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Via Regulations.gov

The Honorable Brenda Mallory
Chair, Council on Environmental Quality
The White House
1600 Pennsylvania Ave NW
Washington DC 20500

Re: American Petroleum Institute's Comments on the Council for Environmental Quality's Notice of Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change under the National Environmental Policy Act (88 Fed. Reg. 1,196) (CEQ-2022-0005).

Dear Chair Mallory:

The American Petroleum Institute ("API") respectfully submits the following comments on the Council for Environmental Quality's ("CEQ's" or "the Council's") Notice of Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change ("Interim Guidance") under the National Environmental Policy Act ("NEPA" or "the Act").[1] API supports the careful consideration of potential environmental impacts while allowing for the timely authorization of projects that create jobs, economic activity, and federal, state, and local tax revenue. API also shares the Biden Administration's goal of reducing greenhouse gas ("GHG") emissions across the economy and specifically from the production, transportation, and use of energy resources. We also share the administration's goal of permitting reform to reduce Americans' energy bills, promote energy security for the U.S. and our allies, and boost our ability to build energy projects. However, we do not believe that the Interim Guidance helps agencies advance these goals in a lawful or effective manner.

The goal of NEPA is to facilitate "fully informed and well-considered" agency decisions.[2] To that end, the Act "does not mandate particular results, but simply describes the necessary process"[3] through which federal agencies must make decisions. However, since NEPA was

[1] 88 Fed. Reg. 1,196 (Jan. 9, 2023)/CEQ-2022-0005.
[2] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council ("Vt. Yankee")*, 435 U.S. 519, 558 (1978).
[3] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350; *See also Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980*); Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004); *Vt. Yankee*, 435 U.S. at 558.

enacted over fifty years ago, the scope of NEPA reviews has expanded dramatically. This expansion has unfortunately lengthened review times, fostered confusion among project sponsors and regulators, and generated regulatory uncertainty.

Unless the NEPA process is reformed, this Administration's efforts to invest trillions of dollars in infrastructure improvements and environmentally beneficial projects may be compromised. Indeed, timely and fully informed NEPA reviews are critical to successfully implementing the Infrastructure Investment and Jobs Act ("IIJA") that President Biden signed into law on November 15, 2021.[4] This major component of President Biden's "Build Back Better" domestic infrastructure agenda contains approximately $550 billion in new infrastructure spending over current spending levels, for a total of $1.2 trillion over the next five years. Likewise, the Inflation Reduction Act of 2022 ("IRA") that President Biden signed into law on August 16, 2022 will provide nearly $370 billion in tax credits, loan guarantees, and direct investments to improve energy security, increase energy innovation, reduce GHG emissions, and support underserved communities.[5]

These two statutes are not only historic in their scale but are also unprecedented in the level of funding specifically devoted to environmentally beneficial projects, clean energy programs, climate change mitigation and resilience projects, and water infrastructure. In addition to the environmentally beneficial projects described above, the IIJA and IRA will collectively provide nearly $10 billion in funding to facilitate the buildout of carbon capture, utilization, and sequestration ("CCUS") infrastructure and nearly $15 billion to promote the development and deployment of advanced hydrogen projects.[6]

Despite the widely recognized importance of these historic investments, CEQ's Interim Guidance will not help agencies conduct the NEPA reviews, where applicable, to bring these projects into fruition in a timely and effective manner. On the contrary, as currently drafted, the Interim Guidance advises agencies to perform extraneous and unnecessary analyses within project reviews — analyses that will likely make it incredibly difficult, if not impossible, for agencies to provide timely decisions.

Therefore, while API supports this Administration's objective of reducing U.S. GHG emissions and commends CEQ's intent to assist agencies in their consideration of climate change in NEPA reviews, we cannot support the Interim Guidance as currently written. Specifically, we recommend that CEQ rescind the immediate effectiveness of the Interim Guidance and instruct agencies that it should not be relied upon unless and until CEQ finalizes guidelines after completion of proper notice-and-comment rulemaking procedures. API further urges CEQ to ensure that any subsequent guidelines directing agencies to incorporate climate change considerations into NEPA analyses remain focused on the purpose and requirements of NEPA

[4] *See* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/15/remarks-by-president-biden-at-signing-of-h-r-3684-the-infrastructure-investment-and-jobs-act/.
[5] https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/. .
[6] IIJA funding: https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/; IRA funding: https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf. .

and fully respond to the following issues, which are discussed more thoroughly in the detailed comments that follow:

- The Interim Guidance impermissibly advises agencies to use NEPA to advance presidential climate policies and GHG emissions goals regardless of whether those policies and goals are relevant to the proposed action being reviewed;

- The Interim Guidance's suggestion that agencies should quantify an unmanageably broad array of each proposed project's potential GHG emissions contravenes NEPA, invites speculation, and impedes sound decision-making;

- The Interim Guidance misconstrues NEPA's requirement that agencies consider proposed projects' potential "effects" as a means to require the quantification and abatement of proposed projects' GHG emissions irrespective of whether the emissions will have any discernable impacts on the affected environment;

- The Interim Guidance impermissibly advises agencies to consider proposed projects' potential indirect impacts even if the indirect impacts are highly attenuated and speculative, and regardless of whether the impacts are outside of agencies' expertise or statutory jurisdiction;

- The Interim Guidance urges agencies to quantify emissions based on unrealistic "full burn" scenarios and substitution analyses that often cannot be modeled with sufficient certainty or reliability to be useful in agency decision-making;

- The Interim Guidance undermines the objectivity of NEPA reviews by instructing agencies to single out fossil fuel-related projects as requiring the most expansive, speculative, and time-consuming assessments, while urging agencies to streamline the reviews of renewable energy projects by refraining from analyzing indirect or cumulative impacts;

- The Interim Guidance improperly advises agencies to conduct cumulative climate change assessments that are boundless and speculative;

- The Interim Guidance urges agency reviews to exclusively monetize proposed projects' potential GHG emissions impacts even though NEPA does not require monetization and despite concerns that partial monetization will deemphasize other important environmental and economic benefits of the project;

- The Interim Guidance advises agencies to monetize potential GHG emissions using the Interagency Working Group's ("IWG's") social cost of GHG estimates ("SC-GHG estimates") that were not developed for, and are ill-suited for, use in NEPA reviews;

- The Interim Guidance urges agencies to consider alternatives that are plainly infeasible, outside of agencies' jurisdiction, or wholly unrelated to the purpose and need for the project under review;

- The Interim Guidance misconstrues NEPA's requirement that agencies assess reasonable alternatives that can avoid or minimize adverse effects on the human environment as an authorization to evaluate and select alternatives to address the "climate crisis" and "to reduce GHG emissions to the greatest extent possible;" and,

- The Interim Guidance urges agencies to require GHG mitigation measures that NEPA does not require or independently authorize agencies to adopt or impose.

Based on the issues outlined above and discussed in more detail in Section III, API is concerned that continued implementation of the Interim Guidance will not result in "fully informed and well-considered" agency decisions.[7] On the contrary, we believe the Interim Guidance will perpetuate and exacerbate the undue delay, complexity, and inconsistency that have been the unfortunate hallmarks of NEPA reviews for decades, highlighting the need for comprehensive permitting reform.

I. INTEREST OF API

API represents all segments of America's oil and natural gas industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 members produce, process, and distribute most of the nation's energy. API's Climate Action Framework presents actions that the oil and natural gas industry is taking to accelerate technology and innovation, further mitigate emissions from operations, endorse a carbon pricing policy, advance lower-carbon fuels, and importantly, drive consistent, comparable, and reliable climate reporting.[8] API shares the Biden Administration's goal of reducing economy-wide GHG emissions, including within low-income and disadvantaged communities. We further appreciate that achieving meaningful GHG emission reductions will take a combination of public policies, innovation, voluntary initiatives, and public and private investment.

Consistent with a commitment to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the U.S.'s national energy needs in an efficient and environmentally responsible manner, API has a long history of advocating for fully informed and well-functioning NEPA review processes. In each of the many regulatory and judicial proceedings in which API has participated, API has shared and supported CEQ's long-held interest in implementing NEPA "to reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment."[9]

Our frequent advocacy in favor of NEPA reform derives from the firsthand experience of API's member companies. API's members engage in a wide variety of activities that involve major federal actions triggering NEPA reviews, including exploration and production of oil and gas resources on federal lands and the Outer Continental Shelf ("OCS"), construction of interstate

[7] *Vt. Yankee*, 435 U.S. 519, 558 (1978).
[8] API, *Climate Action Framework* (2021), https://www.api.org/-/media/Files/EHS/climate-change/2021/api-climate-action-framework.pdf?la=en&hash=E6BB3FA3013B52153E10D3E66C52616E00411D20.
[9] 43 Fed. Reg. 55,978 at 55,983 (Nov. 29, 1978).

natural gas pipelines and oil and natural gas pipelines that cross federal lands or international borders, construction and operation of liquefied natural gas terminals and CCUS infrastructure to name just a few. Accordingly, our member companies are directly impacted by the NEPA review decisions made by, among other agencies, the Bureau of Land Management ("BLM"), the Bureau of Ocean Energy Management ("BOEM"), the Department of Energy ("DOE"), the Environmental Protection Agency ("EPA"), the Federal Energy Regulatory Commission ("FERC"), the Department of State, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Army Corps of Engineers ("Army Corps"), and the U.S. Forest Service.

API herein provides general comments in Section II below on the need for well-functioning and fully informed NEPA review processes, and the importance of clear and consistent NEPA review guidelines to order to provide for the full, fair, and efficient consideration of a wide variety of nationally important projects and approvals. In Section III, API then describes in detail the ways in which the Interim Guidance impermissibly misconstrues NEPA's procedural requirements and statutory limits, impedes Congress's goal of improving agency decision-making and public awareness, and undermines the Biden administration and the oil and natural gas industry's shared interest in a well-functioning, fully informed, and collaborative NEPA review process.

II. GENERAL COMMENTS

NEPA is a procedural statute[10] that Congress expected would facilitate "fully informed and well-considered" agency decisions;[11] Congress did not intend the Act's procedural mandates to so encumber agencies with extraneous analytical requirements that it would become effectively impossible for agency reviews to culminate in reasonably timely decisions. Indeed, Congress's expectation that NEPA would "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans"[12] cannot be reconciled with decades of implementing the Act such that its required reviews are now widely regarded as among the foremost obstacles to developing the nation's most critical infrastructure.

Despite decades of CEQ guidance and related case law acknowledging that NEPA reviews should be guided by the "rule of reason," the NEPA review process has generally remained unnecessarily complex, unreasonably time-consuming, and uncertain. This impedes investment in critical infrastructure, including projects immediately needed to facilitate the growth of a

[10] *See* 42 U.S.C. § 4332(2)(C) (agency obligation under NEPA is only to prepare detailed statement on "adverse environmental effects which cannot be avoided"); *See also, Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise . . . ."); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, (435 U.S. 519, 558 (1978) (NEPA's "mandate to the agencies is essentially procedural); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment").

[11] *Vt. Yankee*, 435 U.S. 519, 558 (1978).

[12] 42 U.S.C. § 4331(a) (emphasis added).

changing energy market as well as countless investments essential to improving the resiliency, health, and economic wellbeing of underserved communities.

CEQ's recent statistics about Environmental Impact Statements ("EISs") demonstrate that NEPA reviews continue to be unnecessarily complex and unduly protracted. CEQ calculates that the average length of a final NEPA EIS has risen to 661 pages, with an average of 1,042 pages of appendices.[13] Strikingly, the average EIS length has continually increased since NEPA's enactment, despite CEQ's issuance of a directive over 40 years ago stating that normal EISs should be no longer than 150 pages, and at most 300 pages for proposals of "unusual scope or complexity."[14] Given the average length of modern EISs, it is unsurprising that it now takes an average of 4.5 years to complete one, with some EIS reviews extending nearly two decades.[15]

The ever-expanding size of EISs is often attributed to the inclusion of highly attenuated and speculative alternatives and effects, the analysis of which does not further meaningful project review. And, as explained in Section III below, while it is certainly not the outcome that API believes that CEQ intends, the Interim Guidance is likely to further undercut the clarity and consistency of agencies' NEPA reviews. It is also likely to further frustrate the federal government's ability to implement NEPA in a manner that "reduce[s] paperwork, [] reduce[s] delays, and at the same time [] produce[s] better decisions which further the national policy to protect and enhance the quality of the human environment."[16]

There has possibly never been a greater need for CEQ to facilitate well-functioning NEPA review processes. The Biden Administration inherited a strong American energy outlook, reflected in low household energy costs,[17] record GHG emissions reductions,[18] and reduced reliance on foreign energy. NEPA review processes can facilitate the development of projects that simultaneously protect the environment, provide energy, and produce economic benefits. [19]

As noted by the U.S. Energy Information Administration ("EIA") "[o]ver the past 15 years lower emissions in the U.S. have largely been driven by the shift from coal to natural gas in electricity generation . . . Of the 819 million metric ton decline in CO_2 emissions from 2005 to 2019, . . . almost 532 million metric tons (65%) . . . is attributable to the shift from coal-fired to natural gas-fired electricity generation."[20] Importantly, the natural gas resources that are facilitating the power sector's dramatic decline in CO_2 emissions are being produced with far fewer methane emissions. Indeed, as a result of technology and efficiency measures, methane emissions from

[13] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018), (June 12, 2020).
[14] 40 C.F.R. § 1502.7 (1978).
[15] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2018), (June 12, 2020).
[16] 43 Fed. Reg. at 55,983.
[17] "Consumer Expenditures--2019." U.S. Bureau of Labor Statistics, September 9, 2020. https://www.bls.gov/news.release/cesan.nr0.htm. .
[18] U.S. Environmental Protection Agency, "Inventory of U.S. Greenhouse Gas Emissions and Sinks 2019" https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks. .
[19] U.S. Energy Information Administration, "U.S. Energy Facts Explained" https://www.eia.gov/energyexplained/usenergy-facts/.
[20] https://www.eia.gov/todayinenergy/detail.php?id=48296.

production of both oil and natural gas in the largest producing basins were down nearly 70% between 2011 and 2018 and continue to trend downward.[21]

In addition to its continually improving environmental performance, the U.S. oil and natural gas industry directly and indirectly supports more than 11 million U.S. jobs and makes up nearly eight percent of the U.S. economy.[22] Oil and gas activities also contribute billions of dollars to federal and state governments annually, which support important programs like education, infrastructure, and conservation efforts. In 2019 alone, DOI disbursed nearly $12 billion generated from energy production on federal lands and waters to the U.S. Treasury and state governments.[23] In Fiscal Year 2020, even amid the pandemic, the industry paid more than $450 million in bonus bids and lease rentals and more than $6.7 billion in total revenue.[24] In the same year, the Land and Water Conservation Fund, which is funded almost entirely by offshore oil and natural gas revenues, distributed over $227 million across the country for outdoor recreation and conservation efforts.[25] And in 2021, DOI announced that $1.6 billion in funding would be used to address critical deferred maintenance projects and improve transportation and recreation infrastructure in national parks, national wildlife refuges and recreation areas, and Bureau of Indian Education schools. These investments, including those funded through the Great American Outdoors Act,[26] would not exist but for energy development on the OCS.

The ability of U.S. producers to provide more oil and natural gas supplies to the world market has not only created global environmental benefits by displacing fuels produced with higher GHG emissions in less regulated countries,[27] it also improved geopolitical dynamics by increasing the energy security of the U.S. and its allies. Given current global circumstances, it is critically important that CEQ help the relevant agencies conduct timely and effective NEPA reviews that allow the oil and natural gas industry to maintain our domestic energy security.

A well-functioning and fully informed NEPA review process is also essential to the IIJA's $550 billion in new infrastructure spending, A significant amount of IIJA funding is specifically devoted to facilitating the development and further buildout of CCUS and hydrogen infrastructure. More specifically, the IIJA provides $100 million to expand the U.S. Department of Energy's ("DOE's") Carbon Capture Technology program to include front-end engineering and design for carbon dioxide transportation infrastructure and $2.1 billion for the establishment

[21] Methane emissions per unit of production from key basins fell nearly 70% between 2011 and 2019, indicating industry's increased efficiency in reducing emissions, according to data from EPA and EIA. *See* "Falling Methane Rates in Natural Gas Production from Key Basins" at https://www.api.org/climate.
[22] PricewaterhouseCoopers LLP, "Impacts of the Oil and Natural Gas Industry on the US Economy in 2019," https://www.api.org/-/media/Files/Policy/American-Energy/PwC/API-PWC-Economic-Impact-Report.pdf.
[23] U.S. Department of the Interior, "Natural Resources Revenue Data" https://revenuedata.doi.gov/querydata/?dataType=Disbursements.
[24] ONRR, Royalty Revenue Data, https://revenuedata.doi.gov/query-data/
[25] U.S. Department of the Interior, "Secretary Bernhardt Announces $227 Million for State Outdoor Recreation and Conservation Projects" March 31, 2020.
[26] https://www.doi.gov/gaoa.
[27] *See* https://www.bloomberg.com/features/russia-europe-gas-pipeline-climate-impact-2021/#xj4y7vzkg (discussing methane emissions associated with Russian natural gas production. . See also Energy Secretary Granholm's characterization of Russian natural gas as the "dirtiest form of natural gas on earth." https://science.house.gov/hearings?ID=CCCE2DB3-91AE-4E02-ACB0-AFA7512D6EBB.

of a new CO_2 Infrastructure Finance and Innovation Act ("CIFIA") program to provide low-interest loans for carbon dioxide transport infrastructure projects. Another $2.5 billion was allocated to the expansion of DOE's Carbon Storage Validation and Testing program to include large-scale commercialization of carbon sequestration and transport projects. And $3.5 billion was authorized for regional direct air capture projects. The IIJA also authorized DOI to permit geologic carbon sequestration on the OCS.

With respect to hydrogen, the IIJA provided DOE $8 billion for the establishment of clean hydrogen programs, as well as $500 million for a clean hydrogen manufacturing and recycling program. The IIJA also devoted another $1 billion to funding a demonstration, commercialization and deployment program intended to decrease the cost of clean hydrogen production from electrolyzers.

As a major supplement to the IIJA's already historic level of clean energy infrastructure funding, the IRA provides nearly $370 billion in additional federal funding through a mix of tax incentives, grants, loan guarantees, and other investments.[28] This includes an additional $1.55 billion in tax credits for CCUS projects and more than $5.3 in additional tax credits for clean hydrogen projects.[29] The IRA also provides DOE $40 billion in clean energy loan authority, including $2 billion in direct loan programming for the construction or modification of electric transmission facilities, and another $760 million in grants to facilitate the siting of interstate transmission lines.[30] The IRA also allocates EPA $27 billion to award competitive grants for clean energy and climate projects that will reduce GHG emissions.[31]

This unprecedented level of infrastructure investment will almost certainly precipitate NEPA reviews on a scale never before encountered by federal agencies. It is not clear how federal agencies can effectively manage the number of NEPA reviews necessary to bring the anticipated infrastructure investment into being, but clearly CEQ will need to provide agencies some means of ensuring their reviews become more efficient and focused. Without reasonable agency interpretations of NEPA requirements and constructive guidance from CEQ on how agencies can adopt well-functioning and fully informed review processes, agency NEPA reviews will present a formidable barrier to the infrastructure improvements described in the IIJA and IRA.

CEQ plainly recognizes that this historic level of infrastructure investment requires well-functioning NEPA processes, but the Interim Guidance seems to suggest that CEQ intends to help agencies improve the functionality and efficiency of their NEPA reviews only for renewable energy projects. Such an approach is impermissible and inappropriate. CEQ cannot and should not attempt to address dysfunctional NEPA review processes for only those industries and projects that the Administration, or any given Administration, favors. Agencies are not permitted to tailor their reviews to expedite the approval of projects that the Administration supports and mire down or fundamentally change energy projects that the Administration does not favor. NEPA was designed to prevent preordained outcomes – not facilitate them.

[28] https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/.
[29] https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf.
[30] https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf (at. P. 10).
[31] https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf (at. P. 10).

III. THE INTERIM GUIDANCE IS INCONSISTENT WITH NEPA, BINDING LEGAL PRECEDENT, AND CEQ'S INTEREST IN WELL-FUNCTIONING NEPA REVIEW PROCESSES THAT PROMOTE BETTER DECISION-MAKING

In the following subsections, API describes those aspects of the Interim Guidance that we believe contravene NEPA and binding case law interpreting the Act. We also explain how the Interim Guidance will frustrate, rather than further, CEQ's interest in well-functioning review processes and improved agency decision-making.

a. Urging Agencies to Attempt to Quantify the Attenuated and Speculative Potential GHG Emissions Indirectly Associated with Proposed Actions Contravenes NEPA, Disregards Binding Legal Precedent, Ignores Statutory Limits on Agencies' Jurisdiction, and Undermines Agencies' Ability to Consider the Environmental Impacts of their Decisions

The Interim Guidance erroneously suggests that agencies should assume that a proposed project will result in climate change impacts to the human environment whenever there are any presumed direct and indirect GHG emissions associated with the project.[32] This approach disregards the widespread and diffuse global causes of climate change impacts, ignores binding case law on the causal relationship between projects and their "reasonably foreseeable" impacts, and overlooks the jurisdictional limits that constrain the scope of the analyses that agencies conduct under NEPA.

Moreover, in order to attribute greater "significance" to a proposed fossil fuel-related project's GHG emissions for purposes of NEPA reviews than would otherwise be supported by climate science or NEPA case law, the Interim Guidance urges agencies to skew their analyses by assigning speculative indirect and cumulative impacts to only these types of projects. In contrast to its treatment of fossil fuel-related projects, the Interim Guidance suggests that agencies may presume that "certain renewable energy projects" have relatively "minor and short-term GHG emissions," the climate change effects of which need not be fully considered.[33] The Interim Guidance also biases NEPA reviews by requiring agencies to assess proposed oil and natural gas projects' GHG emissions using substitution analyses and "full burn" assumptions that defy NEPA's "rule of reason" and invite agency speculation about attenuated market dynamics that are well beyond the expertise of most agencies.

The inevitable result of these biased, speculative, and unscientific assessments will not be better, more informed agency decision-making. As explained further below, CEQ's preferred GHG assessments will not only lead to longer agency reviews of more speculative and less relevant potential impacts, but they will also undermine agency decision-making by leading to double counting of potential impacts and by frustrating agencies' ability to understand the more direct and less speculative impacts of their decisions.

[32] 88 Fed. Reg. at 1,201.
[33] 88 Fed. Reg. at 1,202.

1. The Interim Guidance Impermissibly Converts NEPA's Requirement to Consider Proposed Projects' "Effects" Into a Mechanism for Regulating Proposed Projects' GHG Emissions Without Regard to Whether the Emissions will have a Discernable Impact on the Affected Environment

Even though the Interim Guidance seemingly recognizes that "NEPA requires agencies to consider the reasonably foreseeable direct and indirect *effects* of their proposed actions,"[34] the Interim Guidance instructs that agencies should "quantify all reasonably foreseeable *emissions* associated with . . . proposed action[s]."[35] This subtle shift from the NEPA's requirement that agencies consider proposed actions' "effects" to the Interim Guidance's recommendation that agencies consider proposed actions' "emissions" allows CEQ to instruct agencies to quantify, consider, and require the abatement of GHG emissions without regard to whether the *emissions* will have a discernable *effect* on the affected environment. Because the climate change *effects* that the Act actually requires agencies to consider would only rarely be "attributable to a single action,"[36] the Interim Guidance's recommendation that agencies quantify and consider proposed projects' GHG emissions essentially urges agencies to use their NEPA authority to regulate GHG emissions.

Indeed, CEQ openly acknowledges that its Interim Guidance is intended, at least in part, to help achieve climate change policy commitments and objectives, such as "reduc[ing] GHG emissions to the greatest extent possible."[37] These current policy preferences, however, can have no bearing on the effects that Congress required agencies to consider when it originally enacted NEPA. And more to the point, the Administration's climate policy objectives do not allow each federal agency wielding authority under NEPA to regulate the GHG emissions of proposed projects simply because the Act obliges them to consider the effects of proposed actions.

The difference between reducing GHG emissions and reducing the effects/impacts potentially associated with GHG emissions is seemingly subtle, but highly important in this context. Climate change results from an increase in atmospheric GHG concentrations from the incremental addition of GHG emissions from a vast multitude of individual sources."[38] Thus, while a single proposed project's GHG emissions may contribute to effects/impacts relevant to NEPA analyses (*e.g.*, the various effects of climate change), GHG emissions are not impacts in and of themselves.

Even if the GHG emissions of a proposed project could be ascertained with reasonable certainty, the GHG contribution of any single project is highly unlikely to change atmospheric GHG concentrations to such an extent that it would allow an agency to correlate a specific climate change *effect* to a particular project's *emissions*. As CEQ and other agencies explained in one of the Interagency Working Group ("IWG")'s prior technical support documents ("TSD") estimating the SC-GHGs:

[34] 88 Fed. Reg. at 1,204 (emphasis added) (citing 42 U.S.C. § 4332(2)(C)(i) and 40 C.F.R. § 1508.1(g)).
[35] 88 Fed. Reg. at 1,204 (emphasis added).
[36] 88 Fed. Reg. at 1,201.
[37] *See e.g.,* 88 Fed. Reg. at 1,206.
[38] 88 Fed. Reg. at 1,201.

> …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.[39]

More recently, in the 2021 Interim TSD, the IWG (and therefore CEQ) reiterated that "[u]nlike many environmental problems where the causes and impacts are distributed more locally, climate change is a true global challenge making GHG emissions a global externality."[40] To be clear, API does not take these statements on the global nature of climate change to mean that domestic efforts to reduce GHG emissions are futile or unnecessary, and API in fact agrees that domestic GHG reduction efforts are critical to facilitating international climate change efforts. Rather, API believes these statements reflect that GHG emissions are not the same as climate change effects, and that it is therefore not credible under the NEPA framework to attribute climate change effects to each proposed project that may result in GHG emissions. Absent direct and discernable connections between most proposed projects' GHG emissions and specific climate change effects, CEQ's broad request that agencies quantify, consider, and abate proposed projects' GHG emissions amounts is effectively a recommendation that agencies use their NEPA reviews to regulate GHGs. This is a substantial deviation from the actual NEPA statute.

If, on the other hand, CEQ views GHG emissions as a proxy for the type of climate change effects that NEPA requires agencies to consider, one would expect the Interim Guidance to provide some GHG emissions threshold that agencies could use to help discern whether a specific project's anticipated GHG emissions could be correlated to particular climate change effects. But the Interim Guidance declines to suggest that "any particular quantity of GHG emissions . . . 'significantly' affects[s] the quality of the human environment."[41] Not only is CEQ's omission of any threshold for significance inexplicably inconsistent with the Council's prior guidance on the consideration of GHG emissions in NEPA reviews,[42] it makes plain that CEQ's goal in advising agencies to quantify proposed projects' potential GHG emissions is to encourage and facilitate agencies' efforts to regulate GHGs and "reduce GHG emissions to the greatest extent possible"[43] using their NEPA review authority. Nonetheless, the fact remains that no scientifically reliable method exists to attempt to establish any threshold for significance.

2. The Interim Guidance's Suggested Framework for Considering Indirect and Cumulative GHG Emissions Associated with Proposed Actions Impermissibly Invites Speculation

[39] IWG TSD: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866 at 10 (Feb. 2010).
[40] Interim TSD at 15.
[41] 88 Fed. Reg. at 1,200.
[42] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.") (emphasis in original).
[43] 88 Fed. Reg. at 1,206.

As the previous subsection explains, the Interim Guidance advises agencies to quantify proposed projects' potential direct GHG emissions without regard to their significance or whether they are rationally correlated to reasonably observable climate change effects. In this subsection, we explain that the Interim Guidance advises agencies to also speculatively quantify proposed projects' potential indirect and tangentially related "upstream" and "downstream" GHG emissions over which agencies have no expertise or control.[44] The Interim Guidance then further advises agencies to consider the incremental contribution of these attenuated and speculative impacts "when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[45]

CEQ's request that agencies speculatively quantify GHG emissions that are too attenuated to be foreseeable is not only at odds with NEPA and binding Supreme Court jurisprudence, but it also applies discriminately, only when agencies are reviewing fossil fuel-related projects. Agencies reviewing renewable projects are free to presume no significant indirect or cumulative GHG impacts "[a]bsent exceptional circumstances."[46] While NEPA authorizes CEQ to guide agencies in their NEPA reviews, the Act does not permit the Council to direct agencies' reviews toward the outcomes that CEQ or an administration favors.

A. The Interim Guidance's Suggestion that Agencies Consider the Indirect and Cumulative GHG Emissions of Fossil Fuel-Related Actions Contravenes Binding NEPA Jurisprudence

While NEPA itself makes no mention of indirect or cumulative effects, CEQ notes that the current regulations "require[] agencies to consider the reasonably foreseeable direct and indirect effects of their proposed actions[.]"[47] However, the Interim Guidance misconstrues the types of indirect and cumulative effects that are reasonably foreseeable and wholly ignores that NEPA requires agencies to consider only effects with a strong causal connection to the action under review. The Interim Guidance's instruction prevents agencies from applying reasonable limits in determining which indirect and cumulative impacts are reasonably foreseeable and bear a sufficient causal relationship to the agency action. Eliminating this long-standing discretion and advising agencies to identify and attempt to quantify the speculative indirect or cumulative impacts of only a subset of agency decisions (*i.e.*, those related to fossil fuels) does not improve agency decision-making and serves only to "trivialize NEPA."[48]

The concept of causation is central to understanding an agency's obligation under NEPA to consider indirect effects. To be consistent with binding Supreme Court precedent, agencies must treat causation as a critical limit on their obligation to evaluate the effects of GHG emissions. While upstream and downstream GHG emissions may bear some tenuous relationship to a federal action, that is not enough to require 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

[44] 88 Fed. Reg. at 1,204.
[45] 88 Fed. Reg. at 1,205.
[46] 88 Fed. Reg. at 1,202.
[47] 88 Fed. Reg. at 1,204.
[48] *Andrus v. Sierra Club*, 442 U.S. 347, 355 (1979).

particular effect under NEPA and the relevant regulations."[49] Indirect effects only must be considered when there is a "reasonably close causal relationship" that would qualify as a "proximate cause" under tort law.[50]

Thus, for example, CEQ may not compel agencies to implement NEPA in a manner that requires consideration of impacts outside of the agencies' statutory jurisdiction.[51] Congress intended NEPA to ensure that in making decisions, agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts."[52] Thus, NEPA requires that environmental impacts be "adequately identified and evaluated" and "prohibits uninformed . . . agency action," but the underlying purpose of NEPA review is to "affect the agency's substantive decision."[53]

Indeed, a NEPA review is triggered by an action that a federal agency proposes to undertake pursuant to an authorizing statute (*e.g.,* a federally issued permit under the Clean Water Act or a certificate issued pursuant to the Natural Gas Act). It is through these authorizing statutes that Congress delineated the bounds of agencies' decision-making authority, and therefore also circumscribed the agency's discretion to take the action which triggered the NEPA review. In enacting NEPA, Congress did not intend to broadly erase all the jurisdictional limits that it carefully circumscribed for agencies through a multitude of different authorizing statutes.[54]

Consequently, in *Public Citizen,* the Supreme Court looked at the purpose Congress intended for NEPA as well as a common-sense understanding of causation to 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" and thus "the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.'"[55] In so holding, the Court explained that considering actions an agency has no ability to control serves "no purpose" because it undermines NEPA's "'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process."[56] The Supreme Court therefore concluded that NEPA's "informational purpose" is not served when an agency devotes resources to the consideration of effects that are beyond the agency's ability to control.[57]

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[49] *Public Citizen*, 541 U.S. at 767. .
[50] *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). .
[51] *Public Citizen*, 541 U.S. at 770; *See also National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007).
[52] *Robertson v. Methow Valley*, 490 U.S. 332, 349 (1989).
[53] *Robertson v. Methow Valley*, 490 U.S. 350-351.
[54] *See Town of Barnstable v. Federal Aviation Administration*, 740 F.3d 681 (D.C. Cir. 2014) (FAA lacked authority to contradict approval of wind project regardless of outcome of assessment of risk to air traffic).
[55] *Public Citizen*, 541 U.S. at 770.
[56] *Public Citizen,* 541 U.S. at 767-68.
[57] *Public Citizen,* 541 U.S. at 769. Several other courts have similarly looked to the underlying purpose of NEPA and reached the same commonsense conclusion. *See Sierra Club v. Fed. Energy Regul. Comm'n,* 827 F.3d 36, 47-49 (D.C. Cir. 2016) (finding that the Federal Energy Regulatory Commission was not obligated to consider effects it

For example, in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, the U.S. Court of Appeals for the Eleventh Circuit held that, when the Army Corps undertakes a NEPA review for the proposed approval of a discharge permit under Section 404 of the Clean Water Act ("CWA"), it should not consider the environmental effects of the wholly separate activities that approving the permit might later make possible.[58] According to the Eleventh Circuit, "NEPA and its regulations require agencies to consider only those effects caused by the agency's action" and not the "attenuated" effects caused by later activities made possible by the agency's action.[59] "Only the effects caused by that change in the environment—here, the discharge into U.S. waters—is relevant under NEPA."[60] The discharge in that case made it possible (in the "but-for" sense) for the land owner to operate a phosphate mine, which in turn made it possible to process ore and produce fertilizer.[61] But those later activities "[took] place far from and long after the Corps-permitted discharges."[62] Moreover, as relevant to this discussion of agency jurisdiction, the court explained that "[t]he Corps did not issue a mining permit, nor a permit to produce fertilizer" because it "has no jurisdiction to regulate or authorize any of that."[63] And because those actions were outside the agency's authority to regulate, the Eleventh Circuit concluded that they were necessarily outside the "effects" of the agency's action that NEPA required it to review.[64]

Not only is the Interim Guidance inconsistent with legal precedent, it makes little practical sense in this context. For example, with reference to the Eleventh Circuit decision described above, Congress conferred to the Army Corps the authority to issue permits for the discharge of dredged or fill material to waters of the United States under Section 404 of the CWA and, in executing that duty, the Army Corps developed expertise in CWA Section 404 permitting and the potential environmental effects of such discharges. Using a similar statutory authorization, Congress vested EPA with the authority to regulate effects from the phosphate mine and the subsequent manufacture of fertilizer, and therefore EPA similarly developed an understanding of the environmental effects of those operations.

This specialization of agency expertise concomitant with their statutory authority is the paradigm Congress intended. Congress did not direct the Army Corps to develop the expertise needed to address any air emission or waste-generation impacts of the hypothetical manufacturing of fertilizer that the Army Corps' issuance of the Section 404 permit may allow to occur. Congress entrusted that jurisdictional authority to EPA, and thereby instructed EPA to become the expert agency for purposes of exercising such authority.

"had no authority to prevent"); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the Army Corps of Engineers did not have to consider effects beyond its "control and responsibility" in its NEPA analysis). .

[58] *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019).

[59] *Id*. at 1,294.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*.

NEPA must therefore be implemented consistent with this statutory paradigm, as Congress intended. By requiring agencies to implement NEPA without regard for their congressionally-authorized jurisdiction or expertise, the Interim Guidance will result in inexpert assessments of potential effects outside of an agency's decision-making authority and inconsistent with "NEPA's core focus on improving agency decision-making."[65]

There are also very practical reasons for requiring agencies to conform the scope of their NEPA analyses to the extent of their statutory jurisdiction. When an agency is encouraged or required to consider every possible indirect GHG emission or climate change impact upstream and downstream of the discrete authorization it is considering, that expansive analysis will necessarily overlap with and duplicate (and possibly conflict with) other agencies' analyses and authorizations. And when each agency is encouraged or required to similarly consider all possible upstream and downstream impacts irrespective of how limited the agency's jurisdiction may be or how attenuated and speculative the indirect effects are, wasteful duplication and inconsistency is all but a certainty.

The result of this inevitable duplication and inconsistency is not just the squandering of agency resources on needless paperwork or the perpetuation of inordinate delay; requiring each agency to speculate as to tangentially related impacts outside of their statutory jurisdiction frustrates rather than furthers well-informed decision-making. Requiring agencies to analyze any and all indirect impacts will distract agencies from fully or effectively assessing the direct impacts of their proposed actions.

Since first promulgating its regulations in 1978, CEQ has maintained that "NEPA's purpose is not to generate paperwork."[66] But that is precisely what would be accomplished if CEQ does not rescind the Interim Guidance and cease requiring agencies to inexpertly opine on indirect or cumulative effects that are beyond their statutory authority and thus expertise to control.

B. The Interim Guidance Urges Agencies to Quantify GHG Emissions Based on Unrealistic "Full Burn" Scenarios and Substitution Analyses that Cannot be Modeled with Sufficient Certainty to be Useful in Agency Decision-Making

As noted above, an agency's obligation to evaluate indirect and cumulative impacts is limited to those effects which are "reasonably foreseeable." "'Reasonable foreseeability' does not include 'highly speculative harms' that 'distort[] the decision-making process' by emphasizing consequences beyond those of 'greatest concern to the public and greatest relevance to the agency's decision.'"[67] But that is precisely the type of guesswork the Interim Guidance sanctions by requesting that agencies consider even the most speculative and indirect GHG emissions tangentially related to an action being reviewed.

[65] *Public Citizen,* 541 U.S. at 769 n. 2.
[66] *See* 1978 NEPA Regulations at 40 C.F.R. § 1500.1(c).
[67] *City of Shoreacres*, 420 F.3d at 453 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)) (alteration in original). .

According to the Interim Guidance:

> where the proposed action involves fossil fuel extraction, direct emissions typically include GHGs emitted during the process of exploring for and extracting the fossil fuel. The reasonably foreseeable indirect effects of such an action likely would include effects associated with the processing, refining, transporting, and end-use of the fossil fuel being extracted, including combustion of the resource to produce energy.[68]

This overly simplistic portrayal of fossil fuel projects and the downstream uses of resources like oil and natural gas undermines agencies' NEPA analyses by encouraging them to consider potential impacts based on guesswork rather than foreseeability. Setting aside that this provision of the Interim Guidance ignores the requirement that agencies consider only those impacts that are proximately caused by proposed actions and within agencies' jurisdiction to address, it is also factually incorrect, or at least misleading.

While oil and natural gas produced from federal leases may ultimately be combusted, these hydrocarbons are also used as feedstock for a number of products such as fertilizers, fabrics, medicines, plastics, chemicals, and a wide variety of consumer products. Thus, the Interim Guidance's suggestion that agencies evaluate fossil fuel projects using a "'full burn' assumption" "that all of the available resources will be produced and combusted to create energy"[69] is an unduly speculative and improper "worst case" scenario.[70]

"Full burn" emissions assumptions are of little practical value, and reliance on these assumptions leads to unrealistic assessments of potential impacts that cannot be construed as reasonably foreseeable. For instance, it is very rare that an interstate natural gas pipeline will continually operate at a 100 percent utilization rate. While each pipeline project is unique, many pipeline projects are constructed to satisfy peak demand scenarios or to ensure reliability in meeting existing demand. In such cases, and many others, the "full burn" assumption bears no resemblance to reality.

Even when natural gas and oil are ultimately combusted, the extent of GHG emissions associated with that downstream combustion can vary greatly depending on where those hydrocarbons are combusted and for what purpose and are often and increasingly subject to other government policies that aim to reduce these emissions.[71] For instance, many states have taken significant steps to regulate GHG emissions, like participating in the Regional Greenhouse Gas Initiative ("RGGI"), which is a state-led effort to cap power sector CO_2 emissions.[72] Other states, like California,[73] Massachusetts,[74] and Washington,[75] have enacted their own state-specific GHG

[68] 88 Fed. Reg. at 1,204.
[69] 88 Fed. Reg. at 1,205.
[70] *Robertson v. Methow Valley*, 490 U.S. 332, 359 (1989).
[71] *See* FREQUENTLY ASKED QUESTIONS: How much carbon dioxide is produced when different fuels are burned?, U.S. Energy Info Admin., https://www.eia.gov/tools/faqs/faq.php?id=73&t=11. .
[72] https://www.rggi.org/. .
[73] https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program.
[74] https://www.mass.gov/guides/electricity-generator-emissions-limits-310-cmr-774.
[75] https://ecology.wa.gov/Air-Climate/Climate-Commitment-Act/Cap-and-invest.

cap-and-trade programs. Natural gas or oil that is exported for combustion may have an even more divergent GHG emissions profile. While differences in the GHG associated with combustion of natural gas and oil already widely differ based on location, these divergent emissions profiles of combusted natural gas and oil will increase as CCUS projects become more prevalent.

Similarly, the Interim Guidance encourages non-expert agencies to conduct substitution analyses that will conclude that any action (including no-action alternatives) that decreases the supply of a fossil fuel will increase the price of that resource, which in turn, will reduce global demand for the fossil fuel.[76] Seemingly recognizing that most agencies are ill-equipped to engage in complex economic modeling of international energy market dynamics, the Interim Guidance downplays the recommended analysis as merely entailing the application of "basic economic principles of supply and demand," and suggests that agencies simply use one of a handful of available economic models linked in the Federal Register Notice.[77] However,, the Interim Guidance never explains how these models were developed or identified by CEQ as suitable tools for agencies attempting to predict the potential impact of their decisions on global energy consumption. Nor does the Interim Guidance describe why CEQ viewed these models' methodologies or data inputs as reliable or identify which specific contexts CEQ believes are appropriate for each of these models/tools.

In fact, it is entirely unclear which models and tools CEQ believes agencies should use when conducting substitution analyses. The BLM assessment "Modeling Choice for the Federal Coal Programmatic Review,"[78] which the Interim Guidance identifies as providing "multiple power sector models available to Federal agencies for use in NEPA analysis"[79] is, in reality, a discussion of the poor suitability of many of the CEQ-referenced models to the substitution analysis BLM attempted to conduct. Far from illustrating the wide variety of suitable models that agencies can use for substitution analyses, the BLM assessment demonstrates that the available models have multiple critical limitations and may be entirely unsuited for substitution analyses outside of specific contexts. That is likely why the "GHG Tool and Resources" page that CEQ linked in the Federal Register notice describes the models and tools in a way that significantly tempers the Council's broad endorsement of these models in the Interim Guidance.

> The Council on Environmental Quality . . . provides this non-exhaustive compilation of greenhouse gas . . . estimating tools and related resources available on government and university or college websites solely for information and convenience. Reference on this website to any specific tool, its developers, or links to non-CEQ sites does not constitute or imply CEQ's endorsement of or responsibility for the opinions, data, or products provided at those links. CEQ does not control or guarantee the accuracy, legality, relevance, timeliness, or

[76] 88 Fed. Reg. at 1,205.
[77] 88 Fed. Reg. at 1,205; 88 Fed. Reg. 1,201, FN 56.
[78] Peter Howard, Inst. for Pol'y Integrity, N.Y.U. Sch. of L., The Bureau of Land Management's Modeling Choice for the Federal Coal Programmatic Review (June 2016), https:// policyintegrity.org/files/publications/BLM_Model_ Choice.pdf. . ("BLM Model Choice Review").
[79] 88 Fed. Reg. at 1,205, FN 95.

> completeness of the information contained on a linked website or referenced tool.[80]

One of the power sector models CEQ cites in the Interim Guidance is BOEM's MarketSim,[81] which API and its members have encountered on multiple occasions, including most recently in BOEM's Draft Supplemental EIS ("DEIS") for Gulf of Mexico ("GOM") Lease Sales 259 and 261.[82] As described in the BLM Model Choice Review, MarketSim:

> models the supply and demand of multiple energy resources (coal, natural gas, oil) and energy by four domestic sectors (residential, commercial, industrial, and transportation) at the national scale. The model captures the rest of the world through the modeling of imports and exports and renewables . . . , though in less detail. Demand, coal production, and electricity production are modeled at the national scale . . . , while oil and natural gas supply are modeled at fairly aggregate spatial scales (e.g., Alaska, Lower 48, etc.).[83]

While some of the price demand and supply elasticities are drawn from peer-reviewed literature, many parameters are simply derived from "expert input."[84] Thus, "the model may be overly simple such that it may not capture important nuances of the energy resource market. Specifically, the model is only as accurate as its elasticity and adjustment parameters, which drive the model's results."[85]

Similarly, with respect to BOEM's DEIS, MarketSim accurately reflected that net GHG emissions are higher under the No Action Alternative largely because curtailed domestic production in the GOM would be primarily replaced with imports of higher carbon-intensity production from overseas to meet unfulfilled oil demand.[86] However, "BOEM's analysis otherwise overstates impacts on foreign GHG emissions" because BOEM concluded "that reduced [outer continental shelf] production decreases foreign oil consumption via higher prices and assumes that foreign oil consumption is not replaced by other types of energy consumption."[87]

This is the same "basic economic principle[] of supply and demand" that the Interim Guidance urges all agencies to adopt irrespective of context.[88] However, as API explained to BOEM:

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[80] https://ceq.doe.gov/guidance/ghg-tools-and-resources.html.
[81] Industrial Economics, Inc. 2021. Consumer surplus and energy substitutes for OCS oil and gas production: the 2021 revised Market Simulation Model (MarketSim). US Department of the Interior, Bureau of Ocean Energy Management. OCS Study BOEM 2021-072.
https://www.boem.gov/sites/default/files/documents/MarketSim%20Model%20Documentation.pdf.
[82] BOEM-2022-0048.
[83] BLM Model Choice Review at 6.
[84] BLM Model Choice Review at 6.
[85] BLM Model Choice Review at 6.
[86] API Comments (BOEM-2022-0048-28953) at 7 (citing DEIS at 4-7).
[87] API Comments (BOEM-2022-0048-28953) at 7.
[88] 88 Fed. Reg. at 1,205.

> a more complete analysis would account for foreign energy substitutions as opposed to just foreign oil consumption. Without such an analysis, BOEM cannot credibly speculate that 'the Leasing scenario would still result in increased GHG emissions when compared to the No Leasing scenario.' . . . Moreover, the DEIS does not support net higher GHG emissions under the action alternatives. As BOEM observes . . . 'because the quantifiable foreign analysis is not comprehensive, domestic production and consumption emissions are not directly comparable to the foreign estimates. Therefore, BOEM is not providing a combined quantitative estimate of domestic and foreign emissions because it would be potentially misleading to add them together.'[89]

Further undermining the simplistic application of "basic economic principles of supply and demand" that the Interim Guidance urges,[90] MarketSim does not account for the imperfect competitive structure of the global oil market.[91] Specifically, the analysis does not consider potential imperfect competitive actions from foreign suppliers that have excess capacity, such as OPEC+, or suppliers that respond to other metrics besides price, such as market share. Additionally, there is evidence that OPEC+ functions as a balancing mechanism whereby it assesses liquids demand, then non-OPEC+ supply, and then determines what level of OPEC+ supply is needed to balance demand and supply.

In contrast, the foreign consumption and supply elasticity parameters used in MarketSim assume foreign markets only respond to price. Accounting for these numerous additional market realities could create significantly different results. For example, Golombek *et al.* (2018)[92] developed a dominant firm model to characterize OPEC's market power and arrived at supply elasticities significantly different than those used in MarketSim.

Economic models like MarketSim and the others suggested in the Interim Guidance can be very useful tools when used in the correct context and for a proper purpose, but they are not precision instruments capable of pinpointing price changes or market responses at the scales they are often used. Models such as these can be used to forecast general trends and give an idea of the magnitude of impact that key variables (*e.g.*, prices) may have on certain outcomes (*e.g.*, production). However, expecting a model to accurately forecast a change of less than one cent per billion barrels of oil or associated production impacts over a multi-decade period is not realistic. Yet, under BOEM's DEIS, "[t]he average differences in price in the No Leasing scenario relative to the Leasing scenario over the 40 years of oil and natural gas production anticipated from a proposed GOM lease sale are $0.068 per billion barrels higher for oil, $0.006 per thousand cubic feet higher for natural gas, $0.001 per ton higher for coal, and $0.007 per kilowatt higher for electricity."[93] Given the very small price differences modeled through

[89] API Comments (BOEM-2022-0048-28953) at 7.
[90] 88 Fed. Reg. at 1,205.
[91] *See, e.g.,* Boug *et al.* (2016) "Modelling OPEC Behavior: Theory and Evidence" Discussion Paper 843. Statistics Norway (which finds support for imperfect competition in the oil market, and that OPEC's behavior has changed significantly recently)
[92] Golombek *et al.* (2018) "OPEC's market power: An empirical dominant firm model for the oil market" Energy Economics 70 98-115.
[93] *See* DEIS Addendum at 10 n.9.

MarketSim, BOEM had no reason to conclude that a per-barrel price estimate is statistically different from zero or that a corresponding reduction in consumption is distinguishable from background noise or random error.

Thus, MarketSim, which was developed for the express purpose of estimating the energy market's response to production anticipated under BOEM's five-year leasing program,[94] is not universally capable of credibly modeling the effects on fossil fuel consumption and therefore GHG emissions of even BOEM lease sales. Thus not only are the Interim Guidance's over-simplified "economic principles of supply and demand"[95] belied by observable market realities, they are limited by the accuracy of various un-reviewed model inputs and in many contexts, simply unable to reasonably predict fossil fuel consumption with a level of precision that is relevant or helpful to an agency's NEPA review. Indeed, given the limits on what BOEM can reliably assess using a model designed specifically for its OCS leasing program, CEQ cannot reasonably claim that appropriate models are available for a broad variety of agency decisions or that agencies' substitution analyses should always find that decreased domestic fossil fuel production will result in decreased fossil fuel consumption or *vice versa*. The attenuated impacts of individual fossil fuel-related decisions on consumption and therefore GHG emissions are not reasonably foreseeable. Rather, these are the precise types that 'distort[] the decision-making process.'"[96]

3. The Interim Guidance Undermines the Objectivity of NEPA Reviews by Favoring a Certain Class of Low-Emission Projects

The preceding subsections describe how the Interim Guidance encourages speculative NEPA reviews by directing agencies to assess impacts that are not reasonably foreseeable and which lack a close causal connection to the action under review. While API is certainly concerned that CEQ is directing agencies to examine the effects of their actions in a manner that is inconsistent with NEPA and binding jurisprudence interpreting the Act, API is also concerned that the Interim Guidance seemingly directs agencies to apply these more expansive requirements exclusively to fossil fuel-related projects. When reviewing renewable projects, on the other hand, agencies are encouraged to omit the speculative assessments of tangentially related indirect effects and permitted to refrain from using imprecise models to discern the impact of an increased supply of energy-on-energy consumption.

CEQ must surely recognize that the expansive and speculative analyses of effects that the Interim Guidance encourages for fossil fuel-related projects lead to even longer NEPA review timelines and more expansive EISs. But for fossil fuel-related projects and other projects viewed as inconsistent with the Administration's "GHG reduction goals,"[97] expansive delay and excessive paperwork no longer appear to be deficiencies that the Council wants agencies to avoid or

[94] Industrial Economics, Inc. 2021. Consumer surplus and energy substitutes for OCS oil and gas production: the 2021 revised Market Simulation Model (MarketSim). US Department of the Interior, Bureau of Ocean Energy Management. OCS Study BOEM 2021-072.
[95] 88 Fed. Reg. at 1,205.
[96] *City of Shoreacres v. Waterworth*, 420 F.3d 440,453 (5th Cir. 2005) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)) (alteration in original). .
[97] 88 Fed. Reg. at 1,205.

minimize. For "certain infrastructure or renewable energy projects," on the other hand, the "depth of [an agency's] analysis" and need for "precision regarding emission reduction benefits" must yield to the need for an "efficient and accessible analysis."[98] Stated differently, the Interim Guidance impermissibly reflects that inefficient NEPA processes are features to be embraced and exacerbated when reviewing fossil fuel-related projects, and obstacles to be avoided when reviewing renewable or clean infrastructure projects.

This is the antithesis of the type of informed agency decision-making that Congress required when it enacted NEPA. CEQ cannot and should not direct agencies' NEPA reviews toward favored industries or outcomes by biasing the scope of review and inequitably, arbitrarily and impermissibly choosing to emphasize or ignore GHG emissions based on the type of project being reviewed. Nor should agencies' reviews disproportionately use paperwork, inefficiency, and delay as a means to forestall disfavored projects they are statutorily required to authorize. "The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements."[99]

The Interim Guidance's rather explicit bias in favor of renewable energy and against fossil fuels is not only impermissible as a matter of law, but it is also substantively baseless and does not account for instances when natural gas displaces more GHG-intensive coal. CEQ overlooks, for instance, that natural gas has reduced reliance on more carbon intensive fuel sources - "Almost 532 million metric tons (65%) of the decline in CO_2 emissions [between 2005 and 2019] is attributable to the shift from coal-fired to natural gas-fired electricity generation."[100] More recently, domestically produced natural gas is increasingly important to our allies in the European Union ("EU"). Not only are U.S. liquefied natural gas ("LNG") exports helping reduce the EU's dependency on Russian imports following its invasion of Ukraine, they are also helping offset the EU's reliance on coal-fired power.[101]

b. The Interim Guidance Requires Assessment of Cumulative Climate Change Impacts and GHG Emissions that are Boundless and Speculative

The Interim Guidance advises that an agency evaluating a proposed action's potential "cumulative climate change effects" should "consider the proposed action in the context of the emissions from past, present, and reasonably foreseeable actions."[102] More specifically, CEQ is urging agencies to attempt to assess the potential global climate change impacts that may result from the incremental contribution of a single project or agency decision "when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency

[98] 88 Fed. Reg. at 1,202.
[99] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777, 103 S.Ct. 1556, 1563, 75 L.Ed.2d 534 (1983) (citation omitted).
[100] https://www.eia.gov/todayinenergy/detail.php?id=48296.
[101] *See* https://www.reuters.com/business/energy/germany-extends-run-times-coal-fired-power-plants-boost-supply-2022-09-28/; *See also* https://www.bloomberg.com/news/articles/2022-12-22/germany-returns-to-coal-as-energy-security-trumps-climate-goals; *See also* https://iea.blob.core.windows.net/assets/3c8fa115-35c4-4474-b237-1b00424c8844/CO2Emissionsin2022.pdf. .
[102] 88 Fed. Reg. at 1,205-1,206.

(Federal or non-Federal) or person undertakes such other actions."[103] While API recognizes that CEQ's regulations have for many years required agencies to consider the cumulative effects of their actions, the cumulative effects that the Interim Guidance urges agencies to estimate are so boundless and indeterminable that it is not realistic to presume that any agency could develop a reasonably reliable assessment.

Such a cumulative impact analysis requires an inexpert agency to engage in the same impermissible speculation described in the preceding section on "indirect impacts," but then also consider those direct and highly attenuated indirect impacts in conjunction with the agency's assessment of all worldwide past and present GHG emissions and climate change impacts as well as the agency's predictions about all future global GHG emissions and climate change impacts. While API recognizes that agencies may use models to assign values to these past, present, and future GHG emissions and climate change impacts, API questions the utility of using incredibly uncertain estimates of indeterminable outcomes.

The goal of a NEPA review is to identify and use information to make better decisions. An analysis that purports to discern a single project's incremental impact on global climate change in relation to all the GHGs that were ever emitted or will be emitted can never be credibly reliable, and therefore advising agencies to develop these analyses will not help agencies make better decisions.[104]

c. The Interim Guidance's Strong Suggestion that Agencies Utilize SC-GHG to Monetize Climate Change Impacts Ignores the Inherent Limits of the IWG's SC-GHG Estimates and Impermissibly Supplants NEPA's Required Analysis of Potential Impacts to the Physical Environment with CEQ's own Non-Statutory Requirement to Assess Conformity with Administration Policy

The Interim Guidance instructs agencies to "apply the best available estimates of the SC–GHG to the incremental metric tons of each individual type of GHG emissions . . . expected from a

[103] 88 Fed. Reg. at 1,205.

[104] The Interim Guidance also advises agencies to "consider whether certain communities experience disproportionate cumulative effects, thereby raising environmental justice concerns" 88 Fed. Reg. at 1,206. Although federal agencies including EPA and CEQ are only now in the development phases of a framework and scientific approach for conducting cumulative impact analyses, API fully recognizes the value of the consideration of environmental justice in environmental reviews. . The natural gas and oil industry intends to operate in a way that helps protect all human health – regardless of race, color, national origin or income – and the environment. Natural gas and oil companies seek to meet the demand for affordable, reliable, and ever cleaner energy and have a positive impact on the communities in which we operate. The oil and natural gas industry strives to understand, discuss and appropriately address community concerns with our operations. The industry supports addressing problems of potential inequitable impacts on communities and facilitating the involvement of all people. API believes that environmental justice considerations can be addressed at various stages of environmental reviews and permitting throughout a project, and the industry welcomes the opportunity to work with CEQ on issues of importance on this matter in future regulatory actions. The oil and natural gas industry is committed to supporting constructive interactions between industry, regulators, and surrounding communities/populations that may be disproportionately impacted and addressing any potential inequitable effects. However, API believes these objectives can best be achieved without requiring or condoning highly unreliable cumulative impact analyses that do not actually improve agency decision-making.

proposed action and its alternatives."[105] According to CEQ, "[t]he SC–GHG provides an appropriate and valuable metric that gives decision makers and the public useful information and context about a proposed action's climate effects even if no other costs or benefits are monetized, because metric tons of GHGs can be difficult to understand and assess the significance of in the abstract."[106]

CEQ's suggestion that agencies use the SC-GHG in NEPA reviews is improper because NEPA does not require agencies to monetize potential impacts as part of their NEPA analyses and it flatly prohibits the biased monetization described in the Interim Guidance. As explained below, encouraging agencies to monetize potential GHG impacts while dissuading a full comparison of the associated benefits of a proposed action impermissibly prejudices the NEPA review process, unlawfully elevates GHG reduction policies over statutorily mandated considerations, and makes it harder for both decision makers and the public to fully understand the potential impacts of agency decisions.

The Interim Guidance also ignores well known and expressly disclosed limits on the use and utility of the IWG's SC-GHG estimates. As we further explain below, the IWG's SC-GHG estimates were never designed for, and are therefore particularly ill-suited for use in NEPA analyses. Even if the SC-GHG estimates were appropriate for use in NEPA analyses (which they are not), as described below, CEQ's directive that agencies use the IWG's SC-GHG values is premature given that the IWG has thus far failed to follow through with substantive and procedural improvements that this Administration has deemed essential to improving the accuracy, reliability, and transparency of the SC-GHG estimates.

1. CEQ's Partial Monetization Suggestion Represents an Unexplained and Impermissible Policy Shift that Conflicts with NEPA and Undermines Agency Decision-Making

NEPA requires "agencies only to look hard at the environmental effects of their decisions."[107] Thus, neither the Act nor CEQ's regulations require agencies to conduct a cost-benefit analysis when evaluating the environmental effects of projects.[108] However, when an agency decides to undertake a comparison of costs and benefits, it has an obligation to conduct an objective and balanced assessment.[109]

The Interim Guidance does not permit such an objective approach. In fact, even though the Interim Guidance directs agencies to monetize the potential GHG impacts of proposed projects, it urges agencies *against* weighing those monetized GHG impacts against the potential benefits

[105] 88 Fed. Reg. at 1,202.
[106] 88 Fed. Reg. at 1,202.
[107] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) ("*Citizen Against Burlington, Inc.*").
[108] 42 U.S.C. § 4332; 40 C.F.R. § 1502.22.
[109] *See High Country Conservation Advocates v. United States Forest Service*, 52 F.Supp.3d 1174, 1181-1182 (D. Col. 2014) ("NEPA does not require an explicit cost-benefit analysis to be included in an EIS. . . However, where such an analysis is included it cannot be misleading."); *See also WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013).

or merits of proposed actions.[110] The obvious result of such a one-sided analysis is a NEPA review that is biased against projects and decisions with associated GHG emissions even if those projects and decisions are projected to deliver significant economic, energy reliability, national security, or employment benefits.

Monetization of potential climate change impacts without corresponding monetization of benefits would therefore render agencies' NEPA analysis arbitrary and capricious. Indeed, CEQ's suggestion that agencies monetize only the adverse GHG impact but not the benefits of only certain projects and decisions is the exact inverse of the first federal court decision to address the social cost of GHGs. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the U.S. Court of Appeals for the Ninth Circuit found that it was arbitrary and capricious for the National Highway Traffic Safety Administration ("NHTSA") to ignore the social costs of GHG emissions in its review of fuel economy standards while monetizing the employment and sales impacts of more stringent standards.[111] An agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs."[112] This fundamental principle of regulatory analyses is equally applicable here; an agency cannot put its thumb on the scale by exclusively valuing the potential social cost of GHG emissions of a proposed project while wholly ignoring the potential economic and employment benefits of those actions.

The fact that the Interim Guidance urges agencies to quantify the SC-GHGs of a proposed project but not any potential benefits is inconsistent with the plain text of NEPA. In addition to establishing a national policy for the environment, Congress intended NEPA "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and *fulfill the social, economic, and other requirements* of present and future generations."[113] NEPA also directs the federal government to, among other things, "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences" and "achieve a *balance* between population and resource use which will permit high standards of living and a wide sharing of *life's amenities*."[114] And in establishing CEQ, NEPA requires members of CEQ "to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural *needs and interests of the Nation*."[115] Given that the Interim Guidance only instructs agencies to estimate the social cost of GHG emissions associated with their proposed actions while ignoring any benefits (including social, economic, and national security benefits, for example) of their actions, the guidance fails to fulfill the balanced statutory directives of NEPA.

"Congress in enacting NEPA, . . . did not require agencies to elevate environmental concerns over other appropriate considerations."[116] But this is precisely what the Interim Guidance instructs agencies to do. In fact, CEQ's suggestion that agencies monetize only potential GHG

[110] *See* 88 Fed. Reg. at 1,211.
[111] 538 F.3d 1172, 1198 (9th Cir. 2008).
[112] *Ctr. for Biological Diversity v. NHTSA.*, 538 F.3d at 1200.
[113] 42 U.S.C. § 4331(a) (emphasis added).
[114] 42 U.S.C. § 4331(b)(3) and (5) (emphasis added).
[115] 42 U.S.C. § 4342 (emphasis added).
[116] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

emissions is even more pernicious and inconsistent with NEPA because the Interim Guidance seeks to elevate one distinct type of environmental concern over other environmental concerns.

Indeed, the Interim Guidance dissuades agencies from monetizing not just economic considerations, but also other non-GHG environmental concerns that are clearly within the purview of NEPA. This singular focus on monetizing GHG emissions alone diminishes NEPA reviews' focus on other reasonably foreseeable environmental impacts. Even though they are often far less speculative than GHG emissions and climate change impact projections, direct and foreseeable impacts to air, water, natural resources, or cultural resources are therefore likely to be downplayed and undervalued simply because agencies do not monetize those impacts in the manner CEQ instructs for GHG emissions.

This partial-monetization analysis does not improve agency decision-making or better inform the public about agency decisions. On the contrary, partial monetization improperly emphasizes one specific type of potential impact among the many that agencies must consider under NEPA. Yet, there is no basis on which to conclude that a monetized impact is more or less important to consider than a non-monetized impact. Additionally, monetized benefits and costs are only meaningful when they are compared to one another in aggregate. But that is precisely the type of comparison that CEQ's Interim Guidance dissuades agencies from undertaking. Thus, CEQ's partial-monetization analysis biases agency reviews to inappropriately elevate GHG emissions concerns over all other considerations and reimagines the NEPA review process as simply a means to "achiev[e] relevant climate action goals and commitments, including Federal goals, international agreements, state or regional goals, Tribal goals, agency-specific goals, or others as appropriate."[117]

Moreover, the Interim Guidance's suggestion that agencies use the IWG's SC-GHG estimates in NEPA analysis not only conflicts with Congress's intent in enacting NEPA, but it is strikingly and inexplicably inconsistent with the federal government's longstanding position on the use of the SC-GHG in NEPA reviews and similarly specific agency decisions.[118] To be sure, CEQ and agencies are permitted to change policy positions and adopt new regulatory interpretations of statutory requirements, but the Council cannot do so in the manner CEQ has done in promulgating the Interim Guidance.[119] New and changed policy positions are subject to the same judicial review standards[120] under which "a reviewing court shall . . . hold unlawful and set aside

[117] 88 Fed. Reg. at 1,203.
[118] See decisions in which federal agencies argued against reliance on the IWG's SC-GHG estimates in NEPA reviews: *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 31 (D. D.C. 2019); *Citizens for Health Community v. BLM,* 377 F. Supp. 3d 1223 (D. Colo. 2019); *Wilderness Workshop v. BLM,* 342 F. Supp. 3d 1145 (D. Colo. 2018); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1096-98 (D. Mont. 2017); *Citizens for a Healthy Community v. BLM*, 377 F.Supp. 3d 1223 (D. Col. 2019); *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185 (D. Mont. 2020). . See decisions in which FERC declined to consider the SC-GHG under public interest determinations under the Natural Gas Act: *EarthReports, Inc. v. Fed. Energy Reg. Comm'n*, 828 F.3d 949, 953-54 (D.C. Cir. 2016); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (remanding to FERC for a discussion of whether it still holds the *EarthReports* position); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 672 Fed. App'x 38 (D.C. Cir. 2016); *Appalachian Voices v. FERC,* 2019 WL 847199, 2 (D.C. Cir. 2019).
[119] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
[120] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.").

agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[121]

This standard requires agencies and CEQ alike to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[122] That said, if a "new policy rests upon factual findings that contradict those which underlay [a] prior policy," CEQ "must" provide "a more detailed justification" for its action.[123] The same is true if the CEQ's "prior policy has engendered serious reliance interests that must be taken into account."[124] In such cases, in order to offer "a satisfactory explanation" for its action, as part of providing "a rational connection between the facts found and the choice made,"[125] CEQ must give "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[126] In the Interim Guidance, CEQ provides no explanation at all for its decision to abandon the litigation position the federal government has adopted and consistently applied over many years. In fact, while "the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position,"[127] the Interim Guidance reflects no acknowledgement that CEQ has fundamentally changed its longstanding position on the use of the IWG's SC-GHG estimates in NEPA reviews and similar analyses of discrete agency actions. CEQ's unexplained and atextual new requirement that agencies must monetize proposed projects' GHG emissions is therefore impermissible.

2. The IWG's SC-GHG Estimates are Unsuited for use in NEPA Analyses

CEQ should rescind the Interim Guidance's recommendation that agencies use the IWG's SC-GHG estimates to monetize GHG emissions impacts because these estimates are only appropriately used in broad considerations of costs and benefits in analyses under E.O. 12866.[128] More to the point, the SC-GHG estimates were not developed for, or suited to use in NEPA

[121] 5 U.S.C. § 706(2)(A).
[122] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, (1962)).
[123] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. at 515.
[124] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. at 515.
[125] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (1983) (internal quotations omitted).
[126] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. at 515.
[127] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (emphasis in original).
[128] E.O. 12866 at Sec. 1(a). When the proposed action is deemed a "significant federal action," E.O. 12866 required agencies to coordinate with OMB's Office of Information and Regulatory Affairs ("OIRA") in the development of a formal cost-benefit analysis called a Regulatory Impact Analysis ("RIA"). (E.O. 12866 at Sec. 6(a)(3)(C)). A "Significant regulatory action" is "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [E.O. 12866]" (Sec. 3(f)).

reviews or rules or analyses that require the SC-GHG to be expressed as a single value or within a narrow range of uncertainty.

From its earliest development by IWG in 2009, the SC-GHG "was explicitly designed for agency use pursuant to E.O. 12866."[129] That is why the titles of each of the six technical support documents the IWG published prior to its 2021 Interim TSD disclaimed that they were "for Regulatory Impact Analysis under Executive Order 12866."[130]

While the IWG's SC-GHG estimates may be suitable for use in agencies' Regulatory Impact Analyses ("RIAs") of "significant regulatory actions" involving GHG emissions, "[t]his does not apply to many routine agency actions that will produce GHG emissions."[131] Thus, even though API agrees with the need to take action to address climate change, given the significant uncertainty and recognized malleability of SC-GHG estimates through modest changes to one or a few inputs, API does not support expanded use of the IWG's SC-GHG estimates beyond their originally intended application in cost-benefit analysis. Indeed, in addition to, and in fact because of, the ease with which they can be "manipulated to reflect preferences, philosophies, assumptions, and so on,"[132] the SC-GHG estimates reflect such a broad range of uncertainty that they are wholly unsuitable for use in NEPA reviews and, contrary to CEQ's assertions, cannot reasonably "provide context for GHG emissions and climate effects to help decision makers and the public understand proposed actions' potential GHG emissions and climate change effects."[133]

The IWG's 2021 Interim TSD illustrates this limited utility. "For purposes of capturing uncertainty around the SC-GHG estimates in analyses, the IWG emphasized previously and reemphasizes [in the Interim TSD] the importance of considering all four of the SC-GHG values."[134] The range of all four of the Interim TSD's SC-CO_2 estimates for 2025 span from $17 to $169 per metric ton in 2020 dollars.[135] In the context of an agency's NEPA review of a project that may result in GHG emissions, the difference between $17 and $169 per metric ton is immense. An agency's NEPA analysis may indicate that a decision will have a significant adverse effect on the human environment if GHG emissions are estimated to result in damages valued at $169 per metric ton and could easily result in a "finding of no significant impact" ("FONSI") if impacts from GHG emissions are valued at $17 per metric ton. Similarly, an alternative to a proposed project may appear reasonable if it mitigates damages of $169 per metric ton and may be unreasonable to consider if it avoids $17 per ton in damages. Thus, while the range of uncertainty inherent in the IWG's SC-GHG estimates may not preclude their use in broad assessments of costs and benefits in RIAs, these values are not suitable for NEPA analyses

[129] Palenik Z. (2020). . The Social Cost of Carbon in the Courts: 2013-2019. New York University Environmental Law Journal, 28(3), 393-428.
[130] *See* 2010 TSD; May 2013 TSD; May 2013 TSD (revised); November 2013 TSD; August 2016a TSD (for CO_2); and August 2016b TSD (for Methane and Nitrous Oxide).
[131] Palenik Z. (2020). . The Social Cost of Carbon in the Courts: 2013-2019. New York University Environmental Law Journal, 28(3), 393-428.
[132] Taylor, A. (2018). Why the Social Cost of Carbon is Red Herring. Tulane Environmental Law Journal, 31(2), 345-372, 366.
[133] 88 Fed. Reg. at 1,202.
[134] Interim TSD at 4.
[135] Interim TSD at Table ES-1.

or any other type of analysis in which a single value or reasonably narrow range can "directly determine policy outcomes."[136]

The SC-GHG estimates "were developed by the IWG with a methodology to fit the specific purpose of a benefits estimate to be added to a regulatory impact analysis . . ."[137] "While a great deal of attention has been paid to dealing with uncertainty in the [Integrated Assessment Models], the reality of this enterprise is that a high degree of uncertainty is baked in and cannot reasonably be estimated away.[138] At best, this methodology is capable of producing "a very wide range of potential" SC-GHG estimates, and even this wide range of SC-GHG estimates remains unreliable because entirely different ranges of estimates can be generated by modestly changing a handful of subjective model inputs.[139]

> In aggregate, the SCC estimates developed by the interagency working group and others represent a strange marriage of conventional economic-financial logic, arbitrary economic-financial logic, massively expansive biophysical phenomena, preference, and uncertainty management utilized to create a digestible input--a dollar amount--for use in the dominant cost-benefit analysis . . . framework.[140]

Moreover, the subjective judgments that are necessary inputs into the IWG's integrated assessment models ("IAMs") make the product of those IAMs endlessly malleable. Indeed, the SC-GHG estimates reflect ideology as much as they reflect the actual, long-term externality cost of climate change."[141] Thus, "[f]or these assumptions, the tools of science, economics, or statistics are incapable of providing a 'best' or single value."[142]

> [P]roducing a wide range of SC-CO_2 estimates is simply the best we can do using this methodology, and it is the best we will ever be able to do. The . . . Central SC-CO_2 is not an optimal price of CO_2 emissions or a best estimate of the benefits of CO_2 reductions. It is a noncomprehensive estimate of the benefits of GHG reductions using one set of assumptions that is arguably defensible given the theoretical and methodological challenges associated with the approach.[143]

[136] Kaufman, N. (2018). The Social Cost of Carbon in Taxes and Subsidies, Part 1: The Current Use of Estimates. . Center for Global Energy Policy, Columbia SIPA (March 2018).
[137] Kaufman, N. (2018). The Social Cost of Carbon in Taxes and Subsidies, Part 1: The Current Use of Estimates. . Center for Global Energy Policy, Columbia SIPA (March 2018).
[138] Taylor, A. (2018). Why the Social Cost of Carbon is Red Herring. Tulane Environmental Law Journal, 31(2), 345-372, 364-5.
[139] Kaufman, N. (2018). The Social Cost of Carbon in Taxes and Subsidies, Part 1: The Current Use of Estimates. . Center for Global Energy Policy, Columbia SIPA (March 2018).
[140] Taylor, A. (2018). Why the Social Cost of Carbon is Red Herring. Tulane Environmental Law Journal, 31(2), 345-372, 366.
[141] Taylor, A. (2018). Why the Social Cost of Carbon is Red Herring. Tulane Environmental Law Journal, 31(2), 345-372, 369.
[142] Kaufman, N. (2018). The Social Cost of Carbon in Taxes and Subsidies, Part 1: The Current Use of Estimates. . Center for Global Energy Policy, Columbia SIPA (March 2018).
[143] Kaufman, N. (2018). The Social Cost of Carbon in Taxes and Subsidies, Part 1: The Current Use of Estimates. . Center for Global Energy Policy, Columbia SIPA (March 2018).

There are multiple other reasons why use of the IWG's SC-GHG values is particularly inappropriate in NEPA analyses. As previously noted, although the SC-GHG estimates are presented on a seemingly precise per-ton basis, the estimated monetary value associated with the emission of a single ton of GHG in a given year is derived from modeling "all climate change impacts" throughout the world on a time horizon that extends nearly 300 years into the future[144] using subjective judgments and framing decisions that render the model outputs endlessly malleable. Because the SC-GHG estimates "reflect ideology as much as they reflect the actual, long-term externality cost of climate change,"[145] they cannot be squared with the "rule of reason" and agencies' obligation under NEPA to assess only those impacts that are reasonably foreseeable. On the contrary, the fact that the SC-GHG estimates are derived from models of the potential damage from aggregated global GHG emissions from all sources over multiple centuries means there is no "reasonably close causal relationship" between the proposed federal action under review and the IWG's SC-GHG values.[146] Stated differently, given the manner in which the IWG's SC-GHG estimates are derived, the specific damages or impacts represented by the SC-GHG values cannot be attributed to, or said to be proximately caused by, any single project or decision being reviewed pursuant to NEPA.

3. Suggesting use of the IWG's SC-GHG Estimates Requires Agencies to Inappropriately Weigh Potential Extraterritorial Impacts over Potential Impacts to the Affected Environment

The Interim Guidance's strong suggestion that agencies use the SC-GHG values based on estimated global climate change impacts is plainly inconsistent with Congress's intent that NEPA "foster and promote the general welfare . . . of Americans"[147] and with CEQ's stated intent that agencies "use the best available information and science when assessing the potential future state of the affected environment."[148] As previously explained, the SC-GHG is the monetized value extrapolated from all projected global climate change impacts from all projected GHG emissions. This value has little or no relation or significance to the potential climate change impacts that may be observed within any reasonable proximity to the project under review and does not allow agencies to correlate particular climate change effects or impacts to specific individual projects' potential GHG emissions. The overwhelming vast majority of the potential impacts that form the basis for the SC-GHG estimates will be outside of the environment directly affected by the project, and likely outside of the United States.

CEQ's suggested use of the SC-GHG values based on estimated global climate change impacts is therefore in tension with the plain language of 42 U.S.C. § 4332(2)(C), which does not expressly authorize NEPA to be applied outside the United States. As noted by the D. C. Circuit, "[b]ecause the decision-making processes of federal agencies takes place almost exclusively in this country and involves the workings of the United States government, they are uniquely

[144] Interim TSD at 9.
[145] Taylor, A. (2018). Why the Social Cost of Carbon is Red Herring. Tulane Environmental Law Journal, 31(2), 345-372, 369.
[146] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).
[147] 42 U.S.C. § 4331(a).
[148] 88 Fed. Reg. at 1,198.

domestic."[149] In addition to the absence of any evidence of extraterritorial application in the text of the statute, "NEPA's legislative history illuminates nothing in regard to extraterritorial application."[150]

Although the Interim Guidance accurately notes that Congress in enacting NEPA was concerned about "the worldwide and long-range character of environmental problems," CEQ incorrectly suggests that this congressional concern "mandates" that agencies "consider worldwide . . . environmental problems" as part of their NEPA assessments of purely domestic decisions.[151] On the contrary, despite including statutory "language that indicates that Congress was concerned with the global environment and the worldwide character of environmental problems," Congress gave no indication that it contemplated that agencies would assess the potential foreign impacts of their domestic actions.[152]

Thus, while Congress understood that federal actions could cause environmental effects in foreign jurisdictions, the text of NEPA does not indicate that Congress authorized agencies to assess those extraterritorial impacts. Nor can NEPA be reasonably interpreted to require agencies to consider such far-reaching potential extraterritorial effects. Under the canon of statutory construction known as the presumption against extraterritorial application "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[153] This cannon of construction reflects "the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind."[154]

Even if NEPA could be interpreted to allow agencies to consider the extraterritorial effects of proposed actions and alternatives, mandating that agencies use the IWG's SC-GHG estimates remains inappropriate and highly confusing because, despite repeated requests from API and others, the IWG has consistently declined to present domestic SC-GHG estimates alongside its global estimates. As such, agencies applying the IWG's SC-GHG estimates have no ability to discern what proportion of those monetized effects apply domestically, and they certainly cannot use those estimates to better understand potential impacts within a more localized "affected environment."

In fact, one of the reasons the IWG has resisted presenting domestic SC-GHG values alongside global SC-GHG values is because the IWG does not believe that its models provide the IWG the ability to monetize SC-GHG impacts on a national-level, much less a project-level. As explained in the Interim TSD:

> the development of a domestic SC-GHG is greatly complicated by the relatively few region- or country-specific estimates of the SC-CO2 in the literature. At present, the only quantitative characterization of domestic damages from GHG

[149] *Envt'l Def. Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993).
[150] *Nat'l Res. Def. Council v. NRC*, 647 F.2d 1345, 1367 (D.C. Cir. 1981).
[151] 88 Fed. Reg. at 1,203, Note 68 (citing 42 U.S.C. § 4332(2)(F)).
[152] *Dep't of Transp. v. Public Citizen*, 541 U.S. at 759.
[153] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).
[154] *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016).

> emissions, as represented by the domestic SC-GHG, is based on the share of damages arising from climate impacts occurring within U.S. borders as represented in current IAMs.[155]

The IWG has repeated this same refrain in each of its preceding TSDs, and so did the National Academies of Sciences, Engineering, and Medicine ("NASEM" or "National Academies") in its 2017 report and recommendations on how the IWG might improve the SC-GHG estimates and the process through which the estimates are developed. [156] As noted by the NASEM:

> Estimation of the net damages per ton of CO2 emissions to the United States alone, beyond the approximations done by the IWG, is feasible in principle; however, it is limited in practice by the existing SC-IAM methodologies . . .[157]

Given the IWG and the NASEM's express disclaimer that the IWG's models and methods cannot quantify SC-GHG impacts on even a national level, CEQ should not instruct agencies to use those estimates to monetize potential greenhouse gas impacts on a much more fine-grained project-specific basis. Doing so necessitates impermissible levels of speculation and conflicts with CEQ's stated intent that agencies "use the best available information and science when assessing the potential future state of the affected environment."[158]

4. Even if SC-GHG Estimates were Appropriate for use in NEPA Analyses, CEQ's Suggestion that Agencies Utilize the IWG's Estimates is Premature

Even if the IWG's SC-GHG estimates were appropriate for use in NEPA analyses (which they are not), CEQ's suggestion that these values be used is premature because the SC-GHG estimates have only been issued on an interim basis without any notice and comment. While the IWG accepted comment on the Interim SC-GHG estimates after they were developed, the IWG has not responded to any of the comments it received on the Interim TSD during a comment period which concluded nearly two years ago.[159]

API and others submitted detailed comments to the IWG and White House Office of Management and Budget ("OMB") raising significant concerns about the lack of transparency in the IWG's SC-GHG estimation process, the uncertainty inherent in the IWG's modeling approach, the sensitivity of the IWG's estimates to a handful of subjective policy judgments, and the limited utility of the SC-GHG estimates to rulemaking and policy decisions outside of the RIA process. To date, API has not received any response to these comments and concerns.

Pursuant to E.O. 13990, the IWG was required to update and replace the Interim SC-GHG estimates with final estimates that were based on stakeholder and scientific feedback by January

[155] Interim TSD at 15-16.
[156] *See* National Academies of Sciences, Engineering, and Medicine 2017. *Valuing Climate Damages. . Updating Estimates of the Social Cost of Carbon Dioxide. .* Washington, DC: The National Academies Press ("NASEM 2017").
[157] NASEM 2017 at 53.
[158] 88 Fed. Reg. at 1,198.
[159] *See* 86 Fed. Reg. 24,669 (May 7, 2021) and https://www.api.org/-/media/Files/News/Letters-Comments/2021/API_SC_GHG_Comments_062121.pdf.

2022.[160] The IWG never did so, and neither OMB nor the IWG have ever explained the delay in this process.

E.O. 13990 also required the IWG to develop a new transparent and scientifically supported estimation process consistent with the recommendations of the National Academies by June 1, 2022.[161] Once again, the IWG never did so, and the administration has never explained why.

Finally, E.O. 13990 required the IWG to "provide recommendations to the President, by no later than September 1, 2021, regarding areas of decision-making, budgeting, and procurement by the Federal Government where the [SC-GHG estimates] should be applied."[162] To date, no such recommendation has been made.

Even if the Council could properly advise agencies to use the IWG's SC-GHG estimates, CEQ should not proceed ahead of the delegated decision-makers by determining the appropriate use or recommended use of the SC-GHG estimates before the IWG has completed the task of providing its recommendations on the appropriate use of the SC-GHG estimates. Nor should the Interim Guidance encourage reliance on SC-GHG values that have not yet been developed through the process this Administration has elsewhere deemed essential. CEQ's suggestion that agencies use interim SC-GHG estimates that were not developed based on any consideration of public comments and are inconsistent with the National Academies' recommendations is therefore inappropriate and premature.

d. The Interim Guidance Impermissibly Advises Agencies to Consider Alternatives Irrespective of Agency Jurisdiction, the Purpose and Need for the Action Under Review, or Feasibility

Undertaking analyses of alternatives wholly untethered from the objectives of the applicants seeking agency authorization or entirely outside the jurisdiction or control of the agency does not improve agency decision-making. On the contrary, consideration of alternatives that cannot or will not be implemented because they are unrelated to the proposed project or inconsistent the agency's statutory authority squanders agency and project proponents' resources, unnecessarily prolongs reviews, and most importantly, impedes the agency's ability to effectively weigh the potential impacts of a proposed decision against reasonably viable alternatives.

Notwithstanding that "NEPA requires only consideration of *reasonable* alternatives,"[163] CEQ's Interim Guidance seemingly encourages agencies to conduct analyses of alternatives that could be plainly infeasible, wholly outside of agencies' statutory jurisdiction, and inconsistent with Congress's intent that NEPA's procedural and analytical requirements be implemented in a way that facilitates better and more informed agency decision making.[164] Far from "improving the

[160] E.O. 13990 at Sec. 5.
[161] E.O. 13990 at Sec. 5(b)(ii).
[162] E.O. 13990 at Sec. 5(b)(ii)(C).
[163] *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n,* 704 F.3d 12, 19 (1st Cir. 2013) (emphasis added) (*citing Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)).
[164] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004).

efficiency and consistency of"[165] agencies' NEPA reviews, CEQ's Interim Guidance will actually promote substantially more of the delay and inefficiency that are the unfortunate hallmarks of NEPA review processes.

In the subsections that follow, API explains how the Interim Guidance encourages needless analysis of unreasonable alternatives and commandeers agencies' statutory obligation to consider alternatives in furtherance of policy objectives wholly distinct from the environmental effects of a project required by NEPA. We urge CEQ to consider and address these concerns by rescinding the Interim Guidance and instructing agencies to refrain from relying on it.

1. The Range of Alternatives the Interim Guidance Instructs Agencies to Consider is Inconsistent with NEPA and Binding Case Law

When conducting reviews, NEPA requires agencies to consider only "*reasonable* alternatives" to proposed actions.[166] "'[T]he concept of alternatives must be bounded by some notion of feasibility,' which includes alternatives that are 'technically and economically practical or feasible.'"[167] In other words, agencies need only consider alternatives that will "bring about the ends" of the proposed action.[168] And when the project sponsor is not the agency itself, but rather an applicant for an agency authorization, the desired "ends" must fall within the bounds of the applicant's proposed action.

Indeed, in the agency authorization context, absent the applicant's proposal, there would be no activity or project, and no agency action requiring NEPA review. Moreover, there is no point in evaluating alternatives that are so inconsistent with an applicant's goals that they have no reasonable prospect of being implemented. An agency's consideration of such an alternative, therefore, serves only to artificially bias and prolong reviews, while draining agency and applicant resources. Such analyses do not improve agency decision-making or meaningfully inform the public, and thus are plainly at odds with the goals of NEPA.

In contrast, basing alternatives on the goals of the applicant allows agencies to efficiently winnow the universe of potential alternatives to those that should reasonably be considered. Agencies must still analyze the potential impacts of this narrower range of reasonable alternatives, and, in fact, the elimination of unrealistic alternatives allows agencies to devote more resources to analyzing alternatives that could realistically be implemented. As the Supreme Court observed in *Metropolitan Edison Co. v. People Against Nuclear Energy*, "[t]he scope of [an] agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision' . . . is to be accomplished."[169]

[165] 88 Fed. Reg. at 1,197.
[166] *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013) (emphasis added) (citing *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)).
[167] *Beyond Nuclear*, 704 F.3d at 19 (*quoting Vt. Yankee*, 435 U.S. at 551, and *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011)).
[168] *Beyond Nuclear*, 704 F.3d at 19 (*quoting City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)).
[169] 460 U.S. 766, 776 (1983) (*quoting Vt. Yankee*, 435 U.S. at 558).

CEQ's guidance that agencies consider a range of alternatives "consistent with . . . the purpose and need for the proposed action"[170] seemingly acknowledges that alternatives inconsistent with the purpose and need of the applicant are categorically unreasonable. But, this rational construction of agencies' NEPA review obligations cannot be squared with the Interim Guidance's instruction that "agencies should evaluate reasonable alternatives that may have lower GHG emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects."[171]

A request that agencies consider "clean energy alternatives" to "fossil fuel-related projects" erroneously implies that agencies may ignore the goals of the applicant or subjugate them in favor of an administration's policy preferences. NEPA does not permit such indifference to the purpose and need for a project.

"The goals of an action delimit the universe of the action's reasonable alternatives."[172] Where a federal agency is not the sponsor of a project, "the Federal government's consideration of alternatives may accord substantial weight to the preference of the applicant and/or the sponsor in the siting and design of the project."[173] In formulating the EIS requirement, "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."[174] Instead, "[w]hen an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application."[175]

"When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."[176] But that is precisely the consideration the Interim Guidance asks agencies to undertake.

Developing a renewable energy project is an important and worthwhile goal, but it is unlikely to meet the specific purpose and need underlying an applicant's proposed natural gas or oil-related project. A company that requests federal agency authorization for a "fossil fuel-related project intends to develop that specific type of project." Indeed, when a company requests authorization for a "fossil fuel-related project," the proposal is based on a detailed planning effort to design and site a project to help meet a specific market demand. Many critical components, including the location, equipment and technology to be utilized, the necessary proximity to particular infrastructure or resources, the capabilities and experience of the project proponent and its employees, and economic or technical feasibility make it impossible or at least highly speculative for a proposed "fossil fuel-related project" to be converted to a "clean energy alternative" that could meet the specific market demand.

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[170] 88 Fed. Reg. at 1,204.
[171] 88 Fed. Reg. at 1,204.
[172] *Citizen Against Burlington, Inc*., 938 F.2d at 195.
[173] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 99 (1983); *See also City of Grapevine, Tex, v. Dep't of Transp*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016).
[174] *City of Grapevine, Tex. v. Dep't of Transp*, 17 F.3d at 1506 (quoting *Citizen Against Burlington, Inc.*, 938 F.2d at 199).
[175] *Citizen Against Burlington, Inc.*, 938 F.2d at 196.
[176] *Citizen Against Burlington, Inc*., 938 F.2d at 195.

The Interim Guidance's suggestion that agencies consider clean energy alternatives to fossil fuel-related projects is plainly a concern for companies that exclusively operate in the oil and natural gas industry, but CEQ's instruction likely also presents an issue even for those API members that produce energy from both renewable and hydrocarbon sources. Even though these companies may have the capability and resources to develop a renewable energy project, the specific purpose and need underlying a proposed energy project makes the prospect of substituting an entirely different type of energy development remote and speculative. And as the Supreme Court has held, NEPA does not require consideration of "alternatives . . . deemed only remote and speculative possibilities."[177]

Congress's expectation that agency NEPA reviews only consider "reasonable alternatives" not only prohibits CEQ from requiring consideration of alternatives unmoored from the purpose and need for the proposed project, it precludes agencies from considering alternatives over which they have no authority or control. Indeed, it is self-evident that the purpose of an agency action must be within the scope of the statutory authority conferred by Congress. And it is equally apparent that alternatives outside the jurisdiction and control of an agency are not "reasonable" and therefore need not be considered.[178]

Early court decisions following the enactment of NEPA seemed to construe an agency's obligation to consider alternatives as eliminating any jurisdictional limits imposed by the agency's governing statute by requiring, for example, that an agency consider an alternative that eliminated offshore oil and gas leasing, which is compelled by federal law.[179] Subsequent decisions by the Supreme Court and other courts, however, have since reaffirmed the common-sense view that reviewing agencies need only consider those alternatives they are statutorily able to pursue.[180] It is now widely recognized that NEPA does not expand an agency's substantive authority and that consideration of alternatives that an agency has no power to act upon does not further NEPA's goals.[181] Indeed, "[w]hen an agency is asked to sanction a specific plan, [it] should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives."[182]

2. The Interim Guidance Advises Agencies to Consider Alternatives in Pursuit of Policy Goals Unrelated to NEPA

CEQ improperly instructs agencies to consider alternatives that promote the current Administration's policy goals and objectives that are different from and inconsistent with NEPA's required assessment of reasonable alternatives that avoid or minimize adverse effects on the human environment. For instance, the Interim Guidance directs that, given "the urgency of

[177] *Vt. Yankee*, 435 U.S. 519, 551 (1978).
[178] *See Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) ("An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.") (Citations omitted).
[179] *Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).
[180] *See e.g., Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519 (1978); *See also Dep't of Trans. v. Public Citizen*, 541 U.S. 752 (2004).
[181] *See e.g., Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996).
[182] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.

the climate crisis," "agencies should evaluate reasonable alternatives that may have lower GHG emissions, . . . and consider mitigation measures to *reduce GHG emissions to the greatest extent possible.*"[183]

Advising agencies to consider alternatives that may "reduce GHG emissions to the greatest extent possible"[184] impermissibly unburdens agencies of their obligation to apply the "rule of reason" to their consideration of alternatives. It also effectively replaces agencies' *statutory* obligation to evaluate measures that avoid or minimize adverse effects on the human environment with an *administrative* requirement to avoid or minimize GHG emissions regardless of whether the emissions will have a discernable effect on the human environment. This is not a permissible construction of the Act; "Congress in enacting NEPA . . . did not require agencies to elevate environmental concerns over other appropriate considerations."[185] It therefore also follows that Congress did not require agencies to elevate one particular type of environmental concern over all other environmental concerns required to be considered under NEPA.

In fact, CEQ seemingly acknowledges that the GHG minimization analysis it is requiring agencies to undertake is wholly separate and distinct from NEPA's required consideration of effects on the human environment. The Interim Guidance plainly states that CEQ intended its GHG minimization analysis to ensure that agency "decisions . . . align with climate change commitments and goals."[186] In other words, the alignment between an agencies' decision and the Administration's climate policy objectives is not the means by which agencies avoid or mitigate their decisions' adverse impacts to the human environment; it is the goal itself.

Congress did not enact NEPA for agencies to "help meet climate change goals and commitments, or alternately, detract from them."[187] Rather, as CEQ elsewhere expressly acknowledges, "NEPA calls upon agencies to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects on the human environment."[188]

The "rule of reason" that the Interim Guidance frequently cites but hardly embraces "does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them."[189] Telling agencies that they should make meaningful progress toward the Administration's climate goals and commitments may be an important policy objective, but an administration's policy objectives cannot unilaterally alter the NEPA review process Congress requires agencies to conduct. Not only is CEQ's suggestion that agency NEPA reviews facilitate policy objectives fundamentally inconsistent with the Act,[190] it is shortsighted.

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[183] 88 Fed. Reg. at 1,204 (emphasis added).
[184] 88 Fed. Reg. at 1,204.
[185] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); *see City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999).
[186] 88 Fed. Reg. at 1,204.
[187] 88 Fed. Reg. at 1,204.
[188] 88 Fed. Reg. at 1,203 (citing 42 U.S.C. 4332(2)(C)(iii); 40 CFR 1502.1, 1502.14).
[189] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.
[190] *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("'NEPA was not intended to resolve fundamental policy disputes.'") (*quoting Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987)).

Presidential administrations change and so do the policy goals and priorities that govern agency actions under any given administration. The alternatives that agencies are required to consider under NEPA should not. Congress did not intend NEPA reviews to be the means by which each new administration ensures that each agencies' decisions conform to their policy priorities. Congress required agencies to consider alternatives based on whether the alternatives could reasonably address some or all of an agency decision's potential adverse effects on the human environment, not based on whether they accord with any given administration's policy goals or commitments.

The universe of alternatives that agencies must consider as part of their NEPA reviews does not expand or contract based on the vagaries of electoral politics or fluctuating policy priorities. Even those, like API, that broadly support the Biden Administration's goal of reducing GHG emissions across the economy and specifically in the energy sector must be wary of construing NEPA to allow administrations to arrogate agency review processes to manipulate alignment with policy objectives.

e. The Interim Guidance Encourages Agencies to Consider Mitigations not Authorized by NEPA

The Interim Guidance advises agencies to "consider available mitigation measures that avoid, minimize, or compensate for GHG emissions and climate change effects," and explains that "[g]iven the urgency of the climate crisis, CEQ encourages agencies to mitigate GHG emissions to the greatest extent possible."[191] While we share CEQ's interest in reducing GHG emissions across the economy, NEPA does not require nor independently authorize agencies to adopt or require project proponents to implement mitigation measures.[192]

NEPA is a procedural statute[193] that Congress expected would facilitate "fully informed and well-considered" agency decisions.[194] The Act "does not mandate particular substantive

[191] 88 Fed. Reg. at 1,206.
[192] *Methow Valley Citizens Council*, 490 U.S. at 352-53; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010).
[193] *See, e.g., Vt. Yankee*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23, (2008) ("NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.") (citation and quotation marks omitted); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) ("NEPA is an essentially procedural statute intended to ensure fully informed and well considered decision-making"); *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) ("The procedural duty imposed upon agencies by this section is quite precise . . . ."); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) ("NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment . .).
[194] *Vt. Yankee*, 435 U.S. 519, 558 (1978).

environmental results; rather, it focuses Government and public attention on the environmental effects of proposed agency action."[195]

Thus, as CEQ's own regulations make clear, NEPA "does not mandate the form or adoption of any mitigation."[196] The only authority an agency has to require mitigation therefore must be found in the agency's action statute.[197] As the Supreme Court has recognized, "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather than unwise-agency action."[198]

While we believe it is plainly evident that NEPA does not provide agencies any independent authority to require the adoption of mitigation measures, API wishes to clarify that we are not suggesting that mitigation has no role in agency NEPA reviews. Many project proponents include mitigation measures as integral components of their project design. Agencies also consider (but cannot require) mitigation measures as reasonable alternatives in EISs as well as in EAs to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS. This latter use of mitigation can allow agencies to comply with NEPA's procedural requirements by issuing an EA and a "mitigated FONSI."[199]

API is not suggesting that agencies abandon consideration of mitigation in these contexts, but API is urging that CEQ refrain from directing agencies to treat their procedural considerations under NEPA as new substantive obligations or statutory authorizations. Indeed, CEQ's suggestion that agencies consider imposing maximum GHG emissions mitigation is not only problematic generally, but wholly impermissible and unworkable as applied to GHG emissions.

By advising agencies to "mitigate GHG emissions to the greatest extent possible,"[200] CEQ essentially dropped any pretense that the mitigation provisions in the Interim Guidance are intended to avoid or lessen the impacts that are properly the subject of NEPA reviews. Here again, the Interim Guidance urges agencies to view mitigation measures as a means to achieve "climate action goals and commitments, including Federal goals, international agreements, state or regional goals, Tribal goals, agency-specific goals, or others as appropriate."[201] While the precise role of mitigation under NEPA has been the subject of some debate, there is no reasonable dispute that an administration's policy goals or commitments should have no bearing

[195] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011) (*quoting Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
[196] 40 C.F.R. § 1508(s).
[197] *See Robertson*, 490 U.S. at 351-52 ("There 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").
[198] *Methow Valley Citizens Council*, 490 U.S. at 350 (comparing NEPA, which does not impose substantive obligations on an agency, with Section 7 of ESA, which requires agencies to ensure that its actions do not jeopardize threatened or endangered species).
[199] Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact ("Mitigation Guidance"); 76 Fed. Reg. 3,843 at 3,846 (Jan. 21, 2011).
[200] 88 Fed. Reg. at 1,206.
[201] 88 Fed. Reg. at 1,203.

on NEPA mitigation measures. Policy goals and objectives can and do change from administration to administration, but the impacts that are properly considered for mitigation under NEPA do not.

Moreover, the Interim Guidance's suggestion that agencies address GHG emissions "to the greatest extent possible"[202] seemingly urges agencies to prioritize GHG emissions reductions above the more direct effects of proposed decisions such as habitat modification, water resource impacts, or emissions of conventional pollutants. This is the inevitable consequence of directing agencies to use NEPA reviews to reduce GHG emissions rather than environmental impacts.

Indeed, the difference between reducing emissions and impacts is seemingly subtle, but highly important in this context. While GHG emissions may contribute to impacts relevant to NEPA analyses (*e.g.*, the various effects of climate change), GHG emissions are not impacts in and of themselves. As CEQ acknowledges in the Interim Guidance, "[e]ven if the United States and the world meet ambitious decarbonization targets, [climate change] trends will continue for many years, adversely affecting critical components of the human environment."[203] The inevitability of these trends is even more relevant in the context of individual proposed decisions under NEPA because even if an agency fully mitigated and offset a project's GHG emissions, the impact of a changed climate – the only impact relevant for purposes of NEPA analyses – will persist. We raise this, not to suggest that reducing GHG emissions is unimportant or futile, but to show how the reduction or even the complete elimination of GHG emissions from a project subject to NEPA does not mitigate the "effects" or "impacts" in a manner relevant to a NEPA review.

The Interim Guidance's misapplication of NEPA as the appropriate statute for effectuating GHG emissions reductions is further reflected in CEQ's Mitigation Guidance. In the Mitigation Guidance, CEQ stresses the critical importance that agencies monitor not only the implementation of mitigation measures, but also the effectiveness of the mitigation measures once they are implemented.[204] "Effectiveness monitoring tracks the success of a mitigation effort in achieving expected outcomes and environmental effects."[205] How is such oversight possible in the context of Interim Guidance's advisory for agencies to "mitigate GHG emissions to the greatest extent possible" and for the Interim Guidance's problematic wide scope of speculative indirect and cumulative GHG emissions? Even if one were able to discern the difference in climate impacts specifically attributable to the GHG emissions of a project that were eliminated through NEPA mitigation measures, the SC-GHG estimates that CEQ instructs agencies to use shows that the majority of the impacts or effects that are relevant to NEPA analyses will not be observed for hundreds of years.[206]

[202] 88 Fed. Reg. at 1,206.
[203] 88 Fed. Reg. at 1,200.
[204] 76 Fed. Reg. at 3,850.
[205] 76 Fed. Reg. at 3,850.
[206] Interim TSD at 16-17.

Consider also how CEQ's Mitigation Guidance instructs agencies when mitigation measures "have not had the environmental results predicted in the NEPA and decision documents."[207] According to the Mitigation Guidance:

> It is an agency's underlying authority or other legal authority that provides the basis for the commitment to implement mitigation and monitor its effectiveness. [A]gencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities and they expect the resources to be available to perform or ensure the performance of the mitigation. In some cases, . . . agencies may exercise their authority to make relevant funding, permitting, or other agency approvals and decisions conditional on the performance of mitigation commitments by third parties. It follows that an agency must rely on its underlying authority and available resources to take remedial steps. Agencies should consider taking remedial steps as long as there remains a pending Federal decision regarding the project or proposed action. Agencies may also exercise their legal authority to enforce conditions placed on funding, grants, permits, or other approvals. If a mitigation commitment is simply not undertaken or fails to mitigate the environmental effects as predicted, the responsible agency should further consider whether it is necessary to prepare supplemental NEPA analysis and documentation. . . . Much will depend upon the agency's determination as to what, if any, portions of the Federal action remain and what opportunities remain to address the effects of the mitigation failure.[208]

Here again, CEQ's own guidance makes plain the important difference between mitigating an impact under NEPA and ameliorating a factor that contributes to an impact under NEPA. Even if agencies "mitigate GHG emissions to the greatest extent possible"[209] as the Interim Guidance suggests, those agencies will not know for many decades if not centuries whether those GHG reductions "mitigate the environmental effects as predicted."[210] And if agencies' GHG reduction efforts ultimately "fail[] to mitigate the environmental effects as predicted"[211] decades or centuries in the future, the agencies will have no authority under NEPA to take remedial steps – "an agency must rely on its underlying authority and available resources to take remedial steps."[212]

That is why CEQ has since 2011 cautioned that "agencies should not commit to mitigation considered in an EIS or EA unless there are sufficient legal authorities."[213] And that is also why CEQ must refrain from advising agencies to require GHG emissions reductions under the guise of NEPA mitigation. An agency cannot require mitigation measures under NEPA; it is only an

[207] 76 Fed. Reg. at 3,851.
[208] 76 Fed. Reg. at 3,851.
[209] 88 Fed. Reg. at 1,206.
[210] 76 Fed. Reg. at 3,851.
[211] 76 Fed. Reg. at 3,851.
[212] 76 Fed. Reg. at 3,851.
[213] 76 Fed. Reg. at 3,851.

agency's underlying statutory authority that allows it to require, monitor, and ensure the mitigation of a proposed decision's impacts and effects.

IV. The Impermissible and Unsound Interim Guidance Underscores the Need for Bipartisan Permitting Reform in Congress

At base, the instructions and directives that CEQ provides through the Interim Guidance reflect an attempt to commandeer Congress's singular authority to shape and direct our nation's energy policy. Congress has long exercised this authority through statutes like the Federal Land Policy and Management Act, Natural Gas Act, Mineral Leasing Act, and Outer Continental Shelf Lands Act; and more recently through the IIJA, and the IRA. While these and other similar statutes authorize agencies to make a variety of decisions that impact America's approach to energy development, agencies must do so within the context of the broad national energy policy goals and outcomes that only Congress can prescribe. The Interim Guidance attempts to upend the comprehensive and cohesive energy policymaking role entrusted to Congress by devolving national energy policy decisions to the scores of discrete actions that will be undertaken by dozens of agencies with widely varied expertise and authority. This policy devolution is not permissible; national energy policy decisions must be made through political processes – not NEPA processes.[214]

Indeed, the Interim Guidance reveals yet again the irrationality and futility of attempting to establish broad national energy policies through unenduring agency guidance. Each successive Presidential administration of a different political party can be expected to issue different guidance from its predecessor (in some cases that is widely divergent), which undermines the certainty that project developers need to make significant capital investments in energy projects can take years to develop.

This inconsistent and ephemeral policy landscape underscores the need for statutory permitting reform. API has been quite vocal in its support for bipartisan permitting reform, and we will continue to work across industry sectors and political parties to achieve meaningful and enduring permitting reform in Congress.

V. CONCLUSION

API appreciates the opportunity to provide these comments on CEQ's Interim Guidance. As we have noted throughout these comments, API shares the Biden Administration's goal of reducing GHG emissions across the economy and specifically from the production, transportation, and use of energy resources, but we do not believe that the Interim Guidance helps agencies advance these goals in a lawful or effective manner. API therefore urges CEQ to rescind the immediate effectiveness of the Interim Guidance and instruct agencies that it should not be relied upon unless and until CEQ finalizes the guidelines after completion of proper notice-and-comment rulemaking procedures. API further urges CEQ to ensure that any subsequent guidelines

[214] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777, 103 S.Ct. 1556, 1563, 75 L.Ed.2d 534 (1983) (citation omitted) ("[t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.").

directing agencies to incorporate climate change considerations into NEPA analyses remain focused on the purpose and requirements of the Act and fully respond to these comments.

Sincerely,

Jennifer Stewart

Director, Climate & ESG Policy