leading case, our office (among others) challenged the National Highway Traffic Safety Administration (NHTSA), when it declined to prepare an EIS on the setting national fuel economy standards and did not analyze the effects of NHTSA's decision on climate change. The Ninth Circuit was very clear in holding that NEPA applies to major projects that involve carbon dioxide emissions, stating: "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Center for Biological Diversity, et al. v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008). Of course, not all projects that involve GHG emissions will require the same depth of analysis; NEPA's "rule of reason" will allow agencies to tailor their EIS to the level of analysis appropriate to the project involved. However, it is now clear that the cumulative climate change impact of GHG emissions is an environmental effect that is subject to NEPA and that requires NEPA analysis where the emissions are significant.<sup>9</sup>

### **CEQ Should Reconsider Its Proposed Presumptive Threshold for Significance of 25,000 MMT Per Year GHG Emissions**

CEQ has proposed that GHG emissions under the level of 25,000 metric tons per year (MMT/yr) be deemed an insignificant amount, below which no NEPA analysis need be performed. CEQ appears to have chosen this number based on its use by the U.S. Environmental Protection Agency (EPA) in EPA's GHG Emissions Mandatory Monitoring and Reporting Rule, and in EPA's proposed Tailoring Rule, both of which were designed to apply to large stationary (chiefly industrial) sources of GHG emissions that are subject to the Clean Air Act, 42 U.S.C. 7400, et seq.<sup>10</sup> We note that EPA's final Rule does not use the 25,000 MMT threshold. California understands the desire of agencies and project applicants for certainty as to whether or not an individual project requires a climate change analysis under NEPA, and we do not wish to see projects with insignificant impacts delayed by a requirement for such an analysis where the project's impacts do not actually merit it. However, we do not believe that the proposed level of 25,000 MMT per year is an appropriate threshold.

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<sup>8</sup> National Academy of Sciences, *Limiting the Magnitude of Future Climate Change, Report in Brief*, (May 19, 2010) p. 2-4, available at <https://americasclimatechoices.org>.

<sup>9</sup> See 40 C.F.R. § 1508.7, defining cumulative impacts for NEPA purposes.

<sup>10</sup> EPA's final Tailoring Rule, issued May 13, 2010, had not yet been published in the Federal Register as of the writing of this letter, but is available at [www.epa.gov/nsr/actions.html#2010](http://www.epa.gov/nsr/actions.html#2010).

We do not believe that this threshold has a sound legal or factual basis for the purposes to which CEQ proposes to apply it. EPA chose the threshold for use in the review of the air pollutant emissions from large stationary sources that is required under the Clean Air Act; this is a program of limited scope and application, applicable to a well defined and fairly small universe of sources. EPA chose this number based on administrative necessity, judging that it was low enough to pull in the majority of stationary sources of GHG emissions, but high enough to limit the number of sources covered to an amount that state and local air pollution permitting agencies could feasibly handle.<sup>11</sup> Administrative necessity underlies the EPA thresholds, and EPA made a factual case for the need for the necessity of this threshold, based on actual staffing, permit processing, and financial data from state and local permitting agencies. CEQ has not presented any comparable data in its proposal that would necessitate the artificial, non-science-based 25,000 MMT per year threshold it proposes for its NEPA guidance. Without such data or other comparable justification, the proposal lacks the factual and legal support needed for such a limitation on what science and the courts recognize as a potentially significant environmental impact.

Further, the reach of NEPA is far different from that of the Clean Air Act. NEPA is much broader, covering a multitude of projects to which the Clean Air Act does not apply, and including such the full range and diversity of the actions that federal agencies undertake, fund, or permit. Such activities include highway construction, certification of jet engine design, and purchase of electricity and office supplies, to name only a very few. Invoking administrative necessity, as EPA did in the Tailoring Rule<sup>12</sup>, to apply a 25,000 MMT per year threshold to all federal agencies would require a far more searching analysis, and a far more solid record of supporting facts, than CEQ has thus far presented. We would instead suggest that the guidance require each federal agency to develop its own indicators of significance for GHG and climate change analysis, and to adopt them as regulations, or at least make them open and public.

### **Land and Resource Management Actions and Agencies Should Not Be Exempt**

CEQ has asked for comments on whether and how its guidance should be applied to land management and resource agencies and actions. This is a crucial issue, since such decisions profoundly influence land use, water availability and distribution, and power supply and cost. As noted above, the effects of federal land and resource decisions are especially important in the Western U.S., given the huge amounts of land that is owned and managed by the federal government in California and the other Western States. CEQ is not legally empowered to, and does not claim to, exempt land management and resource actions that have GHG and climate change impacts from NEPA. Federal agency actions affecting GHG emissions and climate change are certainly covered by NEPA if they are potentially significant. However, leaving these actions out of the CEQ NEPA guidance might be perceived by agencies, project

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<sup>11</sup> See, e.g., Final Tailoring Rule pre-Federal Register version, pp. 303-305.

<sup>12</sup> California does not address, or express an opinion on, the legality or validity of the Tailoring Rule in these comments.

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proponents, and the public as implying that these actions are not covered by NEPA, or do not have climate change implications. We urge CEQ to make it clear that land and resource management actions that significantly increase GHG emissions are subject to NEPA, and that CEQ further charge the agencies that make these decisions with promptly developing their own regulations to cover the requirements for NEPA analyses of such decisions.

We suggest that CEQ look at the Guideline recently issued by the California Resources Agency to interpret the California Environmental Quality Act (CEQA). This Guideline presents an approach to analyzing the GHG and climate change impacts of land use decisions. This CEQA Guideline may be found at 14 Cal. Code of Regs., section 15064.4(a). We also recommend that CEQ examine the Statement of Reasons issued by the Resources Agency, which gives insight into the reasoning behind the Guideline, and suggests how it may be used and interpreted. It is available at <http://ceres.ca.gov/ceqa/guidelines/>.

### **The Greenhouse Gases Subject to NEPA Analysis Should Not Be Limited to the Montreal Six That CEQ Lists**

Finally, we note briefly that CEQ limits the need for a NEPA analysis for climate change impacts to federal actions involving the GHGs listed in Executive Order 13514 (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride). We would suggest instead that CEQ make clear that at least these six GHGs are covered by NEPA, but that it leave open the possibility that additional GHGs may need to be addressed, depending on the action involved and the state of scientific knowledge at the time the NEPA analysis is done. For example, the Federal Aviation Administration (FAA) makes many decisions that affect jet flight and, consequently, the altitude at which water vapor and contrails from jets are emitted. The FAA noted several years ago in *Aviation & Emissions: A Primer* that “[w]ater in the aircraft exhaust at altitude may have a greenhouse effect, and occasionally this water produces contrails, which may also have a greenhouse effect.”<sup>13</sup> The document notes that science has not reached a consensus on this issue. However, it is an indication that limiting the GHGs that are covered by NEPA to the six listed in the draft guidance may omit pollutants that do affect climate change and should be considered to be covered by NEPA.

### **CONCLUSION**

California has taken a leadership role in combating climate change, and will continue to do so, since it is already experiencing sea level rise, increased wildfires, and unpredictable snowpack levels that we believe are due at least in part to global warming. We welcome CEQ’s taking the initiative to issue guidance to federal agencies as to the legal requirement to perform good NEPA analyses of the GHG/climate change impacts of federal actions. We look forward to

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<sup>13</sup> *Aviation & Emissions: A Primer* at pp. 1-2. See, also, *Aviation and the Global Atmosphere, Special Report of IPCC Working Groups I and III* (1999), at 3, and “Aircraft Contrails Factsheet”, EPA430-F-00-005.

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working with CEQ as it refines its proposal, and hope that these comments have been helpful. If you have questions, please do not hesitate to call us.

Sincerely,

Susan Durbin

For EDMUND G. BROWN JR.  
Attorney General

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