June 22, 2020

Via Electronic Submission

Sharon Cooperstein
Policy and Regulatory Analysis Division
Office of Regulatory Policy and Management (Mail Code 1803A)
Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, DC 20460

Re: EPA-HQ-OA-2020-0128 – EPA Guidance; Administrative Procedures for Issuance and Public Petitions

Dear Ms. Cooperstein,

GPA Midstream Association (“GPA Midstream”) appreciates the opportunity provided by the Environmental Protection Agency (“EPA”) to submit comments on the Agency’s proposed regulations establishing procedures and requirement for how EPA will manage the issuance of guidance documents.1

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream supports the proposed regulations. The new rules would provide a regulatory framework to ensure EPA acts within its authority delegated by Congress to provide guidance that interprets, explains and clarifies legal requirements, but does not create new requirements. The proposed regulations also codify the foundational legal principle that

---

guidance documents are non-binding in nature and cannot be used as a vehicle to impose new obligations on the public.

Moreover, EPA’s procedural approach is sound. EPA’s proposal to 1) publish all guidance documents in a centralized web-based platform, 2) publish and make available for public comment all new significant guidance documents, including modification and withdrawal of significant guidance documents, and 3) establish a process by which members of the public can submit requests to modify or withdraw existing guidance documents establishes the necessary structure to ensure transparent use of guidance documents.

In addition, GPA Midstream does urge EPA to clarify the proposed regulations consistent with the associated regulatory preamble in two ways. First, EPA should make clear that while new significant guidance documents will be proposed through a notice and comment process, the new guidance will not create binding legal obligations on regulated entities. That is certainly the intent of the proposal and thus can easily be confirmed. Second, EPA should make clear that the proposed process for requesting modification or withdrawal of active guidance documents applies to all EPA guidance documents, including guidance issued before EPA finalizes the proposed rule.

I. The Proposal provides sensible tools to inform the public that a new guidance document has been issued, an active guidance document has been modified, or an active guidance document has been withdrawn

GPA Midstream supports EPA’s proposed process for using notifications on the EPA Guidance Portal or other Agency website to inform the public that a new guidance document has been issued, an active guidance document has been modified, or an active guidance document has been withdrawn. Publishing guidance documents in a centralized location will enable regulated entities – and indeed all stakeholders – to have full view of the Agency’s guidance on important matters affecting business operations. If properly implemented, streamlined access to guidance documents will support transparency and a level playing field across regulated industries, as those seeking to understand how EPA interprets or applies a complex requirement will no longer have to undertake a fishing expedition to ascertain whether a relevant guidance document exists.

GPA Midstream likewise supports EPA’s proposal to publish in the Federal Register and solicit public comments before it issues new significant guidance documents and/or proposes to modify or withdraw active significant guidance documents. Allowing interested parties to provide input on the consequences and implications of all significant guidance documents will promote the goals of transparency and good government set forth in the Executive Order underlying this proposed rule.2

Similarly, GPA Midstream urges EPA to adopt its proposal to require concurrence or approval by Presidentially-appointed EPA officials at EPA headquarters for issuance of new guidance documents developed by an EPA Regional Office. EPA guidance should be applied

---

uniformly across the entire nation, and headquarters-level approval will ensure that any Region-specific guidance document is appropriately tailored to the unique circumstances and needs of a given region rather than merely reflecting different interpretations or policy preferences amongst the various offices. Such uniformity is vital to regulated entities, like the members of GPA Midstream, that develop projects throughout the United States.

Finally, GPA Midstream believes that the proposed requirements in 40 C.F.R. § 2.505(c), indicating that guidance documents will avoid mandatory language such as “shall,” “must,” “required,” or “requirement,” should ensure that new guidance documents never create binding legal obligations on regulated entities. However, because new significant guidance documents will be published in the Federal Register and open to public comment, these guidance documents could erroneously be construed to have binding legal effect under the Administrative Procedure Act, 5 U.S.C. § 553. Therefore, GPA Midstream would urge EPA to add a clause to the proposed requirements in 40 C.F.R. § 2.506 to make clear that notwithstanding notice and comment, new significant guidance documents are still only guidance, and thus non-binding and do not create new legal obligations.

II. The Proposal establishes prudent procedural requirements for accepting petitions to modify or withdraw an active guidance document

GPA Midstream supports the proposal to establish an orderly process for stakeholders to petition EPA to modify or withdraw active guidance documents. The structured process will allow regulated entities a fair process to communicate with the Agency and ensure that guidance documents serve their intended purpose—namely, that they help regulated entities comply with existing legal requirements without creating new ones. If a guidance document is not appropriately tailored to help regulated entities comply with existing legal requirements, GPA Midstream applauds EPA’s proposal to allow regulated entities to provide that feedback to the Agency for further consideration – and for the Agency to provide a response within a defined time frame.

EPA’s proposal to use a consistent format is also prudent, as a uniform set of information makes clear all parties’ expectations. It will better ensure that EPA will receive the essential information it needs to respond to the petition – and that the petitioner will have confidence that its petition will not be turned away for insufficient information. It may also generally facilitate agency reviews, so it can act promptly on a petition and provide a stakeholder a timely response.

EPA should, however, clarify and confirm in the final regulation that the petition process to modify or withdraw active guidance will be applied both to new guidance documents issued after EPA finalizes this proposal and existing guidance documents in use today. Considering existing guidance is essential for this procedure to have a material effect, given the age and breadth of existing agency guidance. Limiting this process to prospective guidance only would severely limit the value of creating this process. We presume that EPA intends to cover existing guidance, as the proposal’s regulatory preamble describes “active” guidance documents as “those guidance documents under this rule that EPA expects to cite, use, or rely on.”3 The regulatory preamble also distinguishes between when a “new” guidance document is issued and an “active”

3 Proposed Rule at 31106.
guidance document has been modified or withdrawn, though both types are intended to be covered by the proposed rule.\footnote{Id. at 31107.}

However, the proposed regulation itself could be construed to only apply to guidance documents issued after the proposed rule is made final. Proposed 40 C.F.R. § 2.502(b) states that “the procedures in this subpart apply to all active guidance documents as defined in this subpart, \textit{issued by all components of the [EPA] after [date of issuance for the final rule].}” Consistent with the regulatory preamble, GPA Midstream urges EPA to revise § 2.502(b) or § 2.503 (Definitions) to make clear that the petitioning process applies to guidance documents regardless of when a document was issued. EPA could clarify this by inserting “and in effect on or” before “after,” to ensure existing guidance are covered properly.

Finally, because EPA’s proposed framework will result in an orderly process for accepting petitions on the modification or withdrawal of active guidance documents, EPA should adopt similar regulations governing the submission of requests to modify or withdraw existing regulations. While regulated entities are free to request such relief without new regulations, applying a similar framework for requests to modify or withdraw existing regulations will help streamline the process and ensure that the requests are dispositioned in an expedient fashion, furthering the Executive Order’s underlying goal of having a more open and fair regulatory process.

* * *

GPA Midstream appreciates and welcomes the opportunity to provide these comments. If you have any questions regarding our comments, please contact Matthew Hite, Vice President of Government Affairs, at mhite@gpamidstream.org.

Respectfully Submitted,

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association