August 20, 2018

Edward A. Boling,
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Comments on the Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018)

Docket No. CEQ-2018-0001

Associate Director Boling,

GPA Midstream Association appreciates the opportunity to submit comments in response to the Council on Environmental Quality's (CEQ) notice of potential revisions to update and clarify CEQ's National Environmental Policy Act (NEPA) regulations. GPA Midstream is optimistic that CEQ can streamline the NEPA review process to reduce unnecessary regulatory burdens that hamper domestic energy development.

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members of all sizes 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. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream is the primary advocate for a sustainable midstream industry focused on enhancing the viability of natural gas, natural gas liquids and crude oil. We work with legislators and regulators to promote a safe and viable midstream industry. Our member companies have significant experience with NEPA and the NEPA review process.

NEPA is a frequent source of frustration for our companies because it delays the approval and implementation of important energy infrastructure projects that are vital to a strong U.S. natural gas industry. Meaningful NEPA reform could improve infrastructure development without sacrificing environmental protection.

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GPA Midstream is mindful of past CEQ efforts to achieve meaningful NEPA reform. As far back as 1979, CEQ sought to "reduce paperwork, to reduce delays, and at the same time to produce better decisions" by promulgating NEPA regulations. 43 Fed. Reg. 55,978 (Nov. 30, 1979). CEQ's initial regulations provided a solid foundation for an efficient NEPA review process, which included the imposition of time limits on the environmental review process and page limits on the analysis. Despite CEQ's well-intentioned objectives, federal agencies have grossly complicated NEPA review, turning it into a time-consuming and unwieldly process. Rarely do agencies comply with the 150-page limitation CEQ set for environmental impact statements (EIS).[1] In fact, the length of an environmental assessment (EA), which should be significantly shorter than an EIS, frequently exceeds 150 pages. The NEPA review process is often fraught with delays that can be years long. Such delays waste agency resources, impair job growth, and prevent economic development. CEQ can address these issues through common sense regulatory reform.

NEPA Process

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

- Federal agencies often fail to conduct NEPA reviews in a timely fashion. According to the National Association of Environmental Professionals, they take an average of 5 years to complete. The development of a critical path timeline up front and setting mandatory permittee/agency check-ins would help minimize delays. CEQ should consider streamlining the required consultation processes between agencies by requiring that these consultations occur concurrently with other NEPA requirements in, and by establishing deadlines for agency feedback. In order to strengthen the review process, we propose the following language updates.

  40 C.F.R. § 1502.25(a) ~~To the fullest extent possible, a~~ Agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

  40 C.F.R. § 1502.5(b) For applications to the agency, appropriate environmental assessments or statements shall be commenced ~~no later than~~ immediately after the application is received. Federal agencies shall ~~are encouraged to~~ begin preparation of

[1] *See* 40 C.F.R. § 1502.7

such assessments or statements earlier~~, preferably~~ and jointly with applicable State or local agencies.

- GPA Midstream also supports the "one agency, one decision" policy in the Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807. CEQ should revise its regulations to incorporate the one federal decision framework in Executive Order 13807 and make that framework applicable to all regulated federal agencies.

- CEQ can improve the efficiency of the NEPA review process by imposing enforceable deadlines for all stages of the NEPA review (e.g. scoping, development of alternatives, preparation of draft EA/EIS, issuance of a final decision, etc.). Additionally, CEQ should require federal agencies to devote sufficient staff and agency resources to complete NEPA reviews in a timely manner. CEQ should amend 40 C.F.R. § 1501.6(b)(4), which allows cooperating agencies to assist with the NEPA review, to permit CEQ staff to assist with any federal agency's NEPA review process if the agency requests assistance. As noted below, CEQ also should amend its regulations to permit federal agencies to accept private funding for the contractors the agencies select.

- CEQ also should take steps to ensure that federal agencies take consistent approaches in the NEPA review process. While individual agencies should remain free to promulgate their own NEPA regulations, they should be bound by the deadlines, page limitations, and other efficiency measures that CEQ imposes.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

- CEQ should expand how federal agencies use or tier to existing decisions and environmental analyses as part of the NEPA review of proposed actions. When authorizing new, agencies should consider when the NEPA review can be used as a programmatic review. This will allow agencies to expedite review of future actions that are similar in nature to previously reviewed actions since a detailed review of this area has already been performed. In order to do so, we propose to expand 40 C.F.R. § 1506.4 to include the following language.

  40 C.F.R. § 1506.4

  Any environmental document in compliance with NEPA shall ~~may~~ be combined with any other agency document to reduce duplication and paperwork. This includes the use of relevant and timely prior environmental studies, analysis and decisions conducted in earlier Federal, State, Tribal or Local environmental reviews or authorization decisions.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

- Cooperating agencies should limit their analysis to only items where they exclusively have expertise or authority. This can be accomplished using the following language:

  40 C.F.R. § 1501.6 (b)(2) Participate in the scoping process (described below in §1501.7) on items where the cooperating agency has sole jurisdiction or authority.

- The use of critical path timelines mentioned above in Question 1 would also apply here.

- CEQ should specify that the scoping process is necessary only for actions requiring an EIS. A scoping process is not necessary for actions that fall within a categorical exclusion (CE) or require an EA because no significant environmental impacts result from such actions. Some agencies, however, engage in the scoping process for all NEPA reviews. For example, the U.S. Forest Service has a policy to conduct scoping for all proposed actions. This approach wastes agency resources and causes delays. CEQ should implement a regulation that standardizes the scoping process for all federal agencies.

Scope of NEPA Review

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

- CEQ regulations state that, "environmental impact statements shall be written in plain language". 40 C.F.R. § 1502.8. Well-defined criteria ensures that NEPA documents will follow a clear format with a focus on the significant issues instead of mere background material. This should avoid unnecessary confusion and complexity that results from an overly complex analysis.

- GPA Midstream also supports page limitations for EIS's and EAs. While documents should be thorough, page limitations ensure that the documents are concise and can be reviewed in a timely manner. CEQ's regulations governing the format and page limitations of NEPA documents and the time limits for completing the documents are well intended. However, federal agencies frequently ignore these regulations. GPA Midstream proposes the following amendment:

  40 C.F.R. § 1502.7

  (a) The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than ~~150~~ 200 pages and for proposals of unusual scope or complexity shall ~~normally~~ be less than ~~300~~ 350 pages.

  (b) The text of a final environmental assessment shall be less than 100 pages

  (c) A federal agency must obtain the Council's approval to exceed these limits.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how?

- CEQ should revise its NEPA regulations to emphasize that environmental review documents should be concise and focus on relevant and significant environmental issues. This can be accomplished during the scoping process. Existing regulations require agencies to identify the significant issues they must analyze during the NEPA process and eliminate the insignificant issues. *See* 40 C.F.R. § 1501.7. CEQ should stress the need for agencies to clearly identify insignificant issues that will not be discussed in detail in the EIS. The elimination of insignificant issues early in the NEPA process should reduce the amount of analysis that is not important to a decision maker as well as the length of the EIS.

- CEQ should revise how and when agencies include an economic impacts analysis in the review process. If an agency includes such an analysis, it should identify a clear nexus between the environmental impact and socioeconomic impact. CEQ regulations state that social or economic impacts, by themselves, should not require preparation of an EIS (40 C.F.R. § 1508.14). Instead, agencies must evaluate social and economic impacts of an action only when they are interrelated with natural or physical environmental effects. The EA or EIS should describe a clear nexus between the socioeconomic impacts assessed and those that are physical or environmental.

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

- CEQ should add a step to the public comment process to incorporate proposed mitigation options. After receiving feedback, the local agency manager, who is most familiar with the resources, should decide how the project should proceed.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

a. Major Federal Action;

b. Effects;

c. Cumulative Impact;

d. Significantly;

e. Scope; and

f. Other NEPA terms.

- CEQ should narrow the definition of major federal action in 40 C.F.R. § 1508.18 so that federal agencies analyze only the portions of a project over which there is federal jurisdiction or significant federal control. In doing so, CEQ should reject the "small handle" approach to

NEPA review where a federal agency relies on limited authorization over a larger project to analyze the full scope of the project. CEQ should promulgate regulations directing a federal agency to define the federal action during the scoping process so that the agency will limit its review to the impacts of the specific activity requiring a federal permit or authorization and those portions of the entire project over which the federal agency has sufficient control and responsibility to warrant federal review. In adopting such regulations, CEQ should rely on the U. S. Army Corps of Engineers' NEPA regulations, in particular 33 C.F.R. Part 325, Appx B.[2] These NEPA implementing procedures provide a framework for analyzing the scope of a federal action and instruct the agency to narrowly tailor its analysis to those portions of the project over which the agency has jurisdiction or control.

- CEQ should revise the definition of effects in 40 C.F.R. § 1508.8 to limit "direct" effects to those proximately connected to a project, and to clarify that "indirect" effects are necessarily limited and generally equivalent to "connected projects" in 40 C.F.R. § 1508.25(a)(1). Additionally, CEQ should clarify that a cumulative impact does not include impacts that would occur regardless of the proposed action. By making these changes, CEQ will relieve federal agencies of the obligation to analyze impacts that are not a result of a proposed action. In the midstream gas industry, this likely would reduce the need to analyze greenhouse gas impacts generated from downstream combustion when a new pipeline project would merely transport gas from an existing production facility and distribute it downstream to an existing and currently operating power plant. The analysis of upstream extraction and downstream combustion of gas should not be attributed to a pipeline project when such activity would likely occur absent the pipeline.

- The term "proposed action" also is not defined in the regulations. In fact, the only reference to the proposed action is found in 40 C.F.R. § 1502.14, which states, "Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits".[3] Oftentimes, the terms purpose and need will be confused with taking action on the proposed action. For clarity the following definition is suggested:

  Proposed Action: The suggested agency approach that addresses the purpose and need for taking action.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

a. Alternatives;

b. Purpose and Need;

[2] Attached as Attachment 1.

[3] The regulations do define the term "proposal" in as: "*Proposal* exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23.

c. Reasonably Foreseeable;

d. Trivial Violation; and

e. Other NEPA terms.

- CEQ regulations lack clear definitions for many terms such as "alternatives" and "alternatives including the proposed action." CEQ's "Forty Most Asked Question Concerning CEQ's National Environmental Policy Act Regulations," however, provides a clearer definition of these terms. Similar to Comment 14, we recommend the incorporation of the Forty Questions into the regulation language for clarity and to avoid confusion.

- Additionally, CEQ should provide boundaries to the concept of "all reasonable alternatives" in 40 C.F.R. § 1502.14 by defining it to mean only those alternatives that are feasible. CEQ should specify that "all reasonable alternatives" is a narrower range of alternatives when a non-federal entity proposes a project. In such a situation, alternatives should be limited to the authorization of the proposed project, authorization of the project with reasonable design adjustments that a project proponent could reasonably implement, and denial of the project.

- Under NEPA, an agency must consider alternatives to the proposed action including the no action alternative (40 C.F.R. § 1502.14). However, the no action alternative is not defined in the regulations; you must refer to CEQ's Forty Questions guidance document (Question No. 3) for a definition. CEQ should incorporate this definition into its regulations.

- CEQ regulations do not define the requirements for a purpose and need statement. Instead these terms are used tautologically in 40 C.F.R. § 1502.13, "The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." For clarity the following definitions are suggested:

  Purpose: Purpose is what the agency hopes to accomplish by taking action (e.g., make a determination on whether to issue a permit)

  Need: The need is why the agency is taking action and what it hopes to address (e.g., response to an application for a permit; fulfilling statutory responsibility)

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?
a. Notice of Intent;

b. Categorical Exclusions Documentation;

c. Environmental Assessments;

d. Findings of No Significant Impact;

e. Environmental Impact Statements;

f. Records of Decision; and

g. Supplements.

- Categorical exclusions that have been approved for one agency should be standardized and available to all other agencies. For example, a Department of Energy categorical exclusion is not necessarily available for the U.S. Army Corps. Standardizing categorical exclusions across agencies would create certainty for regulated entities, as NEPA is concerned with the type of action and associated impacts not the agency taking them.

- In order to clarify a federal agency's obligation to supplement its NEPA analysis, CEQ should define when the duty to perform a supplemental analysis ceases. In defining this term, CEQ should follow the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) and the Ninth Circuit's decision in *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013). Those cases conclude that once an agency action is complete, "[t]here is no ongoing major Federal action that could require supplementation." *Norton*, 542 U.S. at 73; *see also Ctr. for Biological Diversity*, 706 F.3d at 1095.

  CEQ should amend 40 C.F.R. § 1502.9(c)(1) as follows:

  (c) Agencies:

  (1) Shall prepare supplements to either draft or final environmental impact statements if the agency has not made a final decision, and:

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

- Similar to the comments in Question 1, GPA Midstream supports the development of review deadlines. If an agency fails to comply with the deadlines, CEQ should work with the agency to expedite the process, much like the role that the Federal Permitting Improvement Steering Council plays in Fast-41 projects.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

- CEQ should allow all agencies to use contract resources funded by the permittee. Projects frequently face significant delays due to agency backlogs. Allowing all agencies to use contract resources would help alleviate the backlogs and reduce the time agencies need to reach a final decision. CEQ can implement this requirement by amending 40 C.F.R. § 1506.5 to add a subsection (d) that states: "All federal agencies shall allow for the private funding of contractors selected by the agency."

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

- Tiering can be an effective way to use policy or program-level EISs to streamline future actions. Unfortunately, CEQ regulations do not provide streamlining mechanisms other than permitting the incorporation of other EISs or EAs. However, certain federal agency regulations do allow for streamlining mechanisms. For example, the Department of Energy (DOE) regulations allow for the use of a Supplement Analysis (10 C.F.R. § 1021.314 (c)). Similarly, the Department of Interior (DOI) regulations authorize the agency to prepare an EA and issue a Finding of No Significant Impact for an action with significant impacts if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects(43 C.F.R. § 46.140). The CEQ regulations should include similar mechanisms to promote streamlining across all agencies.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

- CEQ should refine the requirement to analyze "all reasonable alternatives" so that it clarifies the appropriate range of alternatives an agency should consider. CEQ should rely on the D.C. Circuit's decision in *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 74 (D.C. Cir. 2011), which instructs an agency to consider the needs and goals of the parties involved in the action when performing a NEPA review and may narrow the range of alternatives analyzed when the project proponent is a non-federal entity. Additionally, CEQ should clarify that NEPA does not require an agency to consider alternatives that are unlikely to be implemented. *See Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996).

General

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

- Similar to Comments 1 and 2, agencies should integrate the NEPA analysis with other environmental analyses and related actions required by other laws or by executive orders, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.). Coordinated environmental reviews are beneficial whenever other analyses and decision documents consider the same issues and information as a NEPA analysis. This will result in a more efficient review process that will provide a better basis for informed decision making and avoid unnecessary duplication and paperwork.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

- CEQ should provide for an expedited review process for any projects deemed to be in the national interest (e.g. economically important or advancing national security). Where these criteria apply, the agencies shall have authority to consider expedited permit processes. If projects of national interest are identified, the agencies should assign personnel to assist in facilitating the permittee through a fast-tracked permit review and decision process. In addition, the federal government should work closely with the state to ensure they have the resources necessary to expedite the permit issuance.

- CEQ can significantly improve the review process by limiting the "connected action" reach of Federal agencies. As an example, when a pipeline crosses 5 miles of BLM administered land, and then 2 miles of fee land, the BLM requires the entire 2 miles on fee surface to be archaeologically cleared (Class III on the ground survey). This is because the pipeline would not impact the fee land if BLM was not concurrently permitting it on federal land. However, a Class III archeological survey should be limited to no more than 660 feet (1/8th mile) because: (1) the fee landowner will negotiate where he wants the pipeline, so it can bend and turn easily within the first 660 feet; (2) the cultural resources belong to the surface owner (not the BLM) and they may not want others to know about them; (3) the fee owner may want to direct the pipeline where it would partially impact an archeological site, which they own, rather than to go across an area where they plan to build a corral or a new home site.

- CEQ should promote a broader use of categorical exclusions by encouraging federal agencies to rely on them more frequently for routine or similar projects. To do so, CEQ should advise agencies to promulgate a categorical exclusion or recommend that Congress promulgate a statutory categorical exclusion if an agency repeatedly issues findings of no significant impacts for the same or similar actions. This would greatly improve the NEPA review

process. For example, BLM has relied on Categorical Exclusion No. 2 from Section 390 of the Energy Policy Act of 2005 to reduce the time required to process APDs for federal minerals using an existing well pad on non-federal land. This has helped BLM comply with the Mineral Leasing Act's 30-day deadline for action on an APD in some areas of the country.

20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

- The BLM Field Office in the Permian Basin has a unique tool under the Permian Basin Programmatic Agreement. This tool was developed with Federal funding and is valuable when the archeological sites in the area are similar and there is a high concentration of projects. This tool should be examined for broader use as it can streamline the process.

GPA Midstream appreciates the opportunity to submit comments on this important issue. If you have any questions, please contact Matthew Hite.

Sincerely,

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association