March 25, 2015

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

Re: Revised Draft Guidance for Federal Departments and Agencies Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed.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

Dear Mr. Greczmiel:

The American Chemistry Council, American Farm Bureau Federation, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Highway Users Alliance, American Iron and Steel Institute, American Petroleum Institute, American Public Power Association, American Wood Council, America's Natural Gas Alliance, Association of Oil Pipe Lines, Corn Refiners Association, Council of Industrial Boiler Owners, Gas Processors Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Rural Electric Cooperative Association, Natural Gas Supply Association, Portland Cement Association, The Fertilizer Institute, and the U.S. Chamber of Commerce (collectively, "the Associations")[1] appreciate the opportunity to submit the following comments in response to the Council on Environmental Quality's ("CEQ's") Revised Draft Guidance for Federal Departments and Agencies

[1] A description of each Association is included in Appendix A.

Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (December 24, 2014) ("Revised Draft Guidance").

Introduction and Summary of Comments

The Associations represent the United States' leading energy, agriculture, manufacturing, and transportation sectors that form the backbone of the nation's industrial ability to grow our economy and provide jobs in an environmentally-sustainable and energy-efficient manner. Projects and activities by the Associations' members that realize these joint goals of economic growth and environmental stewardship often require permits, licenses, or approvals from federal agencies and, hence, may be subject to review under the National Environmental Policy Act ("NEPA"). The Associations' members thus have a strong interest in ensuring that the agencies implement NEPA and achieve its goals effectively, efficiently, and consistently with established regulations and case law.

As more than forty years of experience with implementing NEPA have demonstrated, overly broad NEPA reviews can add significant and unreasonable costs and delays to projects and can, in turn, challenge the viability of projects that grow the economy, promote favorable environmental outcomes, and further energy development at home. As the nation works to recover from the recent economic recession, it is essential that government programs impacting economic development in the United States—including NEPA—are implemented in a manner that supports and does not hinder growth. Many of the key drivers of economic growth in this country are impacted by NEPA reviews. For example, increased oil and gas development—which is leading directly towards U.S. energy independence—is frequently subject to NEPA reviews, both for development on federal land as well as other infrastructure needed to transport and process products. Likewise, the manufacturing renaissance is inextricably tied to feedstock supply chains and infrastructure projects that are subject to NEPA review. Thus, adopting guidance that goes beyond the scope of NEPA imposes additional burdens on permitting agencies and significant delays on project applicants that could threaten to slow or even stop our ongoing economic recovery. Moreover, adopting unduly broad guidance could impede implementation of other federal policies, including those designed to reduce GHG emissions. Thus, to the extent CEQ elects to proceed with final guidance, it is imperative that the guidance stay firmly within the scope of the NEPA statute and CEQ's implementing regulations and does not unduly threaten economic growth, energy independence, or implementation of other environmental programs.

The unique nature of GHG emissions and climate change presents fundamentally different considerations than any other environmental issue and, in turn, bars a one-size-fits-all approach for all agencies addressing all projects in all situations as CEQ proposes. As CEQ explains in the Revised Draft Guidance, "GHG emissions from an individual agency action will have small, if any, potential climate change effects. Government action occurs incrementally, program-by-program, and climate impacts are not attributable to any single action, but are exacerbated by a series of smaller decisions, including decisions made by the government." 79 Fed. Reg. at 77,825. Because the contribution of any project with GHG emissions is minute relative to the atmospheric concentration of GHGs and relative to the GHG emissions from other natural and anthropogenic sources and because the effects of GHG emissions are global in

nature, it is virtually impossible to draw connections between a specific federal action and specific climate change effects.

As a result, consistent with decades of NEPA precedent and practice, it is critical that any guidance that addresses the evaluation of GHG emissions under NEPA provides appropriate and necessary limits to ensure that agencies remain focused on the specific proposed action before them. CEQ must ensure that its guidance to agencies appropriately prohibits them from venturing beyond the scope of what NEPA requires by restricting the evaluation of GHG emissions and related climate change effects that are so unrelated, speculative, or remote that they are unable to inform the agency's ultimate decision regarding a specific proposed action. Without such necessary limits in place, addressing GHG emissions has the risk of increasing uncertainty regarding critical government approvals and decisions. This will dramatically increase the time and cost of NEPA reviews into a boundless exercise that will overwhelm the agencies, cause unworkable delays to important projects, lead to legal and litigation burdens for all parties, and as such damage the international competitiveness of the Associations' members.

Despite the unique challenges posed by GHG emissions and climate change, at a minimum, CEQ must ensure that any guidance incorporating climate change considerations into NEPA analyses is consistent with NEPA itself, CEQ's implementing regulations, and the significant case law that has evolved in the courts over four decades. The distinct challenges of climate change do not authorize CEQ and the agencies to act inconsistently with long-established foundational principles of NEPA review that have been enforced consistently by the courts. Guidance documents serve a limited purpose of explaining and interpreting laws and regulations. They should have no binding legal effect and cannot be used as a tool to amend, revise, or repeal existing regulations without following proper administrative procedures. Where guidance goes too far and effectively expands existing interpretations of laws and regulations, it is unlawful and should not be issued or followed. Thus, it is critical that any final CEQ guidance for consideration of GHG emissions is grounded in existing CEQ regulations, particularly those that define the scope of appropriate NEPA reviews.

In light of these guiding principles, the Associations, who share decades of experience working with NEPA in a broad range of industry sectors subject to the law, have several serious concerns that we believe render the Revised Draft Guidance inconsistent with NEPA, its implementing regulations and established case law.

- In light of these serious deficiencies identified below by the Associations, the Revised Draft Guidance should be withdrawn.

- In no case should any final guidance issued by CEQ be applied to ongoing NEPA reviews that have proceeded past the scoping stage.

- CEQ's proposal to include upstream and downstream emissions in NEPA analyses significantly risks being applied in a manner that is inconsistent with NEPA regulations. The NEPA regulations are designed to limit and bound the scope of NEPA review by ensuring that potential environmental effects that are too remote, too speculative, or beyond the scope of the deciding agency's decision making authority are not included as indirect or cumulative effects.

- CEQ's proposal inappropriately expands the scope of the NEPA review of GHG emissions and climate change effects by including transnational environmental effects.

- CEQ's proposal inappropriately expands the scope of the Revised Draft Guidance to land and resource management actions. In doing so, CEQ fails to address the unique and diverse challenges that such NEPA reviews face, overlooks the paralyzing effect this one-size-fits-all guidance will have on the land management decision-making process both procedurally and from legal challenges, and exacerbates the risk that NEPA challenges will prevent agencies from fulfilling their statutory mandates to promote and authorize multiple, diverse uses of federal land. CEQ should expressly exclude land and resource management actions from any final guidance, as it initially proposed to do in 2010.

- CEQ's proposal inappropriately directs agencies to include the draft Office of Management and Budget ("OMB") social cost of carbon estimates when seeking to monetize costs and benefits in NEPA reviews.

- By directing agencies to incorporate climate change mitigation measures and monitoring into final decision documents as part of their NEPA review, CEQ's proposal exceeds the scope of NEPA and CEQ's implementing regulations.

- CEQ's proposal inappropriately sets an arbitrary 25,000 tons CO_2e/year threshold for including GHG emissions in NEPA reviews.

In light of these serious deficiencies, the Associations urge CEQ to withdraw the Revised Draft Guidance at the earliest opportunity. Withdrawing the Revised Draft Guidance will avoid any confusion related to the applicable requirements for addressing potential climate change impacts in a NEPA review. Withdrawing the Revised Draft Guidance will not impede the agencies' ability to use their discretion to continue to address all potential environmental impacts of a proposed action in a manner that is consistent with NEPA, CEQ's implementing regulations, and NEPA case law.

While the Associations believe that withdrawal of the Revised Draft Guidance is the best option available to CEQ at this time, we offer CEQ a number of suggestions for improvement if CEQ moves forward with revised or final guidance. These suggestions are presented as alternative arguments and are not intended to waive the Associations' primary position that the Revised Draft Guidance should be withdrawn.[2] At the outset, it is essential that CEQ ensure that any final guidance be fully consistent with CEQ's implementing regulations and case law and does not venture beyond the scope of what NEPA allows by incorporating GHG emissions and potential climate change impacts that cannot be attributed to the proposed action. To avoid duplicative efforts and unnecessary delay, CEQ should clarify that any final guidance will not be applicable to proposed actions that have already begun the scoping process. CEQ should also clarify that, consistent with existing NEPA law, transnational impacts should not be evaluated in NEPA reviews. Further, CEQ should exclude land and resource management actions from any

[2] Nor is this intended to waive any future arguments the Associations or their members may have regarding the Revised Draft Guidance or any of the provisions contained in it.

final guidance and proceed, if at all, with sector-specific guidance tailored to the unique challenges posed by land and resource management decisions. In addition, EPA should eliminate or, at a minimum, substantially increase the presumptive threshold for quantifying GHG emissions and allow agencies more discretion to determine whether qualitative or quantitative approaches to evaluating potential climate change effects should be employed. Finally, we urge CEQ and affected agencies to work with the Associations to develop approaches to address GHG emissions and climate change effects that focus on identifying the proper scope of NEPA review, establish a clear process and timeline for NEPA reviews, and avoid the creation of overwhelming burdens, delays, and litigation risk to new projects.

NEPA Overview

A fundamental tenet of NEPA is that it is a procedural statute. NEPA does not mandate any particular outcome or require an agency to select an alternative that has the fewest environmental consequences or the lowest GHG emissions. NEPA simply requires that an agency take a "hard look" at the environmental consequences of any major federal action it is undertaking. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Once the procedural elements of NEPA have been satisfied and the environmental consequences of a proposed action have been given the required scrutiny, an agency may issue its decision relying on the factors and considerations specified in the statute under which it is acting.

When evaluating a proposed agency action under NEPA, an agency can begin by conducting an Environmental Assessment ("EA"), which is a concise environmental analysis that allows an agency to evaluate the significance of any potential environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.9. If the agency determines that the environmental impacts of a proposed action will not be significant, it can issue a Finding of No Significant Impact ("FONSI") and conclude its NEPA obligations. *Id.* §§ 1508.9, 13. However, if an agency determines—either before or after conducting an EA—that a project's environmental impacts will be significant, it must prepare an Environmental Impact Statement ("EIS") that addresses, among other things, "the environmental impact of the proposed action" and "alternatives to the proposed action." 42 U.S.C. § 4332(C).

To complete this analysis, an agency must consider the direct, indirect, and cumulative effects of the proposed action 40 C.F.R. §§ 1508.7, 8. However, the scope of such a review is appropriately limited by the requirement that such effects be "reasonably foreseeable" and, for indirect effects, proximately caused by the proposed action under review. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). In addition, the agency must evaluate mitigation measures which, if implemented, could reduce the environmental impact of the proposed action. *Id.* §§ 1508.20, 25.

Importantly, as discussed in more detail below, the scope of a NEPA analysis is not unlimited, and only that information that is useful to the environmental decision maker need be presented. *See Dep't. of Trans. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) ("Rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision maker. An agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant

actions"). Thus, despite its lack of substantive requirements, these procedural obligations, coupled with opportunities for public involvement, *see* 40 C.F.R. Part 1503, ensure that agencies are fully informed of potential environmental impacts before taking final action with respect to a proposed federal action. As discussed below, CEQ's Revised Draft Guidance fundamentally and unlawfully alters several of these current statutory and regulatory obligations.

I. CEQ Must Withdraw the Revised Draft Guidance

At the outset, the Associations urge CEQ to withdraw the Revised Draft Guidance. As explained in the sections that follow, the Revised Draft Guidance is inconsistent with NEPA and CEQ regulations and, if implemented, would unlawfully expand the scope of NEPA analyses. For example, the Revised Draft Guidance could be interpreted to expand the indirect and cumulative impacts that an agency must consider under NEPA and to require agencies to adopt and enforce mitigation measures as part of the NEPA process. In doing so, the Revised Draft Guidance would effectively transform NEPA from a procedural statute into a substantive one that directs agencies to adopt alternatives with the lowest GHG emissions. Thus it is critical that CEQ take action to ensure that neither agencies nor the courts utilize CEQ's Revised Draft Guidance in a manner that unlawfully contradicts NEPA or CEQ's implementing regulations. In the alternative, if CEQ determines that guidance is necessary, the Associations urge CEQ to prepare a second revised draft that addresses the Associations' concerns below in a manner that is consistent with NEPA and CEQ's implementing regulations and abandons a one-size-fits-all approach to addressing GHGs under NEPA for all federal actions—including land and resource management actions—that fails to consider the diverse scenarios under which NEPA can be triggered.

A. Addressing Climate Change Impact Under NEPA

GHG emissions and climate change are fundamentally different from other types of emissions and environmental impacts that agencies are required to evaluate in NEPA analyses. As EPA stated in its endangerment determination for GHG emissions from mobile sources, "greenhouse gas emissions emitted from the United States (or from any other region of the world) become globally well-mixed, such that it would not be meaningful to define the air pollution as greenhouse gas concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world." 74 Fed. Reg. 66,496, 66,517 (Dec. 15, 2009). As a result, the GHG concentration at a given location cannot be traced to a specific source or subset of sources, but instead is the product of the incremental contributions of all sources of GHG emissions across the planet. As CEQ acknowledges, "GHG emissions from an individual agency action will have small, if any, potential climate change effects." 79 Fed. Reg. 77,825.

The global nature of GHG emissions and climate change has important implications for NEPA analyses and the evaluation of the potential environmental effects of a proposed federal action. As CEQ and other federal agencies have recognized:

> climate change presents a problem that the United States alone cannot solve. Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from

> enough to avoid substantial climate change. Other countries would also need to take action to reduce emissions if significant changes in global climate are to be avoided.

Interagency Working Group on Social Cost of Carbon, Technical Support Document: - Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866 at 10 (Feb. 2010) (hereinafter "2010 Social Cost of Carbon Report"). In light of the comparative magnitude of GHG emissions from other sources, it is virtually impossible to isolate and evaluate the climate change impact of GHG emissions from a single federal action, let alone the incremental differences in climate change impacts between various alternatives. Because individual projects make such small contributions to atmospheric GHG concentrations, it is difficult to imagine a scenario where the potential climate change impacts of a given project could be considered "significant" in any meaningful way. While CEQ suggests in the Revised Draft Guidance that this is simply "a statement about the nature of the climate change challenge," 79 Fed. Reg. at 77,825, it is nonetheless a factual and accurate statement that cannot simply be ignored as agencies assess obligations under NEPA.

In recognition of these unique challenges posed by the global nature of GHG emissions and climate change, CEQ has proposed to use GHG emissions as a "proxy for assessing a proposed action's climate change impacts." 79 Fed. Reg. at 77,825. It is important to recognize, however, the limitations with respect to establishing a causal link between GHG emissions from a particular source and the environmental and climate change impacts related to such source. Since the proportional emissions from any given project are infinitesimally small, CEQ must ensure that agencies avoid any temptation, as described in Section III, *infra*, to expand the scope of the NEPA review to include other upstream or downstream GHG emissions that lack the requisite causal connection to the proposed action in an effort to artificially increase the significance of a proposed project's climate change impacts. Instead, a qualitative approach that recognizes the causal disconnect—or at least the minute causal relationship—between any given project and potential climate change impacts may be more appropriate under NEPA.

At the same time, quantifying GHG emissions, in appropriate and specific circumstances, can be an effective tool in comparing various alternatives in a NEPA analysis. However, in order for such an approach to achieve NEPA's primary goal of informing agency decision making, it is critical that the GHG emissions included in the comparison are appropriately limited to those that are closely related to the proposed project and thus are useful to inform the agency's decision. As explained in Section III, *infra*, as the causal connection between a proposed action and potential upstream and downstream effect becomes more attenuated, attempts to quantify GHG emissions also become more speculative and uncertain. Thus, given the global nature of GHG emissions and climate impacts, any final guidance issued by CEQ must vigorously apply existing regulatory and legal limits on the scope of NEPA reviews, including the proximate cause and foreseeability limits included in the evaluation of indirect and cumulative effects. If appropriate limits are applied, quantifying GHG emissions can be an effective way for agencies to take the requisite hard look at the potential environmental impacts of a proposed action and alternatives. Without such limits in place, however, the scope of a NEPA review could become boundless and preclude any meaningful comparison between alternatives.

At this time, many federal agencies have been developing significant experience and expertise in analyzing climate change in NEPA reviews that are specifically tailored to the types of actions that those agencies undertake. In that context, CEQ's one-size-fits-all approach in this Revised Draft Guidance is both unnecessary and counterproductive to the extent that it interferes with agencies' existing efforts to address climate change under NEPA. In light of the progress made by individual agencies and the serious deficiencies in the Revised Draft Guidance, the Associations urge CEQ to withdraw the Revised Draft Guidance and consider whether such centralized guidance is even necessary. In the event that CEQ determines that such guidance is still necessary, it must narrow the scope to ensure the NEPA analysis is appropriately limited, in accordance with CEQ regulations and case law, and does not include other emissions that are not properly attributable to the proposed action.

B. Risks to Associations If the Revised Draft Guidance Is Finalized in this Form

If finalized in its current form, the Revised Draft Guidance effectively could amend CEQ's existing regulations in a manner that unlawfully expands the scope of the NEPA analysis and imposes substantive obligations on agencies and project sponsors without following proper rulemaking procedures. Because of their global nature, GHG emissions and climate change impacts can be evaluated on extremely broad scales, and it is imperative that the procedural and substantive limits on NEPA be vigorously enforced in this context, not expanded. Guidance documents are intended to serve a limited purpose, which is to interpret and explain laws and regulations, not to replace or amend them. It would be unlawful for CEQ to issue guidance that would effectively amend regulations without the necessary procedural protection afforded by the Administrative Procedures Act ("APA"). *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (asserting that overreaching guidance documents allow an agency to make law "without notice and comment, without public participation, … without publication in the Federal Register or Code of Federal Regulations[,]" and without judicial review).

Despite CEQ's admonition that, if finalized, the Revised Draft Guidance would not be a binding rule or regulation, 79 Fed. Reg. at 77,823, the Associations are concerned that it may be treated as such by agencies or by the courts. If that were to occur, the Associations' members could find themselves and the agencies with which they interact effectively bound by the unlawful and overreaching provisions in the Revised Draft Guidance without being afforded the full complement of procedural protections the APA is intended to provide. In some cases, agencies elect to apply CEQ guidance in a binding manner, even if it overrides actual CEQ regulations. *See, e.g.*, *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 409 (6th Cir. 2013) ("[T]he Corps appears to read the CEQ Guidance as overriding the [40 C.F.R.] § 1508.7 requirements to consider past impacts. . . . Yet, the Corps offers no authority that allows an interpretive guidance to work such a substantive change to a duly promulgated regulation) (internal citation omitted)).[3] As described below, the Revised Draft Guidance would expand the NEPA review for GHG emissions beyond what NEPA and CEQ regulations otherwise require,

[3] In fact, EPA is already urging other agencies to comply with the Revised Draft Guidance in comments on draft EISs. *See*, EPA Region 10, Comments on the Draft Environmental Impact Statement for the Jordan Cove Energy Project, (Docket No. CP13-483-000) and Pacific Connector Pipeline (Docket No. CP12-492-000) at 14 (Feb. 11, 2015) (recommending that FERC "consider the approaches for climate impact assessment outlined in CEQ's recent 'Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts.'"

and an Association member seeking approval of a project would have little recourse if an agency imposed such requirements on their projects during the NEPA process. As a result, they could be subject to additional costs, delays, and potentially unlawful substantive obligations. In addition, CEQ appears to pre-judge certain potential climate change effects by, for example, labeling geographies and ecosystems as vulnerable to climate change. *See, e.g.*, 79 Fed. Reg. at 77,821. Agencies may be hesitant to critically assess the likelihood of potential climate change impacts if they perceive that CEQ has already reached a conclusion within the context of this guidance.

Likewise, courts effectively can make a CEQ guidance document *de facto* binding in their jurisdictions by endorsing and adopting it as the correct interpretation of NEPA or a CEQ regulation. *See, e.g.*, *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011) ("The First, Eighth, and Tenth Circuit have adopted this CEQ guidance as a framework for applying [40 C.F.R.] § 1502.9(c)(1)(i) …. We now join them in doing so." (internal citations omitted)); *Great Old Broads for Wilderness v. Kimbell*, 790 F.3d 836, 854 (9th Cir. 2013) ("[W]e have adopted the Council for Environmental Quality's ("CEQ") guidance that 'supplementation is not required when two requirements are satisfied: (1) the new alternative is a *minor variation* of one of the alternatives discussed in the draft EIS, and (2) the new alternative is *qualitatively within the spectrum of alternatives* that were discussed in the draft [EIS]." (emphasis in original)). If a court were to adopt final CEQ guidance on GHG emissions in a project-specific NEPA challenge that was unrelated to the Associations' missions, the Associations could be foreclosed from full participation in the judicial review process due to a lack of perceived legal interest in the project at issue sufficient to justify intervention in the case.

Moreover, the broad principles in the Revised Draft Guidance that are discussed more fully below, including the requirement to incorporate upstream and downstream GHG emissions, to include the draft OMB social cost of carbon estimates when monetizing costs and benefits, and to consider mitigation measures and monitoring plans, will further complicate the NEPA review process for agencies in a manner that will not only add time and cost to the NEPA review process, but will also increase the risk of litigation over the sufficiency of the agencies' attempts to incorporate these new obligations into NEPA analyses. Thus, even if the final guidance is applied by agencies and the courts as nonbinding guidance, NEPA's history has shown that litigation is inevitable and would produce additional costs and delay for both agencies and project applicants. To the extent litigation is based on confusion over the guidance or assertions that the guidance imposes obligations that are inconsistent with NEPA and CEQ's implementing regulations, neither the litigation nor the associated costs and delays would further NEPA's ultimate goal of improving agency decision making.

Thus, in the event that CEQ decides to go forward with guidance on considering the effects of GHG emissions and climate change effects in NEPA analyses, it must ensure that the guidance is consistent with NEPA and CEQ's existing regulations.

II. Any Final Guidance Should Not Be Applied to Ongoing NEPA Reviews

In the event CEQ proceeds to issue final guidance for addressing potential climate change impacts in NEPA analyses, the Associations request that CEQ clarify and amend the proposed effective date for a final guidance document. In the preamble, CEQ recognizes that "[t]he

revised draft guidance will be effective immediately once finalized for newly proposed actions …." 79 Fed. Reg. at 77,818. However, CEQ goes on to state in the Revised Draft Guidance that "[a]gencies are encouraged to apply this guidance to all new agency actions moving forward, *and, to the extent practicable, to build its concepts into currently on-going reviews*." *Id.* at 77,831 (emphasis added). While it is appropriate to delay the effective date until a final guidance is issued, the Associations are concerned by the costs and confusion that would follow if an agency attempts to apply the final guidance to NEPA reviews that are already underway when the guidance becomes effective. An agency's NEPA analysis is a frequently long, costly, and litigious process that demands considerable resources from the lead and coordinating agencies, private parties whose permit or license application is under review, and the general public that participates in the NEPA process. Project developers that have already completed a public scoping process have expended time and resources developing NEPA-required information established through this process and under nearly four decades of NEPA precedent, which the Revised Draft Guidance fundamentally alters. The same is true of lead and coordinating agencies. Therefore, imposing any final guidance on projects that are already well along in the permitting and NEPA review process would cause unplanned additional cost and considerable delay. Moreover, such retroactive applicability is bad public policy. Rather than creating confusion and uncertainty by requiring the final guidance to be incorporated into ongoing agency review "to the extent practicable," the Associations urge CEQ to adopt a bright-line rule that any final guidance will only apply to new NEPA reviews that have not yet undergone the scoping process.

As CEQ states in the Revised Draft Guidance, the provisions of any final guidance would not "establish legally binding requirements in and of itself." 79 Fed. Reg. at 77,823. Furthermore, as described below, agencies are already incorporating potential climate change impacts into NEPA analyses guided by existing laws, regulations, and legal precedent. *See, e.g.*,, FERC, Draft EIS: Jordan Cove Energy and Pacific Connector Gas Pipeline Project 4-892 to 895 (Nov. 7, 2014).[4] Those same laws and regulations will remain applicable after any guidance is finalized. While the Associations continue to have concerns with the manner in which agencies are currently conducting NEPA reviews, completing a NEPA review under the existing legal framework would be less burdensome than starting the NEPA process over again. Therefore, applying a bright-line applicability rule that excludes projects that have begun the scoping process will not create any risk that potential climate change impacts will be ignored in NEPA analyses already underway. Interested stakeholders will continue to have the full procedural protections afforded by NEPA in the event that they believe an agency's consideration of climate change impacts was insufficient. Thus, the Associations urge CEQ and the agencies to avoid unnecessary cost and confusion surrounding the NEPA review process by limiting application of any final guidance to new proposals that have not yet begun the NEPA review process when guidance is finalized and relying, in the interim, on existing regulations, case law, and established agency procedures.

[4] *Available at* https://www.ferc.gov/industries/gas/enviro/eis/2014/11-07-14-eis.asp.

III. The Proposal to Include Upstream and Downstream GHG Emissions Is Incompatible with CEQ's NEPA Regulations for Indirect and Cumulative Impacts

As proposed, the Revised Draft Guidance would create significant risks of being interpreted to transform and unlawfully expand the requirement in 40 C.F.R., Part 1508, that federal agencies consider the direct, indirect, and cumulative impacts of other federal and nonfederal actions. CEQ's regulations and current case law appropriately limit the scope of an agency's evaluation of such impacts to ensure that agencies remain focused on the proposed federal action before them. By imposing a requirement to account for the effects of upstream and downstream GHG emissions from other federal and nonfederal actions, 79 Fed. Reg. at 77,826, the Revised Draft Guidance could require agencies to consider environmental effects that may be outside of the scope of what is contemplated by existing regulations and case law. If finalized, this directive would prevent agencies from applying reasonable limits in determining which indirect and cumulative impacts bear a sufficient causal relationship to the agency action to be included in the related NEPA review and could subject agencies to unnecessary judicial review whenever irrelevant upstream and downstream GHG emissions are not addressed. Eliminating agency discretion to determine which potential indirect or cumulative impacts should be considered would, as the Supreme Court recognized in *Andrus v. Sierra Club*, 442 U.S. 347, 355 (1979), "trivialize NEPA."

As CEQ recognizes, climate change is unique among environmental impacts because "diverse individual sources of emissions each make relatively small additions to global atmospheric GHG concentrations …." 79 Fed. Reg. at 77,825. In this respect, "climate change is the ultimate 'small handle' problem, where an individual project has only a very small individual contribution to an extremely significant cumulative problem." Neal McAliley, NEPA and Assessment of Greenhouse Gases, 41 Envtl. L. Rep. News & Analysis 10,197, 10,199 (2011). However, CEQ should not respond to this "small handle" situation by requiring agencies to cast their nets more broadly to encompass more and virtually unlimited GHG emissions within the scope of their NEPA reviews by requiring the inclusion of upstream and downstream GHG emissions as indirect or cumulative effects.

The fundamental purpose of a NEPA review is to inform agency decision making and, as a result, NEPA and CEQ's regulations include important limitations to ensure that agencies do not consider environmental impacts that are either so far removed from the proposed federal action or so speculative that they are not relevant to the discrete project and decision before the agency. *See* 40 C.F.R. 1508.7, 8 (limiting scope of indirect and cumulative impact analysis to future actions that are "reasonably foreseeable"). 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 protect agencies and private entities whose permit or license applications are subject to NEPA review against unnecessary litigation over hypothetical, tangential, or *de minimis* environmental effects. These limits must be strictly enforced in the unique context of GHG emissions and climate change where, unlike other environmental impacts, GHG emissions are universally mixed in the atmosphere and bear no specific geographic nexus to the climate impacts they may cause.

For decades, CEQ's NEPA regulations have required federal agencies to evaluate indirect effects of a proposed action, which are defined as effects that "are caused by the action and are

later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). The concept of causation is central to understanding an agency's obligation under NEPA to consider indirect effects and must continue to serve as a critical limit in an agency's obligation to evaluate the effect of GHG emissions. While upstream and downstream GHG emissions may bear a relationship to a federal action, that is not the test for inclusion in a NEPA review. The Supreme Court has explained that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Public Citizen*, 541 U.S. at 767. Indirect effects must only be considered when there is a "reasonably close causal relationship" that would qualify as a "proximate cause" under tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Public Citizen*, 541 U.S. at 767 (citing W. Keeton, *et al*., Prosser and Keeton on Law of Torts 264, 274-75 (1983) for proximate cause standard). Thus, for example, an agency need not consider environmental effects of actions over which the agency has no control. *Public Citizen*, 541 U.S. at 770 ("We hold 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."); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (same).

Application of this proximate cause standard for indirect effects has significant implications for consideration of upstream and downstream GHG emissions. Specifically, a federal action cannot be considered a proximate cause of an upstream or downstream action if such other action is likely to occur without the proposed federal action. Courts have frequently addressed this issue in the context of induced growth, finding that an agency need not consider the environmental effects of third party development when the federal project is responding to development that would occur anyway. *See, e.g.*, *Citizens for Smart Growth v. Dep't of Transp.*, 669 F.3d 1203, 1205 (11th Cir. 2012) (no need to evaluate "the project's stimulation of commercial interests in a previously residential area" when "commercial uses in the study area were already being planned or developed"); *City of Carmel-By-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) ("The construction of Hatton Canyon freeway will not spur on any unintended or, more importantly, unaccounted for, development because local officials have already planned for the future use of the land, under the assumption that the Hatton Canyon Freeway would be completed."); *Morongo Band of Mission Indians v. Fed. Aviation Administration*, 161 F.3d 569 (9th Cir. 1998) ("[T]he project was implemented in order to deal with existing problems; the fact that it might also facilitate further growth is insufficient to constitute a growth-inducing impact under 40 C.F.R. § 1508(b).").

The same analysis applies to upstream effects. For example, in *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010), the court held that environmental effects associated with oil production in Canada need not be considered when evaluating a pipeline project because the oil would be produced and transported regardless of whether the pipeline project would be completed. Thus, a proposed federal action cannot be considered a proximate cause of upstream and downstream action simply because it is part of the same chain of events.

In addition, an agency's obligation to evaluate indirect and cumulative impacts is limited to those effects which are "reasonably foreseeable." 40 C.F.R. §§ 1508.7, 1508(b). "'Reasonable foreseeability' does not include 'highly speculative harms' that 'distort[] the decisionmaking process' by emphasizing consequences beyond those of 'greatest concern to the

public and greatest relevance to the agency's decision.'" *City of Shoreacres*, 420 F.3d at 453 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)) (alteration in original). Applying this standard, courts have frequently affirmed agency decisions to limit the scope of NEPA analyses in order to exclude speculative future events. In *City of Shoreacres*, the court agreed that the Army Corps of Engineers' NEPA review for an evaluation of a proposed ship terminal did not need to evaluate cumulative effects from the potential deepening of the harbor at some future date. *Id.* at 453. In another case, the Fifth Circuit affirmed the Department of Transportation's decision to exclude from its cumulative impacts analysis of a proposed LNG facility the potential environmental effects of other proposed federal projects for which draft EISs had not yet been prepared. *Gulf Restoration Network v. Dep't of Transp.*, 452 F.3d 362, 370 (5th Cir. 2006). The court explained that the agency was "entitled to conclude that the occurrence of any number of contingencies could cause the plans to build the ports to be cancelled or drastically altered." *Id.*

Despite CEQ's recognition that "a reasonably close causal relationship" is required for consideration of upstream and downstream emissions, 79 Fed. Reg. at 77,826, other portions of the Revised Draft Guidance appear to ignore this critical legal limit by directing federal agencies to evaluate all upstream and downstream GHG emissions. Thus, the Revised Draft Guidance, if finalized, unnecessarily creates risks that it could be applied in a manner that defeats the purpose of a proper NEPA review by distracting federal agencies from proposed federal action through the inclusion of a host of upstream and downstream emissions that should be irrelevant to the agency's decision making process because they are either outside of the agency's control, too speculative, and/or not reasonably foreseeable. These risks are clearly evidenced in the example of a hypothetical open pit mine included in the Revised Draft Guidance. *See* 79 Fed. Reg. at 77,826. There, CEQ asserts that an agency considering whether to permit an open pit mine would need to evaluate the GHG emissions from every activity from "clearing the land for extraction" to "using the resource." 79 Fed. Reg. at 77,826.

Determining which upstream or downstream GHG emissions may be included within the scope of indirect or cumulative effects of a proposed action is necessarily context-driven and should not be subject to a categorical rule. In many cases, demand for minerals is driven largely by economic development and responds very little, if at all, to changes in supply. Thus, for example, construction of a new open pit copper mine is unlikely to induce growth in copper demand, and any emissions associated with final use of the product could be excluded from a NEPA analysis because it meets an existing rather than new demand. *See, e.g.*, *City of Carmel-By-The-Sea*, 123 F.3d 1142, 1162 (9th Cir. 1997) (no need to consider downstream effects when federal action will not spur additional demand for development). Similarly, when conducting a NEPA analysis for a pipeline intended to transport hydrocarbons from an established production basin to a central collection hub or refining and processing region, an agency would not need to consider upstream emissions associated with resource extraction because the hydrocarbons would be produced and transported to market even if the proposed pipeline were not built. *See Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010); *see also*

As a result, CEQ cannot direct agencies to categorically incorporate all upstream and downstream GHG emissions into a NEPA analysis without first establishing that such emissions meet threshold standards as either indirect or cumulative effects. Several federal agencies already have set limits on the upstream and downstream impacts that are properly included in a

NEPA analysis for projects within their jurisdiction. *See, e.g., Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61, 163, at P 128 (2015) ("The potential environmental effects associated with shale gas development are neither sufficiently causally related to the AIM Project to warrant a detailed analysis nor are the potential environmental impacts reasonably foreseeable, as contemplated by the CEQ regulations."); *Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 at PP 77-78 (2014) (explaining that upstream production activities are beyond the scope of FERC's NEPA review of an LNG export terminal application); *Constitution Pipeline Company, LLC*, 149 FERC ¶ 61,199, at P 98-101 (2014) (finding an insufficient causal link between proposed natural gas pipeline and increased natural gas development using hydraulic fracturing); *Central New York Oil and Gas Company, LLC*, 137 FERC ¶ 61, 121, at P 84 (2011) ("Marcellus Shale development and its associated potential environmental impacts are not sufficiently causally-related to the MARC I Project to warrant the more comprehensive analysis that commenters seek"), *aff'd sub nom. Coalition for Responsible Growth and Resource Conservation v. FERC*, 485 Fed. App'x 472, (2d Cir. 2012) ("FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development were not sufficiently causally-related to the project to warrant a more in-depth analysis."); DEPT. OF ENERGY, ADDENDUM TO ENVIRONMENTAL REVIEW DOCUMENTS CONCERNING EXPORTS OF NATURAL GAS FROM THE UNITED STATES 2 (2014) ("DOE cannot meaningfully estimate where, when, or by what method any additional natural gas would be produced. Therefore, DOE cannot meaningfully analyze the specific environmental impacts of such production . . . . [n]or can DOE meaningfully consider alternatives or mitigation measures as they relate to natural gas production …."). Thus, if CEQ issues a final guidance rather than withdrawing the Revised Draft Guidance, the Associations urge CEQ to clarify that the guidance is not intended to expand existing requirements to consider indirect and cumulative effects and to ensure that any examples, such as the open pit mine, are consistent with existing regulations and case law.

If the Revised Draft Guidance is finalized in its current form, the directive to consider upstream and downstream GHG emissions would add a large degree of regulatory uncertainty and significantly increase the time and cost of conducting NEPA reviews, both for the agencies and for parties seeking permits and licenses for development projects. At the same time, directing agencies to include upstream and downstream effects that lack the requisite causal connection to the proposed action will not fulfill NEPA's goal of improving agency decision making. As CEQ acknowledges in the Revised Draft Guidance, climate change is the result of "relatively small additions to global atmospheric GHG concentrations" made by "diverse individual sources." 79 Fed. Reg. at 77,825. It will be costly and time consuming for an agency to identify and quantify the GHG emissions from each diverse individual source that may be considered upstream or downstream of a proposed federal project. Furthermore, given the global nature of climate change, an open-ended directive to consider upstream and downstream emissions has the potential to dramatically increase legal challenges to NEPA analyses as critical stakeholders seek to identify potential upstream and downstream emissions that were not accounted for by the agency. Thus, rather than focusing on indirect and cumulative effects that are closely related to a proposed federal action and have the potential to inform an agency's decision, the Revised Draft Guidance's broad and open-ended directive to consider upstream and downstream GHG emissions could shift the agency's time and resources toward increasingly tangential issues that are unlikely to inform the agency's ultimate decision on a proposed action.

Thus, the result would be significant costs and delay without a proportional improvement in the quality of agency decision making.

IV. CEQ Should Clarify that Transnational Impacts Should Not Be Evaluated

If CEQ proceeds to issue final guidance, it must explicitly affirm that NEPA does not require consideration of international and global impacts of GHG emissions, consistent with established law that agencies are only required to examine impacts within the United States. Congress' purpose in establishing NEPA was to "foster and promote the general welfare … and fulfill the social, economic, and other requirements of present and future generations of *Americans*." 42 U.S.C. § 4331(a) (emphasis added). Thus, to the extent that limited upstream and downstream GHG emissions are included in a NEPA review as indirect or cumulative effects, agencies must limit that analysis to domestic emissions. The rule regarding consideration of international impacts under NEPA was established by Executive Order 12114, which limits the scope of an EIS to the sovereign territory of the United States. The Executive Order was confirmed in *Natural Resources Defense Council v. Nuclear Regulatory Comm.* 647 F. 2d 1345 (D.C. Cir. 1981), where the court upheld an EIS that did not address impacts outside the United States. Other federal courts have been unanimous in declining to require an EIS to study any impacts beyond those set in E.O. 12114. *See, e.g.*, *Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006) (NEPA does not apply to impacts in Mexico of actions to a canal located solely in the United States); *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D. D.C. 2003) (NEPA does not apply extraterritorially in areas under the sovereign control of another nation). This conclusion is further supported by CEQ's recognition that "it is not useful, for NEPA purposes, to link GHG emissions from a proposal to specific climatological changes to a particular site." 79 Fed. Reg. at 77,808.

The impacts of climate change are no different from other environmental impacts that agencies have long considered. Although climate change may be global in nature due to the fact that GHGs from all sources become well-mixed in the atmosphere, the only impacts that NEPA requires an agency to consider are those within the United States. Indeed, the global nature of climate change further reinforces the need to provide appropriate limits on the scope of NEPA reviews, as inclusion of transnational climate change impacts would make the scope of any NEPA review potentially boundless. Imposing such an obligation on agencies would be extremely onerous and would impose significant costs on agencies and project sponsors without a commensurate improvement in environmental decision making. Thus, CEQ should confirm this long-standing law and explicitly state that agencies need not include transnational climate change impacts in NEPA analyses.

V. The Revised Draft Guidance Should Not Be Applied to Land and Resource Management Actions

In a significant departure from CEQ's proposal in 2010, *see* 75 Fed. Reg. 8046 (Feb, 23, 2010), the Revised Draft Guidance includes land and resource management actions. 79 Fed. Reg. at 77,825. In doing so, CEQ fails to fully appreciate the complex nature of many land and resource management actions, the significant uncertainty related to climate change impacts from such actions, and the fact that there is no "one size fits all" approach to the myriad land and resource management activities that trigger NEPA. By failing to address the complex and

unique nature of land and resource management actions, the Revised Draft Guidance is particularly ill-suited in this context and will exacerbate many of the ongoing challenges that already plague NEPA reviews, particularly at the programmatic planning level. Moreover, the Revised Draft Guidance offers no specific insight into how climate change effects can be incorporated into the broad and diverse range of land and resource management actions which differ so significantly from other agency actions. We, therefore, urge EPA to explicitly exclude land and resource management actions from the scope of any final guidance.

Federal land management agencies are bound by statutory requirements to manage lands for diverse resource uses. *See* Multiple-Use Sustained-Yield Act 16 U.S.C. § 528 *et seq.*; National Forest Management Act 16 U.S.C. § 1604 *et seq.*; Federal Land Policy and Management Act ("FLPMA") 43 U.S.C. §1701 *et seq.*; Alaska National Interest Lands Conservation Act 16 U.S.C. § 3101 *et seq.* Managing lands for diverse use of resources means that agencies must promote and authorize a wide variety of activities, many of which will have some environmental impacts associated with them. As an example, under FLPMA, the BLM is required to manage public lands for multiple uses. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 57 (2004); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009). "'Multiple use' means 'a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *New Mexico ex rel. Richardson*, 565 F.3d at 710 (citing 43 U.S.C. § 1702(c)). These statutes drive the need for federal agencies to have comprehensive resource management plans which are, in effect, living documents establishing guiding principles for agency actions at the site-specific level. They are highly varied, dynamic and vast. Moreover, agencies have a legal obligation to revise resource management plans in response to changing conditions or changing public needs. *E.g.*, 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(a).

Because resource management plans are intended to establish long-term management principles for subsequent agency actions, it is often difficult to predict the environmental effects of establishing such plans *ex ante*. As a result, decisions made in the land and resource management context frequently involve a greater degree of speculation than other federal actions subject to NEPA. At the time NEPA review is required, many details regarding resource development proposals remain uncertain. Final decisions regarding when, or even if, resources are extracted may depend on unpredictable market conditions. Likewise, the scope and eventual impact of a given project or series of projects may depend on additional exploratory activities. Thus, while a qualitative assessment of the potential environmental impacts of the multiple uses included in a resource management plan may be possible, a more detailed analysis that quantifies the potential environmental impacts of such a diverse array of future actions is virtually impossible to conduct at the resource management plan stage.

Further, resource management plans are part of a multi-phased decision-making structure that is unique to land and resource management actions. In this decision making structure, broad programmatic resource management plans are followed at a later date by site-specific plans where decisions are made with respect to specific proposals for action. As a result, NEPA review may be triggered multiple times and at various degrees of specificity within the land and

resource management structure. This phased structure can create uncertainty regarding whether, and at what level of detail, potential climate change impacts must be considered at the various stages. In particular, to ensure efficient and meaningful consideration of potential environmental effects under NEPA it is critical to understand how the various levels of NEPA review interact and the degree to which certain potential environmental effects—such as climate change impacts—can be addressed more effective at earlier or later stages of the NEPA review process. For example, as the Revised Draft Guidance notes, in some contexts, it may be most efficient to address environmental impacts primarily at the programmatic level and then incorporate those analyses by reference at the site-specific stage. 79 Fed. Reg. at 77,830. In other cases, it may be reasonable to defer a substantial portion of the NEPA analysis to the site-specific decision-making stage where potential environmental impacts may be less speculative.

Given the challenges associated with applying NEPA in the context of land and resource management actions, it is not surprising these actions, particularly the development of comprehensive resource management plans, can be effectively paralyzed by legal challenges brought by interest groups opposing a particular use. Thus, interest groups opposed to land and resource management actions such as snowmobiling, timber harvests, and oil and gas development can use NEPA challenges based on potential impacts related to climate change or any host of other potential environmental effects can use NEPA challenges as a way to stall implementation of actions with which they disagree. As a result, litigation of programmatic EISs can paralyze implementation of the management plans, and any subsequent agency decision under the plan threatening to extinguish any reasonable possibility to engage in activities on federal land. For example, in *People of the State of California v. United States Department of Agriculture*, No. CIV-s-05-0211 (E.D. Cal., filed May, 26, 2005), a NEPA challenge to the 2004 Sierra Nevada Forest Plan amendment was litigated for seven years before the judge eventually ordered a supplemental NEPA analysis. Such litigation can effectively block any land or resource management actions. As long as such legal challenges can proceed, agencies attempting to manage their resources in accordance with their multi-use mandates will rarely, if ever, reach decisions or implementation of decisions in a reasonable time frame.

The end result of the general agency paralysis produced by such NEPA litigation is the agencies' unlawful failure to comply with their statutory mandates to develop and revise resource management plans and promote multiple uses on federally managed lands. Indeed, by preventing land use agencies from taking action to implement their statutory mandates, the litigation-based delays that have become so common for programmatic EISs have in many cases barred the government from achieving NEPA's primary goal by impeding rather than informing agency decision making. However, despite CEQ's suggestion to the contrary, applying the Revised Draft Guidance generally to the wide and diverse universe of land and resource management decisions will do nothing to alleviate existing challenges in applying NEPA and, instead, will almost certainly have the effect of making things worse.

CEQ asserts in the preamble that it is extending the Revised Draft Guidance to include land and resource management actions in order to "ensure consistency and certainty about whether and how agencies should address GHG emissions and impacts of climate change in their NEPA analyses and documents." 79 Fed. Reg. at 77,803. Despite that stated goal, the Revised Draft Guidance offers virtually no concrete assistance to help agencies achieve it. Instead, the Revised Draft Guidance makes vague statements such as: "The revised draft guidance sets out

the broad principles to assist agencies when they make determinations on how to conduct NEPA analyses with respect to the effects of GHGs and climate change …." *Id.* at 77,805. CEQ compounds these generalized exhortations by referring repeatedly to existing regulations, such as 40 C.F.R. § 1502.22, that direct agencies' response to uncertainty and a lack of data in a NEPA review. *Id.* at 77,803, 77,805, 77,806. CEQ continues by urging agencies to "apply their best judgment and expertise when determining how to consider the level of GHG emissions and impacts of climate change at the programmatic and project or site-specific level of NEPA analysis and documentation" and to "use their discretion to determine the appropriate comparison and balancing of long- and short-term emissions and impacts of climate change with other long- and short-term resource impacts and benefits." *Id.* at 804.

Directing agencies to comply with these broad principles in a diverse number of settings without providing any concrete guidance on how they can be implemented will do little to ensure consistency and certainty in NEPA analyses for land and resource management actions. To the contrary, establishing a guidance that instructs agencies to use their "best discretion" and "best judgment" while also directing them to apply broad principles such as indirect and cumulative impacts (both upstream and downstream) will further exacerbate existing confusion related to NEPA reviews for land and resource management decisions and lead to the paralysis of public policy. The Associations do not dispute the need to defer to the expertise of land and resource management agencies in this context; however, the structure of the Revised Draft Guidance, which is simultaneously prescriptive and vague, is particularly ill-suited as a one-size-fits-all approach for land and resource management actions. By failing to address the unique challenges posed by specific and varied types of land and resource management actions—including compliance with statutory management mandates, evaluating highly speculative environmental effects associated with future site-specific action, and balancing NEPA obligations at various stages of the agency planning and implementation process—applying the Revised Draft Guidance to land and resource management actions would add to the existing complexity of such NEPA reviews and give opponents of agency actions even more opportunities to disrupt the agencies' planning processes through time consuming NEPA litigation. For these agencies with specific statutory mandates to actively manage federal lands for multiple uses, a default "no action" alternative brought about through virtually endless NEPA challenges is contrary to Congress' intent in drafting their organic statutes and unlawfully deprives end users of the benefits that a multiple use mandate is intended to provide.

As CEQ correctly notes, land and resource management decisions are highly complex and frequently involve the potential for countervailing environmental effects associated with both carbon emissions and carbon sequestration. *Id.* at 826. A single guidance based solely on broad principles simply cannot provide the level of analysis necessary to improve decision making across a wide range of agency actions that include forest management and grazing plans, recreational use plans, and resource extraction permitting covering hydrocarbons, coal, and a wide variety of hard-rock minerals. As a result, extending the Revised Draft Guidance to include land and resource management actions, in its current form, would be counterproductive and ill-advised, burdening agencies to respond to litigation, and threatening the legal rights of mineral interest holders. In the absence of concrete guidance applicable to land and resource management actions, requiring agencies to apply such broad principles will subject them to even greater scrutiny during judicial review by stakeholders and courts who in the absence of any concrete guiding principles articulated by CEQ could seek to apply their own standards instead.

For these reasons, we urge CEQ to expressly exclude land and resource management actions from any final guidance, as it originally proposed to do in 2010. The Revised Draft Guidance will exacerbate greatly any perceived flaws in existing NEPA case law and regulations by failing to take into account the unique contexts for land and resource management decisions both generally as distinct from other types of actions under NEPA and the specific contexts in which specific land management decisions arise. To the extent that CEQ believes that guidance is necessary for land and resource management actions, it should proceed through a separate process for individual types of land use management actions rather than subjecting them to an ill-suited approach that fails to account for the complex nature of land and resource management decisions. Specifically, in the event CEQ moves forward with guidance for land and resource management actions, we urge it to proceed on a sector-by-sector approach that addresses the challenges described above in a concrete manner that is specific to the multitude of different land and resource management decisions that agencies may face.

VI. The Draft OMB Social Cost of Carbon Estimates Should Not Be Applied in NEPA Analyses

The Revised Draft Guidance adds further uncertainty, confusion, and vulnerability to the NEPA review process by directing federal agencies to apply the draft OMB social cost of carbon estimates when monetizing the costs and benefits of a proposed action and alternatives. 79 Fed. Reg. at 77,827. The Associations have identified a host of critical problems with the draft OMB social cost of carbon estimates in prior comments submitted to the OMB. We incorporate those comments here by reference.[5] In light of some fundamental and critical flaws in the draft OMB social cost of carbon estimates and the process that led up to it, a decision to include this metric in NEPA analyses would be antithetical to the purposes of transparency and improved decisionmaking that NEPA seeks to achieve. Unless and until a more rigorous, balanced, and transparent social cost of carbon estimate can be developed as part of an appropriately open and public process, CEQ must rescind this aspect of the Revised Draft Guidance and, for the reasons explained below, explain that the draft OMB social cost of carbon estimates should not be included in NEPA reviews unless and until the flaws and deficiencies identified in comments to OMB are corrected. Directing agencies to apply flawed social cost of carbon estimates would impede NEPA's goal of promoting informed decision-making. For example, overestimating the benefits of reducing GHG emissions could cause an agency to consider alternatives with inappropriately expensive (and cost-ineffective) mitigation measures that would not be justified under a more accurate assessment of climate benefits.

Several flaws and deficiencies are of particular relevance in the context of a NEPA review. First, the goal of this concept—projecting cost to society for carbon emitting activities—

[5] *See* Comments of The American Chemistry Council *et al.* re: Technical Support Document: Technical Update to the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866 (Appendix A); American Natural Gas Alliance *et al.*, Petition for Correction: Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 1286 (February 2010) and Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866 (May 2013) (Appendix B); Comments of The American Public Power Association re: The Technical Support Document, Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866 (February 26, 2014) (Appendix C).

can be manipulated by simply changing relevant timeframes, adjusting discount rates, including particular risks, and arbitrarily calibrating other data inputs. Thus, the outcome of a social cost of carbon analysis based on the draft OMB social cost of carbon estimates will have less to do with the possible environmental impacts of a proposed action than with the assumptions of the agency that performs the analysis. As a result, rather than informing agency decision making, the inclusion of draft OMB social cost of carbon estimates may instead be used to advance policy priorities rather than the permitting and licensing of proposals from private parties.

Second, the draft OMB social cost of carbon estimates were developed by OMB and other federal agencies through a process lacking both transparency and any opportunity for peer or public review. As the Associations have explained, the process failed to comply with OMB guidance for developing influential policy-relevant information under the Information Quality Act, Pub. L. No. 106-554 § 515, and legal standards for promoting public participation and transparency in understanding and replicating models. Further, the process used to develop the draft OMB social cost of carbon estimates is antithetical to the NEPA's central premise that transparency and open discourse are critical to informed agency decision making.

Third, the draft OMB social cost of carbon estimates are based on global rather than domestic effects. In fact, in its 2010 Report, the Interagency Working Group on Social Cost of Carbon concluded that 90 to 93 percent of the benefits of reducing GHG emissions would occur outside of the United States. 2010 Social Cost of Carbon Report at 11. As discussed in Section IV, *supra*, agencies must confine NEPA reviews to environmental impacts that will occur within the United States. Thus, applying the draft OMB social cost of carbon estimates without first excluding international benefits would be inconsistent with NEPA.

Fourth, many of the key assumptions and data inputs to the draft OMB social cost of carbon estimates—including damage functions and modeled time horizons—remain highly uncertain, casting significant doubt on the accuracy of any estimates that an agency may include in a cost benefit analysis. Further, OMB has failed to disclose and quantify key uncertainties to inform decision makers and the public about the effects and uncertainties of alternative actions which are required by OMB and central to a proper NEPA analysis. Given the opaque process by which the draft OMB social cost of carbon estimates were developed and the unlawful failure to give the public an opportunity to test and recreate the models used to develop the draft OMB social cost of carbon estimates, the supposed accuracy of the draft OMB social cost of carbon estimates—and their usefulness in agency decision making—is unsupportable.

In light of these significant deficiencies and the uncertainty surrounding the draft OMB social cost of carbon estimates, directing agencies to include draft OMB social cost of carbon estimates in cost benefit analyses would be inconsistent with CEQ's existing regulations. CEQ's implementing regulations provide agencies with detailed instructions for addressing incomplete or unavailable information. 40 C.F.R. § 1502.22. The central function of this regulation is to allow the agency to explain the information that is missing and its relevance to the agency action so that both the agency and interested stakeholders are fully informed of the uncertainty associated with potential environmental effects. In earlier versions of the regulation, agencies faced with incomplete or unavailable information were directed to prepare a hypothetical worst-case scenario in lieu of complete or available information. *See, e.g.*, *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1474 (9th Cir. 1983); *Sierra Club v. Sigler*, 695

F.2d 957 (5th Cir. 1983). In rescinding the "worst case analysis" requirements, CEQ explained that such catastrophic outcomes should only be included in a NEPA review "if the analysis is supported by credible scientific evidence and is not based on pure conjecture." 51 Fed. Reg. 15,618, 15,618 (Apr. 25, 1986). Instead, CEQ stressed that "when preparing an EIS, agencies must disclose the fact that there is incomplete or unavailable information," *id.* at 15,621, in order to "better inform the decision maker and the public," *id.* at 15,620. By now directing agencies to include draft OMB social cost of carbon estimates in cost benefit analyses, CEQ fails to fully inform agency decision makers and the public of the significant uncertainty in these estimates and suggests instead that they are based on credible scientific evidence. Using NEPA guidance to validate this flawed and controversial metric would be utterly inconsistent with NEPA's goals.

The problems associated with applying the draft OMB social cost of carbon estimates to NEPA analyses are readily observable in *High Country Conservation Advocates v. U.S. Forest Service*, __ F. Supp. 2d __, 2014 WL 2922751 (D. Colo. June 27, 2014). In that case, which involved three agency actions related to a coal mine on federal land, several organizations challenged the final EIS, alleging that the agencies failed to appropriately address the draft OMB social cost of carbon estimates in their cost benefit analysis. The court found that the final EIS was arbitrary and capricious because the agencies failed to justify their decision not to apply the draft OMB social cost of carbon estimates. *Id.* at *10. Significantly, however, the court did not mandate the inclusion of the draft OMB social cost of carbon estimates in NEPA cost benefit analysis and observed that "the agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of GHG emissions from the Lease Modifications." *Id.* at 11. This case highlights the challenges that agencies face when seeking to monetize the costs and benefits of a proposed federal action, particularly when GHG emissions and climate change effects must be evaluated. Given the critical flaws and deficiencies in the draft OMB social cost of carbon estimates and the district court's clear direction that agencies have discretion to exclude the draft OMB social cost of carbon estimates from cost benefit analysis when properly justified, it is critical that CEQ provide guidance to the agencies that explains the deficiencies in the draft OMB social cost of carbon estimates and assist agencies in articulating a reasoned basis for excluding the metric from cost benefit analyses in future NEPA reviews at this time.

Thus, the Associations urge CEQ to rescind its proposal to apply the draft OMB social cost of carbon estimates in NEPA reviews and instead direct agencies to comply fully with 40 C.F.R. § 1502.22 when seeking to monetize the environmental costs and benefits of proposed actions. To that end, until draft OMB social cost of carbon estimates are improved significantly as a result of a fully public and transparent process, this will require agencies to fully disclose the uncertainties and inadequacies of current efforts to calculate the social cost of carbon. Only after these uncertainties and inadequacies are resolved should CEQ and the agencies consider whether to include draft OMB social cost of carbon estimates in NEPA analyses.

VII. Agencies Cannot Be Compelled to Adopt Mitigation Measures as Part of a NEPA Analysis

In the Revised Draft Guidance, CEQ makes a number of statements that could be construed as requiring federal agencies to take affirmative action to mitigate GHG emissions from federal projects as part of their NEPA review. Specifically, CEQ calls on federal agencies

to evaluate the permanence, verifiability, enforceability, and additionality of proposed mitigation measures. 79 Fed. Reg. at 77,828. The Revised Draft Guidance then goes further and directs agencies when adopting either a FONSI (which accompanies an EA) or Record of Decision ("ROD") (which follows an EIS) to "identify those mitigation measures [adopted to address climate change] and … consider adopting an appropriate monitoring program." *Id.*

The Associations are concerned that these directives could be construed by federal agencies, public stakeholders, or the courts as establishing a legal obligation to adopt climate change mitigation measures as part of any NEPA review. For example, the Revised Draft Guidance's reference to "permanence, verifiability, enforceability, and additionality," *id.*, refer to substantive obligations imposed in offset programs used to mitigate emissions in other contexts and blurs the line between procedural and substantive requirements. Further applying these standards in the context of potential climate change impacts is even more problematic because, as described in Section I, *supra*, the climate change impacts, if any, attributable to a specific action and, by extension, any related mitigation measures are too small to be measured. The risk that these directives would be construed as imposing a legal obligation is further heightened by CEQ's response to comments on the 2010 Draft Guidance. There, CEQ noted that some commenters requested that CEQ "explicitly acknowledge that adoption of mitigation measures considered under NEPA are not *per se* required, and should not be required under the NEPA statute." *Id.* at 77,819. CEQ has declined to do so in this Revised Draft Guidance.

Requiring mandatory adoption of climate change mitigation measures would impermissibly transform NEPA from a procedural statute into one with substantive requirements. As such, the Revised Draft Guidance cannot be reconciled with the Supreme Court's holding that, while "NEPA does set forth significant substantive goals for the Nation, … its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). This is among the most critical limiting factors of NEPA and applies to all aspects of an agency's decision making process, including the decision whether or not to adopt measures to mitigate potential environmental effects of a proposed action.

CEQ's implementing regulations require that the scope of an EIS include, as alternatives to the proposed action, "[m]itigation measures (not included in the proposed action)." 40 C.F.R. § 1508.25(b)(3); *see also id.* §1508.20 (defining mitigation). Thus, as the Supreme Court has noted, "one important ingredient of an EIS is the discussion of the steps that can be taken to mitigate adverse environmental consequences." *Methow Valley*, 490 U.S. at 351. The Court went on to explain that "[t]here 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." *Id.* at 352. As a result, the Court reversed an appellate court ruling requiring each EIS to include "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts." *Id.* at 353 (emphasis in original). Citing *Methow Valley*, appellate courts have routinely confirmed that there is no substantive obligation to adopt mitigation measures identified in an EIS. *Westlands Water District v. Department of Interior*, 376 F.3d 853, 873 (9th Cir. 2004); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000); *City of Caramel-By-The-Sea*, 123 F.3d at 1154.

In contrast to EISs, CEQ's regulations allow agencies to include appropriate mitigation measures in EAs to avoid an action rising to the level of a significant impact to the environment. *See Akiak Native Community v. U.S. Postal Service*, 213 F.3d 1140, 1147 (9th Cir. 2000) ("We must keep in mind that NEPA does not *require* that Environmental Assessments include a discussion of mitigation strategies."). Promoting voluntary adoption of mitigation measures in the EA context is a helpful tool that agencies can use to ensure that a proposed action's environmental effects will not reach a level of significance. By adopting such measures in a "mitigated FONSI," an agency can avoid the added cost and burden of preparing a full EIS while ensuring that environmental impacts are minimized. Thus, the decision whether to address (and ultimately adopt) mitigation measures in an EA and FONSI are left to the discretion of the agency conducting the NEPA analysis, and such discretion should not be curtailed by the mandates that would be imposed by the Revised Draft Guidance.

The courts have made clear that neither NEPA nor CEQ's implementing regulations impose a duty on federal agencies to adopt mitigation measures in a FONSI or ROD after completing an EA or EIS. Thus, to the extent the Revised Draft Guidance would direct federal agencies to do so, it is unlawful. The Associations urge CEQ to clarify in the final guidance that, consistent with settled NEPA law, the duty to consider mitigation measures while preparing an EIS is strictly a procedural requirement and imposes no substantive obligation on federal agencies to adopt measures to mitigate climate change in the subsequent ROD or FONSI. Consistent with CEQ regulations and established case law, the Associations also urge CEQ to clarify that agencies have no legal obligation under NEPA to evaluate mitigation measures when conducting an EA, but instead have discretion to consider mitigation options when evaluating the significance of potential environmental impacts in the context of a mitigated FONSI. Without these changes, the Revised Draft Guidance could be construed as impermissibly amending CEQ's existing regulations in a manner that is fundamentally inconsistent with NEPA's role as a procedural statute designed to improve agency decision making. Further, it will invite needless litigation from stakeholders whose preferred mitigation measures are not included in final RODs.

The Associations also urge CEQ to clarify that, consistent with existing law, NEPA is a procedural statute that does not require agencies to include monitoring programs in their RODs if they elect to adopt mitigation measures. *See* 79 Fed. Reg. at 77,828 (urging agencies to "consider adopting an appropriate monitoring program"). Regardless of the value, if any, that such monitoring programs may provide, those programs are clearly outside the scope of NEPA. As explained above, NEPA cannot be used to impose obligations of any kind on an agency after a decision on a proposed project has been made. For example, the Supreme Court rejected a demand for a supplemental EIS to address increased use of a forest road by off-road vehicles, holding that, because there was no "ongoing major federal action," there was no duty under NEPA to reopen an EIS that had been completed years earlier. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004). Thus, NEPA cannot provide a cause of action to require a monitoring program in a ROD that adopts mitigation measures.

Likewise, the Associations urge CEQ to clarify that NEPA imposes no substantive requirements with respect to government goals for emission reduction targets. The Revised Draft Guidance states that agencies can "incorporate by reference applicable agency emissions targets such as applicable Federal, state, tribal, and local goals for GHG emissions reductions … and make it clear whether the emissions being discussed are consistent with such goals." 79 Fed.

Reg. 77,826. CEQ must make clear that complying with any relevant emission reduction goals is not required under NEPA. Failure to do so could create the risk both of federalizing state, tribal, and local emission reduction goals and of making compliance with such goals a statutory obligation under NEPA. Either of these outcomes would be unlawful under NEPA. Further, to the extent CEQ elects to reference such emission reduction goals in any final guidance, the Associations urge CEQ to expressly acknowledge that many such goals include provisions to allow for growth and for the development of new projects.

Finally, the Associations have concerns with the list of potential mitigation measures identified in the Revised Draft Guidance, which include "enhanced energy efficiency, lower GHG emitting technology (e.g. using renewable energy), carbon capture, carbon sequestration (e.g. forest and coastal habitat restoration), sustainable land management practices, and capturing or beneficially using fugitive GHG emissions such as methane." 79 Fed. Reg. at 77,828. Contrary to CEQ's suggestion in the Revised Draft Guidance, many of these proposed alternatives will not be available to agencies or project applicants as a practical matter. In many cases, these options are not provided for in existing regulations and pose significant technical, financial, and logistical challenges. In particular, the Associations note that carbon capture and sequestration ("CCS") is technically infeasible due to the short-term and long-term uncertainty and risks surrounding the design, installation and operation of CCS projects, and the absence of a regulatory infrastructure to oversee and regulate long-term CO_2 storage. Mandating CCS for proposed projects would impose technical and regulatory uncertainties in project development, force unacceptable delays to the project, and could impose costs that would likely render the project unviable. Likewise, in most cases, a renewable energy project would be outside the scope of a proposed action and thus outside of a proposed project's boundary and control. Directing agencies to consider these theoretical mitigation measures will not improve agency decision making if, as a practical matter, they cannot be implemented due to technical, financial, or logistical constraints.

VIII. CEQ Should Not Adopt A Presumptive Threshold For GHG Quantification, And, In Any Event, The Proposed 25,000 Metric Ton Threshold Is Inappropriate

In the Revised Draft Guidance, CEQ retains a presumptive 25,000 metric ton threshold for quantifying GHG emissions from a proposed federal action. First, the blanket presumed threshold is contrary to established NEPA procedures and the "rule of reason" that is designed to guide agency NEPA reviews. The Guidance makes no attempt to scientifically support its 25,000 metric ton "reference point" as an appropriate threshold for analysis. This, at the outset, contravenes the NEPA requirements for "accurate scientific analysis" and "scientific integrity." 40 C.F.R. § 1500.1. Further, CEQ provides no rational basis in the Revised Draft Guidance for selecting 25,000 metric tons as the threshold and fails to provide clear guidance as to how such a threshold should be assessed. Finally, to the extent such a threshold is warranted, the threshold selected by CEQ is far too low and should be set significantly higher to better capture projects that are truly substantial in nature and reflect the level of GHG emissions that may be relevant to agency decision making.

First, adopting a presumptive threshold for quantifying GHG emissions is both unnecessary and inconsistent with prior NEPA practice. There is no established "threshold" for reporting or quantifying emissions or discharges of other conventional pollutants, and there is no

reason to establish such a uniform threshold for all federal agencies with respect to GHG emissions. Thus, CEQ should refrain from establishing a black line quantitative threshold and instead, consistent with prior practice, allow agencies to apply the "rule of reason" to govern when they should consider GHG emissions and climate change.

Despite CEQ's suggestions to the contrary, it is a likely scenario that, if the final guidance were to contain such a threshold, agencies applying the guidance would treat the 25,000 metric ton reference point as a binding threshold point for quantifying GHG emissions, if not for making significance determinations. As described in Section I, *supra*, federal agencies frequently apply CEQ guidance strictly. As a practical matter, agencies are unlikely to "use their experience and expertise to determine when a more detailed analysis of GHG emissions is required," 79 Fed. Reg. at 77,811, and instead will mechanically apply the threshold provided by CEQ. Thus, adopting a presumptive threshold would likely cause agencies to mechanically apply the threshold rather than relying on their own expertise and the rule of reason as Congress intended.

Second, CEQ offers no rationale to support the proposed threshold of 25,000 metric tons. The Revised Draft Guidance asserts that 25,000 metric tons is "an appropriate reference point that would allow agencies to focus their attention on proposed projects with potentially large GHG emissions." *Id.* at 77,828. However, it makes no attempt to explain why 25,000 metric tons is an appropriate level to distinguish between large and small emissions. Instead, it appears that CEQ may be relying implicitly on its prior justifications from the 2010 Draft Guidance. *See* 2010 Draft Climate Change Guidance at 3 (stating that the 25,000 metric ton threshold was selected because it is consistent with EPA's use of that threshold for GHG emission reporting under the Clean Air Act). As the Associations explained in comments on the 2010 Draft Guidance, these considerations are irrelevant in the NEPA context. NEPA's primary goal is to ensure that the potential environmental impacts of major federal actions are considered. Ensuring a proper balance between capturing enough emissions and avoiding too great a burden for purposes of the reporting scheme, as EPA has attempted to do, is an entirely different goal from ensuring that potential environmental issues are properly evaluated. Indeed, EPA never intended or implied that this threshold was relevant to an analysis of potential environmental impacts. Further, in any event, EPA in choosing a threshold for regulation of GHG emissions under the agency's Tailoring Rule subsequently adopted a much larger emission threshold in final GHG regulations. 75 Fed. Reg. 31,514 (June 3, 2010) (applying emissions thresholds of 75,000 and 100,000 metric tons under the prevention of significant deterioration program). Thus, to the extent that CEQ does adopt an emissions threshold in the final guidance, a much higher threshold should be adopted.

Third, CEQ fails to provide necessary guidance for determining when the threshold is met and what an "emission quantification analysis means." For example, CEQ fails to clarify whether the threshold would apply only to direct emissions from the proposed action or also includes indirect and cumulative impacts such as the upstream and downstream emissions discussed in Section III, *supra*. Given the concerns that the Associations have identified with the Revised Draft Guidance's proposed treatment of indirect and cumulative impacts, it is critical that any emissions threshold focus solely on direct emissions from the proposed federal action. To do otherwise would exacerbate the uncertainty and confusion that CEQ's proposed treatment of indirect and cumulative emissions will produce.

Conclusion

The Associations thank CEQ for the opportunity to present comments on the Revised Draft Guidance. As indicated, the Associations, who share decades of experience working with NEPA in a broad range of industry sectors subject to the law, have several serious concerns with the Revised Draft Guidance and with CEQ's proposed approach to evaluating potential climate change effects under NEPA. As explained above, addressing climate change under NEPA poses unique challenges because the relative contribution of any project with GHG emissions is minute relative to the atmospheric concentration of GHGs and to the GHG emissions from other natural and anthropogenic sources domestically and globally. Thus, because the effects of GHG emissions are global in nature it is virtually impossible to draw connections between a specific federal action and specific climate change effects. In light of these challenges, it is imperative that CEQ and the agencies avoid venturing beyond the scope of what NEPA requires and restrict evaluation of climate change effects and GHG emissions that lack an adequate causal relationship with the proposed action to inform the agency's ultimate decision. For the reasons explained above, the Revised Draft Guidance fails to meet these criteria and is inconsistent with NEPA, its implementing regulations, and established case law. Therefore, the Revised Draft Guidance should be withdrawn. In the event CEQ decides to finalize this Revised Draft Guidance, it must first address the deficiencies identified above and ensure that the final guidance is consistent with NEPA and CEQ's implementing regulations. We look forward to meeting with CEQ and, as appropriate, the relevant agencies to discuss these comments at the earliest convenience.

Respectfully Submitted,

American Chemistry Council

American Farm Bureau Federation

American Forest & Paper Association

American Fuel and Petrochemical Manufacturers

American Highway Users Alliance

American Iron and Steel Institute

American Petroleum Institute

American Public Power Association

American Wood Council

America's Natural Gas Alliance

Association of Oil Pipe Lines

Corn Refiners Association

Council of Industrial Boiler Owners

Gas Processors Association

Independent Petroleum Association of America

Interstate Natural Gas Association of America

National Association of Manufacturers

National Rural Electric Cooperative Association

Natural Gas Supply Association

Portland Cement Association

The Fertilizer Institute

U.S. Chamber of Commerce

Appendix A

The **American Chemistry Council** ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $812 billion enterprise and a key element of the nation's economy.

The **American Farm Bureau Federation** is the nation's largest general farm organization, representing agricultural producers in all 50 states and Puerto Rico growing commodities in virtually all sectors of agriculture.

The **American Forest & Paper Association** ("AF&PA") is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing GDP. The industry makes products essential for everyday life from renewable and recyclable resources, producing about $210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately $50 billion.

The **American Fuel & Petrochemical Manufacturers** ("AFPM") (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Highway Users Alliance** represents motorists, RV enthusiasts, truckers, bus companies, motorcyclists, and a broad cross-section of businesses that depend on safe and efficient highways to transport their families, customers, employees, and products. Highway Users members pay the taxes that finance the federal highway program and advocate public policies that dedicate those taxes to improved highway safety and mobility.

The **American Iron and Steel Institute** ("AISI") serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in 43 states.

The **American Petroleum Institute** ("API") represents over 625 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The **American Public Power Association** ("APPA") is the national service organization representing the interests of the more than 2,000, not-for-profit municipal and other state and local community-owned electric utilities that collectively provide electricity to approximately 47 million Americans. These utilities, or "public power" systems, are among the most diverse of the electric utility sector, providing power to small, medium, and large communities in 49 states, except Hawaii, and in many American territories, such as the U.S. Virgin Islands, Puerto Rico, American Samoa, and Guam.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs more than 360,000 men and women in family-wage jobs.

Representing North America’s leading independent natural gas exploration and production companies, **America's Natural Gas Alliance** (“ANGA”) works with industry, government and customer stakeholders to promote increased demand for and continued availability of our nation’s abundant natural gas resource for a cleaner and more secure energy future.

The **Association of Oil Pipe Lines** (“AOPL”) is a national trade association that represents owners and operators of oil pipelines across North America and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation’s refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels. AOPL members operate approximately 90% of the energy liquids pipeline miles in the United States.

The **Corn Refiners Association** (“CRA”) is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Gas Processors Association** (“GPA”) has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA is composed of 130 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

The **Independent Petroleum Association of America** (“IPAA”) serves as an informed voice for the exploration and production segment of America’s oil and natural gas industry. IPAA represents the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 54 percent of domestic oil and produce 85 percent of domestic natural gas.

The **Interstate Natural Gas Association of America** ("INGAA") is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA's 24 members represent the vast majority of the interstate natural gas transmission pipeline companies in the United States, operating approximately 200,000 miles of pipelines, and serving as an indispensable link between natural gas producers and consumers.

The **National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Rural Electric Cooperative Association** ("NRECA") is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of nation's electric customers. NRECA is dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA member electric cooperatives are private, independent electric utilities, owned by the members they serve.

Established in 1965, the **Natural Gas Supply Association** ("NGSA") represents integrated and independent companies that produce and market approximately 30 percent of the natural gas consumed in the United States. NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

The **Portland Cement Association** ("PCA") represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states, with distribution centers in all 50 states, servicing nearly every Congressional district. PCA members account for approximately 80% of domestic cement-making capacity

The Fertilizer Institute ("TFI") represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI's members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply.

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.