



**American
Fuel & Petrochemical
Manufacturers**

1800 M Street, NW
Suite 900, North
Washington, DC
20036

202.457.0480 office
202.457.0486 fax
afpm.org

**AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS' COMMENTS ON THE
COUNCIL ON ENVIRONMENTAL QUALITY'S ADVANCE NOTICE OF PROPOSED
RULEMAKING, "UPDATE TO THE REGULATIONS FOR IMPLEMENTING THE
PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT"
DOCKET No. CEQ-2018-0001
83 FED. REG. 28591**

David Friedman
American Fuel & Petrochemical
Manufacturers
1800 M Street, NW, Suite 900
Washington, DC 20036

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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes the opportunity to comment on the Council on Environmental Quality’s (“CEQ” or “Council”) advance notice of proposed rulemaking entitled, “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act”¹ (the “ANPRM”). On June 20, 2018, CEQ issued this ANPRM soliciting public comment on potential revisions to update the regulations and ensure a more efficient, timely, and effective National Environmental Policy Act (“NEPA”) process. AFPM appreciates CEQ taking this long overdue step and the opportunity to provide feedback to the Council. Given CEQ’s mission and its prominent role in promulgating NEPA implementing regulations for the federal government, this rulemaking action has the potential to streamline environmental review processes across all important sectors of the economy while continuing to ensure the robust consideration of environmental impacts as Congress intended.

NEPA was enacted to ensure that federal agencies take a hard look at the environmental effects of their decisions. Congress intended NEPA to inform federal agencies’ decision-making processes, not to delay or obstruct them or the underlying projects. Accordingly, CEQ’s original implementing regulations addressed two distinctly important purposes: (1) ensuring that federal agencies would perform high quality NEPA reviews; and (2) ensuring that the NEPA process does not unduly delay or burden the project development process. Unfortunately, almost 40 years later, that second purpose still has not been realized. Rather than helping federal agencies “make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment (40 C.F.R. § 1500.1(c)),” far too often NEPA and CEQ’s regulations are used as a tool for project opponents to impede private development for ideological reasons and a source for state agencies to use private dollars to fund public initiatives that are unrelated to the federal action or its impacts. This is not what Congress intended.

AFPM supports the legislative policies underlying NEPA and submits these comments to assist in the revision of CEQ’s NEPA regulations with the goal of more efficiently facilitating environmental reviews and authorization decisions for both straightforward and complex projects. Specifically, these comments are designed to enable concurrent, synchronized, timely, efficient, and consistent NEPA reviews, all while protecting the environment. The ANPRM notes that CEQ’s primary focus is on specific aspects of these regulations that the Council has direct authority to change. AFPM recognizes that a number of strategies for improving the NEPA process would require legislative action and has attempted to limit our comments on the ANPRM to regulatory or policy solutions that could be accomplished by CEQ under this rulemaking effort. As a result, in several instances, AFPM respectfully proposes possible new regulatory language for the Council’s consideration. AFPM would welcome the opportunity to meet with CEQ to discuss these issues further at the Council’s convenience.

¹ See 83 Fed. Reg. 28591 “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act” Advanced Notice of Proposed Rulemaking, Docket No. CEQ–2018–0001, published June 20, 2018, <https://www.gpo.gov/fdsys/pkg/FR-2018-06-20/pdf/2018-13246.pdf>



II. AFPM'S INTEREST IN CEQ'S ANPRM

AFPM is a national trade association representing nearly all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible—from clothing to life-saving medical equipment and smartphones. As such, AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide. AFPM member companies also are leaders in human safety and environmental responsibility and have extensive experience in harmonizing these important values with timely project development.

Refineries and petrochemical facilities are subject to multiple layers of federal, state, and local environmental, health, safety, security, and fuels regulations covering both construction and operation. These programs are all-encompassing, regulating everything from infrastructure siting, to emissions limitations at both the facility and equipment levels, to decommissioning. Like other industries, we must undertake an exceedingly long and complex permitting process when we seek to build new facilities, expand existing facilities, and even to install new emissions control equipment. This process can take many years, involve multiple agencies – each with different and frequently competing objectives – and introduce redundancy, all of which significantly increases costs and project timelines. Unfortunately, that means that in some cases, our companies abandon projects that would enhance our nation's refining and petrochemical manufacturing capacities and support increased employment in our industries and related industries and suppliers.

To produce these essential goods, AFPM members also depend on all modes of transportation to move their products and have made significant infrastructure investments to support and improve the efficiency of the transportation system. Like fixed facilities, transportation infrastructure projects, particularly linear projects like pipelines and rail, are subject to a long and complex permitting process when seeking to build, maintain, or expand infrastructure.

In 2000, according to the National Association of Environmental Professionals, the federal government took an average of 1,166 days (3.2 years) to complete Environmental Impact Statements ("EISs") required by NEPA. By 2016, the time required had ballooned to between 1,667 days (4.6 years) and 1,862 days (5.1 years) – not including the time needed for required state and regional analyses. *See* National Assn. of Env. Professionals, *Annual NEPA Report* 2015 at 18 (Aug. 2016). "In an evaluation of regulatory environments, the United States was ranked 15th out of 33 global economies for ease of permitting, according to a 2017 World Bank study. Estonia, France and Portugal were all found to have better permitting systems than the United States." *See* World Bank, *Doing Business Economy Rankings, OECD high-income*.² From the time a project is conceived to the start of construction, a developer can expect years of paperwork, redundant reviews, agency delays, and legal complications. In fact, it often takes longer for the government to approve a project than it takes for a developer to build it.

² *See* <http://www.doingbusiness.org/rankings?region=oeed-high-income>



AFPM acknowledges the need for robust analyses of infrastructure projects to ensure that environmental impacts are appropriately considered. Yet, the current permitting processes and regulatory requirements often unnecessarily hinder needed infrastructure developments. Efforts to reform permitting processes should promote efficiency in, and accountability for, reviews and ultimately reduce the costs and burdens of delayed infrastructure projects by eliminating duplicative actions, ensuring consistency in reviews and providing timely and predictable review schedules. We welcome the opportunity to share our initial thoughts on your questions regarding how the NEPA permitting process and the regulatory environment in which the refinery and petrochemical sectors operate can be improved.

III. AFPM'S COMMENTS ON CEQ'S ANPRM

In the ANRPM, CEQ requests comments on potential revisions to update and clarify the Council's NEPA regulations. In particular, CEQ requests comments on the following specific aspects of these regulations, and requests that commenters include question numbers when providing responses. The remainder of these comments provide AFPM's responses to the questions posed by CEQ.

A. NEPA Process

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

Yes. AFPM supports concurrent, synchronized, timely, and efficient environmental reviews and authorization decisions and believes there are opportunities to revise CEQ's regulations to improve the NEPA process to achieve them. Under current law, project sponsors must navigate environmental reviews under NEPA and the permitting processes of multiple Federal and state agencies with decision-making authority. Likewise, these various agencies frequently engage in a lengthy sequential process rather than in a parallel, coordinated fashion. Both unnecessarily delay the NEPA and authorization processes. Requiring streamlined and coordinated reviews that are organized by the lead agency would create much-needed efficiency, consistency, and organization that will help reduce costs and delays.

To accomplish these objectives, CEQ should strengthen its existing regulations, which currently encourage concurrent and coordinated reviews in a timely manner, by mandating the preparation of a single, comprehensive document that is coordinated by a lead agency and developed under a mandatory critical path timeline. As discussed below, CEQ should establish a deadline of one year for lead agencies to complete their environmental review. AFPM also supports NEPA reviews that are limited to the authority and jurisdiction of the specific federal agency responsible for the federal action under consideration. Attempts to expand NEPA review beyond the scope of each agency's statutory authority should be avoided. In addition, federal agencies should begin preparation of environmental assessments or statements earlier and jointly with applicable State or local agencies.



AFPM also supports a consistent approach to environmental reviews across regions. AFPM members own, operate, or rely on pipelines to transport crude oil, natural gases, natural gas liquids and refined products to and from their facilities. Pipeline projects span multiple federal, state, and regional authorities, creating a patchwork of differing permitting requirements or differing interpretations of existing regulation and law. Revisions to CEQ's NEPA regulations that can foster collaboration among federal agencies would greatly streamline federal review.

CEQ should closely examine two recent efforts designed to improve NEPA reviews and revise the CEQ NEPA regulations consistent with what has proven successful. On December 4, 2015, the Fixing America's Surface Transportation ("FAST") Act was signed into law. Title 41 of the FAST Act (FAST-41) was designed to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process for certain infrastructure projects. While FAST-41 is limited to specific projects, much of the best practices identified to improve the timeliness, predictability, and transparency of environmental reviews could be useful for improving CEQ's NEPA regulations.³ Further, having one agency serve as a liaison to facilitate communication and establish and enforce timelines has proven successful.

On April 9, 2018, a dozen federal agencies executed a memorandum of understanding ("MOU") on implementation of Executive Order 13807, which directed federal agencies to expedite environmental review and permitting for major infrastructure projects. The Office of Management and Budget and CEQ also issued a guidance memorandum to accompany the MOU.⁴ Both FAST-41 and the recent MOU could be used as blueprints to revise CEQ's NEPA regulations, specifically related to federal agency communication, role of the lead agency, and the potential for an oversight agency designed to develop timelines and resolve delays. Addressing these three areas would go a long way to achieving concurrent, synchronized, timely, and efficient environmental reviews and authorization decisions.

For these reasons, at a minimum, AFPM proposes that CEQ revise the following provisions of its regulations to streamline and coordinate the process:

- 40 C.F.R. § 1502.25(a) – Agencies shall prepare draft environmental impact statements concurrently and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. § 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.), and other environmental review laws and executive orders.
- 40 C.F.R. § 1502.5(b) – For applications to the agency, appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies shall begin preparation of such assessments or statements earlier and jointly with applicable State or local agencies.

³ See <https://cms.permits.performance.gov/tools/fy-2018-recommended-best-practices-report>

⁴ See <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>



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

Yes. AFPM supports revisions to CEQ’s regulations that would allow the use of prior environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, where the analysis is still relevant and timely. In fact, AFPM suggested this change as part of our regulatory reform comments to the U.S. Army Corp of Engineers.⁵ Often new pipelines are developed on existing rights of way for a variety of reasons. In addition, rights of way can be shared by several different types of infrastructure (e.g., electric utilities; oil, gas, or product pipelines; and railroads). In these, and potentially other, instances CEQ’s NEPA regulations should allow for the use of prior studies, analyses, and decisions conducted in earlier reviews or authorization decisions related to other projects on that right of way. This use would be contingent on the prior studies, analyses, and decisions being relevant, timely, and that nothing has *materially* changed in that area. Further, there should be an opportunity to partially rely on or augment a previous study, analysis, and decision to support and inform the analysis of a new project or expansion of an existing one. This would considerably reduce duplication, while maintaining a robust environmental review. Specifically, 40 C.F.R. § 1506.3(a) should be revised to obligate agencies (i.e., revise “may” to “shall”) to adopt, in whole or in part, draft or final EISs when they meet the standards of § 1506.3.

In addition, 40 C.F.R. § 1506.4 should be made mandatory and further revised and expanded to address a scenario where prior environmental studies, analyses, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions provide relevant and timely information about the action under evaluation. This should include parameters as to what is relevant and timely, including overlapping or adjacent action areas and similar activities and/or effects as well as reviews and authorizations performed within the last ten (10) years.

Finally, it is important for the lead agency to determine early in the NEPA process whether any analyses or studies meet the requirements for adopting (under 40 C.F.R. § 1506.3) or combining (under 40 C.F.R. § 1506.4) and identify them in its scoping notice under 40 C.F.R. § 1501.7).

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

⁵ See COMMENTS OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ON THE U.S. ARMY CORPS OF ENGINEERS’ REQUEST FOR COMMENT, “THE UNITED STATES ARMY, CORPS OF ENGINEERS; SUBGROUP TO THE DOD REGULATORY REFORM TASK FORCE, REVIEW OF EXISTING RULES,” DOCKET NO. COE-2017-0004 submitted October 18, 2017
https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/USACE_AFPM_Response_to_Comments.10.18.17.pdf



Yes. AFPM supports revisions to CEQ's NEPA regulations to ensure optimal interagency coordination of environmental reviews and authorization decisions. Specifically, the Council should focus revisions on the role of the lead agency, the scope of alternatives considered, the purpose and need of the analysis, and the cooperating agencies' scope of review.

CEQ should revise its NEPA regulations to more clearly define the role of the lead agency. The lead agency, by definition, has the "primary responsibility for preparing the environmental impact statement." 40 C.F.R. § 1508.16. As a result, CEQ should revise its regulations to better reflect the lead agency's role and to equip the lead agency to better fulfill its responsibilities. For example, CEQ should revise 40 C.F.R. § 1501.6 to require the lead agency to quickly identify and coordinate with cooperating agencies, including by developing project-specific plans and interagency schedules to ensure that a record of decision will be issued within one year (see AFPM discussion of time limits below), and to make clear that cooperating agency involvement should be limited to issues on which that agency has jurisdiction:

- 40 C.F.R. § 1501.6(a)(4) – Should be revised to include a new subsection (a)(4) that provides: "As soon as possible and before publishing the notice of intent required under 40 C.F.R. § 1501.7, the lead agency shall identify all cooperating agencies and develop an interagency schedule for completing the NEPA and related State and Federal environmental review and authorization processes within one year from the initiation of scoping."
- 40 C.F.R. § 1501.6(b)(2) – "Participate in the scoping process (described below in § 1501.7) on issues for which the cooperating agency has jurisdiction or authority."

NEPA requires the development, analysis, and weighing of a reasonable range of feasible alternatives to ensure that Federal officials make informed decisions. Currently, the scope of alternatives for the same project can vary by agencies. AFPM supports the consideration of a consistent set of alternatives across all agencies involved in the review. To that end, the lead agency should determine the scope of alternatives to be considered by cooperating agencies. Further, only feasible alternatives, as determined by the lead agency, should be considered. This could be accomplished through revisions to 40 C.F.R. § 1508.25.

Like the alternatives considered, the "purpose and need" for the same project can vary by agencies. AFPM supports the development of a single "purpose and need" for a project to be used by all coordinating and permitting agencies. The lead agency should also determine the purpose and need to be considered by cooperating agencies. This could be accomplished through revisions to 40 C.F.R. § 1502.13.

AFPM also supports limiting the scope of a federal agency's NEPA analysis to only its jurisdiction/authority. This would prevent agency scope creep beyond an agency's area of expertise and authority. This could be accomplished by stating in 40 C.F.R. § 1501.7 that each agency's analysis and comments must be limited to its jurisdictional and statutory authority.

Finally, AFPM encourages CEQ to clarify that lead agencies may use the scoping process to assist only in the preparation of EISs, rather than for environmental assessments ("EAs").



Conducting scoping on EAs is contrary to CEQ’s interpretation that EAs must be concise documents that are narrowly-tailored and prepared expeditiously.

B. Scope of NEPA Review

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

Yes. AFPM supports the intent of the original CEQ regulations to “help public officials make decisions that are based on understanding of environmental consequences.” 40 C.F.R. § 1500.1(c). As CEQ has recognized for almost 40 years, the goal “is not to generate paperwork – even excellent paperwork – but to foster excellent action.” *Id.* Over the years, however, many federal agencies have lost sight of this goal. Rather than preparing succinct and cogent studies to inform the decision-making process, almost invariably they draft encyclopedic documents. That “everything under the sun” approach not only is contrary to NEPA, it also is anathema to successful project development. It prevents agencies from “concentrat[ing] on the issues that are truly significant” and encourages them to amass “needless details.” 40 C.F.R. § 1500.1(b). These extraneous analyses both delay the NEPA process and, ironically, provide fodder for litigation. CEQ should carefully consider any changes to the NEPA implementing regulations and be mindful of how such changes could be abused by project opponents to delay or cancel needed projects.

As a result, AFPM encourages CEQ to impose mandatory page limits on EISs. We believe that a maximum of 200 pages for standard EISs and 400 pages for “unusually complex” EISs (both exclusive of Appendices), is appropriate to provide the necessary analyses without sacrificing the defensibility of the documents.⁶ In addition, AFPM believes it is important to empower the project proponent, the entity most familiar with the scope of the underlying project, to request that an EIS be considered “unusually complex” and for the action agency to approve that request absent a clear demonstration of good cause by agency leadership.

Accordingly, AFPM recommends that CEQ revise 40 C.F.R. § 1502.7 to codify these changes. For the same reasons, AFPM supports imposing an overall mandatory NEPA timeline of one (1) year from the date a notice of intent to prepare an EIS is published in the Federal Register for the lead agency to issue a record of decision (“ROD”). Upon determination of the lead agency, the lead agency should work with cooperating agencies and CEQ to develop project-specific-plans that identify and schedule the steps necessary to meet the one-year timeline. For the above reasons, AFPM recommends that CEQ revise its NEPA regulations as follows:

⁶ These page limitations are based on a memorandum of “Additional Direction for Implementing Secretary’s Order 3355” issued by the Department of the Interior (“DOI”) on April 27, 2018. While the DOI policy (which would be ultimately be superseded by any CEQ regulations) limits EISs to 150 pages or 300 pages for unusually complex documents, AFPM believes that in some circumstances, that may be overly stringent and risks the defensibility of the documents. *See*

https://www.doi.gov/sites/doi.gov/files/uploads/ds_memo_on_additional_direction_for_implementing_so_3355.pdf



- 40 C.F.R. § 1502.5 should be revised to include a new subsection (e) that provides: “The lead agency shall complete the final environmental impact statement and issue a record of decision within one year from the date it publishes notice of intent pursuant to 40 C.F.R. § 1501.7.”
- 40 C.F.R. § 1502.7 should be revised to state: “The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall be less than 200 pages and for proposals of unusual scope or complexity shall be less than 400 pages. The lead agency shall accept a project proponent’s request to deem its proposal ‘of unusual scope or complexity,’ unless the agency clearly demonstrates in writing why the proposal should not be treated as such. The lead agency shall waive the page limit requirement if requested in writing by the project proponent.”
- 40 C.F.R. § 1501.7(b)(1)-(2) should be revised and consolidated to state: “As part of the scoping process, the lead agency shall identify in its notice of intent the mandatory page limit and time limit for the environmental impact statement and the eligibility of the project proponent to request a waiver of either limit.”

Question 5: Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?

Yes. In AFPM’s experience, over-analysis of non-significant impacts is the leading cause of long and complex EISs. Such analyses are unnecessary and oftentimes lead to litigation over issues that Congress did not intend to be evaluated in detail under NEPA. As CEQ correctly recognizes in 40 C.F.R. § 1502.2(b):

Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

CEQ should further direct agencies in how to implement this provision when analyzing non-significant impacts. For example, agencies should include no more than one paragraph disclosing each type of impact that the lead agency determines to be clearly non-significant. Detailed impacts analysis in the EIS should be reserved for any impacts that the agency determines to be significant.

In addition, CEQ should direct how and when economic impacts are included in the review process. When included, there should be a clear linkage between the environmental impact and particular aspects of socioeconomics. CEQ regulations state that social or economic impacts, by themselves, are not intended to require preparation of an EIS. 40 C.F.R. § 1508.14. Instead agencies must evaluate social and economic impacts of that action only when they are directly correlated with natural or physical environmental effects. As a result, CEQ’s regulations should direct lead agencies to describe a clear nexus between the socioeconomic impacts and the physical or environmental components assessed in their NEPA documents.



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

CEQ should add a step to the public comment process to address commenter-proposed mitigation options. The lead agency should then work with the local agency manager, who is most familiar with the resources, to evaluate possible mitigation options that are feasible.

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

- Major Federal Action;
- Effects;
- Cumulative Impact;
- Significantly;
- Scope; and
- Other NEPA terms.

Yes. AFPM supports CEQ’s efforts to improve the definitions of key NEPA terms in its regulations. While many of those definitions continue to inform the implementation of NEPA well, others should be updated to address ambiguities and reflect lessons learned from experience operating under NEPA’s framework.

- **Major Federal Action** – AFPM urges CEQ to take a narrower view of the scope of the proposed “federal action” that the agency analyzes under NEPA. Under the current regulatory framework that scope is not defined, which has led to action agencies analyzing non-federal portions of projects as part of the “federal action” under NEPA. This is sometimes known as the “small federal handle” situation and can result in overly broad NEPA analyses for major projects when only a minor component of the overall project requires a federal permit/authorization. See also AFPM’s response to Question 19 below. To address this CEQ should revise its definition of “major federal action” in 40 C.F.R. § 1508.18 by adding a new subsection (d) explaining that “Federal actions include only the portions of an action which independently meet this definition. Non-federal portions or components are not within the scope of the federal action and should be analyzed instead as a cumulative impact.”
- **Cumulative Impact** – For the reasons explained in AFPM’s response to Question 19 below, CEQ should revise its definition of “cumulative impact” in 40 C.F.R. § 1508.7 by adding a sentence providing that “Cumulative impacts include the impacts associated with the non-federal components of a proposed action that is partially subject to federal jurisdiction or authorization.”
- **Scope** – For the reasons explained in AFPM’s response to Question 19 below, CEQ should revise its definition of “scope” in 40 C.F.R. § 1508.25 to better articulate the concept of “connected actions” in subsection (a) and limit their scope based on the action agency’s jurisdiction or authority. To accomplish this, AFPM recommends revising 40



C.F.R. § 1508.25(a)(1) to state “Connected actions, which means that they are activities without independent utility that are subject to the federal lead agency’s jurisdiction or authority, and are closely related to the proposed action, and therefore should be discussed in the same impact statement. Actions are connected if they...”

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

- Alternatives;
- Purpose and Need;
- Reasonably Foreseeable;
- Trivial Violation; and
- Other NEPA terms.

Yes. AFPM agrees that it is important to update CEQ’s regulations by defining several NEPA terms that are fundamental to compliance with the statute. Absent such definitions various federal action agencies have adopted their own regulatory definitions, resulting in inconsistency in how the federal government carries out the NEPA process. AFPM supports CEQ adopting the following definitions to increase uniformity in the statute’s implementation.

- **Purpose and Need** – AFPM recommends that CEQ adopt individual definitions for the terms “purpose” and “need” to reflect the distinct nature of these important concepts. CEQ should define “purpose” to mean “The objective(s), identified by the lead agency, sought to be achieved as a result of the federal action, taking into account any directly applicable federal or state legislation and the goals of the project proponent.” CEQ should define “need” to mean “The underlying situation(s) or condition(s), identified by the lead agency in consultation with the project proponent, prompting the proposed federal action.”
- **Trivial Violation** – AFPM recommends that CEQ adopt a definition of “trivial violation” to further recognize NEPA’s purpose as a procedural statute and to supplement CEQ’s direction in 40 C.F.R. § 1500.3 that “any trivial violation of these regulations [should] not give rise to any independent cause of action.” Accordingly, AFPM encourages that CEQ define “trivial violation” as “A minor violation or non-compliance with any federal agency’s regulations for implementing the Act, which results in harmless error or does not materially affect the lead agency’s ultimate conclusions.”

Finally, as commented elsewhere, AFPM notes that many key concepts and definitions that are fundamental to implementing NEPA are found only in the “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations.” If CEQ or the agencies are still using this document, it has become de facto regulation and CEQ must incorporate these comments and definitions into the regulation and conduct a proper notice and comment process. AFPM specifically recommends that CEQ incorporate definitions for the following terms that are discussed in the “Forty Most Asked Questions”:

- **Alternatives** – AFPM suggests that CEQ define “alternatives” to mean “Those alternatives to the proposed action confirmed by the lead agency that would meet the



stated purpose and need of the proposed action and are practical or feasible from a technical and economic standpoint.”

- **Reasonably Foreseeable** – To help implement other aspects of CEQ’s NEPA regulations, including 40 C.F.R § 1508.8(b), AFPM recommends more narrowly defining “reasonably foreseeable.”

Question 9: Should the provisions in CEQ’s NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

- Notice of Intent;
- Categorical Exclusions Documentation;
- Environmental Assessments;
- Findings of No Significant Impact;
- Environmental Impact Statements;
- Records of Decision; and
- Supplements.

Yes. While CEQ’s current regulations, 40 C.F.R. § 1506.10(b)(2), provide for a 30-day “cooling off” period after issuance of the Final EIS before a ROD is issued, in AFPM’s experience that period rarely, if ever, results in changes to an agency’s decision. Instead, that period almost invariably amounts to an unnecessary 30-day delay. AFPM therefore urges CEQ to revise its regulations by reducing the “cooling off” period.

AFPM also believes that CEQ should allow categorical exclusions (“Cat EXs”) that are established by one federal agency to be used government-wide by other federal agencies. This would create a comprehensive and uniform catalogue of available Cat EXs. As Cat EXs, by definition, are actions which do not individually or cumulatively have a significant effect on the human environment, they should be able to be universally used across the federal government. This would reduce redundant analysis but preserve a robust review of environmental impacts.

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

Yes. As previously stated in AFPM’s response to Question 1, CEQ should revise its regulations to require lead agencies to work with cooperating agencies to develop a mandatory critical path timeline. In addition, in light of AFPM’s recommendation that CEQ impose a deadline of one-year from publishing a notice of intent for lead agencies to issue a Final EIS and ROD, AFPM requests that CEQ impose a limit on the period of time between when the action agency receives the permit application or request for authorization and when the notice of intent is published under 40 C.F.R. § 1501.7 to no more than six (6) months unless the project proponent requests an extension of that period in writing.

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



Yes. AFPM supports codifying as an approved option the ability of project proponents to fund

- 1) Dedicated agency staffing to prepare NEPA documents;
- 2) Dedicated agency lawyers to perform legal review of NEPA documents and related authorizations; and
- 3) Third-party contractors to assist agency staff in preparing NEPA documents.

A lack of agency staffing and legal resources is regularly cited by lead agencies as a primary cause for delay in the NEPA process. Accordingly, it is crucial to allow project proponents to enter into reimbursable agreements under which funds are provided to ensure sufficient internal and external agency staffing to complete the NEPA process on schedule and to ensure the completion of timely legal reviews.

For these reasons, AFPM requests that CEQ add the following text to the end of 40 C.F.R. 1605.6(c): “At the request of the project proponent, the lead agency and the project proponent shall enter into a reimbursable agreement providing for (1) dedicated agency staffing and/or a third-party contractor to work on behalf of the lead agency to prepare an environmental impact statement, and (2) dedicated agency legal staffing to counsel the lead agency during the NEPA process and perform all necessary legal reviews.”

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

Yes. AFPM supports the use of tiering as an effective way to use policy or program-level EISs to streamline subsequent NEPA reviews of future actions. Unfortunately, CEQ’s current regulations do not identify mechanisms for such streamlining other than using other EISs or EAs. *See* 40 C.F.R. §§ 1502.20, 1508.28. This should be improved by adopting practices from other federal agencies that allow such mechanisms. For example, the U.S. Department of the Interior’s regulations allow agencies to tier off of programmatic or broader-scale EISs to complete an EA leading to a Finding of No Significant Impact, even if there will be significant direct, indirect, or cumulative effects, as long as those significant effects already are appropriately analyzed in the EIS from which the tiering occurs. *See* 43 C.F.R. § 46.140. In such circumstances, the agency may expedite the NEPA process by issuing a Finding of No *New* Significant Impact. CEQ’s regulations should include similar mechanisms to promote consistent streamlining practices across all agencies.

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

As previously stated, AFPM supports limiting the scope of NEPA analyses to the lead agency and the cooperating agencies’ respective jurisdictional and statutory authorities. Further, only feasible alternatives, as determined by the lead agency, taking into consideration feedback from the project proponent, should be considered.



C. General

Question 14: Are any provisions of the CEQ’s NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

The “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” guidance should be updated to ensure the information is not obsolete.

Question 15: Which provisions of the CEQ’s NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

AFPM has no comments on this topic at this time.

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

Yes. As previous stated AFPM supports the combination of Final EIS and ROD into a single document, thereby eliminating the 30-day “cooling off” period currently provided under 40 C.F.R. § 1506.10(b)(2).

In addition, similar to AFPM’s comments in response to Questions 1 and 2, CEQ’s regulations should require agencies to incorporate into their NEPA analyses all environmental impact analyses and related surveys and studies required by other laws and Executive Orders. This can be reflected in the examples in CEQ regulations 40 C.F.R. § 1502.25: the Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 et seq.); the National Historic Preservation Act of 1966 (16 U.S.C. §§ 470 et seq.); and the Endangered Species Act of 1973 (16 U.S.C. §§ 1531 et seq.). Coordinated environmental reviews are beneficial whenever other analyses and decision documents consider the same or related issues and information as the NEPA analysis. This will result in a more synchronized process, providing a better basis for informed decision-making and avoiding unnecessary duplication and paperwork.

Question 17: Are there additional ways CEQ’s NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

Yes. CEQ should develop a mechanism for expediting NEPA review of nationally significant projects (e.g., pipeline projects that serve a national economic or security interest). To do this, CEQ could identify evaluation criteria to determine when a project is in the national interest and then create a priority list for expediting environmental reviews.

While these projects would still undergo extensive environmental review, there would be heightened deadlines for completing the prioritized work. This could be accomplished by suggesting that lead and cooperating agencies allocate additional resources to the project or



assigning specific personnel to assist in facilitating the permittee through an expedited permit review and decision process.

AFPM also urges CEQ to address in regulation the appropriate scope of analysis under NEPA regarding greenhouse gas (“GHG”) emissions and climate change. We support the decision to rescind the previous CEQ guidance on these topics and believe that a regulation from CEQ setting forth the appropriate focus and limits of GHG and climate change analyses is necessary to ensure consistency. As a result, AFPM recommends that CEQ address these topics as follows:

- **GHGs** – AFPM recommends that CEQ address the GHG emissions issue in its regulations by explaining that lead agencies should quantify as direct effects the anticipated GHG emissions directly attributed to the development and operation/implementation of the proposed action and limit indirect emissions to roads, construction related emissions, and other ancillary activities directly related to project.
- **Climate Change** – AFPM recommends that CEQ acknowledge in its regulations that the potential impacts to climate from individual proposed actions cannot be determined precisely or analyzed in detail without resorting to speculation and inference because at present, there is no commonly accepted method for attributing discrete environmental effects to GHG emissions from individual projects. As a result, it is impossible to determine whether any such impacts would be significant. Applying the longstanding principle under NEPA that an impact should be analyzed at a level commensurate to its significance, 40 C.F.R. § 1502.2(b), CEQ therefore should make clear that NEPA analyses of climate change impacts should be narrative and identify only reasonably foreseeable impacts from climate change attributed to the proposed action. Separately, see also AFPM’s comments in response to Questions 1 and 3 above.

Question 18: Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ’s NEPA regulations, and if so, how?

Yes. See AFPM’s comments in response to Questions 1 and 3 above regarding the development of a critical path timeline. That approach also would help to set timing expectations with the tribal governments up front.

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

Yes. AFPM recommends that CEQ revise its regulations to better articulate the concept of “connected actions” in 40 C.F.R. § 1508.25(a) and limit their scope based on the action agency’s jurisdiction or authority. This is particularly important for projects (oftentimes linear) that occur on both federal land and private land. While the federal land agency has authority to direct aspects of and identify potential feasible alternatives for portions of the project within its jurisdiction, the private landowner will have other priorities and obligations for portions of the project on its property. Treating the non-federal portions or components of such projects as



“connected actions” under NEPA oftentimes results in project delays and wasted resources. That would be avoided by clarifying that non-federal portions of projects are not considered “connected actions” and instead should be analyzed as cumulative impacts of the action. *See also* AFPM’s comment on the definition of “cumulative impact” in response to Question 7 above.

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

Yes. AFPM recommends that CEQ expressly acknowledge in its regulations that uncertainty oftentimes accompanies the long-term planning required for mitigation and that it is appropriate for project proponents to account for that uncertainty by including adaptive management procedures in their mitigation plans. CEQ should make clear that an action agency’s approval of a mitigation plan includes approval of the adaptive management procedures found within and that a project proponent’s subsequent use of adaptive management to address future mitigation issues has no impact on the underlying NEPA analysis and does not require supplemental analysis.

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

IV. CONCLUSION

AFPM thanks CEQ for its time and consideration of our comments related to revisions of CEQ’s NEPA regulations. AFPM acknowledges the need for robust analyses of environmental impacts that NEPA provides. However, the current implementation of the NEPA permitting process across federal agencies can be lengthy, inconsistent, and duplicative. Efforts to reform the NEPA process should promote accountability for reviews and ultimately reduce the costs and burdens of delayed projects by eliminating duplicative actions, ensuring consistency in reviews, and providing timely and predictable review schedules. We share CEQ’s commitment to environmental stewardship. It is because of these shared interests that AFPM submits our comments on this important rulemaking action. We look forward to the opportunity to work together on this. Please contact me at (202) 457-0480 or dfriedman@afpm.org if you wish to discuss these issues further.

Sincerely,

David Friedman
Vice President, Regulatory Affairs