

May 24, 2010

VIA U.S. & ELECTRONIC MAIL

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

**Subject: National Environmental Policy Act Draft Guidance Documents Entitled
“Consideration of the Effects of Climate Change and Greenhouse Gas
Emissions” & “NEPA Mitigation and Monitoring”**

Dear Mr. Boling:

On February 18, the Council on Environmental Quality (“CEQ”) issued three draft National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321, *et seq.* (“NEPA”) guidance documents for public review and comment. Public notice of the draft documents was made in the February 23, 2010 issue of the *Federal Register*, and comments on two of the three guidance documents were requested by May 24, 2010. 75 Fed. Reg. 8045 (February 23, 2010). These comments respond to those two guidance documents (collectively referred to hereafter as the “NEPA Guidance”) and individually referred to as follows:

1. “Consideration of the Effects of Climate Change and Greenhouse Gas Emissions;” (referred to as the “Climate Change Guidance”); and
2. “NEPA Mitigation and Monitoring (referred to as the “Mitigation Guidance”).”

These comments on the NEPA Guidance are submitted on behalf of Oglethorpe Power Corporation (“Oglethorpe Power” or the “Corporation”).¹ As an owner and/or operator of numerous electric utility generating units in the State of Georgia, and as a significant borrower of funds guaranteed by the Rural Utilities Service and made by the Federal Financing Bank, Oglethorpe Power has a keen interest in ensuring that CEQ makes informed

¹ Oglethorpe Power is the largest electric generation cooperative in the United States in terms of kilowatt-hour sales. Through its Electric Membership Corporation (“EMC”) member/owners, Oglethorpe Power generates electric power for approximately 65% of the land area of the State of Georgia. Oglethorpe Power serves 39 of the 42 EMCs in Georgia, which in turn provide electricity to approximately 4.1 million Georgians.

and sensible decisions about the issues raised in its draft NEPA Guidance which, if finalized, will be considered by Federal agencies as they review and possibly revise their respective NEPA programs, so as to evaluate proposals for Federal actions (some of which may involve the Corporation) under NEPA.

I. Introduction.

CEQ proposed its draft Climate Change Guidance to help explain how agencies of the Federal Government should analyze the environmental effects of greenhouse gas (“GHG”)² emissions and climate change when describing the environmental effects of a proposed agency action in accordance with §102 of NEPA and CEQ’s implementing regulations, the latter found at 40 C.F.R. Parts 1500-1508. Reasoning that these requirements apply to GHG emissions and climate change impacts, CEQ concludes in the guidance that climate change issues arise when considering:

1. The effects of GHG emissions from proposed (or alternative) actions; and
2. The relationship climate change effects may have on the proposed (or alternative) actions.

As part of the NEPA analyses, CEQ proposes to advise Federal agencies to consider whether examination of the “direct and indirect” GHG emissions from proposed actions may provide meaningful information to decision-makers and the public. Regarding the effects climate change may have on the design of a proposed (or alternative) action, CEQ advises agencies to set reasonable “spatial and temporal” boundaries for the assessment, focusing on those aspects of climate change that may lead to alterations in the impacts, sustainability, vulnerability and design of the proposed (or alternative) actions. Significantly, CEQ cautions that agencies should recognize the scientific limits of their ability to accurately predict the effects of climate change, avoiding efforts to analyze “wholly speculative” effects. CEQ reminds action agencies that they need not undertake exorbitant research or analysis of projected climate change impacts, but may instead summarize and incorporate the relevant scientific literature.

CEQ also proposes to provide guidance for Federal agencies on the mitigation and monitoring of activities undertaken in a NEPA process. Noting that the Mitigation Guidance is intended to reinforce existing requirements and responsibilities, CEQ states that mitigation includes avoiding, minimizing, rectifying, reducing or compensating for adverse environmental impacts associated with the triggering Federal actions. CEQ proposes that those mitigation measures adopted by the agency be identified as binding commitments to the extent consistent with agency authority, and that a monitoring program be created (or strengthened) to ensure that effective mitigation measures are implemented.

² For purposes of these comments, we refer to CEQ’s definition of GHGs which includes carbon dioxide (“CO₂”), methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

II. Use of a Specific Carbon Dioxide – Equivalent (“CO₂-e”) Emissions Threshold Limit.

CEQ proposes a threshold of 25,000 tons per year (“tpy”) CO₂-e³ be used by agencies to assess whether an analysis of the examined actions’ direct and indirect GHG emissions is in order. However, even for actions that have annual direct emissions less than 25,000 tpy CO₂-e, CEQ encourages federal agencies to consider whether the actions’ long-term emissions should require a “similar analysis.” While CEQ attempts to clarify that the 25,000 tpy level is not an indicator of a threshold for significance under NEPA, it proposes that the 25,000 tpy be used as an indicator of a minimum level that may “warrant some description” in the NEPA analysis. Thus, it is unclear exactly what the significance, if any, is of an action’s GHG emissions exceeding the 25,000 tpy level. CEQ should reconsider its guidance, and should clarify how an emissions threshold for GHGs is to be used by agencies as they conduct their responsibilities under NEPA.

CEQ bases its 25,000 tpy threshold on the use of this level as a reporting threshold in the U.S. Environmental Protection Agency’s (“EPA’s”) recently-promulgated GHG reporting rule.⁴ We note, however, that while this was the same emissions threshold proposed last year in EPA’s “tailoring rule,”⁵ this threshold was increased to 75,000 tpy when EPA finalized that proposal on May 13, 2010. To the extent calling out a specific threshold is even advisable, CEQ should consider increasing the 25,000 tpy “indicator level” to match the level chosen in the tailoring rule, which will itself be used to determine whether a physical change or change in the method of operation constitutes a major stationary source that triggers permitting and project review requirements under the Prevention of Significant Deterioration program of the Clean Air Act.

Perhaps the greater concern is the use of any specific emissions threshold to gauge the appropriateness of an agency’s response under NEPA. CEQ should be careful to avoid having this level (or any level for that matter) of GHG emissions characterized as an indicator of a threshold of “significant effects.” GHGs, like CO₂, are very ubiquitous pollutants. Unlike other pollutants addressed in the Clean Air Act, CO₂ has no local or regional effects (such as the production of ozone by emissions of oxides of nitrogen and volatile organic compounds). Instead, CO₂ must be assessed using complex global mathematical models with limited resolution at the regional and local level. In fact, while available evidence supports the theory that CO₂ concentrations have increased in the earth’s atmosphere in the last century, much discussion and study is still underway to better understand the implications of these increased concentrations. Determining the effect GHG emissions are having on climate is a difficult proposition, which the globe’s most preeminent scientists continue to study. Given the scientific

³ Generally defined as the number of metric tons of CO₂ emissions with the same global warming potential as one metric ton of another GHG. *See* 74 Fed. Reg. 56260, 56384 (Oct. 30, 2009).

⁴ 74 Fed. Reg. 56260 (Oct. 30, 2009).

⁵ 74 Fed. Reg. 55292 (Oct. 27, 2009).

uncertainty surrounding our current ability to predict the possible impacts of a specific project on future climate change or the impact of future climate change on a specific project, Oglethorpe Power believes it is debatable whether additional CEQ guidance related to this issue adds any real value to the NEPA process. However, if CEQ concludes that it needs to provide guidance now to federal agencies on evaluating the GHG emissions from a regulated action, great care should be taken in advising agencies on the assessment of effects (a cornerstone of the NEPA program) from GHG emissions. While it may not be unreasonable to instruct agencies to quantify GHG emissions from an action and to discuss alternatives that could reduce such emissions, discussing any links between such emissions and climate change, envisioned by CEQ on page 3 of the Climate Change Guidance, even qualitatively, is at best problematic. CEQ could consider waiting until science has established more firm links between GHG emissions and any possible consequent effects on climate before requiring Federal agencies to discuss the aspects of an examined action, even on a qualitative basis. In fact, to illustrate the point, it will be difficult to discuss the phenomenon on any basis other than a qualitative one. As CEQ notes, it will not be useful under the NEPA analysis to attempt to link any specific climatological change(s) or environmental impact(s) to a particular project or specific set of emissions, as any linkage is at this point “difficult to isolate and ... understand.”

In this same vein, CEQ should be careful to avoid any notion by a Federal agency that project GHG emissions above a specified threshold are substantial or significant enough to require the development of an environmental assessment or environmental impact statement. The science of climate change simply is not advanced enough at this time to direct agencies to use any particular level of emissions to conclude that a more in-depth examination or environmental analysis for a proposed project is appropriate. Thus, while an examination of proposed and alternative actions could legitimately focus on a compilation of GHG emissions for the various scenarios, it would seem that any discussion of the quantitative or specific effects – including the cumulative effects – of GHG emissions from a discrete project will be difficult or impossible. Related to this approach is CEQ’s instruction that agencies apply the rule of reason to their analyses, to ensure that an emphasis is placed on the issues deserving of study and to avoid useless boiler-plate documentation.

CEQ also proposes that agencies determine whether current or projected effects of climate change on proposals for agency action warrant consideration. CEQ reasons that climate change can affect the environment of a proposed action in a variety of ways. For example, CEQ states that climate change can affect the integrity of a development or a structure by exposing it to a greater risk of floods, storm surges or higher temperatures. Moreover, CEQ states that climate changes can increase the vulnerability of a resource, ecosystem or human community, causing a proposed action to result in consequences more damaging than prior NEPA experience might indicate. An example used in this regard is an industrial process withdrawing significant amounts of water from a stream that is dwindling because of decreased snow pack in mountains. Finally, CEQ states that climate change can magnify the “damaging strength” of certain effects of a proposed action.

As CEQ notes, NEPA’s rule of reason bounds the level of detail needed in an environmental effects analysis, keeping a focus on those aspects of the environment affected by

the proposed action and alternatives.⁶ A close causal relationship is needed to trigger the obligation of an agency to discuss the particular effects of an examined action. Where significant uncertainties exist between the contemplated actions and any resulting effects, the discussion should consider the extent to which the current state of science of climate change supports hard and fast conclusions about possible effects. This remains true, even where the agency attempts to temper forecasts using the filter of “reasonably foreseeable” future conditions.

III. Mitigation and Monitoring

In its Draft Mitigation Guidance, CEQ presupposes an obligation on Federal agencies through NEPA to mitigate the environmental effects of examined actions, and to create a binding monitoring program to assess the performance of adopted mitigation measures. While courts have held that the requirement that an agency discuss mitigation measures is implicit in NEPA and CEQ regulations, there is a distinction between a requirement that mitigation be discussed in sufficient detail to ensure the 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. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). NEPA does not require a particular substantive result, but instead prescribes a process. *Okanogan Highlands Alliance v. Williams*, 1999 U.S. Dist. LEXIS 4068 (D. Or. 1999). While an environmental impact statement must include a discussion of measures to mitigate the adverse affects of a proposed action, *Oregon National Resources Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987), environmental assessments do not require a discussion of mitigation strategies. *Akiak Native Community v. U.S. Postal Service*, 213 F.3d 1140 (9th Cir. 2000).

CEQ should ensure that its guidance does not confuse the obligation to discuss mitigation with an obligation to impose mitigation. While NEPA’s processes often lead to the development of alternatives in mitigation strategies, agencies are not required to mitigate the effects of their activities. They are only required to consider mitigation as part of the NEPA decisionmaking process. As CEQ notes, any mitigation measures identified as binding commitments will depend on sources of agency authority independent of NEPA, which is a procedural statute. While NEPA is designed to ensure that agency decisions are environmentally conscious, requiring that the agency gather, study and disseminate information concerning the project’s environmental consequences, NEPA contains no substantive directives for agency decisions. NEPA is strictly a procedural statute, mandating only that federal agencies follow a particular process. *City of Ridgeland v. National Park Service*, 253 F. Supp. 2d 880 (D. Miss. 2002).

⁶ We note also that a rule of reason applies to the consideration and discussion of alternatives. *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, 435 U.S. 519 (1978) (only feasible alternatives must be considered; remote and conjectural alternatives may be ignored); *Natural Resources Defense Council v. Morton*, 458 Fed. 2d 827 (D.C. Circuit 1972) (federal agencies need not discuss alternatives that are remote and speculative).

In the Mitigation Guidance, CEQ seeks comment on the scope of a Federal agency's ability to respond in situations where prescribed mitigation is not implemented, or is ineffective (termed "mitigation failure.") As a general matter, CEQ regulations provide that supplements must be prepared if there are significant changes made to a project which are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns. Such requirements apply, of course, only to major Federal actions that significantly affect the environment, *i.e.*, to situations that require the development of an environmental impact statement. In addition, as CEQ notes, another limiting factor on the ability to revisit an agency decision is whether any Federal action remains to serve as the basis for NEPA jurisdiction. If not, then any remaining opportunity to address an issue like mitigation failure within the bounds of NEPA is foreclosed, as jurisdiction over the agency's review of the action has expired. The extent or duration of a federal action is an issue that CEQ should consider carefully in the context of this guidance, as the duration will vary depending on the nature of the action itself. Duration will likely vary on a case-by-case basis. For example, if the trigger for Federal NEPA jurisdiction is a Clean Water Act § 404 dredge and fill permit issued by the U.S. Army Corps of Engineers, the life of the Federal action would be limited, at least, by the life of the activities that required permitting in the first instance; once those activities have been completed, the basis for asserting regulatory jurisdiction has expired. The duration of other Federal actions may not be as apparent, but likewise have limiting characteristics. Approvals for loan guaranties, for example, might be a Federal action only at the time such approvals are issued. In any case, a rule of reason should be considered in any approach that might use the failure of certain mitigation measures to second-guess the issuance of an environmental assessment and accompanying finding of no significant impact. CEQ should be careful not to create guidance that increases the potential for endless reviews of Federal actions once the involved agencies have considered the environmental effects of their actions in an appropriate deliberative process involving all interested parties, *i.e.*, once NEPA has been met and decisions for moving forward have been made.

IV. The Role of Guidance in the NEPA Process.

The central goal of NEPA is to utilize a systematic interdisciplinary approach to integrate science and environmental design with decision-making that accounts for the environmental consequences of agency decisions. CEQ's responsibility is to identify and develop appropriate consultation and decision-making procedures for Federal agencies as they implement their NEPA responsibilities. Therefore, CEQ should emphasize that the Climate Change Guidance and the Mitigation Guidance are just that – guidance – and not enforceable rules. While CEQ guidance should be always be considered by Federal agencies, NEPA charges all agencies to utilize sound science and proper design when establishing environmental procedures, and when making environmental decisions. Although CEQ guidance is relevant, all agencies remain directly responsible for development and implementation of their own NEPA regulations. NEPA envisions independent agency authority when formulating and implementing environmental review programs.

Oglethorpe Power appreciates the opportunity to comment on CEQ's NEPA Guidance. If you have any questions about these comments, please do not hesitate me at 770-270-7166.

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Sincerely,



Douglas J. Fuller
Vice President, Director of Environmental Affairs

cc: Mr. Charles W. Whitney, Esq. (OPC)
Mr. Clarence D. Mitchell (OPC)
Mr. Clay Robbins (OPC)
Mr. Boyd Vaughan (OPC)
Graham Holden, Esq. (Jones Day)

ATI-2422818v4