



February 13, 2023

To: Environmental Protection Agency

Subject: Consideration of Transboundary Effects in the EPA External Review Draft of Report on the Social Cost of Greenhouse Gases (Docket No. EPA-HQ-OAR-2021-0317)

The Institute for Policy Integrity at New York University School of Law¹ respectfully submits this comment letter on the Environmental Protection Agency's (EPA) assessment of climate damages on a global basis in its draft report on the social cost of greenhouse gases (Draft Report).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.³

EPA appropriately accounts for climate damages globally in the Draft Report. Adopting a global value is economically sound, consistent with the approach EPA first developed under the George W. Bush administration,⁴ and in line with Circular A-4's recommendation that agencies report "effects beyond the borders of the United States."⁵ However, this approach has also sparked unmeritorious legal challenges claiming an inconsistency with standard administrative practice. In light of these arguments, EPA should situate its consideration of global climate damages in administrative precedent.

EPA has many precedents to draw from. As this letter explains, **agencies often consider the extraterritorial effects of their actions—including effects on international reciprocity, international cooperation, and transboundary spillovers**—when administering their statutory authority. In particular, EPA should consider highlighting the following examples:

- The National Environmental Policy Act (NEPA) instructs agencies to "recognize the worldwide . . . character of environmental problems."⁶ Interpreting that language, courts have required agencies to consider the transboundary

¹ This document does not purport to represent the views, if any, of New York University School of Law.

² EPA External Review Draft of Report on the Social Cost of Greenhouse Gases (Sept. 2022) (Docket No. EPA-HQ-OAR-2021-0317) [hereinafter Draft Report].

³ Policy Integrity is submitting a separate comment letter on the Draft Report supporting EPA's economic evaluation of incremental climate damages and offering suggestions for further improvements.

⁴ Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,446 (July 30, 2008).

⁵ OFF. OF MGMT. & BUDGET, CIRCULAR A-4, at 15 (2003). Agencies regularly consider the costs to foreign entities and benefits to foreign entities in their decisionmaking. *See, e.g.*, Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program and the Fee for Use of the System, 80 Fed. Reg. 32,267, 32,269, 32,290 (June 8, 2015); Recordkeeping Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing, Material From Cattle, 71 Fed. Reg. 59,653, 59,663-65 (Oct. 11, 2006).

⁶ 42 U.S.C. § 4332(2)(F).

environmental impacts of domestic actions,⁷ and federal agencies have done so for over 40 years.⁸

- Outside the climate context, EPA and other agencies have considered the effects of international reciprocity and cooperation in a wide range of contexts. For example, when EPA began its program of stratospheric ozone regulation under the Reagan Administration, it recognized that it could consider “other countries’ willingness to take regulatory action” in “deciding whether and how to regulate.”⁹ Courts have upheld EPA’s authority to consider effects on international reciprocity and cooperation in other contexts.
- Agencies have also considered transboundary spillover effects on numerous occasions in making key decisions. And court decisions highlight the need for agencies to consider transboundary spillovers in energy and environmental policy.

This comment discusses each of these points in turn.

I. Agencies Often Consider the Transboundary Environmental Effects of Domestic Actions

The National Environmental Policy Act (NEPA) broadly instructs agencies to “recognize the worldwide and long-range character of environmental problems” and “lend appropriate support” to help “maximize international cooperation.”¹⁰ Consistent with this command, agencies have assessed the transboundary impacts of their actions for more than 40 years.

In 1979, Executive Order 12,114 was issued for the “purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions.”¹¹ The Executive Order instructs agencies to “take into consideration in making decisions” effects of their actions on the “environment of the global commons outside the jurisdiction of any nation,” “the environment of a foreign nation,” and “natural or ecological resources of global importance designated for protection.”¹² Building off of that Executive Order, in 1997, the Council on Environmental Quality (CEQ) issued guidance concluding that “NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.”¹³

While executive orders and CEQ guidance provide nonbinding guidance for agencies to consider the transboundary effects of their actions, some courts have gone even further by

⁷ *Env’t Def. Fund, Inc. v. Massey*, 986 F.2d 528, 536 (D.C. Cir. 1993).

⁸ *See* Exec. Order No. 12,114, §§ 2–3, 44 Fed. Reg. 1957, 1957–60 (Jan. 4, 1979) (instructing agencies to consider effects of their actions on the “environment of a foreign nation” and “the global commons”).

⁹ Protection of Stratospheric Ozone, 53 Fed. Reg. 30,566, 30,569 (Aug. 12, 1988).

¹⁰ 42 U.S.C. § 4332(2)(F).

¹¹ Exec. Order No. 12,114 § 3, 44 Fed. Reg. 1957 (Jan. 4, 1979).

¹² *Id.* at § 2–3.

¹³ *Id.* (July 1, 1997).

holding that NEPA requires agencies to consider foreseeable transboundary effects. Most notably, in *Massey v. Environmental Defense Fund*, the D.C. Circuit held that NEPA required the National Science Foundation to consider environmental impacts before proceeding with plans to incinerate food waste in Antarctica, rejecting the agency’s argument that the presumption against extraterritoriality applies.¹⁴ The court found that “Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment.”¹⁵ This was consistent with prior D.C. Circuit opinions that recognized the “sweeping scope of NEPA.”¹⁶ In these prior cases, the D.C. Circuit had noted that “the sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action”¹⁷ and, as one judge had explained, that “[NEPA] was designed explicitly to take account of impending as well as present crises in this country and *in the world as a whole*.”¹⁸

Numerous other courts have followed the D.C. Circuit’s lead in interpreting NEPA’s scope. For instance, in the 2010 case of *Manitoba v. Salazar*, the U.S. District Court for the District of Columbia stated that “NEPA requires agencies to consider reasonably foreseeable transboundary effects resulting from a major federal action taken within the United States.”¹⁹ And similarly, in a 2017 case, the U.S. District Court for the Southern District of California held that the Department of Energy must take into account the effects in Mexico of both the U.S. and Mexico portions of an electric transmission line that ran across the national border.²⁰

To be sure, some courts have held that NEPA does not require agencies to consider certain environmental effects of their actions when those effects occur in foreign countries. Some courts have suggested that the question merits a case-by-case inquiry,²¹ and case law on the issue is not entirely consistent.²² But courts have held that consideration of transboundary impacts is warranted under NEPA when those impacts affect global commons²³ or ultimately affect “the

¹⁴ *Env’t Def. Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

¹⁵ *Id.* at 536.

¹⁶ *Id.*

¹⁷ *Calvert Cliffs’ Coord. Comm. v. United States A.E. Comm’n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971).

¹⁸ *City of Los Angeles v. NHTSA*, 912 F.2d 478, 491 (D.C. Cir. 1990) (Wald, C.J., dissenting on other grounds) (emphasis added).

¹⁹ *Gov’t of Man. v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010).

²⁰ *Backcountry Against Dumps v. U. S. Dep’t of Energy*, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487, at *3 (S.D. Cal. Aug. 29, 2017).

²¹ *E.g. Greenpeace USA v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990) (“Congress intended to encourage federal agencies to consider the global impact of domestic actions and may have intended under certain circumstances for NEPA to apply extraterritorially.”).

²² *See Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 301 n.8 (1st Cir. 1999) (collecting case law going both directions); *Hirt v. Richardson*, 127 F. Supp. 2d 833, 844 (W.D. Mich. 1999) (same); Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 *Geo. Wash. L. Rev.* 757, 760 (1994) (“There is no consensus about whether NEPA applies extraterritorially.”).

²³ *Massey*, 986 F.2d at 533–34 (“[I]n a sovereignless region like Antarctica, where the United States has exercised a great measure of legislative control, the presumption against extraterritoriality has little relevance and a dubious basis for its application.”); *Ctr. for Biological Diversity v. Nat’l Sci. Found.*, No. C 02-5065 JL, 2002 WL 31548073, at *3 (N.D. Cal. Oct. 30, 2002) (finding that NEPA applies to a project occurring in the “high seas”).

American environment” despite originating abroad²⁴—both of which greenhouse gas emissions undoubtedly do. And in any event, regardless of what NEPA requires, agencies have frequently invoked the statute to consider the transboundary effects of domestic actions, as described above.

II. Agencies Have Looked to International Reciprocity and Cooperation in Deciding How to Regulate, Including EPA on Numerous Prior Occasions

Across a wide range of contexts—including outside the climate context—agencies have justified rules on the importance of international reciprocity and cooperation. These rules offer strong precedent for EPA’s consideration of global climate impacts.

Perhaps most notably, reciprocity concerns were central to EPA’s highly successful program of stratospheric ozone regulation under the Reagan administration.²⁵ When issuing regulations in 1988, EPA stated that in “deciding whether and how to regulate . . . it may consider . . . the effect of United States action on other countries’ willingness to take regulatory action.”²⁶ EPA further stated that “[c]onsideration of the international ramifications of United States action” was also warranted when “analyzing the cost and feasibility of controls” and recognized that “the need for other nations to limit their emissions may make appropriate United States action that encourages, or does not discourage, other nations to agree to such limits.”²⁷ In its corresponding regulatory impact analysis, EPA estimated program benefits based on international participation rates and the influence that U.S. action would have on those rates.²⁸

Courts on several occasions have confirmed EPA’s authority to consider international cooperation when setting domestic pollution standards. For example, in *National Coalition Against the Misuse of Pesticides v. Thomas*, the U.S. Court of Appeals for the D.C. Circuit upheld EPA’s rule under the Food, Drug, and Cosmetic Act (FDCA) establishing an interim tolerance of 30 ppb for the chemical ethylene dibromide (EDB).²⁹ Although the chemical had been banned domestically, the interim tolerance would permit foreign mango producers to continue using EDB while they developed an alternative.³⁰ EPA reasoned that revoking the 30 ppb tolerance of EDB “could be seen as an unfair and unduly abrupt action by mango-producing nations” and “could damage cooperative efforts that have characterized relations among the U.S. and various food-exporting nations.”³¹ EPA found that “[s]ince effective enforcement of food safety laws depends upon such cooperation, a ban might increase the risk that fruit and

²⁴ *Hirt*, 127 F. Supp. 2d at 845 (“NEPA is designed to ensure that federal agencies contemplating actions that will [a]ffect the American environment carefully consider those environmental effects. It would elevate form over substance to suggest that simply because those environmental impacts emerge on the other side of a national boundary, NEPA procedures are not applicable.”).

²⁵ Protection of Stratospheric Ozone, 53 Fed. Reg. 30,566, 30,569 (Aug. 12, 1988).

²⁶ *Id.*

²⁷ *Id.* at 30,569.

²⁸ EPA, *Regulatory Impact Analysis: Protection of Stratospheric Ozone 5-4 to 5-12* (1988).

²⁹ 815 F.2d 1579 (D.C. Cir. 1987).

³⁰ *Id.* at 1581.

³¹ *Id.* at 1582.

vegetables would enter the U.S. treated with unsafe levels of pesticides or infested with pests or diseases.”³²

More recently, the D.C. Circuit likewise upheld EPA’s consideration of international cooperation in *National Association of Clean Air Agencies v. EPA*.³³ There, EPA promulgated a regulation tightening NO_x emission standards for newly certified commercial aircraft gas turbine engines under Section 231 of the Clean Air Act³⁴ to bring U.S. standards “into alignment” with newly-updated international ICAO standards.³⁵ EPA justified this rule by stating that “in the interests of expediency and of bringing U.S. domestic law into conformity with . . . obligations under the Chicago Convention . . . the most appropriate course for now. . . is to simply update [EPA] regulations to track [the 1999 ICAO standards] in terms of both stringency levels and scope of applicability.”³⁶ While petitioners challenged this rule on the basis that the statute required EPA to prioritize public health over “all other concerns—including international standards,” the D.C. Circuit held that the EPA took a reasonable approach by considering international harmonization as part of its standard-setting.³⁷

Another example of an agency regulating based on international cooperation is when the National Oceanic and Atmospheric Administration (NOAA) and Department of Commerce chose to extend the Atlantic herring fishing season at the request of foreign nations.³⁸ NOAA and the Department of Commerce had issued regulations for Atlantic herring fishing, but subsequently extended the season for foreign fishing because foreign fishermen had not been able to harvest their allocations within the allotted timeframe.³⁹ NOAA determined that the extension, “in the spirit of international cooperation and comity, [would] provide the greatest overall benefit to the United States with respect to fishing, fish, and other activities and products pertaining to the food supply.”⁴⁰

III. Beyond the Climate Context, Agencies Have Justified Actions Based on Transboundary Spillover Effects

Agencies have also justified key actions on the existence of spillover effects, whereby effects that begin in foreign countries ultimately lead to domestic consequences. This too offers further support for EPA’s approach to climate damage.

³² *Id.*

³³ 489 F.3d 1221 (D.C. Cir. 2007).

³⁴ 42 U.S.C. § 7571 (authorizing emissions standards for aircraft engines to limit “air pollution which may reasonably be anticipated to endanger public health or welfare”).

³⁵ *Nat’l Ass’n of Clean Air Agencies*, 489 F.3d at 1225 (quoting Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 68 Fed. Reg. 56,226, 56,226 (proposed Sept. 30, 2003)).

³⁶ *Id.* at 1226 (quoting Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 70 Fed. Reg. 69,664, 69,681 (Nov. 17, 2005)).

³⁷ *Id.* at 1229–30.

³⁸ Amendment of Regulation, Foreign Fishing Atlantic Herring, 42 Fed. Reg. 56,128 (Oct. 19, 1977).

³⁹ *Id.* at 56,129.

⁴⁰ *Id.*

One example is the Department of Energy’s (DOE) consideration of liquefied natural gas (LNG) exports to nations with which the United States does not have a free trade agreement. Section 3 of the Natural Gas Act requires DOE to consider export applications for their “consisten[cy] with the public interest,” but does not define “public interest.”⁴¹ To address this gap, DOE issued a policy statement outlining the factors it would consider.⁴² This policy statement explains that DOE “will consider international trade policy, foreign policy, and national security interests.”⁴³ DOE has repeatedly reaffirmed its reliance on international considerations in deciding export applications, including in recent Congressional testimony.⁴⁴ Pursuant to the policy statement, DOE has taken international considerations into account in numerous export approvals. For example, DOE highlighted that one application would “promote free trade” and “energy interdependence among all nations.”⁴⁵ DOE also touted that another application would promote “an efficient, transparent international market for natural gas with diverse sources of supply” and thereby “provide[] both economic and strategic benefits to the United States and our allies.”⁴⁶ There, DOE explained that “to the extent U.S. exports can

⁴¹ 15 U.S.C. § 717b(a).

⁴² New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684, 6,685 (Feb. 22, 1984). While the guidelines were initially developed for import applications, they remain relevant because DOE has since extended the guidelines to non-FTA export applications. See Laura Figueroa & Sarah Ladin, *The Public Interest Review for LNG-Related Authorizations*, Inst. for Pol’y Integrity 5 (Aug. 2022), https://policyintegrity.org/files/publications/LNG_Related_Authorizations_Report_-_vF.pdf.

⁴³ New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. at 6,688.

⁴⁴ DOE’s Program Regulating Liquefied Natural Gas Export Applications, Statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas, Before the House Subcommittee on Energy and Power, Committee on Energy and Commerce (Mar. 25, 2014); The Department of Energy’s Strategy for Exporting Liquefied Natural Gas: Hearing Before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Government Reform, 113th Cong. 45 (2013) (statement of Christopher Smith, Acting Assistant Sec’y for Fossil Energy, Office of Fossil Energy, Dep’t of Energy).

⁴⁵ Phillips Alaska Natural Gas Corp. & Marathon Oil Co., Order No. 1473, Docket No. 96-99-LNG, Order Extending Authorization to Export Liquefied Natural Gas from Alaska 47–56 (Apr. 2, 1999) (“In considering the international effects of granting long-term export authority in Yukon Pacific, the Department reinforced its belief the public interest generally is best served by a free trade policy: Such a policy promotes energy interdependence among all nations, rather than energy dependence on a few nations. Competition in world energy markets promotes the efficient development and consumption of energy resources, as well as lower prices, whereas economic distortions can arise from artificial barriers to the free flow of energy resources. Accordingly, the DOE believes that the public interest in free trade generally supports approval of proposed exports.”);

⁴⁶ Corpus Christi DOE Order No. 3638, Docket No. 12-97-LNG, Final Opinion And Order Granting Long-Term, Multi-Contract Authorization To Export Liquefied Natural Gas By Vessel From The Proposed Corpus Christi Liquefaction Project To Be Located In Corpus Christi, Texas, To Non-Free Trade Agreement Nations 191 (May 12, 2015) (“We have also considered the international consequences of our decision. We review applications to export LNG to non-FTA nations under section 3(a) of the NGA. The United States’ commitment to free trade is one factor bearing on that review. An efficient, transparent international market for natural gas with diverse sources of supply provides both economic and strategic benefits to the United States and our allies. Indeed, increased production of domestic natural gas has significantly reduced the need for the United States to import LNG. In global trade, LNG shipments that would have been destined to U.S. markets have been redirected to Europe and Asia, improving energy security for many of our key trading partners. To the extent U.S. exports can diversify global LNG supplies, and increase the volumes of LNG available globally, it will improve energy security for many U.S. allies and trading partners.”).

diversify global LNG supplies, and increase the volumes of LNG available globally, it will improve energy security for many U.S. allies and trading partners.”⁴⁷

In addition to considering transboundary spillover benefits, agencies also consider transboundary spillover costs. All industry compliance costs ultimately fall on the owners, employees, or customers of regulated and affected firms, which typically have foreign owners and investors. In general, about 29% of U.S. corporate debt and 14% of U.S. equities are foreign-owned,⁴⁸ and adding foreign direct investment to portfolio stock ownership suggests that foreigners own about 40% of U.S. corporate equity.⁴⁹ Yet agencies frequently fail to distinguish and segregate the share of compliance costs that accrue to foreigners, and thus implicitly capture costs on a global basis.⁵⁰ When agencies do separate foreign compliance costs, they have sometimes recognized that those costs are nonetheless relevant due to the potential for transboundary spillovers. For instance, the Food and Drug Administration regularly includes a section on international effects in its regulatory impacts analyses, and has recognized that costs borne by foreign producers are particularly relevant because “a portion of foreign costs could be passed on to domestic consumers.”⁵¹

Courts have confirmed that agencies may—and in some cases, must—take into account certain international spillover effects. In a recent decision, the U.S. Court of Appeals for the Ninth Circuit rejected a Bureau of Ocean Energy Management (BOEM) approval of an offshore oil drilling and production facility after the agency “failed to include [greenhouse gas] emissions estimates resulting from foreign oil consumption in its analysis.”⁵² As the court explained, “omitting” the “key variable” of “foreign oil consumption” led to BOEM’s “counterintuitive result” that domestic extraction could reduce total greenhouse gas emissions.⁵³ The court recognized that increased domestic production causes “foreign consumers [to] buy and consume more oil,” and because that consumption “can be translated into estimates of greenhouse gas emissions” that harms the United States, the agency had an obligation to consider those increased foreign emissions resulting from domestic action.⁵⁴ Two subsequent district court opinions

⁴⁷ *Id.*

⁴⁸ Dept. of Treasury et al., *Foreign Portfolio Holdings of U.S. Securities* at B-3 (2020), <https://perma.cc/6VP6-PPG6>.

⁴⁹ Steve Rosenthal & Theo Burke, *Who’s Left to Tax? U.S. Taxation of Corporations and Their Shareholders* at 2 (Urban-Brookings Tax Policy Center Working Paper, 2020), <https://perma.cc/YMR2-XREM>.

⁵⁰ *See, e.g.*, EPA, Regulatory Impact Analysis for the Proposed Reconsideration of the Oil and Natural Gas Sector Emission Standards for New, Reconstructed, and Modified Sources at 3-13 (2018) (acknowledging that some portion of regulatory costs will likely “accru[e] to entities outside U.S. borders” through foreign ownership, employment, or consumption).

⁵¹ Requirements for Additional Traceability Records for Certain Foods, 87 Fed. Reg. 70,910, 71,071 tbl.2 (Nov. 21, 2022).

⁵² *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020).

⁵³ *Id.* at 736.

⁵⁴ *Id.*

similarly faulted Department of Interior analyses for omitting the effects of domestic production on foreign demand and consumption (as of this writing).⁵⁵

In another recent decision, *City of Oberlin v. FERC*, the D.C Circuit upheld FERC’s approval of a certificate of public convenience and necessity for a natural gas pipeline under Section 7 of the Natural Gas Act which FERC based in part on international considerations.⁵⁶ As part of its public convenience and necessity analysis, FERC credited all of the pipeline company’s precedent agreements, including its Canadian export precedent agreements, as evidence of the pipeline’s benefits.⁵⁷ The court upheld FERC’s consideration of this transboundary benefit, holding that “FERC could lawfully consider the export precedent agreements because an assessment of the public convenience and necessity requires a consideration of all the factors that might bear on the public interest.”⁵⁸

Conclusion

EPA rationally accounts for climate impacts on a global basis for all of the reasons that the agency offers in the Draft Update. Moreover, as detailed in this comment letter, EPA’s approach is consistent with how many agencies have exercised their regulatory authority, as agencies have often considered transboundary environmental harms, international reciprocity and cooperation impacts, and transboundary spillovers. EPA should highlight these regulatory precedents as additional support for its global approach.

Sincerely,

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⁵⁵ See *Figueo & Ladin*, *supra* note 38, at 33 (first citing *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 764–67 (D. Alaska 2021) and then citing *Friends of the Earth v. Haaland*, No. CV 21-2317 (RC), 2022 WL 254526, at *14–15 (D.D.C. Jan. 27, 2022).

⁵⁶ 39 F.4th 719 (D.C. Cir. 2022).

⁵⁷ *Id.* at 725.

⁵⁸ *Id.* at 726.