

C O M M E N T S

CEQ's Draft Guidance on NEPA Climate Analyses: Potential Impacts on Climate Litigation

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I. Introduction

In December 2014, the White House Council on Environmental Quality (CEQ) issued for public comment a draft guidance document¹ on how federal agencies should evaluate climate change in their analyses under the National Environmental Policy Act.² The draft guidance does not directly regulate greenhouse gases (GHGs) or climate change, but rather provides agencies with “direction on when and how to consider the effects of greenhouse gas emissions and climate change in their evaluation of all proposed Federal actions. . . .”³

This is the second time CEQ has issued draft guidance on the subject. Its 2010 draft guidance on the analysis of GHGs in NEPA documents, though nonbinding, was widely expected to draw attention from federal agencies and ultimately from the courts.⁴ However, this expectation did not come to fruition. While federal agencies did begin to incorporate climate change in NEPA analyses more frequently, there was little consistency in how they did so,⁵ and in the courts, the 2010 draft guidance has had very little influence.⁶

1. Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77802 (proposed Dec. 24, 2014) [hereinafter 2014 Draft Guidance].
2. National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §2-209.
3. 2014 Draft Guidance, *supra* note 1, at 77823.
4. See Svend Brandt-Erichsen, *CEQ Marks 40th Anniversary of NEPA With New Guidance on Greenhouse Gas Impacts, Mitigation, and Categorical Exclusions*, MARTEN LAW NEWS, Feb. 22, 2010, <http://www.martenlaw.com/newsletter/20100222-nepa-climate-change-guidance> (predicting that portions of the 2010 draft guidance would be “likely to influence future legal challenges to the adequacy of GHG analyses contained in NEPA documents”).
5. PATRICK WOOLSEY, CTR. FOR CLIMATE CHANGE LAW, CONSIDERATION OF CLIMATE IN FEDERAL EISs 2009-2011 3 (2012).
6. In two cases, courts upheld an agency's climate analysis based in part on the agency's assertion that it followed some elements of the 2010 draft guidance. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 & n.5, 44 ELR 20001 (D.C. Cir. 2013); *Save Strawberry Canyon v. U.S. Dep't of Energy*, 830 F. Supp. 2d 737, 754-55, 41 ELR 20344 (N.D. Cal. 2011). In no cases, however, does it appear that a court overturned an agency's NEPA analysis because it was not conducted in accordance with the guidance.

Like the 2010 draft guidance, the 2014 draft guidance repeatedly states that it is *not* intended to create any new or binding requirements on agencies.⁷ Yet, despite its apparent lack of teeth, the 2014 draft guidance has renewed interest from environmental practitioners and scholars. A recent *Environmental Law Reporter (ELR)* Comment by Nicholas Yost, a former general counsel of CEQ, proclaimed in its title that “Practitioners Should Take Note of CEQ's New Guidance.”⁸ Yost further stated that, given the risk of NEPA litigation, a “wise” agency would “follow the guidance CEQ has proffered in order to produce an adequate NEPA document.”⁹

But if the guidance, either in draft or final form, is purely advisory, why would a NEPA document's legal sufficiency depend on whether the agency had followed the draft guidance? And why should the 2014 draft guidance influence courts when the 2010 guidance did not? In this Comment, I argue that the 2014 guidance differs from the 2010 guidance in several important ways, and that it—in combination with the body of climate case law under NEPA—may have the potential to ultimately improve the level and detail of climate analysis that courts will require in future NEPA litigation.

II. Overview of NEPA and Climate Change

NEPA can—and should—play a role in addressing future climate change. As Chief Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit stated in her dissent in one case, climate should be considered under NEPA because “anticipat[ing] environmental problems and develop[ing] strategies for their resolution *before* they reach the crisis stage . . . is far cheaper in human, social, and economic terms.”¹⁰

7. 2014 Draft Guidance, *supra* note 1, at 77823 n.4.
8. Nicholas C. Yost, *NEPA and Climate Change: Practitioners Should Take Note of CEQ's New Guidance*, 45 ELR 10646, 10646 (July 2015).
9. *Id.* at 10647.
10. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 489-90, 21 ELR 20170 (D.C. Cir. 1990) (Wald, C.J., dissenting) (emphasis added).

Many agency actions contribute GHG emissions to the atmosphere, or are located in areas vulnerable to climate change. NEPA could potentially be used to require agencies to study and compare alternatives and mitigation measures to address climate change for a broad array of federal actions affecting GHG emissions, or to require agencies to consider alternatives that are more resilient to climate change impacts.

Requiring in-depth climate analysis could result not only in better process, but in better action. NEPA, though procedural in nature, can unquestionably result in more environmentally friendly agency decisions.¹¹ Final agency decisions under NEPA can be challenged under the Administrative Procedure Act (APA),¹² and failure to comply with NEPA procedures “expose[s] an agency to litigation and the possibility that a federal court will set aside its [environmental impact statement] EIS and enjoin agency action until any legal deficiencies are remedied.”¹³ As a result, agencies often modify projects to avoid or lessen their environmental impacts if they know or suspect that NEPA will apply.¹⁴ If agencies must give due consideration to climate impacts, their final actions may ultimately be more responsive to those impacts.¹⁵

Consequently, since the 1990s, environmentalists have tried to use litigation to require agencies to conduct climate analysis under NEPA. But these cases have raised substantial questions about when and how the analysis should be conducted. The question of “when” involves two threshold issues: (1) what level of climate impacts are so low that agencies need not analyze them under NEPA; and (2) what level of climate impacts are sufficiently large that they are “significant” and warrant detailed discussion in an EIS.¹⁶ Agencies and courts have struggled with determining the scale at which an agency should evaluate its GHG emissions, and the point at which the climate impacts of an agency’s action should be deemed significant. As to the question of “how,” the largest issue has been how agencies should address the substantial scientific uncertainty associated with predicting specific climate impacts, especially at small geographic or temporal scales.

The 2010 draft guidance was intended to clarify some of these questions.¹⁷ It applied to all federal actions, excluding land management decisions,¹⁸ and directed agencies

to evaluate the relationship between their actions and climate change by considering two types of impacts: first, the potential for federal actions to influence climate change; and second, the potential for climate change to affect federal actions.¹⁹ The 2010 guidance set an annual benchmark of 25,000 metric tons of carbon dioxide (CO₂)-equivalent (MTCO_{2-e}), and provided that actions with *direct* emissions greater than this benchmark would be a useful—though not necessarily conclusive—indicator of whether the action was significant for purposes of NEPA.²⁰ The draft guidance further noted that for many proposed actions, GHG emissions would be “so small as to be . . . negligible,” but did not specify at what scale this determination should be made.²¹

Instead, CEQ directed agencies to use the “rule of reason” in determining how extensively to analyze emissions,²² a test that the guidance also applies to determining which alternatives an agency must study in detail, how far into the future it must assess the potential effects of GHG emissions on climate change, and whether the agency must discuss the project’s vulnerability to climate change impacts.²³ The 2010 draft guidance did provide agencies with general recommendations about how to conduct a climate analysis,²⁴ but while CEQ accepted public comments on the draft, it never finalized the 2010 guidance, leaving courts, agencies, and the public to grapple with answering many of the questions that CEQ left unaddressed.²⁵

III. Potential Role of the 2014 Draft Guidance in NEPA Climate Litigation

With the issuance of the 2014 draft guidance, CEQ has again tried to resolve some of these lingering uncertainties. The new draft guidance retains the basic structure of the previous version, directing agencies to evaluate both the potential effects of a proposed action on climate change and vice versa.²⁶ It also continues to provide that agencies will have substantial discretion in how they tailor their NEPA processes to accommodate the concerns raised in the guidance.²⁷ However, the new guidance is more detailed than the 2010 version, and includes several key changes that may have an impact on how courts interpret NEPA’s requirements in the context of climate change. This section

11. A.B.A. SECTION OF ENV’T, ENERGY, & NATURAL RES., *GLOBAL CLIMATE CHANGE AND U.S. LAW* 155, 157 (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014) [ABA REPORT].

12. Administrative Procedure Act (APA), 5 U.S.C. §§501 et seq., available in ELR STAT. ADMIN. PROC.

13. ABA REPORT, *supra* note 11, at 157.

14. *Id.*

15. *Id.* at 158.

16. Brandt-Erichsen, *supra* note 4.

17. CEQ issued an earlier version of this draft guidance in 1997, but it was never distributed publicly and received very little attention from either agencies or the courts; therefore, my Comment focuses on the 2010 and 2014 draft guidance documents. See Draft Memorandum from Kathleen McGinty, CEQ Chair, to All Federal Agency NEPA Liaisons 4 (Oct. 8, 1997), available at [http://www.boem.gov/uploaded Files/BOEM/Environmental Stewardship/Environmental Assessment/ceqmemo.pdf](http://www.boem.gov/uploaded%20Files/BOEM/Environmental%20Stewardship/Environmental%20Assessment/ceqmemo.pdf).

18. Memorandum from Nancy H. Sutley, CEQ Chair, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emis-*

sions 1, 3 (Feb. 18, 2010), available at <https://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf> [hereinafter 2010 Draft Guidance].

19. *Id.* at 1.

20. CEQ adopted this level from the threshold that EPA applied for reporting and permitting under the GHG reporting and tailoring rules. *Id.* at 2.

21. *Id.* at 3.

22. Brandt-Erichsen, *supra* note 4.

23. 2010 Draft Guidance, *supra* note 18, at 4-5, 7-8.

24. *Id.* at 5.

25. Jessica Anne Wentz, *Draft NEPA Guidance Requires Agencies to Consider Both GHG Emissions and the Impacts of Climate Change on Proposed Actions*, 26 ENVTL. L. N.Y. 01, 57, 59 (2015), available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wentz_elny_article_-_ceq_climate_guidance.pdf.

26. For a full summary of the 2014 draft guidance and its key provisions, see *id.*

27. 2014 Draft Guidance, *supra* note 1, at 77824.

discusses what these changes are and how they could affect some of the hurdles faced by environmentalists in NEPA climate litigation.

A. Legal Weight of Draft Guidance Generally

I. Past Cases

Before discussing specific ways that the 2014 draft guidance may impact NEPA litigation, it is necessary to consider how it might be viewed by the courts generally. One potentially useful indicator is how the courts have treated other CEQ guidance documents, including the 2010 draft guidance. As the “administering agency” of NEPA, CEQ’s interpretation of NEPA’s requirements is often viewed deferentially by courts.²⁸ But the level of deference varies depending on several factors.²⁹ Courts afford the most deference to agency regulations that have been finalized after notice-and-comment rulemaking.³⁰ Interpretive guidance documents that have not undergone notice and comment are entitled to less deference, though they are often used by courts as persuasive or consultative authority.³¹ In some cases, agency documents are entitled to deference at a level proportional to the document’s “power to persuade.”³² CEQ guidance documents do not receive the “substantial deference” to which CEQ regulations are entitled,³³ but generally have persuasive value to courts, and sometimes have featured predominantly in court decisions interpreting the provisions of NEPA.³⁴

The 2010 draft guidance, though, received very little attention in the courts. Very few cases even cited to the 2010 draft guidance and in most cases where they did, the deciding court did not afford any level of deference

to the document.³⁵ There are probably several reasons for this. First, the 2010 draft guidance was not the product of notice-and-comment procedures, nor was it ever finalized. Second, when it published the 2010 draft guidance, CEQ stated that it did not intend agencies to apply the guidance until it was finalized.³⁶ In past cases, courts have determined that draft nonbinding policies that have been issued for public comment are not entitled to deference before being finalized, because “comments must still be considered and a rule must be properly adopted.”³⁷ As a result, courts were not sympathetic to arguments that agencies were required to follow the 2010 draft guidance to prepare an adequate climate analysis under NEPA. However, where agencies cited provisions of the 2010 draft guidance to justify the adequacy of their climate analysis, at least two courts did cite the agency’s adherence to the draft guidance as part of their rationale to uphold the agency actions.³⁸

2. Potential Impact of 2014 Draft Guidance

Courts may be more likely to give deference to the 2014 guidance document than they afforded to the 2010 version, and thus more likely to measure an agency’s compliance with NEPA based on how closely the agency followed the guidance. The 2014 guidance itself states that it is not intended to be legally binding on agencies—in fact, it states that it “does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable,” and that it “does not establish legally binding requirements in and of itself.”³⁹ But unlike the 2010 draft guidance, the 2014 revised draft guidance in a sense has already undergone public notice and comment: CEQ issued the 2010 draft guidance for public comment, received over 100 sets of comments in response, and responded to those comments in the 2014 draft guidance, which was published in the *Federal Register*.⁴⁰ While CEQ has reissued the 2014 guidance for public comment, the 2014 draft guidance already reflects CEQ’s consideration of public comments submitted in 2010.

Additionally, unlike the 2010 draft guidance, CEQ intends that agencies apply the 2014 version to some extent even before it is finalized: CEQ directs agencies to “apply this guidance to the NEPA review of new proposed agency actions moving forward and, to the extent practicable, to build its concepts into ongoing reviews.”⁴¹ Thus, even in its draft form, the 2014 draft guidance may still have some “power to persuade.”

28. Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287, 10296, 10309 (Apr. 2015) (“CEQ’s interpretations, once mentioned in a reviewing court’s opinion as having some kind of judicial weight, no doubt subtly shaped subsequent judicial practice and, presumably, action agencies’ choices in turn”).

29. See *id.* for a full discussion of judicial deference and CEQ interpretations of NEPA.

30. See *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

31. William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

32. *Id.* at 1098, 1109; see also *Battle Creek Health Sys. v. Leavitt*, 498 F.3d 401, 409 (6th Cir. 2007).

33. *Associations Working for Aurora’s Residential Env’t v. Colorado Dep’t of Transp.*, 153 F.3d 1122, 1127 n.4, 28 ELR 21459 (10th Cir. 1998) (noting that while the court could rely on CEQ’s “Forty Questions” guidance document, that guidance document was not owed the substantial deference afforded to rules that are the product of notice-and-comment procedures).

34. Colburn, *supra* note 28, at 10309. Interestingly, though CEQ’s “Forty Questions” guidance document did not go through notice and comment before it was issued in 1981, it has been adopted by at least four circuits in interpreting certain provisions of NEPA. See *Russell Cnty. Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045, 41 ELR 20314 (9th Cir., 2011) (joining the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Eighth Circuit, and the U.S. Court of Appeals for the Tenth Circuit in “adopt[ing] [a] CEQ guidance as a framework for applying” CEQ regulations on supplementation of EISs); see also *Save Strawberry Canyon v. U.S. Dep’t of Energy*, 830 F. Supp. 2d 737, 756, 41 ELR 20344 (N.D. Cal. 2011) (“Here, the federal agency looked to federal guidance to conduct its analysis. That was sufficient”).

35. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 n.5, 44 ELR 20001 (D.C. Cir. 2013) (noting that the 2010 draft guidance is “not an authoritative interpretation of NEPA’s requirements entitled to deference,” though the court “nevertheless [found] it useful”).

36. 2010 Draft Guidance, *supra* note 18, at 12.

37. *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828-29, 31 ELR 20071 (10th Cir. 2000).

38. *WildEarth*, 738 F.3d at 309 & 309 n.5; *Save Strawberry Canyon*, 830 F. Supp. 2d at 754-55.

39. 2014 Draft Guidance, *supra* note 1, at 77802.

40. *Id.*

41. *Id.* at 77803.

Overall, the 2014 draft guidance will not be afforded the same level of deference that courts afford CEQ's formal regulations, but there is some indication that, even in draft form, it may still be persuasive to the courts. Once finalized, the guidance will have more substantial impact in the courts.⁴² In future NEPA litigation, environmental groups may be more likely to succeed when challenging agencies that did not conduct their climate analyses in accordance with the criteria of the 2014 draft guidance. Some of these more specific criteria, and how they relate to previous NEPA litigation, are discussed below.

B. Scientific Uncertainty and Speculative Future Impacts

I. Past Cases

Assessing climate change under NEPA can be difficult. Predictions about climate impacts become increasingly uncertain at smaller scales, such as where an agency is assessing an action that is short-term or that has a small geographic footprint. The 2010 draft guidance highlighted the fact that the consequences of climate change are often uncertain: It noted the unreliability and unavailability of useful scientific tools to analyze climate impacts,⁴³ and exempted land and resource management actions because at the time there was “no established Federal protocol for assessing their effect on atmospheric carbon release and sequestration at a landscape scale.”⁴⁴

Agencies have often used CEQ's acknowledgement of inherent uncertainty to avoid assessing climate under NEPA, arguing that where climate impacts are difficult to predict, or involve high levels of scientific uncertainty, the impacts are too “remote and speculative” to require evaluation under the statute.⁴⁵ This defense can arise at all phases of the NEPA process, and in different aspects of the NEPA impacts themselves. In some cases, agencies have dismissed any and all predictions of climate change impacts as mere speculation.⁴⁶ The defense can also be invoked to limit the scope of the impact analysis that an agency conducts, such as where an agency asserts that local climate impacts cannot be assessed because of scientific uncertainty.⁴⁷

In NEPA litigation, many courts have held that agencies may not use the remote and speculative defense to avoid discussing climate altogether. Generally, courts have agreed that climate change is a reasonably foreseeable impact of GHG emissions that, if significant, must be discussed under NEPA.⁴⁸ In a U.S. Court of Appeals for the Ninth Circuit case, *Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)*, an environmental group argued that NHTSA should have prepared an EIS when it issued new fuel standards, because the standards would have significant impacts on GHG emissions.⁴⁹ The Ninth Circuit held that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct,” and that “the fact that ‘climate change is largely a global phenomenon that includes actions . . . outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of its actions on global warming’”⁵⁰

In *Mid-States Coalition for Progress v. Surface Transportation Board*,⁵¹ the U.S. Court of Appeals for the Eighth Circuit held that the Surface Transportation Board violated NEPA when it failed to analyze the increased emissions that could result from its construction of a large rail project.⁵² The court held that even if the *extent* of climate effects is speculative, the *nature* of these effects is not, and that agencies must assess these impacts under NEPA.⁵³ Under CEQ regulations, when there is incomplete or unavailable information, agencies are required to make clear that such information is lacking, obtain the information if doing so is not impracticable, or discuss it using theoretical methods.⁵⁴

2. Potential Impact of the 2014 Guidance

The 2014 draft guidance may make it more difficult for agencies to cite scientific uncertainty when arguing that the climate impacts from an action are too remote or speculative to assess. Unlike the 2010 draft guidance, which highlighted the difficulty and uncertainty in climate assessment, the 2014 draft guidance provides that “GHG estimation tools have become widely available, and are already in broad use not only in the Federal sector, but also in the private sector, by state and local governments, and globally.”⁵⁵ In fact, the availability of these tools underpinned CEQ's decision to apply the 2014 guidance to federal land and resource management actions.⁵⁶ The

42. See *Dabney*, 222 F.3d at 828-29 (noting that finalized draft policies adopted pursuant to rulemaking procedures should be accorded *Chevron* deference, but if, when finalized, they lack the requisite formality and are construed as interpretative rules, they should be examined under a less deferential standard based on whether the interpretation is “well reasoned” and “has the power to persuade”).

43. 2010 Draft Guidance, *supra* note 18, at 8.

44. *Id.* at 2.

45. See Alana M. Wase, *Climate Change Impacts and NEPA: Overcoming the Remote and Speculative Defense*, 72 MD. L. REV. 967 (2013).

46. See Western Env'tl. Law Ctr., Comments on CEQ Revised Draft Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews 3 (Mar. 24, 2015), available at http://www.wildcalifornia.org/wp-content/uploads/2015/05/WELC_CEQclimateguidance_032415.pdf; see also North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp., 713 F. Supp. 2d 491, 520 (M.D.N.C. 2010).

47. *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

48. See *Center for Biological Diversity v. NHTSA*, 508 F.3d 508, 556, 37 ELR 20281 (9th Cir. 2007); *contra* *Sierra Club v. Federal Hwy. Admin.*, 715 F. Supp. 2d 721, 741 (S.D. Tex. 2010) (stating that no “law or regulation” required the Federal Highway Administration to consider climate impacts related to vehicle use on a new highway).

49. *Center for Biological Diversity*, 508 F.3d at 556.

50. *Id.* at 550.

51. *Mid-States Coal. for Progress*, 345 F.3d 520.

52. *Id.* at 550.

53. *Id.* at 549.

54. *Id.* (citing 40 C.F.R. §1502.22(b)).

55. 2014 Draft Guidance, *supra* note 1, at 77827.

56. *Id.* at 77803.

guidance directs agencies to use assessment tools to inform the scope and type (quantitative or qualitative) of analysis they conduct, and states that because these tools are diverse in scope and sophistication, agencies can choose different tools based on their needs.⁵⁷ Thus, the 2014 draft guidance suggests that assessing climate change impacts, even at local scales, is no longer a purely speculative endeavor.

The draft guidance may thus open up the possibility of NEPA challenges based on an agency's failure to assess climate for federal land and resource management actions.⁵⁸ In addition, environmentalists may be more likely to succeed in challenges to agency determinations that climate impacts are too remote and speculative, particularly where an agency makes this determination despite the existence of relevant tools or information. The guidance also clarifies that certain impacts are *not* so remote and speculative that agencies can ignore them. In particular, unlike the 2010 guidance, the 2014 guidance provides that reasonably foreseeable direct and indirect climate change effects from an action include both emissions that may occur as a predicate for the agency action (upstream emissions) and as a consequence of the agency action (downstream emissions)—within limits of feasibility and practicality.⁵⁹ By clarifying that these “connected actions” have a reasonably close causal relationship to an agency's action, the 2014 draft guidance provides that their emissions cannot be dismissed by an agency as “remote and speculative.”

C. Agency Determination of Significance

I. Past Cases

Climate change typifies a NEPA dilemma known as the “tyranny of small decisions,” whereby “[t]housands of federal actions, each contributing a relatively wee fraction of worldwide GHG emissions, combine to increase the likelihood of devastating global climate change related impacts,” yet individually may not cause any significant impacts.⁶⁰ As a result, many agency NEPA analyses have concluded that GHG emissions from an individual agency action will have small, if any, potential climate change effects, and thus do not need to be discussed.⁶¹ Certainly, some agency actions, such as purely administrative ones, have no climate impacts, but by comparing a single action with the millions of GHG sources at national or global scales, almost any action—even the permitting of a coal-fired power plant—could be made to seem insignificant. The 2010 draft guidance did establish that actions with high GHG emissions—those exceeding the 25,000 MTCO_{2-e}

benchmark—are likely to be significant, regardless of the relation between that action and other contributors to climate change.

However, by keying an action's significance to this benchmark value, the 2010 draft guidance also set an unintentional “dividing line” above which an action would *always* require preparation of an EIS, and below which an action would not warrant any description of its climate impacts.⁶² In one case, a court cited to this benchmark in upholding an agency's finding of no significant impact; the agency argued that because its action fell below the threshold, no NEPA climate analysis was required.⁶³ Courts have also cited to other agency guidance documents on climate and NEPA to determine the scale at which to assess climate impacts, and when those impacts are significant.⁶⁴

In 2010, for instance, the Ninth Circuit held that the U.S. Forest Service was not required to discuss climate in an environmental assessment for a project involving the thinning of 810 acres of national forest.⁶⁵ Plaintiffs argued that the project, which would reduce the density of trees in the area by about 87%, would significantly impact climate by reducing the forest's ability to sequester carbon.⁶⁶ The court cited to a Forest Service guidance document that directed the agency to analyze climate unless the proposal was of such a “minor scale that the direct effects would be meaningless,”⁶⁷ listing a “proposal to burn 30,000 acres of ponderosa pine stands” as an example of when climate analysis would be required.⁶⁸ The court noted that, unlike the example used in the guidance document, the forest thinning project would impact a “relatively small amount of land” and “thin rather than clear cut trees,” and held that the Forest Service was not required to analyze, or even discuss, the climate effects from the project.⁶⁹

2. Potential Impact of 2014 Guidance

The 2014 draft guidance may help environmental litigants compel agency consideration of how its action will impact climate change, especially where the agency asserts that its action will have insignificant impacts relative to global emissions. The 2014 draft guidance explicitly states that comparing emissions from a proposed action with global emissions “is not an appropriate basis for deciding whether to consider climate impacts under NEPA.”⁷⁰ In fact, CEQ

57. *Id.* at 77827.

58. *Id.* at 77825. The guidance directs agencies to assess net carbon emissions, meaning the action's emissions compared with any resulting carbon sequestration.

59. *Id.* at 77825-26.

60. James R. Holcomb IV, *NEPA and Climate Change: After the CEQ's Draft Guidance*, 41 TEX. ENVTL. L.J. 259, 263 (2011).

61. See *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1252 (W.D. Wash. 2009) (agency analyzed climate impacts based on action causing “a change in global atmospheric carbon dioxide of less than 0.01 percent of the total”).

62. Yost, *supra* note 8, at 10648; see also *Save Strawberry Canyon v. U.S. Dept. of Energy*, 830 F. Supp. 2d 737, 754-55, 41 ELR 20344 (N.D. Cal. 2011) (noting that the U.S. Department of Energy, based on the 2010 draft guidance, “considered GHG emissions of 25,000 MTCO_{2-e} per year to be a ‘dividing line for major GHG emitters, which could have the potential to result in an adverse impact on the environment’”).

63. *Save Strawberry Canyon*, 830 F. Supp. 2d at 754-55.

64. In the absence of centralized guidance, some federal agencies have issued their own internal guidance or directives on the incorporation of climate change under NEPA. See WOOLSEY, *supra* note 5, at 4-5.

65. *Hapner v. Tidwell*, 621 F.3d 1239, 1245, 40 ELR 20248 (9th Cir. 2010).

66. *Id.* at 1242-43; Brief for Petitioner at 56, *Hapner v. Tidwell*, 621 F.3d 1239 (2010) (No. 09-35896).

67. *Hapner*, 621 F.3d at 1245.

68. *Id.*

69. *Id.*

70. 2014 Draft Guidance, *supra* note 1, at 77825.

included the statement in the draft guidance in response to agency analyses that used the global emissions comparison approach.⁷¹ Additionally, the 2014 draft guidance expressly states that the 25,000 MTCO_{2-e} benchmark is *not* a substitute for an agency's determination of significance, and provides that the benchmark is only to be used for "purposes of disclosure" and to set a value above which an agency may be required to analyze climate quantitatively.⁷²

To the extent that courts view the 2014 draft guidance as persuasive (or if it is finalized), agencies using either of the following justifications for concluding that their action is insignificant may be at risk of challenge: (1) the low proportion of emissions from their action relative to emissions at the global or other disproportionately large scale; or (2) the mere fact that their action falls below the 25,000 MTCO_{2-e} benchmark.

D. Requiring an Agency to Analyze Climate Adaptation

I. Past Cases

The 2010 draft guidance directed agencies to consider both an action's potential impacts to climate change (emissions) and the potential impacts of climate change on the action (adaptation). However, while the emissions portion of the guidance received considerable attention from agencies and the courts, the adaptation portion has been largely ignored.⁷³ Very few agencies have incorporated climate adaptation into their NEPA documents. In 2013, Defenders of Wildlife conducted a study of 154 EISs to determine how well agencies incorporated the adaptation criteria set forth in the 2010 draft guidance. They boiled down the criteria into a set of 10 questions that the 2010 draft guidance suggested should be answered in an adequate NEPA adaptation analysis, but found that only 10% of the EISs "included enough information about climate change to even apply the questions."⁷⁴ Where agencies did assess climate impacts to their proposed actions, the analyses were limited in scope or detail. In most cases, agencies offered a rationalization for why they did not conduct an analysis, often citing scientific uncertainty about climate change and its impacts to communities.⁷⁵

Adaptation has been given similarly little attention by the courts. Only one case, in the District Court for Alaska, appears to have addressed an agency's failure to consider climate adaptation in an EIS. In *Kunaknana v. U.S. Army Corps of Engineers*, the plaintiffs claimed that the U.S. Army Corps of Engineers (the Corps) failed to consider how climate change's impacts to the Arctic—particu-

larly flooding resulting from snowmelt and melting permafrost—could impact a drilling facility that the Corps permitted in that area.⁷⁶ The court held that the Corps' failure to analyze this information in its NEPA analysis was arbitrary and capricious.⁷⁷

2. Potential Impact of 2014 Guidance

The 2014 draft guidance expands upon the discussion of climate adaptation in the 2010 draft guidance, and provides that considerations of climate adaptation are "squarely within the realm of NEPA, informing decisions on whether to proceed with and how to design the proposed action so as to minimize impacts on the environment, as well as informing possible adaptation measures to address these impacts, ultimately enabling the selection of smarter, more resilient actions."⁷⁸ The 2014 draft guidance provides that agencies should consider the ways in which climate change could alter a project's environmental impacts over the project's lifespan; for instance, impacts from climate change could include heat waves, wildfires, drought, sea-level rise, or more intense storms, all of which could affect a project and worsen its resulting environmental impacts.⁷⁹ Agencies are not required to conduct their own research on what impacts could occur, but should summarize and incorporate all relevant scientific literature. In particular, the 2014 draft guidance directs agencies to conduct such an analysis where a project is in an area vulnerable to climate change, or where it has a long lifespan that could be shortened because of climate impacts.⁸⁰

Climate adaptation is especially ripe for NEPA litigation, as few agencies currently analyze how climate change could affect their actions. In addition, the 2014 guidance contains significantly more discussion of how this analysis should be conducted, and unlike the 2010 guidance, says that these considerations fall squarely within the realm of NEPA. Environmental groups may thus be more likely to succeed in NEPA challenges where an agency failed to consider climate adaptation in an EIS, particularly for projects located in vulnerable areas (such as on the coast) or where a project has a long lifespan.

E. Ensuring a Sufficient Level of Detail in a Climate Analysis

I. Past Cases

The 2010 draft guidance, though lacking in specific instruction, directed agencies to thoroughly assess the impacts of their action with respect to climate, and to use the assessments to make an environmentally informed

71. *Id.*

72. *Id.* at 77828.

73. Aimee Delach et al., *Reasonably Foreseeable Futures: Climate Change Adaptation and the National Environmental Policy Act 3* (2013), available at <http://www.defenders.org/publication/reasonably-foreseeable-futures-climate-change-adaptation-and-national-environmental>.

74. *Id.* at 3.

75. *Id.*

76. *Kunaknana v. U.S. Army Corps of Engineers*, 2014 WL 2207707 (D. Alaska May 27, 2014).

77. *Id.* at *20.

78. 2014 Draft Guidance, *supra* note 1, at 77828-29.

79. *Id.* at 77825.

80. *Id.*

decision.⁸¹ It directed agencies to incorporate climate into their NEPA analyses wherever doing so would provide meaningful information, such as when: (1) identifying reasonable alternatives to a proposed action; (2) analyzing the direct, indirect, and cumulative environmental impacts of each alternative and the proposed action; and (3) setting appropriate mitigation measures.⁸²

Agencies increasingly began to incorporate climate analysis into their NEPA documents after CEQ issued the 2010 draft guidance, but the depth of such climate analysis has varied substantially by agency, jurisdiction, and type of action.⁸³ So long as an agency conducted some form of climate analysis, though, environmental groups have largely been unsuccessful in challenging the sufficiency of this analysis. While sometimes the agency in question conducted a fairly thorough climate review,⁸⁴ in many other cases, courts upheld much more cursory or minimal assessments of environmental impacts.⁸⁵

Indeed, it appears that environmental plaintiffs have succeeded in challenges alleging the insufficiency of an agency's climate analysis in only one court. In a 2014 decision, the District Court of Colorado held that the Bureau of Land Management (BLM) violated NEPA by failing to consider the costs of GHG emissions from a coal mining lease modification where the federal government had provided the social cost of carbon to use as a protocol for conducting the analysis.⁸⁶ In March 2015, the same court addressed the sufficiency of an agency's indirect impacts analysis. The court overturned an EIS prepared by the Office of Surface Mining Reclamation and Enforcement (OSM), stating that its consideration of direct and indirect air quality impacts from a mining plan was insufficient.⁸⁷ Specifically, the court said that a NEPA review should consider coal combustion impacts as indirect effects of the mining plan, and that uncertainty about the timing or rate of the coal combustion or the type of emissions controls that would be in place could not justify ignoring the combustion impacts.⁸⁸

2. Potential Impact of 2014 Guidance

The 2014 guidance provides more specific direction for agencies about how to conduct an impacts analysis under NEPA, and consequently may increase the likelihood that courts will compel agencies to conduct their analysis to comport with the guidance. For instance, the 2014 guidance specifies that, where tools to do so are available, agencies should conduct and disclose *quantitative*, rather than *qualitative*, estimates of GHG emissions and sequestration.⁸⁹ If an agency's action has direct and indirect emissions that fall below the reference point of 25,000 MTCO_{2-e} per year, the agency is not required to conduct a quantitative analysis unless doing so is easily accomplished.⁹⁰ This is also a departure from the 2010 draft guidance, which only required agencies to conduct a quantitative analysis for actions with *direct* emissions greater than the reference point.

The 2014 draft guidance also specifies that where a cost-benefit analysis is relevant to the agency's choice of alternative, agencies must incorporate this analysis by reference; CEQ suggests that agencies use the social cost of carbon in such a cost-benefit analysis. Finally, the draft guidance states that "[i]t is essential . . . that Federal agencies not rely on boilerplate text to avoid meaningful analysis."⁹¹

Environmentalists may thus be more likely to succeed in NEPA challenges where: (1) an agency evaluated emissions qualitatively when it could have done so quantitatively; (2) an agency failed to analyze both upstream and downstream emissions of its agency action; (3) an agency did not consider the short- and long-term effects of its actions; (4) the agency failed to conduct a cost-benefit analysis or use the social cost of carbon where doing so would have been useful to the decisionmaking process; or (5) the agency used boilerplate text to avoid a detailed climate analysis.

IV. Conclusion

While it is important to keep the 2014 draft guidance in perspective—it is, after all, only a draft version of a non-binding guidance document—it could nevertheless prove to be a useful tool both for agencies seeking guidance on how to conduct a climate analysis under NEPA, and environmentalists who want to improve agency consideration of climate. By cloaking the draft guidance in administrative formalities, CEQ may have created a guidance document that, like some it has issued in the past, is used by the courts as a tool to measure an agency's compliance with NEPA.⁹² Hopefully, the guidance will ultimately incentivize agencies to take the threat of climate change seriously, both in the climate analyses they conduct and the decisions they make.

81. 2010 Draft Guidance, *supra* note 18, at 1.

82. Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. COLO. L. REV. 473, 487 (2010).

83. WOOLSEY, *supra* note 5, at 3, 17.

84. In one case, BLM analyzed the impacts resulting from its lease of two coal tracts, and quantified the emissions from those two mines, other mines in the area, and because the mine produced coal to be used in coal-fired power plants, also analyzed emissions from coal combustion. *WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 35-36, 44 ELR 20069 (D.D.C. 2014).

85. See *Border Power Plant Working Grp. v. U.S. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003); see also *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 24 ELR 20937 (W.D. Wash. 1994) (upholding a general discussion of climate impacts in a programmatic EIS); *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232 (W.D. Wash. 2009) (court deferred to agency climate analysis, even though the administrative record contained conflicting evidence).

86. *High Country Conservation Advocates v. U.S. Forest Serv.*, 2014 WL 2922751 (D. Colo. June 27, 2014) (holding that BLM's NEPA analysis of climate change impacts was inadequate, and that the EIS must provide a justification for not using the social cost of carbon as a protocol to evaluate impacts).

87. *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining Reclamation & Enft.*, 2015 WL 996605, *6 (D. Colo. Mar. 2, 2015).

88. *Id.*

89. 2014 Draft Guidance, *supra* note 1, at 77826.

90. *Id.*

91. *Id.* at 77824.

92. For further discussion of the relationship between administrative process and judicial deference in the context of CEQ and other administering agencies, see Colburn, *supra* note 28, at 10294-96.