



SOUTHERN NEVADA WATER AUTHORITY

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Horst Greczmiel
Council on Environmental Quality
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Dear Mr. Greczmiel:

SUBJECT: COMMENTS ON REVISED DRAFT GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NEPA REVIEWS, 79 FED. REG. 77802 (DEC. 24, 2014)

Southern Nevada Water Authority (SNWA) appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ's) Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77802 (Dec. 24, 2014), hereinafter the Draft Guidance. Please consider these comments when finalizing the Draft Guidance.

I. Introduction

SNWA is a political subdivision of the State of Nevada formed by cooperative agreement to represent seven member water and wastewater agencies in southern Nevada, including Big Bend Water District, City of Boulder City, City of Henderson, City of Las Vegas, City of North Las Vegas, Clark County Water Reclamation District, and Las Vegas Valley Water District. SNWA is responsible for managing the regional water resources of southern Nevada and developing solutions that will ensure adequate future water supplies for the Las Vegas Valley through the development and implementation of regional water resource management and conservation programs and initiatives. SNWA is committed to environmental responsibility in its management and development of water resources and is actively engaged in conservation efforts.

II. Summary of Comments

SNWA appreciates CEQ's efforts to provide guidance on how agencies should address the complex and uncertain issues associated with climate change and greenhouse gas (GHG) emissions in National Environmental Policy Act (NEPA) analyses. While SNWA agrees with much of the Draft Guidance, there are a number of areas that CEQ should revise or clarify. The major issues that require additional attention include the appropriate scope of analysis (including considerations of upstream and downstream emissions), significance determinations for GHG

emissions, quantification of emissions, consideration of alternatives, analysis of alternatives, analysis of the effects of climate change, and the definition of emissions. Each of these issues is discussed further below.

III. Comments on the Draft Guidance

A. Scope of Analysis

In the context of analyzing direct and indirect impacts, the Draft Guidance states that “emissions from activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions) should be accounted for in the NEPA analysis.”¹ The term “accounted for” is vague and has the potential to impermissibly expand the scope of the analysis beyond traditional NEPA principles.

Under the CEQ regulations, effects of the action are limited to those that are caused by the proposed action. Direct effects occur at the same time and place; indirect effects occur later in time or distance, but are still reasonably foreseeable.² Predicate actions, by definition, occur before the proposed action and are not caused by the proposed action. Thus, they should not be considered to be “effects” of the action. The NEPA analysis for a proposed action should be required to incorporate an analysis of the predicate action’s effects only if a predicate action is a connected action, i.e., does not have independent utility.³ The Guidance should clarify that upstream emissions that are not the result of a connected action need not be included as effects of the proposed action.

Downstream actions should not be considered an indirect effect of the proposed action unless they satisfy the proximate-cause test established by the U.S. Supreme Court in *Department of Transportation v. Public Citizen*,⁴ which requires a greater causal connection than mere “but for” causation. The Guidance should acknowledge that downstream emissions that do not satisfy this proximate-cause test need not be “accounted for” as effects of the action. The Guidelines should also incorporate the language in the preamble that recognizes that agencies should not “engag[e] in analyses that focus on speculative downstream emissions.”⁵

The Draft Guidance explains that “[a]gencies can rely on basic NEPA principles to determine and explain reasonable temporal and spatial parameters of their analyses to disclose the reasonably foreseeable effects that may result from their proposed actions.”⁶ It then provides an example regarding an open-pit mine that is unhelpful and potentially misleading:

¹ 79 Fed. Reg. at 77826.

² 40 C.F.R. § 1508.8.

³ See, e.g., *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

⁴ 541 U.S. 752, 767 (2004).

⁵ 79 Fed. Reg. at 77805.

⁶ *Id.* at 77826.

For example, a particular NEPA analysis for a proposed open pit mine could include the reasonably foreseeable effects of various components of the mining process, such as clearing land for the extraction, building access roads, transporting the extracted resource, refining or processing the resource, and using the resource. Depending on the relationship between any of the discrete elements in the process, as well as the authority under which such elements may be carried out, the analytical scope that best informs decision-making may be to treat these elements as the direct and indirect effects of phases of a single proposed action.⁷

Because the propriety of treating all of these elements as phases of a single proposed action for purposes of a NEPA analysis depends on countless variables, including, as the Draft Guidance notes, the relationship and authority underlying these activities, this example does not provide any further clarity as to the appropriate scope of review for GHG emissions. But the suggestion that it may be appropriate for an open pit mine to have to account for and analyze the GHG emissions resulting from use of the extracted materials could be read as establishing a rebuttable presumption that such an analysis is necessary. CEQ should clarify that the scope of review for climate change impacts does not differ from the scope of review for any other resource impacts and that there is not a rebuttable presumption that agencies need to analyze the climate change impacts of the entire chain of commerce.

Additionally, the Draft Guidance recommends that agencies address climate change in two distinct ways: (1) “The potential effects of a proposed action on climate change as indicated by its GHG emissions; and (2) The implications of climate change for the environmental effects of a proposed action.”⁸ The characterization of the second analytical approach would benefit from additional explanation. Language similar to that used in the preamble⁹ would provide more clarity and should be incorporated into the Guidance to describe the second approach: (2) Any effects that climate change may have on the proposed action and on resources anticipated to be impacted by the proposed action.

Furthermore, SNWA supports the Draft Guidance’s acknowledgment that NEPA includes a principle of proportionality, which recognizes that the extent of the analysis should be commensurate with the quantity of projected GHG emissions.¹⁰ However, as discussed further below in Section III.C, the Draft Guidance’s references to “quantity” of emissions in this principle, and other references to “net” emissions, are inconsistent with the acknowledgement that not all projects will require quantification of emissions.

B. Determination of Significance

The Draft Guidance does not provide sufficient direction on when GHG emissions would be deemed significant and require preparation of an Environmental Impact Statement (EIS). The

⁷ *Id.*

⁸ *Id.* at 77824.

⁹ *Id.* at 77811.

¹⁰ *Id.* at 77825.

Draft Guidance reaffirms that the significance of climate change impacts of proposed agency actions are subject to the traditional “context and intensity” factors of the CEQ regulations.¹¹ But it provides little direction as to how to address those context and intensity factors when dealing with a global phenomenon. CEQ discounts any reliance on the fact “that emissions from a government action or approval represent only a small fraction of global emissions” and concludes that such fact “is not an appropriate basis for deciding whether to consider climate impacts under NEPA.”¹² Since CEQ deems global emissions to be not relevant, it should provide some indication as to how agencies should determine the appropriate context or basis for comparison. A subsequent provision of the Draft Guidance indicates that agencies can frame the context for the analysis by incorporating applicable federal, state, local, or tribal emission reduction targets and discussing whether the emissions being discussed are consistent with such goals.¹³ But it appears that any project with net emissions would be inconsistent with reduction goals, which adds little to the context analysis for the significance determination. SNWA recognizes that flexibility to determine significance based on project-specific characteristics is important, but the lack of direction in the Draft Guidance regarding this issue will likely lead to inconsistencies in agencies’ findings of significance.

In addition, the Draft Guidance states that “CEQ does not expect that an EIS would be required based on cumulative impacts of GHG emissions alone.”¹⁴ But the next sentence states that, “[i]n the context of GHG emissions, there may remain a concern that an EIS would be required for any emissions because of the global significance of aggregated GHG emissions.”¹⁵ It is not clear what CEQ intended by its reference to “there may remain a concern that an EIS would be required” This language could be interpreted as contrary to the first sentence, implying that an EIS might be required based on the significance of aggregated (i.e., cumulative) GHG emissions alone. The Guidance should clarify that, if a proposed action has no significant impacts on the human environment, including direct and indirect GHG emissions, an EIS should not be required merely on the basis that global GHG emissions are significant.

After reiterating the standard definition of “cumulative impact,” the Draft Guidance concludes that “[c]onsequently, agencies need to consider whether the reasonably foreseeable incremental addition of emissions from the proposed action, when added to the emissions of other relevant actions, is significant when determining whether GHG emissions are a basis for requiring preparation of an EIS.”¹⁶ It is not clear what “other relevant actions” may be in a given context or when the cumulative emissions of the proposed action with those other relevant actions may be significant. Also, if interpreted broadly, this statement is inconsistent with the previous recognition that an EIS should not be required based on cumulative impacts alone. CEQ should provide additional direction regarding this issue.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 77826.

¹⁴ *Id.* at 77826.

¹⁵ *Id.*

¹⁶ *Id.*

C. Quantification of Emissions

The Draft Guidance provides a reference point of 25,000 metric tons CO_{2-e} emissions on an annual basis below which a GHG emissions quantitative analysis is not warranted, unless quantification below that reference point is easily accomplished.¹⁷ This begs the question of how an agency can determine whether the proposed action would surpass the reference point of 25,000 metric tons CO_{2-e} without a quantitative analysis. The Guidance should address this issue.

In addition, the Guidance also appears to suggest that agencies should prepare a quantitative analysis of biogenic GHG emissions, regardless of the 25,000-metric-ton reference point: “In addressing biogenic GHG emissions, land management agencies should include a comparison of *net* GHG emissions and carbon stock changes that would occur with and without implementation of the proposed land management actions.”¹⁸ The reference to “net emissions” implies quantification. CEQ should clarify when qualitative analyses of GHG emissions may be appropriate and how agencies should make that determination.

The Draft Guidance recognizes that climate impacts and biogenic GHG emissions of land management actions are most relevant at the forest and landscape scale, and that site-specific projects should incorporate by reference or tier to programmatic analyses when appropriate.¹⁹ SNWA supports this approach, as it may help reduce the potential for unnecessary resource-intensive analyses. However, if no such programmatic analysis is available for a site-specific project to tier to, the Draft Guidance could be read to suggest that a quantification of net biogenic GHG emissions is required for any agency action that involves vegetation clearing. CEQ should reiterate the rule of reason and principle of proportionality to acknowledge that, even in the absence of a programmatic analysis, quantification or detailed analysis of net GHG emissions may not be necessary for all projects that impact vegetation. CEQ should also clarify that its recommendation that, when useful, agencies “compare the levels of GHG emissions caused by each alternative,”²⁰ should not be read as requiring quantification to determine the “levels of GHG emissions” if the 25,000-metric-ton reference point has not been met.

D. Alternatives

The Draft Guidance states that a “monetary cost-benefit analysis need not and should not be used in weighing the merits and drawbacks of the alternatives when important qualitative considerations are being considered.”²¹ CEQ should clarify this statement to recognize that economic feasibility is relevant to whether an alternative is “reasonable” and whether it meets the project purpose and need.²²

¹⁷ *Id.* at 77827-77828.

¹⁸ *Id.* at 77287 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* at 77828.

²¹ *Id.* at 77827.

²² *See* 40 C.F.R. §§ 1502.13, 1502.14.

CEQ should also clarify that its direction to agencies to compare the GHG emissions of the various alternatives²³ does not mean that the agencies are required to identify or evaluate a low- or no-emission alternative in every NEPA analysis. The language in the mitigation section that “agencies should consider reasonable mitigation measures and alternatives as provided for under the existing regulations to lower the level of potential GHG emissions”²⁴ suggests that each NEPA analysis should have an alternative specific to reducing GHG emissions. However, the preamble emphasizes that “agencies should consider mitigation measures and reasonable alternatives to reduce action-related GHG emissions in the same fashion as they consider them for any other environmental effects.”²⁵ Since NEPA does not automatically require the evaluation of an alternative specifically aimed to reduce impacts to a single resource, the Guidance should not imply such an alternative is required for GHG emissions for every proposed action.

E. Effects of Climate Change

The Draft Guidance suggests that climate change effects be “considered in the analysis of projects that are located in areas that are considered vulnerable to specific effects of climate change . . . within the project’s anticipated useful life.”²⁶ This language could be read to imply that a vulnerability assessment must first be conducted to determine whether a project is in such an area. CEQ should encourage agencies to use existing vulnerability studies when appropriate and clarify that formal vulnerability studies are not necessarily required for each project when existing studies are not available.

In support of the statement that “GHGs already in the atmosphere will continue altering the climate system into the future, even with current or future emissions control efforts”, the Draft Guidance cites the Second National Climate Change Assessment, USGCRP, 2009.²⁷ This reference should be updated to the more recent Third National Climate Change Assessment, USGCRP, 2014, which the Draft Guidance cites elsewhere.²⁸

By directing agencies to consider “the implications of climate change for the environmental effects of a proposed action,” CEQ implies that the current state of the science and the ability to model future climate and environmental impacts at the local scale is fairly well constrained. In reality, studies have revealed significant differences when comparing projected climate change impacts for a region from different global climate models.²⁹ The disparities arise primarily from

²³ 79 Fed. Reg. at 77828.

²⁴ *Id.*

²⁵ *Id.* at 77816.

²⁶ *Id.* at 77829.

²⁷ *Id.* at 77829 n.51.

²⁸ *See id.* at 77825 n.15, 77830 n.61 (citing U.S. Global Change Research Program, Climate Change Impacts in the United States: The Third National Climate Assessment (Jerry M. Melillo, Terese (T.C.) Richmond, and Gary W. Yohe eds.) (2014)).

²⁹ *See, e.g.,* Vano, Julie A., Bradley Udall, Daniel R. Cayan, Jonathan T. Overpeck, Levi D. Brekke, Tapash Das, Holly C. Hartmann, Hugo G. Hidalgo, Martin Hoerling, Gregory J. McCabe, Kiyomi Morino, Robert S. Webb, Kevin Werner, and Dennis P. Lettenmaier, 2014: Understanding Uncertainties

global climate model and emission scenario selection, hydrologic model selection, and the type of downscaling method applied to make the impact assessment relevant to the local scale. The large uncertainties in the modeling capabilities therefore limit the value of conducting detailed impact analyses. The Guidance should acknowledge these shortcomings in the current state of the science.

F. Definition of Emissions

In the definition of “emissions,” the Draft Guidance includes the “release of stored GHGs as a result of destruction of natural GHG sinks such as forests and coastal wetlands, as well as future sequestration capability.”³⁰ However, in the section on considering the impacts of the proposed action, CEQ recommends that “agencies use the projected GHG emissions and also, when appropriate, potential changes in carbon sequestration and storage” as a proxy for climate change effects.³¹ Similarly, the discussion of vegetation management practices states that “[t]he analysis should take into account the GHG emissions (biogenic and fossil), carbon sequestration potential, and the net change in carbon stocks that are relevant in light of the proposed actions and time-frames under consideration.”³² Since the definition of emissions already includes changes in sequestration potential, the additional reference to these changes either is duplicative or suggests that the use of the term “GHG emissions” does not always include those changes in carbon sequestration. CEQ should clarify when the term “emissions” is intended to include concepts of sequestration and storage.

The Guidance would also benefit from definitions of “sequestration” and “carbon stocks.” For those familiar with climate change issues, those terms are commonplace. However, to the inexperienced reader, those terms may not be self-explanatory.

IV. Conclusion

Thank you for considering SNWA’s comments and including them in the federal administrative record for the Draft Guidance. Please continue to keep SNWA on the interested public mailing list and please contact Kimberly Reinhart at (702) 862-3457 or kimberly.reinhart@snwa.com if you have any questions.

Sincerely,



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ZLM:CL:df

in Future Colorado River Streamflow. *Bull. Amer. Meteor. Soc.*, 95, 59–78. doi:
<http://dx.doi.org/10.1175/BAMS-D-12-00228.1>

³⁰ 79 Fed. Reg. at 77823 n.1.

³¹ *Id.* at 77825.

³² *Id.* at 77826.