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October 9, 2014

Council on Environmental Quality
Attn: Horst Greczmiel
722 Jackson Place NW
Washington, DC 20503

SUBJECT: Draft Guidance on Effective Use of Programmatic National Environmental Policy Act Reviews, 79 Fed. Reg. 50,578

The American Petroleum Institute (“API”) respectfully submits the following comments on the Council on Environmental Quality’s (“CEQ” or “Council”) August 25, 2014 Draft Guidance on Effective Use of Programmatic National Environmental Policy Act (“NEPA”) Reviews, 79 Fed. Reg. 50,578 (“Draft”). While API welcomes efforts to streamline the NEPA review process, we are writing to request that CEQ revise the Draft to make clear that there is no presumption in favor of programmatic NEPA reviews for two or more related federal actions, which API would view as unduly burdensome and contrary to law, and to offer additional comments on alternatives to streamlining what to many in the regulated communities can seem like a confusing, needlessly time-consuming, and uncertain process.

I. Interest of the American Petroleum Institute

API is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API’s more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation’s energy and are backed by a growing grassroots movement of more than 20 million Americans.

II. General Comments on the Programmatic NEPA Review Process

API’s members engage in a wide variety of federally regulated activities that may implicate NEPA reviews, including exploration and production of oil and gas resources on federal lands and the Outer Continental Shelf, construction of interstate oil and natural gas pipelines, and construction and operation of petroleum refineries and liquefied natural gas terminals, just to name a few. Accordingly, API



member companies are directly impacted by the NEPA review decisions made by, among other parts of the federal government, the Bureau of Land Management, the Bureau of Ocean Energy Management, the Department of Energy, the Federal Energy Regulatory Commission, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the U.S. Forest Service.

Despite decades of development of CEQ regulations, guidance, and related case law, API believes that the NEPA review process overall, including programmatic reviews, remains unnecessarily complex, time-consuming, and uncertain, which in turn acts as an impediment to investment in the nation's energy resources and infrastructure. Recent examples where significant uncertainty has clouded actual or potential programmatic NEPA reviews (in terms of timing, scope of review, and the threshold issue of whether any programmatic review was required at all) that affect the oil and gas industry include proposed leasing in California's Monterey Shale formation, geological and geophysical surveying activities on the Atlantic Outer Continental Shelf, and the construction of liquefaction facilities to export liquefied natural gas.

API previously addressed issues of timing, complexity, and other streamlining matters in comments on CEQ's Draft Guidance for "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act" submitted in January 2012 (a copy of which is appended to these comments). CEQ finalized this guidance in March 2012, with only minimal and non-substantive changes based on API's comments. Nevertheless, API urges CEQ to revisit these 2012 comments and apply them to the current Draft as well to ensure that CEQ adopts, and that agencies implement, our recommendations for reducing complexity, improving efficiency, establishing clear timelines, improving interagency coordination, and otherwise streamlining NEPA reviews. API's 2012 recommendations are equally important for programmatic documents. In fact, given the manner in which other NEPA assessments may "tier off" of a larger programmatic NEPA review, it is vital that CEQ include guidance to scope programmatic reviews appropriately, minimize analytical redundancy in tiered documents, and otherwise ensure that tiering can be done effectively and efficiently.

At the same time, API notes that "guidance" documents may not carry, and often have not carried, enough weight to compel agencies to carry out the guidance in practice. To more effectively ensure agencies implement NEPA in the way CEQ intends, and in ways that facilitate the timely development of vital infrastructure, energy, and other projects, CEQ should strongly consider going through formal notice and comment rulemaking. CEQ has the ability to add significant clarity on key questions plaguing programmatic NEPA reviews by going through regular notice and comment rulemaking

instead of promulgating non-binding guidance documents which tend to skirt the most important issues while perpetuating more uncertainty. Issues that API would like to see addressed in rulemaking include: the imposition of overly broad, inapplicable, or impractical mitigation measures in programmatic NEPA documents; impact analyses based on hypothetical or speculative information; and the use of programmatic NEPA reviews to limit the scope and content of future actions rather than evaluate and mitigate environmental impacts. Going forward, API therefore urges CEQ to amend its regulations to address these and other issues through regular notice-and-comment rulemaking procedures subject to judicial review.

III. Specific Comments on the Draft

a. CEQ Should Revise the Draft to Expressly Adopt the *National Wildlife Federation v. Appalachian Regional Commission* Test

API's core concern with the Draft as currently written is that it may be interpreted by agencies as creating a presumption that a programmatic NEPA assessment is appropriate – or compelled out of an abundance of caution and aversion to litigation risk – whenever two or more interrelated federal actions are considered, or when a single federal action is considered that may share issues in common with another reasonably foreseeable future federal action. This interpretation warps the true purpose of NEPA, and may lead to agencies combining completely different projects or industries into a single programmatic NEPA document, which would give rise to other practical and legal concerns.¹ Where a functional presumption in favor of programmatic review exists, API's members will be adversely affected by additional delays and costs, and both Federal agencies and regulated parties will face prolonged litigation risks that drain resources from effective regulation and private economic investment.

For example, the Draft strongly suggests that programmatic reviews are appropriate “for repetitive agency activities”;² revising regulations;³ when agencies have limited information or are uncertain about

¹ For example, the Draft suggests that proximity in geographic space should be a factor accorded significant weight in deciding whether to perform a programmatic review. *See, e.g.*, 79 Fed. Reg. 50,582 (“Programmatic examples include: A suite of ongoing, proposed, or reasonably foreseeable actions that share a common geography or timing, such as multiple activities within a defined boundary (i.e., Federal land or facility).”). Combined with the Federal Land Policy and Management Act's multiple-use mandate, this would seem to suggest that the Bureau of Land Management is required to perform a programmatic assessment for any and all permitted activities on particular federal lands simply because they may be close geographically, a plainly absurd result.

² 79 Fed. Reg. 50,581.

the timing of environmental impacts;⁴ or, simply, “whenever appropriate.”⁵ It should go without saying that these formulations of when programmatic reviews are warranted are overly broad and could be construed by agency officials to cover virtual any two loosely related major federal actions. The factors weighing in favor of programmatic review must be more narrowly defined, bearing in mind the complexities of defining a project, costs to industry and the government, and timing. The timing issue in particular should be a paramount consideration when performing broad programmatic NEPA reviews, which can take ten or more years to complete, and once completed, are subject to legal challenges on grounds that the reviews are out of date. Allowing for programmatic NEPA review to be triggered “whenever appropriate” suggests such reviews will almost always be deemed appropriate or will transform a relatively narrowly scoped project into a much larger project to accommodate speculative further actions of a nominally similar nature. Guidance supporting broad application of programmatic NEPA will only create a longer, more complex NEPA process and exacerbate litigation risks.

Put another way, taken as a whole, the Draft could make it difficult for an agency, particularly an agency concerned about NEPA liability, to not perform a programmatic review out of an abundance of caution to stave off legal challenges on grounds that a programmatic review not performed was nevertheless “appropriate” according to CEQ guidance. This is plainly not the result compelled by NEPA, and is in direct conflict with U.S. Supreme Court cases interpreting NEPA. We strongly urge CEQ to revise and sharpen the Draft to remove these and other uses of exceptionally broad discretionary language to describe the triggers for programmatic reviews.

In fact, API believes that in most cases, there should be a presumption against programmatic reviews because case-by-case analysis of projects will provide more robust environmental information regarding the projects within the scope of an agency’s authority. CEQ regulations already provide that agencies must prepare a single EIS when “[p]roposals or parts of proposals [] are related to each other closely enough to be, in effect, a single course of action. . . .”⁶ A single EIS is appropriate, for example, when

³ *Id.* at 50,582.

⁴ *Id.* at 50,581. Programmatic triggers when agencies have limited information or are uncertain about timing of environmental impacts also raise concerns that programmatic decisions would be biased towards no action or limiting actions based on purely speculative fears. Unavailability of information should not be grounds to halt a government action, *Sierra Club v. Sigler*, 695 F.2d. 957, 970 (5th Cir. 1983), or to prematurely limit such action through a programmatic analysis.

⁵ *Id.* at 50,588.

⁶ 40 C.F.R. § 1502.4(a).

an agency takes “broad Federal actions such as the adoption of new agency programs or regulation.”⁷ It is hard to square the text of CEQ’s regulations with much of the Draft, and API urges CEQ to revise it.

A brief examination of NEPA case law also counsels in favor of a more limited reading of any programmatic NEPA requirements. In *Kleppe v. Sierra Club*,⁸ cited favorably by CEQ in the Draft,⁹ the U.S. Supreme Court held that the Department of the Interior and other federal agencies “responsible for issuing coal leases, approving mining plans, and taking other actions to enable private companies and public to develop coal reserves on federally owned or controlled land”¹⁰ were not required to issue a programmatic EIS for the entire Northern Great Plains region. *Kleppe* reflects skepticism by the Court regarding programmatic reviews even for projects that share a number of the factors in the Draft in common, including location and type of activity. The Court found that the agencies had not proposed a regional plan and further explained,

Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements. In sum, respondents’ contention as to the relationships between all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive impact statement covering all before proceeding to approve specific pending applications.¹¹

Similarly, in *National Wildlife Federation v. Appalachian Regional Commission*,¹² the D.C. Circuit explained that “a programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program.”¹³ In *National Wildlife*, the court examined whether the agency was required to prepare a programmatic EIS “for an ongoing, but mostly completed, federally assisted highway development project.”¹⁴ The court noted that a “multi-phase federal program like a major

⁷ *Id.* § 1502.4(b). *Contra.* 79 Fed. Reg. 50,582 (“CEQ recommends agencies give particular consideration to preparing a [programmatic NEPA document] when: (1) Initiating or revising a national or regional rulemaking, policy, or program[.].”). This section of the Draft seems to directly contradict existing CEQ regulations.

⁸ 427 U.S. 390 (1976).

⁹ 79 Fed. Reg. 50,586 n.45.

¹⁰ 427 U.S. at 393.

¹¹ *Id.* at 414-15.

¹² 677 F.2d 883 (D.C. Cir. 1981).

¹³ *Id.* at 888.

¹⁴ *Id.* at 884.

highway development is a probable candidate for a programmatic EIS,”¹⁵ but found that a programmatic EIS was not required because “preparation of site-specific EISs in connection with the Appalachian highways, as the system currently stands, is sufficient compliance with NEPA.”¹⁶ In its analysis, the court suggested two questions when evaluating whether an agency should prepare a programmatic EIS: (1) “could the programmatic EIS be sufficiently forward looking to contribute to the [agency’s] basic planning of the overall program? ... [and (2)] does the [agency] purport to ‘segment’ the overall program, thereby unreasonably constricting the scope of . . . environmental evaluation?”¹⁷

While *National Wildlife* and its progeny are cited somewhat favorably by CEQ in the Draft,¹⁸ the *National Wildlife* test is couched merely in terms of what “CEQ recommends agencies give particular consideration to[.]” API suggests that the Draft expressly adopt the *National Wildlife* test as the paramount principle for determining when programmatic NEPA reviews are warranted, avoiding the hazards associated with a presumption in favor of programmatic reviews.

b. CEQ Should Address the Relationship Between Programmatic NEPA Reviews and Programmatic ESA and MMPA Evaluations

API also requests that CEQ revise the Draft to address how programmatic NEPA reviews and provisions of protected species statutes, including programmatic Endangered Species Act (“ESA”) evaluations and

¹⁵ *Id.* at 888.

¹⁶ *Id.* at 891.

¹⁷ *Id.* at 889. Additionally, In *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Cir. 2009), the Fourth Circuit applied the *National Wildlife* test to FERC’s decision not to prepare a programmatic EIS when implementing a new provision of the Federal Power Act, which provided FERC with “jurisdiction in certain circumstances to issue permits for construction or modification of electric transmission facilities. . . .” *Id.* at 310. The court found that FERC was not required to issue a programmatic EIS because its regulations met neither of the two elements of the test enunciated in *National Wildlife*. In reaching its decision, the court explained that the programmatic EIS would not be sufficiently forward-looking to contribute to FERC’s basic planning of the overall program,

[b]ecause permit applications will come in from private parties, [therefore] FERC cannot now identify projects that are likely to be sited and permitted. By the same token, FERC does not have information about the ultimate geographic footprint of the permitting program. Without such information a programmatic EIS would not present a credible forward look and would therefore not be a useful tool for basic program planning.

Id. at 316.

¹⁸ 79 Fed. Reg. 50,582 n.17-18 and accompanying text.

incidental take authorizations under the Marine Mammal Protection Act (“MMPA”) will be coordinated, and to clarify the relationship between the multiple processes. The Draft acknowledges the potential importance of programmatic NEPA reviews on determining compliance requirements under the ESA.¹⁹ For example, because NEPA reviews may provide analysis relevant to related ESA consultations, and because Biological Opinions can shape the development of proposed alternatives and mitigation measures, the processes should be coordinated to avoid duplication of efforts and to ensure that they inform one other in the most effective way possible. If the NEPA review and ESA and MMPA consultations are programmatic, coordination of these broader processes may be even more difficult logistically and substantively.

CEQ should revise the Draft to include a schedule or other mechanism for coordinating these and other interagency consultation processes (for example, National Historic Preservation Act reviews) in ways that could help ensure that they proceed as effectively as possible, including more concrete agency-to-agency coordination requirements, public release of status updates, and enforceable timelines and consistency requirements for both processes.

c. Other Specific Comments

- Section IV.D of the Draft explains that mitigation measures announced at the programmatic level could be applied in subsequent tiered NEPA reviews to specific projects and sites.²⁰ Even though mitigation measures recommended at the programmatic level now usually end up applied to individual projects, API is concerned that the guidance would make such application mandatory, even where a particular mitigation measure is impractical or inappropriate for that project. API recommends revising section IV.D of the Draft to recognize and provide guidance that agencies need not apply all programmatic mitigation measures at the individual project level, and in some circumstances should not (*e.g.*, where a measure would be impossible to carry out or impose undue hardship).
- Programmatic NEPA reviews should not be permitted to effectively inject new regulatory requirements into mature regulatory programs. For example, under former Minerals Management Service regulations, operational risks would be carefully researched and proposed actions (*e.g.*, regulations, standards, etc.) would address those risks. Meanwhile, a programmatic EIS would independently identify a concern and suggest a mitigation measure. This mitigation

¹⁹ *Id.* at 50,584.

²⁰ *Id.* at 50,586.

would circumvent the regulatory program and be imposed by lease stipulation or conditions of approval with little or no further review. This is how same-season relief well, shunting, marking of equipment, fishery training for rig workers, and other requirements have been imposed outside the normal regulatory channels and without proper analysis or notice and comment. This problem may be exacerbated now that the Bureau of Ocean Energy Management (“BOEM”), which has responsibility for programmatic and plan-specific NEPA documents, is separate from Bureau of Safety and Environmental Enforcement (“BSEE”). Without considering the overall effects on safety and environmental risks, BOEM may develop lease stipulations and Conditions of Approval, as needed, to satisfy NEPA concerns, which may or may not allow for clarity or alignment in purpose with BSEE programs. This potential outcome should be precluded by CEQ. Any proposed mitigations identified through programmatic NEPA reviews should be forwarded to other relevant regulatory agencies for assessment and potential incorporation into a regulatory program in an appropriate and consistent manner.

- The Draft explains that there is value in “identifying broad mitigation and conservation measures that can be applied to subsequent tiered reviews.”²¹ But mitigation measures should not be confused with conservation measures. NEPA is an “action-forcing” statute to identify possible adverse environmental effects of a proposed action, but it does not require that environmental impacts outweigh other values of the project. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Simply put, the NEPA process is not a conservation tool. The Draft should be revised to make it clear that NEPA mitigation measures are not the same as conservation measures.
- Appendix C of the Draft contains examples of programmatic NEPA reviews that CEQ deems “successful.”²² To provide more useful and balanced guidance to agencies, and to avoid a presumption in favor of programmatic reviews as described above, API recommends Appendix C be amended to also include examples of programmatic NEPA reviews not undertaken properly by agencies, as well as examples of cases requiring agencies to correct deficiencies in programmatic documents.

²¹ *Id.* at 50,581.

²² *See id.* at 50,581;

http://www.whitehouse.gov/sites/default/files/docs/draft_effective_use_of_programmatic_nepa_reviews_august_2014.pdf, at 51.

- Section IV.B.2 of the Draft describes how agencies can involve the public in developing programmatic NEPA reviews, which CEQ suggests should also include “non-governmental organizations and citizen’s groups.”²³ However, this discussion of what constitutes the “public” and how best to engage them omits any reference to regulated industries, labor organizations, and other important stakeholders directly impacted by the NEPA process. API recommends this section be revised to include guidance to agencies on engagement with industry and labor, at a minimum, as well as other potential stakeholders.
- CEQ appears to leave open to agency interpretation the lifespan of a programmatic NEPA document.²⁴ The Draft should be revised to require agencies to indicate how and when new or better information will be incorporated into tiered project or site specific EAs or EISs when there is an existing programmatic NEPA document in place.
- Finally, CEQ’s conclusions in Section VII reiterate many of the benefits of programmatic NEPA reviews, but do not suggest that agencies also factor in costs. While the Draft mentions costs elsewhere,²⁵ CEQ should reiterate in the Draft’s conclusion – and elsewhere – that a robust cost/benefit analysis should also be a principal consideration in weighing whether to perform a programmatic NEPA assessment. In addition, “costs” should be defined to include any source of administrative expense, delays to economic activity, interjection of uncertainty, and other risks that CEQ has an interest in minimizing. The Draft seems primarily concerned with describing benefits, and another way to balance out any perceived presumption in favor of programmatic reviews would be to include deeper discussion of the costs of programmatic and subsequent tiered NEPA reviews.

* * *

Thank you for the opportunity to provide comments. If you have any questions, please contact Ben Norris at (202) 682-8251, or norrisb@api.org.

²³ 79 Fed. Reg. 50,584 and n.32.

²⁴ “Agencies must consider and make reasonable efforts to anticipate the length of time the programmatic decision and its supporting NEPA review will be maintained.” *Id.* at 50,588

²⁵ *E.g.*, “as an agency determines the appropriate scope for a PEIS, it should consider ... the cost/benefit of addressing them programmatically.” *Id.* at 50,588.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stacy Linden', with a stylized, cursive script.

Stacy Linden

Attachment



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January 27, 2012

VIA ELECTRONIC FILING

The Council on Environmental Quality
ATTN: Horst Greczmiel
Associate Director for National Environmental Policy Act Oversight
722 Jackson Place, N.W.
Washington, DC 20503

Re: Comments on “Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act”

Dear Mr. Greczmiel:

On behalf of its members, the American Petroleum Institute (“API”) appreciates the opportunity to comment on the “Draft Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act” issued by the Council on Environmental Quality (“CEQ”). *See* 76 Fed. Reg. 77492 (Dec. 13, 2011). API is a national trade association that represents nearly 500 members involved in all aspects of the oil and natural gas industry, which supports 9.2 million U.S. jobs and more than 7.5 percent of the U.S. economy. API and its members regularly encounter the National Environmental Policy Act (“NEPA”) in a variety of contexts, including in conjunction with the numerous federally required permits, plans, leases, and other approvals to explore, develop, and produce energy resources on federal lands onshore and on the Outer Continental Shelf. API’s members spend substantial time and money to comply with NEPA’s requirements, and their projects frequently face litigation challenging NEPA adequacy despite the agencies’ diligent preparation of NEPA documents in accordance with CEQ and individual agency regulatory procedures.

API supports the CEQ’s goals in the draft guidance to facilitate efficient and timely environmental reviews. API also supports the draft guidance’s several principles and strategies to realize those goals, such as agency cooperation, concurrent (rather than sequential) reviews, concise documentation, and reasonable timeframes. CEQ’s reemphasis and clarification of these concepts should provide the regulated community increased certainty, critical to support highly complex and expensive energy generation projects and to create jobs domestically. The draft guidance also helpfully illustrates that time-saving techniques and high-quality environmental analyses are not mutually exclusive objectives.



API provides the below comments on certain aspects of the draft guidance. CEQ should clarify or strengthen these items, consistent with existing law, to further improve the NEPA process for agencies, project proponents, and the public.

Section 1: A longer analysis does not necessarily mean a better analysis. It is well known that an Environmental Impact Statement (“EIS”) may span hundreds or thousands of pages (without appendices), resulting in a somewhat incoherent document. Moreover, an Environmental Assessment (“EA”) may reach similar lengths, blurring its distinction from an EIS. API thus fully supports CEQ’s instruction for agencies to prepare concise NEPA documents and focus on the chief potential impacts posed by an individual proposed action. However, CEQ should consider providing greater specificity on the minimum and maximum expected length of NEPA documents, particularly EAs, to better preserve the respective utility of these different devices. The draft guidance’s vague statements that there are “a range of appropriate lengths of EISs” and “an EA’s length should vary” could encourage the preparation of longer documents, regardless of the degree of analysis actually warranted by potential impacts, as a perceived precaution against charges of inadequate analyses.

Sections 4 and 5: API agrees with CEQ that early cooperation among all agencies involved in a proposed action can help expedite the NEPA review process and avoid disagreements that threaten substantial delays. CEQ should strengthen this direction.

First, CEQ should specifically encourage agencies to jointly explore and execute a Memorandum of Understanding (“MOU”) or similar agreement to foster coordinated, timely reviews for an individual or specific type of project. An MOU creates and formalizes standard procedures shared by multiple agencies with overlapping jurisdiction. Alignment of agency processes results in greater transparency and certainty for complex projects, and facilitates preparation of joint or concurrent environmental reviews under different laws. For example, in June 2011, the U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, National Park Service, and Environmental Protection Agency signed and implemented an MOU regarding air quality analyses and mitigation for federal oil and gas decisions. See http://www.blm.gov/wo/st/en/info/newsroom/2011/june/NR_06_27_2011.html. That MOU transcended agencies’ divergent standards, timing, and impact thresholds that caused project delays. These strategies stemmed from best practices developed in the context of a single major natural gas development project. As another example, in May 2002, several departments entered into an Interagency Agreement (“IA”) on early coordination of environmental reviews for natural gas pipelines. Consistent with these examples, in its final guidance, CEQ should agree to promote MOU-type arrangements, periodically review such documents, and seek to institutionalize successful concepts government-wide to promote NEPA coordination.

Second, and related, the final guidance should prescribe steps for agencies to resolve disputes that may arise during the NEPA process without significantly delaying the project. For example, the above-cited air quality MOU describes procedures for expedited and effective dispute resolution. This process begins at the staff level, with unresolved issues quickly elevated to higher-level officials within each agency. CEQ may also consider assuming a role in dispute resolution; for instance, under the above-cited pipeline IA, disputing agencies may consult CEQ,



which then must issue a written recommendation, typically within 30 days. Since interagency disputes are common, CEQ should encourage dispute resolution strategies for situations even where MOUs or IAs do not exist.

Third, API recommends that CEQ address recurring problems concerning agencies withholding comments or changing positions late in the NEPA process. Consistent with API's comments on Section 9 below, the final guidance should advise agencies to furnish solicited input within a reasonable and defined period of time, and that failure to do so will not derail or substantially delay the NEPA process. Moreover, the final guidance should indicate that once a resource agency has submitted its comments under NEPA, it may not make significant changes to those comments or re-open an expired agency comment period, absent pertinent new information that represents a significant environmental threat. Such steps would encourage informed agency input upfront and deter inordinate delay in the NEPA process.

On a related point, the final guidance should address the current practice by some agencies of conditioning NEPA approval on the project proponent first acquiring permits or approvals from other agencies. The final guidance should make clear that it is improper for agencies to require project proponents to obtain permits or approvals from various agencies in any particular sequence. Each agency involved in the NEPA review process should make its own independent NEPA determinations in its own subject matter areas, and should not require permits or determinations by other agencies as a prerequisite to its own NEPA determinations.

Section 7: API supports the use of incorporation by reference to produce more concise NEPA documents (see Section 1 comments above) and avoid unnecessary expenditures of proponent and agency resources to reproduce already-completed environmental reviews. Yet, CEQ's draft guidance does not sufficiently utilize this helpful method to avoid duplication of effort. API's members often conduct multi-phase projects involving a sequence of similar activities in close geographical proximity. For example, onshore oil and gas drilling may consist of multiple wells on a single lease or field. An even clearer illustration involves planning and drilling of exploration or production wells on one or adjacent deepwater Outer Continental Shelf leases. Each requisite federal approval triggers NEPA, although the relevant activity's local impacts have recently been assessed.

To account for these contexts, rather than merely allowing incorporation by reference in a new EA or EIS, CEQ should announce a presumption that a recently completed EA or EIS will suffice for a later activity that is substantially similar, poses like impacts, occurs in reasonably close proximity, and takes place reasonably contemporaneously (e.g., within 5 years of the EIS or EA), except where significant changed circumstances exist requiring supplementation under NEPA. This step would save significant time and costs to reanalyze a similar activity in the same affected environment, without sacrificing consideration of environmental impacts. Such "horizontal tiering" from existing analyses (as opposed to tiering from a more general prior NEPA document) is consistent with, e.g., Bureau of Land Management Determinations of NEPA Adequacy for subsequent actions, and NEPA categorical exclusions enacted by the Energy Policy Act of 2005 for development of federal oil and gas resources.



Section 9: Finally, and perhaps most importantly, API appreciates the draft guidance's recognition of the need for clear timeframes for NEPA reviews. Too often, energy projects experience months and even years of delay due to NEPA obstacles, with no discernable end date. Given the enormous investments and extensive planning necessary to locate and produce oil and gas resources, such delays and uncertainty pose a major problem to domestic energy security.

API proposes that CEQ bolster its draft guidance in three ways. First, CEQ should require agencies, as a standard practice, to set a reasonable expected time limit for the overall NEPA review at the outset of the NEPA process, and firmly adhere to that schedule. Individual agencies may determine the precise time limit or certain milestones for a project, ideally in consultation with the project proponent, to determine project needs and time sensitivities. Second, consistent with API's above comments, the factors for determining the timeline should also include the similarity of the proposed action to earlier reviewed actions. That is, a proposed action should require a shorter NEPA review if a like action was recently analyzed in a similar, nearby location. Third, CEQ should encourage agencies to monitor and periodically report on their NEPA performance, including the average length of time to complete NEPA review for common types of projects. These adjustments in the final guidance would afford greater certainty among project proponents, cooperating agencies, and the commenting public.

Thank you for considering these comments. API looks forward to CEQ's response and to reviewing the final guidance when issued. If you have any questions regarding these comments, please contact Peter Tolsdorf at (202) 682-8074, or tolsdorfp@api.org.

Sincerely,

A handwritten signature in black ink that reads "Harry Ng" followed by a long horizontal flourish.

Harry Ng

Vice President, General Counsel and Corporate
Secretary, American Petroleum Institute