

August 20, 2018

Mr. Edward Boling
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Re: Advance Notice of Proposed Rulemaking to Revise Regulations Concerning the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018)

Dear Mr. Boling,

The Interstate Natural Gas Association of America (“INGAA”) and the American Gas Association (“AGA”) respectfully submit these comments in response to the Council on Environmental Quality’s (“CEQ”) request for comment on potential revisions to its regulations concerning the National Environmental Policy Act (“NEPA”).¹

INGAA is a non-profit trade association that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in the United States. INGAA’s member companies transport over 95% of the nation’s natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

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 74 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 70 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 one-fourth of the United States’ energy needs.

Interstate natural gas pipeline projects are often subject to broad review by multiple federal agencies, which must jointly fulfill their individual obligations under NEPA. Ensuring coordinated, streamlined NEPA review among multiple agencies is essential to the timely development of infrastructure required to meet the public need for natural gas.

¹ 83 Fed. Reg. 28,591 (June 20, 2018), Docket No. CEQ–2018–0001 (“ANPR”).

In the forty years since CEQ promulgated its NEPA regulations in 1978,² there have been significant changes in the way agencies review projects and how they develop, share, and analyze information in support of their decisions. For example, technological advances since 1978 permit gathering and analyzing information in greater amounts and detail than before, which can both more efficiently inform agency decision-making, but also may lead agencies to more comprehensive and detailed reviews than are actually necessary for their decision-making. Greater focus on the purposes of NEPA, and more emphasis on coordination and efficiency among federal agencies, are needed if NEPA reviews are not to overrun their mandate.

INGAA and AGA support CEQ's interest in making durable revisions to its NEPA regulations. INGAA and AGA appreciate the opportunity at this early stage of CEQ's rulemaking process to provide comments on key principles of revision and additional clarity around issues that are frequently litigated. As the rulemaking process unfolds, INGAA and AGA look forward to providing additional comments.³

I. Key Principles of Revision

A. NEPA Review Should Focus on What Is Meaningful to the Agency in Exercising its Decision-Making Authority⁴

In revisiting its NEPA regulations, CEQ should focus on revisions that direct agencies to gather and analyze information that is meaningful to the agency's decision. Such direction would help realign NEPA reviews with the requirements and intent of the statute, providing insight to agencies and the public while reducing unnecessary information gathering and analysis.

NEPA is intended to provide a framework for federal agencies to understand the environmental impacts of their decisions and to consider measures to avoid, minimize, or mitigate such impacts.⁵ Accordingly, each agency must focus on information that *meaningfully informs* the agency's action.

NEPA analysis is only meaningful if it informs decision-making within the bounds of the agency's discretion pursuant to the agency's action statute—the statute under which the agency

² CEQ's authority to promulgate regulations implementing NEPA derives most directly from Executive Orders. See Executive Order 11514, "Protection and Enhancement of Environmental Quality" (March 5, 1970); Executive Order 11991, "Relating to Protection and Enhancement of Environmental Quality" (May 24, 1977). See also *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).

³ See 5 U.S.C. § 553.

⁴ See ANPR, *supra* n.1 at 28,591 (Question 5).

⁵ See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (citing 42 U.S.C. § 4321) (NEPA "was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States.").

will be making a decision triggering NEPA review. The agency's action statute limits the agency's discretion and prescribes the criteria that the agency must follow in reaching its decision. NEPA does not modify or expand the parameters of an agency's decision-making authority and imposes only procedural requirements to inform and facilitate the agency's decision.⁶ NEPA only requires analysis upon which the agency has the discretion to act under the relevant action statute.⁷

In short, revisions to CEQ's regulations should provide additional direction to agencies to focus their NEPA efforts on what is relevant to their discretionary decision under their respective action statutes. Efforts that extend beyond this principle are not required by NEPA and would not fulfill its purposes.

B. NEPA Review Should Probe Significance of Impacts⁸

NEPA does not require developing equally comprehensive analyses of all impacts prior to making a significant or non-significant determination. Yet agencies and the public increasingly expect project applicants to provide extraordinarily comprehensive and detailed analyses of all impacts, with limited focus on the significance of the impact.⁹ In these instances, NEPA is inappropriately transformed into an information-generating statute, rather than an aid to agency decision-making. Revisions to CEQ's regulations should re-focus agencies on early, threshold assessments of significance wherever possible.

Under NEPA, agencies should focus more narrowly on *significant* environmental impacts resulting from their decisions. Consistent with NEPA's purpose, agencies are required to consider "detailed information concerning significant environmental impacts."¹⁰ The statute sensibly recognizes that not all impacts to the environment are *de jure* or *de facto* significant and that agency consideration of information concerning non-significant environmental impacts

⁶ *Id.* at 756.

⁷ *See id.* at 768; *see also Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (explaining that where "the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency's actions, and therefore NEPA is inapplicable.").

⁸ *See ANPR, supra* n.1 at 28,591 (Questions 2, 5 and 15).

⁹ It is not uncommon, for example, for interstate natural gas pipeline projects to submit thousands of pages of data and analysis to reviewing agencies like the Federal Energy Regulatory Commission ("Commission"), even before a formal application has been filed. These and other analyses are then used by the Commission to prepare an Environmental Impact Statement that may span many hundreds of pages, or an Environmental Assessment that may span more than two hundred pages. More specific direction from CEQ about applying the limiting principle of impact significance will assist the Commission and cooperating agencies to streamline their NEPA reviews to better fulfill NEPA's mandate.

¹⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

would not meaningfully inform the agency's decision. Refocusing on the significance of the impact will have the benefit of narrowing information requests and streamlining the NEPA process.

Revisions to the regulations should focus on methods that probe significance as follows:

- Agencies should leverage available information that is sufficient to be probative of significance, rather than requiring new project-specific information in all instances. For example, existing information from prior reviews in the vicinity or on similar circumstances can inform the agency about whether additional information-gathering or analysis is warranted.
- Revisions to the regulations should accommodate and promote the use of advanced technologies and techniques that reduce the effort and time to develop information that is probative of significance. For example, remote sensing technologies ranging from data analytics to aerial review can provide efficient, effective insight into the potential significance of an agency's decision.

In short, CEQ's regulatory revisions should encourage agencies to limit their information requirements to what is meaningful to the agency's decision and probative of significance, leveraging existing information and advanced technologies wherever practical.

II. Additional Clarity Around Issues That Are Frequently Litigated Can Improve Predictability and Efficiency

NEPA has become the leading basis for challenging agency decisions, including with respect to energy infrastructure.¹¹ Despite clear Supreme Court precedent on key issues such as the purpose of NEPA and the limiting principles governing NEPA review, numerous legal decisions have applied these principles in confusing ways that invite further legal challenges that impede rather than promote informed agency decision-making. The perpetual litigation cycle encourages agencies to continually expand their NEPA reviews as a defensive measure rather than as an aid to decision-making. CEQ should ensure that revisions to the implementing regulations address common issues that are frequently litigated.

¹¹ From 2006-2016, the U.S. Courts of Appeals issued 238 decisions in NEPA cases. *See* NAEP NEPA Practice, Annual NEPA Report 2016 at 32. In 2016, the U.S. Courts of Appeal issued 27 decisions involving implementation of NEPA by federal agencies. FERC was involved in three of these cases. Although FERC was not the agency with the largest number of cases, FERC's three cases rank it high among agencies with NEPA cases in 2016. *Id.* at 33. Since 2016, FERC has been involved in several notable NEPA decisions issued by U.S. Courts of Appeals. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017); *City of Boston Delegation, et al. v. FERC*, Nos. 16-1081, *et al.* (D.C. Cir. July 27, 2018).

INGAA and AGA encourage CEQ to focus on the following issues and make regulatory improvements consistent with the key principles noted above.

A. Greater Focus on and Adherence to Interagency Coordination¹²

Interstate natural gas pipeline projects are often subject to broad review under NEPA by multiple federal agencies. Ensuring coordinated and streamlined NEPA review among multiple federal agencies is essential to the timely development of infrastructure required to meet the public need for natural gas.

The existing NEPA regulations attempt to provide a framework for a coordinated review across agencies for projects involving multiple federal agencies.¹³ Despite these regulations, breakdowns in interagency coordination significantly prolong the NEPA review process and often put agencies in adversarial positions.

Recognizing that significant improvements can be made through greater interagency coordination, the Administration recently developed a Memorandum of Understanding Implementing One Federal Decision (“OFD MOU”) under Executive Order 13807.¹⁴ The following elements from the OFD MOU should be anchored in the NEPA regulations to ensure the early and timely interagency coordination:

- Roles and Responsibilities of Lead and Cooperating Agencies: The OFD MOU provides expanded guidance on the roles of each that are helpful in ensuring the efficient coordination among parties.¹⁵
- Permitting Timetable and Concurrence Points: Preparing a single multi-agency permitting timetable with specific concurrence points ensures early and continued interagency coordination at key points during the process.¹⁶
- Elevation of Delays and Dispute Resolution: Providing a mechanism for resolving disagreements among agencies that requires initial elevation through the chain of command of each relevant federal agency encourages resolution of disputes in a consistent manner.¹⁷

¹² See ANPR, *supra* n.1 at 28,591-92 (Questions 1, 3, and 16).

¹³ 40 C.F.R. § 1501.5.

¹⁴ Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, March 20, 2018 at Attachment A.

¹⁵ *Id.* at A-6 – A-8.

¹⁶ *Id.* at A-5; A-9 – A-11.

¹⁷ *Id.* at A-11 – A-12.

Incorporation of these elements into the implementing regulations can both advance the effectiveness and durability of these measures and improve interagency coordination.

B. The Purpose and Need under NEPA Must Reflect the Agency’s Statutory Decision in Light of the Proposal Before It

The goal of NEPA is to better inform agencies as they make decisions pursuant to their statutory responsibilities under the action statute.¹⁸ The NEPA framework imposes only procedural requirements on agencies and does not define the parameters for the agency’s analysis. Consequently, the substantive criteria of the analysis must reflect the purpose and need of the decision under the action statute in order to effectively inform the agency.

One frequent hindrance to NEPA implementation is overbroad definition of purpose and need under NEPA. This error can transform NEPA from a useful decision-making aid into an obstacle that delays agency decision-making and even impresses federal agencies into environmental policy roles far outside their statutory authority. Revisions to the implementing regulations should clearly require each agency to tailor the purpose and need to the specific decision before the agency.

Where multiple federal agencies have reviewing authority under different statutes, the lead federal agency must—consistent with the OFD MOU—develop the purpose and need to support a single, coordinated NEPA review among the agencies to the extent possible. For example, the Commission is the lead agency for most interstate natural gas pipeline projects. Adhering to that purpose and need throughout the NEPA review will avoid agency delays and disagreements. Concurrence points along the Permitting Timetable identified under the OFD MOU will serve as checks along the way.

C. The Alternatives Analysis Must Reflect the Purpose and Need¹⁹

Federal agencies must consider a range of reasonable alternatives to proposed actions.²⁰ Alternatives to the proposed action must be able to achieve the purpose and need of the proposed federal action under consideration. Correctly defining the purpose and need of a project is particularly important in the context of the alternatives analysis. Excessively broad analysis of alternatives unmoors the NEPA review from its chief function, to inform the agency’s decision and the public’s understanding.

¹⁸ See *Public Citizen*, 541 U.S. at 768–69 (stating as a goal that the “agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts”).

¹⁹ See ANPR, *supra* n.1 at 28,592 (Question 13).

²⁰ 40 C.F.R. § 1502.14.

Under NEPA, the analysis of alternatives is limited to a reasonable number of alternatives that meet the purpose and need of the agency's decision.²¹ By tailoring the purpose and need of the analysis to the agency's decision under the action statute, agencies ensure that the analysis generates information that meaningfully informs that decision. NEPA does not require agencies to consider alternatives that achieve similar outcomes as the action before the agency through means that lie outside of the agency's authority. These alternatives fail to inform the agency meaningfully about its decision since they do not fulfill the purpose and need driving the agency's decision.

For example, under Section 7 of the Natural Gas Act, the Federal Energy Regulatory Commission ("FERC") is required to deny, approve, or conditionally approve applications to construct interstate natural gas pipeline facilities.²² Given the purpose and need of the Commission's decision—the denial, approval, or conditional approval of interstate natural gas transportation—it is ineffectual for the Commission to assess the environmental impacts of, for example, other non-natural gas energy projects that could deliver power that is equivalent to the Btu value of the transported gas, or demand-reduction proscriptions that would legally limit demand for energy. Such projects do not meet the purpose and need for the decision actually before the Commission—namely, the decision whether the specific interstate natural gas project is in the public convenience and necessity—and, as such, are not reasonable alternatives for consideration under NEPA.

In addition, agencies would benefit from clear standards to reasonably limit the scope of the alternative analyses. Even within the proper frame of purpose and need, the breadth of the analyses has increased to include an unreasonable number of alternatives at a level of detail that is unnecessarily burdensome. For interstate natural gas pipeline projects, for example, the depth of analysis has increased such that full mapping and resource-by-resource analysis is required for many alternatives. This level of detail does not result in a meaningful distinction between alternatives. Such broad and intensive analyses require months of effort and impose significant costs that often far exceed the purpose of the alternatives analysis. In addition, it mistakenly implies to the public a high degree of agency control over project development beyond the parameters of the agency's decision, which leads to misunderstanding, loss of public trust, and increased litigation.

In short, revisions to the NEPA regulations should reduce the unnecessary burden associated with alternatives analyses by directing agencies to tailor the analyses to the purpose and need of the agency decision under the action statute and by reasonably limiting the range of alternatives, to be analyzed only to the extent necessary to probe significance.

²¹ See *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (stating that “a reasonable alternative is defined by reference to a project’s objectives.”) (citation omitted).

²² 15 U.S.C. § 717f.

D. The Cumulative Impacts Analysis Must Be Limited to Impacts That Are Reasonably Foreseeable and Provide Meaningful Insight to the Agency²³

The cumulative impacts analysis has been a focal point for litigation aimed at expanding the scope of NEPA analyses without better serving NEPA's purpose. Clear and practical limits on the scope of the cumulative impacts analysis in the regulations would help discourage some of this misdirected litigation.

The cumulative impacts analysis seeks to ensure that an agency considers not just the impacts of its own action on a resource, but how those impacts could be aggregated with other impacts on the same resource in the same time and place.²⁴ Existing NEPA regulations and guidance provides instruction to agencies investigating the appropriate bounds of the cumulative impacts analysis.²⁵

First, the agency identifies the resources and geographic area likely to be impacted by a decision, and the time frame over which its decision will likely have impacts.²⁶ Next, the agency identifies other actions that may reasonably be expected to occur and which would impact the resources impacted within the identified geographic and temporal scope of the agency's action in a manner that compounds the impacts of the agency's decision. This second step is bounded by what is known to the agency, what is reasonably foreseeable to the agency, and what is significant to the human environment.²⁷

This analytical framework ensures that an agency is considering in its cumulative impacts analysis only what would be meaningful to its decision. By incorporating these principles into the implementing regulations, CEQ can provide agencies clear and practical direction on the scope of their cumulative impacts analyses.

E. NEPA Reviews Should Only Be Long Enough to Accomplish Their Purpose²⁸

The preparation time for Environmental Assessments and Environmental Impact Statements has grown ever longer. A study conducted by the National Association of Environmental Professionals found that in 2016 the average length of time to prepare the Final Environmental Impact Statement ("EIS") was 5.1 years (1,864 days)—the longest since at least

²³ See ANPR, *supra* n.1 at 28,592 (Question 17).

²⁴ 40 C.F.R. § 1508.1.

²⁵ See 40 C.F.R. § 1508.7; Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997) ("CEQ Guidance"), available at https://ceq.doe.gov/publications/cumulative_effects.html.

²⁶ See CEQ Guidance, *supra* n.25 at 15.

²⁷ See 40 C.F.R. § 1508.7.

²⁸ See ANPR, *supra* n.1 at 28,591 (Question 4).

1997.²⁹ The prolonged review process can be attributed to several related factors, including inefficient interagency coordination, litigation, and expanding data expectations beyond the purpose of NEPA.

Unnecessarily prolonged reviews can be avoided by adherence to the key principles noted above, including ensuring that agency reviews are focused on significant impacts, rather than comprehensive, equal analysis of all impacts. In addition, CEQ should consider regulatory revisions that require agencies to apply clear, practical mechanisms for achieving the Administration's expectations for short, effective NEPA reviews.³⁰

Specifically, the OFD MOU set a government-wide goal of reducing, to two years, the average time for each agency to complete the required environmental reviews and authorization decisions for major infrastructure projects.³¹ Regulatory revisions should anchor this expectation and can set out factors that agencies should consider in developing expected timelines for different categories of decisions they make. Developing default timelines for typical decisions, especially those involving multi-agency reviews, can substantially improve NEPA reviews and agency decisions.

In promulgating the existing regulations, CEQ declined to prescribe universal time limits for the entire NEPA review process, and instead opted to encourage federal agencies to set time limits appropriate for individual actions.³² CEQ should consider revising its regulations to require adherence to project-specific time limits set by the lead federal agency by incorporating concepts from the OFD MOU on permitting timetables and concurrence points and milestones.³³

²⁹ See National Association of Environmental Professionals, Annual NEPA Report 2016 at 12. NAEP concluded that FERC, however, achieves efficient times compared to other agencies: the Commission averaged 540 days for a draft EIS and 663 for a Final EIS (less than two years).

³⁰ One particular challenge with timing arises in the context of supplemental EISs. The existing CEQ regulations prevent an agency from making a decision on a proposed action until 90 days after a draft EIS is published and 30 days after a final EIS is published. 40 C.F.R. § 1506.10(b). When these waiting periods are applied to supplemental EISs – often only to address a discrete issue – they can unreasonably delay agency action. INGAA and AGA encourage CEQ to address this challenge in regulatory revisions that allow an agency for good cause to act before the section 1506.10(b) waiting periods have concluded.

³¹ See OFD MOU, *supra* n.14 at 1-2.

³² See 40 C.F.R. § 1501.8.

³³ See OFD MOU, *supra* n.14 at A-4 – A-5.

F. NEPA Documents Should Only Be Long Enough to Accomplish Their Purpose³⁴

Current regulations state that EISs should normally be less than 150 pages and less than 300 pages for proposals of unusual scope or complexity.³⁵ Federal agencies have grown accustomed to providing comprehensive and equal analysis of all issues regardless of significance or meaningfulness to the decision before the agency, leading to NEPA documents that far exceed the stated regulatory norm.

By focusing on critical impacts that are significant and likely to provide meaningful input to the agency, brevity and focus can be achieved in these documents. Standardizing page lengths is challenging because each agency handles a different array of decisions of varying complexity. However, CEQ's regulations can direct agencies to identify categories of typical decisions and to set the appropriate benchmark length and focus (or organization) of the NEPA document for each category, subject to exceptional circumstances.

G. Regulatory Definitions Should Be Improved³⁶

Clear and simple regulatory definitions are a critical component of an effective regulatory program. CEQ's existing NEPA regulations do not provide definitions for all critical terms and, where definitions are provided, sometimes sow more confusion than clarity. For example, the definition of "Major Federal action" is lengthy, conflates Federal actions with Major Federal actions, and is circular with the meaning of "significant."³⁷ The regulations also omit definitions for "alternatives," "purpose and need," "reasonably foreseeable," and "trivial" violation.³⁸ This lack of clarity results in a growing body of sometimes inconsistent judicial glosses on key terms, leading to more litigation and reduced public confidence in the NEPA program. CEQ should review the scope and quality of the existing definitions to identify clarifications, revisions, and additions designed to reduce confusion and disagreement in the implementation of NEPA.

H. Regulations Should Support the Use of Qualified Technical Consultants³⁹

The existing NEPA regulations allow for the use of contractors in the preparation of EISs.⁴⁰ In considering revisions to this regulation, INGAA and AGA encourage CEQ to support agencies' ability to engage qualified technical consultants to assist in NEPA analyses (both Environmental Assessments and EISs). By engaging qualified professionals, agency resources

³⁴ See ANPR, *supra* n.1 at 28,591 (Question 4).

³⁵ See 40 C.F.R. § 1502.7.

³⁶ See ANPR, *supra* n.1 at 28,591-92 (Questions 7 and 8).

³⁷ See 40 C.F.R. § 1508.18.

³⁸ See 83 Fed. Reg. 28,591, 28,591-92.

³⁹ See ANPR, *supra* n.1 at 28,592 (Question 11).

⁴⁰ See 40 C.F.R. § 1506.5.

can be devoted to disciplined supervision of reviews tailored to the decision before the agency and increase efficiency in their review process. Specifically, the use of qualified technical consultants will aid agencies in meeting the timeframes established by the OFD MOU.

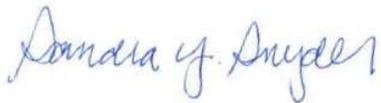
III. Conclusion

INGAA and AGA appreciate the opportunity to comment on the ANPR. If you have any questions or need more information, please do not hesitate to contact Sandra Snyder at 202-216-5955 or Pam Lacey at 202-824-7340.

Sincerely,



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