



March 10, 2020

Via e-filing on www.regulations.gov

Council on Environmental Quality
Attention: Docket ID No. CEQ-2019-0003
730 Jackson Place, NW
Washington, DC 20503

Re: Comments on Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (Jan. 10, 2020)

Dear Sir or Madam:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments to the Council on Environmental Quality (“CEQ”) in response to its proposal to update the regulations implementing the National Environmental Policy Act (“NEPA”), 85 Fed. Reg. 1,684 (Jan. 10, 2020).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream supports the proposed rulemaking, which outlines significant improvements on how the National Environmental Policy Act (“NEPA”) would be implemented by lead agencies and reviewed by courts. These proposed improvements are consistent with GPA Midstream’s previous comments on CEQ’s Advanced Notice of Proposed Rulemaking, 83 Fed. Reg. 28,591 (June 20, 2018) (“ANPRM”), which we incorporate here by reference. Comments from GPA Midstream Association, CEQ-2018-0001-11892 (Aug. 20, 2018) (“GPA Comments”)

As the text of NEPA is not detailed, the statute provides limited guidance for federal agencies. Moreover, CEQ’s existing NEPA regulations are likewise relatively limited – and have

not been updated for many years. With projects that implicate NEPA invariably being challenged in court, the lack of statutory or regulatory guidance has left the courts to fill the vacuum by creating a large body of federal common law interpreting NEPA to govern agency obligations. This has meant a significant portion of the law controlling NEPA analyses is not in either statute or regulation, can vary from circuit to circuit, and relies on loosely defined standards such as the “rule of reason” and a “hard look” as interpreted by federal judges. Over time, this has led to agencies requiring ever more expansive reviews in an effort to satisfy expected judicial review. Hence, even relatively simple Environmental Assessments are now complex affairs that can take years to complete and consume hundreds of pages. And even then, lead agencies and project proponents face uncertainty and significant litigation risk as a reviewing court may still hold that more analysis of a particular issue (among many) could have been done.

- The proposal correctly includes provisions that enhance agency coordination in accordance with the One Federal Decision Executive Order.
- CEQ has properly proposed to impose time and page limitations and establish a system of accountability to better ensure agencies observe those limitations.
- The proposal would streamline reviews and avoid unnecessary duplication, by authorizing the use of tiering for Environmental Assessments and encouraging agencies to use existing studies and information for NEPA analyses.
- The proposal would allow agencies more flexibility to use contractors to assist with NEPA reviews, thereby reducing the backlog of NEPA analyses that accumulate when budgetary limits on agency staff results in bottlenecks in the process.
- Importantly, the proposal would align the NEPA “Purpose and Need” statement with the applicant’s goals, so that only realistic and feasible alternatives are analyzed.

I. CEQ Correctly Proposes to Adopt Reasonable Measures to Simplify and Speed Up the NEPA Process Across Agencies

Simplifying and speeding up the NEPA process is a bipartisan issue with several statutes and directives from Presidents of both parties issued towards these purposes. *See generally* 85 Fed. Reg. at 1,688-1,690 (summarizing various legislative initiatives and executive orders). Unfortunately, many of these efforts only targeted specific types of projects, such as highway and transit projects (SAFETEA-LU) or disaster recovery projects (Stafford Act). GPA Midstream supports CEQ’s efforts to implement mechanisms that will simplify and speed NEPA reviews for all types of projects. In particular, the proposals to improve agency coordination, impose time and page limitations, allow the use of existing relevant materials in both Environmental Impact Statements (“EISs”) and Environmental Assessments (“EAs”), and allow the use of contractors should be the most effective in improving the NEPA review process. GPA Midstream

recommended each of these measures in its comments on the ANPRM, GPA Comments at 2-4, 9-10, and continues to support their adoption in the proposed rulemaking.

A. CEQ Properly Proposes to Enhance Interagency Coordination

GPA Midstream supports the proposed rule's new provisions that codify aspects of inter-agency coordination from the "One Federal Decision" Executive Order. *See generally*, E.O. 13,807 (Aug. 15, 2017). The revisions to proposed sections 1501.7 and 1501.8, which would quickly resolve disagreements between agencies, more precisely define lead and cooperating agency responsibilities, including concrete steps for lead agencies to hold cooperating agencies to established schedules, and otherwise clarify coordination procedures. Allowing multiple agencies to produce a single EIS and joint record of decision, consistent with the One Federal Decision framework, should reduce unnecessary complexity and delays while still allowing full participation by all agencies involved in the NEPA process.

B. Imposing Time and Page Limitations Will Ensure NEPA's Original Role is Sustained, While Removing Unnecessary Delays

GPA Midstream supports the proposed implementation of presumptive time and page limitations. The lengthy NEPA review process is a frequent source of frustration for our members as even energy infrastructure projects that are relatively simple may be unreasonably delayed. These delays waste agency resources, impair job growth, and prevent economic development. CEQ's proposed page and time limits are reasonable in that they should focus agency efforts on the potentially significant environmental impacts of a proposed project, instead of requiring them to expend pages and time on marginal, speculative, or remote potential impacts.

Such limitations are not a novel concept as CEQ's initial regulations sought to make EISs reasonable in scope by imposing page limitations. *See* 40 C.F.R. § 1502.7 (imposing a page limit of 150 pages for most projects and 300 pages for "proposals of unusual scope or complexity"). Unfortunately, as courts have continually imposed new obligations on agencies, these page limits are unenforced and largely ignored. In addition, CEQ should provide additional clarification regarding the inclusion of appendices within the presumptive page limits. In many instances, cumulative length of appendices far exceeds that of the EIS itself.

GPA Midstream is also pleased to see that proposed § 1502.7 would impose at least some accountability for honoring page and time limits, in that they require a senior agency official to approve exceptions in writing. We suggest, however, that once implemented, CEQ maintain records of these written exceptions to understand whether they are truly issued as exceptions or as a matter of course, frustrating any potential benefit from the page and time limits.

A. Use of Existing Relevant Materials Will Eliminate Unnecessary Duplication and Appropriately Expedite the Review

GPA Midstream supports the proposed regulation's extension of tiering to EAs and the use of existing studies and environmental analyses as an important method to incorporate high quality information into environmental reviews, while reducing the time that would otherwise be taken to generate new materials. Indeed, this would avoid agencies having to re-invent the wheel for each EA or EIS when there are already closely related studies and analyses, such as those created under the Fish & Wildlife Coordination Act, the National Historic Preservation Act, and the Endangered Species Act, among other sources. This allows lead agencies to draw on the expertise of other agencies, even if they are not coordinating on the particular proposed project – and avoids inconsistent analyses and conclusions.

A. Expanding the Use of Contractors to Supplement Agency Resources Will Improve Efficiency and Help Reduce Delays and Backlogs

Backlogs are a significant cause of NEPA delays. Congressional budgets dictate funding for staff resources which, for some agencies, mean that a single agency employee may be juggling several NEPA reviews at once. Therefore, GPA Midstream strongly supports the use of contract resources to supplement and reinforce agency resources.

Objections to the use of contractor resources as allegedly creating potential conflicts of interest are not well founded. Agencies will supervise the contractors and, after an independent review of the work, make an independent decision. Many federal agencies already use contractors for similar purposes, *see, e.g.*, FERC, Third Party Contractors¹ (explaining policy for using applicant-funded contractors for assisting FERC in preparing NEPA reviews); EPA, EPA Active Contracts Report by Vendor² (listing contractors used for regulatory analytical support, enforcement support services, and data gathering, among many other functions), and there is no hard evidence that this has presented any actual questions of bias or improper conflicts. Further, although the project proponent may provide funding for the contractor, proposed § 1506.5 leaves contractor selection to the agency. This would not only eliminate any alleged incentive by a contractor to accommodate a project proponent. Establishing long term contracts to assist in agency NEPA reviews (at private sector pricing) would make agency contracting just as attractive as contracting for private sector clients.

¹ Available at, <https://www.ferc.gov/industries/gas/enviro/tpc.asp>.

² Available at, <https://www.epa.gov/contracts/epa-active-contracts-report-vendor>.

II. The “Purpose and Need” Statement Should be Determined by the Applicant’s Goals in Order to Evaluate Reasonable Alternatives

GPA Midstream supports the proposed modification to 40 C.F.R. § 1502.13 that would clarify that “the agency shall base the purpose and need on the applicant’s goals and the agency’s statutory authority.” 85 Fed. Reg. at 1,701. The Purpose and Need statement, because it dictates the array of alternatives analyzed, can be a significant root of unnecessary delay and cost. As noted in GPA’s Comments on the ANPRM, agencies should focus their environmental reviews on the potential environmental impacts that are most relevant and significant for each proposed project. GPA Comments at 5. Where a poorly designed Purpose and Need statement generates several impractical or infeasible alternatives, the lead agency may expend months and add dozens, if not hundreds, of pages to an environmental review analyzing alternatives that could never be implemented and provide no practical information to the agency or the public. Thus, CEQ’s proposed revision to the Purpose and Need regulation would be a very effective reform. GPA Midstream also notes that a more formalized definition of “alternatives,” “all reasonable alternatives,” and “alternatives including the proposed action” could benefit reviewing agencies and the public in focusing on the relevant and significant alternatives for a project. This is discussed further in our comments on the ANPRM. *See* GPA Comments at 7 (discussing clarifying definitions and potential incorporation of CEQ’s “Forty Most Asked Questions” guidance document).

The proposed regulation’s approach has support in existing case law. *See, e.g., Theodore Roosevelt Conserv. Partnership v. Salazar*, 661 F.3d 66, 74 (D.C. Cir. 2011); *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (reversing lower court for imposing “a broad social interest” as the purpose and need for a timber project). Project opponents frequently demand that lead agencies define the Purpose and Need at such a broad level of abstraction that it no longer bears a reasonable relationship to a private applicant’s project. For instance, where a midstream company is seeking a right-of-way through federal lands for a natural gas processing project, opponents may demand that the Purpose and Need be defined so broadly as to require the agency to consider the installation of rooftop solar panels as an alternative to a right-of-way. *See, e.g., Protect Our Communities Foundation v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (for an EIS evaluating a right-of-way for a wind power project, challengers demanded that the U.S. Bureau of Land Management consider the installation of rooftop solar panels as an alternative). A Purpose and Need statement this broad generates unreasonable alternatives that the project applicant cannot implement, making them merely variations of the No Action Alternative.

Project opponents, however, are not the only variable distorting the Purpose and Need statement and its related project alternatives. Although many courts allow federal agencies to *consider* the private applicant’s purpose and need for its own proposed project (if they choose to do so), several courts have also required agencies to integrate amorphous agency goals into the Purpose and Need statement lest the alternatives be unreasonably narrow. For instance, the Ninth

Circuit in *Citizens Against Burlington, Inc. v. Busey IV*, 938 F.2d 190, 196 (D.C. Cir. 1991), held that “an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.” Some courts view this as a directive for the lead agency to develop *its own* purpose and need for a private entity’s project. And even when an agency does, some courts are not satisfied. In *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1071-1072 (9th Cir. 2010), the court found a Purpose and Need statement defective because only one of the four objectives were an agency “goal,” making the six alternatives analyzed unreasonably narrow. This demand by some courts to develop some undefined number of undefined agency “goals” for a private project “to the extent that the agency can determine them,” *Burlington*, 938 F.2d at 196, has no basis in the statute and only sows confusion and a waste of resources.

Creating a Purpose and Need statement that is either too abstract or dominated by lead agency “goals” leads to alternatives that can be so divorced from the private applicant’s proposed project as to be merely a wasteful duplication of the No Action Alternative. Returning to the prior example, a midstream company is not in the business of installing rooftop solar panels, and analyzing this as an alternative to a right-of-way for a natural gas processing plant adds no useful information to the decision-maker. Should the agency select rooftop solar panels as the preferred alternative, that decision would kill the project. On the other hand, to avoid litigation risk, the agency may feel compelled to devote significant time and attention to alternatives that all parties know would never be implemented by the applicant. And even then, the agency’s decision would be reviewed under subjective and poorly defined standards. *See, e.g., State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (an agency’s selection of a range of alternatives “is governed by a ‘rule of reason’” and it is not compelled to consider “remote and speculative” alternatives) (internal quotations omitted). What is reasonable or “remote and speculative” is ultimately determined by the presiding judge, not by any clear standard to guide lead agencies, applicants, or the public.

Accepting the applicant’s project goal (*i.e.*, to build the project) provides a clear standard without restraining reasonable alternatives or make any particular alternative a foregone conclusion. Lead agencies may consider different variations of the project, such as routes, sizes, or locations, as well as the No Action Alternative. This will devote lead agency, applicant, and public resources to meaningful analyses of potential environmental impacts from a realistic version of the proposed project, avoiding the expenditure of dozens of pages on unrealistic alternatives that would not be implemented – and thus are no different, from a practical standpoint, than the No Action Alternative.

GPA Midstream appreciates the opportunity to submit these comments in response to CEQ’s proposed rule and is standing by to answer any questions that the agency may have.

Respectfully submitted,

A handwritten signature in black ink, reading "Matthew Hite". The signature is written in a cursive style with a large, stylized initial "M".

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

