

April 15, 2010

To: The President's Council on Environmental Quality

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

We support the efforts of the President's Council on Environmental Quality to provide federal agencies with greater guidance in considering the effects of climate change and greenhouse gas emissions under the National Environmental Policy Act. To that end, we respectfully submit, as comments on CEQ's Draft NEPA Guidance Document, this cover letter together with the attached Interim Draft Report: "How to Take Climate Change into Account: A Guidance Document for Judges Adjudicating Water Disputes." Although the audience for this Report is state and federal judges, because their need for guidance on climate change impact is similar to that of federal agencies, this report may have important perspectives for CEQ to consider in finalizing its Draft NEPA Guidance document.

The need for greater guidance on climate change impacts for decision makers and policymakers follows from scientists' conclusion that "stationarity is dead" (P.C.D. Milly et al, *Science*, 319, 573 (2008)). This conclusion, explored in detail in the Interim Report, has important implications for federal agencies in carrying out their duties under NEPA. It means that, when characterizing the "affected environment" (40 CFR 1502.15) for purposes of determining the impact of a proposed future action on that environment, agencies can no longer rely wholly upon past data or even, in all cases, past understandings of the interrelationships of natural processes in that ecosystem. To give an example discussed in the Interim Report, data regarding the past availability of water supplies in a particular watershed during a particular season is no longer an entirely reliable predictor of future water supplies in that same watershed during the same season. As a result of higher temperatures associated with climate change, that region may be experiencing earlier snowmelt, for instance, and hence lower water supplies.

The implications of this inability to rely wholly upon past data regarding the characteristics of a particular ecosystem is as critical to the policy implementation role of federal agencies under NEPA as it is to the decision-making process of state and federal judges adjudicating water disputes. As is recognized in the CEQ Draft NEPA Guidance document (Guidance at 8), it will mean, among others, that federal agencies will need to take on a more active role in evaluating climate science. The Interim Report seeks to assist judges in understanding the current state of climate science, the methods by which scientists' conclusions are validated, and options

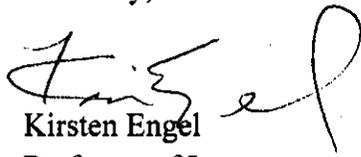


available to judges to better understand scientific reports. These aspects of the Interim Report may be useful to federal agencies as well.

In sum, while still under development, we believe that the guidance found in the attached Interim Report on how federal and state judges should take "climate change into account" is very much relevant to CEQ's efforts to provide guidance to federal agencies on how they should take climate change into account in their NEPA decision-making process.

Thank you for the opportunity to submit this Interim Report as a comment on the Draft NEPA Guidance document.

Sincerely,



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Professor of Law



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