



March 10, 2020

Submitted via [//www.regulations.gov/](http://www.regulations.gov/)

Mary B. Neumayr
Chairman
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

RE: Comment on the Proposed Rule on “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” 85 Fed. Reg. 1684 (Jan. 10, 2020), Docket No. CEQ–2019–0003

The Western Urban Water Coalition (WUWC) appreciates this opportunity to comment on the Council on Environmental Quality (CEQ) proposed rule on “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” 85 Fed. Reg. 1684 (Jan. 10, 2020). Throughout the West, significant investment in water supply infrastructure is needed to provide drought resilience and reliable water supply in the face of growing populations, aging water systems, new regulatory requirements, and changes in the amount and type of precipitation due to climate change. Regulatory reform is needed to promote water supply infrastructure and improve and protect our nation’s water supplies.

Established in 1992 to address the West’s unique water supply and water quality challenges, WUWC consists of the largest urban water utilities in the West, serving more than 40 million water consumers in major metropolitan areas in seven western states. WUWC includes the following urban water utilities:

- *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project;
- *California* – Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District and City and County of San Francisco Public Utilities Commission;
- *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water;
- *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority;
- *New Mexico* – Albuquerque Bernalillo County Water Utility Authority;
- *Utah* – Salt Lake City Public Utilities, and
- *Washington* – Seattle Public Utilities.¹

¹ WUWC member Seattle Public Utilities does not participate in these comments.

WUWC is committed to presenting new and different perspectives on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to provide a reliable, high quality, sustainable urban water supply for present and future generations. As operators of public water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock every day of the year. WUWC is an advocate for effective and practicable approaches to the construction and operation of water supply infrastructure critical to the economic growth, natural resource sustainability, and quality-of-life in the Western states.

WUWC has historically been, and will continue to be, an ardent supporter of the goals of the National Environmental Policy Act (NEPA) and federal policy that strives to ensure the effective use of the nation's water resources. WUWC has consistently recognized the importance of comprehensive and environmental review and public participation in advancing large-scale infrastructure projects. Such review results in better decisions and better projects. However, WUWC supports improving the NEPA procedures to make them more efficient, timely, and effective. The existing NEPA process has resulted in delays that have hindered and discouraged critical infrastructure projects. The predictability and timeliness of federal decisions have been hampered by an inefficient and protracted environmental review process, featuring voluminous documentation, and exhaustive effects analysis and seeming to favor quantity over quality.

Throughout its 28-year history, WUWC has been very active in legislative and regulatory initiatives related to NEPA. We have appeared before congressional committees, met with federal agencies, and commented on proposed CEQ guidance. WUWC has a strong interest in increasing the efficiency of NEPA procedures and supports CEQ's goal of updating its regulations to ensure a more efficient, timely, and effective NEPA process. WUWC members engage regularly with the federal agencies in obtaining authorizations for facilities and operations on or adjacent to federal lands that provide critical water supplies to their citizens. WUWC members are active collaborating partners with the federal agencies and a variety of stakeholders. WUWC members have decades of experience participating in NEPA and related environmental analyses, and we submitted comments on August 20, 2018, on the CEQ's Advance Notice of Proposed Rulemaking (ANPRM) to update the NEPA implementing regulations. *See* CEQ-2018-0001-12226.

A. General Comments

WUWC is pleased to see that the proposed regulations reflect many of our comments on the ANPRM with respect to improving the efficiency of the NEPA process. WUWC supports the proposed revisions to the rules that improve interagency coordination, encourage more effective comments, clarify the requirements for analyzing impacts and alternatives, increase the use of categorical exclusions where appropriate, and allow non-federal project proponents to prepare NEPA documents subject to appropriate conflict of interest requirements and assurances of federal agency oversight and control. These proposed changes to the NEPA process will streamline the review and approval of critical infrastructure projects, ultimately improving the nation's water supply and resiliency.

However, WUWC is concerned that some of the proposed regulations could result in changes that have the potential to create confusion, change existing procedures and substantive requirements that are well understood and engrained in NEPA practice, or present litigation risk by seeking to reverse established case law that is based upon existing and unmodified statutory language. In that regard, some of the proposed regulations could be counterproductive, even if they are directed at goals long embraced by WUWC. Our comments identify issues that we believe fall into this category. Such litigation could delay important water infrastructure projects and thereby adversely impact WUWC members and the communities they serve.

1. Agency Resources

While WUWC supports expediting the NEPA process and making it more efficient, WUWC is concerned that federal agencies will need sufficient funding, staffing, and resources to effectively implement the proposed changes, including the required time and page limits. One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays and uncertainty in decision-making. These problems often arise because of insufficient staffing and lack of federal agency resources to conduct the necessary procedures. Delays caused by insufficient federal staff and resources are likely to increase with budget cuts.

WUWC believes there are solutions to this problem. First, agencies must secure adequate funding so they can complete their decision-making responsibilities on time. Second, and related to this point, to supplement congressional appropriations, federal agencies should be permitted and encouraged to pursue cooperative relationships with non-federal sources of funding for agency staff positions in support of completing the NEPA process. Under such relationships, federal agencies would retain complete control over the work and would remain responsible for the objectivity and adequacy of the NEPA document.

In addition, decision-making would be expedited and procedures would be more reliable and certain as a result of developing and using standard form agreements as the basis for allowing project sponsors to assume the cost of permitting procedures, including environmental impact statements (EISs) for “gray” infrastructure projects (*i.e.*, human engineered, new construction or upgrading of dams, pipelines, roads, etc.). A standard form could easily be adjusted to apply to an environmental assessment (EA) as needed. Reimbursement agreements could expedite the permitting process via provisions allowing the project applicant to pay for a full-time agency project manager and other personnel as well as other contractor consultants. The agreements could also provide in basic general terms for lead agency coordination with other consulting/cooperating agencies to meet timelines, and they could be adapted to or paired with an interagency agreement for the project.

Finally, flexibility should be applied in making exceptions to the deadlines and page limits set forth in the regulations. The lead agency official should approach requests for exceptions with the understanding that project-specific needs will sometimes require departures from the regulations.

2. Indirect and Cumulative Effects

A substantial body of case law has developed over the years concerning agencies' obligations to evaluate indirect and cumulative impacts under NEPA. Some cases have grounded this requirement in the statute itself, rather than the CEQ regulations. *See, e.g., Hanly v. Kleindienst*, 471 F.2d 823, 830-31 (2d Cir. 1972). Indeed, indirect and cumulative effects are often important aspects of a projects' environmental impacts that ought to be considered, subject to appropriate limitations on the definition of those impacts. If CEQ removes the regulatory requirement to analyze indirect and cumulative effects, it may open the door to claims that the CEQ regulations are invalid by being inconsistent with statutory requirements. Additional guidance should be developed on the foreseeability concept to identify cumulative effects. In clarifying the standard for cumulative effects, the final rules should establish that speculative future activities would not be considered, and that cumulative effects would only be considered where reliable evidence demonstrates that a future activity is reasonably certain to occur and whose impacts are susceptible of quantification. WUWC will continue to analyze an appropriate definition of "effects," including indirect and cumulative effects, and may provide additional comments on this topic.

3. Climate Change

Climate change, including deeper and extended droughts, is having a profound effect on water in the West and, in turn, on WUWC members and their customers. Climate change has necessitated identifying new sources of water and building new water delivery and storage infrastructure. Water infrastructure projects undertaken by WUWC members address the effects of climate change in the West. We believe that climate change is a factor to be considered under NEPA. The precise manner in which it will be considered would vary based on the proposed action. In some cases, including most situations involving western water resources, the effects of climate change would be considered under the Affected Environment section. In cases under NEPA generally, climate change would be considered in the Environmental Consequences analyses as part of the cumulative impacts section.

In addition, it is important for NEPA reviews to avoid the temptation to require significant restrictions on proposed actions in an effort to address climate change related natural resource problems, *e.g.*, water scarcity. Oftentimes, the proposed infrastructure project has no causal connection to climate change and is certainly not the source of the underlying problem. Yet, using NEPA as the hook, the project is asked to bear a disproportionate share of the burden in an attempt to solve the problem. The CEQ regulations should clarify that projects will not face this dilemma. Based on these considerations, we believe that CEQ should maintain guidance on how to consider climate change in EAs and EISs. Previous CEQ guidance on that subject has been withdrawn, with new draft guidance proposed on June 26, 2019, 84 Fed. Reg. 30,097. Because of the importance of the CEQ NEPA regulations to the "effects" and climate change issues, we request that CEQ reinstate a procedure for developing guidance on climate change after the publication of the final rules.

B. Specific Comments

The following table provides more detailed comments on specific aspects of the proposed regulations.

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Purpose and Policy	1500.1	WUWC does not support the proposed changes to the CEQ regulations regarding the purpose of NEPA and federal agency policy. The statute speaks for itself on these topics, and proposed section 1500.1 does not properly recognize the environmental protection and informational purposes of NEPA.
Notice of Intent	1500.3(b)(1), 1501.9(d)	WUWC supports the provisions in section 1500.3(b)(1) and 1501.9(d) regarding the notice of intent, including the requirement to request specific comments on potential alternatives and impacts.
Comments	1500.3(b), 1503.1(b), 1503.3	WUWC supports establishing the requirement in section 1500.3(b)(3) that issues raised in litigation must have been timely raised during the NEPA process with sufficient clarity. WUWC supports the proposed revisions to section 1503.3. WUWC recommends clarifying in section 1503.3(a) that specificity and detail are encouraged in comments on a proposed action submitted during scoping. WUWC suggests revising section 1503.1(b) to allow agencies the option, at their discretion, to request comments on the summary of submitted alternatives, information, and analyses section in the final EIS. Agencies are not required to seek public comments on the final EIS under current practice or under the proposed regulations (section 1503.1(b)), and requiring additional public comments on a section of the final EIS following publication of the final EIS could add unnecessary complexity and delay to the NEPA process. Moreover, an additional round of public comments on the summary of submitted alternatives, information, and analyses section in the final EIS is not necessary to support the agency's certification that it has considered that information. (See WUWC's comments below regarding the certification requirement in proposed section 1502.18.)

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Stays	1500.3(c)	WUWC does not support proposed section 1500.3(c), which would allow agencies to structure their procedures to provide for stays of agency decisions pending administrative or judicial review. Allowing for agency stays could introduce more procedures and delay into the NEPA process.
Remedies	1500.3(d)	WUWC recommends clarifying the new provisions regarding remedies in section 1500.3(d). The proposed rule is not clear on whether allegations of a failure to comply with NEPA should be made before the Record of Decision (ROD) is issued.
Reducing Delay	1500.5	For clarity, WUWC suggests revising section 1500.5(d) to add a reference to cooperating agencies' responsibility to participate in the NEPA process through timely submission of comments, as follows: "Engaging in interagency cooperation before the environmental assessment or environmental impact statement is prepared, <u>and participating through timely submission of comments.</u>" WUWC also suggests revising section 1500.5(e) to refer to all agency disputes (not just the lead agency): "Ensuring the swift and fair resolution of agency disputes." For clarity, WUWC recommends revising section 1500.5(f) to change "real issues" to "significant impacts," as follows: "Using the scoping process for an early identification of what are and what are not <u>significant impacts.</u>"
Level of NEPA Review	1501.2	WUWC recommends adding the word "environmental" before the word "effects," consistent with the statutory requirement to analyze the "environmental impact" and "adverse environmental effects" of a proposed action (42 U.S.C. § 4332(C)).
Categorical Exclusions	1501.4, 1507.3	WUWC supports proposed section 1501.4 and proposed revisions to section 1507.3, which could improve efficiency in the NEPA process by expanding agencies' use of categorical exclusions where appropriate. To further improve efficiency, WUWC suggests the CEQ regulations specifically allow an agency to apply a categorical exclusion established in another agency's NEPA procedures.

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Environmental Assessments	1501.5(a)	WUWC suggests deleting the phrase “or has decided to prepare an environmental impact statement” from section 1501.5(a). This language is confusing in this context and could imply that an EIS may be prepared even though the agency determined that an action is not likely to have significant effects or that a categorical exclusion applies.
Findings of No Significant Impact	1501.6(c)	WUWC supports the new provisions in section 1501.6(c) recognizing the use of a “mitigated Findings of No Significant Impact (FONSI)” where mitigation will avoid significant impacts.
Categorical Exclusions	1501.4, 1507.3	WUWC supports proposed section 1501.4 and proposed revisions to section 1507.3, which could improve efficiency in the NEPA process by expanding agencies’ use of categorical exclusions where appropriate. To further improve efficiency, WUWC suggests the CEQ regulations specifically allow an agency to apply a categorical exclusion established in another agency’s NEPA procedures, possibly through section 1506.3.
Interagency Cooperation	1501.7	WUWC supports requiring, to the extent practicable, evaluating a proposal in a single EIS and issuing a joint ROD (or, if appropriate, a single EA and joint FONSI). WUWC suggests clarifying that agencies also should, to the extent practicable, develop a single mitigation plan for a proposed action that encompasses the concerns of the various agencies. WUWC suggests revising section 1501.7(j) as follows to improve clarity and provide stronger direction on resolution of missed milestones: “If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the agencies responsible for the potential delay. The officials at the responsible agencies shall immediately elevate the issue within the agencies, address the cause of the delay, and, if necessary, establish a new milestone date in consultation with the lead agency.” WUWC recommends adding a provision that calls for the lead agency to identify the preferred alternative, with concurrence from cooperating agencies, in the draft EIS, unless a strong justification exists for not doing so (e.g., not enough information is available).

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Cooperating Agencies	1501.8, 1503.2	WUWC supports the proposed revisions to sections 1501.8 and 1503.2 regarding the roles of cooperating agencies. WUWC suggests revising section 1501.8 to add that a lead agency “shall” request all federal agencies with jurisdiction by law to participate as a cooperating agency, and those agencies shall be a cooperating agency. WUWC suggests revising section 1501.8(b)(7) and/or 1503.2 to clarify that the lead agency is not required to consider cooperating agencies’ comments that are received after the deadline for providing comments.
Scoping	1501.9	Agencies are often unwilling to appropriately segregate and eliminate significant issues during the scoping process. Rather than use their judgment to separate out insignificant issues that can be eliminated from detailed study or briefly addressed, agencies often study all issues identified during scoping as a means of “litigation-proofing” an EIS. This leads to unwieldy EISs, delays in the NEPA process, and encyclopedic documents that are difficult for the public and stakeholders to understand. WUWC supports the changes to scoping in section 1501.9. WUWC suggests revising the regulations to clarify that issues identified during scoping should be specific concerns or questions (such as habitat for particular species of concern), rather than broad or general topics (such as “wildlife”). The regulations should also make clear that agencies should not necessarily accept as significant all issues raised during scoping.
Time Limits	1501.10	WUWC supports the establishment and enforcement of overall time limits for the NEPA process as set forth in section 1501.10. As discussed above in Section A.1, WUWC is concerned that agencies must have sufficient resources and staffing to allow them to meet the time limits for the NEPA process. WUWC recommends revising section 1501.10(b)(2) to require the senior agency official to include a statement of the reasons in the required written approval for a longer time period. We note, however, that it is sometimes necessary to extend

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
		deadlines to ensure adequate review and full public participation. WUWC recommends revising proposed section 1501.10(d) to require the lead agency to establish uniform and realistic time limits for each constituent part of the NEPA process, and stating that this schedule must be complied with to the maximum extent practicable and permitted by law. WUWC suggests the regulations mandate inclusion of at least the following constituent parts in the agency’s schedule of the NEPA process: • Agreement among the agencies on a protocol and timeframe for elevating and resolving concerns. • Identification of Purpose and Need; • Identification of the information needed to support the agencies’ environmental reviews and authorization decisions; • Agreement among the agencies on analytic procedures and methodologies; • Identification of the range of alternatives to be analyzed; • Identification of the preferred alternative • Completion of each agency’s environmental review and feedback on intermediate NEPA documents. WUWC suggests adding a table of all deadlines to the preamble of the final rule to assist agencies, applicants, and the public in understanding deadlines in the NEPA process.
Tiering	1501.11	WUWC supports proposed section 1501.11 regarding tiering, which will improve efficiency in the NEPA process.
Timing	1502.5(b)	WUWC supports the concept of agencies working with potential applicants prior to receipt of the application as reflected in section 1502.5(b). WUWC recommends providing additional guidance, either in the final rule or in the preamble,

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
		regarding the type of activities that can be worked upon in advance of an application.
Page Limits	1502.7	WUWC supports the proposed revisions to section 1502.7 to establish enforceable page limits for EISs. WUWC recommends additional language be added in section 1502.7 to specify that technical studies prepared to support the analysis in a NEPA document may be cited for public review but would not be required to be attached as an appendix to the NEPA document. Appendix documents should be limited to those that are of major significance to the EIS and that cannot be readily accessed from other sources.
Supplemental EISs	1502.9(d)	WUWC supports the proposed changes regarding supplemental EISs, including revising section 1502.9(d)(1) to clarify that a supplemental EIS is required only if a major federal action remains to occur. WUWC also recommends revising section 1502.9 to specify that a supplemental EIS should be limited to the issue that gave rise to the need for a supplemental EIS.
Purpose and Need	1502.13	WUWC supports the proposed revisions to section 1502.13 to clarify that the purpose and need must be based on the goals of the applicant and the agency's authority.
Alternatives	1502.14, 1508.1(z)	WUWC supports the proposed revisions to section 1502.14 regarding alternatives and the proposed definition of "reasonable alternatives" in section 1508.1(z). WUWC supports further revising section 1502.14 to establish a presumptive maximum number of alternatives for evaluation of a proposed action, which could be exceeded for proposals of unusual scope or complexity. As with similar numerical targets included in these regulations, it is important for the agency to retain flexibility based on project-specific needs and the underlying need to address alternatives fully, as case law has established to be a requirement of NEPA itself. We believe it is necessary to treat a targeted number of alternatives as a recommendation or guidance, not a regulatory requirement.

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Affected Environment	1502.15	WUWC recommends the following revision to the first sentence of section 1502.15 to clarify the appropriate extent of the affected environment: “The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, based, if applicable, on information identified in an applicant’s studies or reports.”
Environmental Consequences	1502.16	WUWC recommends the following revision to section 1502.16(a)(5): “Possible conflicts between the proposed action and the environmental protection objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned.” WUWC recommends the following revision to section 1502.16(a)(6) to remove any confusion or ambiguity: “Energy requirements and energy conservation potential of various alternatives and mitigation measures.” WUWC recommends adding a section to provide that when project design features, industry best management practices, mitigation measures, or compliance with other environmental laws will minimize or reduce potential impacts to insignificant levels, the agency can treat those impacts as insignificant and avoid conducting a detailed analysis of those impacts. In this regard, WUWC strongly supports the use of mitigation to facilitate NEPA and other agency reviews. Guidance from federal agencies that frequently rely on mitigation in the project review context would be very beneficial.
Submitted Alternatives, Information, and Analyses Section	1502.18	WUWC does not support proposed section 1502.18, which would (1) require the lead agency to certify that it considered all of the alternatives, information, and analyses submitted by public commenters, and (2) purport to entitle the lead agency to a conclusive presumption that it had, in fact, considered that information. Existing law speaks for itself on a lead agency’s responsibility to consider public comments and the level of deference that courts give agency determinations. This attempt to manufacture greater agency deference and influence judicial review is legally vulnerable and is not appropriate for regulations implementing a statute. It could also be counterproductive to try to change the level of agency

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
		deference, which could result in agency overreach that could be unchecked by courts.
EIS Publication	1502.21	WUWC recommends requiring the lead agency to provide a draft EIS or other document to the project applicant upon request, and to consider comments from the project applicant, prior to publishing the document. The lead agency should retain full control over the final EIS, however. This would eliminate or reduce the likelihood that draft documents contain significant factual errors that affect project assumptions and corresponding impact analyses.
Electronic Publication, Notice, and Submission of Comments	1502.21, 1503.1(c), 1506.6	WUWC supports revisions to the regulations to allow electronic publication, notice, and submission of comments.
Methodology and Scientific Accuracy	1502.24	WUWC supports the proposed revisions to section 1502.24. WUWC suggests clarifying, either in the final rule or in the preamble, that the agency can rely on data submitted in a timely manner during the NEPA process unless new reliable data has become readily available prior to the agency's final decision and the new data can be timely incorporated into the record at reasonable cost. In the past, the environmental review process has taken so long that agencies have faced claims of relying on outdated data (e.g., water quality monitoring data), forcing agencies to re-do their analyses and adding more time to the NEPA process.
Actions During NEPA Process	1506.1	WUWC recommends revising the language in section 1506.1(b) to provide greater clarity and remove ambiguity regarding actions that may be taken prior to issuing a FONSI or ROD. CEQ should make clear that an applicant may take actions that do not trigger a major federal action significantly impacting the environment.
Preparation of Environmental Documents	1506.5	WUWC supports encouraging the preparation of both EISs and EAs by applicants or proponents of proposed projects or their contractors. When this is done, the lead agency must retain full control over the content of the NEPA document to ensure its objectivity. All aspects of applicant-prepared NEPA

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
		documents must be reviewed by the lead agency, or appropriate cooperating agency, and the federal agencies must have the last word on content. When the lead agency or a third-party contractor, rather than the project proponent, prepares an EIS or EA, CEQ regulations should require more robust communication with the project proponent during the NEPA process: • Communicate with the proponent on technical, economic, and environmental issues, because the proponent is generally very knowledgeable about the proposed action. • Keep the project proponent updated on conclusions about project impacts to foster early development and coordination regarding potential mitigation measures. • Circulate mitigation concepts among cooperating agencies with the goal of developing a single mitigation plan to satisfy mitigation requirements of all involved agencies. As discussed above in Section A.1, WUWC also supports the use of cost-recovery and reimbursable agreements between the lead agency and the project proponent to fund environmental reviews and related processes.
Emergencies	1506.12	WUWC recommends the following revision to the second sentence of section 1506.12: “Agencies and the Council will limit such arrangements to actions necessary to control or timely remediate impacts associated with the emergency.” For emergency situations, including natural disasters such as wildfires or hurricanes, it is important for remediation measures to be implemented quickly to avoid further harm even though such measures may have environmental impacts of their own.
Agency Procedures	1507.3(a)	WUWC supports the clear statement in section 1507.3(a) that agency NEPA procedures cannot impose additional procedures or requirements beyond those in the CEQ regulations.

Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
Effects	1508.1(g)	As discussed above in Section A.2, WUWC believes that indirect and cumulative effects should be considered in NEPA analyses, subject to additional guidance and definitions on the meaning of these terms.
Human Environment	1508.1(m)	WUWC suggests deleting the definition of “human environment” in section 1508.1(m). The proposed definition is so broad as to be ambiguous at best and devoid of meaning at worst.
Major Federal Action	1508.1(q)	WUWC supports the proposed revisions to the definition of “major Federal action” to clarify that NEPA does not apply to “non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.” WUWC recommends clarifying the term “Federal control and responsibility,” which is ambiguous, could lead to confusion and disagreement, and could result in a moving target as new federal legislation is enacted. As CEQ recognizes, the crucial question is whether “federal control or responsibility” is present, such that the agency has “the ability to influence the outcome of its action to address the effects of the project.” 85 Fed. Reg. 1709. More specific language could require an action to be either subject to federal statutory or regulatory approval, or entirely or significantly financed with federal funding such that the proposed action would not go forward without federal support. WUWC suggests CEQ revise the definition of “major Federal action” to limit it to “new” activities (rather than “new and continuing activities”). WUWC suggests CEQ revise the definition to make clear that a “major Federal action” does not include proposed operational changes to ongoing activities unless the change itself has independent effects that will be major and which are subject to federal control and responsibility.
Mitigation	1508.1(s)	WUWC supports the proposed definition of mitigation in section 1508.1(s). WUWC suggests clarifying that a project proponent is responsible for mitigating only the incremental impacts of its proposed project. However, the applicant should

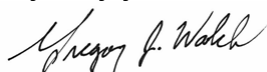
Topic	Proposed Regulations (40 C.F.R. §)	WUWC Comment
		be accorded the flexibility to pursue mitigation that goes beyond these circumstances to ameliorate other impacts and, in doing so, receive corresponding credit within the federal decision framework. WUWC also suggests providing that in cases where mitigation is difficult to define precisely, it can be implemented after project approval through adaptive management.
Tribes	<i>Passim</i>	WUWC supports tribal governments participating as cooperating agencies. However, the regulations should not expand the jurisdiction of tribes outside reservations. There is no statutory authority to do so, and Executive Order 13175 concerns only federal policies that have tribal implications (i.e., that impact activities on a reservation). The proposed regulations would give tribes undue influence over the development of projects that would be constructed entirely outside reservation boundaries. This could make the NEPA process more complicated and more costly. For projects outside reservation boundaries, tribes (like any interested party that is not a cooperating agency) can still participate in the NEPA process and share their concerns with the lead agency.

C. Conclusion

Based on this extensive background and our members' experiences being on-the-ground partners with the CEQ and the states, WUWC is prepared to assist the CEQ in its efforts to develop the NEPA implementing regulations and both improve and encourage the sustainability and resilience of water supply infrastructure across the nation. Further, WUWC looks forward to continued dialogue and collaboration on how these new NEPA implementing regulations will impact water providers in the West.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur, at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,



Gregory J. Walch
Chairman

cc: Donald C. Baur, Perkins Coie LLP