



April 10, 2023

**Submitted via email**

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington DC 20503

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

**RE: Comments on RIN: 0331-AA07, Council on Environmental Quality National Environmental Policy Act Implementing Regulations Revisions Phase 2 (Received Date: Jan. 30, 2023)**

The Western Urban Water Coalition (WUWC) <sup>1</sup> appreciates this opportunity to comment on the Council on Environmental Quality's (CEQ) draft notice of proposed rulemaking (NPRM) to modify certain aspects of its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA). WUWC is a coalition of 18 of the largest western water utilities formed over 30 years ago to address the unique water issues facing the western United States. WUWC members serve over 40 million water consumers across seven states and rely on a vast infrastructure of water storage and supply to provide reliable, high-quality water to these costumers. The replacement of aging water infrastructure and the development of new water infrastructure is critical to complement the significant water conservation steps already being taken by 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.

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

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<sup>1</sup> WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, The 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).

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. As a result, 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 continues to be, in full support of the goals of NEPA and federal policy that strives to ensure the effective and environmentally responsible use of the nation's water resources. It 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. 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. As you undertake your review of CEQ's Phase 2 NEPA rules, WUWC would like to share its proposed recommendations for future action. We hope that this information will be helpful to CEQ and will serve as the basis for further discussions with WUWC.

To meet NEPA's goals, WUWC supports improving NEPA procedures to make them more efficient, timely, and effective. NEPA processes under CEQ's 1978 regulations have 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 that seems to favor quantity over quality. Such exhaustive and voluminous analysis can frustrate public participation and informed decision making. As the Biden Administration reviews and reforms NEPA's implementing regulations, WUWC appreciates this opportunity to provide comments and recommendations to help streamline the NEPA procedures and support CEQ's goal of updating its regulations to ensure a more efficient, timely, and effective NEPA process.

## **Introduction**

Throughout its 30-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), on March 10, 2020 on the Proposed Rule on Update to the Regulations Implementing Procedural Provisions (CEQ-2019-0003, Tracking ID 1k4-9fh9-vbgt), and on the Notice of Proposed Rulemaking, "National Environmental Policy Act Implementing Regulations Revisions," 86 Fed. Reg. 55757 (Oct. 7, 2021), Docket No. CEQ-2021-0002. 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.

The current 2020 Final Rule regulations are consistent with many of WUWC's comments with respect to improving the efficiency of the NEPA process. WUWC supports the revisions to the rules that 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 federal agency oversight and control. These changes to the NEPA process will 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, ultimately improving the nation's water supply and resiliency. WUWC believes the Biden Administration should retain the following revisions incorporated in the 2020 Final Rule:

- Notices of intent (§ 1501.9(d))
- Soliciting detailed comments during the notice and comment period (§ 1503.1(b))
- Expanding provisions for categorical exclusions (§§ 1501.4, 1507.3)
- Using mitigated FONSI (§ 1501.6(c))
- Establishing a single environmental impact statement (EIS) and joint record of decision (ROD) requirement for interagency cooperation (§ 1501.7)
- Establishing and enforcing time limits in the NEPA process (§ 1501.10)
- Tiering for environmental assessments and environmental impact statements (§ 1501.11)
- Working with applicants before receipt of the application (§ 1502.5(b))
- Creating page limits that support graphic display of quantitative and geospatial information (§§ 1502.7, 1508.1(v))

- Clarifying the requirement for a supplemental EIS only if a major federal action remains to occur and providing for findings of no new significant impacts (§ 1502.9(d))
- Clarifying the definition for “reasonable alternatives” (§§ 1502.14, 1508.1(z))
- Allowing electronic publication and submission of comments (§§ 1502.20, 1503.1(c), 1506.6)
- Clarifying that NEPA does not apply to projects with minimal federal funding (§ 1508.1(q))
- Revising the definition of “mitigation” to require a nexus to specific effects (§ 1508.1(s))
- Clarifying that allegations of failure to comply with NEPA can only come after final agency action. (§ 1500.3(d))
- Clarifying that agencies should identify significant issues and eliminate other issues from further study (§ 1501.9(a)), and that the lead agency should identify and eliminate non-significant issues from detailed study (§ 1509.1(f)(1))
- Requiring a senior agency official to provide written approval for a longer time period for completion of an environmental impact statement or environmental assessment (§ 1501.10)

A number of other WUWC specific recommendations were not adopted in the 2020 Final Rule, although the basic objectives of some of these comments do appear to have been incorporated. WUWC requests that the following recommended revisions be given further consideration by CEQ:

- Revising the purpose and policy section to better reflect the purposes of environmental protection and informational purposes of NEPA (§ 1500.1)
- Allowing agencies the option to request comments on alternatives (§ 1503.1(b))
- Clarifying some of the required procedures to reduce delay (§ 1500.5)
- Requiring the lead agency to identify its preferred alternative in the draft EIS (§ 1501.7)
- Requiring senior agency official to include justification in the required written approval of extension of deadline (§ 1501.10(b))
- Adding more parts of the NEPA process for which deadlines must be established by the lead agency (§ 1501.10(d))
- Providing additional guidance on what types of activities can be worked on in advance of an application (§ 1502.5(b))
- Identifying a maximum number of alternatives (the regulations require a reasonable number of alternatives, but provide no further guidance) (§ 1502.14)
- Revising the description of an “affected environment” to include reference to data from an applicant’s studies (§ 1502.15)
- Revising the language with regard to environmental consequences to emphasize mitigation (§ 1502.16)
- Providing guidance on if and when to incorporate new information that is developed during the preparation of an EIS (§ 1502.23)
- Deleting the definition of “human environment” (§ 1508.1(m))
- Revising the definition of “major federal action” for consistency with case law under the 1978 regulations (§ 1508.1(q))

Additionally, WUWC is concerned that some regulations in the 2020 Final Rule have the potential to undermine environmental protection, create confusion, and change existing procedures and substantive requirements that are well understood and engrained in NEPA practice. Some proposed regulations could be counterproductive because they present litigation risk of reversing established case law that is based upon existing and unmodified statutory language. Also, litigation delays on important water infrastructure projects adversely impact WUWC members and the communities they serve. One such proposed change of concern is the apparent reduction in scope of examined environmental impacts. Our comments below identify issues that we believe fall into this category.

## Specific Issues

Two specific issues should be central to any comprehensive review and reform of the NEPA process and its implementing regulations.

### 1. Agency Resources

While WUWC supports expediting the NEPA process and making it more efficient, we are concerned that federal agencies will need sufficient funding, staffing, and resources to implement changes, including the required timing 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.

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.

Standard form agreements should be used as the basis for allowing project sponsors to assume the cost of permitting procedures, including EISs for “gray” infrastructure projects (i.e., human engineered, new construction or upgrading of dams, pipelines, roads, etc.). Also, a standard form could be adjusted to apply to an environmental assessment (EA) as needed to make environmental review and decision-making procedures more reliable and certain.

Reimbursement agreements could expedite the permitting process via provisions allowing the project applicant to pay for a full-time agency project manager and other agency personnel, as well as contractor consultants. The agreements could also incorporate provisions for lead agency coordination with other participating or cooperating agencies to meet timelines, and they could be adapted to or paired with an interagency agreement for the project.

Finally, flexibility should be available 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. 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 are being designed to address the effects of climate change in the West. We believe that climate change is a factor that must be considered under NEPA. The precise manner in which it should be considered would vary based on the proposed action. In most situations involving western water resources, the effects of climate change would be considered under the Affected Environment section and the Environmental Consequences analyses.

Also, it is important for NEPA reviews to avoid the temptation to impose significant restrictions on proposed projects in an effort to address broad natural resource problems related to climate change that cannot reasonably be attributed to the project, e.g., water scarcity. Oftentimes, a proposed infrastructure project has no causal connection to climate change and is certainly not the source of the underlying resource problem. Yet, using NEPA as the hook, federal agencies require the project to bear a disproportionate share of the mitigation burden. CEQ regulations should clarify that projects will not be burdened in this way. CEQ should codify guidance consistent with these considerations on how to consider climate change in EAs and EISs.

### 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 engaging in a dialogue and collaboration on how these new NEPA implementing regulations will impact water providers in the West.

For more information, please contact me at (303) 739-7378 or [mbrown@auroragov.org](mailto:mbrown@auroragov.org), or WUWC's national counsel, Ted Boling of Perkins Coie at 202-661-5872 or [tedboling@perkinscoie.com](mailto:tedboling@perkinscoie.com).

Very truly yours,



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