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Via electronic mail: GCC.guidance@ceq.eop.gov

Mr. Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Re: Council on Environmental Quality Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed.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. 77,802 (Dec. 24, 2014)¹

Dear Mr. Greczmiel:

The Interstate Natural Gas Association of America (“INGAA”) submits these comments in response to the Council on Environmental Quality’s (“CEQ”) Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (“Revised Draft Guidance”). INGAA is a trade organization that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America. INGAA is comprised of 24 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the United States and comparable companies in Canada. Its United States members are regulated by the Federal Energy Regulatory Commission (“FERC”) pursuant to the Natural Gas Act (“NGA”), 15 U.S.C. §§ 717-717w. INGAA’s members, which operate approximately 200,000 miles of pipelines, provide an indispensable link between natural gas producers and natural gas consumers in the residential, commercial, industrial and electric power sectors. INGAA’s members are committed to providing safe and reliable transportation services to their diverse customers, without undue discrimination, and to maintaining a high level of customer service. INGAA’s U.S. members stand to be affected by the Revised Draft Guidance if it is finalized because interstate natural gas pipeline projects must undergo National Environmental Policy Act (“NEPA”) review.

Natural gas plays an increasingly vital role in the United States economy, and interstate pipelines are essential to that development. The INGAA Foundation, Inc., INGAA’s research arm, estimates that, even absent regulatory changes—like the U.S. Environmental Protection Agency’s (“EPA”) proposed Clean Air Act (“CAA”) rules discussed below—that might further increase demand for natural gas, 23,300 miles of large-diameter transmission pipelines must be built in the next twenty years to meet projected demand. The INGAA Foundation, Inc., *North American Midstream Infrastructure Through 2035: Capitalizing on Our Energy Abundance at*

¹ On February 23, 2015, the comment period for the Revised Draft Guidance was extended to March 25, 2015. 80 Fed. Reg. 9443 (Feb. 23, 2015).

19 (Mar. 18, 2014), *available at* <http://www.ingaa.org/Foundation/Foundation-Reports/2035Report.aspx>. INGAA also projects that the United States and Canada will need to invest \$313 billion through 2035 on natural gas midstream assets, including new mainlines, natural gas storage fields, laterals to/from storage, power plants and processing facilities, gas lease equipment, LNG export facilities, and related equipment. *Id.* at 14. Given the projected need for new infrastructure, INGAA is concerned about any policy initiative that might hinder the critical infrastructure necessary to meet market demand for natural gas on a timely and predictable basis.

Increased demand for natural gas is not purely market-driven. Federal policies expressly favor the development and use of natural gas. For example, EPA's proposed new source performance standards for new electric generating units ("EGUs") under section 111(b) of the CAA would effectively outlaw new coal-fired EGUs in favor of natural gas-fired EGUs. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014). Similarly, EPA's proposed emission guidelines for existing EGUs under section 111(d) would increase demand for natural gas among existing EGUs. *See* 79 Fed. Reg. 34,830 (June 18, 2014). As discussed below, EPA has predicted that natural gas for use in power generation will increase as a result of these rules. Other national policy initiatives, like a focus on improving energy independence, also will lead to significant increased demand for natural gas and the interstate pipelines and related infrastructure needed to deliver that natural gas to market.

The siting, construction, and operation of interstate natural gas pipelines are regulated by FERC pursuant to the NGA. Before a new interstate natural pipeline is constructed or expanded, FERC must issue a certificate of public convenience and necessity ("Certificate") finding that there is a need for the project and that it is in the public interest. FERC's issuance of a Certificate is a "major federal action" under NEPA, and thus, as part of the certificate process, FERC conducts a thorough review of the proposed pipeline route and environmental impacts under NEPA. Pursuant to the Energy Policy Act of 2005, which amended the NGA, FERC is the designated lead agency for NEPA review of interstate natural gas pipeline projects. Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered sections of Title 42 of the U.S. Code). As such, these comments focus on FERC practice and precedent with regard to considering greenhouse gas ("GHG") emissions and climate change in NEPA reviews.

For the reasons that follow, INGAA respectfully requests that CEQ withdraw the Revised Draft Guidance. If CEQ nevertheless decides to finalize the guidance, a number of clarifications are warranted to ensure the guidance is both consistent with current law and clear and workable for federal agencies and project proponents. As discussed in detail below, CEQ must reaffirm that agencies have substantial discretion in how they tailor NEPA reviews to address GHG emissions and climate change, including that agencies may not consider these impacts at all if they are too removed, unforeseeable, or speculative in relation to the proposed project, especially given that, as CEQ acknowledges, no particular project can be said to proximately cause any particular climate change-related effect.

I. Executive Summary

- The Revised Draft Guidance contradicts NEPA law and regulations, U.S. Supreme Court decisions, and agency precedent by ignoring the requirement that there be a proximate causal connection and agency control over an action's effects before those effects must be considered. CEQ also ignores the requirement that impacts be both reasonably foreseeable and significant before they are required to be analyzed.
- The nature of climate change is such that there is *no* causal connection—much less a reasonably foreseeable and proximate causal connection—between a single project's GHG emissions and a climate change-related effect like sea-level rise.
- CEQ's proposal to have GHG emissions serve as a proxy for climate change-related impacts in NEPA analyses has no basis in law or science. There is no "dose-response" relationship between particular GHG emissions and particular climate-related effects that would support such a proxy analysis.
- CEQ's proposal to require analysis of "upstream" and "downstream" effects of a proposed action regardless of control and causation is both contrary to law and likely to lead to boundless inquiries.
- The Revised Draft Guidance runs counter to current agency interpretation of NEPA law. Some of these interpretations are currently before the U.S. Court of Appeals for the District of Columbia Circuit. If CEQ decides to finalize the guidance, it should at a minimum wait until the Court rules on these challenges.
- If CEQ intends to change the law, it must adhere to the Administrative Procedure Act. Alternatively, if finalized, the guidance must make clear that it is not binding and that agencies retain discretion to interpret and implement NEPA law. Moreover, it must be internally consistent, and should apply only to newly proposed projects after the guidance is finalized.
- The Revised Draft Guidance would contradict the Administration's policy favoring the development of natural gas by making natural gas infrastructure more difficult to develop and bring to market.
- CEQ should clarify its statements on mitigation measures to ensure they are consistent with existing law and guidance.
- CEQ should not use a 25,000 ton reference point and the social cost of carbon. The reference point suggests a hard-and-fast demarcation, which is arbitrary. The social cost of carbon is too uncertain to be useful and was designed for the rulemaking process, not for environmental analysis of individual projects.

- There is no need for guidance to specifically address GHG emissions and climate change because the law is clear on agency obligations regarding the consideration of potential environmental impacts of proposed projects.
- If the Administration wishes to regulate GHG emissions and to address climate change, it should entrust that initiative to EPA, the subject matter expert.
- As such, the guidance either should be withdrawn or substantially revised before being finalized.

II. The Revised Draft Guidance is inconsistent with existing law and agency practice.

In the Revised Draft Guidance, CEQ proposes novel and questionable interpretations of NEPA law and regulations to address GHG emissions and climate change. The proposal is inconsistent with both existing law and agency practice and, therefore, must be withdrawn or substantially revised before it is finalized.

A. The Revised Draft Guidance contradicts existing NEPA law.

1. NEPA regulations and *Public Citizen* require a proximate causal connection and agency control over an action's effects before those effects must be considered.

Under CEQ's NEPA regulations, federal agencies must identify and consider direct and indirect environmental effects that are "caused by" a proposed agency action and are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). The U.S. Supreme Court has clarified that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause" before the action is construed to be the "cause" of an environmental effect that must be considered. *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). The Court explained that the test for determining whether an agency has legal responsibility for a particular effect under NEPA is akin to the "familiar doctrine of proximate cause from tort law." *Public Citizen*, 541 U.S. at 767 (citation and internal quotation marks omitted). Even a "but for" relationship is not enough to render an agency responsible for a particular effect. *Id.* In that case, the Court found that because a federal agency had "no ability . . . to prevent" Mexican motor carriers from entering the United States, the agency need not have analyzed the projected increased emissions associated with those vehicles. *Id.* at 769. Moreover, the Court determined it was pointless to include such information in the environmental impact statement ("EIS") because the agency "simply lacks the power to act on whatever information might be contained in the ["EIS"]" on that point. *Id.* at 768.

The Court found that the requirement to look at "cumulative impacts" under 40 C.F.R. § 1508.7 would not alter the determination regarding which effects need to be analyzed and considered. In other words, a cumulative impacts analysis "does not require [an agency] to treat the [action] itself, or consequences from the [action], as an effect." *Public Citizen*, 541 U.S. at 770. The Court unanimously concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be

considered a legally relevant ‘cause’ of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its [analysis]” *Id.*

Thus, *Public Citizen* supports the proposition that an agency need not consider climate change in a NEPA analysis if the proposed project would not proximately cause a climate change-related environmental effect. In addition, the agency need not consider climate change if the agency has no control over *other* emissions that might lead to climate change effects, including emissions from activities that are “upstream” or “downstream” of the proposed project. A blanket requirement that agencies identify and consider a project’s anticipated GHG emissions, as well as upstream and downstream GHG emissions, is both meaningless and contrary to law. Because scientists cannot demonstrate that GHG emissions from a particular source cause *any* particular environmental effect, as CEQ itself has admitted, 79 Fed. Reg. at 77,825 (“climate impacts are not attributable to any single action”; there are “difficulties in attributing specific climate impacts to individual projects”), it would be improper for CEQ to mandate analysis of GHG emissions and of mitigation measures for GHG emissions, as if GHG emissions were a “proxy” for environmental effects, which they are not. *Id.*

The Revised Draft Guidance contradicts established Supreme Court precedent that an agency only is required to consider environmental impacts in a NEPA review if the impacts are proximately caused by the proposed action and the agency has control over such impacts. The preamble to the Draft Guidance categorically states, omitting these critical caveats, that “agencies are required to consider reasonably foreseeable direct and indirect effects, and the cumulative nature of those effects when analyzing proposed Federal actions,” and that “[t]he focus should be and remains on the foreseeability of identifying potential effects and the extent of those effects.” *Id.* at 77,814-15. While CEQ states it “is rejecting a hard and fast rule requiring or prohibiting consideration of indirect emissions,” it ignores the control and causation thresholds by focusing merely on foreseeability. *Id.* at 77,815. CEQ neglects to consider *Public Citizen*.

Strikingly, footnote 24 of the proposed guidance goes even further and directly contradicts *Public Citizen* by stating that NEPA reviews must consider all direct, indirect, and cumulative impacts, including “the full range of effects that flow from the action, *regardless of the ability to control or regulate those effects.*” *Id.* at 77,825 n.24 (emphasis added). As noted above, *Public Citizen* held to the contrary that effects need not be considered when agencies have “no ability to prevent a certain effect.” 541 U.S. at 770.

2. A single project’s GHG emissions do not cause climate change-related effects.

The nature of climate change is such that many billions of tons of GHG emissions (both anthropogenic and natural) contribute to increased concentrations of GHG emissions in the atmosphere. Those increased atmospheric concentrations are thought to cause climate change, and it is climate change or global warming that is thought to lead to adverse environmental effects like sea-level rise, increased droughts and flooding, and increased hurricane intensity. There are several steps in the process between the emission of a single ton of anthropogenic GHG and an effect like sea-level rise. A single project simply cannot be said to cause—much less proximately cause—any particular climate change-related effect. Moreover, no federal

agency has control over *all* the sources of GHG emissions that can be said to cause climate change. CEQ has skipped a step or two in seeming to equate a project's GHG emissions with climate change impacts, and will be hard-pressed to show that relatively minuscule emissions from a single pipeline or other infrastructure project reasonably foreseeably and proximately *cause* sea-level rise, or any of the other environmental effects that CEQ argues are caused by GHG emissions. The scientific evidence just does not exist to support such an assertion. Several courts have held that, before an agency will be required to analyze an impact, there must be a "substantial degree of certainty" that the effects of an action are caused by that action. *Medina Cnty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 702 (5th Cir. 2010); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1230 (10th Cir. 2008). No certainty between an alleged cause (project GHG emissions) and alleged effect (e.g., sea-level rise) exists here, much less a "substantial degree of certainty."

CEQ's contention that an agency's "statement that emissions from a government action or approval represent only a small fraction of global emissions is more a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate impacts under NEPA" is misguided. 79 Fed. Reg. at 77,825. Unfortunately, changing the analysis will not alter the fact that emissions from a particular action *do* in fact represent only a small fraction of global emissions. CEQ's proposed methodology would artificially enhance the contribution of each individual project to climate change, ignoring the science that no such impact or connection can be made. The fact that an individual agency action would make only a small contribution to climate change is an entirely rational reason on which to decide whether or not to consider the climate impacts of that action. As CEQ states in the preamble, "it is not useful, for NEPA purposes, to link GHG emissions from a proposal to specific climatological changes to a particular site . . ." *Id.* at 77,808. Maintaining otherwise would conflict with the law that a NEPA analysis should include only emissions with a proximal causal relationship to certain effects. As discussed above, there is no proximate causal relationship between any individual project and specific climate change effects.

3. GHG emissions cannot properly serve as a proxy for climate change-related impacts.

CEQ states that, "[i]n light of the difficulties in attributing specific climate impacts to individual projects, CEQ recommends agencies use the projected GHG emissions . . . as the proxy for assessing a proposed action's potential climate change impacts." *Id.* at 77,825. This recommendation is improper and not supported by law. NEPA requires an analysis of impacts or effects, not emissions. Furthermore, as explained above, because there are billions of GHG emissions sources and sinks that increase and reduce emissions every day, there is no proximate causal connection between a single project's GHG emissions and climate change, and there is no basis in science to equate particular project-level GHG emissions with particular climate change-related impacts.

While CEQ urges "agencies [to] take into account the expected effects of GHG emissions resulting from all phases and components over the life of a project, including short- and long-term adverse and beneficial effects," *id.* at 77,822, it is impossible to know what the "expected effects" of GHG emissions from a single project will be. Given the billions of sources of GHG emissions globally, and the billions of sinks of GHG emissions worldwide, no single project can

be said to cause or contribute to climate change, much less to any single effect of climate change (e.g., sea-level rise, drought, or more intense hurricanes). Similarly, the preamble states that “climate change effects should be considered in the analysis of projects that are designed for long-term utility The focus of this analysis should be on those aspects of the environment that, . . . are affected by the proposed action and on the significance of climate change on those aspects of the environment. Agencies should consider the specific effects of the proposed action..., the nexus of those effects with projected climate change effects on the same aspects of our environment” *Id.* at 77,813. But there is no “nexus” between a single project and climate change, much less any nexus between a single project and any potential environmental effect that may be thought to be a result of climate change.

For example, if sea-level rise is perceived to be likely to occur regardless of the proposed action, it need not be examined as part of the NEPA review of indirect effects of the project. *See, e.g., Citizens for Smart Growth v. Sec’y of Dep’t of Transp.*, 669 F.3d 1203, 1215 (11th Cir. 2012) (upholding agency decision not to examine certain indirect impacts because they would be occurring anyway). Not only would it be impossible to prove that the project was a proximate cause of sea level rise, as discussed above, no federal agency would have control over sea-level rise, climate change that leads to sea-level rise, or even all of the GHG emissions that lead to that climate change. Thus, agencies need not examine climate change-related impacts like sea-level rise as an indirect impact because they could never be seen to be proximately caused by a particular project and because agencies have no control over such impacts.

Because there are billions of sources of GHG emissions globally, because it is well understood that most of those sources are naturally occurring, and because there are infinite, concomitant GHG emission reductions and sinks, there is no possible way to ascertain the impacts of a small source of particular GHG emissions. There may be instances in environmental science where the dose-response relationship is sufficiently established that the emission of a substance may properly serve as a proxy for the health or environmental impacts of that emission. GHG emissions and climate change impacts are not one of those instances. The science is not even close to establishing a dose-response relationship between *particular* GHG emissions and *particular* climate change effects. It is therefore improper from a scientific perspective to equate a project’s GHG emissions with a climate-related impact like hurricane intensity. It also is unlawful, because the case law requires an agency to demonstrate both proximate causation and that such effects would not be occurring anyway.

4. The Revised Draft Guidance effectively ignores the “reasonable foreseeability” and “significant effects” tests.

Although CEQ gives lip service to the requirement that effects be “reasonably foreseeable” as required under 40 C.F.R. § 1508.8, 79 Fed. Reg. at 77,815, its application of the concept to climate change is misplaced. Because of the many billions of sources of GHG emissions worldwide, and the complex relationships among sources and sinks of GHG emissions, very little about a project-level increase in GHG emissions is “reasonably foreseeable.” While scientists believe that a significant increase in *global* anthropogenic GHG emissions likely will lead to increased atmospheric concentrations of GHG emissions, which in turn will lead to increased global temperatures, which in turn may lead to sea-level rise,

increased storm intensity, increased drought and flooding events, and other effects, so many different factors go into each of these developments that it would be impossible to “foresee” what impact a *single project’s* GHG emissions would have on climate change. What if a project on the other side of the country or world decided to reduce the same amount of emissions at the same time, thereby offsetting the emissions from the project? Or if the national economy went into recession again, depressing national emissions and offsetting the project’s emissions? The project’s GHG emissions in those two cases would almost certainly have *no* effect on climate change or climate change-related impacts. Thus, there is nothing “reasonably foreseeable” about effects that might result from a single project’s GHG emissions.

NEPA requires federal agencies to prepare an EIS only for major federal actions “*significantly* affecting the quality of the human environment . . .” 42 U.S.C. § 4332(2) (C) (emphasis added). Similarly, the NEPA regulations provide that federal agencies focus only on the potential *significant* impacts of agency actions, not all potential impacts. 40 C.F.R. § 1500.1(b) (“NEPA documents must concentrate on the issues that are truly significant”). Because a single project’s GHG emissions almost certainly will be an insignificant contributor to climate change in terms of context and intensity, and because there is *no* “reasonably foreseeable” connection between a single project’s GHG emissions and any particular environmental impact that might result from climate change, a single project’s GHG emissions will be too insignificant to warrant analysis. A qualitative dismissal of the effects of a project’s GHG emissions is just the sort of “brief discussion” contemplated by the regulations, which allows the decisionmaker and the public to focus on the significant issues presented by a proposed action. *Id.* § 1508.9.

CEQ asserts in the Revised Draft Guidance 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. . . . Consequently, 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.” 79 Fed. Reg. at 77,826. To be consistent with CEQ regulations and case law, CEQ should clarify that the “global significance of aggregated GHG emissions” is irrelevant to a particular proposed project and never needs to be considered in a NEPA review. As discussed, there is no causal relationship between a single project and the “global significance of aggregated GHG emissions,” and furthermore, no agency has control over such emissions. Moreover, in determining the “significance” of a proposed project’s GHG emissions, it would be improper to “add” those emissions “to the emissions of other relevant actions” when “other relevant actions” have no causal relationship with the project, and the agency has no control over such actions. As the Supreme Court noted, a cumulative impacts analysis “does not require [an agency] to treat the [action] itself, or consequences from the [action], as an effect” that must be analyzed. *Public Citizen*, 541 U.S. at 770. CEQ regulations define “cumulative impact” as “the impact on the environment *which results from* the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7 (emphasis added). Because a single project’s GHG emissions cannot be said to “result” in climate change effects, an analysis of a project’s effects on climate change almost always will be inappropriate to be considered under a cumulative impacts analysis. Moreover, as discussed above, CEQ improperly assumes, contrary to NEPA law, that “emissions” can be equated to “impacts.” CEQ states that “the NEPA analysis

and documentation should present a reasonably thorough discussion of probable environmental consequences.” 79 Fed. Reg. at 77,803. But almost nothing about the effects of a project’s GHG emissions and impacts on climate change can be characterized as “probable.”

5. CEQ’s proposal regarding upstream and downstream emissions lacks legal basis and logical constraints.

CEQ 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.” *Id.* at 77,826. For example, CEQ suggests that an analysis of the impacts of a proposed mine could include not only GHG emissions from mining, but also GHG emissions from the transport, refining, processing, and use of the mined resource. *Id.* at 77,826. CEQ posits that an agency considering a permit for a mine would have to examine “clearing land for the extraction” and “using the resource.” *Id.* At base, the proposition conflicts with *Public Citizen’s* holding that such impacts need only be considered if the agency has control over them, as discussed at length above.

To illustrate the absurdity of CEQ’s upstream/downstream proposal, assume an agency was required to perform a NEPA review before an auto manufacturing plant was constructed. Would CEQ require an examination of the GHG emissions from each vehicle mile traveled for each car the plant was expected to sell? Because additional cars mean additional road deterioration, would CEQ require an analysis of the additional roads that would need to be constructed or maintained to serve those cars? Would the emissions from additional oil drilling needed to fuel those cars or the mining and smelting operations to supply the steel for the cars need to be analyzed as an upstream impact? To extend the analogy to a non-climate change-related context (which is likely what will happen regardless of CEQ’s intentions), would CEQ require an analysis of the public health impacts of increased motor vehicle deaths that might result from having additional cars on the road produced by the factory? These examples illustrate the potential unbounded review that might accompany CEQ’s upstream/downstream proposition if it is finalized. There is no logical stopping point to such an analysis. While some of these illustrative “downstream” effects might be “foreseeable,” none of them would likely be within the control of the agency undertaking the approval action, and none of them would arguably be proximately caused by the agency action under review.

In the context of interstate natural gas pipelines, this analysis is critical to get right. It has been argued that pipelines induce growth in demand for natural gas, which in turn leads to increased supply and drilling for natural gas. This contention is backward. INGAA’s members do not build pipelines “on speculation.” Pipelines are constructed only when both demand for the gas and the gas supply are already in place. Pipelines are mere conduits connecting market-driven demand and supply forces. Thus, it is market-driven demand for natural gas—demand which is met by exploration and drilling activities—which causes pipelines to be built. In other words, demand for natural gas comes first, then supply of natural gas, and then pipelines to connect the two.

“Upstream” emissions of a pipeline are not a predicate of a FERC certificate order nor are “downstream” emissions a consequence of FERC’s actions. The causal relationship for both is too far attenuated. With respect to upstream impacts, often referred to as induced production, FERC’s actions do not drive exploration and production decisions or activities nor their emissions. Natural gas production is driven by a multitude of factors including the existence of a natural gas (and liquids) producing geology, the feasibility of extraction, market demand both nationally and globally, the cost of extraction and production, and the commodity prices of the natural gas and any natural gas liquids. The commitments to locate, acquire, finance and develop production facilities are made well in advance of FERC issuing a certificate order approving a pipeline project. These production facilities do not rely on any one interstate pipeline project to bring the natural gas to market. Most major production areas are in close proximity to multiple existing interstate pipelines and often connect to many of them via gathering pipelines and intrastate pipelines.

Moreover, the nature of the natural gas pipeline system is such that, once constructed, pipeline operators do not know with any certainty the original source of the natural gas being transported in the pipeline, and only in limited instances (e.g., delivery to gas-fired electric generators) do they know the ultimate destination of such gas. Pipelines do not serve a particular producer and rarely serve a single end-user. There are numerous options for producers to transport their gas and a single pipeline project is not likely to foreclose or trigger their production activities. If a proposed FERC pipeline project were not to go forward, producers may utilize gathering lines or intrastate pipelines to move their gas to existing interstate pipelines, and these projects typically do not undergo NEPA review. Moreover, the level of production activity is driven by factors unrelated to a new pipeline project such as the price of natural gas, the existence and price of natural gas liquids, the availability and cost of natural gas liquids processing and market demand. In most circumstances, these production activities exist before FERC issues a certificate order approving a pipeline project and will continue to operate regardless of the completion of that project.

Downstream emissions of an interstate natural gas pipeline are neither closely connected nor reasonably foreseeable. Interstate natural gas pipelines do not typically deliver gas from the wellhead to the burnertip. Instead, interstate natural gas pipelines are only one piece of the path from wellhead to burnertip. On the upstream end, production can be delivered through other gathering lines, intrastate pipelines, or other interstate pipelines before it is received by the pipeline project under review by FERC. Similarly, on the downstream end, the gas moves through other interstate pipelines, intrastate pipelines or local distribution company (“LDC”) systems before it reaches the end user. Importantly, the interstate pipeline does not own the gas; it merely provides capacity rights for others to move their gas through the pipeline. Capacity owners may include producers, LDCs, marketers, industrial customers, or gas-fired electric generators. Capacity owners acquire gas from any source upstream of the proposed pipeline and move it to any point downstream of the pipeline—all without the control, approval, or knowledge of the interstate pipeline owner. There may be hundreds of receipt and delivery points beyond the geographic footprint of the pipeline from which gas can be acquired or delivered. Further, any pipeline capacity under contract can be assigned or released to other parties and any unused capacity in a pipeline can also be made available to third parties on a daily or interruptible basis.

Just as there is no predictability in determining where and when the gas is being produced, there is no reasonable foreseeability regarding where the gas will be utilized (with the limited exception of interstate pipelines that deliver directly to electric generating facilities—but even then, the generators have the ability to assign their pipeline capacity to others when their facility is off-line). Natural gas is used for a variety of purposes, including electric power generation, industrial uses, residential purposes, commercial uses, and vehicle fuel. In the industrial sector, natural gas is used in the pulp and paper, metals, chemicals, refinery, stone, clay and glass, plastic and food processing industries. The amount of emissions (if any) generated by these uses depends on where the gas goes on any given day. Thus, it would be impossible to predict the downstream emissions associated with any given pipeline project. Further, most of these uses are pre-existing operations which have alternative sources of natural gas or can use alternative fuels. As with production, it is the downstream activities that are inducing these associated emissions, not FERC’s actions. And of course, FERC has no control over these “downstream” emissions.

A recent federal court decision found that only because there was “extreme interdependence” between a coal mine and its sole customer, a single power plant, could downstream coal combustion-related impacts from that power plant be considered an “indirect effect” of the upstream coal mine’s expansion. *See Diné Citizens Against Ruining Our Env’t v. United States Office of Surface Mining Reclamation*, Civ. Action No. 12-cv-01275-JLK, slip op. at 14 (D. Colo. March 2, 2015). (Incidentally, the court also neglected to consider plaintiffs’ arguments that an analysis of the proposed mine’s expansion include an examination of the effects of climate change, running counter to CEQ’s suggestion described above, that GHG emissions from the use of a mined resource be considered. 79 Fed. Reg. at 77,826). Because it is market demand for natural gas that induces pipelines, natural gas drilling and combustion cannot be said to be upstream or downstream “indirect effects” of interstate natural gas pipelines, and thus need not be analyzed in a NEPA review of a proposed pipeline.

6. CEQ must reconsider its statements regarding disclosure obligations.

On January 28, 2015, CEQ official Horst Greczmiel distinguished between the concepts of “control” and “disclosure,” stating on a Powerpoint slide in a presentation to the National Association of Environmental Professionals that, “[d]isclosure goes beyond those actions over which the agency has control or responsibility – it includes effects outside the control of the agency; however, the agency should clearly distinguish those effects.” This distinction is not found in the Revised Draft Guidance or the preamble. The Revised Draft Guidance can, however, be read to encourage disclosure of the potential effects of GHG emissions regardless of whether the agency has the ability to control such emissions, if such disclosure may be “useful to the public.” *Id.* at 77,829-30. If CEQ finalizes the guidance, it should make clear that NEPA (as interpreted by the NEPA implementing regulations and case law) contains no disclosure requirement independent of the agency’s obligation to analyze environmental effects of a proposed agency action.

The many examples listed above demonstrate that CEQ’s Revised Draft Guidance contradicts existing NEPA law. CEQ must ensure that if it finalizes the guidance, it accurately reflects NEPA law contained in statute, regulations, and case law, including the *Public Citizen* decision. As CEQ has noted, “NEPA regulations . . . already encompass consideration of climate

effects.” Letter from Michael J. Boots, Acting Chair, Council on Environmental Quality, to Joseph Mendelson, III, et al., Regarding CEQ’s Response to a Petition for Rulemaking and Issuance of Guidance to Require Inclusion of Climate Change Analysis in NEPA Documents at 2 (Aug. 7, 2014) (“Boots Letter”). There is no need for a guidance to specifically address climate change because the law is clear on agency obligations regarding considering the potential environmental impacts of proposed projects. CEQ should either withdraw its proposal, or must ensure any guidance it issues on this subject is consistent with existing law.

It is particularly important that CEQ ensures any final guidance is consistent with existing law and current federal agency interpretations because CEQ has been charged by Congress with oversight of NEPA implementation. Its pronouncements on NEPA are, therefore, important, if not always accorded deference.² Five years ago, CEQ proposed to find that “it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular projects or emissions, as such direct linkage is difficult to isolate and to understand.” Memorandum for Heads of Federal Departments and Agencies from Nancy H. Sutley, Chair, CEQ, Regarding Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions at 3 (Feb. 18, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>. Nothing has changed in the science in the intervening five years since CEQ made that statement to warrant the policy change CEQ proposes in the Revised Draft Guidance.

B. The Revised Draft Guidance contradicts agency interpretations of NEPA.

Agencies, relying on *Public Citizen* and NEPA regulations, have concluded that they need not analyze the effects of GHG emissions from a particular project if there is an insignificant relationship between that particular project’s emissions and global climate change, and if the agency has no control over those emissions. For example, FERC has noted that “there is no standard methodology to determine how a project’s incremental contribution to GHG emissions would result in physical effects on the environment, either locally or globally.” *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 at P 243 (2014). It has concluded that “because we cannot determine the project’s incremental physical impacts on climate change, it is not possible to determine whether or not the project’s contribution to cumulative impacts on climate change will be significant.” *Id.* at P 246. FERC also has determined that both upstream and downstream GHG emissions are too speculative to assess. *Id.*

Similarly, FERC and the U.S. Department of Energy (“DOE”) have also concluded that under CEQ’s NEPA regulations they are not required to consider potential climate impacts of projects like pipelines and export terminals because they do not proximately cause upstream impacts, like increased development of natural gas, or downstream impacts, like increased burning of fossil fuels. *See, e.g.*, FERC, Final Environmental Impact Statement for the Constitution Pipeline and Wright Interconnect Projects (Docket Nos. CP13-499-000 and CP13-502-000) at 4-256 (Oct. 24, 2014) (“Emissions of GHGs from Constitution’s project would not

² The Supreme Court has found that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

have any direct impacts on the environment in the area of the projects. Currently, there is no standard methodology to determine how the proposed Constitution Pipeline Project's relatively small incremental contribution to GHGs would translate into physical effects of the global environment. The GHG emissions from the construction and operation of Constitution's project would be negligible compared to the global GHG emission inventory."); FERC, Final Environmental Impact Statement on Algonquin Gas Transmission, LLC's Algonquin Incremental Market Project (Docket No. CP14-96-000) at 4-303 (Jan. 23, 2015) ("Emissions of GHGs from the proposed Project and other regional projects would not have any direct impacts on the environment in the Project area. Currently, there is no standard methodology to determine how a project's relatively small incremental contribution to GHGs would translate into physical effects on the global environment."). The D.C. Circuit has upheld Bureau of Land Management determinations not to "identify specific effects on the climate in order to prepare an adequate EIS." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). And the Colorado federal district court upheld the U.S. Forest Service's conclusion that it could not "describe with particularity how the project would contribute to overall climate change." *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011).

In June 2013, a senior U.S. Army Corps of Engineers official, adhering to the *Public Citizen* control doctrine, testified before Congress that the Corps does not consider the climate change impacts of "upstream" and "downstream" activities from U.S. coal export terminals because "many of the activities of concern to the public, such as rail traffic, coal mining, shipping coal outside of U.S. territory and the ultimate burning of coal overseas, are outside the Corps' control and responsibility for the permit applications related to the proposed projects." Complete Statement of Jennifer A. Moyer, Acting Chief, Regulatory Program, U.S. Army Corps of Engineers, Before the Committee on Energy and Commerce, Subcommittee on Energy and Power, U.S. House of Representatives, at 5 (June 18, 2013), *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Moyer-EP-Energy-Abundance-Regulatory-Markets-Legal-Barriers-2013-6-18.pdf>. Moyer also noted that "the possible future shipment of coal by oceangoing vessels across the Pacific Ocean beyond the limits of U.S. navigable waters, and the possible future off-loading, distribution, and burning of coal in Asia are attenuated and far removed from the activities regulated by the Corps at any of the three shipping facilities." *Id.* at 5-6 (noting further that it is commercial markets that drive this activity).

Moreover, in written response to questions to the House Committee on Energy and Commerce, the Corps stated that it has never considered the international climate change effects of permitting U.S. export terminals. Questions for the Record Before the Energy and Power Subcommittee, Committee on Energy and Commerce, at 1 (June 18, 2013), *available at* <http://docs.house.gov/meetings/IF/IF03/20130618/101000/HHRG-113-IF03-Wstate-MoyerJ-20130618-SD003.pdf>. The Corps further stated that "[g]reenhouse gas emissions will be evaluated to the extent that they occur within the Corps' control and responsibility in association with construction activities and potential increase in vessel traffic associated with any work that may be permitted." *Id.* The agency indicated that it believes a global life-cycle analysis "is beyond the Corps' statutory authorities. Because the Corps does not have control or responsibility over the activities associated with the full life-cycle of a commodity we are unable to provide details regarding the challenges of such an evaluation." *Id.* at 2. The Corps also

acknowledged, with regard to foreseeability of effects and causation, that “[w]e do not have sufficient information at this time to conclude whether it would be possible to connect the effects of extracting, transporting, and burning coal from a specific mine, through a specific shipping facility, to its ultimate global destination for consumption and the potential resulting effects on global climate change.” *Id.*

Agencies in other contexts have been unable to causally connect any particular source’s emissions to any particular climate change-related impact. For example, the U.S. Geological Survey established in general climate change guidance that “[i]t is currently beyond the scope of existing science to identify a specific source of CO₂ emissions and designate it as the cause of specific climate impacts at an exact location.” U.S. Geological Survey, Memorandum, “The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts” (May 14, 2008). The Department of Interior has noted, in guidance relating to determining threshold requirements to assess climate change under the Endangered Species Act, that, “the requisite causal connections cannot be made between the emissions of GHGs from a proposed agency action and specific localized climate change.” U.S. Dep’t of Interior, M-37017, Guidance on the Applicability of the Endangered Species Act to Proposed Actions Involving the Emissions of Greenhouse Gases at 6 (Oct. 3, 2008), *available at* <http://www.doi.gov/solicitor/opinions/M-37017.pdf>.

These determinations were made not only in accordance with NEPA law, but with common sense as well. FERC has no control over the use of natural gas that is transported in an interstate natural gas pipeline. Similarly, it has no control over whether new wells are explored or drilled. As the Supreme Court has noted, it makes little sense to analyze such attenuated activities. Agencies are not, and should not be, obligated to conduct NEPA analyses of potential effects over which they have no control. An expensive and lengthy process to analyze attenuated effects serves no useful purpose and in fact can be harmful by delaying the construction of much-needed infrastructure. With such loose standards, FERC NEPA reviews would become lengthier, more complex, and more vulnerable to litigation. Furthermore, delaying the construction of interstate natural gas pipelines would impede the Administration’s climate change policy, which encourages the increased use of natural gas-fired generation. Delaying the infrastructure needed to accomplish this task would lead to greater GHG emissions as a result.

C. If finalized, the Revised Draft Guidance would upset litigation in which agencies are defending their interpretations.

Recent challenges to FERC certificate orders have argued that NEPA requires FERC to analyze upstream and downstream emissions related to interstate pipeline and LNG projects. *See Sierra Club v. FERC*, No. 14-1275 (D.C. Cir. appeal docketed Dec. 10, 2014) (challenging Order Denying Rehearing and Clarification, *Freeport LNG Development, L.P.*, 149 FERC ¶ 61,119 (2014)); *Sierra Club v. FERC*, No. 14-1249 (D.C. Cir. appeal docketed Nov. 17, 2014) (challenging Order Denying Rehearing, *Sabine Pass Liquefaction, LLC*, 148 FERC ¶ 61,200 (2014)); *Sierra Club v. FERC*, No. 14-1190 (D.C. Cir. appeal docketed Sept. 29, 2014) (challenging Order Denying Rehearing, *Cameron LNG, LLC*, 148 FERC ¶ 61,237 (2014)). FERC has correctly rejected these arguments because the alleged upstream and downstream impacts have neither a reasonably close causal relationship to the pipeline nor are they

reasonably foreseeable. The Revised Draft Guidance must not be drafted in such a way that it can be interpreted to require that all upstream and downstream emissions even only tangentially related to an interstate natural gas pipeline project must be included in FERC's NEPA analysis. Such a "soup to nuts" review of emissions flies in the face of NEPA's causal connection and reasonable foreseeability requirements. Further, a blanket application of the example in the guidance that a NEPA analysis should include the effects of "using the resource" is inapposite to FERC pipeline projects.

Each of these pending challenges will address in some fashion the issues discussed in the Revised Draft Guidance. If CEQ finalizes the guidance before these cases are decided in the D.C. Circuit, it runs the risk of issuing guidance that will directly contradict new case law. This would make the guidance immediately obsolete at most, and at the very least would further confuse stakeholder perceptions of the role and importance of the guidance. If CEQ chooses to finalize the guidance, it should at a minimum wait until these cases reach conclusion, either at the D.C. Circuit or on any appeals to the Supreme Court.

The Revised Draft Guidance appears, intentionally or not, to overturn existing Supreme Court case law on the importance of causation and control, reasonable foreseeability, and significant effects. If CEQ proceeds down this route, the change in its interpretation of both the NEPA statute and its own NEPA regulations with regard to causation would also have far-reaching effects, potentially impacting all NEPA actions, not just reviews addressing climate change. Taken to its logical extreme, CEQ's proposed unbounded "upstream/downstream" analysis, unchecked by the well-founded causation and control doctrines, would create irrational and extreme obligations for agencies to produce limitless and ultimately inconsequential analyses, given that the agency would have no ability to do anything about the described attenuated impacts. If it finalizes the guidance, CEQ must respect the bounds established by the Supreme Court to limit the extent of NEPA reviews. Any alternative would be unlawful and unworkable.

III. If CEQ aims to change the law, it must adhere to the Administrative Procedure Act.

Although CEQ recently denied a petition to amend its NEPA regulations to address climate change, 79 Fed. Reg. at 77,803 n.6; *see generally* Boots Letter, its Revised Draft Guidance suggests that it is attempting to subvert the regulatory process to do just that. As discussed above, the Revised Draft Guidance contravenes existing law and longstanding agency practice, and represents a major change in the federal government's position on the issue of climate change in NEPA reviews. As such, it effectively seeks to amend the law. Thus, as drafted, the Revised Draft Guidance risks being taken not merely as an interpretation of existing NEPA law, but as a "major substantive legal addition" to that law, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000), making it vulnerable to being vacated for not undergoing the rulemaking procedures mandated under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

When promulgating a substantive rule, an agency must comply with the procedural requirements of the APA, including providing public notice of proposed rulemaking, an opportunity for public comment, and a description of the rule's basis and purpose. *Id.* Agency

rules are subject to judicial review and may be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

The D.C. Circuit Court of Appeals has set aside guidance before for being a rulemaking-in-disguise:

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes “binding.”

Appalachian Power, 208 F.3d at 1021 (citation omitted). In that case, the D.C. Circuit set aside guidance issued by EPA because it had “significantly broadened” and “in effect amended” a regulation. *Id.* at 1028. The court noted that under the APA, guidance can be construed to be a “rule” if it consists of a statement by an agency with “general or particular applicability and future effect” *Id.* at 1021 (quoting 5 U.S.C. § 551(4)) (internal quotation marks omitted). This broad definition can include “virtually every statement an agency may make” *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983). “Labeling a major substantive legal addition to a rule a mere interpretation” will not allow the agency to escape rulemaking requirements. *Appalachian Power*, 208 F.3d. at 1024 (citations omitted).

The D.C. Circuit has also “looked to post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties.” *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014). Thus, even if an agency frames a document as mere “guidance,” it can be interpreted by a court to be a binding rule that must undergo APA-mandated rulemaking procedures based on how the agency treats the document in operation. In any final guidance, CEQ must be careful to adhere to the APA and relevant case law to ensure that either (1) an intentional change in law undergoes proper rulemaking procedure; or (2) the guidance is adopted and implemented uniformly as nonbinding and noncontrolling, regardless of how the guidance is labeled.

IV. Any final guidance must be internally consistent.

A number of topics within the Revised Draft Guidance and its preamble are internally inconsistent, with the preamble saying one thing, and the proposed guidance saying another. In some cases, the proposed guidance itself is internally inconsistent. If CEQ decides to finalize the guidance, it must ensure that at a minimum, the guidance is internally consistent to avoid confusion and consistency in application. Otherwise, the guidance will be both unworkable and subject to litigation.

For instance, while CEQ says in the preamble on the one hand that the guidance will not be legally enforceable and “does not create any new or additional regulatory requirements for project proponents,” *id.* at 77,816, on the other hand, CEQ states that it “aims to *ensure consistency and certainty* about whether and how agencies should address GHG emissions and impacts of climate change in their NEPA analyses and documents,” *id.* at 77,803 (emphasis

added). Moreover, CEQ states that the guidance is “*applicable* to all proposed Federal agency actions,” *id.*, and “recommends that agencies address GHG emissions and the effects of climate change *for all proposed actions*,” *id.* at 77,808 (emphasis added). In the draft guidance language itself, CEQ states that the guidance is issued “to provide Federal agencies direction.” *Id.* at 77,822. Aside from the first statement, each of these statements suggests that CEQ in fact intends the “guidance” to be binding on agencies.

CEQ also states on the one hand that “agencies have the discretion to perform quantitative or qualitative analyses, whichever is more appropriate, as long as they document the rationale behind choosing one form of analysis over the other,” 79 Fed. Reg. at 77,822, while on the other provides a “reference point” above which a quantitative analysis would appear to be presumed, explaining that “[t]his is an appropriate reference point that would allow agencies to focus their attention on proposed projects with potentially large GHG emissions.” *Id.* at 77,827-28.

CEQ must ensure that the language of any final guidance is both internally consistent and consistent with any preamble to the final guidance. As written, the guidance would be unworkable for federal agencies. The guidance is vague, and leaves agencies uncertain about the Administration’s position regarding addressing climate change in NEPA reviews. Contrary to CEQ’s stated aims, such uncertainty will lead to a lack of consistency in implementation, and will provide additional ammunition for litigants to challenge projects under review, leaving the federal government vulnerable to increased litigation and projects subject to delays and regulatory uncertainty.

V. Any final guidance must reaffirm agency discretion and be nonbinding.

INGAA welcomes CEQ’s statement that the Revised Draft Guidance, even if finalized, “is not a rule or regulation” and “does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable. . . . [T]his document does not establish legally binding requirements in and of itself.” 79 Fed. Reg. at 77,823 n.4. Unfortunately, given other statements in the Revised Draft Guidance discussed above, this assertion risks being construed as mere “boilerplate,” *Appalachian Power*, 208 F.3d at 1027, rather than as an unequivocal statement of agency intent regarding the effect of the guidance.

CEQ should emphasize in the clearest of terms that agencies retain discretion with regard to whether and how to analyze climate change in NEPA reviews and that the guidance is nonbinding. The guidance and preamble do contain a few statements to this effect, but CEQ must ensure such language clearly trumps any language inadvertently suggesting the guidance has binding effect. *See, e.g.*, 79 Fed. Reg. at 77,804 (“agencies should apply their best judgment and expertise when determining how to consider the level of GHG emissions and impacts of climate change. . . . [A]gencies [should] exercise their expert judgment and provide the basis for determining *whether and how* to analyze GHG emissions.”); *id.* at 77,824 (“Agencies continue to have substantial discretion in how they tailor their NEPA processes to accommodate the concerns raised in this guidance”). The Supreme Court has recognized the importance of agency discretion and expertise in performing NEPA reviews and the final guidance must reflect such discretion. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (“Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion

of the responsible federal agencies”); *id.* at 414 (“determination of the extent and effect of these factors . . . is a task assigned to the special competency of the appropriate agencies.”). Should CEQ finalize its guidance, it should reiterate this position to avoid confusion. Although prior CEQ guidance has been found not to be controlling, binding or even persuasive, *see, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822, 837 n.15 (9th Cir. 1986); *State of Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986); *Cabinet Mountain Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (all speaking to CEQ’s 1981 “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” document, 46 Fed. Reg. 18,026 (Mar. 23, 1981)), CEQ should avoid the litigation that led to such determinations by being clear upfront about its intentions.

Relatedly, CEQ should clarify that if this guidance is finalized, it will not be actionable. Similarly, CEQ should affirmatively state that if an agency departs from the guidance, such departure would not violate the law. Without such a statement, INGAA is concerned that the guidance will provide novel and legally indefensible grounds for third parties to challenge federal approvals, permits, and licenses for projects.

In sum, if CEQ finalizes this guidance, it should clarify that agencies are “free to ignore it,” and that the guidance has “no legal impact,” as the D.C. Circuit suggested would help render a guidance document non-reviewable. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d at 253 (citation and internal quotation marks omitted). Alternatively, if CEQ wishes to amend its regulations interpreting NEPA, it must enter into a notice-and-comment rulemaking process to do so, as discussed above. Without a statement clarifying that the guidance is nonbinding and that agencies retain full discretion to determine whether and how to address climate change in NEPA reviews, this guidance, as discussed above, would directly conflict with FERC, U.S. Army Corps of Engineers, and other agency policy on NEPA reviews, usurping agency control and discretion.

VI. CEQ should remove the 25,000 mtCO₂e “reference point,” and should refrain from defining the term “emissions.”

While INGAA supports CEQ’s clarification that CEQ does not intend for agencies to determine the “significance” of a project by using a proxy of 25,000 metric tons of carbon dioxide-equivalent (“mtCO₂e”) per year, 79 Fed. Reg. at 77,807, 77,827-28, INGAA is concerned that the level will indeed operate as a quasi-substantive threshold at which CEQ (and litigants) will expect agencies to perform quantitative analyses of projects that exceed that threshold. In the interstate natural gas pipeline context, 25,000 mtCO₂e roughly equates to the emissions of a single turbine in a compressor station, an essential component of any interstate pipeline expansion project. Thus, INGAA is concerned that establishing such a threshold would significantly impact the NEPA reviews of all greenfield and most interstate natural gas pipeline expansion projects regardless of their actual environmental impacts.

CEQ now refers to the 25,000 mtCO₂e level as a “reference point” rather than a significance threshold, suggesting that the number is a nonmandatory threshold, and indicates that quantitative analyses of proposed projects should not and need not be undertaken when the agency determines such analysis would not be appropriate. But demarcating a hard and fast line above which CEQ does clearly expect quantitative analyses will be undertaken makes these

statements contradictory. The Revised Draft Guidance suggests that agencies will be expected *in every instance* to perform a quantitative analysis if the project's emissions will exceed 25,000 mtCO₂e/year. Because agencies must undertake particularized environmental analyses of the impacts of each project, establishing a presumptive threshold for undertaking a certain type of review removes agency discretion from the NEPA process. Mandating a quantitative analysis of GHG emissions from projects that emit above the threshold also will substantially slow down and increase the costs involved in the NEPA process.

Moreover, CEQ has not sufficiently established how and why it selected the 25,000 ton figure as a reference point. There is no basis in the NEPA statute or regulations for establishing such a bright-line threshold devoid of any actual connection to environmental impacts. The fact that EPA has required entities emitting at that level to report their GHG emissions every year does not lend sufficient support to recommend a similar threshold for requiring a quantitative analysis of environmental impacts under NEPA.

Separately, CEQ proposes to define the term "emissions" to include not only the emissions of a project, but also 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." *Id.* at 77,823 n.1. INGAA respectfully suggests that EPA is the expert agency best suited to be redefining what constitutes an "emission."

VII. CEQ should not endorse the use of the social cost of carbon in NEPA reviews.

While the Revised 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," it suggests that if a cost-benefit analysis is to be undertaken, the federal social cost of carbon ("SCC") "metric" "can provide decisionmakers . . . with some context for meaningful NEPA review." *Id.* at 77,827. For the reasons stated below, INGAA urges CEQ to withdraw the suggestion that agencies utilize the SCC in NEPA reviews.

A. The SCC is too uncertain and contains too many other flaws to be useful.

First, SCC estimates, as the federal government itself has cautioned, suffer from "uncertainty, speculation, and lack of information," and "any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional." Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 2 (Feb. 2010), *available at* <http://www.epa.gov/oms/climate/regulations/scc-tsd.pdf> ("February 2010 TSD"); *see also* Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* at 2 (rev. Nov. 2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf> ("November 2013 TSD") (acknowledging continued limitations of the social cost of carbon). There are simply too many issues associated with both the derivation and application of SCC estimates to make them useful in a decisionmaking exercise. The Interagency Working Group ("IWG") on the SCC has attempted to deal with this

significant uncertainty by urging agencies to select SCC estimates using a range of four discount rates over various time scales. This exercise forces agencies to come up with multiple numbers that purportedly estimate the cost or benefit of a single additional ton of GHG emitted or reduced. The range is often comically broad: for instance, the IWG derived SCC estimates of negative \$29/metric ton to positive \$991/metric for 2020 carbon dioxide emissions. November 2013 TSD at 19 tbl. A2.

The process by which the IWG has developed the SCC estimates has been cloaked in secrecy and not subject to peer review, raising additional doubts about the validity and veracity of the SCC estimates. The IWG chose three integrated assessment models (“IAMs”)—DICE, FUND, and PAGE—to develop SCC values. The choice of those models and inputs to those models to derive SCC values did not undergo peer review and were not subject to public comment. The value-laden choice of discount rates also was not subject to peer review or public comment, an especially glaring issue given that even small changes in discount rates can lead to large changes in SCC estimates. The IWG has not released any detailed information about how the SCC values were derived, despite requests from stakeholders.

In addition, although there are uncertainties in estimating the costs of a regulation or other action to society, costs are much easier to estimate than benefits, particularly with respect to global climate change. The IAMs fail to account for this relative difference in uncertainty between the two figures. The SCC purports to represent both the costs and the benefits of emissions of carbon dioxide, but given this divergence in certainty between estimating costs and benefits, agencies should not use SCC figures that purport to capture both.

Another key issue is that SCC estimates are improperly inflated because they incorporate the global benefits of a domestic reduction and the global costs of a domestic emission of carbon dioxide. While GHG emissions can be said to have global rather than local effects, it is inappropriate to agglomerate benefits that largely accrue outside the United States when federal agencies have no jurisdiction to hold worldwide emissions constant, or to control the climate costs and benefits that may result outside of its borders. The IWG has noted that the domestic SCC values represent just 7 to 23 percent of the global values. February 2010 TSD at 11 (“[T]he interagency workgroup determined that a range of values from 7 to 23 percent should be used to adjust the global SCC to calculate domestic effects. Reported domestic values should use this range.”). Guidelines issued by the White House Office of Management and Budget (“OMB”) state that agency cost-benefit analyses “should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately.” OMB, Circular A-4 Regulatory Analysis at 15 (Sept. 17, 2003), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

B. The SCC was developed for the rulemaking context, not for NEPA reviews.

The second key reason why CEQ should avoid endorsing the use of SCC estimates in NEPA reviews is that the SCC was developed to assist agencies in weighing the macro costs and benefits of proposed rules, not to assist with evaluating the emissions impacts of single projects. The IWG was formed to help “ensure consistency in how benefits are evaluated across agencies”

and “specifically . . . for the rulemaking process . . .” February 2010 TSD at 4. EPA has stated that the SCC is used “to estimate the climate benefits of rulemakings” and “the value of damages avoided for a small emission reduction (i.e. the benefit of a CO2 reduction).” EPA, The Social Cost of Carbon, <http://www.epa.gov/climatechange/EPAactivities/economics/scc.html> (last updated Nov. 26, 2013). The Administration admits the numerous uncertainties involved in using the SCC even in the rulemaking context, and requires a range to be used to reflect these uncertainties. Using the SCC to evaluate the impacts of a single project on climate change—where an individual project’s relationship to climate change is questionable—is even more speculative.

In sum, the highly flawed and uncertain SCC estimates—developed for use in the rulemaking context—cannot properly be referred to as “metrics.” CEQ should not endorse their use in NEPA reviews.

VIII. CEQ should clarify its statements on mitigation measures to ensure they are consistent with existing law and guidance.

CEQ states that the Revised Draft Guidance “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.” 79 Fed. Reg. at 77,816. However, CEQ suggests that agencies consider specific alternatives in their NEPA reviews, including “enhanced energy efficiency, lower GHG-emitting technology, increasing the use of renewable energy, planning for carbon capture and sequestration, sustainable land management practices, and capturing or beneficially using fugitive methane emissions.” *Id.* at 77,820.

Unfortunately, CEQ neglects to note that most of these suggested “alternatives” would not be considered “reasonable” for a proposed project that does not already incorporate these measures as part of its design and scope. CEQ regulations require agencies to consider only those alternatives to the proposed action that are reasonable and consistent with the project’s purpose and need. 40 C.F.R. § 1502.13. CEQ reiterates this principle in the preamble to the Revised Draft Guidance: “agencies should consider a reasonable range of alternatives consistent with the purpose and need for the proposal, and *if such information would be useful* . . . a comparison of alternatives and potential mitigation that addresses GHG emissions, carbon sequestration, and the impacts of climate change.” 79 Fed. Reg. at 77,805 (emphasis added). This statement should be included in the actual guidance if it is finalized, and not just in the preamble. INGAA notes further these options also are not appropriate in the interstate natural gas pipeline context. Mitigation measures like these generally are particularly inappropriate in the context of natural gas pipelines for which few mitigation measures exist. Pipelines are already required under the CAA to install “best available control technology” for compressor stations. Moreover, natural gas pipelines *are themselves* mitigation measures for electric generating facilities switching from coal to natural gas.

Under CEQ’s NEPA regulations, agencies must consider mitigation measures which, *if implemented*, would reduce the environmental impact of the proposed action. 40 C.F.R. §§ 1508.20, 1508.25. The Supreme Court has confirmed that NEPA does not mandate actual mitigation measures. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). Prior CEQ mitigation guidance endorsed the notion that agencies cannot require mitigation

without substantive authority. If the guidance is finalized, it must tie the concept of mitigation to the scope of agency authority to require such mitigation. For example, any agency requirement of mitigation for upstream and downstream effects of a project would be in tension with CEQ's mitigation guidance. Should CEQ finalize the draft guidance, it should restate this clarification to avoid confusion.

It is worth noting that, practically speaking, it is not at all clear how an individual project could ever purport to mitigate climate change impacts. Again, CEQ appears to conflate the concepts of GHG emissions and climate change impacts. CEQ's new interpretation would require project proponents to mitigate purported climate-related impacts by reducing the project's GHG emissions. But in no way would reducing a project's GHG emissions actually mitigate *any* climate-related impacts. The relationship between the two is far too attenuated, and as CEQ accurately notes, a "statement that emissions from a government action or approval represent only a small fraction of global emissions is . . . a statement about the nature of the climate change challenge . . ." 79 Fed. Reg. at 77,825. There is just no way that the emissions from a single project would either directly or indirectly cause a particular climate change-related impact or could mitigate such impact. Any such mitigation-by-proxy would not only be illogical but would be meaningless. GHG emissions from *any* project that FERC would consider approving are minuscule and insignificant considering the global causes and reach of climate change.

CEQ's discussion of the tools available to analyze the effects of GHG emissions and climate change suggests that agencies should use tools that are available. *Id.* at 77,824. This contradicts NEPA and the CEQ's regulations which dictate that the analysis should only be undertaken when the effects of the action are significant. It will often not be appropriate to use certain tools and CEQ should make clear that it is not mandating the use of the tools it discusses.

IX. Any final guidance should apply only to newly proposed projects.

INGAA urges CEQ to issue a statement clarifying that the Revised Draft Guidance is a proposed action and has no effect until finalized. This is critical because parties have begun citing the Revised Draft Guidance in motions before agencies as if it had legal effect. *See, e.g.,* Sierra Club Req. for Reh'g at 5 & n.1, 17 & nn.26-27, *In re Corpus Christi Liquefaction, LLC*, No. CP12-507 (FERC Jan. 29, 2015); EPA Region I, Comments on Algonquin Incremental Market Project (AIM Project) FEIS at 2, FERC Docket No. CP14-96-000 (Mar. 2, 2015). If agencies begin to cite to and incorporate references to the Revised Draft Guidance in their rulings, this may give rise to arguments that the Revised Draft Guidance has *de facto* legal effect. This is a serious concern because it will lead to confusion and uncertainty regarding the obligations of both agencies and project proponents. In at least one case, EPA has adopted and advocated (in an official document) CEQ's revised proposed position with regard to using GHG emissions as a proxy for environmental impacts, even though CEQ has not finalized its guidance. *See* EPA, Comments on Constitution Pipeline and Wright Interconnect Projects Final Environmental Impact Statement (FERC EIS 0249F) (Dec. 2, 2014), *available at* http://www.epa.gov/region2/spmm/pdf/constitution_pipeline_wright_feis.pdf ("EPA believes that the estimated levels of GHGs emitted or induced by a proposal and reasonable alternatives represent a reasonable proxy for impacts"). As discussed above, the implications of rolling out a

policy change or regulatory amendment without undergoing mandated public notice and comment procedures would violate the APA.

Moreover, if CEQ finalizes the guidance, it should affirmatively state that it will apply only to projects proposed after the date the guidance is finalized. CEQ makes contradictory statements on this point. On the one hand, CEQ states that the Revised Draft Guidance would apply only to “newly proposed actions” once the guidance is finalized, 79 Fed. Reg. at 77,818, and that the guidance “does not suggest that agencies retrospectively prepare an analysis for decisions already made or projects that are underway.” *Id.* at 77,819. The last sentence of the Revised Draft Guidance, however, states that agencies “to the extent practicable” “are encouraged” “to build its concepts into currently on-going reviews.” *Id.* at 77,831. Similarly, if CEQ finalizes the Revised Draft Guidance, it should clarify that the term “newly proposed actions” means projects for which the NEPA process has not yet commenced. This is the only possible meaning for that term that will be both fair and workable for project proponents and reviewing agencies.

X. The guidance contradicts the Administration’s climate change policy.

If finalized, the Revised Draft Guidance would run counter to President Obama’s goal to reduce the nation’s use of coal and increase the use of natural gas and renewable fuels. EPA’s proposed rules for new, modified, and existing electric generating units under section 111(b) and section 111(d) of the CAA would steer the source of most electric generation in the United States from coal to natural gas. As noted above, EPA estimates that the section 111(d) rule will increase demand for natural gas in electricity generation. EPA, EPA-452/R-14-002, Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants at ES-24 (June 2014) (“RIA”). EPA has predicted that “[n]atural gas use for electricity generation will increase by as much as 1.2 trillion cubic feet (TCF) in 2020 relative to the base case” *Id.* An economic analysis recently released by the Center for Strategic and International Studies (“CSIS”) and the Rhodium Group reveals that, “under any foreseeable scenario, natural gas demand will increase” as a result of the section 111(d) rule. CSIS & Rhodium Group, “Commodity Market Impacts of EPA’s Clean Power Plan,” at 1 (Feb. 9, 2015), *available at* http://csis.org/files/publication/150209_RHG_ENR_CPPCommodityMarketImpacts.pdf. The study notes that the most cost-effective way to meet the targets EPA has proposed is to increase the use of natural gas-based generation, “provided the gas can be delivered on time and in sufficient quantities . . . , highlight[ing] the need for additional natural gas pipeline infrastructure.” *Id.* Other national policy initiatives, like a focus on improving energy independence, will also lead to significant increased demand for natural gas and the interstate pipelines and related infrastructure needed to deliver that natural gas to market. In arguing that its section 111(d) rule would be feasible to implement even if significant new natural gas-fired generation capacity needed to be added to the nation’s fleet, EPA notes that “[n]atural gas pipeline capacity has regularly been added in response to increased gas demand and supply, such as the addition of large amounts of new NGCC capacity from 2001 to 2003, or the delivery to market of unconventional gas supplies since 2008. These pipeline capacity increases have added significant deliverability to the natural gas pipeline network to meet the potential demands from increased use of existing NGCC units.” *Id.* EPA assumes that new natural gas pipelines and other infrastructure can come online relatively quickly. The Revised Draft Guidance would impede that effort by making the development of critical

infrastructure needed to support the use of natural gas far more difficult, time-consuming, expensive, and subject to increased litigation risk.

The CSIS-Rhodium Group study found that for significant increases in natural gas use to occur “seamlessly and cost-effectively,” “the necessary infrastructure—pipelines, pumping stations, gathering lines—will need to be in place in a timely fashion.” CSIS & Rhodium Group at 10. The report notes that “[t]his midstream infrastructure is a critical component to making natural gas a viable choice for many of the states and regions in the US that might seek to benefit from natural gas both for its emissions reduction potential and production value.” *Id.*

To meet the nation’s goals on energy independence and reducing GHG emissions, in part by the increased use of natural gas-fired generation, the federal government has encouraged the timely construction of natural gas-related infrastructure. The guidance will contradict this policy by making the infrastructure necessary to use natural gas more difficult and expensive to construct. Examples of federal policy to expedite natural gas infrastructure and energy independence include:

- Presidential Memorandum (2011): providing transparency, accountability and certainty in infrastructure permitting and review processes.
- Executive Order 13604 (2012) – Improving Performance of Federal Permitting and Review of Infrastructure Projects
- Blueprint for a Secure Energy Future (2012): reducing reliance on foreign oil, saving families and businesses money at the pump, and positioning the U.S. as the global leader in clean energy
- Executive Order 13605 (2012): Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources and Associated Infrastructure
- Executive Order 13604 Steering Group (2012 – 2014): Comprehensive review to identify best practices for infrastructure permitting
- State of the Union (2014): announced an effort to improve the efficiency of the federal permitting process, cutting through red tape and accelerating federal permits and reviews
- Quadrennial Energy Review (2014): focus on reviewing energy infrastructure and resilience to guide federal investment and policy to ensure the functioning of national energy system
- Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure (May 2014)

Finally, if CEQ aims to regulate GHG emissions from the oil and gas sector through the NEPA process (as would appear to be the case), INGAA encourages CEQ to defer to EPA and its recently announced efforts to regulate methane from the oil and natural gas sector. Compliance with these forthcoming regulations should trump other efforts to address climate change. Climate change guidance must be finalized and interpreted in such a way so that it does not conflict with EPA’s regulatory efforts as the expert federal agency.

XI. Conclusion.

In sum, INGAA encourages CEQ to withdraw the Revised Draft Guidance as both unnecessary and contrary to existing law. Alternatively, if CEQ chooses to issue final guidance, it must ensure it adheres to current NEPA law, is consistent with the Administration's policy to expedite certain infrastructure projects, is workable, affirms agency discretion over NEPA reviews, and will not give rise to independent causes of action.

Sincerely,

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