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LEGAL TOOLS FOR CLIMATE ADAPTATION ADVOCACY: NEPA

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The Sabin Center for Climate Change Law (SCCCL) develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

Climate Change Adaptation Handbook: Using NEPA to Promote Climate Change Adaptation

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USING NEPA AND STATE ENVIRONMENTAL IMPACT REVIEW LAWS TO PROMOTE ADAPTATION

INTRODUCTION

The National Environmental Policy Act (NEPA) was signed into law by President Richard Nixon in 1970. NEPA requires federal agencies to evaluate the environmental effects of a wide range of actions, including direct federal undertakings and projects that receive federal funding or permits.¹ Many states have since enacted similar laws of varying scope, requiring evaluation of the environmental impacts of certain state and local actions.² For instance, New York State enacted the State Environmental Quality Review Act (SEQRA) in 1975.³ Some municipalities, including New York City, have their own environmental review procedures.⁴

The purpose of NEPA and similar state laws is to ensure that government agencies investigate and disclose potential significant impacts of their actions on the environment and to encourage agencies to take a hard look at the environmental impacts of a project before acting.⁵ NEPA establishes procedural, rather than substantive, obligations, “prohibit[ing] uninformed – rather than unwise – decision making.”⁶

Since climate change has emerged as a critical environmental issue, some agencies have evaluated and disclosed the projected greenhouse gas (GHG) emissions attributable to government actions.⁷ Government agencies have also occasionally performed a “reverse environmental impact analysis,” in which the effects of climate change on a government project are considered.⁸ However, many, if not most, government agencies have failed to meaningfully consider the effects of climate change on proposed projects in connection with the environmental review process.⁹

This section briefly describes the traditional environmental impact assessment process, discusses the legal authority for using NEPA and similar state laws to address climate change adaptation, and explains how citizens can use these laws to encourage agencies and applicants to consider climate change impacts – both those caused by and those affecting a proposed project.

BACKGROUND

ENVIRONMENTAL IMPACT REVIEW GENERALLY

Under NEPA, federal agencies are required to prepare an environmental impact statement (EIS) for any major federal action that may significantly affect the quality of the human environment.¹⁰

As a first step in the NEPA process, agencies may prepare an Environmental Assessment (EA) providing evidence and analysis for determining whether the action at issue will significantly impact the environment.¹¹ An EA is not necessary if the agency has decided to prepare an EIS.¹² When preparing an EIS, agencies begin with the “scoping” process.¹³ NEPA regulations require the lead agency to invite early participation from other agencies and the public as to the scope of the proposed EIS.¹⁴ “Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.”¹⁵ Once the agency determines the significant issues to be analyzed in the EIS, it produces a draft EIS.¹⁶ After a comment period, the agency produces and publishes a final EIS.¹⁷

NEPA requires that an EIS describe the effect a proposed project will have on the environment and resources, as well as alternatives to the proposed action. See Box 1. Only “significant” environmental impacts trigger the EIS requirement.¹⁸ Whether an impact is

significant depends on both the context and the intensity of the impact.¹⁹ Such a determination is fact-specific and largely within the agency’s discretion.²⁰

Environmentalists have used NEPA as a tool to hold agencies accountable for producing a sufficient EIS and as an indirect way to challenge proposed projects. The public can submit comments at both the scoping and the draft phases of the environmental review process. Additionally, citizens with standing can bring litigation where they believe an agency has failed to comply with NEPA’s procedural requirements. Although NEPA does not require agencies to implement the most environmentally advantageous alternatives, public comments and litigation can influence outcomes by “spur[ring] agencies to choose alternatives that have comparatively favorable effects” on the environment.²¹

Box 1

NEPA'S EIS REQUIREMENT

[A]ll agencies of the Federal Government shall -

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA Section 102(2)(C), 42 U.S.C. § 4332(2)(C).

ENVIRONMENTAL IMPACT REVIEW IN A CHANGING CLIMATE

NEPA and similar state laws can be used to promote informed decision-making in light of projected climate change impacts. For example, these laws might foster adaptation efforts by encouraging agencies to concentrate development in less vulnerable areas or to design new structures in vulnerable areas to withstand projected climate conditions.²² Although NEPA and its state counterparts do not explicitly require consideration of climate adaptation, they can be read to require such consideration. Bolstering this view, various federal, state, and local governments have proposed or issued guidance expressly addressing climate change analyses under environmental impact review laws.²³ Additionally, many government entities have instituted policies promoting climate change adaptation.²⁴ Such policies are relevant under NEPA and its implementing regulations, which provide that EISs should discuss potential inconsistencies with existing federal, regional, state, and local policies.²⁵

The National Environmental Policy Act

As noted above, NEPA requires federal agencies to research and disclose the environmental impacts of major federal actions significantly affecting the quality of the human environment.²⁶ The language of this key provision is defined broadly by regulation and has been interpreted broadly by courts.²⁷ Notably, the term “affecting” includes both direct and reasonably foreseeable indirect effects.²⁸ Moreover, agencies must consider “cumulative impacts,” which are defined as impacts resulting “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions....”²⁹

Based on NEPA’s broad language, some legal scholars have argued that the Act and its implementing regulations can fairly be read to require consideration of climate change impacts.³⁰ A project’s cumulative or indirect effects may include effects caused or exacerbated by climate change.³¹ For example, construction of a waste storage facility on a shoreline might significantly affect the environment if rising sea levels cause the facility to be inundated and wash the waste away.³² Moreover, agencies should consider future climate conditions when determining an appropriate threshold against which to compare projected environmental impacts.³³

The Council on Environmental Quality (CEQ), the federal entity charged with promulgating regulations governing implementation of NEPA, concurs with this interpretation. In December 2014, CEQ issued revised draft guidance on consideration of greenhouse gas emissions and the effects of climate change in NEPA reviews (“Draft NEPA Guidance”).³⁴ Notably, the Draft NEPA Guidance clarifies that climate change adaptation and resilience are important considerations for agencies planning actions.³⁵ Specifically, the Draft NEPA Guidance

instructs agencies to describe the affected environment for the expected lifespan of the proposed project based on available climate change projections.³⁶

Although the Draft NEPA Guidance does not purport to create new obligations under NEPA, it is significant because, upon adoption, it will represent CEQ's interpretation of its own regulations. A non-binding interpretation of this type is "entitled to respect" by courts to the extent that it has the "power to persuade."³⁷ Thus, this document, when final, will (if something like the current language remains) provide support for the position that NEPA requires consideration of climate change impacts on agency actions where relevant. To date, most federal agencies have not systematically considered such impacts as part of the environmental review process.³⁸

State Environmental Review Laws

Fifteen states, plus the District of Columbia and Puerto Rico, have enacted environmental impact review laws.³⁹ Like NEPA, these state disclosure laws do not explicitly require consideration of climate change impacts on proposed projects, but can be read to require such consideration.⁴⁰ Some states have established regulations and policies promoting climate change adaptation analyses in the environmental review process. A few notable examples are addressed here.

In New York, regulations promulgated under SEQRA require that EISs consider future baseline conditions at project sites.⁴¹ The New York Department of Environmental Conservation (DEC), the state agency charged with issuing statewide regulations under SEQRA, also adopted a policy on climate change adaptation in 2010 (2010 DEC Policy). The 2010 DEC Policy directs agency staff to "incorporate climate change adaptation strategies" into DEC operations.⁴² Additionally, New York State recently enacted a landmark adaptation bill. The "Community Risk Reduction and Resiliency Act" amends certain state statutes to reflect greater awareness of and preparedness for climate change-associated risks such as sea level rise and flooding.⁴³ The Act also requires state agencies to consider future physical climate risks caused by storm surges, sea level rise, or flooding in certain decisions, and it requires DEC to adopt regulations establishing science-based state sea level rise projections.⁴⁴ Although this law does not specifically amend SEQRA, it reflects New York State's climate change adaptation policy.

New York City has begun to routinely include analyses of projects' resiliency to climate change in environmental impact statements through the New York City Environmental Quality Review (CEQR) process.⁴⁵ New York City has produced several versions of a comprehensive environmental impact review guidance document, the CEQR Technical Manual (CEQR Manual).⁴⁶ The 2014 CEQR Manual includes guidance on when to conduct an analysis of climate change-associated impacts on proposed projects.⁴⁷

In California, guidelines promulgated under the California Environmental Quality Act (CEQA) address the impact of the environment on a proposed project. These guidelines provide that environmental impact reports (the California equivalent of EISs) should evaluate “any significant environmental effects the project might cause by bringing development and people into the area affected” and “any potentially significant impacts of locating development in other areas susceptible to hazardous conditions.”⁴⁸ However, the California Court of Appeal has held in several cases that CEQA does not require consideration of the impacts of the environment on a project and that the CEQA guidelines are invalid to the extent they provide otherwise.⁴⁹ The California Supreme Court recently granted review of a case raising the same issue, *California Building Industry Association v. Bay Area Quality Management District*.⁵⁰ The court limited briefing in the case to the issue of whether CEQA ever requires analysis of the impacts of existing environmental conditions on future residents or users of a proposed project.⁵¹ A decision has not yet been issued, but the case will likely have significant implications for whether CEQA can be used to promote climate change adaptation by requiring state agencies to perform reverse environmental impact analyses. Once published, interested parties may find the opinion by searching for Case No. S213478 on the California Official Reports website, *available at* <http://www.lexisnexis.com/clients/CACourts/>. For additional resources regarding state climate change adaptation policies, see the adaptation resource webpage maintained by the Sabin Center for Climate Change Law.⁵²

TAKING ACTION

Concerned citizens and organizations can use the environmental review process to promote climate change adaptation. Through the procedural requirements of NEPA and its state counterparts, citizens can play an important role by providing agencies with relevant information to help guide their environmental impact analysis.⁵³ This section describes concrete steps the reader can take to participate in NEPA’s environmental review process. Although state practices vary, most states provide similar opportunities to participate in the environmental review process. Check your state’s environmental review statute and administrative procedures law, or your state environmental agency’s website, for notice and comment requirements.

PUBLIC COMMENTS

NEPA provides for public participation in the environmental review process. The public can shape the process by submitting comments at the scoping and draft environmental impact statement (DEIS) phases.

How to: Submit Scoping Comments

Step 1: Find a project

As noted above, NEPA requires agencies preparing an EIS to begin by determining the scope of the proposed impacts analysis. Agencies initiate the EIS process by publishing a Notice of Intent (NOI) describing the planned project.⁵⁴ Citizens seeking to promote climate change adaptation efforts through the environmental review process can find NOIs in the Federal Register, <https://www.federalregister.gov/> by searching for the phrase "Notice of Intent to Prepare an Environmental Impact Statement". New NOIs are filed often; individuals should check the Federal Register regularly or subscribe for updates to identify projects of interest.

Step 2: Understand your options for participation

In addition to describing the proposed project, the NOI must provide information about opportunities for public participation in the scoping process.⁵⁵ The lead agency may choose to hold a scoping meeting where people can submit comments verbally.⁵⁶ The NOI will also describe how citizens can submit written comments. Generally, the agency will provide a mailing address as well as methods for electronic filing. It is important to note the deadline for submitting comments. The lead agency sets the timeline for accepting comments,⁵⁷ which may range from several weeks to several months.

Step 3: Formulate Comments

Effective scoping comments will vary widely depending on the author, the nature of the proposed project, and the potential environmental impacts. Moreover, some federal agencies will provide specific formatting requirements and list topics on which comments are sought.⁵⁸ However, scoping comments designed to promote climate change adaptation should generally discuss some or all of the following issues:

- *The potential impact of climate change on the proposed project.* For example, if the project is a new structure within a coastal zone, scoping comments should address the potential impact of sea level rise on the structure. Public comments need not definitively prove that climate change will impact the project. Instead, the comments should alert the agency to the possibility of a significant environmental impact so the agency can perform further analyses.
- *The legal basis for consideration of climate change impacts.* As discussed above, existing NEPA regulations, as well as federal, state, and local policies, support consideration of climate change adaptation in connection with the environmental review process. Climate change impacts may be considered as indirect impacts,

cumulative impacts, or future baseline environmental conditions depending on the project. Moreover, the project's consistency with local, state, and national policies is a relevant consideration for an EIS.

- *Sources of data.* Scoping comments should provide current and reliable sources of data regarding climate change impacts relevant to the proposed project. A good starting point is the International Panel on Climate Change's recent *Fifth Assessment Report*, which provides a clear view of up-to-date scientific knowledge regarding climate change.⁵⁹ Projections of climate change impacts in the project's state or region will be the most helpful.
- *Uncertainty in Climate Change Projections.* Scoping comments should acknowledge the uncertainty inherent in projections of future environmental conditions and urge the lead agency to consider reasonable worst case scenarios where appropriate.⁶⁰ For example, projects involving particularly sensitive, expensive, or dangerous materials may warrant a low risk threshold.
- *Potential adaptation measures.* Scoping comments may include suggestions for ways to avoid potential climate change impacts. For example, scoping comments may suggest that sensitive equipment be raised to avoid damage from flooding or that a structure be built further inland.
- *Alternatives.* Commenters may describe suggested less climate vulnerable alternatives to the proposed project, and contrast the environmental impacts of such alternatives with the proposal. CEQ regulations require agencies to consider the alternative of "no action"⁶¹, so it is unnecessary to address this option in depth in one's scoping comments.
- *Identifying information.* Comments should also make sure to identify the name and docket number of the project at issue.

Once completed, comments may be submitted in accordance with the lead agency's instructions in the NOI. Submitted comments become part of the public record, can be obtained under the Freedom of Information Act, and might be posted on the agency's web site. A scoping comment template, for a project vulnerable to sea level rise, is provided in Appendix A. Lead agencies are required to consider all comments, and some agencies will prepare a final scoping document that formally responds to those comments. If the final scoping document or DEIS does not include suggestions made in the substantive comment or explain why the

suggestions were rejected, the lead agency may have failed to meet its legal obligations under NEPA.

How to: Submit comments on the Draft EIS

Step 1: Find a project

After the lead agency has determined the scope of the proposed EIS, it prepares a draft environmental impact statement (DEIS) “in accordance with the scope decided upon in the scoping process.”⁶² After preparing the DEIS, the agency must invite comments from the public.⁶³ Notices of the publication of DEISs appear in the Federal Register and on the Environmental Protection Agency’s website, <http://www.epa.gov/Compliance/nepa/eisdata.html>. Like NOIs, large numbers of DEISs appear each year.

Step 2: Understand your options for participation

The lead agency’s Federal Register notice for a new DEIS will provide information about opportunities for public participation. Like an NOI, the Federal Register notice for a DEIS will generally provide information about any public meetings the agency chooses to hold, as well as methods to submit written comments electronically or by mail. Again, it is important to note the deadline for submitting comments on the DEIS, which will vary depending on the agency and the complexity of the proposed project.⁶⁴

Step 3: Formulate Comments

Although it is a draft, the DEIS should be as complete and thorough as possible. Its purpose is to present the agency’s complete environmental analysis to the public and elicit suggestions for change.⁶⁵ Comments on the DEIS may result in modifications reflected in the subsequent final environmental impact statement (FEIS).⁶⁶ Comments regarding the DEIS should generally discuss many of the same issues relevant at the scoping phase of the environmental review process. However, at the DEIS stage, comments may include more specific and substantive critiques of the agency’s analysis and methodology. NEPA requires agencies to both read public comments and to respond to them in the FEIS.⁶⁷

LITIGATION

Where an agency fails to produce a sufficient EIS, citizens with standing can initiate litigation to enforce NEPA’s mandates. For an overview of NEPA Litigation, refer to a legal guide, such as Daniel R. Mandelker, *NEPA Law and Litigation*, Second Edition (2014)⁶⁸ or Albert M. Ferlo, et al, *The NEPA Litigation Guide*, Second Edition (2012).⁶⁹

REFERENCES

¹ 42 U.S.C. § 4321, *et seq.*

² **California** (Cal. Pub. Res. Code §§ 21000 to 21177); **Connecticut** (Conn. Gen. Stat. §§ 22a-1 to 22a-1h); **District of Columbia** (D.C. Code Ann. §§ 8-109.1 to 8-109.11); **Georgia** (Ga. Code Ann. §§ 12-16-1 to 12-16-8); **Hawaii** (Hawaii Rev. Stat. §§ 343-1 to 343-8); **Indiana** (Ind. Code Ann. §§ 13-12-4-1 to 13-12-4-10); **Maryland** (Md. Nat. Res. Code Ann. §§ 1-301 to 1-305); **Massachusetts** (Mass. Gen. Laws Ann. ch. 30, §§ 61, 62 to 62H); **Minnesota** (Minn. Stat. Ann. §§ 116D.01 to 116D.06); **Montana** (Mont. Code Ann. §§ 75-1-101 to 75-1-105, 75-1-201 to 75-1-207); **New York** (N.Y. Evtl. Conserv. Law §§ 8-0101 to 8-0117); **North Carolina** (N.C. Gen. Stat. §§ 113A-1 to 113A-13); **Puerto Rico** (P.R. Laws Ann. tit. 12 §§ 1121 to 1127); **South Dakota** (S.D. Codified Laws Ann. §§ 34A-9-1 to 34A-9-13); **Virginia** (Va. Code §§ 3.1 to 18.8, 10.1-1200 to 10.1-1212); **Washington** (Wash. Rev. Code §§ 43.21C.010 to 43.21C.910); **Wisconsin** (Wis. Stat. Ann. § 1.11); *see also* NEPA Law and Litig. § 12:2 (2014).

³ N.Y. Evtl. Conserv. Law §§ 8-0101 to 8-0117.

⁴ *See, e.g.*, 62 RCNY § 5-01, *et seq.*; 43 RCNY § 6-01, *et seq.*

⁵ *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“[NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”); *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976) (“[T]he essential requirement of the NEPA is that before an agency takes major action, it must have taken a ‘hard look’ at environmental consequences.”) (internal quotations omitted).

⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349; *see also* Paul Weiland et al., *Environmental Impact Review*, in *GLOBAL CLIMATE CHANGE AND U.S. LAW* 153, 156 (Michael B. Gerrard & Jody Freeman eds., Second ed. 2014).

⁷ Weiland, *supra* note 6, at 158 (citing Amy L. Stein, *Climate Change under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. COLO. L. REV. 473, 476-77, 505-17 (Spring 2010)).

⁸ Michael B. Gerrard, *Reverse Environmental Impact Analysis: Effect of Climate Change on Projects*, 247(45) N.Y.L.J. 1 (Mar. 8, 2012).

⁹ Gerrard, *supra* note 8.

¹⁰ 42 U.S.C. § 4332(2)(C).

¹¹ 40 C.F.R. §§ 1501.3, 1508.9.

¹² 40 C.F.R. § 1501.3.

¹³ 40 C.F.R. § 1501.7.

¹⁴ 40 C.F.R. § 1501.7(a)(1).

¹⁵ 40 C.F.R. § 1508.25.

¹⁶ 40 C.F.R. § 1502.9(a).

¹⁷ 40 C.F.R. §§ 1502.9(b), 1503.1, 1503.4.

¹⁸ *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 139 (2010) (“The agency need not complete an EIS if it finds ... that the proposed action will not have a significant environmental impact.”); *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

¹⁹ 40 C.F.R. § 1508.27 (defining “significantly”); see also *Hanly v. Kleindienst*, 471 F.2d at 831 (finding that “in deciding whether a major federal action will ‘significantly’ affect the quality of the human environment ... absolute, as well as comparative, effects of a major federal action must be considered”).

²⁰ See *River Rd. Alliance, Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 449 (7th Cir. 1985) (“The statutory concept of ‘significant’ impact has no determinate meaning, and to interpret it sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an [EIS] are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides.”)

²¹ Weiland, *supra* note 6, at 159.

²² Katrina F. Kuh, *Impact Review, Disclosure, and Planning*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE* 543 (Michael B. Gerrard & Katrina Fischer Kuh, eds. 2012).

²³ Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews [hereinafter “2014 Draft Guidance”], 79 Fed. Reg. 77801 (Dec. 24, 2014), available at http://www.whitehouse.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance.pdf. New York State Department of Environmental Conservation, *Climate Change and DEC Action* (2010), available at http://www.dec.ny.gov/docs/administration_pdf/commisclimchpolicy.pdf; New York City Environmental Quality Review, *Technical Manual* (2014), Chapter 18: Greenhouse Gas Emissions and Climate Change, available at http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/18_Greenhouse_Gas_Emissions_2014.pdf.

²⁴ See, e.g., Exec. Order No. 13,653, 78 Fed. Reg. 66817 (2013); Department of Defense, *Climate Change Adaptation Roadmap* (2014), available at <http://www.acq.osd.mil/ie/download/CCARprint.pdf>; Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change* (2010), available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>.

²⁵ 40 C.F.R. § 1502.16(c) (An EIS “shall include discussions of ... [p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned.”); 40 C.F.R. § 1506.2(d) (“To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)”).

²⁶ 42 U.S.C. § 4332(2)(C).

²⁷ See, e.g., 40 C.F.R. § 1508.14 (providing that the term “human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment”); 40 C.F.R. § 1508.18 (providing that the term “Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility”); *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agr.*, 681 F.2d 1172, 1177 (9th Cir. 1982) (quoting *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973)) (“The statutory phrase ‘actions significantly affecting the quality of the environment’ is intentionally broad, reflecting the [NEPA]’s attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency”).

²⁸ 40 C.F.R. §§ 1508.3, 1508.8.

²⁹ 40 C.F.R. § 1508.7.

³⁰ See, e.g., Kuh, *supra* note 22, at 544-48; Katherine M. Baldwin, Note, *NEPA AND CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. Cal. L. Rev. 769 (2009).

³¹ Kuh, *supra* note 22, at 545.

³² *Id.* at 546.

³³ CEQ, *Considering Cumulative Effects under the National Environmental Policy Act*, at 41 (1997), available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (clarifying that agencies must define an appropriate threshold against which to compare projected environmental impacts, and this threshold should incorporate future environmental conditions).

³⁴ 2014 Draft Guidance, *supra* note 23. CEQ previously issued draft guidance on consideration of the effects of climate change and GHG emissions in 2010. Nancy H. Sutley, Memorandum for Heads of Federal Departments and Agencies, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (2010) [hereinafter “2010 Draft Guidance”], available at http://www.energy.gov/sites/prod/files/CEQ_Draft_Guidance-ClimateChangeandGHGEmissions-2.18.10.pdf; The 2010 Draft Guidance clarified that agencies should consider climate change impacts affecting proposed federal actions during the scoping process, and instructed agencies to consider “the sensitivity, location, and timeframe of a proposed action” in determining the degree to which consideration of projected climate change impacts should be analyzed. However, the 2010 Draft Guidance was never adopted, and the December 2014 Draft NEPA Guidance supersedes it. *See also* Letter from Michael Boots, Acting Chair, Council on Environmental Quality (Aug. 7, 2014), available at http://energy.gov/sites/prod/files/2014/08/f18/CEQPetition_InclusionofClimateChangeAnalysisinNEPA_2014.pdf (denying a 2008 Petition submitted by several organizations requesting that CEQ amend its NEPA regulations and issue guidance addressing climate change impacts and expressing CEQ’s position that NEPA regulations “already encompass consideration of climate effects....”)

³⁵ Draft NEPA Guidance at 23.

³⁶ *Id.* at 21-22.

³⁷ *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

³⁸ Gerrard, *supra* note 8, at 2-3.

³⁹ Weiland, *supra* note 6 at 165; List of state laws, *supra* note 8.

⁴⁰ Kuh, *supra* note 22, at 548.

⁴¹ N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.9.

⁴² DEC, Climate Change and DEC Action (2010), available at http://www.dec.ny.gov/docs/administration_pdf/commisclimchpolicy.pdf.

⁴³ 2014 Sess. Law News of N.Y. Ch. 355 (S. 6617-B).

⁴⁴ *Id.*

⁴⁵ *See* Ethan I. Strell, “Environmental Impact Statements Beginning to Address Climate Resiliency,” *Environmental Law in New York*, Vol 25, No. 10 (Oct. 2014).

⁴⁶ CEQR Manual (2014), available at http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf.

⁴⁷ *Id.* at 18-7.

⁴⁸ Cal. Code Regs. tit. 14, § 15126.2

⁴⁹ *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455, 134 Cal. Rptr. 3d 194 (2011) (holding that “the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.”); *S. Orange Cnty. Wastewater Auth. v. City of Dana Point*, 196 Cal. App. 4th 1604, 127 Cal. Rptr. 3d 636 (2011); *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App. 4th 889, 98 Cal. Rptr. 3d 137 (2009); *Baird v. Cnty. of Contra Costa*, 31 Cal. App. 4th 1265, 38 Cal. Rptr. 2d 93 (1995), *as modified* (Feb. 23, 1995).

⁵⁰ *California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.*, 312 P.3d 1070 (Cal. 2013).

⁵¹ *Id.*

⁵² SCCCL, State Adaptation Resources, available at <http://web.law.columbia.edu/climate-change/resources/adaptation-resources>.

⁵³ See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) (The purpose of NEPA's EIS requirement is to "ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process."); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.")

⁵⁴ 40 C.F.R. §§ 1501.7, 1508.22.

⁵⁵ *Id.*

⁵⁶ 40 C.F.R. § 1501.7(b)(4).

⁵⁷ 40 C.F.R. §§ 1501.7(b)(2), 1501.8(b)(2)(ii).

⁵⁸ See, e.g., National Park Service ("NPS"), Director's Order 12 § 8.6 NPS Review of Non-NPS NEPA Documents — Style and Format for Environmental Review Comments, available at http://www.nature.nps.gov/protectingrestoring/DO12site/08_review/086_style.htm.

⁵⁹ Intergovernmental Panel on Climate Change, Fifth Assessment Report (2014), available at <http://www.ipcc.ch/report/ar5/index.shtml>

⁶⁰ See *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("[T]he basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known."); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011).

⁶¹ 40 C.F.R. §1502.14(d).

⁶² 40 C.F.R. § 1502.9(a).

⁶³ 40 C.F.R. § 1503.1.

⁶⁴ 40 C.F. R. § 1501.8(b)(2)(iv).

⁶⁵ *Nat'l Comm. for the New River v. F.E.R.C.*, 373 F.3d 1323, 1329 (D.C. Cir. 2004).

⁶⁶ *Id.*

⁶⁷ 40 C.F.R. §§ 1502.9(b) ("Final environmental impact statements shall respond to comments as required in part 1503 of this chapter."), 1503.4 ("An agency preparing [an FEIS] shall assess and consider comments both individually and collectively, and shall respond...stating its response in the final statement.").

⁶⁸ Available for purchase at <http://legalsolutions.thomsonreuters.com/law-products/Treatises/NEPA-Law-and-Litigation-2d-2014-ed-Environmental-Law-Series/p/100276412>.

⁶⁹ Available for purchase at <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=215088>.

APPENDIX A

Filed Electronically (if applicable)

[Addressee]

[Agency]

[Address]

[Date]

RE: [Include the name of the project and the docket number]

[Addressee]:

[Your name or organization]¹ submits these comments on the scope of the proposed environmental impact statement (“EIS”) for the [project] as announced by [agency].²

Since the scoping process is intended to help agencies identify significant issues for consideration, [organization] focuses on a critical issue that was not identified in [agency]’s Notice of Intent (“NOI”) – the potential impact of climate change on the [project]. Specifically, sea level rise, and an associated increase in flooding and storm surges, may pose a significant risk due to the Project site’s coastal location.

NEPA and Climate Change

Pursuant to its obligations under the National Environmental Policy Act (“NEPA”), [agency] must consider sea level rise and related coastal processes as reasonably foreseeable significant adverse impacts. NEPA’s implementing regulations provide that agencies must consider reasonably foreseeable indirect and cumulative environmental impacts.³ The Council on Environmental Quality (“CEQ”) has taken the position – and several courts have held – that these regulations require federal agencies to evaluate the climate change impacts of their actions.⁴ The Commission also must consider sea level rise and storm surge as future baseline

¹ [Brief description of your organization or your personal interest in the project, if relevant]

² [Cite the notice]

³ See 40 C.F.R. 1508.7 (defining “cumulative impact”), 1508.8 (defining “effects” as including direct and reasonably foreseeable indirect effects), 1508.25(c) (providing that EISs must consider direct, indirect, and cumulative impacts); see also CEQ, *Considering Cumulative Effects under the National Environmental Policy Act* (1997) [hereinafter “Considering Cumulative Effects Under NEPA”], available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.

⁴ Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews [hereinafter “2014 Draft Guidance”], 79 Fed. Reg. 77801 (Dec. 24, 2014), available at http://www.whitehouse.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance.pdf; *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008) (finding that “[t]he

environmental conditions. As CEQ guidelines clarify, agencies must define an appropriate threshold against which to compare projected environmental impacts, and this threshold should incorporate future environmental conditions.⁵

Moreover, federal policy supports consideration of climate change adaptation in the proposed EIS. President Obama has issued an executive order regarding adaptation, which directs agencies to prepare for the impacts of climate change by integrating consideration of climate change into agency operations and overall mission objectives.⁶ More recently, President Obama signed an executive order directing federal agencies to adopt new flood elevation standards, taking climate change into account, for the siting, design, and construction of federal projects.⁷ The Department of Defense (“DOD”) also intends to adapt to the risks of climate change by “integrating climate change considerations into [the DOD’s] plans, operations, and training across the Department....”⁸ [Laws addressing climate change adaptation in the state in which the project is sited are also relevant]

I also note that the Securities and Exchange Commission (“SEC”) has issued guidance regarding publicly traded companies’ obligation to disclose the impacts that climate change may have on their operations.⁹ CEQ has proposed, but not yet finalized, revised guidance that would call for EISs prepared under NEPA to consider future climate impacts on projects.¹⁰ The Draft Guidance clarifies that climate change adaptation and resilience are important considerations for agencies planning actions.¹¹ Specifically, the Draft Guidance instructs agencies to identify the

impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct”); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 548-50 (8th Cir. 2003) (finding that degradation in air quality was a reasonably foreseeable indirect effect of a project that would increase the supply of coal to power plants); *High Country Conservation Advocates v. United States Forest Serv.*, No. 13-CV-01723-RBJ, 2014 WL 2922751, at *8-11, 13-15 (D. Colo. June 27, 2014) (holding that it was arbitrary and capricious for federal agencies to omit analysis of GHG emissions and related costs in EISs for mining exploration projects).

⁵ Considering Cumulative Effects under NEPA, p. 41; 40 C.F.R. 1502.15 (defining “affected environment”); 2014 Draft Guidance, *supra* note 4.

⁶ Exec. Order No. 13,653, 78 Fed. Reg. 66817 (Nov. 1, 2013).

⁷ Exec. Order No. 13,690, 80 Fed. Reg. 6424 (Jan. 30, 2015).

⁸ Department of Defense, *Climate Change Adaptation Roadmap* (2014), available at <http://www.acq.osd.mil/ie/download/CCARprint.pdf>.

⁹ SEC, *Commission Guidance Regarding Disclosure Related to Climate Change* (2010) (“Significant physical effects of climate change... have the potential to affect a registrant’s operations and results. For example, severe weather can cause catastrophic harm to physical plants and facilities and can disrupt manufacturing and distribution processes.... Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publically filed disclosure documents.”), available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>.

¹⁰ 2014 Draft Guidance, *supra* note 4.

¹¹ *Id.*, at 23.

affected environment based on available climate change projections for the expected lifespan of the proposed project.¹²

Sea Level Rise

As oceans absorb heat and as glaciers and ice sheets melt, global sea levels are rising at increasing rates.¹³ In the next several decades, storm surges and high tides will combine with sea level rise and, in some locations, land subsidence to increase flooding in many regions, threatening the communities and industries along our coastlines.¹⁴ Many sources provide current and credible data regarding sea level rise and its potential consequences. As relevant examples, [organization] points [agency]'s attention to:

- Intergovernmental Panel on Climate Change (“IPCC”), Chapter 2.2.3 Ocean, cryosphere and sea level. In *Climate Change 2014 Synthesis Report, Fifth Assessment Report*, at SYR-22 – SYR-23, *available at* http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_LONGERREPORT_Corr2.pdf.
- The National Climate Assessment, pp. 44-45, 396-417, *available at* <http://nca2014.globalchange.gov>.
- Climate Central, *Surging Seas: Sea Level Rise Analysis*, *available at* <http://sealevel.climatecentral.org>.
- Risky Business: The Economic Risks of Climate Change in the United States, *available at* http://riskybusiness.org/uploads/files/RiskyBusiness_Report_WEB_09_08_14.pdf

Using these and other sources, [agency] should assess the projected range of sea level rise and storm surge throughout the life of [project] and identify ways to prepare for climate change-related risks. To avoid underestimating these risks, [agency] should consider basing its analysis on sea level rise at the high end of the projected range. [Example of a sea level rise prediction for the state or region in which the project is located]

Additionally, to adequately protect [project] from future climate change impacts, [agency] should consider the risks of more frequent and severe flooding. These risks are not fully reflected by static sea level rise data. Increasingly intense storm surges are a foreseeable risk on the coast of [project location], where [project] is sited.

¹² *Id.*, at 21-22.

¹³ Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2 [hereinafter “National Climate Assessment”], p. 44.

¹⁴ National Climate Assessment, p. 45; Gordon, Kate, 2014: *Risky Business: The Economic Risks of Climate Change in the United States*. The Risky Business Project [hereinafter “Risky Business”], p. 20.

Finally, the design of [project] should incorporate an additional margin of safety, known as “freeboard,” to account for unanticipated risk factors. The inclusion of freeboard in flood planning is intended to protect against risks that can contribute to flood heights, such as waves and the effect of development on ground water absorption.¹⁵ These risks are separate from and additional to the risks of sea level rise and storm surge, and should be evaluated as such in connection with [project].

In sum, sea level rise and increased flooding due to climate change pose a foreseeable risk to [project]. However, the [project] NOI does not identify climate change or sea level rise as a significant issue for analysis in the proposed EIS. [Agency] must consider these impacts to adequately protect the Project from future climate change impacts and to fulfill its obligations under NEPA.

Thank you for the opportunity to submit comments on the scope of the [project] EIS. Please feel free to contact [organization or individual] with any questions.

Sincerely,
[organization or individual]

Enclosures:

[List any attachments to your scoping comments]

¹⁵ American Society of Civil Engineers, Highlights of ASCE 24-05 Flood Resistant Design and Construction (2010), *available at* <http://www.fema.gov/media-library/assets/documents/14983>; FEMA Hurricane Sandy Recovery Advisories RA2: Reducing Flood Effects in Critical Facilities (April 2013) and RA5: Designing For Flood Levels above the BFE After Hurricane Sandy (April 2013), *available at* <http://www.fema.gov/media-library/assets/documents/30966>.