WESTERN ENERGY ALLIANCE

August 26, 2019

Submitted via https://www.regulations.gov/

Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions

Dear Mr. Boling:

Western Energy Alliance appreciates the opportunity to submit comments on the Council on Environmental Quality's (CEQ) draft National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas Emissions (GHG). The guidance is necessary to provide federal agencies with a roadmap for NEPA compliance that is consistent, streamlined and legally defensible. The Alliance generally supports the draft guidance, although we propose several suggested changes below.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

NEPA's statutory requirements are intended to buttress federal agency actions with a consideration of the environmental impacts of those decisions. In practice, NEPA has instead become a weapon used by activist environmental groups to prevent federal agencies from approving projects under their jurisdiction, thus impacting federal agencies' ability to carry out their statutory obligations for the benefit of the America people.

Over the past few years, environmental groups have dramatically increased the use of litigation to stymie federal agency actions. These groups are strategically choosing venues where the courts are known to take expansive views of NEPA's requirements. CEQ's guidance is therefore necessary and appropriate, given its role in guiding all federal agencies' NEPA implementation.

Legal Framework

As the draft guidance rightly notes, "NEPA is a procedural statute that serves the twin purposes of ensuring that agencies consider the environmental consequences of their

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proposed actions and inform the public about their decision-making process." NEPA does not mandate particular results based on the environmental analysis conducted by an agency. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). In other words, an agency could perform all required NEPA GHG analysis and determine that a preferred alternative is not the most environmentally friendly alternative, but still proceed to approve that alternative.

Importantly, federal agencies also may not prioritize environmental concerns at the expense of operators or the development of their valid existing lease rights. NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. States Forest Serv., 297 F.3d 1012, 1022 (10th Cir. 2002).* To that end, the Alliance agrees with the draft guidance that "NEPA does not require agencies to adopt mitigation measures."

Instead, agencies are to consider environmental impacts while balancing other statutory obligations. For instance, the Federal Land Policy and Management Act (FLPMA) mandates that the Bureau of Land Management (BLM) prevent unnecessary or undue degradation of public lands. However, "preventing unnecessary or undue degradation does not mean preventing all adverse impacts upon the land…[A] certain level of impairment may be necessary and due under a multiple use mandate." BLM Instruction Memorandum (IM) 2019-018.

Mitigation cannot be *required*, and adverse impacts can occur while still satisfying NEPA. Therefore, the Alliance suggests that CEQ clarify its statement in the draft guidance regarding mitigation. Specifically, the Alliance requests that the following sentence be removed: "However, comparing alternatives based on potential effects due to GHG emissions, along with other potential effects and economic and technical considerations, can help agencies differentiate among alternatives."

The implication of the prior sentence is that one alternative will be "differentiate[d]," i.e. *preferred* based on relative GHG emissions, which is contrary to the statutes and case law outlined above. CEQ should instead make clear that alternatives with lower GHG emissions are *not* in any way preferable based solely on that factor – instead, it is just one of many factors that agencies can consider.

Indirect Effects and Causal Relationships

The Alliance supports the statement in the draft guidance that "following the rule of reason, agencies should assess effects when a sufficiently close causal relationship exists between the proposed action and the effect. A 'but for' causal relationship is not sufficient." However, the Alliance encourages CEQ to expand upon this statement to provide agencies more guidance on what constitutes a "sufficiently close causal relationship."

For instance, BLM has recently been challenged on the reasonably foreseeable indirect impacts of leasing a parcel of land for oil and natural gas development. When BLM prepares for a lease sale, the direct impacts of the proposed action is the offering of leases, for which no emissions were authorized. The reasonably foreseeable indirect impacts of the action are the emissions from exploration and development on the leases.

As another example, when BLM issues a right-of-way (ROW) for a pipeline or for access to a wellpad location, the reasonably foreseeable indirect impact of that ROW approval is tied specifically to the construction of the pipeline or accessing the wellpad. Across the West there are a large number of split estates with federal minerals and private surface, and in these cases, the environmental impacts downstream from the wellhead may have zero federal nexus and should therefore be outside the purview of NEPA analysis.

However, environmental groups have pressed BLM to conduct an entirely speculative analysis of the end-use emissions from downstream combustion. This completely ignores the fact that BLM does not control the specific end use of the oil and natural gas produced from the federal leases or as a result of a ROW, and it is impossible to know how the oil and natural gas produced will actually be used. At the leasing phase BLM has limited information about potential bidders' development plans or what formation may be targeted for development. In fact, BLM does not even know if the parcels will be acquired. CEQ should provide clarity on the extent to which a "sufficiently close causal relationship" exists; for instance, what are the reasonably foreseeable indirect impacts of a decision to lease a parcel of land or issue a ROW.

CEQ could further support federal agencies by providing examples of what does and does not satisfy the two-part test for when to quantify "reasonably foreseeable indirect GHG emissions;" that is, when "the amount of those emissions is substantial enough to warrant quantification, and when it is practicable to quantify them using available data and GHG quantification tools." The Alliance asks that CEQ specifically define the term "substantial enough" and clarify that the above scenarios regarding end-use emissions of oil and natural gas exploration and pipeline ROWs do not satisfy the two-part test.

Reference Existing Emissions Estimates

The Alliance also supports the draft guidance's statement that "where GHG inventory information is available, an agency may also reference local, regional, national, or sector-wide emission estimates to provide context for understanding the relative magnitude of a proposed action's GHG emissions."

The context these estimates provide will make clear that individual projects' impacts are almost always statistically insignificant in a national context, aside from the largest-scale projects that require an environmental impact statement. Providing this analysis will further demonstrate NEPA compliance, bolster the legal defensibility of the analysis, and follow the "rule of reason" standard that bounds all NEPA analysis.

However, the Alliance disagrees with the requirement that, where quantitative analysis is impracticable, an agency "should include a qualitative analysis and explain its basis for determining that quantification is not warranted." Unlike the quantitative analysis discussed above, qualitative analysis implies a speculative procedure that will not assist an agency with NEPA compliance; instead, it merely adds paperwork requirements and will result in inconsistent interpretation of the results. The Alliance asks CEQ to remove this provision from the final guidance document.

Social Cost of Carbon

The Alliance also strongly supports the draft guidance's statement that "an agency need not weigh the effects of the various alternatives in NEPA in a monetary cost-benefit analysis using any monetized Social Cost of Carbon (SCC) estimates and related documents." The statement is consistent with recent court rulings regarding the use of SCC in analyzing oil and natural gas projects. *See, e.g., Appalachian Voices v. Fed. Energy Regulatory Comm'n*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019); *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019). The Alliance urges CEQ to retain this directive in the final guidance.

Conclusion

Western Energy Alliance appreciates the opportunity to provide comments, and we generally support the draft guidance on consideration of GHGs. We urge CEQ to finalize the guidance while incorporating the above suggested edits. Please do not hesitate to contact me with any questions.

Sincerely,

Tripp Parks
Vice President of Government Affairs