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Council on Environmental Quality  
730 Jackson Place NW  
Washington, DC 20503

1800 M Street NW  
Suite 900 North  
Washington, DC  
20036

202.457.0480 office  
202.457.0486 fax  
afpm.org

## **AFPM COMMENTS ON CEQ'S INTERIM GUIDANCE ON NEPA CONSIDERATION OF GHG EMISSIONS AND CLIMATE CHANGE, DOCKET NO. CEQ-2022-0005**

The American Fuel & Petrochemical Manufacturers (“AFPM”) submits these comments on the Council on Environmental Quality’s (“CEQ”) interim guidance “National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change”<sup>1</sup> (“Interim Guidance”), Docket No. CEQ-2022-0005.

### **I. Interest of AFPM**

AFPM is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. AFPM is the leading trade association representing the makers of the fuels that keep us moving, the manufacturers of the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. To receive necessary materials and to move their essential products to satisfy growing demand, AFPM members depend on the timely development of, and enhancements to, transportation infrastructure such as pipelines. These transportation infrastructure projects are subject to multiple layers of federal, state, and local regulation, covering both construction and operation. At the federal level, the long and costly permitting processes for these projects typically trigger National Environmental Policy Act (“NEPA”) review.

Properly scoped NEPA analyses allow AFPM members to complete critical and much-needed infrastructure projects while ensuring the lawful consideration of related environmental impacts. But such consideration must be appropriately tailored to the circumstances of a particular project, based on scientifically sound information, and grounded in the law.

While AFPM joins the U.S. Chamber of Commerce coalition’s comments on the Interim Guidance, we write separately to explain why several aspects of the Interim Guidance are particularly concerning for AFPM and its members. NEPA reviews have grown encyclopedic in the decades since NEPA was enacted, adding time, cost, and other burdens without adding to the public’s knowledge of project impacts. CEQ should be seeking to streamline NEPA reviews, not expand them. Yet, CEQ one-sidedly seeks to streamline NEPA for renewable energy projects, while significantly expanding NEPA reviews for all other projects, especially fossil fuel projects. We respectfully request that CEQ reconsider its Interim Guidance in light of the comments provided below.

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<sup>1</sup> 88 Fed. Reg. 1196 (Jan. 9, 2023).



## II. Background

Federal agencies have routinely and excessively delayed NEPA review of projects, which have “increased project costs and blocked the American people from the full benefits of increased infrastructure investments.”<sup>2</sup> CEQ’s Interim Guidance threatens to exacerbate these problems that CEQ has known about for decades. All-but-mandatory climate analysis of projects threatens to hijack NEPA and add to unnecessary delays and costs without enhancing public understanding. It also will exacerbate project opponents using NEPA to increase costs and delay for projects—especially fossil fuel-related projects—so that a project could be cancelled as uneconomical. There are numerous examples of this strategy in action, through NEPA and other litigation.<sup>3</sup>

As a result, agencies and project applicants have expanded the scope and depth of their NEPA analyses as protective measures against these routine lawsuits. This has proved to be no panacea, however, as lengthy records create their own risks. The more expansive the issues and evidence considered by an agency, the greater the chance for omissions, analytical errors, or conclusory judgments in the analysis. Similarly, lengthier records are themselves costly and impose delay.<sup>4</sup> The only solution is that “the Federal Government, as a whole, must change the way it processes environmental reviews”<sup>5</sup> by eliminating uncertainty and directing agencies to produce concise and straightforward environmental analyses.

## III. Comments

NEPA requires federal agencies to identify and analyze the reasonably foreseeable environmental impacts caused by a “major Federal actions *significantly* affecting the quality of the human environment.”<sup>6</sup> CEQ should not encourage expansive agency reviews of federal actions that are not major, or federal actions that would not significantly affect the environment. Like CEQ’s 2016 Guidance,<sup>7</sup> CEQ is impermissibly stretching the boundaries of what could reasonably be considered indirect effects of a proposed project.

### A. CEQ’s Strong Presumption that GHG Emissions Need to be Considered and Quantified in Virtually Every Circumstance is Unreasonable

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Exec. Order No. 13,766, 82 Fed. Reg. 8657, 8657 (Jan. 30, 2017); Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,463 (Aug. 24, 2017) (“More efficient and effective Federal infrastructure decisions can transform our economy.”).

<sup>3</sup> [Keystone XL](#); [Atlantic Coast Pipeline](#); [PennEast Pipeline](#); [Byhalia Pipeline](#); [Jordan Cove Terminal](#); [Oakland Bulk and Oversized Terminal](#); [Millennium Bulk Terminal](#). Numerous lawsuits were filed, many of which are still ongoing, against the Mountain Valley Pipeline. Project opponents are also wielding NEPA in an attempt to shut down the Dakota Access Pipeline—an *operating* pipeline.

<sup>4</sup> See National Association of Environmental Professionals, *2021 Annual NEPA Report* 8-9 (July 2022) (noting the 2021 average time to complete EISs—around 4.5 years—was 1.4 years longer than in the year 2000).

<sup>5</sup> 82 Fed. Reg. at 40,463.

<sup>6</sup> 42 U.S.C. § 4332(C) (emphasis added).

<sup>7</sup> U.S. Council on Environmental Quality, Final Guidance for Federal Department and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016).



CEQ's Interim Guidance establishes a strong presumption that greenhouse gas ("GHG") emissions need to be considered and quantified in virtually every circumstance. But this ignores well-established case law ruling that the proper scope of an agency's NEPA analysis (e.g., what constitutes an indirect effect) is done on a case-by-case basis.<sup>8</sup>

CEQ claims to be following the "rule of reason" of NEPA analysis, when in fact it is applying a rule of inclusion. CEQ all-but-demands that GHG emissions categorically (1) are quantifiable; (2) have quantifiable social costs; and (3) are significant if there is any increase. By doing so, CEQ transforms NEPA review into an outcome-driven process, wherein agencies' role is to perform extensive climate reviews of all fossil fuel projects that could require uneconomical mitigation or project denials.

CEQ states that agencies should not forego quantifying GHG emissions because the project's contribution is only a small fraction of global or domestic GHG emissions. CEQ is thereby directing agencies to ignore the significance (or lack thereof) of a project's GHG emissions, contrary to NEPA's statutory requirements and thus beyond CEQ's delegated authority. CEQ also treats GHGs and climate considerations as more important to focus on than other environmental impacts, ignoring that agencies "need not give greater consideration to potential effects from GHG emissions than to other potential effects"<sup>9</sup> and that impacts are discussed "in proportion to their significance."<sup>10</sup> Federal agencies must offer genuine justifications for decisions and the NEPA statutory text clearly requires a line to be drawn on how any GHG emissions associated with a major federal action "significantly" affect the environment, particularly if, in the absence of the U.S.-based project moving forward, a similar, and possibly less efficient, project will be constructed outside of the U.S.

CEQ should clarify that agencies should not consider effects that are otherwise causally remote from the proposed action or speculative, which can include effects from upstream or downstream emissions from midstream infrastructure like oil and gas pipelines.<sup>11</sup> CEQ could craft far more useful guidance by helping agencies better understand reasonable foreseeability and causation through examples and general directives. For instance, CEQ should recognize that the Federal Energy Regulatory Commission ("FERC") could reasonably adopt a default policy that pipeline projects do not typically produce indirect effects related to upstream or downstream emissions, which could be rebutted in case-specific circumstances.

For upstream emissions, FERC has explained that "environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as

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<sup>8</sup> *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir 2019) (rejecting claim that "emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project").

<sup>9</sup> Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019).

<sup>10</sup> 40 C.F.R. § 1502.2(b).

<sup>11</sup> See *Birckhead*, 925 F.3d at 517-18, 520-21 (affirming FERC's decision that upstream and downstream GHG emissions were not indirect effects because of a lack of sufficient causation and reasonable foreseeability); *Tenn. Gas Pipeline Co.*, 163 FERC ¶ 61,190, PP 55-66 (2018).



contemplated by CEQ regulations.”<sup>12</sup> For downstream emissions, FERC similarly has recognized that, typically, downstream GHG emissions from midstream infrastructure will not constitute an indirect effect because, in most instances, it will not be possible to identify where and what the end use of natural gas will be or what volume of natural gas ultimately will be shipped through the pipeline.<sup>13</sup>

FERC’s policies are both lawful and well-informed. Natural gas, like other resources (*e.g.*, crude oil) is a global commodity that will come to market even in the absence of a given pipeline project.<sup>14</sup> Given the way the natural gas market is structured today—particularly with the development of secondary markets—in many if not most cases a pipeline operator will not know the ultimate destination of transported gas nor its end use. In fact, while electricity generation is a major use for natural gas, a significant portion of the nation’s natural gas supply is used for industrial purposes that do not involve combustion (*e.g.*, fertilizer manufacturing, chemical feedstocks, etc.).<sup>15</sup> Thus, FERC generally cannot establish a sufficient causal link between changes in downstream GHG emissions and a particular pipeline project.<sup>16</sup> Further, even assuming there was some link, it is unlikely that FERC could develop reliable projections of the theoretical change given the numerous and constantly changing variables involved. It follows that downstream GHG emissions typically are not indirect effects of new pipeline projects and therefore do not require either quantitative or qualitative consideration in NEPA analyses.

In practice, then, NEPA analysis of GHG emissions for pipeline projects—including quantification consistent with the approach discussed below—typically should be limited to those emissions directly attributable to the development and operation of the pipeline in the project area.

## **B. The Guidance is a Rule Subject to the APA**

In *Appalachian Power Co. v. EPA*, the D.C. Circuit held that a Clean Air Act permitting memorandum characterized as “guidance” was a *de facto* legislative rule, “reflecting a settled agency position which has legal consequences” for state permitting agencies and regulated

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<sup>12</sup> *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, P 59 (2018).

<sup>13</sup> *See id.* at P 62.

<sup>14</sup> *See, e.g., Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, P 41 (“Production and end-use combustion of natural gas will likely occur regardless of the Commission’s approval of the New Market Project.”); *id.* at P 60 (stating that the fact that natural gas infrastructure is a part of the supply chain to bring gas to market does not mean that approval of a particular pipeline project will cause or induce the effect of additional shale gas production); *id.* at P 63 (“Companies will continue to negotiate for and find natural gas supplies; end use consumption of natural gas will occur regardless of whether the project before us is approved.”); *id.* at P 66 (“The Commission has found that downstream local distribution companies will continue to negotiate for and find natural gas supplies.”).

<sup>15</sup> *See, e.g.*, U.S. Energy Information Agency, Use of Natural Gas, *available at* <https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php>.

<sup>16</sup> The D.C. Circuit has recognized that there is typically an insufficient causal connection between FERC’s authorization of midstream projects and GHG emissions that may result from upstream production activities or downstream end-use activities over which FERC has no authority. *See, e.g., Sierra Club*, 827 F.3d at 47; *Sierra Club*, 827 F.3d at 68; *EarthReports, Inc.*, 828 F.3d at 952; *cf. Sierra Club v. FERC*, 867 F.3d 1357, 1380 (D.C. Cir. 2017) (identifying an exceptional circumstance).



entities.<sup>17</sup> Because the Guidance directs agencies, inter alia, to ignore the significance of a project's GHG emissions, the Guidance is a de facto legislative rule under the APA. For this reason, the Guidance has legal consequences for permitting agencies and regulated parties pursuing infrastructure projects, notwithstanding CEQ's protestations.<sup>18</sup> Accordingly, CEQ must withdraw the interim guidance and, if it decides to pursue this policy, re-propose the guidance in the form of a rulemaking and citing lawful statutory authority.

### **C. Encouraging Agencies to Ignore NEPA's and Agencies' Limits Puts Projects at Risk of Litigation**

Directing agencies to act contrary to NEPA or to exceed their statutory limits unnecessarily puts projects in legal risk due to flawed NEPA reviews that will not withstand judicial scrutiny.

Agencies should not be analyzing impacts that fall outside the scope of their respective statutory purview. Nor should they be analyzing impacts subject to a separate federal permitting process that ensure environmental impacts are managed at an acceptance level. This means agencies are not required to consider upstream or downstream GHG emissions if the agency has no jurisdiction to act on those emissions, even when those emissions otherwise would have a sufficient causal connection to the proposed action and would be reasonably foreseeable.<sup>19</sup>

Likewise, agencies are not authorized by NEPA to mandate particular results. The Supreme Court has explained that "[i]t is now well settled that NEPA itself does not mandate particular results, but prescribes the necessary process."<sup>20</sup> CEQ's strong encouragement of mitigation wherever possible flouts that limitation.

Similarly, CEQ's recommendation that agencies consider specific types of alternatives, such as "clean energy alternatives to proposed fossil fuel-related projects,"<sup>21</sup> completely disregards an applicant's purpose and goals of their project. Agencies should not manipulate a project in an effort to achieve the Administration's or the agency's objectives. Applicants may have no expertise or experience, for example, in implementing clean energy projects, and should not be penalized for choosing to implement projects in which they specialize. Agencies need only consider "reasonable alternatives to the proposed action,"<sup>22</sup> and the project proponent's "purpose and need" is—and should remain—the reference point for determining reasonable alternatives.<sup>23</sup>

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<sup>17</sup> 208 F.3d 1015, 1021–23 (D.C. Cir. 2000).

<sup>18</sup> See 88 Fed. Reg. at 1197 (arguing the guidance is not a rule or regulation).

<sup>19</sup> See, e.g., *Public Citizen*, 541 U.S. at 770; *Birckhead*, 925 F.3d at 519; *Sierra Club*, 827 F.3d at 47; *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955-56 (D.C. Cir. 2016).

<sup>20</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>21</sup> 88 Fed. Reg. at 1203.

<sup>22</sup> 40 C.F.R. § 1502.14(a).

<sup>23</sup> *Citizen Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("[NEPA's] rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them.").



CEQ should not be encouraging agencies to flout these limitations. Encouraging agencies to consider policy-directed and unrealistic alternatives reflects that CEQ's assumptions regarding fossil fuel infrastructure projects are significantly flawed.

The products manufactured by AFPM members are produced, transported, bought, and sold in a global market. CEQ admonishes agencies to perform a resource substitution analysis to determine whether upstream products would still be produced or transported to market.<sup>24</sup> CEQ also directs this analysis to consider whether downstream products would still be consumed, in the absence of the project. In both cases, CEQ states that the assumption that they would be defies basic supply and demand.

But CEQ ignores that for infrastructure projects, there are several modes of getting products from point A to point B, from rail to pipelines to tanker trucks to ships. It is not unreasonable for agencies to conclude that without a new pipeline, it would often be transported by a different pipeline or one of the other alternatives.

And because pipeline projects often displace other transportation modes, these oil and gas projects may provide emissions *reductions* and other environmental benefits compared to transporting oil and gas by rail, barge, or tanker truck. Moreover, because pipeline projects transport globally-demanded and exchanged products, the "no action" alternative may actually *increase* emissions to the extent that the product would be supplied from or consumed in areas that lack emission-related regulations as stringent as the U.S.

For natural gas infrastructure, in particular, if a pipeline is not approved, the result may be an actual increase in global GHG emissions to the extent consumers would have to turn to higher carbon-intensive emissions to produce energy.

In sum, CEQ appears to assume that fossil fuel infrastructure necessarily increases GHG emissions, when in many circumstances the opposite may be true.

#### **IV. Conclusion**

AFPM members depend on transportation infrastructure like pipelines and rail. Cost-effective and timely development and enhancement of this infrastructure requires streamlining environmental reviews under NEPA, which have metastasized over the previous decades. Unfortunately, CEQ's Interim Guidance will only encourage further delays, costs, and, ultimately, cancellation of much-needed infrastructure projects rather than providing an orderly procedure by which the public can become informed about projects' environmental impacts.

Consistent with its past comments to CEQ, AFPM encourages the agency to continue to proactively improve the NEPA process by, among other things, increasing agency accountability, reducing costs and time associated with environmental reviews, and providing predictability in review schedules. AFPM shares CEQ's commitment to environmental stewardship and, based on this shared commitment, submits these comments and will continue to look for opportunities to work together with CEQ on this and other issues in the future.

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<sup>24</sup> 88 Fed. Reg. at 1205.



Respectfully submitted,

A handwritten signature in black ink, appearing to read 'TK', with a long horizontal flourish extending to the right.

Tyler Kubik  
Counsel  
[tkubik@afpm.org](mailto:tkubik@afpm.org)