



Comments of the American Public Power Association and the National Rural Electric Cooperative Association on the Council on Environmental Quality's Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions

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I. Introduction

The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) (collectively, the Associations) appreciate 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Quality's (CEQ) *Draft National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas Emissions* (Draft Guidance).¹ The Draft Guidance is intended to provide direction and clarification to federal agencies on how to consider the impacts of greenhouse gas (GHG) emissions and the impacts of climate change when conducting reviews under NEPA and to facilitate federal agencies' compliance with NEPA.²

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing nearly 900 local electric cooperatives. America's electric cooperatives belong to the communities that they serve and comprise a unique sector of the electric industry. From growing suburbs to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape.

The Associations in the course of providing electricity, must engage in activities that sometimes involve federal agency action. Accordingly, the implementation of NEPA, particularly in connection with U.S. Army Corps of Engineers (Corps) permits, is important to

¹ Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097 (June 26, 2019) (Draft Guidance).

² CEQ defines GHGs as carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF₆) and nitrogen trifluoride (NF₃). The vast majority of GHG emissions from electric utilities are CO₂ emissions.

Association members, as well as to the public at large, whose health, safety, and general welfare depends on a cost-effective and reliable supply of electricity.³

The Associations appreciates this opportunity to provide the perspective of public power utilities and rural cooperative with NEPA experience, especially in the context of federal permits and other federal actions on which APPA and NRECA members rely for critical energy projects--including development of renewable energy nationwide--to inform development of the final guidance. Our comments are focused on the portion of the Draft Guidance that concerns the proper scope of analysis and causation standard for NEPA reviews of federal agency actions. APPA and NRECA encourage CEQ to finalize the Draft Guidance expeditiously to provide clear and necessary guidance to federal agencies on evaluation of GHG emissions during NEPA reviews.

APPA and NRECA members are leaders in the power industry's transition towards use of low-emission generation sources, including renewable energy sources; they are investing in new technologies, working to strengthen and expand the transmission grid, and making other resource improvements to support those technologies. APPA and NRECA members are committed to protecting the environment and to environmental sustainability, and they support ongoing national and state efforts to protect the environment and improve public health through appropriate laws and regulations. Since 2005, public power utilities have reduced their CO₂ emissions by 33 percent.⁴ Cooperatives are reducing emissions through a combination of emission-reduction measures at power plants and fuel switching to natural gas and renewables. These efforts have contributed to electric generators reducing their emissions of sulfur dioxide and nitrogen oxides by 92 and 84 percent, respectively. This, in turn, has led to substantial reductions in ambient levels of fine particulate matter and ozone. Electric generators also have cut mercury air emissions by nearly 90 percent since 2006. In addition, data collected by the U.S. Energy Information Administration indicate that electric generators have substantially

³ APPA and NREC have an interest in NEPA implementation, regulations and guidance by CEQ and by federal agencies generally. The Associations has filed comments on numerous aspects of the NEPA program, including, but not limited to: CEQ's Advance Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018) Docket No. CEQ-2018-0001-12329 and CEQ-2018-0001-12137; 79 Fed. Reg. 77,802 (December 24, 2014) (Revised Draft Guidance).

⁴ APPA Statistical Report (July 2019); <https://www.publicpower.org/resource/2019-public-power-statistical-report>.

reduced emissions of carbon dioxide. All of this has been achieved while the U.S. economy and energy consumption have continued to grow.

The electric generating industry is undergoing a transformation, which is changing the way electricity is generated, transmitted and used. Therefore, we expect to continue to need federal agency permits and approvals that will undergo NEPA review. In our members' experience, NEPA reviews that are appropriately focused on the specific agency action under review, and on those effects caused by that action, best meet the purposes and requirements of NEPA. In contrast, lengthy or overly broad NEPA reviews add significant and unreasonable costs and delays to projects, increase litigation risks, and can inhibit the viability of projects that grow the economy and provide affordable energy.

The Draft Guidance encourages agencies to use their expertise and experience to determine how, and to what degree, to analyze reasonably foreseeable potential direct and indirect effects of GHG emissions when the amount of those emissions is substantial.⁵ Further, the Draft Guidance directs federal agencies to explain its decision if an agency concludes quantification of GHG emissions would not be practical or overly speculative.⁶ The Draft Guidance also appropriately recognizes that NEPA and CEQ implementing regulations do not require agencies to monetize costs and benefits of a proposed action.⁷ We believe this approach strikes an appropriate balance and recommend that CEQ address the below key principles in its final guidance.

- The final guidance should include language confirming that an agency's scope of environmental review and analysis should be focused on those effects that are caused by its action and are subject to its regulatory jurisdiction and control.
- The final guidance should confirm that the indirect effects and cumulative impacts analyses are limited to effects proximately caused by the action under review and within the agency's control.

⁵ 84 Fed. Reg. 30,098.

⁶ *Id.*

⁷ 84 Fed. Reg. 30,098-99.

II. The Scope of an Agency’s NEPA Evaluation Should Be Appropriately Limited

The fundamental purpose of a NEPA review is to inform agency decision making. 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 decision before the agency. When evaluating a proposed federal agency action under NEPA, the agency takes a “hard look” at the environmental consequences of the specific proposed federal action.

Determining an appropriate scope of analysis is central to ensuring that a NEPA review is efficient, effective, and appropriately tailored to best inform the agency’s review of the proposed action. We suggest that CEQ incorporate language setting forth the proper scope of the agency review to ensure that, as a threshold matter, the action agency’s NEPA analysis is appropriately limited to, and focused on, the activity under review and subject to the agency’s control and jurisdiction.

Challengers have attempt to compel agencies to adopt a broader scope of NEPA analysis and to attribute to the agency’s action, effects well beyond the agency’s control and jurisdiction. Undertaking such broad analyses confuses the proper focus of a NEPA review, wastes time and resources, and increases litigation risks by failing to set and follow clear limits. The Supreme Court’s decision in *Dep’t. of Transp. v. Public Citizen* sets forth several limiting principles, including that 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.”⁸

Setting forth these appropriate limits not only will promote informed agency decision making by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also will protect agencies and private entities whose permit or license applications are subject to a NEPA process against unnecessary delay, burden, and litigation over hypothetical or tangential environmental impacts. These limits are especially important in the context of GHG emissions and climate change, because GHG emissions are mixed in the atmosphere and bear no specific geographic nexus to impacts of climate change in a particular location. Confirming an appropriate scope of review is critical to utilities that depend on the

⁸ *Dep’t of Transp. V. Public Citizen*, 541 U.S. at 767 (2004).

efficient and timely review and authorization of permits that allow important energy infrastructure to be constructed and maintained.

III. Proximate Cause Should Be the Governing Legal Standard for Determining Effects

Once the appropriate scope of NEPA review is determined, the next step is to evaluate the direct, indirect, and cumulative effects associated with the proposed federal action. The Draft Guidance properly recognizes that “but for” causation is not sufficient.⁹ That is, just because an effect would not occur “but for” an agency action, does not mean the effect should be attributed to the agency action for NEPA purposes. The Draft Guidance further states that the “rule of reason” “permits agencies to use their expertise and experience to decide how and to what degree to analyze particular effects.”¹⁰ In this regard, the Draft Guidance recognizes that “impacts of a proposed action should be discussed in proportion to their significance, [with] only a brief discussion of issues that are not significant.”¹¹ As the Draft Guidance notes, “[a]gencies preparing NEPA analyses need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment.”¹²

The Draft Guidance adopts a framework through which a “projection” of a proposed action’s direct and indirect GHG emissions may be used as a “proxy” for assessing potential climate effects.¹³ Following the “rule of reason,” action agencies are to consider effects when a “sufficiently close causal relationship” exists between the proposed action and the effect.¹⁴ “A ‘but for’ causal relationship is not sufficient.”¹⁵ Following these parameters, agencies “should attempt to quantify a proposed action’s projected direct and reasonably foreseeable indirect GHG emissions” when: (1) the amount of those emissions is substantial enough to warrant quantification and (2) it is practicable to quantify the emissions using available data and GHG quantification tools.¹⁶ This analysis is only appropriate if the quantification is deemed to be practicable and not “overly speculative.”¹⁷ Where GHG inventory information is available, “an

⁹ 84 Fed. Reg. at 30,098.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

agency also may reference local, regional, national, or sector-wide emission estimates to provide context for the relative magnitude of a proposed action's GHG emission."¹⁸ This approach, along with a "qualitative summary discussion of the effects of GHG emissions based on a literature review," is intended to allow the agency to present the environmental impacts of the proposed action clearly and with sufficient information to make a reasoned choice among alternatives and will satisfy NEPA's cumulative effects analysis because the potential effects of GHG emissions are inherently global.¹⁹

APPA and NRECA generally support the Draft Guidance's approach but encourages CEQ to adopt, in the guidance, the proximate cause legal standard set forth in *Public Citizen* for an effect's analysis, thereby ensuring proper limits are established for an agency's evaluation of any direct, indirect, and cumulative impacts of a proposed activity.²⁰ Accordingly, the agency's evaluation of effects under NEPA should focus on the effects proximately caused by the proposed federal action and not attribute to that action the impacts of other activities that are beyond the agency's control. Future environmental conditions not attributable to the agency action or within the agency's control are not caused by the action under review and, thus, should not be attributed to the agency action as direct or indirect effects in a NEPA analysis.

In *Public Citizen*, the Court rejected a NEPA challenge to regulations issued by the Federal Motor Carrier Safety Administration (FMCSA) that established safety and inspection requirements for trucks and buses crossing the border from Mexico to operate in the United States. Petitioners contended that FMCSA had violated NEPA by not considering the environmental impacts of those trucks and buses. While FMCSA's issuance of the regulations allowed the President to lift a congressionally imposed moratorium on the entry of Mexican trucks into the United States, and thus were a "but for" cause of increased truck traffic from Mexico, the Supreme Court deemed that causal connection insufficient to require FMCSA to consider the environmental effects of increased Mexican truck traffic as part of its NEPA

¹⁸ 84 Fed. Reg. at 30,098.

¹⁹ *Id.*

²⁰ The law generally distinguishes between proximate cause and "but for" causation: Proximate cause is "[a] cause that is legally sufficient to result in liability [;] [a] cause that directly produces an event and without which the event would not have occurred." Black's Law Dictionary 213. "But for" causation, on the other hand, casts a wider net, capturing a broader series of events that can be traced to a particular action without regard to whether the actor is in a position to control those events, and considers whether an injury would have occurred "but for" the action at issue.

review.²¹ According to the Court, the “legally relevant” cause of any increased truck traffic would be the President’s lifting of the moratorium, not the issuance of the FMCSA regulations.²² Moreover, because FMCSA had no authority to prevent cross-border truck movements, the Court found that requiring the agency to evaluate the environmental effects of increased truck traffic “would have no effect on FMCSA’s decision making – FMCSA simply lacks the power to act on whatever information might be contained in the [NEPA review].”²³

The courts have confirmed that proximate cause is the governing standard under NEPA, both leading up to and following *Public Citizen*.²⁴ However over time, as a matter of practice by some agencies, the indirect effects and cumulative impact analyses have inappropriately become a “catch-all” to address a wide range of effects not actually caused or controlled by the agency action under review, placing agencies under increasing pressure to consider effects the agencies have no authority to regulate, such as GHG emissions by downstream parties. The final guidance will be most effective, and consistent with Supreme Court precedent, if it confirms the proper legal standard of proximate cause applies, which, in turn, will promote timely evaluation of projects and reduce litigation risk.

²¹ *Public Citizen*, 541 U.S. at 768.

²² *Id.* at 769.

²³ *Id.* at 768.

²⁴ See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (NEPA requires a “reasonably close causal relationship ... like the familiar doctrine of proximate cause from tort law); *Found. on Econ. Trends v. Lyng*, 943 F. 2d 79 (D.C. Cir. 1991) (plaintiffs “have failed to state a claim under NEPA because they have not alleged that the USDA’s program is the proximate cause of the environmental effects they fear”); *OVEC*, 556 F. 3d at 196 (“In [*Public Citizen*], the Supreme Court rejected the idea that ‘an agency’s action is considered a cause of an environmental effect [for purposes of NEPA] even when the agency has no authority to prevent the effect.’ The Court instructed that proximate causation, rather than ‘but for’ causation, was the relevant measure of the causal relationship between the agency action and the environmental effects.”); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) (“a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a ‘proximate cause,’ in the sense meant by tort law, of the proposed agency action.”).

IV. Conclusion

The Associations appreciate the opportunity to comment on CEQ's Draft Guidance. We respectfully submit that CEQ adopt the recommendations and clarifications in these comments and issue final guidance on this important subject. Please contact Ms. Carolyn Slaughter (cslaughter@publicpower.org) or Ms. Janelle Lemon (janelle.lemen@nreca.coop) should you have questions regarding these comments.