WESTERN ENERGY ALLIANCE

April 10, 2023

Jomar Maldonado
Director for NEPA
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

RE: CEQ Interim NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change Docket No. CEQ-2022-0005

Dear Mr. Maldonado:

Western Energy Alliance urges the Council on Environmental Quality (CEQ) to withdraw the National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas (GHG) Emissions (Interim Guidance) 88 Fed. Reg. 1,196 (Jan.9 2023). With the Interim Guidance, CEQ would change the original intent of NEPA from informing agency decision-making to becoming a tool to drive broad policy issues on climate change and the usage of fossil fuels, which are the purview of Congress. The Interim Guidance would serve to increase uncertainty and the potential for litigation that disincentivizes investment in U.S. infrastructure. It will further protract already lengthy delays of the NEPA process and related agency authorizations. Instead, CEQ should seek to develop guidance that is consistent with the NEPA statute and permissible scope of NEPA review, legally defensible, and streamlined for efficiency.

Western Energy Alliance represents 200 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independent oil and gas producers, the majority of which are small businesses with an average of fourteen employees. Alliance members have deep experience and institutional knowledge about the NEPA process and its pitfalls in agency decision-making related to the federal onshore oil and gas program.

I. General Comments

NEPA's statutory requirements were intended by Congress to foster informed federal agency decision-making and public access to information. NEPA does not expand a federal agency's substantive authority or statutory jurisdiction nor confer powers beyond those granted to the agency by Congress.

In practice, NEPA has become far removed from its original legislative intent as promulgated and passed by Congress. NEPA has become a litigation weapon used by activist organizations that focus on preventing federal agencies from approving projects under their jurisdiction, thus hindering federal agencies' abilities to carry out their statutory obligations for the benefit of the America people. NEPA has become a tool used

1775 Sherman St., Ste 2700 Denver, CO 80203
P 303.623.0987 F 303.893.0709 W WesternEnergyAlliance.org

by those seeking to delay indefinitely or even halt infrastructure and energy development, pipelines, mining of critical minerals, roads, bridges, water projects, and other vital infrastructure, even when the projects include measures to mitigate potential impacts. Over the past few years, anti-industry, anti-development, and anti-renewables activist environmental groups have dramatically increased the use of litigation to stymie federal agency actions. Since 2015, nearly every Bureau of Land Management (BLM) lease sale has been challenged and BLM Fiscal Year 2022 statistics show 100% of proposed oil and natural gas lease parcels were protested for the first time in the 25 years the agency has been tracking it. These groups are strategically choosing venues where the courts are known to take expansive views of NEPA's requirements. Given CEQ's role in guiding all federal agencies' NEPA implementation, it should ensure it is providing guidance that is consistent, clear, streamlined and legally defensible.

Moreover, from a practical standpoint, the Interim Guidance creates a series of subjective standards and aspirational goals that will result in more confusion, inconsistent application and implementation, extensive delays in the NEPA process, and significant additional litigation premised upon the NEPA analyses relied upon for agency decisions.

Climate change is a complex, global issue and it is difficult, at best, to analyze its potential environmental effects at the project, local, state, and regional levels, much less analyze the potential climate effects from a single project or agency decision. At present, federal agencies, industry, academia, and the scientific community still do not have sufficient and reliable scientific methodology or computer modeling that can accurately forecast the effects of climate change based upon site-specific information for a particular project or discrete agency decision.

Challenges to obtaining viable data to inform agency decision making include that federal agencies lack precise computational models for local projections of expected climate and climate change impacts that may or may not result from GHG emissions at the upstream project level. Without such models, federal agencies are limited to reacting to already-observed effects that may or may not be attributable to climate change within their resource areas, which makes it difficult to plan for future changes. Moreover, neither Congress nor the Executive Branch of the federal government have adopted threshold significance criteria that would guide agencies on what levels of impact would result in a determination that a proposed action would have a significant effect upon climate change and/or related impacts to local ecosystems nor is it reasonable to adopt such criteria given the absence of science that can support any such projections.

In other words, it is recognized that current science and computer models cannot link individual projects that contribute to atmospheric GHG emission levels to specific changes to climate or other potential direct, indirect, or cumulative effects on the environment. This lack of scientific and computational certainty opens the door for very subjective, potentially biased, and tenuous assumptions for NEPA analysis parameters that will, because of their inherent unreliability, lead only to speculative and inconsistent analyses

that will not inform or facilitate agency decision-making. The Interim Guidance only exacerbates these issues, to the benefit of no one. The Alliance strongly objects to CEQ's Interim Guidance and urges the agency to withdraw it.

II. Legal Constraints on GHG and Climate Analyses Under NEPA

1. Interim Guidance Cannot Unilaterally Amend the NEPA Statute or Otherwise be Used as a Policy Tool to Direct Specific Outcomes for Projects

At the outset, the fundamental premise of CEQ's Interim Guidance is contrary to the NEPA statute and long-established U.S. Supreme Court precedent. The Interim Guidance elevates climate change as the predominant resource issue to be analyzed and mitigated and seeks to subordinate the United States' abundant oil and natural gas resources and companies' private property rights to develop their hydrocarbon assets. *See, e.g.,* Interim Guidance, 88 Fed. Reg. at 1,204 (instructing 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 and consider mitigation measures to reduce GHG emissions to the greatest extent possible.")

The Interim Guidance also focuses on perceived negative impacts from oil and natural gas projects while not taking into account any of the numerous benefits these resources provide. Such benefits include the significant reduction in GHG emissions in the United States due to increased use of natural gas for electric generation.[1] Oil and natural gas enable renewable energy by providing feedstock for the fabrication of materials needed to construct renewable energy projects and serving as critical back-up generation for intermittent wind and solar energy sources. Furthermore, there is not a replacement energy source that does everything that oil and natural gas do.

The Interim Guidance maintains that assessing whether projects will increase or decrease climate change is within the purview of federal agencies' statutory obligations for NEPA reviews. *See*, e.g., 88 Fed. Reg. at 1,204 (stating that "[w]here relevant – such as for proposed actions that will generate substantial GHG emissions – agencies should identify the alternative with the lowest net GHG emissions or the greatest net climate benefit among the alternatives they assess."). The Interim Guidance focuses on using NEPA as a policy tool to implement this Administration's climate goals and objectives. It states that federal agencies should evaluate "how Federal actions will help meet climate change goals and commitments, or alternately, detract from them."88 Fed. Reg. at 1,204. The Interim Guidance references the Biden Administration's pledge under the Paris Agreement to establish an economy-wide target of reducing U.S. net GHG emissions by 50 to 52 percent below 2005 levels by 2030 as a climate goal.

[1] *U.S. Energy-Related Carbon Dioxide Emissions, 2021*, U.S. Energy Information Administration (EIA), December 2022; *Cost and Performance Baseline for Fossil Energy Plants*, Department of Energy, July 2015.

Moreover, the Interim Guidance directs agencies to "use the NEPA process to make informed decisions grounded in science that are transparent with respect to how Federal actions will help meet climate change goals and commitments, or alternatively, detract from them." 88 Fed. Reg. at 1,204. It instructs agencies that "[a] programmatic NEPA review also may serve as an efficient mechanism in which to assess Federal agency efforts to adopt broad-scale sustainable practices for energy efficiency, GHG emissions avoidance and emissions reduction measures, petroleum product use reduction, and renewable energy use, as well as other sustainability practices." *Id.*

The Alliance does not support the premise that CEQ's Interim Guidance should be utilized as a tool to implement NEPA in a manner that drives specific policy outcome-based results on GHG emissions, petroleum product use, and indeterminable global climate change, particularly in the absence of any Congressional action to amend NEPA or otherwise to promulgate national energy and climate legislation.

Congress did not promulgate NEPA as a substantive statute designed to protect the environment. Rather, it is well settled that NEPA is a procedural statute promulgated to ensure that an agency makes an informed decision. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978). NEPA requires an agency to take a "hard look" at the environmental consequences of a proposed action and prescribes public dissemination of relevant environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519 (1978); 40 C.F.R. § 1500.1 (stating that NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations"). NEPA does not dictate any substantive environmental result. Indeed, NEPA is not violated even if a project will cause significant environmental impacts, so long as the agency is "informed" of the potential effects of its decision before it acts. *Robertson,* 490 U.S. at 350.

Importantly, federal agencies may not prioritize environmental concerns or political climate goals at the expense of companies or the development of their valid existing property rights. NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. States Forest Serv., 297 F.3d 1012, 1022 (10th Cir. 2002).* As such, the Alliance does not agree with the Interim Guidance that as part of NEPA analysis agencies "should mitigate GHG emissions associated with their proposed actions to the greatest extent possible" nor are they authorized to do so. 88 Fed. Reg. at 1197.

2. Jurisdictional Limits of Agency Conducting NEPA Analysis; Rule of Reason Legal Standard

The Interim Guidance needs to expressly define the limits on the scope of NEPA analysis based on the jurisdiction of the agency. Federal agencies may only act within the bounds of their enabling statutes. As explained by the Supreme Court, "an agency literally has no

power to act . . . unless and until Congress confers power upon it." *La. Public Serv. Com. V. FCC*, 476 U.S. 355, 374 (1986).

Similarly, the scope of NEPA analysis an agency must conduct is limited by the agency's jurisdiction granted by Congress in the agency's organic statute. This scope of analysis is guided by a rule of reason. In this context, the U.S. Supreme Court has explained that an agency's jurisdictional limits must also be taken into account in deciding the proper scope of analysis under NEPA for a project. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) "Rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision-maker. An agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions".

In other words, the contours of NEPA analysis must necessarily be guided by both the scope of the proposed action and the contours of an agency's jurisdictional limits. NEPA does not require or authorize an agency to analyze the environmental impacts of actions that are outside the agency's jurisdiction. *Public Citizen*, 541 U.S. at 767.

This fundamental legal tenet is critical within the context of NEPA analyses of GHG emissions for upstream oil and natural gas projects, particularly projects on federal lands involving the Department of the Interior and its bureaus and agencies, such as BLM. These agencies do not have the jurisdictional authority to regulate greenhouse gases and significantly, the NEPA process cannot be used as a surrogate for promulgating *de facto* GHG regulations under the Clean Air Act or other regulatory programs within the jurisdiction of the Environmental Protection Agency (EPA).

Congress has not authorized or empowered BLM to establish national energy or climate policy. While some may wish to see BLM limit the production of oil, natural gas, and coal as part of an overall strategy to curtail the use of fossil fuels, the agency has no authority to do so. BLM is obligated to follow its statutory mandates under the Mineral Leasing Act to promote development of the nation's federally owned oil and natural gas resources. Only Congress may establish national energy or climate policy and Congress has not amended the Mineral Leasing Act or otherwise directed BLM to restrict the nation's supply of oil and natural gas resources.

As another example, in a BLM NEPA analysis for an upstream oil and natural gas development project, the ability to assess potential downstream GHG emissions related to subsequent refining or end-use combustion would depend on various factors that are not within the scope of BLM's jurisdiction or even the scope of the proposed upstream action.

The D.C. Circuit applied this legal principle that limits NEPA analysis to the scope of an agency's regulatory jurisdiction in *Sierra Club (Freeport) v. FERC* where it held that FERC's decision to increase the production capacity of a liquefied natural gas terminal was not a legally relevant cause of pollution that may result from increased LNG exports, and

therefore FERC could omit the pollution impacts from its NEPA analysis. 827 F.3d 59, 68 (D.C. Cir. 2016).

The D.C. Circuit further clarified in *Sierra Club II* that NEPA requires agencies to evaluate only those environmental impacts that the agency may "consider when regulating in its proper sphere," and not environmental impacts upon which the agency would be forbidden from relying as a justification for its decision. *Sierra Club II v. FERC,* 867 F.3d 1357, 1373 (D.C. Cir. 2017). In *Sierra Club II,* the court held that Congress instructed FERC to consider the "public convenience and necessity" for a pipeline and authorized FERC to deny a pipeline certificate on the grounds that downstream GHG emissions would be too harmful to the environment. *Id.* at 1373. Based upon this statutory obligation, FERC was therefore required under NEPA to evaluate downstream emissions. *Id.*

Public Citizen and the *Sierra Club* cases are controlling and the Interim Guidance cannot be used to expand the scope of NEPA analysis to actions and activities that are beyond the regulatory jurisdiction of a federal agency. As an example, the Interim Guidance cannot be used to categorically prevent or limit the leasing, development, and production of oil and natural gas resources managed by BLM, and BLM cannot act (e.g., impose limits or mitigation measures) based upon any information it compiles regarding downstream emissions which BLM does not have the authority to regulate. BLM must continue to abide by its statutory authorities. The Mineral Leasing Act and the Federal Land Policy and Management Act require BLM to conduct quarterly competitive oil and natural gas lease sales for lands that are eligible and available for leasing. 30 U.S.C. § 181 *et seq.*; 43 U.S.C. § 1701 *et seq*.; 43 C.F.R. § 3120.1-2(a).

CEQ's guidance on analysis parameters for GHGs and climate must include an explanation of the limits on the scope of NEPA analysis based upon the jurisdictional limits of the federal agency to regulate actions outside of its regulatory purview.

III. Agencies Cannot be Compelled to Adopt and Impose Mitigation Measures Under the NEPA Process

NEPA is a procedural statute and therefore, it does not mandate a particular environmental outcome. As a result, the Supreme Court has held that a discussion of mitigation should be included in a NEPA analysis to ensure adequate consideration of the potential environmental consequences of the proposed project, but a requirement to mitigate is inappropriate. *Robertson,* 490 U.S. at 351-53 (holding that the appeals court erred "in assuming that NEPA requires that action be taken to mitigate the adverse effects of major federal actions").

NEPA simply requires an agency to undertake "a reasonably complete discussion of possible mitigation measures." *Robertson*, 490 U.S. at 352. "Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read

to require agencies to obtain an assurance that third parties will implement particular measures." *Id.* at 353 n.16.

As the Supreme Court explained, "one important ingredient of an EIS is the discussion of the steps that can be taken to mitigate adverse environmental consequences." *Robertson*, 490 U.S. at 351. Significantly, the Supreme Court went on to explain that "[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and substantive requirement that a complete mitigation plan be actually formulated and adopted on the other." *Id.* at 351.

Similarly, well-established legal precedent makes clear that NEPA and its implementing regulations do not impose a duty on federal agencies to require mitigation measures after completing an Environmental Assessment and a Finding of No Significant Impact.

The Interim Guidance discussion on alternatives and mitigation are contrary to this fundamental NEPA tenet. Requiring mandatory imposition of mitigation measures to address climate change and GHG emissions would unlawfully transform NEPA from a procedural statute into a substantive, environmental protection statute. Only Congress can amend the NEPA statute. Moreover, the Interim Guidance cannot be utilized to unilaterally amend CEQ's existing regulations implementing NEPA.

IV. Reasonable Alternatives

The Interim Guidance discusses analysis of alternatives analyzed under NEPA in the context of GHG emission reductions and mitigation measures. See, e.g., 88 Fed. Reg. at 1,204 stating that "[w]here relevant – such as for proposed actions that will generate substantial GHG emissions – agencies should identify the alternative with the lowest net GHG emissions or the greatest net climate benefits among the alternatives they assess." This guidance overreaches the parameters of NEPA provided by Congress.

Under well-established precedent, the range of alternatives is derived by the purpose and need for the proposed action. When a company from the private sector proposes to develop their property rights, the agency is supposed to provide due deference to the proponent's purpose and need for the project. It is well settled that BLM must consider reasonable alternatives that will accomplish the intended purpose of the proposed action, are technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e).

"Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint." CEQ 40 Most Asked Questions, 46 Fed. Reg. 18026 (March 23, 1981). "Alternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency." *Citizens' Comm. to Save our Canyons v. U.S. Forest Serv.,* 297 F.3d 1012, 1031 (10th Cir. 2002); *Colorado Envtl. Coal. v. Dombeck*,

185 F.3d 1162, 1174-75 (10th Cir. 1999). An agency need not consider alternatives that "it has in good faith rejected as too remote, speculative, . . . impractical or ineffective." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001); *see also Vermont Yankee*, 435 U.S. at 551.

The Interim Guidelines must be consistent throughout to provide that emission reductions should only be examined if technically and economically feasible and the alternative would still meet the purpose and need of the proposed action. As the Interim Guidance states, "[n]either NEPA, the CEQ Regulations, or this guidance require the decision maker to select the alternative with the lowest net GHG emissions or climate costs or the greatest net climate benefits." 88 Fed. Reg. 1204.

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

NEPA does not require BLM to conduct a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequence." *Headwaters, Inc. v. BLM*, 914 F.3d 1174, 1181 (9th Cir. 1990) (citation omitted). Despite these well-established legal precedents, the Interim Guidance still directs 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 and consider mitigation measures to reduce GHG emissions to the greatest extent possible." 88 Fed. Reg. at 1204.

The Alliance opposes the recommendation to include clean energy alternatives when evaluating a proposed fossil fuel project because they do not accomplish the purpose and need of the project applicant. Once a lease is issued, the government has granted the lessee a contractual right to explore for and produce oil or natural gas from that parcel, which removes the possibility of an alternative energy project such as wind or solar from taking place in that location. Additionally, an agency would be required to determine the alternative is technically and economically feasible to match the technical and economic benefits from oil and natural gas projects, rather than being a hypothetical alternative.

Further, with regard to requiring analysis of clean energy alternatives to proposed fossil fuel projects, CEQ needs to take into consideration that alternatives must meet the purpose and need for the proposed action. "An agency need not consider alternatives that 'extend beyond those reasonably related to the purposes of the project.'" *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012) (citation omitted); *see also Partners in Forestry Co-op., Northwood All., Inc. v. U.S. Forest Serv.*, 638 F. App'x 456, 464 (6th Cir. 2015) ("Rather, the number of alternatives that an agency considers is within its discretion, as long as it takes into

account the project's purpose and environmental consequences."). "An alternative is 'reasonable' if it is objectively feasible as well as 'reasonable in light of [the agency's] objectives.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011) (citation omitted).

The Interim Guidance heavily emphasizes consideration of the no action alternative when analyzing GHG emissions in the NEPA review process. This is inconsistent with the intent of Congress which placed an emphasis on approving the proponent's project.

Alternatives must meet a non-federal applicant's goals. "Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).

For example, the U.S. Court of Appeals for the District of Columbia Circuit upheld a BLM EIS that adopted the non-federal applicants' proposal to revise an existing decision to expand the authorized number of oil and natural gas wells that may be drilled and to relax seasonal restrictions. *Theodore Roosevelt Conservation P'ship,* 661 F.3d at 73. The court found that BLM's chosen range of alternatives were reasonable because each alternative addressed the applicants' proposal, which BLM also had adopted as its objective. *Id.* at 74.

The court also rejected claims that BLM should have analyzed an additional alternative to "cap or scale back development" to increase wildlife populations because that alternative did not conform with BLM's purpose and need: "The Bureau selected a reasonable range of alternatives in light of its purpose; it was under no obligation to include a scaled-back-development alternative that would not 'bring about the ends of the federal action.'" *Id.* at 74–75.

The Interim Guidance calls for the agency to maximize GHG emissions reductions without regard to the technical or economic feasibility of such action. This approach combined with the suggested expansion of alternatives to be considered will likely result in NEPA analysis taking more than the current average of 4.5 years to complete and could unjustifiably and impermissibly hinder agency approvals for federal mineral leasing.[2]

The Alliance urges CEQ to make clear that alternatives with lower GHG emissions are *not* in any way preferable based solely on that factor. Instead, it is just one of many factors that agencies can consider.

[2] *Environmental Impact Statement Timelines (2010-2018)*, CEQ, June 12, 2020.

V. Indirect Effects; NEPA Does Not Require Analysis of Remote or Speculative Impacts

The Interim Guidance states: "As with any NEPA review, the rule of reason should guide the agency's analysis and the level of effort can be proportionate to the scale of the net GHG effects." 88 Fed. Reg at 1205. The emphasis on anchoring the scope of NEPA analysis to "net GHG effects" is contrary to NEPA and inappropriate. At a minimum, this presumes that climate mitigation must be imposed and/or that net effects presume an impact that must be analyzed and mitigated.

The Alliance does not support the statement that agencies should provide a "full burn" assumption to fossil fuel-related actions so the agency can provide "an upper bound estimate of GHG emissions by assuming that all of the available resources will be produced and combusted to create energy." 88 Fed. Reg. at 1205.

While GHG emissions may be quantified at the project-level in certain circumstances, federal agencies do not have the tools to analyze or predict what impact, if any, these GHG emissions will have on global climate.

NEPA requires analysis of a project's environmental impacts caused by the proposed action. Regarding the causal connection between impacts on the environment from project-level effects, the Supreme Court held that NEPA should be "read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metro. Edison v. People Against Nuclear Energy,* 460 U.S. 766, 774 (1983).

Similarly, in *Department of Transportation v. Public Citizen*, the Supreme Court held that "NEPA requires a 'reasonably close causal relationship' akin to proximate cause in tort law," and "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." 541 U.S. 752, 754, 770 (2004).

For the oil and natural gas industry, as well as other sectors, there is no close causal connection between individual U.S. project-level GHG emissions and global climate change. At the project level, oil and natural gas projects may result in the emission of greenhouse gases, but the potential effects of these emissions cannot be accurately quantified or predicted in the context of global climate change.

NEPA does not require the full disclosure of impacts that are remote or speculative. *Vermont Yankee*, 435 U.S. at 551. As discussed above, while GHG emissions may be estimated at the project-level, federal agencies do not have a tool to analyze or predict what impact, if any, these GHG emissions will have on global climate.

This limitation is based upon well-established legal precedent. The Supreme Court has characterized the "rule of reason" as requiring an agency "to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976). The speculative nature of potential effects from project-level GHG emissions on the global climate is particularly relevant to the boundaries of indirect and cumulative impacts analysis under NEPA.

As recognized by the Supreme Court, agencies have discretion to limit the scope of their cumulative impact discussions based on reasonableness and practical considerations. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). It is well settled that agencies are not required to consider cumulative impacts that are too speculative or hypothetical to meaningfully contribute to NEPA's goals of public disclosure and informed decision-making. *Vermont Yankee*, 435 U.S. at 551 (recognizing that NEPA was not meant to require agencies to consider remote and speculative possibilities, the effects of which cannot be readily ascertained).

The Interim Guidance should be amended to recognize and endorse these limitations on indirect and cumulative impacts analyses for GHG emissions.

VI. Proper Scope of NEPA Analysis for Multi-Tiered Federal Programs such as BLM's Onshore Oil and Gas Program

Courts have long recognized the staged nature of federal upstream oil and natural gas projects. Oil and natural gas leasing necessarily involves a correspondingly sequential NEPA analysis by BLM in which the nature and specificity of impacts at each step in BLM's approval process are analyzed at the time when the impacts from those decisions are best understood and can most accurately be quantified. *See N. Alaska Envtl. Ctr. v. Kempthorne (NAEC),* 457 F.3d 969, 977 (9th Cir. 2006) ("[Oil and gas] projects generally entail separate states of leasing, exploration and development. At the earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize.").

Plaintiffs seeking to challenge federal oil and natural gas leasing decisions have long attempted to argue that BLM is required to analyze potential GHG emission impacts upon future development, even though such development is not known at the time BLM offers lands and minerals for lease. The Interim Guidance needs to take into consideration that for federal programs such as BLM's onshore oil and gas program, NEPA takes place not only at the project stage, but also at the leasing stage, and land-use planning stage.

With regard to oil and natural gas leasing, when BLM prepares for a lease sale, the direct impact of the proposed action is the offering of leases, for which no emissions are

authorized. The reasonably foreseeable indirect impacts of the action are the emissions from exploration and development on the leases.

However, inclusion of indirect emissions causes redundant consideration of downstream projects that are not certain to come to fruition. As an example, when BLM issues a right-of-way (ROW) for a pipeline or for access to a well pad location, the reasonably foreseeable indirect impact of that ROW approval is tied specifically to the construction of the pipeline or accessing the well pad. Across the West there are a large number of split estates with federal minerals and private surface, and in these cases, the environmental impacts downstream from the wellhead may have zero federal nexus and should therefore be outside the purview of NEPA analysis.

It is beyond BLM's ability to control or even know what the end uses of oil and natural gas produced on federal leases will be, in addition to the inability to know if and how the leases will even be developed. These limiting factors underscore that the analysis of downstream uses is uncertain and entirely speculative.

Assuming, that all leases will be developed and ultimately lead to downstream combustion and future GHG emissions is highly speculative due to many factors including future energy prices, resource supply and demand, regulatory procedures, volume of GHGs vented from processing facilities, and processing and pipeline technologies.

From a legal standpoint, it is well settled that BLM is not required to analyze speculative impacts to comply with NEPA. As the U.S. Supreme Court has held, NEPA does not require the full disclosure of impacts that are remote or speculative. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978).

Since affordable energy is essential to global economies and public health, global hydrocarbon demand will continue to grow and GHG emissions will occur regardless of whether a specific federal project is completed or not. Eliminating federal oil and natural gas development would only result in replacement of production from other countries. Further, most imported oil production results in higher emissions as there are frequently less regulatory requirements than in the United States.

VII. Social Cost of Carbon (SCC) and Social Cost of Greenhouse Gases (SC-GHG); Analysis of the Social Benefits of Oil and Natural Gas are Required

The Alliance agrees with and supports the statement in the Interim Guidance that "NEPA does not require a cost-benefit analysis where all monetized benefits and costs are directly compared. In a NEPA review, the weighing of the merits and drawbacks of the various alternatives need not be displayed using a monetary cost-benefit analysis and should not be when there are important qualitative considerations." 88 Fed. Reg. at 1211. This statement applies with equal weight for the analysis that employs SC-GHG. The comments below apply to both the SCC and SC-GHG.

The Alliance does not agree with and opposes the Interim Guidance's statement on SC-GHG:

> "[u]sing the SC–GHG to provide an estimate of the cost to society from GHG emissions—or otherwise monetizing discrete costs or benefits of a proposed Federal action— does not necessitate conducting a benefit-cost analysis in NEPA documents. As described in Section IV(B), the SC–GHG estimates are useful information disclosure metrics that can help decision makers and the public understand and contextualize GHG emissions and climate damages. Agencies can use the SC–GHG to provide information on climate impacts even if other costs and benefits cannot be quantified or monetized." 88 Fed. Reg at 1211.

With regard to NEPA review for the federal onshore oil and gas program, BLM is not required to apply a SCC in its review. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 78 (D.D.C. 2019) (upholding agency decision to decline to apply a social cost of carbon protocol). BLM is not under any legal requirement to utilize the SC-GHG in environmental reviews, and in fact it is not a tool that provides any meaningful information to either the public or the decision-maker at this scale and with such vast imprecision.

Rather, BLM has in the past explained that calculating the SCC from the combustion of an unknown quantity of produced oil would be "highly speculative" and that a wide range of potential costs would be "less than helpful in informing the public and the decision-maker." 368 F.Supp.3d at 78-79. That reasoned determination is entitled to deference by a reviewing court. *Id; see also Wilderness Workshop*, 342 F. Supp. 3d at 1159-60 ("[BLM] chose not to [apply the social cost of carbon], provided sufficient support in the record to show this, and thus satisfied NEPA in this respect."); *W. Org. of Res. Councils v. BLM*, No. 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) ("[D]espite the benefits of the social cost of carbon protocol, NEPA does not require a cost-benefit analysis under these circumstances.").

The SCC calculation was developed as a tool to measure the potential costs and benefits of agency rulemakings. Federal rulemakings potentially impact the climate and GHG emissions at a scale that allows for a comprehensive evaluation of the potential costs of that regulation. However, individual agency actions such as leasing decisions and permit approvals typically have at most a *de minimis* impact on climate change and GHG emissions, so applying the SCC analysis does nothing to better inform agency decision-making through the NEPA process.

Further, the use of such calculations presents significant risk to the integrity of NEPA reviews and does not advance NEPA's goals of promoting informed agency decision-making because there are multiple subjective variables that can be manipulated to inflate the estimated costs for carbon emitting activities. These adjustments can include

subjective changes to relevant timeframes, adjusting discount rates, including or excluding particular risks, minimizing the social benefits of domestic natural gas and oil, and arbitrarily calibrating other data inputs. Thus, the outcome of applying SC-GHG will have less to do with the possible environmental impacts of a proposed action than with the assumptions BLM uses to perform the analysis.

As a result, rather than informing agency decision-making, the inclusion of the SC-GHG in calculations may instead become a new strawman and focus for improper usage that goes far beyond the proper purposes of NEPA, such as justification to advance energy policy priorities or imposing compensatory requirements on lessees to implement such policies. Courts have consistently ruled that these are improper uses of SCC calculations. The District Court of New Mexico recently held the following regarding BLM environmental reviews:

> NEPA does not require "that agencies weigh the economic costs and benefits of a proposed action. To the contrary, 40 C.F.R. § 1502.23 specifically provides that agencies need not do so, and in fact should avoid such comparisons when, as here, the NEPA analysis in question involves important qualitative considerations." While certain quantitative data needs analyzing, the "regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand, consistent with the broad discretion typically afforded to an agency's choice of methodology." *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCYY, 2020 U.S. Dist. LEXIS 149785, at *34 (D.N.M. Aug. 18, 2020).

Similarly, the U.S. District Court of the District of Columbia has held:

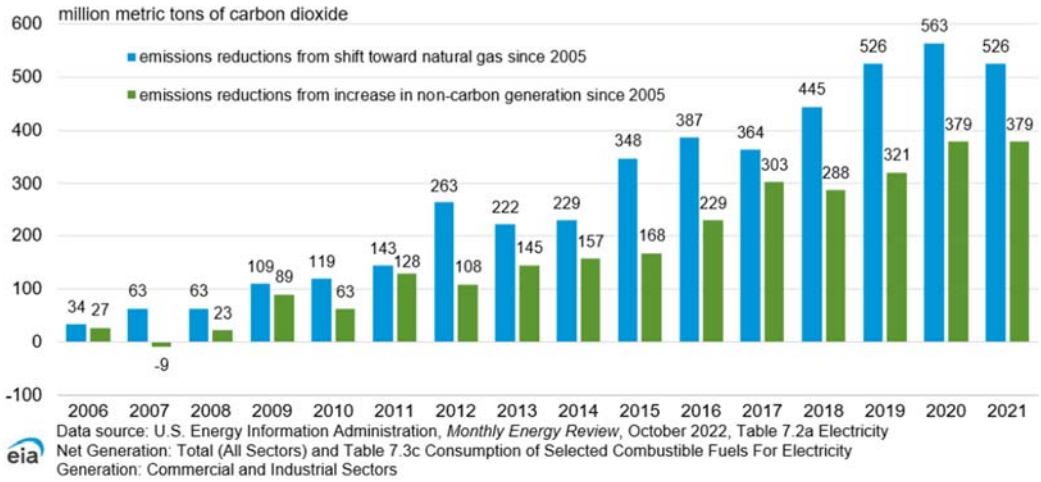
> "BLM here provided reasoned explanations for why it declined to use the social cost of carbon protocol. BLM explained that in the context of each lease sale, calculating the social cost of carbon from CO2 emissions from the combustion of an unknown quantity of produced oil and gas would be highly speculative, and that the range provided by WildEarth's comments and protests represents a 4,000% difference in potential [social cost of carbon] estimates. BLM reasonably determined that a 4,000 percent range in potential costs would be "less than helpful in informing the public and the decision-maker. (While we agree that some level of uncertainty is unavoidable in assessing impacts from complex environmental systems, in this case that uncertainty is compounded by basing any potential [social cost of carbon] estimates on speculative GHG emissions.). That reasoned determination is entitled to deference." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 78-79 (D.D.C. 2019).

Taken together, these rulings make clear that applying SC-GHG estimates to NEPA documents will not provide relevant information for BLM's decision-making or the public. Instead, the courts make clear that this tool is potentially useful only on a broad scale such as an agency rulemaking that will potentially have a significant impact on global emissions, rather than a *de minimis* result at the individual agency action level.

Moreover, the Interim Guidance largely ignores the significant benefits that oil and natural gas resources provide. Countries with greater access to reliable, affordable energy not only have higher standards of living, but generally also have cleaner environments and healthier populations. For example, increased use of natural gas electricity generation leads to lower levels of air pollution by displacing other higher carbon-emitting energy sources and offers a tangible measure to help address climate change.

Increased natural gas electricity generation has reduced more GHG emissions than non-carbon generation, including wind and solar energy. Natural gas has delivered 58% of the reduction in greenhouse gases resulting from fuel switching in the electricity sector, removing 4,404 million metric tons of carbon dioxide (MMT) since 2005. In contrast, wind, solar, and other non-carbon energy sources have reduced GHG emissions by 2,798 MMT or 42%.[3]

Figure 7. CO_2 emissions reductions relative to 2005 caused by changes in the fuel mix of electricity generation



Furthermore, intermittent wind and solar energy are not possible without backup, with natural gas electricity being the best backup source. Any valid analysis must analyze both costs and benefits and agencies should recognize that the balance of benefits from oil and natural gas heavily outweigh the impacts.

[3] EIA, December 14, 2022.

The Alliance urges CEQ to withdraw the Interim Guidance that encourages the application of SC-GHG estimates in the NEPA process.

Conclusion

Western Energy Alliance appreciates the opportunity to provide comments. We urge CEQ to consider ongoing Congressional bipartisan efforts to streamline the NEPA process to allow development of all American energy sources to ensure energy security and a reliable, affordable energy mix for our nation and the world. CEQ should withdraw this Interim Guidance that adds more complexity, delays, and litigation risk to the NEPA process. Please do not hesitate to contact me with any questions.

Sincerely,

Kathleen M. Sgamma
President