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**Submitted via [//www.regulations.gov/](https://www.regulations.gov/)
(Docket No. CEQ–2021–0002)**

Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

RE: Comments on Notice of Proposed Rulemaking, “National Environmental Policy Act Implementing Regulations Revisions,” 86 Fed. Reg. 55757 (Oct. 7, 2021), Docket No. CEQ–2021–0002

The Western Urban Water Coalition (WUWC) ¹ appreciates this opportunity to comment on the Council on Environmental Quality’s (CEQ) notice of proposed rulemaking (NPRM) to modify certain aspects of its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA). 86 Fed. Reg. 55757 (Oct. 7, 2021). In this phase of CEQ’s rulemaking, CEQ proposes: (1) To eliminate language in the description of purpose and need for a proposed action when it is an agency’s statutory duty to review applications for authorization (see 40 C.F.R. § 1502.13) and make a conforming edit to the definition of “reasonable alternatives” (see 40 C.F.R. § 1508.1(z)); (2) To remove limitations on agency NEPA procedures for implementing CEQ’s NEPA regulations (see 40 C.F.R. § 1507.3); and (3) To return to the definition of “effects” in the prior longstanding NEPA regulations (see 40 C.F.R. § 1508.1(g)). As discussed in these comments, the WUWC supports keeping the 2020 NEPA provisions on the description of purpose and need, encourages CEQ to establish a strong and coherent framework for CEQ to review agency procedures, and supports CEQ’s proposal to revise the definition of “effects” or “impacts” to restore the substance of the definition of “effects” and “cumulative impacts” contained in the 1978 NEPA regulations.

Introduction

WUWC was established in 1992 to address the West’s unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population

¹ WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, City of 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). Seattle Public Utilities does not participate in this comment submission.

centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states. Some of these utilities also operate wastewater, stormwater, natural gas, and electric, including hydroelectric, facilities for their customers.

WUWC members are public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water sources are being diminished by climate change and other factors and the development of sustainable supplies is vital. The replacement of aging water systems and the development of new water infrastructure is critical to complement the significant water conservation steps already being taken by western municipal water users to meet the challenges of climate-related events like droughts, wildfires, and floods, as well as the public safety threats of seismic events and facility failures. Regulatory reform, particularly pertaining to NEPA, is needed to promote the sustainability and resiliency of water supply infrastructure and improve and protect our nation's water supplies.

WUWC has historically been, and continues to be, in full support of the goals of NEPA as the federal law that strives to ensure the effective and environmentally responsible use of the nation's water resources. WUWC has consistently recognized the importance of comprehensive environmental review and public participation in advancing large-scale infrastructure projects. Such review results in better decisions and better projects and provides important protection for the environment.

To meet NEPA's goals, WUWC supports improving NEPA procedures to make them more efficient, timely, and effective. As the Biden Administration reviews and reforms CEQ's 2020 NEPA implementing regulations, WUWC appreciates this opportunity to provide comments and recommendations to help improve NEPA procedures and support CEQ's goal of updating its implementation regulations to ensure a more efficient, timely, and effective NEPA process.

Throughout its 29-year history, WUWC has extensive experience working with CEQ and various federal agencies on initiatives related to NEPA. With regard to NEPA, we have appeared before congressional committees, met with federal agencies, participated in workshops and roundtable discussions, commented on proposed CEQ and agency-specific guidance and rulemaking, and been a party to litigation. And, of course, WUWC members engage regularly with the federal agencies in obtaining authorizations for facilities and operations requiring federal approval on or adjacent to federal lands and waters. As a result, 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. We submitted comments on August 20, 2018 on the CEQ's Advance Notice of Proposed Rulemaking (ANPRM) to update the NEPA implementing regulations (CEQ-2018-0001-12226), and on March 10, 2020 on the Proposed Rule on Update to the Regulations Implementing Procedural Provisions (CEQ-2019-0003, Tracking ID 1k4-9fh9-vbgt). WUWC is prepared to assist CEQ in this regulatory process, most specifically on how improved NEPA guidelines can support water providers in the West while protecting the environment. The comments set forth in this letter are offered in furtherance of these general goals.

Specific Comments

WUWC shares CEQ's concern that some provisions in the 2020 NEPA rule could be interpreted to undermine environmental protection, create confusion, and change existing procedures and requirements that are well understood and engrained in NEPA practice. Some 2020 Rule provisions are even counterproductive because they present litigation risk of reversing established case law. Litigation delays on important water infrastructure projects would adversely impact WUWC members and the communities they serve.

WUWC agrees with CEQ that some of the 2020 amendments need updates for NEPA to fulfill its statutory role and to reduce delays and uncertainty in the NEPA process. WUWC supports the preservation of the 2020 NEPA provisions to the extent that the regulations improve interagency coordination, encourage more effective comments, clarify the requirements for analyzing impacts and alternatives, promote the use of categorical exclusions where appropriate, and allow non-federal project proponents to prepare NEPA documents subject to appropriate conflict of interest disclosures and assurances of federal agency oversight and control. Some of the 2020 NEPA provisions streamline the review and approval of critical infrastructure projects without compromising NEPA's fundamental purpose to ensure federal agencies take a hard look at the environmental consequences of proposed actions and alternatives for improving the nation's water supply and resiliency.

A. Description of purpose and need (40 C.F.R. § 1502.13) and definition of reasonable alternatives (40 C.F.R. § 1508.1(z))

The description of purpose and need sets the parameters for the range of reasonable alternatives that NEPA lead and cooperating agencies consider and informs the scope of effects analyzed in the EIS. WUWC agrees with CEQ that the purpose and need statement should lead to consideration of reasonable alternatives to the proposed action, consistent with NEPA's requirements. A purpose and need statement that is too narrow is inconsistent with NEPA's requirement to consider alternatives to the proposed action, but so too is a boundless analysis of alternatives. Agencies are guided by a rule of reason in identifying the reasonable alternatives that are technically and economically feasible and meet the purpose and need of a proposed action.

1. Description of purpose and need (40 C.F.R. § 1502.13)

The 1978 NEPA regulations required that an EIS briefly state the underlying purpose and need to which the agency is responding in proposing the alternatives. The 2020 NEPA regulations modified this provision by adding language that requires agencies to base the purpose and need on the goals of an applicant and the agency's authority when the agency's statutory duty is to review an application for authorization. Applicant goals are a relevant consideration in the development of the purpose and need statement. In the proposal to eliminate this language, CEQ may be over-reading the significance of the 2020 amendments. WUWC supports keeping the 2020 NEPA provisions on the description of purpose and need as they are narrow and codify federal Court of Appeals precedent and CEQ guidance.

In *Citizens Against Burlington, Inc. v. Busey*, the D.C. Circuit affirmed that “reasonable alternatives” are defined by reference to an applicant’s goals and an “agency cannot redefine the goals of the proposal; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process.”² Agencies must “consider an applicant’s wants when the agency formulates the goals of its own proposed action.” *Id.* Agencies “cannot determine for the applicant what the goals of the applicant’s proposal should be.” *Id.* The 2020 NEPA provisions codify this longstanding caselaw. If CEQ were to follow through on their proposal to eliminate the 2020 language, CEQ would effectively be overturning D.C. Circuit precedent from *Citizens Against Burlington*, and siding with the dissenting opinion, notwithstanding the fact that *Citizens Against Burlington* has been relied upon by the D.C. Circuit and other courts for three decades. Numerous courts of appeals have affirmed that agencies must consider a private applicant’s objectives, needs, and goals in the consideration of reasonable alternatives.³

CEQ should address the extent to which the 2020 regulations codified CEQ guidance on the interpretation of the 1978 regulations. In its [2003 guidance](#), CEQ clarified that the lead agency “has the authority for and responsibility to define the ‘purpose and need’ for purposes of NEPA analysis.”⁴ Decades of case law have affirmed that in defining the purpose and need, federal agencies should respect the role of local and state authorities in the planning process and appropriately reflect the results of that process in the federal agency’s NEPA analysis of purpose and need.⁵ CEQ also noted that agencies should not adopt a purpose and need statement that is so narrow as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”⁶ If CEQ ultimately decides to restore the 1978 language, CEQ should emphasize that agencies must articulate a purpose and need that is consistent with the purpose of the applicant’s proposal, as determined by consultation with the applicant. CEQ should clarify that agencies must avoid characterizing a purpose and need that fundamentally alters an applicant’s proposal or changes its economics to a degree that threatens the viability of the proposal.

CEQ should also clarify that “purpose” and “need” are distinct concepts and explain the terms “purpose” and “need” in section 1502.13 to make clear that the “purpose” explains why the proposed action is being undertaken (i.e., to improve the resiliency of water resource projects). The purpose should be stated in a manner that indicates the resolution of an underlying issue or problem. The “need” should support the assertion that the problem to be solved by the action exists (i.e., support for notion that there is or will be a resiliency problem to be corrected or improved).

² *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (emphasis in original).

³ See *Colo. Env’t Coal. v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999); *Citizens for Smart Growth v. Sec’y of Transp.*, 669 F.3d 1203 (11th Cir. 2012); *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411 (4th Cir. 2012); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013); *Coal. for Advancement of Reg’l Transp. v. Fed. Highway Admin.*, 576 Fed. App’x 477 (6th Cir. 2014).

⁴ Letter from the Hon. James L. Connaughton, Chairman, CEQ, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) (“Connaughton Letter”), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-DOT_PurposeNeed_May-2013.pdf.

⁵ See, e.g., *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1224 (M.D. Fla. 2010). (citing *North Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533 (11th Cir. 1990)).

⁶ *Id.* (citing *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664 (7th Cir. 1997); *Alaska Wilderness Recreation and Tourism Ass’n v. Morrison*, 67 F.3d 723 (9th Cir. 1995)).

2. Definition of reasonable alternatives (40 C.F.R. § 1508.1(z))

While WUWC opposes CEQ's proposed change deleting reference to applicant goals in accordance with the proposed change to the purpose and need provision, WUWC supports CEQ's codification of technological and economic limitations on the considered range of alternatives. In 2020, WUWC supported the revisions of 40 C.F.R. § 1502.13 and conforming edits to "reasonable alternatives" in 40 C.F.R. § 1508.1(z) as codification of caselaw under the 1978 NEPA regulations. WUWC encourages CEQ to retain this codification of its [1981 CEQ guidance](#) on the examination of reasonable alternatives in its Phase 2 rulemaking.⁷ Those alternatives that are "reasonable" are those "that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."⁸

B. CEQ regulatory requirements as a "floor" (40 C.F.R. § 1507.3)

The NEPA process as conducted by federal agencies and consultants can be time-consuming, expensive, and disjointed. One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays and uncertainty in decision-making.

WUWC members can point to many projects that have taken far too long to reach final action due primarily to NEPA, in some cases with review procedures that last for decades. For example, Colorado Springs Utilities (CSU) recently constructed a water supply project, the Southern Delivery System (SDS). The SDS project was an \$825 million regional project to bring water from Pueblo Reservoir to Colorado Springs and partner communities, Fountain, Security, and Pueblo West. Eight years and roughly \$17 million were required to complete the NEPA process and related negotiations with the Bureau of Reclamation. An additional \$25 million was spent on meeting other permitting mandates. Over \$160 million was devoted to mitigation and permit commitments, many local, but affected by the NEPA process and incorporated into the final EIS and record of decision. Environmental reviews and authorizations that involve multiple federal, state and local agencies are common. However, historically they have not been resourced sufficiently to support timely interagency consultation or garner consensus regarding important NEPA elements, such as cumulative and indirect effects. This often results in a lengthy NEPA process with multiple setbacks and avoidable delays. CSU's experience with the SDS project demonstrates the process was often not coordinated amongst federal agencies, took much too long to complete, and was inefficient and expensive. Similarly, Denver Water's Gross Reservoir Expansion Project took 17 years from the inception of the NEPA process to final federal authorization, suffering substantial delays due to the need to coordinate a multi-tiered NEPA process among federal agencies.

Some of these delays and uncertainties can be avoided or minimized by consistent procedures coordinated between agencies. President Carter's Executive Order 11991, which directed CEQ to issue regulations to federal agencies for the implementation of procedural provisions of NEPA, reflected the view that the development of consistent regulations and definitions and ensuring the

⁷ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) ("Forty Questions"), <https://www.energy.gov/nepa/downloads/fortymost-asked-questions-concerning-ceqs-nationalenvironmental-policy-act>.

⁸ *Id.* at Question & Answer 2a.

coordination among agencies in EIS preparation would make the EIS process more efficient, more useful to decision makers and to the public, and reduce paperwork. To that end, WUWC supported the clear statement in section 1507.3(a) of the 2020 NEPA provisions that agency NEPA procedures cannot impose additional procedures or requirements beyond those in the CEQ regulations.

WUWC recognizes that the prohibition of “inconsistent” agency NEPA procedures in 40 C.F.R. § 1507.3(a) creates issues, as identified by Secretary Haaland’s [Secretarial Order 3399](#).⁹ WUWC encourages CEQ to establish a strong and coherent framework for CEQ to review agency procedures to ensure that agency discretion is not unbounded. WUWC appreciates CEQ’s essential role in ensuring the maintenance of consistent NEPA practice through its review of agency NEPA procedures for “conformity” with NEPA and its regulations.¹⁰

C. Definitions of “effects” or “impacts” (40 C.F.R. § 1508.1(g))

WUWC supports CEQ’s proposal to revise the definition of “effects” or “impacts” to restore the substance of the definition of “effects” and “cumulative impacts” contained in the 1978 NEPA regulations and that each reference to those terms would include direct, indirect, and cumulative effects. WUWC supports this unified approach to effects analysis, which clarifies that cumulative impacts are part of the effects analysis. WUWC also encourages CEQ to develop additional guidance on the definitions of these terms. A substantial body of case law has developed over the years concerning federal agencies’ obligations to evaluate indirect and cumulative impacts under NEPA. The Supreme Court has found this requirement based on the statute itself, rather than the CEQ regulations.¹¹ 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.

1. Proposed definitions

NEPA does not use the terms “indirect” or “cumulative” in reference to the impacts or effects on the environment to be analyzed under NEPA. Rather, the statute provides for “a detailed statement by the responsible official on -- (i) the environmental impact of the proposed action, [and] (ii) any adverse environmental impacts which cannot be avoided should the proposal be implemented”¹² CEQ regulations, however, have required NEPA analyses to consider direct, indirect, and cumulative effects or impacts, and this rulemaking would restore that language. CEQ’s proposal would define direct effects as effects “caused by the action and occur at the same time and place” and indirect effects as “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” The proposed rules would describe cumulative impact as the impact on the environment which results from “the incremental effects of the action when added to the effects of other past, present, and reasonably

⁹ Sec. Order No. 3399, *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process* (Interior, Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf

¹⁰ 40 C.F.R. § 1507.3(b)(2).

¹¹ *Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976).

¹² 42 U.S.C. § 4332(2)(C).

foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”

We recommend that CEQ consider how the NEPA regulations regarding “effects” can better align with other standards typically coordinated with NEPA analysis. CEQ should revise its regulations to minimize the issues of differing scope of analysis with the various consultation and permitting statutes that are often coordinated in the environmental review and authorization processes. For example, under the National Historic Preservation Act (NHPA), regulations provide for substitution of the NEPA process for Section 106 review. 36 C.F.R. § 800.8(c). The Advisory Council on Historic Preservation has found that integration of the NEPA and NHPA review processes creates efficiencies and promotes transparency and accountability. CEQ should consider opportunities for consistency between NEPA analysis and other reviews typically coordinated with the environmental review and authorization process.

WUWC agrees with CEQ that whether an effect is foreseeable is a context-specific inquiry, but 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. Further, CEQ should codify its [2005 guidance](#) concerning the review of past actions in the consideration of cumulative effects.¹³ Many courts, including courts of appeals, have adopted this guidance as the interpretation of regulations entitled to deference.¹⁴ In its 2005 guidance, CEQ properly notes that agencies can often conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.

2. Consideration of climate change

WUWC supports CEQ’s determination that use of the terms “direct” and “indirect” can help explain both adverse and beneficial effects over various timeframes. As stated by CEQ in the NPRM, a project could have long-term indirect beneficial effects, and those indirect effects could be caused by the action to authorize a project. Those effects should be considered and can require agencies to adequately consider long-term or geographically remote impacts, including climate change impacts or water pollution downstream from a project.

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.

¹³ Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, June 24, 2005, https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

¹⁴ See *League of Wilderness Defs. v. U.S. Forest Serv.*, 549 F.3d 1211, 1217–18 (9th Cir. 2008); *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 408 (6th Cir. 2013); *St. Paul Branch of NAACP v. U.S. Dep’t of Transp.*, 764 F. Supp. 2d 1092, 1104 (D. Minn. 2011); *Friends of Congaree Swamp v. Fed. Highway Admin.*, 786 F. Supp. 2d 1054, 1067–68 (D.S.C. 2011); *Habitat Educ. Ctr., Inc. v. U.S. Forest Service*, 593 F. Supp. 2d 1019, 1032 (E.D. Wis. 2009).

Water infrastructure projects undertaken by WUWC members address the effects of climate change in the West.

For example, in response to ongoing drought and climate change conditions, the Southern Nevada Water Authority (SNWA) invested \$650 million to build a new Low Lake Level Pumping Station, known as L3PS, in Lake Mead to protect access to the region's primary water supply. Climate change projections were used when designing the project to help develop the probable range of future lake elevation changes and the likelihood of Lake Mead water levels dropping below existing pumping capabilities. This data informed SNWA's decision to design L3PS to accommodate future lake levels as low as elevation 900 feet. The L3PS design includes a 26-foot diameter access shaft that descends more than 500 feet to a 12,500-square foot underground cavern. This cavern, known as a forebay, connects with 34 of the world's largest submersible pumps that have a capacity to move more than 900 million gallons of water per day to SNWA's treatment facilities. With this infrastructure in place, SNWA can access water within the full elevation of the lake, regardless of the lake's elevation, thereby ensuring 2.2 million Southern Nevadans maintain access to their drinking water.

Many WUWC members are embarking on similar projects to increase system resiliency. Denver Water's Gross Reservoir Expansion Project, mentioned above, will help secure water supply for one quarter of Colorado's population, increasing the resilience of the system to wildfires, prolonged drought, and other emergencies exacerbated by climate change.

We support CEQ's determination that climate change is a fundamental environmental issue and its relation to the impacts of proposed federal actions falls under NEPA. The difficulty will be in determining the environmental effects that are appropriately examined in the context of the particular proposal under review, the exact nature of those effects, and how those effects can realistically be addressed considering the uncertainty and range of forecasts for such impacts. A properly framed NEPA analysis should assist with this task. The precise manner in which it will be considered would vary based on the proposed action, but in cases under NEPA generally, climate change would be considered in the Affected Environment and Environmental Consequences analyses. We encourage CEQ to restore the substance of the definition of "effects" and "cumulative impacts" contained in the 1978 NEPA regulations, as it would encourage the consideration of climate change under NEPA.

In order for effects analysis to properly consider climate change and environmental justice issues, and the interplay of these issues with other NEPA provisions, CEQ should provide the agencies with updated guidance. Some of this guidance may warrant a degree of codification or regulatory changes to clarify the scope of consideration of these issues. WUWC appreciates CEQ's withdrawal of CEQ's 2019 draft guidance on consideration of greenhouse gas emissions, and its direction to agencies to consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, "including, as appropriate and relevant, the 2016 GHG Guidance."¹⁵ Because of the importance of the CEQ NEPA regulations to the "effects" and climate change issues, we also request that CEQ reinstate guidance for consideration of climate change effects under NEPA as soon as possible.

¹⁵ CEQ Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10252 (Feb. 19, 2021).

Conclusion

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 and Ted Boling at 202-661-5872 or tedboling@perkinscoie.com.

Very truly yours,



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