

**Comments of Southern Company
on Draft NEPA Guidance on Consideration of the
Effects of Climate Change and Greenhouse Gas Emissions
75 Fed. Reg. 8046 (Feb. 23, 2010)
CEQ-2010-0002**

I. Background

On February 23, 2010, the Council on Environmental Quality (“CEQ”) released a draft guidance memorandum addressing Federal agencies’ consideration of Greenhouse Gas (“GHG”) emissions and climate change in their National Environmental Policy Act (“NEPA”) evaluations of proposed Federal actions. *See* 75 Fed. Reg. 8046 (Feb. 23, 2010) (“draft guidance”). Because Southern Company¹ has been and will continue to be a private applicant for various Federal actions, including permitting, loan guarantees, cost-shared funding, etc., Southern Company submits the following comments on the draft guidance. These comments are in addition to and supportive of the comments submitted by the Utility Water Act Group (“UWAG”) and the Edison Electric Institute.

II. Comments

A. CEQ should provide more specific limits to an agency’s analysis of a project’s indirect impacts from GHG emissions.

As UWAG points out in its comments, the draft guidance does not provide guidelines for an agency analyzing the indirect GHG emissions from a proposed project. Like other indirect impacts, indirect GHG emissions should be limited to those that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). CEQ should remind agencies that the indirect impacts are like “links in a chain” and

¹ As a leading supplier of electricity, Southern Company subsidiaries operate over 42,000 megawatts of electric generating capacity in the Southeast and have over 4 million customers. Southern Company’s service territory in the Southeast encompasses more than 120,000 square miles, spanning four states – most of Alabama and Georgia, the panhandle of Florida, and twenty-three counties in southeastern Mississippi.

that this chain is not intended to go on forever. *See, e.g., Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989). The length of the chain should be informed by the policies of NEPA – specifically, the “rule of reason,” the requirement that impacts be discussed in proportion to their significance, 40 C.F.R. § 1502.2(b), and the requirement to keep NEPA documentation concise, *id.* § 1502.2(c). CEQ should take this opportunity to be specific regarding the “length of the chain” by providing examples of remote impacts that are not appropriate for discussion in a NEPA analysis.

To that end, note that agencies’ indirect impacts analyses are limited to those impacts that are “caused by” the Federal action. The Supreme Court has held that “NEPA requires a ‘reasonably close causal relationship’ akin to proximate cause in tort law.” *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752 (2004). Agencies are also not required to include impacts that are not reasonably foreseeable, are speculative or are too remote. For instance, for a Corps permit for construction and operation of a riverboat gambling facility, the Corps was not required to consider the environmental effects of additional secondary development that might be spawned by the riverboat facility. *See Hoosier Env’tl. Council, Inc. v. U.S. Army Corps of Eng’rs*, 105 F. Supp. 2d 953 (S.D. Ind. 2000). Similarly, the Federal Highway Administration was not required to analyze airport expansion as an indirect impact of approving a road construction project. *See Airport Impact Relief v. Wylke*, 192 F.3d 197 (1st Cir. 1999).

CEQ should endorse these limitations on indirect impacts and apply them to GHG emissions. Accordingly, for example, CEQ should clarify that agencies need not discuss marginal changes in CO₂ emissions from a local utility that supplies electricity to a project that is subject to NEPA.

B. CEQ should reaffirm the nature of GHG emissions and climate change as a global, not local, occurrence.

Southern Company agrees with the CEQ's statement in the draft guidance that climate change is a global problem and that "[i]n many cases, the GHG emissions of the proposed action may be so small as to be a negligible consideration." Draft guidance at 3. Southern Company urges CEQ to provide agencies with a suggested statement that would be appropriate and sufficient to include in their analyses. For example: "[The proposed Federal project] may result, directly or indirectly, in an increase in GHG emissions. The increase is estimated to be approximately ____, which represents _____% of global GHG emissions. Because GHG emissions and climate change are a strictly global phenomenon, and because the estimated increase would be negligible, impacts of GHG emissions from this project would not be significant." Recommending agencies develop and utilize such statements would be consistent with other portions of the draft guidance found on page 2 confirming that there are no dominating sources of GHG emissions and recognizing the scientific limits of agencies' abilities to accurately predict climate change effects.

CEQ should also remind agencies that consideration of a project's indirect GHG emissions (as an indirect impact of the project) should be limited as well to exclude those GHG emissions that are merely shifted from one location to another. Because of the well-mixed nature of GHGs, the location at which they are emitted is irrelevant. For instance, where a private applicant seeks Federal permitting, licensing, etc. for a proposed facility, the Federal agency should not be required to include in its indirect impacts analysis the potential increase in GHG emissions associated with increased traffic from workers or employees who otherwise would have traveled to some other locale. As discussed above, this "global" impact can not be said to have been "caused by" the proposed Federal action and should therefore not be required in an

indirect impacts analysis. In other words, marginal changes in GHG emissions from a project are, in general, too far removed from climate change impacts to require substantial NEPA analysis.

C. CEQ’s suggestion that agencies consider the effects of climate change on the proposed Federal action is not consistent with the statutory and regulatory aim of NEPA.

CEQ proposes that Federal agencies consider “[t]he relationship of climate change effects to a proposed action or alternatives, including the relationship to proposal design, environmental impacts, mitigation and adaptation measures.” Draft guidance at 1. This suggestion would impermissibly expand NEPA’s requirement to consider “the environmental impact of the proposed action,” 42 U.S.C. § 4332(2)(C)(i) (emphasis added), to include impacts of some other event on the proposed action. The draft guidance justifies this proposal by including climate change in the “affected environment” of the proposed action: “As with analysis of any other present or future environment or resource condition, the observed and projected effects of climate change that warrant consideration are most appropriately described as part of the current and future state of the proposed action’s ‘affected environment.’” Draft guidance at 6, *citing* 40 C.F.R. § 1502.15. This opens a potentially impossible standard, which could be applied beyond climate change, and is not appropriate. The “affected environment” has to be assessed and discussed in the only meaningful way it can be: in its present state. To do otherwise is plainly speculative.

Thus, Southern Company urges CEQ to omit from its guidance its proposal for agencies to consider current or projected effects of climate change on proposed Federal actions. Certainly, to the extent practicable, an agency may wish to account for such impacts *outside of the context of NEPA*, and the agency would remain free to do so within its statutory discretion if

the guidance is silent on this point. Southern Company urges CEQ to provide language acknowledging that Federal agencies are not required to analyze impacts of the affected environment on the proposed action. Rather, agencies are to analyze impacts of the proposed action (and, for a cumulative impacts analysis, the impacts of the proposed action cumulated with the impacts of other past, present or reasonably foreseeable future actions) on the affected environment.

III. Conclusion

Southern Company appreciates this opportunity to provide comments on CEQ's draft guidance on consideration of effects of climate change and GHG emissions. Southern Company supports CEQ's overall approach to providing guidance to Federal agencies preparing NEPA analyses for projects that may have impacts on global GHG emissions and on climate change. Southern Company requests that CEQ consider, and revise the draft guidance to reflect, these comments to ensure the guidance is consistent with NEPA's statutory and regulatory goals.