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730 Jackson Place, NW
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Docket No. CEQ-2018-0001

Via Federal eRulemaking Portal: <http://www.regulations.gov>.

Dear Council on Environmental Quality:

BP America (BP) appreciates the opportunity to provide written comments to the Council on Environmental Quality (CEQ) on the Advanced Notice of Proposed Rulemaking titled "Update to Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" (83 Fed. Reg. 28591, June 20, 2018).

BP supports CEQ's goal of updating and clarifying its NEPA regulations. We have been engaged with CEQ since last year and, in September of 2017, presented the attached set of potential reforms jointly with The Nature Conservancy. Many of the improvements discussed in this letter build on the concepts discussed in that earlier document.

We were encouraged by the initial list of "Actions to Enhance and Modernize the Federal Environmental review and Authorization Process" published in September of 2017 (82 Fed Reg 43226). We see the ANPRM as an important next step and we look forward to reviewing proposed changes in the near future. BP supports the comments provided by the American Petroleum Institute and the Business Roundtable. Our comments are intended to highlight and elaborate on the comments of our trade associations. Specifically, we ask that CEQ:

- Implement the FAST Act;
- Implement One Federal Decision;
- Extend reform to smaller projects through improved use of Categorical Exclusions ("CEs");
- Modify the "Mitigated FONSI" Guidance to encourage more frequent utilization;
- Encourage use of programmatic Environmental Impact Statements;
- Expand the use of mechanisms for applicant funding of reviews;
- Encourage early alignment of proposed infrastructure projects through informal consultation with project sponsors; and
- Streamline the Air Quality Analysis.



BP's Interest in this Rulemaking

BP has a larger economic footprint in the U.S. than in any other country. We support 125,000+ jobs in the US, and in 2017 alone, BP's operations contributed \$85 billion to the American economy.

BP's operations in the U.S. include 3 oil & gas exploration and production businesses, 3 refineries, 2 petrochemical plants, 14 wind farms in 8 states, 7200 BP/ARCO-branded retail sites and 4,700 miles of pipelines owned or managed by our US Pipelines Business. Many of these businesses are subject to the NEPA process because they operate on federal lands or require federal approvals. Streamlining the NEPA process will directly benefit BP's operations in the US and can be accomplished without compromising the laudable goals of NEPA.

Specific Comments

Implement the FAST Act

In 2015, Congress enacted the Fixing America's Surface Transportation (FAST) Act, which among other things, included provisions to speed the permitting of infrastructure projects. BP supports the federal permitting improvement provisions of the FAST Act. The Act streamlined the NEPA process for "major infrastructure projects" by allowing a proponent to opt into a program supervised by the newly created Federal Permitting Improvement Steering Council (FPISC). The project proponent must agree to fund the FAST Act process. The FAST Act has not been implemented effectively and still does not have an Executive Director, which the Act required by 2016.

We encourage CEQ to adopt the needed FAST Act implementation guidance and regulations. We recognize that the Act seems to be integrated into the One Federal Decision (OFD) framework discussed below but we think CEQ should articulate how it will ensure that all the benefits of the FAST Act will be incorporated into the OFD framework. For example, we recommend that CEQ clarify the governance structure for NEPA projects: what is the role of CEQ versus FPISC and OMB?

BP also recommends that CEQ expand the coverage of the Act by clearly defining the FPISC's discretionary authority to designate projects as "covered" even if under the \$200 million threshold (see 42 USC 4370m (6)(A)(ii) and OMB Guidance para. 3.6). The statutory eligibility criteria for "covered projects" under Title 41 of the FAST Act (FAST 41) is both overly prescriptive with respect to the \$200 million threshold and ambiguous with respect to additional qualifying criteria. As a result, the program has significantly underserved its potential, with many potentially qualifying projects unwilling or unable to avail themselves of the program's benefits. Clarity around qualifying should expand the use of the Act.

Finally, to take full advantage of cost-sharing authorities across government agencies, OMB should issue regulations that implement the cost-recovery provisions of FAST 41, the Economy Act (31 U.S.C. 1535), and other applicable cost share/cost recovery provisions in federal law specific to federal agencies.

Implement One Federal Decision

BP believes that the OFD framework contemplated by Executive Order 13807 and the related Memorandum of Understanding between 12 federal agencies announced in April of 2018 represent an



important step towards reform. We are particularly pleased that the FAST Act and the FPISC that it created will be used in the OFD. However, we have several concerns regarding implementation of OFD.

First, the agencies, OMB and FPISC must dedicate sufficient resources to ensure full implementation. We suggest that OMB take the responsibility of assessing annually whether sufficient resources are being allocated and that OMB should have authority to incentivize agencies to provide support. Specifically, we recommend that:

- a) OMB modify guidance to agencies regarding the development of agency "High Priority Management Goals" to specifically prioritize better integration of permitting and environmental review activities; and
- b) OMB modify budget guidance to agencies and internal OMB budget review processes to use "cross-cutting budget" initiatives to help identify relevant programs and integrate reviews of multiple agencies focused on infrastructure planning, permitting and environmental reviews and mitigation.

Second, CEQ should consider further utilizing "Service First" type authorities. Service First is a way of forming partnerships across agency boundaries to deal with resources with an integrated and collaborative approach. This approach facilitates sharing of facilities, personnel, and other resources in the context of multi-agency permitting and environmental reviews.

Third, state, tribal and local permitting authorities are not integrated into the OFD process. If these permitting authorities are not included in the process, significant unanticipated project delays can result for covered projects despite the benefits of improved Federal coordination.

While the OFD framework notes that lead agencies "may invite" state, tribal and local agencies to participate in the NEPA process, we think CEQ should do more to encourage participation by those agencies. For example, FAST 41 implementation guidance should include an opt-in provision for State and local permitting authorities to be included in the planning and implementation process for covered projects. (see, 42 U.S.C. § 4370m – 3(A), (B); 4(1)(A)(i) and 5(a)). In addition, CEQ should explore extending the Service First concept to local, state and tribal agencies as well as federal agencies.

Fourth, while we support the "target" of completing environmental reviews and authorization decisions within two years, we do not want that "target" to cause agencies or project proponents to short-cut the process. Doing so creates unnecessary litigation risk which can result in long project delays. The same can be said for the page limit targets. BP suggests that project proponents should be permitted to agree to extensions of the permitting timeline and of the page limit restrictions if, in their judgment, the extensions are necessary.

Extend Reforms to Smaller Projects

BP strongly suggests that the OFD principles be extended to smaller projects. As it currently stands, the FAST Act, the OFD framework and the OFD MOU only apply to "major infrastructure projects." As an initial focus, that makes sense, but smaller projects also suffer from long, unnecessary delays, and the OFD principles would also help with those projects. We recommend that CEQ develop a plan for the very quick extension of the principles to smaller projects.



Categorical Exclusions (CEs) are under-utilized by agencies as a tool to streamline environmental reviews and by developers in designing their proposed project. Clearly identifying existing CE authorities would help improve utilization of CEs by both agencies and developers. Project proponents are often unaware of opportunities to modify projects to qualify for CEs in lieu of more in-depth Environmental Assessments. With a fully complete list of available CEs, organized by both agency and type of activity, and available on the internet at a single URL, developers can design their projects to take full advantage of CEs, and agencies can more effectively leverage this tool to advance environmental reviews more efficiently.

Specifically, we recommend that CEQ:

- a) Complete a comprehensive, federal government-wide compilation of existing CEs, arranged by both agency and project type, and available on the internet at a single URL with links to the full text of each CE.
- b) Identify redundancies and incompatible or conflicting CEs and recommend corrective actions to the agencies concerned. Greater consistency is needed in how agencies interpret CEs. Consider ways to expand the number and scope of their CEs and/or further encourage the use of CEs as appropriate and consistent with their legal authorities.
- c) We also suggest that CEQ provide guidance to agencies regarding the limited circumstances in which it is appropriate to deny the use of CEs based on “extraordinary circumstances.” A term such as this can be interpreted differently by different people and agencies, and can limit the usefulness of CEs and thereby extend the NEPA process unnecessarily.

Finally, we commend BLM for issuing Information Bulletin IB 2018-061 re “NEPA Efficiencies for Oil and Gas Development.” This IB encourages BLM to utilize tools to expedite review by using existing tools such as Determinations of NEPA Adequacy (DNAs), CEs and prior programmatic NEPA analyses. We encourage CEQ to coordinate with all implementing agencies (USFWS, USFS, etc.) to develop similar guidance for those agencies.

Modify the “Mitigated FONSI” Guidance

BP believes that project proponents should have the option of agreeing to mitigation measures during the NEPA process to reduce the reasonably foreseeable environmental impacts of a major federal action to a level that is not significant and thereby avoid an EIS, a process known as “Mitigated FONSIs. These are an important tool for accelerating project approval but they can lead to over-reaching by agencies and are under-utilized.

As to over-reaching, some commenters have noted that lead and cooperating agencies can use the project proponent’s desire to avoid the cost and delays associated with an EIS to extract mitigation projects that are not appropriate. We think it is important to the integrity of NEPA to implement measures to prevent this sort of practice. To that end, we suggest that CEQ amend its 2011 Mitigated FONSI guidance to stress the procedural focus of NEPA and to clearly state that mitigation is at the discretion of the project proponent.

To ensure the proper utilization of Mitigated FONSIs, we think the revised guidance discussed above could be supplemented with a thorough legal analysis laying out the legality of Mitigated FONSIs. This may make project proponents and agencies feel more comfortable relying on Mitigated FONSIs. We



recommend that CEQ instruct action agencies to update their rules and guidance to encourage the proper use of mitigated FONSI.

Other Miscellaneous Reforms

Encourage use of programmatic EISs

The programmatic approach under NEPA has not been fully used for its intended purpose and, when used, it often has not fulfilled agency or stakeholder expectations with respect to process efficiencies or streamlined decision-making. BP recommends that CEQ review its 2014 draft guidance on "Effective Use of Programmatic National Environmental Policy Act Reviews" and issue new guidance to explicitly encourage the use of Programmatic Environmental Impact Statements (PEISs) whenever appropriate and feasible (see: <https://www.federalregister.gov/documents/2014/08/25/2014-20199/effective-use-of-programmatic-nepa-reviews>).

Expand the use of mechanisms for applicant funding of reviews

Resource and personnel constraints among Federal permitting authorities can have significant impacts on the ability of these authorities to process NEPA environmental reviews in a timely manner. CEQ should examine relevant legal authorities that would allow for project proponents to fund environmental reviews through accredited third parties or agency designees. If supported by relevant legal authorities, CEQ should issue NEPA implementation guidance to agencies clarifying the conditions under which project proponents could utilize third parties for environmental reviews and/or provide additional resources to be utilized by the agencies for environmental reviews. There are numerous examples of these types of arrangements that can serve as models for implementation.

This issue is particularly acute in the context of air quality modeling and is discussed in more detail in the section below entitled "*Streamline Air Quality Analyses.*"

Encouraging "Early Alignment" of proposed infrastructure projects through informal consultation with project sponsors

Agencies have inconsistent and ambiguous guidance about whether the involvement of federal agencies in informal discussions before projects are publicly proposed or formal NEPA processes are initiated may trigger Federal Advisory Committee Act (FACA) requirements.

CEQ should issue clear guidance applicable across the Executive Branch to enable and encourage such informal consultation across and among federal agencies prior to public scoping while preserving full public engagement in later formal procedures. Early informal discussions can help clarify feasible alternatives and approaches, which will aid in stream-lining the analysis and formal consultation process and will assist in making the mandated timelines and page number requirements more feasible. CEQ could also provide training and resources needed for agencies to understand and consistently implement FACA requirements while working to better engage with a broad range of interested groups - including other federal, state, local, and tribal agencies, NGOs, and the public.

Streamline Air Quality Analysis

Even in cases with limited projected air quality impacts, the NEPA air analysis can take many years to complete. BP has identified several shortcomings that should be addressed to expedite this analysis.



- a) Most federal agencies do not have technical staff to manage the content of a sophisticated air quality analysis;
- b) There is often a reluctance on the part of the agencies to change methodologies from previous NEPA oil and gas analyses;
- c) In some cases, the air quality standards may change or be proposed to change during the EIA, introducing uncertainty into the analysis; and
- d) Additional NEPA projects may be included in the cumulative air quality analysis requiring additional cumulative modeling.

BP suggests the following solutions to address these shortcomings.

Third Party Analysis

The largest hindrance in NEPA air quality analyses is the requirement that an analysis be performed by a third party and thus the project proponent's expertise is not leveraged. Given the magnitude of a many air quality analyses (e.g., regional cumulative analysis), most agencies are not technically equipped to perform this type of work.

The requirement for third party analysis is unnecessary and the NEPA analyses could benefit (in terms of technical content, cost and schedule) by the removal of this requirement. In the Clean Air Act context, many cumulative air quality analyses are conducted as part of New Source Review (NSR) by project proponents and the independence of the analysis is not questioned.

By changing the third-party requirement, a NEPA analysis would essentially be equivalent to Clean Air Act NSR modeling. NSR modeling requires extensive resources but unlike NEPA modeling, it is a defined process and project proponents can lead on both technical content and schedule. Proponents would submit a protocol, share interim results and present end results. The lead agency would remain the ultimate decisionmaker. Under NSR modeling, there is no question regarding independence of results – and EPA remains the decisionmaker with other stakeholders and the public having an opportunity to comment on results and conclusions.

Changing Air Quality Standards

In some cases, air standards will change during the NEPA analysis. The issuance of a Record of Decision should not be delayed waiting for final promulgation of proposed standards. If new standards are proposed but not promulgated, conditional NEPA approval should be given with the commitment by proponents for demonstrating compliance later in the development cycle.

Cumulative Analyses

Cumulative air quality analyses should include only those sources (i.e., projects) that have been proposed and for which a project scope has been defined. Inclusion of sources that do not meet those criteria should not be included. Further, sources included in a cumulative analysis should be within the significant impact area for the proposed project. Sources that are not within the significant impact area do not need to be included in the analysis.

Effect Levels

Air Quality Related Values (AQRV) thresholds should undergo a peer review in formulation and application. For example, the scientific approach for calculating visibility impairment has not



undergone critical review. The technical approach for visibility was incorporated into the 1990 Acid Rain "Criteria Document." Extensive comments were developed by the public on acid deposition but visibility received little attention. There are technical issues that have never been addressed (i.e., relative humidity curves and application of impacts over a sight vista as opposed to a single location). They should be based on proper literature and adopted through a formal rulemaking process before they are required for inclusion in the NEPA review process.

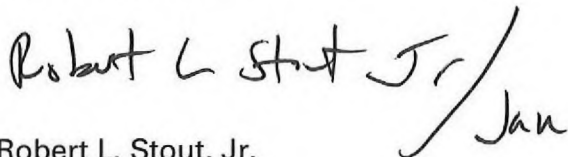
Also, the definition of significant impacts for visibility and deposition need to be defined, undergo the proper peer review in formulation and application. They should be based on proper literature and adopted through a formal rulemaking process before they are required for inclusion in the NEPA review process.

Conclusion

BP appreciates CEQ's efforts to revise the NEPA regulations to improve the efficiency of the review process and we look forward to reviewing proposed revisions to the rules. Thank you for considering our comments.

Please feel free to contact Jim Nolan (james.nolan@bp.com) or me if you have any questions.

Sincerely yours,



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