April 10, 2023

Via WWW.REGULATIONS.GOV

Jomar Maldonado
Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Notice of Interim Guidance and Request for Comments on "National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change (88 Fed. Reg. 1196-1212, January 9, 2023)

Dear Mr. Maldonado,

The undersigned associations (collectively, the "Coalition") offer the following comments in response to the Council on Environmental Quality's (CEQ's) Interim National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas Emissions and Climate Change ("Interim Guidance").[1] Our organizations represent a diverse set of economic sectors that form the backbone of the American economy—agriculture, energy, construction, mining, forestry, manufacturing, transportation, and other sectors.

We fully support the goals of NEPA to inform federal decision-making and the public's understanding of the potential environmental impacts of federal actions so they can be engaged in the federal decision-making process on an informed basis. A fair and efficient federal permitting system that meets these goals is essential for timely investment to meet a wide array of critical needs from addressing the digital divide in rural and large urban areas, to facilitating construction of public transit to connect communities to job centers, to building out the energy and water infrastructure that are essential to a strong economy and to making progress on the climate challenge, to name a few key priorities.

Addressing the challenge of climate change requires citizens, governments, and businesses to work together toward meaningful and achievable objectives. We are collectively leveraging the innovation and the strength of American businesses to find durable solutions that improve our environment, grow our economy, and leave the world better for generations to come. Building the smart, modern, resilient infrastructure of the future – whether new roads and bridges, new nuclear power plants, energy projects and energy storage facilities including those built with critical minerals, or new hydrogen pipelines – requires a transparent and efficient federal environmental review process.

Broader support for NEPA improvement is accelerating. Presidents from both parties have long identified the need for faster, more efficient permitting, issuing executive orders

[1] NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

and guidance to expedite federal decision-making and accelerate project delivery. Recent legislation introduced from members of both parties in the 117th Congress elevated the conversation concerning the need for permitting process improvements. These efforts, which are continuing in the 118th Congress, reflect the bipartisan desire to improve the federal decision-making process.

While many efforts seek to improve the NEPA review processes, CEQ's Interim Guidance will not serve the goals of NEPA or the need for an improved and efficient federal review process. Timely permitting processes are needed to successfully implement the investments of the 2021 Infrastructure Investment and Jobs Act, the CHIPS and Science Act of 2022, and the 2022 Inflation Reduction Act to facilitate critical projects. However, the Interim Guidance will likely increase the level of analysis that agencies will need to perform, reducing the efficiency of the environmental review process and delaying decision-making and potentially blocking critical investments both envisioned by these bills and otherwise needed. Numerous infrastructure projects – from development of domestic sources of critical minerals, to construction of transportation infrastructure, to development of projects necessary to provide our country and our allies with affordable and reliable energy – are priorities for the Administration and essential for the economy and national security.

As explained further below, on several fronts the Interim Guidance expands beyond the boundaries of NEPA: (1) imposing additional, unwarranted information requirements, from technical requirements to contemplating consideration of indirect impacts with no reasonable boundaries, (2) holding different types of projects to different standards of analysis, thereby picking winners and losers and distorting NEPA's application; and (3) skewing the analysis to favor a particular outcome by establishing a presumption that mitigation will be required and that certain types of alternatives will be considered. In fact, the Interim Guidance anticipates that federal agencies will view one particular type of environmental impacts – climate-related impacts – as the driver of decision-making, contrary to NEPA's goal of ensuring that a range of environmental concerns are considered *along with* social, economic, and other factors. And by directing the use of the Social Cost of Greenhouse Gases (SC-GHG) to assess impacts, CEQ sets aside fundamental precepts of NEPA reviews – scientific integrity and transparency. The SC-GHG estimates are inappropriate for the characterization of project-specific impacts, as is well-known to the federal government, which routinely articulated and defends this position in litigation.

The Coalition and the members we represent are committed to working constructively with CEQ to develop guidance that will properly assist federal agencies in considering the reasonably foreseeable impacts of their actions. However, the Interim Guidance does not further the critical need to advance projects essential to the United States' economy and security, nor does it adhere to the established, permissible limits of NEPA analysis.

I. SUMMARY

CEQ should withdraw the Interim Guidance. In addition, CEQ should immediately clarify – based on basic principles of fairness and due process and to avoid further delay in

the decision-making process – that the Interim Guidance does not apply to actions that are underway at the time of issuance. The Interim Guidance will not advance the Administration's stated goal of assisting federal agencies and improving the federal review process. It will create complexities, uncertainty, and additional burdens, and delays on a host of private, nonfederal governmental, and federal projects that are critical to the United States' economy.

As explained in detail below, the Interim Guidance has critical flaws. For example, the direction that agencies should consider certain types of alternatives for certain types of projects, such as a non-fossil-fuel based project alternative to a proposed fossil fuel-related project, finds no support in NEPA or CEQ's regulations. The Interim Guidance does not explain how such an approach to alternatives analysis would serve the decision-maker or the public when neither the agency assessing the project nor a project proponent has the ability to choose that alternative.

Also central to the Interim Guidance's construct is the incorrect notion that a federal agency should follow a limitless chain of upstream and downstream emissions indirectly related to a proposed action, at least for some types of projects, expanding the requirements of NEPA until they have no boundaries. The recommendation that the SC-GHG be used to analyze impacts from individual projects compounds this problem by encouraging the use of information that is well recognized for its inability to characterize impacts from specific projects -- as the government has argued and explained repeatedly in litigation.

For these reasons, and the other reasons addressed below, the Interim Guidance should be withdrawn.[2]

II. CEQ'S INTERIM GUIDANCE WILL GENERATE UNCERTAINTY, INCREASE INFORMATION REQUIREMENTS, AND SLOW PERMITTING REVIEWS FOR CRITICAL PROJECTS.

The Interim Guidance will further slow reviews of projects and other federal authorizations –among those are projects critical to the United States. First, because it takes immediate effect, the Interim Guidance has created immediate uncertainty for projects that are already undergoing NEPA review – even for those nearing agency authorization. CEQ

[2] CEQ characterizes its "Interim Guidance" as explaining "how agencies should apply NEPA principles …" by "recommending," "advising," "guiding," "discussing," and "outlining" various approaches and topics. 88 Fed. Reg. 1198. CEQ disclaims that the Interim Guidance mandates agency action in compliance with the Guidance. However, the Interim Guidance certainly walks close to, if not over, that line. The Administrative Procedure Act requires agencies to go through notice and comment rulemaking to promulgate an action binding on the agencies. *See, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). To the extent that CEQ or other White House components, through the language of the Interim Guidance itself or otherwise, have communicated that agencies are required to comply with the direction set forth in the Interim Guidance, the Administration would need to undertake a notice-and-comment rulemaking as a prerequisite to seeking to bind agencies in this fashion. In any event, modifying the NEPA regulations to this end, even if the procedural requirements of a notice-and-comment rulemaking are satisfied, would nonetheless be unlawful and inappropriate, for the reasons set forth in these comments.

compounds this problem by directing agencies to "consider applying this guidance to actions in the EIS or EA preparation stage if this would inform the consideration of alternatives or help address comments raised through the public comment process."[3] CEQ should clarify that the Interim Guidance does not apply to – and will not delay – the thousands of pending critical private sector actions for which federal authorizations were requested prior to the Interim Guidance. Changing federal requirements for these actions mid-stream is unreasonable.

Second, despite this Administration's recognition of the need to streamline federal reviews and permitting,[4] the Interim Guidance does the exact opposite by establishing significant new information and process requirements. For example, the Interim Guidance suggests amendments to agency NEPA implementing regulations "to ensure they are able to gather from applicants the information needed to analyze the climate change effects of their proposed actions."[5] The Interim Guidance also states that agencies may not "*necessarily*" need to "fund and conduct original climate change research to support their NEPA analyses," including potentially requiring project proponents to do the same, leaving open the possibility that agencies *should* do so.[6] This undercuts both this Administration's goals regarding efficient federal permitting and longstanding NEPA regulations that do not require pursuit of "incomplete information" if the overall cost of obtaining specific additional information is unreasonable or the means to obtain it is not known.[7] The arbitrary nature of CEQ's Interim Guidance in this regard is underscored by CEQ's invocation of the "rules of reason" and "proportionality," which the Interim Guidance applies to only some categories of projects.[8]

NEPA's purpose is not to "generate paperwork."[9] Yet, without appropriate boundaries, the NEPA process can and does result in generating information that is not meaningful to the public or to the ultimate agency decision. Starting with its 1978 rulemaking, CEQ recognized the need for boundaries. Indeed, the desired to reduce paperwork drove that first rulemaking."[10] The 1978 regulations discouraged the "accumulation of extraneous background data," put in place mechanisms to reduce paperwork and delay, directed attention to "significant issues," and set presumptive page

[3] 88 Fed. Reg. 1212.

[4] *See, e.g.*, The Biden-Harris Permitting Action Plan to Rebuild America's Infrastructure, Accelerate the Clean Energy Transition, Revitalize Communities and Create Jobs (https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf).

[5] 88 Fed. Reg. 1205, FN 90.

[6] 88 Fed. Reg. 1211 (emphasis added).

[7] 40 C.F.R. § 1502.21.

[8] *See, e.g.*, 88 Fed. Reg. 1201.

[9] 40 C.F.R. § 1500.1(c) (2019).

[10] 40 C.F.R. § 1500.2(b) (2019) (emphasis added); *see also* 43 Fed. Reg. 55978 (Nov. 29, 1978).

limits, among other provisions intended to focus the agency processes.[11] CEQ's Interim Guidance heads in the other direction.

III. THE INTERIM GUIDANCE SHOULD NOT ESTABLISH INAPPROPRIATE PRESUMPTIONS REGARDING EACH COMPONENT OF THE NEPA ANALYSIS

A. CEQ should not pre-determine the scope of reasonable alternatives.

The Interim Guidance risks pre-determining the outcome of an agency's NEPA review. It steers the NEPA process toward a substantive outcome that disadvantages certain types of projects by telling agencies that they should consider specific types of alternatives – such as non-fossil-fuel based alternative to a fossil fuel related project – and directing agencies to ignore the SC-GHG associated with the hypothetical alternative project.[12] However, NEPA is a procedural statute that does not give agencies the authority to dictate private activity, to change the project, or to disregard an applicant's project purpose. Nor does NEPA give CEQ the authority to dictate to agencies how many, and what types, of alternatives must be considered.

No authority gives CEQ the ability to direct consideration of alternatives to further a particular policy goal. But through the Interim Guidance, CEQ tells agencies to identify an alternative with the least net GHG emissions, which essentially dictates a new required alternative, in addition to "no action," and creates a determinative factor in the selection of alternatives for review – even if a project does not have such an alternative that meets the project's purpose and need. Nor does NEPA make a federal agency a planning authority – NEPA does not give agencies or CEQ the authority to use the review process to advance certain policies by designing the economy and the landscape.[13] Rather, a project's "purpose and need" drives the nature of reasonable alternatives to that project.[14] By clearly defining the purpose and need of a proposed federal action, agencies focus on "real alternatives," as contemplated by CEQ's 1978 rule, that respond to the nonfederal request for action. This includes the "no action" alternative where the agency does not take the requested federal action.[15]

An agency's development of the purpose and need must be reasonable, "and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."[16] Informed by the project's goals as well as the

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[11] 40 C.F.R. §§ 1500.2(b), 1500.4, 1500.5, 1501.7, 1502.7 (2019).

[12] 88 Fed. Reg. 1203.

[13] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (agencies have only those powers given to them by Congress and assertions of "'extravagant statutory power over the national economy'" are greeted with "'skepticism.'").

[14] 40 C.F.R. § 1502.13.

[15] 40 C.F.R. § 1502.14(c).

[16] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

statutory directive for action and the statutory constraints on the agency's decision, the agency's purpose and need for action defines the proper scope of the agency's analysis of alternatives, which must be feasible and reasonable.[17] Agencies should not analyze alternatives that do not meet an applicant's needs and that cannot be implemented by the applicant are not likely to be meaningful to the agency's decision-making process or to the public's understanding of the proposed federal action and are inappropriate under NEPA.[18]

For example, the directives regarding alternatives in the Interim Guidance are inconsistent with Congress' directives to the Federal Energy Regulatory Commission's ("FERC's") to "promote the orderly production of plentiful supplies of…natural gas at just and reasonable rates"[19] to issue certificate orders for interstate natural gas pipeline facilities "required by the present or future public convenience and necessity."[20] If FERC were to follow the Interim Guidance's instructions to identify and consider for implementation a non-fossil alternative to the natural gas project before it, FERC would be reviewing an alternative outside of its statutory role.[21] FERC is a creature of statute and must abide by "those authorities delegated to it by Congress."[22] While FERC's role under the NGA presents a stark example of the infirmities in the Interim Guidance, the situation at other agencies is similar.

Alternatives must be "technically and economically feasible and meet the purpose and need of a proposed action."[23] A requirement to consider an alternative that neither the

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[17] *Id*. at 195 ("CEQ regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable").

[18] *See Protect Our Parks Inc. v. Buttigieg*, 10 F.4th 758, 764 (7th Cir. 2021) (per curiam) ("Put another way, the agencies must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives.") (citing *Busey*); *Del. Riverkeeper Network v. U.S. Army Corps. of Eng'rs*, 869 F.3d 148, 157 (3d Cir. 2017) (stating that an alternatives analysis involves looking to "the range of projects that could achieve the same goal as the proposed project"); *Webster v. U.S. Dep't of Agric*., 685 F.3d 411, 422-24 (4th Cir. 2012) (providing that "[i]n deciding on the purposes and needs for a project, it is entirely appropriate for an agency to consider the applicant's needs and goals" and considering whether agency's purposes and needs were consistent with statutory authorization); *Coal. for Advancement of Reg'l Transp. v. Fed. Highway Admin*., 576 Fed. App'x. 477 (6th Cir. 2014) (quoting *Busey*, 938 F.2d at 196) ("Agencies should consider . . . 'the needs and goals of the parties involved' and the 'views of Congress' in developing a purpose and need statement); *HonoluluTraffic.com v. Federal Transit Admin*., 742 F.3d 1222, 1230 (9th Cir. 2014).

[19] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976).

[20] 15 U.S.C. 717 et seq. (2018). *See* Comments of the U.S. Chamber of Commerce on FERC's Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (April 25, 2022) (https://www.globalenergyinstitute.org/comments-us-chamber-commerce-fercs-certification-new-interstate-natural-gas-facilities-and).

[21] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976) ("NAACP").

[22] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotation omitted)

[23] CEQ, National Environmental Policy Act Implementing Regulations Revisions. 86 Fed. Reg. 55757, 55760 (Oct. 7, 2021) ("Proposed NEPA Phase 1 Rule") (recognizing that "agencies are guided by a rule of reason in identifying the reasonable alternatives that are technically and economically feasible and meet the purpose and need of a proposed action") (citing *HonoluluTraffic.com*, 742 F.3d at 1230).

nonfederal applicant nor the federal agency can implement, because it does not meet the need and purpose of a proposed action violates NEPA's rule of reason.[24] "An agency cannot redefine the goals of the proposal that arouses the call for action;" rather, "it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process."[25] Nor did Congress "expect agencies to determine for the applicant what the goals of the applicant's proposal should be."[26] Reasonable alternatives do not include those that are "remote and speculative possibilities."[27]

The Interim Guidance contravenes these basic and well-established principles.

B. The directive to include a limitless array of upstream and downstream emissions in consideration of indirect effects is contrary to NEPA

The Interim Guidance establishes a presumption that any GHG emissions in a chain of commerce are necessarily indirect effects of even a narrow action before the federal agency.[28] This expands the requirement to consider indirect effects without discernable limits, at least for fossil fuel-related projects, and will result in duplication of analysis and, possibly, mitigation as these same upstream or downstream projects are considered by other federal agencies with the more appropriate claim to authority and role. In so doing, CEQ imposes new requirements beyond the scope of the law and makes broad pronouncements regarding inquiries that are not necessarily fact-specific. Eliminating agency discretion to determine which potential impacts should be considered would

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[24] *E.g., City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) (finding that deferring meeting the project's need "while the [agency] considers alternatives that none unilaterally can bring to pass would more resemble coercion than justice").

[25] *Busey*, 938 F.2d at 199. *See also City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Busey*, 938 F.2d at 197-98) ("where a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project'").

[26] *City of Grapevine, Tex.*, 17 F.3d at 1506. *See also City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867, 869 (D.C. Cir. 1999) (stating that an agency is required only to consider alternatives that "bring about the ends of the federal action;" "a reasonable alternative is defined by reference to a project's objectives.") (internal quotation marks omitted). *See League of Wilderness Def.-Blue Mountains Biodiversity Project v. U.S. Forest Serv*., 689 F. 3d 1060, 1072-73 (9th Cir. 2012) (alternative of exempting large trees from removal did not meet need for fire suppression); *Rivers Unlimited v. U.S. DOT*, 533 F. Supp. 2d 1, 5 (D.D.C. 2008) (agency need not consider expansion of existing river crossing because it did not meet need to build new bridge); *Roosevelt Campobello Intern. Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982); *Envtl. Law & Pol'y Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683-84 (7th Cir. 2006).

[27] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978) (quoting *NRDC v. Norton*, 458 F.2d 827 (D.C. Cir. 1972). "To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." 435 U.S. at 551.

[28] *See* 88 Fed. Reg. 1204 (upstream and downstream indirect emissions must be considered as "reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves use or conveyance of a commodity or resource, and changes relating to the production or consumption of that resource.").

"trivialize NEPA."[29] CEQ also risks unintended consequences as some may urge that the same rationale should apply to other types of impacts, pushing a federal agency further beyond its expertise, authority, and practical ability.[30]

As the causal connection between a proposed action and potential upstream and downstream effects becomes more attenuated, attempts to consider what CEQ characterizes as "indirect effects" of individual projects becomes more speculative and less helpful for NEPA purposes. In cases spanning two decades, *Metropolitan Edison Company v. People Against Nuclear Energy*[31] and *Department of Transportation v. Public Citizen*, the Supreme Court rejected the speculative approach at the heart of the Interim Guidance.[32]

Most recently, in *Public Citizen*, the Court held that NEPA requires a "reasonably close causal relationship," akin to the "familiar doctrine of proximate cause from tort law," between an agency's proposed action and identified effects.[33] The unanimous *Public Citizen* Court did not break new ground with these conclusions[34] – rather, its opinion was rooted in *Metropolitan Edison*, issued two decades prior. In the *Public Citizen* case the Court explained that some effects "'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated."[35] These appropriate limits not only promote informed agency decision-making by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also protects agencies and private entities against baseless litigation over hypothetical, tangential, or de minimis environmental effects.

While upstream and downstream GHG emissions may bear some relationship to a federal action, that is not the test for inclusion in a NEPA review. Requiring consideration of effects far beyond the proximate causal chain of an agency's action would mislead the public about the effects of the agency's action and would burden the agency with producing

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[29] *Andrus v. Sierra Club*, 442 U.S. 347, 355 (1979).

[30] In the Interim Guidance, CEQ also expects each federal agency to become experts on worldwide energy markets by encouraging them to "provide more information on how a proposed action and its alternatives are projected to affect the resulting resource or energy mix, including resulting GHG emissions." 88 Fed. Reg. 1205. As part of this "substitution analysis" CEQ wants the agencies to consider relevant actions related to the "extraction, transportation, refining, combustion, or distribution of fossil fuels, for example." *Id.* Yet CEQ provides no guidance as to how federal agencies with no authority in these areas are to develop the necessary expertise to meet CEQ's expectations.

[31] 460 U.S. 766 (1983).

[32] 541 U.S. 752 (2004).

[33] *Id.* at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

[34] The Coalition disagrees with CEQ's past descriptions of the *Public Citizen* decision. CEQ has unpersuasively attempted to limit *Public Citizen* to its facts and avoids the discussion of proximate causation so central to the case. *See* Proposed NEPA Phase 1 Rule, 86 Fed. Reg. 55766.

[35] *Metro. Edison Co.*, 460 U.S. at 774.

documentation that could not be the basis for action.[36] Turning again to the FERC NGA example, FERC is not charged with and lacks sufficient expertise to conduct a broad assessment at the outermost bounds of a lengthy commercial chain.[37] Doing so would be duplicative of the efforts of state and other federal agencies specifically charged with reviewing emissions under environmental standards. Moreover, even if FERC attempted to analyze such emissions, FERC lacks the authority to regulate the emissions and mitigate the impacts.

Further, in the context of considering impacts, the Interim Guidance "encourages agencies to conduct substitution analysis" to explain how a proposed project would impact the "resulting resource or energy mix, including resulting GHG emissions."[38] In so doing, CEQ calls for highly speculative market analysis that a federal agency may not have the resources to perform or interpret in terms of the implications for any given proposed action before the agency.

CEQ's approach in the Interim Guidance violates NEPA's rule of reason and would subject the agency to litigation challenging its decision based on such effects. While the Interim Guidance repeatedly references the "rule of reason," CEQ makes no attempt to explain why it purports to require an agency to "evaluate an environmental effect where it 'has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions.'"[39]

C. NEPA does not give CEQ authority to encourage a particular outcome or require mitigation

CEQ has stepped outside of NEPA with the Interim Guidance by designing it to favor a particular outcome based on consideration of only one type of impact – climate impacts. It accomplishes this narrow focus by directing the use of the SC-GHG, by establishing a presumption that renewable energy projects do not have associated GHGs worth analyzing, by directing inclusion of a particular type of alternative, and, also, by encouraging agencies to mitigate "to the greatest extent possible," to include compensation.[40] While CEQ disclaims requiring the decision-maker to select an alternative with the lowest climate costs, it then

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[36] The Interim Guidance further complicates reviews by providing unclear direction on consideration of cumulative impacts to the extent it differs from consideration of GHG emissions as direct and indirect impacts. This confusion underscores the practicality of the 2020 NEPA Rule which eliminated separate impact categories. *See* Coalition "Comments on the Council on Environmental Quality's Proposed Rule 'National Environmental Policy Act Implementing Regulations Revisions,'" November 21, 2021 (Docket ID No. CEQ-2021-0002).

[37] The NGA limits federal regulation to "matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce." 15 U.S.C. 717(a). Activities preceding or succeeding jurisdictional transportation are left to the states or relevant federal regulators.

[38] 88 Fed. Reg. 1205.

[39] *See Public Citizen*, 541 U.S. at 767-770.

[40] 88 Fed. Reg. 1206.

pivots to state that "in line with the urgency of the climate crisis, agencies should use the information provided through the NEPA process to help inform decisions that align with climate change commitments and goals."[41] Moreover, the Interim Guidance seemingly creates an expectation for agencies to maximize GHG reductions with no assessment of the cost of doing so or the benefits foregone. These expectations and requirements find no support in the law.

Two fundamental principles are reflected in Section 102 of NEPA: (1) the statute requires agencies to analyze the environmental consequences of their actions;[42] and (2) "NEPA itself does not mandate particular results, but simply describes the necessary process."[43] Both principles are beyond doubt and have been repeated in thousands of instances over decades in agency documents, rulemakings, litigation, and court decisions from the federal District Courts to the U.S. Supreme Court.[44]

Although Section 101 of NEPA articulates broad forward-looking principles, those principles do not expand the authority delegated to federal agencies by Congress.[45] As recognized in numerous decisions, NEPA exists to inform an agency about the environmental impacts of proposed actions and requested authorizations, but it does not alter the limits of an agency's delegated authority from Congress.[46] NEPA neither expands an agency's statutory jurisdiction nor gives it the legal ability to take or compel action beyond the scope of its otherwise-established statutory mandate.[47]

Moreover, there is no basis in NEPA for agencies to craft their analysis around a single policy driver amongst the broad range of concerns related to ecological, historic, cultural, economic, social, or health impacts. To the contrary, in Section 101 of NEPA, Congress explained that its purpose was to "create and maintain conditions under which man and nature can exist in productive harmony, and *fulfill the social, economic, and other requirements* of present and future generations of Americans."[48] Section 101 specifically

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[41] 88 Fed. Reg. 1204.

[42] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (quoting *Cady v. Morton*, 458 F.2d 786, 838 (9th Cir. 1975)).

[43] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see Public Citizen*, 541 U.S. 756-57; *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curium); *Vermont. Yankee Nuclear Power Corp*, 435 U.S. at 558.

[44] *See*, e.g., *Public Citizen*, 541 U.S. at 756.

[45] *See Methow Valley*, 490 U.S. at 350; *Kleppe*, 427 U.S. at 409 (quoting Conference Report on NEPA, 115 Cong. Rec. 40416 (1969)) (NEPA section 102(2)(C) directs "'all agencies to assure consideration of the environmental impact of their actions in decisionmaking'").

[46] *See*, e.g., *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and concluding that NEPA is limited by the statutory authority delegated to agencies).

[47] *See Sierra Club*, 867 F.3d at 1373; *Int'l Brh. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (holding that an "agency lacks authority to impose the [NEPA] alternatives proposed by the Teamsters and those alternatives would go beyond the scope of the [program under review]").

[48] 42 U.S.C. § 4331(a) (emphasis added).

incorporates notions of practicability and "other essential considerations of national policy."[49] NEPA's policies are "supplementary" to agency authorities reflecting those "other essential considerations."[50] In other words, Congress intended to ensure environmental issues were considered *along with* other important issues as a means to furthering Congress's balanced policy goals. It never intended to elevate one particular environmental concern over all other considerations.

The role of mitigation under NEPA illustrates these concepts at work—NEPA itself does not provide agencies with the authority to require mitigation, but agencies can, and may independently and outside of NEPA be required to, consider mitigation within an agency's specific legal authorities. NEPA requires discussion of "any adverse environmental effects which cannot be avoided," and the NEPA rules anticipate considering mitigation but nowhere require it.[51] The Supreme Court has recognized the value of evaluating mitigation under NEPA, but has cautioned that requiring that a mitigation plan actually be developed and implemented would be inconsistent with NEPA's procedural limitations.[52] Of course, mitigation can play a crucial role and may lessen or avoid potentially significant environmental effects so as to both advance environmental goals and make the process more efficient, but NEPA does not provide authority for agencies to require mitigation; only statutes that convey such authority to agencies do so. In anticipation of potential mitigation that might be required under existing statutory authority, project proponents often present proposals to agencies that include measures to lessen or avoid potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS.[53]

D. NEPA is a neutral statute that requires an impartial, fact-based approach

The Coalition supports fair, neutral, and predictable federal reviews for all projects that require any sort of major federal action for implementation. However, CEQ's Interim Guidance recommends an inequitable analytical framework for review of certain infrastructure and renewable energy projects versus other types of projects. CEQ Chair Brenda Mallory put it plainly when she said: "These updated guidelines will provide greater

[49] 42 U.S.C. § 4331(b).

[50] 42 U.S.C. § 4335.

[51] 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14.

[52] *See Methow Valley*, 490 U.S. at 351-52 ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.") In short, "NEPA imposes no substantive requirement that mitigation measures actually be taken." *Id.* at 353 n.16.

[53] Council on Environmental Quality, *The National Environmental Policy Act, A Study of its Effectiveness after Twenty-Five Years* 19 (Jan. 1997) (noting that "mitigated FONSIs [findings of no significant impact]" were on the rise); CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43324 (Jul. 16, 2020) ("Final 2020 NEPA Rule") ("codif[ying] the practice of mitigated FONSIs," consistent with prior guidance); 40 C.F.R. § 1501.6 (governing mitigated FONSIs).

certainty and predictability for green infrastructure projects, help us grow our clean energy economy, and help fulfill President Biden's climate and infrastructure goals."[54] Thus, CEQ's stated intention is to advance a particular outcome, by picking winners and losers, rather than to develop a method of impartial review consistent with its authority under NEPA and its overall responsibility under settled administrative law principles.

The Interim Guidance accomplishes this goal not by making the NEPA environmental review process more efficient for *all* federal actions, but by pre-determining what types of projects should and should not receive streamlined NEPA review. The Interim Guidance does this by determining, prior to review of any particular project, what types of projects do and do not have greenhouse gas emissions associated with them such that a particular level of analysis is required by NEPA.[55] Nothing in NEPA allows CEQ to tell agencies *not* to consider impacts if they are "reasonably foreseeable" within the meaning of the law. Doing so will no doubt have unintended consequences including increasing litigation risk for a range of both public and private projects needing federal actions as agencies struggle to apply, and to justify, analyses under this Interim Guidance.

Whether certain infrastructure and renewable energy projects have reasonably foreseeable direct or indirect climate impacts would necessarily have to be assessed case-by-case, and NEPA does not allow CEQ to make the broad-based claims in the Interim Guidance. To the contrary the statute is neutral, and the CEQ guidance should be neutral in turn. The instruction in NEPA itself, as it applies to Environmental Impact Statements, is entirely neutral regarding both project-type and impact-type – and it is "proposed action" specific.[56]

In turn, the CEQ NEPA regulations are project-type and impact-type neutral, although they do define the universe of impacts that requires analysis. The regulations define "effects or impacts" as "changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable* …."[57] The Supreme Court has further defined "reasonably foreseeable" as requiring something more than "a 'but for' causal relationship …."[58] Instead,

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[54] Press Release, White House, Biden-Harris Administration Releases New Guidance to Disclose Climate Impacts in Environmental Reviews (Jan. 6, 2023) https://www.whitehouse.gov/ceq/news-updates/2023/01/06/biden-harris-administration-releases-new-guidance-to-disclose-climate-impacts-in-environmental-reviews/) .

[55] The Interim Guidance provides that "[a]bsent exceptional circumstances, the relative [sic] minor and short-term GHG emissions associated with construction of certain renewable energy projects, such as utility-scale solar and offshore wind, should not warrant a detailed analysis of lifetime GHG emissions." 88 Fed. Reg. 1202.

[56] NEPA directs consideration of "the environmental impact of the proposed action," "any environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the proposed action," "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

[57] 40 C.F.R. § 1508.1(g) (emphasis added).

[58] *Public Citizen*, 541 U.S. at 767.

effects must be considered when there is a "reasonably close causal relationship" between the proposed federal action and the impact.[59]

Neither NEPA nor its implementing regulations afford CEQ the ability to make the blanket determination that greenhouse gas emissions are not "reasonably foreseeable" effects of certain categories of projects – without regard to facts or context. Yet that is just what CEQ has done by stating that "[a]bsent exceptional circumstances" construction and operation of "certain renewable energy projects" will not warrant a "detailed analysis of lifetime GHG emissions."[60] This is despite its direction in the Interim Guidance, for example, to ensure consideration of GHG emissions in the entire commercial chain of a fossil fuel-related project. Furthermore, CEQ contradicts itself – on the one hand directing detailed attention to any incremental addition of GHGs and, on the other hand, stating that there is no need to analyze certain sources of GHGs.

CEQ fails to explain how this approach comports with its observation that "[c]limate change results from an increase in atmospheric GHG concentrations from the incremental addition of GHG emissions from a vast multitude of individual sources."[61] In other words, on the one hand CEQ takes the position that every GHG emission matters, while on the other hand pre-deciding that some do not. Furthermore, CEQ's preferred approach runs counter to the Interim Guidance's fundamental premise – that accurate and clear climate change analysis is required to help agencies make informed decisions that further Federal, State, Tribal, regional and local climate action goals.[62] The Interim Guidance establishes a presumption that certain types of projects' GHG emissions do not have meaningful impacts, of any sort, running counter to NEPA's "hard look" mandate.[63]

CEQ should revise the Interim Guidance to remove this direction. Each federal agency should decide, based on the facts and proposed action before it, if analysis of GHG emissions and attendant climate impacts, if any, is warranted and should appropriately justify its conclusions.[64] That is the approach that comports with the structure of NEPA which is focused on a particular "proposed action." CEQ's attempt to, in the words of Chair Mallory,

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[59] *Metro. Edison Co., 460 U.S. at 774*.

[60] 88 Fed. Reg. 1202.

[61] 88 Fed. Reg. 1201 (emphasis added).

[62] 88 Fed. Reg. 1197.

[63] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

[64] The Interim Guidance references the "principle of proportionality" and "rule of reason" to support its recommended one-size-fits-all approach. However, NEPA requires that each federal agency, not CEQ, determine the "reasonably foreseeable" impacts of a proposed federal action – and the public interest requires that each agency explain and document its evaluation.

"provide greater certainty and predictability" for one category of projects does not comport with the letter or spirit of the law.[65]

In fact, because NEPA litigation focuses on alleged failures to undertake adequate NEPA review, implementing the Interim Guidance will certainly increase NEPA litigation, because the Interim Guidance directs that some projects do not merit a hard look.[66] Thus, the disparate treatment of projects and impacts by the Interim Guidance could even be expected to delay some projects that the Administration conceivably would rather move forward.

IV. THE SOCIAL COST OF GREENHOUSE GASES IS NOT AN APPROPRIATE TOOL FOR PURPOSES OF ANALYZING POTENTIAL CLIMATE IMPACTS OF PROPOSED INFRASTRUCTURE PROJECTS AND OTHER FEDERAL ACTIONS UNDER NEPA

The SC-GHG estimates are not useful for agency decision-making under NEPA on individual permit decisions. Additional detail is provided in the attached comments submitted in June 2021 in response to a May 2021 notice by the Interagency Working Group on the SC-GHG ("IWG"), which cautioned against an expanded application of the estimates to NEPA reviews and underscored the need for a robust and transparent IWG process.[67]

A. The SC-GHG estimates were not designed for any purpose beyond a regulatory cost-benefit analysis and therefore are not appropriate for NEPA reviews.

The SC-GHG estimates were designed by the IWG for use in "regulatory impact analyses" ("RIAs") under E.O. 12866 as part of a full cost-benefit analysis for federal regulations — not as a way to focus only on costs as part of a NEPA analysis pertaining to individual proposed projects.[68] E.O. 13990, signed by President Biden, directed agencies to use SC-GHG estimates to "determine the social benefits of reducing greenhouse gas emissions *when conducting cost-benefit analyses*."[69] But the Interim Guidance expressly *disclaims* using them as part of a cost-benefit analysis, instead recommending use to

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[65] Press Release, White House, Biden-Harris Administration Releases New Guidance to Disclose Climate Impacts in Environmental Reviews (Jan. 6, 2023) (https://www.whitehouse.gov/ceq/news-updates/2023/01/06/biden-harris-administration-releases-new-guidance-to-disclose-climate-impacts-in-environmental-reviews/).

[66] For example, the Greenlink West transmission line is delayed due to BLM needing to do more analysis to account for the direct, indirect, and cumulative effects of the project. Ice age fossils slow massive power line for renewable energy - E&E News (eenews.net)

[67] Association comments to the Office of Mgmt. & Budget, RE: Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990" (June 21, 2021) ("June 2021 Coalition Comments") (https://www.globalenergyinstitute.org/sites/default/files/2021-06/Association%20Comments%20on%20OMB%20SC-GHG%20Notice%20-%206_21_2021.pdf).

[68] Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

[69] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (2021).

characterize impacts of individual projects, thus removing the estimates from the very context that was intended to make them at all useful to the federal government in the first place. In contrast to an RIA under E.O. 12866, NEPA and its implementing regulations specifically do *not* require a cost-benefit analysis.[70] Given the built-in limitations of the SC-GHG estimates, E.O. 13990 directed the IWG to consider whether there may be other applications of the SC-GHG estimates beyond the regulatory cost-benefit analysis.[71] The IWG was directed to do so by September 1, 2021, but no recommendations have been made public by the IWG.

The SC-GHG estimates do not provide a useful tool for assessing environmental impacts of individual proposed projects, since the SC-GHG estimates instead reflect a monetary value for a suite of potential global socio-economic impacts that are far removed in time and space from any proposed project. In fact, the application of SC-GHG values as a means of quantifying impacts for purposes of NEPA from a single highway, offshore energy project, or new CO_2 pipeline is inaccurate and cannot help an agency determine the "significance" of its action. Indeed, CEQ's NEPA regulations define "significance" as "usually depend[ing] upon the effects in the locale rather than the world as a whole," yet the majority of impacts swept into the SC-GHG estimates go to global effects.[72] The SC-GHG should not be portrayed as a mathematically precise calculation of a project's potential social cost, especially when they are compared against more concrete, immediate, and better understood project benefits – such as capital expenditures, jobs created, local tax revenues generated, or government royalty income. Using SC-GHG estimates does not inform an agency of the reasonably foreseeable environmental changes that could result from approving an individual project.

Rather, the SC-GHG estimates provide a dollar figure that reflects the monetized socioeconomic costs of "all climate change impacts" across the globe projected through year 2300. As such, the estimates do not reflect the incremental environmental impact, if any, of the GHG emissions caused by the specific proposed action before an agency for approval.[73] Estimates of such impacts, based as they are on modeling predictions that extend *nearly 300 years into the future*, present significant uncertainties that break the necessary causal chain of the effect of a proposed action under NEPA.[74] There is no standard methodology for

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[70] 40 C.F.R. § 1502.22 (agencies "need not" undertake a cost-benefit analysis). This CEQ regulatory directive is longstanding and well understood, undercutting CEQ's direction in the Interim Guidance to monetize only one type of cost without monetization of any sort of benefits. *See, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 79 (D.D.C. 2019); 40 C.F.R. § 1502.22 (agencies "need not" undertake a cost-benefit analysis).

[71] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (2021) (directing IWG to "provide recommendations [] regarding areas of decision-making, budgeting, and procurement by the Federal Government where the SCC, SCN, and SCM should be applied.").

[72] 40 C.F.R. § 1508.27.

[73] Interagency Working Group, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990* 2 (Feb. 2021) (hereinafter *IWG 2021 TSD*).

[74] 85 Fed. Reg. 43343-44; *see also Metro. Edison Co.,* 460 U.S. at 774 (effects would fall outside of NEPA if "the casual chain is too attenuated").

specifying the likely local impacts, if any, of a particular project's GHG emissions. Courts have upheld this rationale, in combination with other reasons, for an agency's decision not to use the SC-GHG estimates in a NEPA analysis.[75]

Furthermore, there is no understanding of what value might represent a "significant impact" on the environment for purposes of NEPA. Even the Interim Guidance recognizes that such a threshold cannot be set.[76] Given that there is no discernable method for a federal agency to determine if the SC-GHG represents a "significant impact," the metric has no place in NEPA's analytical framework.[77]

B. Use of the SC-GHG will distort decision-making for individual projects

NEPA requires consideration of reasonably foreseeable impacts of the proposed federal action on the environment, including impacts to land, water, natural resources, and cultural resources. NEPA analysis that focuses on SC-GHG estimates would distort the purpose of a balanced, complete, and robust analysis by narrowly focusing on the monetized estimates of GHG-related impacts, and giving more tangible weight to those potential impacts, without monetizing other impacts or the corresponding benefits of a project since NEPA does not require a cost benefit analysis.[78]

Such an approach would skew both public understanding of potential impacts of a project and substantive decision-making as other types of impacts and priorities would

[75] *EarthReports v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

[76] 88 Fed. Reg. 1206.

[77] CEQ's expansion of the use of the SC-GHG estimates is inappropriate and surprising given the federal government's longstanding, and largely successful, position in litigation that the SC-GHG need not be applied to specific decision-making. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 31 (D. D.C. 2019) (upholding BLM's explanation that the use of the SCC was too speculative for NEPA purposes); *Citizens for Health Community v. BLM*, 377 F. Supp. 3d 1223 (D. Colo. 2019) (upholding *BLM* rejection of the SCC as inappropriate for small, discrete projects); *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145 (D. Colo. 2018) (*BLM* was justified in providing a qualitative assessment of potential climate change impacts instead of using SCC); *EarthReports Inc.,* 828 F.3d at 956 (upholding FERC's rejection of the SCC), *Sierra Club v. FERC*, 672 Fed. Appx. 38 (D.C. Cir. 2016) (same). The government took this position precisely for the reasons explained in this letter – and nothing about the SC-GHG or its utility for specific decision-making has changed. *See, e.g., Appalachian Voices v. FERC,* No. 17-1271, 2019 WL 847199, *2 (D.C. Cir.) (FERC gave "several reasons" why it believed the Social Cost of Carbon tool "is not an appropriate measure of project-level climate change impacts and their significance under NEPA …. That is all this is required for NEPA purposes."). Where the government did not prevail, it had used a monetary cost-benefit analysis for other parts of its analysis or failed to explain itself adequately. *See*, *e.g., Vecinos para el Bienstar de la Comunidad Costera v. FERC,* 6 F.4th 1321 (D.C. Cir. 2021) (FERC not required to use social cost of carbon, but required to address whether it should do so or use another analytical framework); *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo.); *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017).

[78] *See, e.g., Appalachian Voices v. FERC,* No. 17-1271, 2019 WL 847199, *2 (D.C. Cir.) (FERC gave "several reasons" why it believed the Social Cost of Carbon tool "is not an appropriate measure of project-level climate change impacts and their significance under NEPA …. That is all this is required for NEPA purposes.").

suffer by virtue of being excluded from equitable comparison. Relying on such estimates to choose a particular alternative would be arbitrary.

Reliance on SC-GHG estimates elevates consideration of estimated GHG emissions over other potential impacts. This error is compounded by CEQ's direction, discussed further below, that a project's upstream and downstream GHGs be fully quantified and impacts monetized even where the proposed agency action does not afford the federal decision-maker control over those emissions.[79] Using SC-GHG estimates will overshadow consideration of other potential impacts that are not quantified in dollars and will bias choices among alternatives, focusing NEPA on a subset of issues whose effects are not attributable to a single project or activity.

While CEQ asserts that the SC-GHG will help the public understand the extent of a project's GHG-related impact, the opposite is true. The SC-GHG is imprecise and easily manipulated depending on a range of inputs subject to widely differing interpretations and without any accepted and reliable methods for choosing those inputs. Use of the SC-GHG therefore provides a false sense of accuracy and precision. Without proper context, the public and decisionmakers cannot understand the true cost of estimated GHG emissions, if any, associated with a proposed project. That understanding requires an understanding of the monetary costs of other potential impacts and the long-term societal monetary benefits that may be foregone if a project is not built or an alternative chosen only because of one set of potential impacts. For example, SC-GHG has no mechanism to analyze the cost to a community that foregoes a low-cost, reliable energy source because of an overall incrementally-small increase in GHGs that is costed out using a 300-year, global SC-GHG. No answer is provided in the Interim Guidance.

V. USE OF SC-GHG ESTIMATES IS FLAWED BECAUSE THE INPUTS ARE THE SUBJECT OF WIDELY DIFFERING POLICY-RELATED INTERPRETATIONS AND ASSUMPTIONS THE PROCESS OF ARRIVING AT THE SC-GHG LACKS TRANSPARENCY.

The usefulness of the SC-GHG estimates in NEPA analyses is further compromised by the lack of consensus surrounding the selection of the discount rates used and by the flawed process used to arrive at the numbers themselves. CEQ specifically refers the agencies to the work of the Inter-Agency Working Group ("IWG") in developing estimates of the social cost of carbon, methane, and nitrous oxide.[80] First, NEPA analyses must "not be based on misleading economic assumptions" such that the public's review of a project may be skewed.[81] The IWG estimates fail this test because the discount rates underpinning the SC-GHG estimates fail on both accounts, which is, in part, why courts have found agencies acted

[79] *Public Citizen*, 541 U.S. at 770 (holding 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, and thus, the effects need not be considered under NEPA).

[80] 88 Fed. Reg. 1202.

[81] *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996).

reasonably when declining to use the SC-GHG in previous NEPA analyses, citing the lack of consensus on discount rates. [82]

Second, CEQ should not recommend use of the IWG approach to estimating SC-GHG in NEPA analyses because the IWG released the estimates without any prior public notice and comment. The Coalition appreciates the comment period on the Technical Support Document provided on behalf of the IWG in May 2021; however, the IWG has yet to respond to the public comments that were submitted on the notice. Moreover, a lack of transparency surrounding the IWG process, among other limitations with the May 2021 notice, impaired the public's ability to meaningfully comment on the SC-GHG estimates. A brief filed by the Department of Justice in litigation challenging the interim SC-GHG estimates suggested that the IWG would propose revised final SC-GHG estimates in the spring of 2022, and that the public will be given an opportunity to comment, but that has not occurred.[83] Absent a clear understanding of the IWG process, the decisions it has made, and greater transparency, use of the SC-GHG deprives the public of the ability to provide meaningful comments on the estimates when they are used in agency analyses.[84] An open public process is critical to public trust in scientific information, analysis, and its real-world application. Any reliance on SC-GHG estimates as currently published is particularly inappropriate, as the federal government's SC-GHG estimates are all under review and subject to change.

Third, CEQ and agencies should refrain from relying on the IWG SC-GHG estimates because the IWG has thus far failed to heed the recommendations of the National Academy of Sciences ("NAS") regarding the IWG's process and methodology for developing a SCC. The NAS completed its review and issued recommendations including caveats concerning the limitations of the estimates. NAS raised concerns about the scope of the application of the estimates due to the type of models used for their calculation making it challenging to estimate impacts at the national level let alone at the project level. Guiding agencies to reply upon the SC-GHG estimates opens them up to even greater speculation that is inconsistent with NEPA's directive to use the best available science for environmental review.

Fourth, the SC-GHG estimates conflict, without appropriate explanation, with longstanding agency guidance on information quality and regulatory analyses. The estimates fail to follow the Office of Management and Budget's ("OMB") "Final Information Quality Bulletin for Peer Review," which requires "influential scientific information," such as the modeling inputs and assumptions underlying the SC-GHG estimates, to be subject to rigorous peer review. Further, the lack of a formal uncertainty analysis and the improper

[82] *See e.g., EarthReports*, 828 F.3d at 956.

[83] *See* Def. Supp. Br. 23, La. v. Biden, No. 2:21-cv-01074 (W.D. La. filed Jan. 21, 2022).

[84] The Coalition further caution that the limited process afforded to the public to comment on earlier SC-GHG estimates does not and cannot serve as an adequate substitute for the need to provide a full opportunity for public input on the current estimates. For instance, the comment period on the 2013 SCC estimates did not reflect a meaningful opportunity for public comment at the time, in part, given the lack of peer review and public access to information underpinning the estimates. That comment period also predated the IWG's release of the social cost of methane and nitrous oxide estimates, which were not independently subject to public input. Comment periods on rules using previous estimates were similarly inadequate on a legal and policy basis.

characterization of uncertainty with the SC-GHG estimates deviate from OMB's final "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" pursuant to the Information Quality Act. Such analysis is necessary to inform a full and adequate peer review and to enable rational agency decision-making concerning the potential use of the SC-GHG estimates.

VI. CONCLUSION

The Coalition appreciates the opportunity to provide comments on the Interim Guidance and urges CEQ to withdraw and revise it consistent with these comments. Doing so would prevent violations of NEPA and of administrative law requirements and would facilitate efficient federal reviews of authorizations needed for projects critical to the United States.

American Chemistry Council
American Coke and Coal Chemicals Institute
American Council for Capital Formation
American Council of Engineering Companies
American Exploration & Production Council
American Forestry Research Council
American Fuel & Petrochemicals Manufacturers
American Gas Association
American Iron and Steel Institute
American Petroleum Institute
American Pipeline Contractors Association
American Public Gas Association
American Road & Transportation Builders Association
Associated Builders and Contractors
Associated General Contractors of America
Center for LNG
Energy Equipment & Infrastructure Alliance
The Fertilizer Institute
GPA Midstream Association
GPSA Association
Liquid Energy Pipeline Association
Interstate Natural Gas Association of America
National Asphalt Pavement Association
Natural Gas Supply Association
National Mining Association
National Ocean Industries Association
National Stone, Sand, and Gravel Association
Power and Communication Contractors Association
U.S. Chamber of Commerce