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Via E-Mail: GCC.guidance@ceq.eop.gov and
http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/submit

The Council on Environmental Quality
Attn: Ted Boling, Senior Counsel
722 Jackson Place NW
Washington, DC 20503

Re: Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

Dear Mr. Boling:

Thank you for the opportunity to submit comments on the *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* issued by the Council on Environmental Quality ("CEQ") on February 18, 2010 ("Draft Guidance"). This firm represents Peabody Energy ("Peabody") and submits these comments on its behalf. Peabody supports and incorporates by reference the comments filed by Western Business Roundtable and National Mining Association which address the Draft Guidance.

Peabody is the world's largest private-sector coal company with 2009 sales of 244 million tons. Peabody's coal products fuel more than 10 percent of all U.S. electricity generation and 2 percent of worldwide generation. The company has mines in the states of Arizona, Colorado, Illinois, Indiana, New Mexico, and Wyoming. Peabody has also been involved in developing two state-of-the-art high-efficiency mine-mouth electric generating stations in the U.S. and is exploring additional generating opportunities.

Peabody supports continual emissions reductions, including those from CO_2, toward the ultimate goal of near-zero emissions from coal. Peabody is committed to, and invests in, projects to advance technologies and is a global leader in developing clean coal solutions (http://www.peabodyenergy.com/Stewardship/CleanGeneration.asp). Peabody takes its environmental stewardship seriously, understanding the basic energy needs of 300 million Americans and the critical role of clean coal technology as the best way to deliver energy security, economic growth and environmental progress in the 21st century.

Before any government agency action is taken to implement a carbon dioxide reduction policy and regulation, the matter should be thoroughly discussed, debated and vetted by

Congress. Peabody supports an approach to climate issues that puts the development and deployment of clean coal technology first, followed by targets when the costs and regulatory regime have been determined. Therefore, without the critical context of (1) a Congressional decision that determines if and how to regulate the gases that have been denominated "greenhouse gases" ("GHGs")[1]; (2) the framework for any such regulation; (3) a complete and transparent analysis of the effects of regulation across the economy; and (4) a timeline that allows for development and deployment of commercial scale technologies, Peabody believes the Draft Guidance to be premature and, for the reasons discussed below, ambiguous and overreaching in areas. This letter will set forth Peabody's key concerns with the Draft Guidance.

1. The Draft Guidance Incorrectly Presumes a Scientific Consensus Regarding GHG Emissions.

The Draft Guidance fails to reflect the present uncertainty surrounding the issues of GHG emissions. Scientific opinions and conclusions related to GHGs, their causes and effects remain uncertain and contested. Unlike criteria pollutants that can be analyzed on a project-level basis, GHG emissions should be considered in the *global* context. The effects of emissions from a single project site on the global environment are far from understood, and the predictions about future climate change scenarios are even more debatable. The very fact that legislators cannot agree on how or even whether to control GHGs, and that government agencies cannot adopt appropriate scientific thresholds for project specific emissions, indicates the level of uncertainty and the wide chasm of reasonable opinions on the subject. This Draft Guidance would place the cart before the horse by creating an obligation to rely on incomplete, inaccurate or speculative information simply because such information is readily available.

The admonishment that "agencies should recognize the scientific limits of their ability to accurately predict climate change effects" is a helpful recognition of this fact, but the Draft Guidance appears to invoke the warning only in the context of analyzing future climate change impacts on the proposed action. The scientific uncertainty also exists when considering the effects of the proposed action on the global environment and when predicting future outcomes.

Peabody is pleased that the Draft Guidance makes at least a passing reference to acknowledge that "there are no dominating sources [of]...total GHG emissions." We also agree with the recommendation that "environmental documents [should] reflect [the] global context and be realistic in focusing on ensuring that useful information is provided to decision makers for those actions that the agency finds are a significant source of GHGs." (Draft Guidance, page

[1] For purposes of this letter, "GHGs" are defined in accordance with Section 19(i) of Executive Order 13514 as meaning carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

2). However, given the rapidly evolving information and present uncertainty surrounding GHG research, the Draft Guidance does not go far enough to recognize the discretion in each lead agency to determine whether the information in an EIS is appropriate, whether the analysis is complete, and – most importantly – what is significant in the global context.

2. The Draft Guidance Fails to Clearly Explain and Apply the 'Rule of Reason.'

As an instruction to Federal departments and agencies, the Draft Guidance deserves a greater discussion of the "rule of reason" that must go into the agency's decisionmaking process. The United States Supreme Court has long held that NEPA's mandate is "essentially procedural...to insure a fully informed and well-considered decision," and the agency is left with wide discretion to draw the conclusions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); See also *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 228 (1980). The rule of reason is employed to determine whether the EIS contains a "reasonably thorough discussion of the significant aspects of probable environmental consequences." *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (1997). Under this standard, review consists only of ensuring that the agency took a "hard look" at a decision's environmental consequences. *Id.* The rule of reason should "take the uncertainty and speculation involved with secondary impacts into account in passing on the adequacy of the discussion of secondary impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 346 (1989). Moreover, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. *Id.* at 350. The Draft Guidance should do a better job of discussing how the application of the 'rule of reason' will affect the agency's decisionmaking process in light of the present uncertainty surrounding GHG emissions.

Unlike most other environmental consequences, the analysis of whether a project's GHG emissions are significant cannot be determined by objectively comparing the project's emissions to commonly accepted scientific thresholds. As noted above, there is no consensus about the causes and effects of GHGs. Consequently, the agency's determination necessarily must be qualitative, not quantitative, in nature. Particularly in the face of the high level of uncertainty surrounding the effects of GHGs, the Draft Guidance should unambiguously recognize wide discretion by the agencies to determine what information is relevant and adequate for their analysis.

3. The Draft Guidance Should Advise That Determinations of Significance Must Consider Context and Intensity.

Agencies should be reminded in the Draft Guidance that any determination of *significance* requires considerations of both context and intensity. 40 CFR 1508.27. According

to the CEQ regulations, "in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole." *Id.* The Draft Guidance acknowledges this in passing, noting that "climate change is a global problem that results from global GHG emissions." (Draft Guidance, page 2). However, the Draft Guidance fails to give constructive advice on how agencies might determine significance in the cumulative context, what are relative comparisons, and even when project specific impacts might become cumulatively considerable. For example, should agencies add the project-specific emissions to the estimated emissions of related past, present and reasonably foreseeable future projects to ascertain a cumulative GHG emissions count? Should the agency then evaluate that number as a percentage of baseline GHG emissions throughout the region, state, nation or globe? Or is there some other relevant comparison? And how does such an analysis comport with 40 CFR 1508.27?

4. **The Draft Guidance Should Acknowledge that Indirect Impacts Must be Reasonably Foreseeable.**

Agencies should be further reminded that the indirect effects of a proposed action are to be analyzed only if the impact is *reasonably foreseeable.* 40 CFR 1508.8. Although we commend CEQ for acknowledging that any analysis of indirect impacts must be bounded by the limits of feasibility, we urge CEQ to include "reasonable forseeability" language consistent with 40 CFR 1508.8.

5. **The Draft Guidance Should Account for the Incomplete State of GHG Emission Information.**

As you know, the CEQ regulations already provide a process to deal with incomplete or unavailable information. Specifically, Section 1502.22 of the CEQ regulations requires that when an agency is evaluating reasonably foreseeable significant adverse effects in an EIS and there is incomplete information that is essential to a reasoned choice among alternatives, the agency must include the information only if the costs of obtaining it "are not exorbitant." Otherwise, the EIS must include the agency's evaluation of such impacts based upon "theoretical approaches or research methods generally accepted in the scientific community." The Draft Guidance needs to explain how the recommendations in the Draft Guidance are consistent with and clarify 40 CFR 1502.22 given the incomplete state of knowledge regarding GHG emissions.

6. **The Draft Guidance Should Clarify the Phrase "Reasonable Spatial and Temporal Boundaries."**

The Draft Guidance must clarify the meaning of the phrase "reasonable spatial and temporal boundaries" for the assessment of the ways in which climate change could affect the proposed action. It is recommended that the agencies should use the scoping process to set such boundaries in an effort to avoid "wholly speculative effects." (Draft Guidance, page 2).

We appreciate the reference to the scoping process as we believe that comprehensive scoping is one way in which a number of environmental concerns, not just GHG, can be raised and vetted early in the process and would encourage CEQ to emphasize the importance of early scoping and more importantly, the participation of all affected members of the public in the scoping process so that their concerns could be raised and addressed early in the process and taken into consideration during the preparation of the environmental documents. Considering the speed at which the science about climate change is evolving (consistently met with skepticism and challenge), we presume that this is an opportunity for the lead agency to identify what types of scientific information it will deem credible and how far up the biological lifecycle it intends to apply predictions for change. Again, we believe this procedural opportunity to establish limits on the scope of analysis should apply not only to the assessment of climate change impacts on the project, but also the analysis of the project's impacts on the global environment.

7. Numerous Substantive Ambiguities in the Draft Guidance Must be Resolved.

Factual and analytical ambiguities exist throughout the Draft Guidance which concern Peabody about their practical application, particularly in the following substantive areas:

A. Federal land and resource management actions.

According to the Draft Guidance, "CEQ does not propose to make this guidance applicable to Federal land and resource management actions, but seeks public comment on the appropriate means of assessing the GHG emissions and sequestration that are affected by Federal land and resource management decisions." (Draft Guidance, page 2). The exception for "Federal land and resource management actions" is neither explained nor justified in the Draft Guidance, nor are the types of qualifying activities described.

As we understand it, CEQ does not propose to exempt Federal land and resource management actions from the requirements of NEPA to conduct a full and complete analysis of potentially significant environmental effects, including the potential for GHG impacts, and the Draft Guidance should clarify this position. Further, CEQ should commit to issue additional guidance for land and resource management actions, and commit to a timeline for the distribution of such draft guidance. Finally, CEQ should

abstain from finalizing the GHG Draft Guidance until land and resource management actions are incorporated so that the Draft Guidance is comprehensive in scope.

B. 'Meaningful' Quantities.

The Draft Guidance provides that "where a proposed Federal action that is analyzed in an EA or EIS would be anticipated to emit GHGs to the atmosphere in quantities that the agency finds may be *meaningful*, it is appropriate for the agency to quantify and disclose its estimate of the expected annual direct and indirect GHG emissions in the environmental documentation for the proposed action." (Draft Guidance, page 3; Emphasis added). The term "meaningful" is not explicitly defined. If it is intended to refer to 25,000 metric tons or more of CO_2-equivalent GHG emissions on an annual basis, then that figure should be used in place of the word "meaningful." In addition, as a general matter, greater clarity should be provided in the Draft Guidance to "connect the dots" between the 25,000 metric tons emissions used as an "indicator" and the considerations applied by the agency to determine what actions generate "meaningful" quantities of GHG emissions.

That said, the threshold level of direct GHG emissions chosen by CEQ is arbitrary, from an environmental impact perspective. Twenty-five-thousand metric tons per year of CO_2 equivalent does not necessarily constitute a significant environmental effect. Even EPA's "tailoring" rule issued on May 13, 2010 establishes 75,000 and 100,000 tons per year as the minimum levels for triggering Prevention of Significant Deterioration permits under the Clean Air Act.

C. Thresholds of Significance.

The Draft Guidance does not purport to establish a mandatory threshold. However, when the following two sentences are read together, the implication is that the reporting thresholds in the technical documents are something more than recommended guidance: "Where a proposed action is evaluated in either an EA or an EIS, the agency *may* look to reporting thresholds in the technical documents cited above as a point of reference for determining the extent of direct GHG emissions analysis that is appropriate to the proposed agency decision. ... When a proposed federal action meets an applicable threshold for quantification and reporting, as discussed above, CEQ proposes that the agency should also consider mitigation measures and reasonable alternatives to reduce action-related GHG emissions." (Draft Guidance, pages 4-5; Emphasis added). Clarification should be provided on how to reconcile these statements in light of the overall position that the Draft Guidance does not purport to establish a mandatory

threshold and that the present state of GHG research calls for a qualitative rather than quantitative analysis.

D. Long-Term Actions.

According to the Draft Guidance, "[f]or *long-term actions* that have annual direct emissions of less than 25,000 metric tons of CO2-equivalent, CEQ encourages Federal agencies to consider whether the action's long-term emissions should receive similar analysis." (Draft Guidance, pages 1-2; Emphasis added). The meaning of the phrase "long term" is unclear and should either be clarified or deleted. As written, the phase appears to narrow the scope of actions subject to CEQ's guidance.

E. Direct Effects: Agency's Jurisdiction.

The Draft Guidance limits the required assessment for direct emissions to actions that are within the "control or authority" of the agency. (Draft Guidance, page 5). The reader is directed to *DOT v. Public Citizen* (541 U.S. 752) for guidance on this phrase. However, *DOT v. Public Citizen* does not clearly define what is meant by "control or authority." The Draft Guidance should expand upon the meaning of that phrase, including its application in the context of NEPA's Cooperating Federal Agencies. Moreover, NEPA requires consideration of project alternatives even if they are outside the jurisdiction of the lead agency. 40 CFR 1502.14(c). The Draft Guidance needs to explain how to limit the assessment of direct emissions to actions that are within the control or authority of the agency when one or more alternatives may be outside the agency's jurisdiction.

F. Indirect Effects: Upstream/Downstream Impacts.

According to the Draft Guidance, "the analysis [of indirect effects] must be bounded by limits of feasibility in evaluating *upstream and downstream effects* of Federal agency actions." (Draft Guidance, page 3; emphasis added) The Draft Guidance must be clear that indirect effects are only relevant to the analysis if they are *reasonably foreseeable*, pursuant to the definition in Section 1508.8 of the CEQ Regulations. Moreover, the Draft Guidance must provide a greater explanation of what is meant by the feasibility of conducting any indirect effect analysis.

Similarly, the Draft Guidance states that "CEQ proposes to advise Federal agencies that they should consider opportunities to reduce GHG emissions *caused by* proposed Federal actions... ." (Draft Guidance, page 1; emphasis added). This language

should be revised to clarify whether it relates to GHG emissions that were directly and/or indirectly caused by the Federal action.

G. Indirect Effects: Energy Use.

According to the Draft Guidance, NEPA's GHG analysis should "consider applicable Federal, State or local goals for energy conservation and alternatives for reducing energy demand or GHG emissions associated with energy production." (Draft Guidance, page 5). This statement should refer back to the "potential conflicts" provision with State and local policies and plans in Section 1502.16 of the CEQ Regulations in order to avoid expanding the analysis in a way that intrudes upon the state permitting processes. This statement should also be revised to recognize that state and local goals may not be applicable to the federal activity.

H. Alternatives.

With regard to alternatives, the Draft Guidance provides that agencies should consider mitigation measures and reasonable alternatives that would reduce GHG emissions. (Draft Guidance, page 5). In this and other references to alternatives, the Draft Guidance should clarify that the EIS should examine measures to reduce *significant* GHG emissions and include reasonable alternatives only if GHG emissions remain significant and unavoidable. It should also be revised to reflect NEPA's requirement that analyzed alternatives (1) could accomplish the proposed action's purpose and need; and (2) may be feasibly carried out based on technical, economic, environmental, and other factors. *Vermont* Yankee, *supra*, 435 U.S. at 551; *Sierra Club v. Frohlke*, 534 F.2d 1289 (8th Cir. 1976); *see also CEQ Forty Questions*, 46 Fed. Reg. 18026 (1981). An alternative that only reduces GHG may not be appropriate. The Draft Guidance should also clearly state that the analysis of alternatives cannot require consideration of project alternatives that would require a developer to build a different type of facility in a way that is incompatible with the Federal agency's defined purpose and need for the project. Finally, throughout the document, the phrase "reasonable alternatives" should be changed to read "reasonable *and feasible* alternatives." In determining what is "reasonable and feasible" the alternatives must take into consideration and give great weight to what is technically feasible and commercially-available.

Thank you for your consideration of our comments.

Sincerely,

Susan K. Hori

SKH:stm

cc: Linda Crist
Wanda Burget

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