

May 21, 2010

To: The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, NW
Washington, DC 20503

From: Nancy Briscoe
Senior Counsel Environmental Compliance and Safety
NOAA Office of General Counsel
Room 15109, SSMC III
1315 East-West Highway
Silver Spring, MD 20910

RE: National Oceanic and Atmospheric Administration Office of General Counsel comments on the Council on Environmental Quality Draft Guidance, "*Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*" and "*NEPA Mitigation and Monitoring*"

The National Oceanic and Atmospheric Administration (NOAA), Office of General Counsel, appreciates the opportunity to comment on the Council on Environmental Quality (CEQ) Draft Guidance "*Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*" (hereinafter referred to as "Climate Change guidance") and "*NEPA Mitigation and Monitoring*" (hereinafter referred to as "Mitigation guidance"). We applaud CEQ's efforts to provide guidance and consistency on these two important issues. In accordance with the procedures set forth in Federal Register Notice Vol. 75, No. 35 (Tuesday, February 23, 2010), the NOAA Office of General Counsel submits the following comments for your consideration. Please be advised that NOAA's Office of Program Planning and Implementation will be submitting additional NOAA comments under separate cover.

DRAFT GUIDANCE FOR LIMATE CHANGE GUIDANCE

P1. bottom of page. Can examples be given of what would be considered direct (e.g., emissions from a power plant designed to burn coal) v. indirect (e.g., emissions from all cars anticipated to take advantage of the opportunity to drive on a federal highway)? Is CEQ providing any indicators of how much indirect emissions should trigger a similar level of analysis?

P. 2. first paragraph. It may be useful to explain this distinction more explicitly: e.g., finding that an action has emissions at this level does not necessarily trigger a need to prepare an EIS.

P. 2 first full paragraph. The draft says "CEQ does not propose to make this guidance applicable to Federal land and resource management actions, but seeks public comment on the appropriate means of assessing the GHG emissions and sequestration that are affected by Federal land and

resource management decisions." It seems appropriate that the other broad set of issues addressed by the draft guidance -- when and how agencies should incorporate consideration of climate change on the affected environment and project design (adaptation to climate change) -- should likewise apply to resource management decisions. It would be odd to suggest that federal agencies need to consider the ongoing impacts of climate change only when designing physical projects, but could ignore them when considering other kinds of projects affecting species or lands subject to climate change related impacts. It is further unclear why CEQ would not provide guidance to resource management agencies, when the principles addressed in the guidance are the same. CEQ should clarify what the foregoing text means..

P. 2 second full paragraph.

- If the 25,000 tons of direct emissions/year threshold is not a threshold for significance, does CEQ plan to offer any guidance on how to determine what is significant? How should indirect emissions be considered?
- Is CEQ suggesting here that it is highly unlikely any proposed federal action should be considered as having "significant" effects in terms of GHG emissions, since any one action is unlikely to be large enough to come close to dominating global emissions? Or is the point instead that it is inappropriate to think of significance in that way but rather to understand that even small actions can be cumulatively significant? The latter approach would seem most consistent with the CEQ regulatory definition of "significantly" at 1508.27(b)(7).

P. 2 third full paragraph, third line. Replace "is affecting or could affect" with "may interact with."

P. 3 first paragraph, line 10. Insert after "However," "...given the limits of currently available scientific models and techniques to reliably isolate or explain linkages from particular emissions sources to particular climatological impacts, ..."

P. 3 first paragraph, line 10. Since the capabilities of available scientific techniques are improving rapidly, it is important to emphasize that, as these techniques improve, the best available science may soon allow drawing these causal connections. CEQ should make clear that the standard is what the best scientific techniques offer at the time the proposed federal action is being considered, not what is feasible at this point in time. When better tools become available, relying on GHG direct emission amounts as a proxy may no longer be the best approach.

P.3 first full paragraph, line 11. Insert "but not limited to" after "include." Should make clear this is not an exhaustive list of the kinds of federal actions warranting analysis.

P.3 first full paragraph, line 14. More appropriately than what? Than programmatic evaluation? Since the discussion so far has seemed to be about action-specific analysis, this transition confusing.

P. 3 footnote 2. If EPA modifies this threshold under its reporting requirements, for all or for

particular categories of sources, would CEQ's intent be that the new number would supersede the 25,000 tons/year figure used here?

P. 4. second bullet. Define Scope 1. Many readers may not be familiar with what "Scope 1" means.

P. 5 first paragraph, line 6. What principles should be applied to evaluating indirect effects? And how should such effects factor into the determination of significance"? Would 25,000 tons/yr of emissions caused only indirectly warrant careful analysis?

p. 5 first full paragraph, last line. May want to be clear that the purpose of discussing State and local goals is for context only, not to suggest that federal actions are necessarily subject to those limits.

P. 6 header III. Rather than speaking of the effects of climate change "on a proposed action," it makes more sense to talk about the impacts of climate change on particular aspects relevant to the project, such as the affected environment, project design considerations, etc. Climate change cannot really have an effect on a proposal. Delete "ON" and replace with "AS RELEVANT TO."

P. 7 first full paragraph

- Line 4. Insert "the degree of" before term "significance."
- Line 8. More clarity is needed as to why it makes sense to limit analysis of climate-change related impacts to only those that coincide with the type of impacts the action itself will have. For example, isn't it possible or even likely that climate change may impact some aspect of the environment in which the project will be located in a way that is relevant for evaluating project design, but does not have a nexus to the type of effects that will stem from the project itself? For example, if sea level is expected to rise in an area, the project design may need to be changed from what it would otherwise be, although it is unlikely the project itself will impact sea level rise.

P. 7 second full paragraph

- Line 1. Replace "on" with "as relevant to."
- Line 9. Does this qualification, not present in the February draft, belong in this part of the document? This sounds like a discussion more about the effects flowing from the proposed action rather than a discussion of climate-change related effects that will occur in the environment with or without the proposed action.

P. 7 third full paragraph, line 2: Might it be possible that an action expected to occur only over the short term could need to take into account effects of climate change already being observed? Projects with long-term utility or in areas sensitive to climate-change should not be the only ones for which climate-change related impacts are considered relevant.

P. 9 second full paragraph, line 5. Isn't the consideration of alternatives required even where effects would not be "significant"? If so, it probably doesn't make sense to speak of the

alternatives being "at least less significant" than the proposal.

p. 11 Conclusion, last line. Is it feasible to expect that the guidance can be updated to reflect each significant development in science, or law, or policy (much less all three)? This statement could be read to imply that agencies do not have an obligation to improve their NEPA analyses automatically as what is the "best available" information progresses, but rather can await for CEQ to say when the time has come to begin to go beyond the general published reports to more site-specific study.

Overall, we suggest the memo include case studies or examples of how the guidance is envisioned to actually work.

DRAFT GUIDANCE FOR NEPA MITIGATION AND MONITORING

P. 2 fourth full paragraph.

- This paragraph should clarify that the mitigation requirement applies to all "adverse" environmental impacts. The current draft presently refers to "environmental impacts" without qualifying them as "adverse." In addition, it does not distinguish between significant and less than significant impacts. Many NEPA practitioners are under the impression that identification of mitigation is only required for significant adverse impacts. This view is contrary to the CEQ regulations which require in the Record of Decision inclusion of a statement as to whether "all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 CFR 1505.2(c).
- This paragraph, in its discussion of sections of the CEQ regulations and NEPA applicable to mitigation, fails to cite 40 CFR 1502.16(f) which requires in the discussion of environmental consequences "[m]eans to mitigate adverse environmental effects if not fully covered under 1502.14(f)."

P. 3 footnote 2. Recommend including a brief statement and reference to 40 CFR 1501.4(e)(2) that mitigated FONSI's may be subject to the requirement for 30 day public review.

P. 4 under "Mitigation Failure", A(4) the second paragraph briefly discusses what is expected of an agency when there's a substantial mitigation failure and there is no remaining agency action but it does not discuss what is expected of an agency when there is a continuing action. These two paragraphs could use further explanation.

P. 6 third full paragraph. The explanation of NEPA's incorporation of Freedom of Information Act (FOIA) does not appear to track with the statute. NEPA provides that agencies must make available to the public, as provided for by FOIA (5 USC 552) EISs, public comments and the comments of appropriate Federal, state and local agencies. NEPA does not address the public availability and release of monitoring and enforcement records. It is fine for CEQ to recommend

approaches to making such documents available to the public, but the guidance should not be based on CEQ's interpretation of the applicability of FOIA. CEQ should leave procedures for compliance with FOIA to the respective federal agencies.

Pp. 7-8 "Case Study". While the Army approach to mitigation and monitoring is assuredly a good one, a case study seems inappropriate for the guidance at hand. It tends to create confusion and detracts from the effectiveness of the base guidance. We recommend deleting it or simply providing passing reference in a footnote to Army regulations and their utility as an example of appropriate agency practice.

DRAFT