November 22, 2021

Via e-filing on www.regulations.gov

Council on Environmental Quality
Attention: Docket ID No. CEQ-2021-002
730 Jackson Place, NW
Washington, DC 20503

Re: Comments on National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021)

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 revise the regulations implementing the National Environmental Policy Act ("NEPA"), 86 Fed. Reg. 55,757 (Oct. 7, 2021) (the "Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921 and has nearly 60 corporate members that directly employ more than 56,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover close to 90% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2017–2019 period, GPA Midstream members spent over $50 billion in capital improvements to serve the country's needs for reliable and affordable energy.

Summary

GPA Midstream asks CEQ to reconsider two aspects of its overall approach.

- First, GPA Midstream urges CEQ to use this opportunity to continue longstanding efforts to reform NEPA by reducing the time required to complete NEPA reviews, as well as their cost, complexity, and penchant for litigation.
- Second, CEQ should reaffirm that NEPA's role is to provide relevant information to inform the public and agency decisionmakers, but not to support a particular outcome in order to advance a policy preference.

As for the specific proposals, we likewise urge CEQ to reconsider its direction.

- Purpose and Need – We urge CEQ to retain the reforms included in the 2020 NEPA Regulations, 85 Fed. Reg. 43,304 (July 16, 2020), as those improvements matched the longstanding and straightforward interpretations of this key phrase by a majority of courts. The Proposed Rule risks injecting subjective factors into formulating the Purpose and Need, which we submit would be unprecedented, be contrary to NEPA's purpose, and risk politicizing NEPA reviews.

- The original language – We must disagree with the claim that the Proposed Rule is merely restoring language from the 1978 NEPA Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978), allowing each agency to adopt their own substantive NEPA regulations. As written, the Proposed Rule actually would make a significant change to the longstanding approach towards agency implementing regulations – and the actual regulatory language proposed is very different than the 1978 Regulation.

- New definition of "effects" – A significant change in policy such as this requires a sound basis, but CEQ has not provided the necessary justification in the Proposed Rule. The proposal cites non-record statements by unidentified parties, comments on the 2020 NEPA Regulations that CEQ itself had previously rebutted, and certain hypotheticals, which are thus not grounded in fact. CEQ should not proceed with this change based on this record – and if new information is provided, that the public be afforded an opportunity to respond.

I. The Need for NEPA Reform

The need for NEPA Reform is well documented, including by CEQ itself. The Proposed Rule's approach to NEPA, however, goes in a direction that would not address the known problems with the program. We urge CEQ to reconsider this approach.

The need to reform NEPA by streamlining its process has long been recognized on a bipartisan basis. CEQ has documented these problems in its own reviews.[1] Other government agencies have consistently released similar reports.[2] Likewise, Congress has long been frustrated with the delays, costs, and litigation inherent in NEPA implementation, resulting in the bipartisan Fixing America's Surface Transportation ("FAST") Act of 2015, Pub. L. No. 114-94, 42 U.S.C. §

[1] *See*, *e.g.*, CEQ, The National Environmental Policy Act, A Study of Its Effectiveness After Twenty-five Years (Jan. 1997) at 7 (NEPA reviews take too long and cost too much); *id.* at 35 ("Substantial opportunities exist to improve the effectiveness and efficiency of the NEPA process. With this Study in hand, CEQ is embarking on a major effort to reinvent the NEPA process."); CEQ NEPA Task Force, Modernizing NEPA Implementation (Sept. 2003) at xvi (federal agencies surveyed raised issues including "strict enforcement of page limits for EAs and EISs, and a requirement that agencies submit annual progress reports about their ability to achieve NEPA-process improvements."); *id.* at 78 ("A generic term, 'analysis paralysis,' was used to express frustration with what are perceived by some as inordinate and excessive procedural requirements imposed under NEPA.").

[2] *See*, *e.g.*, CRS, Background on NEPA Implementation for Highway Projects: Streamlining the Process, RL32024 (Aug. 6, 2003) (discussing studies of NEPA delays and their causes); CRS, The National Environmental Policy Act: Streamlining NEPA, RL33267 (Dec. 6, 2007) at 10-22 (describing numerous administrative and legislative attempts to streamline NEPA compliance or exclude certain activities altogether); CRS, The National Environmental Policy Act (NEPA): Background and Implementation, RL33152 (Jan. 10, 2011) at 26-31 (discussing NEPA delays through process and litigation as well as various efforts to streamline NEPA); GAO, National Environmental Policy Act, Little Information Exists on NEPA Analyses, GAO-14-370 (Apr. 2014) (attempting to assess extent of NEPA delays based on available information).

4370m, *et seq.* The FAST Act attempted to fix at least some portion of NEPA's shortcomings but it was not unique. Numerous statutes have exempted certain actions from NEPA or limited its application. CRS Report, Statutory Modifications of the Application of NEPA, Report 98-417 A (May 1, 1998). CEQ acknowledged these efforts in crafting the 2020 NEPA Regulations. *See generally* 85 Fed. Reg. at 1,688-1,690 (summarizing various legislative initiatives and executive orders).

The Proposed Rule correctly notes Congress' overwhelming agreement in passing NEPA. 86 Fed. Reg. at 55,757. However, what Congress agreed upon was a brief law that had five sections of instructions for federal agencies to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(B). CEQ issued regulations in 1978 that provided limited direction to agencies, given the wide array of projects and potential environmental impacts requiring a NEPA review. Without clear, prescriptive regulations, courts created new requirements. NEPA is now extremely complex with a body of federal common law governing agency obligations. This means that most law controlling NEPA analyses is not in the statute or regulations, 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 judges.

Over time, as judicial decisions expanded an agency's NEPA obligations, agencies sought to mitigate uncertainty and litigation risk through longer, more technically complex, and more costly reviews. In its 1981 interpretation of the 1978 Regulations, CEQ advised that an Environmental Assessment ("EA") should be no "more than approximately 10-15 pages." CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (Mar 23, 1981, rev'd 1986) at Q. 36a. The 1978 Regulations established that an Environmental Impact Statement ("EIS") "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." 40 C.F.R. § 1502.7 (1978).

However, as courts have required more detailed analyses, NEPA reviews have far exceeded that. For even simple projects, NEPA reviews take years and span hundreds of pages, even for an EA. An EIS includes many more pages of highly technical documentation. CEQ's own review acknowledged this problem. Its June 12, 2020 review of 656 draft and final EISs from 2013 through 2018 found that the average length was 661 pages, with one quarter being 748 pages or more. CEQ, Length of Environmental Impact Statements (2013-2018) (June 12, 2020) at 1. CEQ also found that the average time to complete an EIS – from the time of the Notice of Intent to the Record of Decision – was four and a half years, with 25% taking more than six years. CEQ, Environmental Impact Statement Timelines (2010-2018) (June 12, 2020) at 1. This was in addition to the significant preparatory work before the Notice of Intent, where an applicant supplies "considerable environmental information or … obtain[s] other agency approvals before formally starting the EIS process." *Id.* at 2.

Accordingly, reducing NEPA's delays and costs should continue to be CEQ's top priority, as it has been for four decades. The 2020 NEPA Regulations properly pursued this priority. Citing "the NEPA regulations' explicit direction with respect to reducing paperwork and delays," CEQ sought to "modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely." 85 Fed. Reg. at 43,313. NEPA's unnecessary burdens and costs are a frequent source of frustration for GPA Midstream's members as they waste private and public resources and impede projects, along with the associated economic development

and jobs. While large companies and well-funded advocacy groups have the resources to review and digest hundreds of pages of highly technical information, small businesses, like some of GPA Midstream's members, are at a significant disadvantage.

In 2020, CEQ revised the NEPA regulations for the first time in four decades in order to address these problems. Hence, GPA Midstream is discouraged by CEQ's proposal to "generally restore" the 1978 Regulations, which had resulted in the well-documented problems that demanded reform. 86 Fed. Reg. at 55,757. In fact, the Proposed Rule would encourage agencies to adopt even more exacting rules than CEQ's 1978 Regulations. *See* 86 Fed. Reg. at 55,761 (suggesting "additional procedures or requirements beyond those outlined in CEQ's NEPA regulations" and provides as an example "requiring multiple alternatives or documentation of alternatives considered by dismissed" and public hearings for EAs). *Id.* Thus, the Proposed Rule is not merely silent on the need for NEPA reform, but rejects the concept entirely. CEQ does not acknowledge or explain why it has abandoned its decades-long recognition that reform is needed.

We urge CEQ to rethink this approach – and focus revisions on the need to streamline NEPA processes in order to reduce time, paperwork, and costs.

II. CEQ Should Reaffirm that NEPA is a Procedural Statute to Inform Decisionmakers and Not a Tool to Advance Government Policies

Language in the Proposed Rule's preamble appears to depart from the longstanding interpretation by CEQ and courts that NEPA is a procedural statute to provide information regarding considered agency actions. "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." *Id.* at 351 (footnote omitted). It does not allow agencies to pick and choose what projects proceed based on policy goals or priorities.

Yet, the primary rationale CEQ provides for its proposed revisions is that the existing regulations may not "be compatible with the Administration's policies to improve public health, protect the environment, prioritize environmental justice, provide access to clean air and water, and reduce greenhouse gas emissions that contribute to climate change." 86 Fed. Reg. at 55,759. Thus, CEQ states that agencies must generate information on cumulative greenhouse gas emissions so that "an agency decision maker might select the no action alternative, as opposed to a fossil fuel leasing alternative, on the basis that it best aligns with the agency's statutory authorities and policies with respect to greenhouse gas emission mitigation." *Id.* Although there are many avenues for an administration to pursue its preferred policies, NEPA is not one of them. NEPA merely informs, and thus, it is neutral towards the development of any particular type of proposed project.

GPA Midstream would urge CEQ to reconsider this radical change in how CEQ interprets the substance and policy of NEPA; one that CEQ does not explicitly acknowledge or support with reasoned analysis. Where an agency changes its position, the Administrative Procedure Act requires an agency to "display awareness that it *is* changing position" and "provide [a] reasoned explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Proposed Rule does neither. CEQ should reaffirm that NEPA is, in fact, a procedural, informative

statute that is neutral towards development and disclaim the statute as a tool for implementing a particular Administration's policy priorities.

III. CEQ Should Retain the Changes Made in 2020 Regarding "Purpose and Need."

GPA Midstream urges CEQ to retain the sound revisions made in explaining the "purpose and need" under NEPA. In 2020, CEQ correctly clarified that agencies are, in fact, "responding" to a project sponsor's application for a federal permit, license, or authorization and a NEPA review is only being performed because of the project sponsor's application. 85 Fed. Reg. at 43,330. The revision properly emphasized that "Agencies are not required to give detailed consideration to alternatives that are unlikely to be implemented because they are infeasible, ineffective, or inconsistent with the purpose and need for agency action." *Id.* at 43,351. This clarification aligned 40 C.F.R. § 1502.13 with the majority of courts to consider this issue.

In contrast, CEQ proposes to interpret "Purpose and Need," for the first time, to give little weight to an applicant's goals. The Proposed Rule attempts to justify this change by asserting the 2020 NEPA Regulations "could be construed to require agencies to prioritize the applicant's goals over other relevant factors, including the public interest." 86 Fed. Reg. at 55,760. There is no support offered for this assertion. The 1978 Regulations did not direct agencies to consider the "the public interest" or other abstract concepts CEQ has listed in the preamble, such as "desired conditions on the landscape" or "local economic needs." 86 Fed. Reg. at 55,760. *See* 40 C.F.R. § 1502.13 (1978) ("The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."). CEQ should decline to finalize the Proposed Rule.

A. The "Purpose and Need" for a NEPA Review is Driven by the Applicant's Goals

Where an agency performs a NEPA review for a project sponsor's application for a federal license, permit, or authorization, it is axiomatic that the "purpose and need" for that NEPA review is the project sponsor's application. That is clear in NEPA – and has long been CEQ policy. As the 1978 Regulations state, the agency is *responding* to the project sponsor's application, without which there would be no NEPA review. CEQ reaffirmed this in its Response to Comment document for the 2020 NEPA Regulations.[3] Declining to understand this can result in the agency and applicant exploring alternatives to the proposed action that the applicant cannot implement or the agency cannot authorize. Where a midstream company, for instance, seeks a right-of-way across federal lands for gas gathering lines, the action agency can propose and analyze alternate routes that may have less environmental impact. However, defining the purpose and need statement abstractly to include wind turbines, solar plants, and energy efficiency programs as alternatives to providing natural gas would be a waste of time and resources. The applicant is not seeking to implement such projects and could not implement them if they were selected. Thus, a purpose and need statement, and selection of alternatives, that is not driven by the applicant's goals is merely another version of the No Action Alternative.

[3] See CEQ-2019-0003-72069 (June 30, 2020) ("RTC") at 254 ("If it were not for the proposed project and agency authority to consider the proposal, there would be no permit application and no need for NEPA review in the first place.") (citing cases).

In response to public comment, CEQ reaffirmed this core element of NEPA by clarifying its rules in the 2020 Regulations. This was not a change in interpretation. 85 Fed. Reg. at 1,701. Federal agencies were formulating the purpose and need statement, and selecting alternatives, to be consistent with an applicant's goals for years under the 1978 Regulations. However, CEQ recognized the clarification was required, as opponents to projects were demanding analysis of alternatives that project applicants were not seeking to build, *i.e.*, several different versions of the No Action Alternative.[4] Analyzing such alternatives is a tremendous waste of resources for both the applicant and the agency, as the applicant had no intention of pursuing these alternatives – and had not reduced litigation.

Moreover, CEQ's 2020 revision fit squarely within the established judicial precedent, as courts have warned against defining a purpose and need to include alternatives that differ from the applicant's goal. The Supreme Court has long held that "NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when … the alternatives are deemed to be only remote and speculative possibilities…." Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 551 (1978) (quoting Nat'l Res. Def. Council v. Morton, 458 F.2d 827, 837-38 (1972)).

The Proposed Rule erroneously argues *Citizens Against Burlington, Inc. v. Busey IV*, 938 F.2d 190 (D.C. Cir. 1991) rejected such an approach. 86 Fed. Reg. at 55,760. In fact, *Busey* explicitly endorsed the longstanding approach to NEPA affirmed by 2020 NEPA Regulations. "NEPA plainly refers to alternatives to the 'major Federal actions significantly affecting the quality of the environment,' *and not to alternatives to the applicant's proposal*." 938 F.2d at 199 (quoting 42 U.S.C. § 4332(2)(C)) (emphasis added). "An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goal of its proposed action. *Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be*." *Id.* (emphasis added). This admonition is in line

[4] *See*, *e.g.*, *Environ. Law & Policy Ctr. v. U.S. Nuclear Reg. Comm'n*, 470 F.3d 676, 679-80 (7th Cir. 2006) (for an application to construct a nuclear plant to generate baseload power, opponents demanded analysis of alternatives that included "wind power coupled with energy storage mechanisms, solar power coupled with energy storage mechanisms, fuel cells, geothermal power, hydropower, burning wood waste or other biomass, burning municipal solid waste, burning energy crops, oil-fired plants, coal-fired plants, and natural gas-fired plants"); *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 agency consider the installation of rooftop solar panels as an alternative); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, (10th Cir. 2002) (highway opponents demanded analysis of light rail, commuter rail, and "alternative land use" to reduce travel demand).

with the majority of court decisions. [5] By contrast, CEQ's apparent change in interpretation is aligned with only one court – and has been criticized by others.[6]

Moreover, CEQ now reverses its position without explaining why it has suddenly reversed its long-held position clarified again in 2020 or what new evidence initiated this reversal. Without such an explanation, finalizing the Proposed Rule would be arbitrary and capricious. *See*, *e.g.*, *Fox Television Stations, Inc.*, 129 S. Ct. at 1811.

B. CEQ Should Confirm that it is not Interpreting the Purpose and Need to Incorporate a New "Public Interest" Factor or Other Factors

CEQ should confirm that its proposed revisions would not expand the purpose and need to include new criteria not previously authorized by NEPA or its regulations. The Proposed Rule preamble states that the existing definition of "Purpose and Need" "could be construed to require agencies to prioritize the applicant's goals over other relevant factors, including the public interest." 86 Fed. Reg. at 55,760. Nothing in NEPA, the 1978 Regulations, CEQ guidance documents, or case law directs an agency to consider "the public interest" in determining the purpose and need for a NEPA review. Nor do any of these authorities indicate that some set of "other relevant factors" aid in defining the purpose and need.

Considering these "other factors" would be a new and dramatically different interpretation of the purpose and need requirement. Adding an ambiguous public interest requirement would open the door to transforming NEPA into a substantive statute, instead of one that is merely informational and procedural. Nothing in NEPA countenances that - and including such an interpretation would have predictable results. For instance, one administration may interpret NEPA as finding that all fossil fuel-related projects would be against the public interest while a succeeding administration could provide the same treatment to proposed wind and solar projects. Congress provided no authority to make that type of public interest determination under NEPA.

CEQ also appears to interpret the purpose and need statement to also consider various "other relevant factors," including but not limited to "desired conditions on the landscape or other environmental outcomes, and local economic needs." 86 Fed. Reg. at 55,760. CEQ provides no legal bases for any of these additional factors or an explanation of how an agency might incorporate them into a purpose and need statement. And to the extent there are additional

[5] *See*, *e.g.*, *Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) ("it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."); *City of Bridgeton v. FAA*, 212 F.3d 448, 456 (8th Cir. 2000) ("An alternative that does not accomplish the purpose of the project in question is *un*reasonable and does not require detailed attention in the [Final] EIS."); *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989) (agency cannot reject the purpose of private party's application as defined by the applicant); *Citizens Comm. v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) ("Where the action subject to NEPA review is triggered by a proposal from a private party, it is appropriate to give substantial weight to the goals and objectives of that private actor."); *Florida Clean Water Network, Inc. v. Grosskuger*, 587 F. Supp. 2d 1236, 1247 (M.D. Fla. 2008) (agency need only determine whether applicant's goals are "legitimate" in determining purpose and need).

[6] *Compare Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) *with Busey*, 938 F.2d at 198-99 (rejecting *Van Abbema*); *Colorado Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999) (same).

"relevant factors" it believes agencies should consider, CEQ should name and describe them explicitly as well as identify the bases for those factors in the statute and case law.

Requiring, or even allowing, agencies to incorporate a non-exhaustive list of "relevant factors" would be unprecedented and a dramatic departure from past practices. We urge CEQ confirm that is not its intent. If CEQ proceeds with this change, then, under settled law, *e.g., Fox Television, supra,* CEQ must acknowledge it, provide a reasoned analysis to support it, and allow the public to comment on the bases asserted by CEQ before finalizing any change.

C. CEQ Provides no Basis for its Claims of Confusion

CEQ speculates that the 2020 NEPA Regulations' revisions to the purpose and need regulation must be revised because "an applicant's goals themselves could be potentially confusing or unduly narrow or restrictive." 86 Fed. Reg. at 55,760. No evidence or elaboration is provided for this claim and, based on CEQ's response to comments document for the 2020 NEPA Regulations, no commenter made this assertion. Importantly, CEQ provides no examples of this issue arising in actual NEPA reviews despite the fact that, based on EPA's database,[7] federal agencies have issued 239 draft and final EISs since the 2020 NEPA Regulations became effective. Even if CEQ provided examples of where an individual applicant's goals be "potentially confusing or unduly narrow or restrictive," it would be expected that the lead agency would work with the applicant to obtain clarification. Thus, the hypothetical potential for confusion from individual applicants – absent any actual evidence that this is a widespread, real-life problem – cannot justify CEQ's new interpretation of the purpose and need requirements. Nor is there an explanation as to how reverting to the 1978 regulatory language would solve this hypothetical problem. As noted above, agencies have looked to the applicant's goals to define the purpose and need for decades and this approach has been endorsed by the majority of courts to consider it.

IV. CEQ Should Not Encourage Variations in Agency NEPA Regulations From CEQ's Regulations, Which Will Cause Further Confusion

The Proposed Rule proposes to clarify 40 C.F.R. § 1507.3 to require individual agency NEPA regulations be consistent with CEQ regulations, while simultaneously affording agencies the "discretion and flexibility to develop procedures beyond the CEQ regulatory requirements…." 86 Fed. Reg. at 55,761. The Proposed Rule describes this change as making CEQ's regulations a "floor for environmental review procedures." *Id*. This, too, is a significant change to past practices that goes beyond restoring the 1978 Regulations. Further, CEQ does not explain why this change would be beneficial – and GPA Midstream submits that this change could result in more confusion. Encouraging agencies to expand their own application of NEPA requirements could result in a patchwork of different procedures, definitions, and requirements, varying from agency to agency, resulting in potentially inconsistent agency and judicial interpretations of NEPA. We urge CEQ to reconsider this proposed approach.

A. Agencies Already Had Appropriately Limited Authority to Develop Their Own NEPA Regulations Under the 2020 and 1978 NEPA Regulations

[7] *Available at*, https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.

CEQ should not finalize this proposed change, as the basis for making these revisions is not well-founded. The Proposed Rule argues a revision is needed because the 2020 NEPA Regulations set "a ceiling for agency procedures which departed from CEQ's and Federal agencies' prior understanding and practice." 86 Fed. Reg. at 55,761. However, this contention is not supported by either the 2020 NEPA Regulations or the 1978 Regulations. As adjusted in 2020, the rules allow an agency's own NEPA procedures to differ from CEQ regulations when "there is a clear and fundamental conflict with the requirements of another statute. 40 C.F.R. § 1507.3(a). Further, agencies may adopt "as necessary, agency NEPA procedures to improve agency efficiency…." *Id.* This appropriately confined flexibility afforded to agencies, while also making it clear the 2020 revisions did not impose a ceiling on agencies.

Further, the 1978 Regulations likewise provided agencies with flexibility in adopting their own NEPA rules, subject to appropriate limitations. Agencies could "as necessary adopt procedures to supplement these regulations" but those regulations "shall confine themselves to implementing procedures," not new substantive requirements. 40 C.F.R. § 1507.3(a) (1978).[8] Thus, under the 1978 Regulations, agencies did not have the "discretion and flexibility to develop procedures beyond the CEQ regulatory requirements" or to develop new substantive requirements to "promote better decisions, improve environmental or community outcomes, or spur innovations," as the Proposed Rule claims. 86 Fed. Reg. at 55,761. Agencies were limited to "implementing procedures" under the 1978 Regulations' § 1507.3(a), consistent with CEQ's own NEPA regulations.

Moreover, CEQ has not proffered any actual instance of any agency that developed or sought to use "additional procedures or requirements beyond those outlined in CEQ's NEPA regulations." 86 Fed. Reg. at 55,761. Instead, the Proposed Rule suggests, as an example, that the National Oceanic and Atmospheric Administration ("NOAA") "might adopt agency-specific procedures on the analysis of impacts to species or habitats protected." *Id.* But it is difficult to see how that hypothetical supports the proposed change. If the pre-2020 rules had allowed that type of expanded approach, then NOAA had four decades to have developed such regulations.

B. <u>The Proposed Revisions to Sections 1507.3(a) and (b) Do Not Conform to the 1978 Regulations and Remove Key Elements That Should Be Retained</u>

We further urge CEQ not to proceed with proposed revisions to §§ 1507.3(a)-(b), because CEQ's explanation of what the proposed revisions to § 1507.3 would do does not conform with its proposed regulatory changes. For one, contrary to the preamble's claim, the proposed revisions to § 1507.3 do not "restore" the 1978 Regulations' version of § 1507.3. The proposed regulatory text and 1978 versions of § 1507.3 are very different. Second, the language of the revision itself does not explain any of the "discretion and flexibility" for agencies that the preamble claims. Nor does

[8] *See also id.* § 1507.3(d) (1978) (allowing for different periods of time for issuance of a Record of Decision "when necessary to comply with other specific statutory requirements"). Further the 1978 Regulations stated that "[a]gency procedures <u>shall comply</u> with these regulations except where compliance would be inconsistent with statutory requirements," *id.* § 1507.3(b) (1978), a command very similar to that in the current regulation. *See also* Exec. Order 11,991, 42 Fed. Reg. 26,967 (May 25, 1977) (agency implementation procedures shall "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.").

it require CEQ review of new agency NEPA regulations, as claimed in the preamble. 86 Fed. Reg. at 55,761.

Simply comparing the proposed revisions to § 1507.3(a) and (b) and the text of the 1978 Regulations demonstrates that the Proposed Rule will not merely "restore provisions addressing … agency NEPA procedures for implementing CEQ's NEPA regulations." 86 Fed. Reg. at 55,757. See Attachment 1. Moreover, the differences between the proposed § 1507.3 and the 1978 version of § 1507.3 raise significant issues.

Proposed § 1507.3(b) is most notable for what it omits when compared to the 1978 and 2020 versions of that subsection. It does not contain any language providing the "discretion and flexibility" for agencies "to develop procedure beyond the CEQ regulatory requirements" as the preamble claims. 86 Fed. Reg. at 55,761. Nor would any natural reading of the proposed language indicate that CEQ intends its regulations to merely "provide a floor for environmental review procedures." *Id.* Making CEQ's regulations a "floor" would be a dramatic change to NEPA procedures and practices – and one that should not be proposed only in preamble language.

In addition, there is no language in the proposed revision to § 1507.3 that requires agency procedures to be consistent with CEQ regulations, as required in both the 1978 Regulations and the 2020 NEPA Regulations. The preamble states that "agency procedures need to be consistent with the CEQ regulations," 86 Fed. Reg. at 55,761, but there is no actual requirement for consistency in the proposed regulatory language.

CEQ should retain the current version of 40 C.F.R. § 1507.3. As proposed, CEQ's revisions would omit key requirements that have been maintained since 1978 and are necessary to promote consistency and fidelity to both the statute and CEQ's own regulations, while affording appropriate flexibility in limited circumstances. Further, CEQ should decline its apparent approach of saying little in the actual regulation itself while reading in various "interpretations" that are either absent from the regulatory text or contradicted by it.

C. CEQ Should Revisit its Proposal as Revising § 1507.3 May Encourage a Disparate Patchwork of Agency NEPA Regulations, Which Will Add to the Complexity of the NEPA Process

CEQ's proposal to allow for "additional procedures or requirements beyond those outlined in CEQ's NEPA regulations," 86 Fed. Reg. at 55,761, will only lead to confusion. The Proposed Rule claims that its proposed revisions align "with CEQ's extensive experience implementing NEPA," "longstanding Federal agency experience and practice," "and case law interpreting NEPA's requirements." *Id.* at 55,757. Allowing for each agency to implement new and different regulations is not only inconsistent with CEQ's experience, longstanding practice, and the large body of interpretative case law, but will lead to significant confusion. Without the need for consistency, each agency will be free to craft completely new and different NEPA regulations, which will lead to lawsuits with completely new and different claims, and court rulings laying down new and different rules. Nothing in NEPA, or in CEQ's prior interpretations of that statute, has ever countenanced one set of regulations for the U.S. Army Corps of Engineers and another for the U.S. Bureau of Land Management – each with somewhat different definitions, procedures, or interpretations.

Differing agency NEPA regulations clearly creates potential conflicts when multiple agencies cooperate together on NEPA reviews. CEQ should consider the potential for such conflicts and the likely results: delays, additional or duplicative demands for information from the project applicant, more complex NEPA reviews, and increased litigation risk. Allowing for a disparate patchwork of agency regulations runs counter to the many calls from both project applicants and federal agencies to streamline and simplify NEPA processes.

D. The Proposed Rule Has Not Provided a Legitimate Reason to Allow Broad Variation Among Agency NEPA Regulations

CEQ should likewise reconsider this proposal, because it lacks a demonstrable foundation for making the change. There is, for example, no data or other evidence demonstrating that such revisions to the regulations are needed. As noted above, CEQ offers only a generalized hypothetical about how an agency "might adopt agency-specific procedures," 86 Fed. Reg. at 55,761, but there is no indication that any specific changes contemplated by an agency would be prohibited by the current regulations.[9]

CEQ does state that it "has heard from" unidentified "Federal agencies that the ceiling provisions have created confusion as to whether agencies can continue to carry out their agency-specific procedures or adopt new procedures to implement NEPA for their programs and authorities." *Id.* However, CEQ has not provided support in the record for this hearsay, such as actual evidence of confusion at agencies or the specific agency procedures that have been impacted or would be implemented, but for the language in the 2020 regulations. Such marked change to how NEPA has been implemented by agencies needs to be based on the record so stakeholders will have an opportunity to comment meaningfully.

CEQ also points generally to comments on the 2020 NEPA Regulations that CEQ previously considered and responded to in its response to comments document. CEQ now states it is convinced that claims from (unidentified) commenters have merit – that the 2020 NEPA Regulations were not adequately justified, that they could "preclude[e] an agency from applying its expertise," that they "could interfere with state and Federal collaboration," or that current regulations "would create greater complexity and uncertainty for applicants and potentially additional delays and paperwork." 86 Fed. Reg. at 55,762. However, these conclusory statements do not explain why CEQ has changed its mind and does not provide any concrete examples of these purported problems. The 2020 NEPA Regulations have been effective for over a year and agencies have produced over 200 draft and final EISs, but CEQ has not identified any concrete instance where these concerns with the changes have actually materialized.

In implementing this change to NEPA implementation, CEQ must (1) "display awareness that it *is* changing position," and (2) "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, (2012). With respect to the latter requirement, CEQ must at least "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Yet, here, CEQ has not acknowledged any change in position – and

[9] As noted above, the 2020 NEPA Regulations already allow agency-specific regulations where required by statute or if those regulations may increase efficiency.

has not offered a reasoned explanation for the change. The proposed revision to § 1507.3 is a solution in search of a problem and is not justified in the rulemaking record to date.

V. CEQ Should Decline to Revise the Definition of "Effects"

We likewise urge CEQ not to rescind its 2020 changes clarifying the definition of "effects" (found at 40 C.F.R. § 1508.1(g)). CEQ prudently adopted the changes last year to bring greater clarity to the scope of NEPA decision making - and CEQ offers no reasoned basis for its reversal of position.

CEQ states that restoring an expansive and confusing definition of "effects" "provides for more sound decision making, including decisions informed by science, and a more knowledgeable and engaged public than the definition of 'effects' in the 2020 NEPA Regulations." 86 Fed. Reg. at 55,765. CEQ also claims that the 2020 NEPA Regulation's definition of "effects" is confusing, asserts that restoring the older definition "would better align with the statutory text," and rejects CEQ's earlier reliance on Supreme Court case law in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). 86 Fed. Reg. at 55,766 ("establishing a regulatory limitation on the scope of NEPA analysis [sic] drawn from *Public Citizen* does not lead to improved agency decision making, enhanced public participation, or a better-informed public.").

However, CEQ provides no evidence or explanation in support of its claims, does not refute its own rationale provided in the 2020 NEPA Regulations, and offers only undocumented claims from unidentified "NEPA practitioners and outside stakeholders" and unidentified commenters on the 2020 NEPA Regulations (which CEQ previously responded to and rejected), 86 Fed. Reg. at 55,766, as the basis for its proposal. Thus, the Proposed Rule lacks the necessary "reasoned interpretation to change course" under the Administrative Procedure Act. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Svcs..*, 545 U.S. 967, 1001 (2005).

A. The Proposed Rule Does Not Address the Rationale CEQ Provided in Support of the 2020 NEPA Regulations

CEQ previously determined that broad effects analyses have a history of creating confusion, being subject to overexpansive interpretations, are frequently the subject of litigation, require excessive documentation of speculative and contingent effects, and take the focus away from more closely related environmental effects. 85 Fed. Reg. at 1,707; 86 Fed. Reg. at 43,343-44. Further, CEQ found that attempts at resolving these problems through guidance have failed, that using a proximate cause standard, as outlined in *Public Citizen*, provides a clearer definition of what effects must be evaluated under NEPA, and that nothing in the statute requires a broad effects analysis. 86 Fed. Reg. at 43,344; RTC at 464-68.

Because CEQ does not now directly dispute any of these determinations it made in 2020, CEQ should not proceed with these changes. It is settled law that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). That "reasoned analysis" must include an explanation for the agency "disregarding facts and circumstances that underlay" the prior interpretation or policy. *Fox Television Stations*, 129 S. Ct. at 1811 ("It would be arbitrary or capricious to ignore such matters."). Yet, the Proposed Rule does not address CEQ's

prior determinations and reasoning. CEQ does not now dispute that broad effects analyses caused confusion and were frequent causes of litigation. That such broad effects analyses have long been part of NEPA reviews, 86 Fed. Reg. at 55,764-65, is not a credible response to CEQ's prior determination that broad effects analyses have long been part *of the problem* with NEPA.

Further, referencing off-the-record discussions with unidentified "NEPA practitioners and outside stakeholders" and unidentified comments on the 2020 NEPA Regulations, 86 Fed. Reg. at 55,766, likewise does not provide a valid "reasoned analysis" for the proposed change. Stakeholders may meet with executive agencies, including CEQ, to advocate for positions provided in comments, but unless those explanations are recorded or otherwise memorialized they are not part of the administrative record. An agency's explanation for its decision can only be sustained on the administrative record. *E.g., Vermont Yankee Nuc. Power Corp.*, 435 U.S. at 549. Hence, CEQ statements that unidentified parties made claims of confusion or generally opposed the 2020 NEPA Regulations is not something on which an agency can rely for a rulemaking.

Moreover, CEQ's appeal to the opinions of "[n]umerous commenters" on the 2020 NEPA Regulations similarly cannot sustain its change of position. Those comments were previously considered and rebutted in CEQ's Response to Comments document. *See generally* RTC at 463-79. CEQ's generic assertion that it has reversed its position on how it views those comments is insufficient. If CEQ wishes to change its view, it must explain why it was not convinced by those comments one year ago but now finds them persuasive.

B. The 2020 NEPA Regulation's Change of Scope Was Well Grounded in Case Law

By contrast, the 2020 revisions were well founded, as CEQ clarified the definition of "effects" to be consistent with Supreme Court decisions and other case law. Specifically, as CEQ explained in detail, in its proposed rule, final rule, and response to comments document, it used a proximate cause standard to "provide clarity on the bounds of effects consistent with the Supreme Court's holding in *Department of Transportation v. Public Citizen*, 541 U.S. [752,] 767-68 [(2004)]." 85 Fed. Reg. at 1,708.[10] CEQ also found legal support for its change to the scope of the effects analysis in *Metropolitan Edison Co.*, 460 U.S. 766, 776 (1983). *See* 85 Fed. Reg. at 1,708; 86 Fed. Reg. at 43,343.

The Proposed Rule, however, does not confront its past reasoning. Instead, it states that *Public Citizen* does not *prohibit* a broader review of effects than required by NEPA because that decision also mentioned the longstanding "rule of reason" agencies use in preparing an EIS. 86 Fed. Reg. at 55,766. This thin reed cannot support the weight of CEQ's reversal of the 2020 revisions. The Court was quite clear: "NEPA *requires* 'a reasonably close causal relationship' between the environmental effect and the alleged cause. The Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)) (emphasis added). It is difficult to find a less equivocal statement on what NEPA "requires" with respect to the scope of an effects review. The Court's subsequent statement that agencies use a "rule of reason" to "determine

[10] *See also* 85 Fed. Reg. 43,344 (final rule will "codify a key holding of *Public Citizen* relating to the definition of effects…."); RTC at 479 ("Under the final rule, any effect that is reasonably foreseeable and has a reasonably close causal relationship to the proposed action must be disclosed and considered. The final rule follows the Supreme Court's holding in *Public Citizen*, 541 U.S. at 767-68.").

whether and to what extent *to prepare an EIS* based on the usefulness of any new potential information to the decisionmaking process" does not undermine the Court's *required* limit on the scope of effects to be analyzed once an agency elects to proceed with an EIS. *Id.* (emphasis added).

The Proposed Rule otherwise appears to reject *Public Citizen* altogether: "It is CEQ's view that establishing a regulatory limitation on the scope of NEPA analysis [sic] drawn from *Public Citizen* does not lead to improved decision making, enhanced public participation, or a better informed public." 86 Fed. Reg. at 55,766. The 2020 NEPA Regulations relied heavily on *Public Citizen*. CEQ's proposal to reject it now is not adequately explained in the Proposed Rule. It not sufficient for CEQ to cite to the complaints of unidentified "NEPA practitioners and outside stakeholders," and various hypotheticals: "the 2020 NEPA Regulations *could* undermine longstanding agency discretion … or result in agencies making less informed decisions," they "*could* be confusing to implement and could inappropriately constrain consideration of reasonably foreseeable impacts," or "*could* be used to justify the exclusion of effects of a proposed action." *Id.* (emphases added). CEQ already rejected each of these points in its response to comments. Such a complete reversal of position, including CEQ's rejection of *Public Citizen*, cannot be perched on a pile of hypotheticals. The 2020 NEPA Regulations have been effective for more than a year, yet CEQ failed to identify any actual difficulties in applying the revised definition of "effects." The Proposed Rule's rejection of binding case law, reliance on vague, non-record statements by unidentified parties, and a string of hypotheticals cannot provide the "reasoned analysis" supporting CEQ's dramatic change of position.

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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,

Matt Hite

Vice President of Government Affairs
GPA Midstream Association