



March 10, 2020

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Docket No. CEQ-2019-0003

The Honorable Mary B. Neumayr
Chair
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Proposed Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA), Docket No. CEQ-2019-0003

Dear Chairman Neumayr,

The American Gas Association (AGA) respectfully submits these comments in response to the Council on Environmental Quality's (CEQ) proposed rule, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)", published in the Federal Register on January 10, 2020.¹ In this proposed action, CEQ seeks to update its regulations implementing NEPA for the first time in nearly four decades. AGA appreciates the opportunity to comment on this proposal and supports the balanced approach taken by CEQ to modernize and clarify its NEPA regulations. If implemented, the commonsense amendments offered by CEQ would modernize implementation of NEPA, help facilitate more efficient, effective, and timely environmental reviews by Federal agencies, and advance the important statutory objectives of NEPA, most notably the consideration of the environmental impacts of proposed actions as part of the Federal agency decision making process. AGA has also joined comments filed in this docket by the Unlock American Investment Coalition on March 10, 2020.² These supplemental comments are submitted to highlight specific areas of relevance to AGA and its members.

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 75 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 71 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than 30 percent of the United States' energy needs.

¹ 85 Fed. Reg. 1,684 (Jan. 10, 2020) ("Proposed Rule").

² The Unlock American Investment Coalition includes more than 45 organizations that represent agriculture, energy, construction, forestry, manufacturing, transportation, and other sectors that form the backbone of America's economy. The Coalition fully supports the fundamental goals of NEPA to appropriately consider the potential environmental impacts of federal actions. The Coalition and advocates in support of efforts to modernize the federal environmental review and permitting process under NEPA, with the goal of increasing infrastructure investment in a manner that strengthens our economy and enhances environmental stewardship.

AGA and its members recognize and support the important role that NEPA plays in the federal decision-making process and are strongly committed to being good environmental stewards. We believe that the reasonable, commonsense reforms offered by CEQ in the Proposed Rule will help modernize the federal environmental review and permitting process in a manner that is consistent with the NEPA statute and that appropriately balances infrastructure development and environmental stewardship.

Recognized as the cornerstone of environmental law, NEPA ensures that federal agency decision-makers carefully consider the environmental impacts of “major federal actions.”³ In January 1997 CEQ released *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years* to commemorate 25th anniversary of the act’s passage. In that report, CEQ correctly noted that “NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions. Federal agencies today are better informed about and more responsible for the consequences of their actions than they were before NEPA was passed.”⁴ Notwithstanding these positive benefits, the same study also found that frequently “NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials, particularly senior leadership, is inadequate....Because of this, millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decision-making.”⁵

In the 23 years since CEQ released the NEPA Effectiveness Study, the challenges identified by CEQ – delays, increased cost, and overly technical and complex documents – have become more exacerbated and inefficiencies in the environmental review and permitting process have delayed important infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment.⁶ In 2018, CEQ reviewed 1,161 environmental impact statements (EIS) for which notice of availability was published in the Federal Register between January 1, 2010 and December 31, 2017, and a record of decision (ROD) was issued by June 7, 2018 and assessed the time that elapsed from release of a notice of intent to publication of a ROD. Across all Federal agencies, the average completion time was 4.5 years. Of the 1,161 EISs reviewed, half took longer than 3.5 years to complete and one quarter took more than 6 years to complete.⁷ Although CEQ’s current implementing regulations direct Federal agencies to produce “concise and straightforward environmental analyses” that are not intended to be “encyclopedic” or even in excess of 300 pages,⁸ modern NEPA practice grossly flouts these directives.⁹ NEPA’s statutory purpose to meaningfully inform decision-

³ See, e.g., *Calvert Cliffs’ Coordinating Comm. Inc v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109, 1112 (D.C. Cir. 1971)(“NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. . . . Perhaps the greatest importance of NEPA is to require [agencies] to consider environmental issues just as they *consider* other matters within their mandates.”)(emphasis in original).

⁴ See COUNCIL ON ENVIRONMENTAL QUALITY, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years* (1997), available at <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>

⁵ *Id.* at ix.

⁶ Between 2010 and 2017, the average duration for each federal agency to complete NEPA reviews, from NOI to ROD, ranged from 1.09 to 7.72 years. Across all federal agencies, the average completion time from NOI to ROD was 4.5 years, compared to approximately 3.4 years for the period between 1998 and 2006. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINE (2010-2017) 8-11 (Dec. 14, 2018) 8-11, available at <https://www.whitehouse.gov/wpcontent/uploads/2017/11/CEQ-EIS-Timelines-Report.pdf>.

⁷ See *id.*

⁸ See 40 C.F.R. §§ 1500.4(b). 1502.7. See also 43 Fed. Reg. 55,978, 55983 (Nov. 29, 1978) (“[A] primary objective of the regulations is to insure that these documents are clear, concise, and to the point.”)

⁹ For example, where Federal agencies once produced 50-page environmental impact statements (“EISs”), those

makers is significantly diminished when agencies prepare documents that are unreasonably delayed and unnecessarily voluminous. Not surprisingly, recent presidential administrations – from both political parties – have issued executive orders aimed at attempting to restore order and efficiency to the NEPA process by encouraging federal agencies to implement commonsense reforms that streamline their NEPA reviews.¹⁰

The domestic shale production revolution has resulted in an abundant supply of clean, affordable, domestically produced natural gas. In turn, robust supply coupled with an extensive delivery infrastructure has translated into stable natural gas prices, delivering significant value to the increasing number of utility customers who use this resource in their homes and businesses for heat, hot water, cooking, fireplaces, BBQs, dryers, backup electricity generation and other applications. Natural gas utilities nationwide add, on average, nearly 613,000 customers each year, or one customer every minute. More homes and business in the United States use natural gas today than ever before, and the numbers continue to increase. Alongside this tremendous opportunity and increased use comes the absolute necessity of operating a safe and reliable pipeline infrastructure system to help ensure dependable natural gas delivery. Protracted NEPA reviews for energy infrastructure projects hinders the ability to provide energy to American homes and businesses. Streamlining and clarifying the permitting and environmental review process will help facilitate the environmentally-responsible construction and maintenance of natural gas infrastructure and help AGA members provide timely, safe, reliable and affordable service to the 178 million Americans that enjoy the benefits of natural gas and the millions more that want it, but do not yet have access.

Because AGA members require regulatory certainty to maintain existing infrastructure and to develop new infrastructure, AGA supports CEQ's effort to develop a Proposed Rule that strengthens the role of NEPA in the federal decision making process by building on decades of federal agency experience to better align implementation of NEPA to the goals and objectives of the law. The commonsense reforms offered in the Proposed Rule should help foster a more effective, timely, and transparent process that provides meaningful and pertinent information to both decisionmakers and the public. In fact, many of the changes suggested in the Proposed Rule either codify existing case law and agency best practices or clarify requirements already found in the current CEQ regulations. The Proposed Rule would help streamline and modernize the federal permitting process while advancing the important statutory purpose of NEPA – to meaningfully inform federal agency decisionmakers and the public of the environmental impacts of major federal actions.

AGA commends CEQ for its deliberate approach to this rulemaking. On June 20, 2018, CEQ published an advance notice of proposed rulemaking (ANPRM) seeking public comments on how CEQ could ensure a more efficient, timely, and effective NEPA process consistent with the national environmental policy

same agencies now produce EISs that exceed 10,000 pages. Compare *Life of the Land v. Brinegar*, 485 F.2d 460, 467 (9th Cir. 1973) (upholding a 46-page EIS prepared by the FAA) with the O'Hare Modernization Final Environmental Impact Statement, https://www.faa.gov/airports/airport_development/omp/eis/feis/ (2005 FAA EIS of more than 10,000 pages). Based on recent CEQ data, the average page count, across all Federal agencies, was 669 pages. Of note, one quarter of the EISs reviewed were in excess of 729 pages, excluding appendices. See COUNCIL ON ENVIRONMENTAL QUALITY, LENGTH OF ENVIRONMENTAL IMPACT STATEMENTS (2013-2017), available at https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2019-7-22.pdf.

¹⁰ See, e.g., Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) (Issued by President Trump); Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 30, 2017) (Issued by President Trump); Exec. Order No. 13,604, 77 Fed. Reg. 18,885 (Mar. 22, 2012) (Issued by President Obama); Exec. Order No. 13,274, 67 Fed. Reg. 59,449 (Sept. 18, 2002) (Issued by President George W. Bush).

established in the statute.¹¹ In response to the ANPRM, CEQ received over 12,500 comments from a wide range of stakeholders, including States, Tribes, local governments, environmental organizations, trade associations, and interested members of the public. While the comments varied regarding specific recommendations, most of the substantive comments supported some degree of updating of the current regulations. Not surprisingly, many commenters noted that “overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns despite the NEPA regulations’ explicit direction with respect to reducing paperwork and delays.”¹² On August 20, 2018, AGA and the Interstate Natural Gas Association of America (INGAA) filed joint comments responding to the ANPRM and identified several areas where updates and revisions were most appropriate.¹³

AGA is pleased that many of the suggestions offered in our comments to the ANPRM were incorporated, at least in part, in the Proposed Rule. These include:

- Focusing NEPA Reviews on What Is Meaningful to Agency Decision-Making. NEPA analysis is most meaningful when it informs decision-making within the bounds of the agency’s discretion pursuant to the agency’s action statute (i.e., the statute under which the agency will be making a decision that triggers a NEPA review). The agency’s action statute limits the agency’s discretion and prescribes the criteria that the agency must follow in reaching a decision. For example, the U.S. Army Corps of Engineers typically limits its NEPA reviews to the relevant water crossings when issuing permit approvals for construction activities involving the dredge and fill of wetlands, even if these approvals are part of a larger scale project.¹⁴ This approach has been codified in the Army Corps’ NEPA regulation and upheld by courts¹⁵ and should inform this rulemaking. AGA believes that CEQ’s proposed revision to §1502.13 appropriately tailors the purpose and need of federal action to the agency’s relevant statutory authority and appropriately focus NEPA efforts on what is relevant to their discretionary decision under the controlling action statute. This revision will help facilitate more effective and efficient NEPA review by better aligning the definition of the purpose and need statement with the agency’s action. Similarly, AGA supports CEQ’s proposed revision to §1502.14, which clarifies the scope of the alternatives analysis. NEPA reviews that consider alternatives that do not meet the purpose and need of an action are not meaningful to either agency decision-makers or the public as they may include information that is neither relevant to the decision before the agency nor feasible under the agency’s statutory authority.
- NEPA Reviews Should Focus on Improving Decisions, Not Generating Unnecessary Paperwork. Without appropriate boundaries, NEPA’s procedural obligation for agencies to consider the potential impacts of their decisions can result in a nearly continuous request for information that

¹¹ 83 Fed. Reg. 28,591 (Jun. 20, 2018).

¹² See Proposed Rule at 1,690.

¹³ The AGA-INGAA joint comments on the ANPRM filed on Aug. 20, 2018 may be found here:

<https://www.aga.org/globalassets/research--insights/policy/ingaa-aga-nepa-anpr-comments---8-20-18.pdf>

¹⁴ See 33 C.F.R. § 325 App. B(7)(b)(1) providing that “[i]n some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) *to address the impacts of the specific activity requiring a DA permit* and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.” (emphasis added).

¹⁵ See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 50 (D.C. Cir. 2015)(holding that a proposed pipeline project was not federalized for purposed of NEPA when federal agencies had limited authority with respect to construction).

detracts from the goal of providing agency decisionmakers with analyses that contribute to making reasoned, well-informed decisions. Although CEQ and the courts have attempted to establish these boundaries, agencies are still under significant pressure to provide an ever increasing amount of information on all potential impacts, regardless of significance.¹⁶ AGA supports CEQ's efforts in the Proposed Rule to codify existing practices and to provide agencies additional guidance regarding how to effectively include existing available information in NEPA analyses.¹⁷ CEQ's direction to agencies in the Proposed Rule to "make use of reliable existing data and resources" (e.g., using existing information from prior reviews for similarly situated projects to inform whether additional information-gathering or analysis is warranted) and its clarification that agencies "are not required to undertake new scientific and technical research to inform their analyses" are important steps towards facilitating more efficient, effective, and timely NEPA reviews.¹⁸ Using readily available information from studies, analyses, or research completed for similarly situated projects will not diminish the quality of the environmental review provided to agency decisionmakers. AGA agrees with the Coalition's recommendation that CEQ should include a presumption that analysis of an impact is sufficient for NEPA purposes if analyzed pursuant to a federal statutory scheme designed to regulate that impact, subject to the rule of reason. This would clearly permit, but not require, agencies to rely on existing analyses when it is meaningful to the agency's decision-making. This commonsense change, which builds on existing agency practice and case law¹⁹, should help reduce the amount of time it takes to complete an EIS or EA by reducing the need to conduct duplicative and redundant research during the NEPA process.

- Improving and Enhancing Interagency Coordination. Interstate natural gas pipeline projects are often subject to extensive NEPA review by multiple federal agencies. Ensuring coordinated and streamlined NEPA review across multiple federal agencies is essential to the timely and environmentally responsible development of the infrastructure required to meet the public need for natural gas. AGA strongly supports CEQ's efforts in the Proposed Rule to codify key elements of the One Federal Decision framework detailed in Executive Order 13807.²⁰
- NEPA Reviews and Documents Should Only Be Long Enough to Accomplish Their Purpose. AGA supports CEQ's effort to address the unwieldy length of NEPA documents by establishing

¹⁶ See, e.g., *Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016)(rejecting Plaintiff's argument that the Bureau of Land Management was required to comprehensively analyze the effects of noise on birds at all stages of life); see also *Sierra Club v. United States Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017)(holding that the Department of Energy appropriately "drew the line" when it declined to attempt to quantify impacts on a regional level that would not provide meaningful information about what resources might be impacted, despite Plaintiff's argument that additional, more detailed analysis was required under NEPA).

¹⁷ See 40 C.F.R. §1502.21. See also *Citizens for Smart Growth v. Dep't. of Transportation*, 669 F.3d 1203 (11th Cir. 2012)(holding that local planning documents were properly incorporated into federal agency analysis); *City of Carmel-By-The-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142 (9th Cir. 1997)(holding that indirect effects of a proposed project need not be considered because those effects were incorporated into state and local analyses).

¹⁸ See Proposed Rule, 85 Fed. Reg. at 1721 (Proposed §1502.24).

¹⁹ For example, consider the U.S. Army Corps of Engineers longstanding practice of considering water quality analyses prepared under state review conclusive when reviewing permit applications under its purview. See 33 C.F.R. §320.4(d).

²⁰ In particular, AGA supports CEQ's effort to increase interagency coordination in support of more effective, timely, and predictable NEPA reviews by clarifying the roles of lead and coordinating agencies in the NEPA process and require the development of a joint schedule and identification of specific milestones for environmental reviews to create a more transparent NEPA process that facilitates more effective and efficient NEPA reviews. See Proposed Rule, 85 Fed. Reg. at 1715-16 (Proposed §§1501.7, pertaining to lead agencies, and 1501.8, pertaining to cooperating agencies).

presumptive page limits for EAs and EISs and addressing delays in the NEPA process by establishing presumptive time limits for agencies to complete their NEPA reviews in the Proposed Rule.²¹ CEQ's proposed presumptive page and time limits should foster better decision-making by enabling agencies to prepare NEPA documents that are squarely focused at providing information that is meaningful to the decision at issue. Moreover, this common-sense approach should result in NEPA analyses that are more concise and more accessible by the public, yet still probative of significant issues. These proposed changes should result in a more efficient, transparent, and useful analyses that are consistent with the goals of NEPA.

- Reducing Unnecessary Burdens and Delays.
 - AGA appreciates CEQ's effort to facilitate the use of efficient NEPA reviews, including categorical exclusions. The Proposed Rule includes several important clarifications regarding the application of categorical exclusions, including the ability for federal agencies to mitigate significant impacts and rely on a categorical exclusion.²² This clear, commonsense approach will encourage project applicants to avoid or mitigate impacts and help agencies expedite their NEPA process.
 - Allowing applicants or contractors to assume an increased role in the preparation of EISs under the supervision of a federal agency is a commonsense reform that should help make the NEPA process more efficient without impacting the quality of the analyses in EISs and EAs. This change builds on the longstanding practice of allowing third-party contractors to prepare either an EIS or and EA, under the supervision of the agency, and existing regulatory authority for agencies to allow project applicants to prepare EAs. This noncontroversial change, which requires federal agencies to maintain oversight over and independently review documents prepared by applicants or contractors, should help reduce the time it takes to prepare NEPA documents and allow agencies to focus their limited resources on ensuring that applicable statutory and regulatory requirements are met, rather than spending countless hours preparing what are often highly technical, complex documents. AGA encourages CEQ to clarify in their regulations that agencies may also engage qualified technical consultants to assist in the review of NEPA analyses. This would aid agencies in meeting the timeframes proposed in the Proposed Rule and outlined in the One Federal Decision MOU.
 - AGA also supports the Coalition's recommendation that the Final Rule provide agencies appropriate discretion to complete NEPA reviews pursuant to the regulations currently in effect in cases where the agency reasonably expects that completing the NEPA process under the prior version of CEQ's regulations would be more efficient and help facilitate a more timely decision from the agency.

²¹ See Proposed Rule, 85 Fed. Reg. at 1717 (Proposed §1501.10)(prescribing presumptive time limits of one year for EAs and two years for EISs); Proposed Rule, 85 Fed. Reg. at 1715 (Proposed §1501.5(e))(prescribing a presumptive page limit of 75 pages for EAs); Proposed Rule, 85 Fed. Reg. at 1719 (Proposed §1502.7)(prescribing a presumptive page limit of 300 pages for EISs).

²² Proposed Rule, 85 Fed. Reg. at 1715 (Proposed §1501.4)(providing a clear, stepped analysis whereby an agency should consider whether extraordinary circumstances are present, and, if they are, whether the significant effects can be mitigated, and the action categorically excluded from further NEPA analysis).

In the Proposed Rule, CEQ specifically requested feedback on the need to finalize its proposed guidance to federal agencies regarding the consideration of greenhouse gas (GHG) emissions in NEPA analyses.²³ AGA is committed to reducing GHG emissions through smart innovation, new and modernized infrastructure, and advanced technologies that maintain reliable, resilient, and affordable energy service choices for consumers.²⁴ As with other CEQ guidance documents, if CEQ finalizes its Proposed Rule the draft GHG emissions guidance would need to be reviewed and updated in order to ensure alignment and consistency with CEQ's revised regulations. However, as AGA noted in our comments on the draft GHG emissions guidance, any GHG guidance should be concise, practicable, and, most importantly, recognize that GHG emissions and impact on the climate should be treated the same as any other type of impact under the revised regulations.²⁵

Our member companies rely on timely, transparent federal permits and reviews to meet their construction, maintenance, emergency repair, replacement, and pipeline safety goals. AGA appreciates CEQ's efforts to improve and modernize its NEPA regulations and believes that the proposed rule strikes an appropriate balance between regulatory efficiency and environmental stewardship.

AGA appreciates the opportunity to comment. If you have any questions, please contact me or Pam Lacey, AGA's Chief Regulatory Counsel, at placey@aga.org.

Respectfully Submitted,



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²³ Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions 84 Fed. Reg. 30,097 (June 26, 2019).

²⁴ For additional information, please see AGA's Climate Change Position Statement, available at: https://www.aga.org/globalassets/aga_climate-change-document_final.pdf.

²⁵ In its comments on the Draft GHG Guidance, AGA supported CEQ's effort to focus federal agencies' GHG analysis on those impacts that are reasonably foreseeable, not overly speculative, and that have a sufficiently close causal relationship to the proposed action or permitting decision. Additionally, AGA is pleased that the draft guidance afforded federal agencies the flexibility to use either quantitative or qualitative means to assess GHG impacts, depending on whether GHG emissions "are substantial enough to warrant quantification, and when it is practicable to quantify them using available data and GHG quantification tools." AGA's comments on CEQ's Draft GHG Guidance are available here: <https://www.aga.org/contentassets/fa53c015766b47758be6baff387c8005/ceq-nepa-ghg-guidance-aga-final-08-26-19.pdf>.