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Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, D.C. 20503

**Re: Comments on Proposed CEQ Rulemaking: Update to the Regulations for
Implementing the Procedural Provisions of the National Environmental Policy Act,
Docket ID No. CEQ-2018-0001**

The Western Urban Water Coalition (“WUWC”) appreciates the opportunity to comment on the Council on Environmental Quality’s (“CEQ”) advance notice of proposed rulemaking (“ANPRM”) to update its implementing regulations for the procedural provisions of the National Environmental Policy Act (“NEPA”). *See* 83 Fed. Reg. 28591 (June 20, 2018); 83 Fed. Reg. 32071 (July 11, 2018).

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 western water consumers in major metropolitan areas in six 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; and
- *Washington* – Seattle Public Utilities.

WUWC is committed to presenting a new and different perspective 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 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 and every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming more scarce and critical to the West's sustainability. The WUWC's policy directions and recommendations for federal reform are set forth in the white paper included as Attachment 1.

Throughout its 26-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 during many CEQ guidance procedures. WUWC has a strong interest in efficient NEPA environmental analysis 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 water infrastructure facilities and operations on federal lands and other projects within or affecting municipal watersheds that provide critical water supplies to the citizens and areas served by WUWC members. WUWC members are active collaborating partners with the federal agencies and stakeholders in a variety of ways that may require some level of environmental review under NEPA, including watershed restoration and other vegetation management, and "green" infrastructure initiatives and activities. WUWC members have decades of experience participating in NEPA and related environmental analyses with federal agencies.

WUWC has consistently recognized the importance of comprehensive and detailed environmental review and public participation, especially for the kind of large-scale infrastructure projects its members are involved in. Such review results in better decisions and better projects, and is especially important at a time when water infrastructure throughout the country is generally in need of rehabilitation, expansion, or new development. As a result, our comments are intended to maintain and improve the NEPA procedures, as established and clarified by the CEQ regulations, while making them more efficient, timely, and effective.

Summary Comments In Support Of Regulatory Updates

As summarized below and more fully detailed in Attachment 2, the NEPA process would benefit from change to be more efficient and timely in meeting NEPA's objective of facilitating reasonably informed decision-making regarding proposed federal agency actions with significant environmental effects. The federal regulatory regime governing water resource is, in some important ways, outdated and difficult or impractical to apply to current on-the-ground realities. Regulatory mandates often fail to direct water resource management effort and financial resources at real problems. In some cases, outdated regulations impose obligations on agencies that unnecessarily add to the cost of water service, and can prove technically or economically impossible to satisfy in the face of current conditions. The NEPA process as currently conducted by federal agencies is often time-consuming, expensive and disjointed. CEQ regulations have, by and large, served their purpose well over the 40 years that they have been in effect, but they need revision. CEQ regulations and guidance should revise its regulations to improve coordination among federal agencies and the initial phase of the NEPA process, as well as create a more efficient NEPA analysis process overall.

To improve inter-agency coordination, Federal licensing and regulatory agencies should be required to participate in the NEPA applicability and permitting processes simultaneously with one agency identified as the lead agency. The coordinated process should include an overall schedule with enforceable time lines for deliverables from the agencies and accountability for missing due dates. It should define every agency's regulatory requirements, establish uniform timelines for various NEPA milestones, determine which agency is primarily responsible for evaluating impacts, define a formal dispute resolution process to resolve inter-agency disputes, and develop a single mitigation plan where possible. *See Attachment 2, WUWC Response to Question 1.*

To improve the initial phase of NEPA, the lead federal agency should be empowered and required to make specific determinations at the outset of the process—including determining all required authorizations, the scope of information necessary for analysis, and which agency will be financially responsible for administrative tasks—to enhance efficiency and avoid time-consuming disputes down the road. *See Attachment 2, WUWC Response to Question 1.*

Relatedly, while WUWC recognizes that alternatives are the “heart” of an Environmental Impact Statement (EIS), defining what is “reasonable,” and how many alternatives are needed for analysis is often a source of confusion and delay. Frequently, there is a debate about how many alternatives to consider and often there are too many. CEQ's regulations should place an emphasis on generally narrowing the number and range of alternatives considered. CEQ should clarify that alternatives must not change the scope or economic basis for a proposed action and, particularly when an applicant is involved, be consistent with the scope of the project as proposed. A good way to narrow the range of alternatives is through the scoping process and the consideration of alternatives eliminated from further review.

WUWC also proposes revisions to create a more efficient NEPA analysis process overall. *See Attachment 2, WUWC Response to Question 1.* These include encouraging agencies to rely on existing applicable work product and partner with appropriate parties to gather information and take advantage of local expertise and knowledge. In addition, CEQ should encourage non-federal project proponents to prepare NEPA documents and the use of cost-recovery and reimbursable agreements to support those efforts, and require better agency communication with project proponents that do not prepare NEPA documents. *See Attachment 2, WUWC Response to Questions 1 and 11.* CEQ could also improve NEPA efficiency by increasing the use of categorical exclusions to encompass, for example, activities that experience has shown generally resulted in Findings of No Significant Impact, or projects undertaken to create environmental improvements or restoration. *See Attachment 2, WUWC Response to Question 9.*

In addition, it has been our experience that some project opponents seek to delay projects through meritless appeals or litigation. The threat of litigation, particularly for large water infrastructure and other high-profile projects, has led agencies to try to make their NEPA analyses litigation-proof so they survive judicial challenges under NEPA's “hard look” standard. Consequently, environmental documents can take years to prepare and become prohibitively expensive, all while being generally less comprehensible to the public and stakeholders. Moreover, attempts to address all conceivable issues in an EIS has burdened courts with the responsibility to review more and more fine-grained and minute issues that have limited

relevancy to the given project. We believe that many of these unconstructive practices can be remedied or alleviated through updated regulations, as discussed in Attachment 2. Suggested changes include providing direction on what issues should be included in an EIS, setting requirements for meaningful third-party participation, establishing mandatory jurisdictional procedures with time limits, and imposing realistic targets for the length of NEPA documents and the timeframe for completing decisions. These changes will improve the timeliness of agency decision-making, provide greater certainty to applicants and other stakeholders, and help conserve agencies' and applicants' limited time and money.

Thank you for the opportunity to provide comments on the ANPRM. If you have any questions regarding these comments, please contact Don Baur of Perkins Coie, LLP at (202) 654-6234, dbaur@perkinscoie.com or me at (415) 934-5787, mcarlin@sfgwater.org.

Sincerely,



Michael P. Carlin
Chairman

cc: Donald C. Baur
Perkins Coie LLP
700 Thirteenth St., NW, Suite 600
Washington, D.C. 20005

Attachment 1



***The Western Urban Water Coalition —
Recommendations for Federal Reform to Promote Efficient, Effective and
Environmentally Responsible Water Resource Use and Management that Supports
Economic Vitality and Growth in the West***

The Western Urban Water Coalition (WUWC) was established in 1992 in order to address the West's unique water supply and water quality challenges that threatened the economic sustainability and growth of the large western population centers. WUWC consists of the largest urban water utilities in the Western U.S., who together serve over 40 million water consumers in 17 metropolitan areas across five states. Some of these utilities also operate wastewater, natural gas and electric, including hydroelectric, facilities for their customers. The membership of WUWC includes:

- 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; and
- Washington – Seattle Public Utilities.

WUWC is dedicated to the goal of providing a reliable, high-quality urban water supply for present and future generations, while preserving the unique environmental and recreational attributes of the West. Achieving this goal is critical to the region's economic growth and sustainability. To meet this goal, WUWC is an active public and legislative advocate for pragmatic and progressive water resource management programs. WUWC encourages water exchanges and transfers, supports an adequate supply of water for environmental purposes, advances multi-purpose storage opportunities, promotes water conservation, and advocates for effective and practical environmental regulatory programs. To address the West's unique water supply and water quality challenges, WUWC members are leaders and significant investors in water reuse, conservation and best use of resources. WUWC members have historically pursued innovative solutions and non-traditional sources of supply to improve water supply reliability.

Outlined below are the major challenges currently faced by WUWC members. WUWC and its members look forward to discussing solutions to these challenges with the Administration. We

will be reaching out to Agencies and the Administration in the coming months to begin those discussions.

Major Challenges

WUWC members face challenges resulting from aging infrastructure, increasing regulatory burden, declining water supplies and changing environmental conditions, while simultaneously securing a sustainable water supply for a growing population. The actions taken to date by WUWC to address such challenges reflect the group's commitment to proactively manage water supply demands in the West. WUWC's successes have created the momentum needed to confront future challenges. Support from Congress and President Trump's Administration, however, are needed to maintain that momentum.

WUWC seeks continued development of strong partnerships with the federal government in the following areas:

- **Developing Resilience to Natural Environmental Challenges** -- Changing natural conditions present an extreme challenge to WUWC members. Drought, floods, fire, extreme weather events, warming water temperatures and other such variations in environmental conditions are occurring with increased frequency and unpredictability. According to the Bureau of Reclamation, the United States' recent drought period is the worst in the last one hundred years. The warmest 12 years in recorded history have all occurred in the last 15 years, resulting in fluctuations in water flows and quality, increased droughts and severe weather patterns. These changing conditions present a significant challenge to water supply management decisions designed to sustain economic growth and achieve resilient communities. Because water supply in the West depends on runoff from snowmelt, water providers are being forced to rethink the way their systems operate. The runoff season is already beginning and ending earlier in the year, and system yields can fluctuate dramatically. Each new flood event demonstrates the vulnerability of existing infrastructure designed in reliance on historic hydrology, which is no longer a dependable predictor of the future. Millions of acres of national forests in the West are overgrown and in need of immediate large-scale tree harvesting to prevent catastrophic wildfire and its costly impacts to municipal watersheds. Wildfire events create erosion, sedimentation, and water quality problems that impact water storage and delivery infrastructure.

To address these challenges, water providers will need to ensure that their water supply planning, infrastructure and operational decisions are more resilient to change. Assistance from the federal government in the form of risk management, research and shared resources is essential. Federal adaptation strategies, plans and investments should be developed in close consultation and in partnership with Western water providers. In addition, federal regulatory programs need to be flexible enough to accommodate such strategies. Federal agencies must foster these strategies with a sense of urgency, and engage in timely and thoughtful revision of policies and regulations.

- **Streamlining Environmental Regulation** -- The regulatory regime governing water resource management was established over 40 years ago. It is outdated and cannot be successfully applied to current on-the-ground realities. These mandates often fail to direct

regulatory effort and financial resources at the real problems. In some cases, regulations impose obligations on our agencies that unnecessarily add to the cost of water service, and can even be technically or economically impossible to satisfy in the face of current changing temperatures and flow conditions.

WUWC supports sound and effective regulations to protect environmental values. However, regulatory programs should accommodate both western water supply needs and realistic environmental objectives. Federal agencies should facilitate efforts by water providers to carry out effective adaptation strategies. To advance adaptation, water utilities need regulatory flexibility and streamlined procedures for complying with these laws. Collaboration and open dialogue between federal regulators and water providers are needed to advance these goals.

- **Building and Rebuilding Water System Infrastructure** -- Much of our water infrastructure is nearing the end of its design life. An estimated 240,000 water main breaks occur each year in the United States. Assuming that each of those pipes would need to be replaced, the cost over the coming decades could reach more than \$1 trillion. Capital investment needs for the nation's wastewater and stormwater systems are also estimated to total \$298 billion over the next 20 years. Investment in water infrastructure will generate economic growth and jobs, but will also be costly. Water providers face regulatory requirements that can impede progress on the construction, repair and replacement of infrastructure.

A variety of mechanisms are needed to pay for the costs of necessary infrastructure. Such mechanisms include the expanded use of low interest federal loans, tax-exempt financing, and direct contributions through federal appropriation. In addition, lawmakers and regulators should consider ways to streamline the process for expanding, upgrading and replacing infrastructure, with particular emphasis on making the regulatory oversight/permitting processes more efficient.

- **Optimizing Water Resources** -- Water agencies in the West are implementing effective conservation programs to preserve and extend limited supplies to buffer the impacts of a variable climate and meet the demands of growing populations. WUWC members are involved in water recycling, reuse and groundwater recharge programs designed to make the most efficient use of the water supplies available to them. WUWC members are also successfully implementing an ever-expanding array of other water conservation measures. From water pricing to lawn replacement, and low-flush toilets to gray-water irrigation systems, urban agencies in the West have been leaders in promoting new technologies that advance water conservation. However, federal and state regulatory programs have not kept pace and thus have become impediments to such wise water uses.

The federal government can support these efforts by designating water conservation measures provided to customers by utilities as exempt from the definition of income for tax purposes.

Conclusion

WUWC is committed to confronting and mitigating the major water supply challenges outlined above. WUWC has made significant strides in addressing these obstacles, but collaboration with lawmakers and regulators is necessary for continued success. Preserving safe, reliable and affordable water supplies for consumers requires a strategy that defers to local water resource management decisions; provides regulatory flexibility consistent with the realities of changing environmental conditions; bolsters technical and financial resources; and streamlines regulatory processes. The starting point for confronting these challenges should be close collaboration and partnerships between elected representatives, federal officials and water agencies. WUWC is prepared to fulfill its role in this effort.

Attachment 2

ATTACHMENT 2
Western Urban Water Coalition (WUWC) Comments
on Proposed CEQ Rulemaking:
Update to the Regulations for Implementing the Procedural Provisions of
the National Environmental Policy Act, Docket ID No. CEQ-2018-0001

CEQ Question	WUWC Response
NEPA Process	
1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?	The processing of applications for leases and permits is often delayed because the licensing agencies participate in the NEPA process sequentially rather than simultaneously. Federal licensing and regulatory agencies should be required to participate in the NEPA and permitting processes simultaneously with one agency identified as the lead agency. The coordinated process should include an overall schedule with enforceable time lines for deliverables from the agencies and accountability for missing due dates. This coordinated process should: (1) Define every agency's regulatory requirements, including any differences in regulatory standards or definitions. (2) Establish uniform and realistic timelines for various stages of the NEPA process that supersede inconsistent timelines under NEPA regulations of individual agencies. (A) Deadlines to complete studies and provide agency review (B) Deadlines for publication of the Draft EIS and Final EIS (or EA if applicable) (3) Determine in advance which agency should be primarily responsible for evaluating information or studies related to particular types of environmental impacts. (4) Define a formal dispute resolution process to resolve issues between agencies efficiently and with finality. Use the dispute resolution process to resolve disagreements between resource specialists for different agencies, with deference given to the resource specialist for the primary agency for the particular subject matter. (5) To the extent possible, develop a single mitigation plan for a particular proposed action that encompasses the concerns of the various agencies. The lead federal agency should be empowered and required to make certain determinations at the outset of the process to enhance efficiency and avoid later time-consuming disputes. • Identify all applicable permits and authorizations for the project, from federal, state, and local agencies. • Define the scope of information and analysis that will be necessary to satisfy requirements for the applicable permits. • Determine upfront who will pay for NEPA document preparation, document production to respond to FOIA requests, and preparation of the final administrative record.

CEQ Question	WUWC Response
2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?	1. Encourage agencies to rely on existing studies and environmental analysis where possible, including by (a) allowing an agency to adopt another agency's NEPA analysis; (b) allowing an agency to adopt a non-federal environmental document as long as it can be found that such documents substantially meet the intent of NEPA (e.g., disclosure, public comment), regardless of the degree of federal agency involvement in preparation of the document; and (c) identifying data gaps that will require studies during the NEPA process. Currently, 40 C.F.R. § 1502.21 provides that agencies will incorporate materials "when the effect will be to cut down on bulk without impeding agency and public review of the action." CEQ could revise the regulations to allow agencies greater flexibility in determining when to incorporate existing materials and more strongly encourage the appropriate use of existing materials: Agencies are encouraged to incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk, expedite the agency's decision-making process, or as otherwise deemed appropriate. Agencies shall not incorporate existing materials by reference when doing so will significantly impede agency and public review of the action.... Where appropriate, including where agencies are considering an action that is substantially similar to an action that already underwent NEPA review, agencies are encouraged to adopt relevant Environmental Impact Statements prepared by another agency in their entirety, and/or incorporate all applicable portions of another agency's document. Further, federal agencies may adopt a non-federal environmental document where it can be found that such documents substantially meet the intent of NEPA (e.g., disclosure, public comment), regardless of the degree of federal agency involvement in preparation of the document. CEQ should also expressly allow agencies to adopt existing environmental assessments (EAs) that comply with the relevant portions of CEQ regulations. 2. Encourage agencies to partner with state and local agencies or other appropriate parties to gather information and complete relevant studies, to take advantage of local expertise and knowledge. 3. Encourage preparation of NEPA documents by non-federal project proponents. Establish by regulation that the lead federal agency remains responsible for final review and acceptance of any environmental analysis document. 4. Use more cost-recovery and reimbursable agreements between the lead federal agency and project proponent to fund environmental analysis. <i>See</i> Response to question 11. 5. Should CEQ regulations require the agency or a third-party contractor rather than the project proponent to prepare the environmental documents, mandate more robust communication with the proponent during the NEPA process:

CEQ Question	WUWC Response
	• Communicate with the proponent on technical, economic and environmental issues, because the proponent is most knowledgeable about the project. • Require that all draft and final project documents, other than internal agency communications, be shared with the project proponent to provide corrections and comments which will be included in the administrative record. • 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.
3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?	Revise the regulations regarding "effects" to better align with the joint U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) regulations that implement portions of the Endangered Species Act (ESA). 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" 42 U.S.C. § 4332(C). CEQ regulations, however, require NEPA analyses to consider direct, indirect, and cumulative effects or impacts: "Effects include ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 50 C.F.R. § 1508.8. I. Revise the regulatory definition of "indirect effects" and "cumulative impact" to better align with the definitions articulated in the ESA implementing regulations. CEQ regulations direct that EAs and EISs analyze "indirect effects," which "are caused by the action and are later in time or farther removed in distance, but are still <i>reasonably foreseeable</i>." 40 C.F.R. § 1508.8(b) (emphasis added). Similarly, CEQ regulations define cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and <i>reasonably foreseeable</i> future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." ESA regulations, in contrast, currently define indirect effects as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur," and limit cumulative effects to those "future" activities "that are reasonable certain to occur" There is no compelling reason to require agencies to satisfy distinct standards for determining and analyzing the effects of an action under these laws, and requiring agencies to meet different standards causes needless confusion and delay. CEQ should revise its regulations to (1) closely mirror the ESA regulations, and (2) adopt a similar two-part, test for causation for indirect effects and cumulative impact. Under this test, a future effect is caused by the proposed action only if (a) it would not occur but for the action and (b) it is reasonably certain to occur.

CEQ Question	WUWC Response
	Specifically, CEQ should revise its definition of indirect effects to read: “Indirect effects, which would not occur but for the action and are later in time or farther removed in distance, but are still reasonably certain to occur.” CEQ’s definition of cumulative impacts should be revised to include only those “future actions that are reasonably certain to occur”: “<i>Cumulative impact</i> is the impact on the environment which is caused by the incremental impact of the action when added to existing conditions and future actions that are reasonably certain to occur, regardless of what agency (Federal or non-Federal) or person undertakes such future actions. Only those impacts that would not occur but for the action and are at least reasonably certain to occur are attributable to the action.” /// II. Alternatively, revise and simplify the regulatory definition of effects and related language by eliminating categories of effect. The Services recently published a proposed rule that would revise and simplify the term “effects of the action” in the context of ESA consultation. The Service’s proposed rule would eliminate categories of effect (indirect, interdependent) altogether and instead make clear the term applies to the “entire range of potential effects.” It would define “effects of the action” as “all effects ... that are caused by the proposed action, including effects of other activities that are caused by the proposed action.” In addition, it would adopt a two-part, “but for” test for causation, such that “[a]n effect or activity is caused by the proposed action if [1] it would not occur but for the proposed action and [2] it is reasonably certain to occur.” Even if the Services’ proposed rule is finalized, the above suggested NEPA changes would still better align with the ESA definition of “effects,” because this proposed definition retains the requirement that any effect be “reasonably certain to occur.” Nonetheless, should the proposed rule be finalized as is, CEQ should consider similarly revising and simplifying its regulatory definition of effects and related language: 40 C.F.R. 1508.8 Effects. Effects are all effects that are caused by the action, including effects of other activities that are caused by the proposed action. An effect or impact is caused by the action only if (1) it would not occur but for the action and (2) is at least reasonably certain to occur. Effects and impacts as used in these regulations are synonymous. CEQ should eliminate the remaining language of the current section 1508.8, which states that “Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.” This language has led to longer and more encyclopedic EISs. Alternatively, CEQ should amend the first sentence of that language to provide greater flexibility in analyzing only relevant effects: “Effects, may, but do not necessarily need to, include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health.”

CEQ Question	WUWC Response
	Section 1502.16 (Environmental consequences) should be revised by: (1) changing subsection (a) to read “Effects of the action and their significance (§ 1508.8); (2) eliminating the current subsection (b); and (3) re-lettering the remaining subparts accordingly. Part (c) of section 1508.25 (Scope) should be revised to read “Impacts.” We note that there is a substantial body of case law defining the scope of impacts to be considered. That case law is, on some issues, out-of-date and in need of new consideration and reflection. The case law is often the outgrowth of the CEQ regulations and guidance, as is the case for the scope and kind of impacts to be considered. The process of bringing case law into conformance with current realities, and the original intent of NEPA will take time. In some cases, proposed rule changes could be viewed as inconsistent with case law. CEQ should acknowledge that this tension may exist on certain issues and clearly state, and indeed promote, that is seeking to clarify the agency’s interpretation of the statute to guide future judicial reasoning. In doing so, the rulemaking should note the importance of CEQ’s role as the “keeper of NEPA” and the lead agency responsible for its application.
Scope of NEPA Review	
4. Should the provisions in CEQ’s NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?	I. Time Limits Executive Order 13807 directs federal agencies to complete the NEPA process within a two-year period for major projects. As noted above, most reviews lack any overall schedule or any enforceable timelines for deliverables. CEQ should therefore make time-limited schedules for completing the environmental review process and for allowing public comment more definitive. While we do not believe that two years is a reasonable amount of time for the NEPA process in all cases, that timeline should be adopted or strongly encouraged in all but the most complex cases. To ensure agencies promptly review relevant information, CEQ should also revise its regulations to provide a 30-day deadline for agency review of submitted NEPA studies. CEQ should also establish an online public access website, like the existing permitting dashboard, to publish the status of NEPA and permitting for all projects requiring an environmental impact statement or an environmental assessment. Moreover, extensions have become routine or even the default agency position in the NEPA process. These extensions lengthen the NEPA process, often without good cause to do so. Extensions of time should be reserved for those instances in which they are truly necessary. To that end, CEQ should amend its regulations to admonish that extensions of time limits for completing environmental analysis and public comment periods may be used only in instances where a compelling need is shown. In addition, when a federal applicant is involved and the applicant and federal agency mutually agree to an extension, the federal decision should be made by the appropriate line officer/decision maker at the project level. For those instances where an applicant does not concur with an extension, any extension must be approved by the most senior official in the relevant federal office for the lead agency.

CEQ Question	WUWC Response
	II. Page Length Section 1502.7 currently states that the text of EISs “shall normally” be less than 150-pages, except for proposals of unusual scope or complexity, which “shall normally be less than 300 pages.” These limits are reasonable, but as a practical matter, are not followed. The threat of litigation for water infrastructure projects and other high-profile actions has led agencies to try to make their NEPA analyses litigation-proof so they survive judicial challenges under NEPA’s “hard look” standard. Consequently, environmental documents have become encyclopedic, can take years to prepare, and are prohibitively expensive, all while being less comprehensible to the public and stakeholders. CEQ should revise its regulatory language to clarify that the 150-page is mandatory except in unusual cases. Any exception to this page limit, including the 300-page limit for “proposals of unusual scope or complexity,” must be approved by the most senior official in the relevant federal office for the lead agency and with the consent of the applicant. A procedure should be established to seek an expansion of the page limit. In addition, CEQ should clarify that appendices resulting in environmental documents exceeding page lengths should not be encouraged, but may be used so long as those appendices contain legitimate technical information.
5. Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?	The regulations provide that scoping is “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” 40 C.F.R. § 1501.7. Currently, the regulations only generally provide that agencies should “reduce excessive paperwork by separating significant and insignificant ... issues” (40 C.F.R. § 1500.4), identify the “real issues” (<i>id.</i> § 1500.5), and determine which issues can be eliminated from in depth study (<i>id.</i> at § 1501.7). Despite these general guidelines, agencies are often unwilling to appropriately segregate and eliminate insignificant issues during the scoping process. Rather than use their judgment to separate out “insignificant” issues that can be eliminated or briefly addressed, agencies often address all issues identified as a means of litigation-proofing their documents. This leads to unwieldy EISs, delays in the NEPA process, and encyclopedic documents that are difficult for the public and stakeholders to understand and digest. CEQ could better ensure NEPA documents focus on “significant issues” by adding specificity and a means to provide more discipline to the scoping process. The regulations should expressly require the lead agency to “identify[] the significant issues,” as well as those that can be eliminated from review. In addition, CEQ should expressly limit the number of “significant issues” that an EIS may cover to no more than 6, except for “proposals of unusual scope or complexity,” (Section § 1502.7) in which case the lead agency should have discretion to identify a reasonable number of additional significant issues to consider. The regulations should also make clear that agencies cannot simply accept that all issues presented are significant. In addition, CEQ should clarify that “issues” need to be narrowed to very specific concerns or questions, rather than, for example, an agency accepting a comment that impacts may be significant to “wildlife” in general. Commenters and ultimately the agency should be required to narrow the analysis to a specific question(s), such as impacts to habitat for one or small group of species of concern. The EIS would focus on the affected environment and consequences of the action (and alternatives) for that specific narrow issue.

CEQ Question	WUWC Response
	Moreover, when project design features, industry best management practices, mitigation measures, or compliance with other regulations (such as the Clean Air or Clean Water Act) minimize potential impacts to insignificant levels, the regulations should permit agencies to treat those impacts as insignificant and eliminate the tendency by agencies to conduct full detailed impact analyses on those resources.
6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?	CEQ should consider revising its NEPA regulations to encourage agencies to provide draft documents of portions of documents through the agencies' website only upon the consent of the project applicant. This would allow interested parties to review and digest agency analyses prior to the release of a draft or final EIS. While in some cases this would be advantageous, it is critical that the release of such documents be allowed only with the consent of the project applicant. This will eliminate or lessen the likelihood that pre-publication drafts contain significant factual errors that affect project assumptions and corresponding impact analyses. CEQ should also: develop guidance for how the public can be most effectively and efficiently involved, highlighting preferred format, length and content of comments; and establish a requirement that for an issue to be raised in subsequent appeals, it must have been raised with sufficient clarity in the comments.
7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?	Yes, as discussed below.
a. Major Federal Action;	Revise section 1508.18 (Major Federal Action) to encompass only "new activities" that "will be major" and which "are subject to Federal control and responsibility." In addition, CEQ should limit Major Federal Actions to those that are "entirely or predominantly" controlled by federal agencies and make clear that proposed operational changes to ongoing agency actions will be Major Federal Action only if the new activity, standing alone, satisfies the Major Federal Action criteria: 40 C.F.R. § 1508.18 Major Federal Action: Major Federal action includes actions with effects that will be major and which are subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27) (a) Actions include new activities, including projects and programs entirely or predominantly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 <i>et seq.</i>, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions. In

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	the context of ongoing Federal activities, actions do not include any proposed change to ongoing activities unless the change itself has independent effects that will be major and which are subject to Federal control and responsibility.
b. Effects;	<i>See Response to No. 3 supra.</i>
c. Cumulative Impact;	<i>See Response to No. 3 supra.</i>
d. Significantly;	
e. Scope; and	
f. Other NEPA terms.	
8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?	Yes, as discussed below.
a. Alternatives;	<i>See Response to No. 15 infra.</i>
b. Purpose and Need;	Section 1502.13 (purpose and need) provides for a statement of purpose need that “shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 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>i.e.</i>, 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>i.e.</i>, support for notion that there is or will be a resiliency problem to be corrected or improved). In addition, CEQ should clarify that the agency’s statement of purpose and need focuses on the agency action (<i>i.e.</i>, granting a permit) rather than the proponent’s project that a federal action will allow (<i>i.e.</i> the construction of a water resource project). CEQ should also 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. Current precedent is inadequately clear on this point, so 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.

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	Proposed language follows: “Purpose” should articulate why an action is being proposed. The purpose should be stated in a manner that indicates the resolution of an underlying issue or problem. The purpose must focus on the agency action (i.e., whether to grant a permit) rather than the proponent or applicant’s activity (i.e., construct a water resource project). “Need” should establish the basis for concluding that the problem to be solved by the action exists (i.e., a factual statement that supports the assertion that there is an issue to be corrected by the action). The need must focus on the agency action (i.e., an applicant has sought approval of a needed agency permit) rather than the proponent or applicant’s activity.
c. Reasonably Foreseeable;	As noted above, <i>see</i> Response to No. 3 <i>supra</i> , the term “reasonably foreseeable” seemingly provides a different standard for indirect and cumulative effects than those of other statutes, most notably, the ESA. CEQ should eliminate this term in those definitions and replace it with “reasonably certain to occur.”
9. Should the provisions in CEQ’s NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?	CEQ’s NEPA regulations currently provide extensive process guidance in the context of EISs. But no such regulatory guidance has been provided for the other types of documents, including, for example, EAs, and categorical exclusions (CEs). This has left agencies to reason by analogy for these other NEPA documents. CEQ should either clarify which, if any, requirements and procedures applicable to EISs apply to other categories of documents, or promulgate regulations detailing appropriate procedures for these categories of documents. Doing so will provide more consistency in the NEPA process and increased clarity to agencies in how they must satisfy their NEPA obligations for these documents.
a. Notice of Intent;	The notice of intent (NOI) is important because if properly applied, it should drive the subsequent review efficiently and full participation by interested parties. It is in the interest of all shareholders to focus NEPA from the outset; indeed, well-informed comments are very important. To achieve this goal, the NOI should be required to identify clearly its proposed action and its alternatives, the anticipated schedule, the issues most important of the comment, and limitations on timing, page limits, and mechanisms for public review.
b. Categorical Exclusions Documentation;	NEPA efficiency could be improved substantially by increasing the use of categorical exclusions from NEPA where appropriate. For example, categorical exclusions could be developed based on past agency experience that certain activities have generally resulted in Findings of No Significant Impact, or for projects undertaken to create environmental improvements or restoration.
c. Environmental Assessments;	Section 1502.22 (incomplete or unavailable information) states that “When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is

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	incomplete or unavailable information, the agency shall always make clear that such information is lacking.” CEQ should make clear that EAs are not subject to this requirement, which expressly only applies to “an environmental impact statement.”
d. Findings of No Significant Impact;	
e. Environmental Impact Statements;	<i>See</i> discussion elsewhere in these comments.
f. Records of Decision; and	
g. Supplements.	CEQ should clarify the role and use of Supplemental Information Reports (SIR) and similar evaluation procedures for determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS. In particular, the proposed rule should make it clear that SIRs will be issued only when necessary to clarify new information. The use of Supplement EISs (SEISs) should be recommended as appropriate only in those unusual cases where the existing DEIS/FEIS is clearly inadequate. SEISs should not be used as an excuse to redo a completed DEIS or FEIS. In addition, the rule should set page limits (50/75) for SEISs and specify that only the issue that gave rise to the need for the supplement. Moreover, in light of constantly improving data and knowledge, the regulations should clarify that supplementation is the exception and required only where new information or project modifications present a fundamentally and materially different portrayal of environmental impacts directly relevant to the decision.
10. Should the provisions in CEQ’s NEPA regulations relating to the timing of agency action be revised, and if so, how?	
11. Should the provisions in CEQ’s NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised and if so, how?	I. Role of Applicants CEQ regulations should be revised to encourage preparation of both EISs and EAs by applicants or proponents of proposed projects or their contractors. <i>See</i> Response to Question 2. CEQ regulations should also encourage the use of reimbursable agreements for environmental reviews and related processes. <i>See</i> Response to Question 2 One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays 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. A partial solution to this problem would be to make agency review procedures more efficient

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	and expeditious by encouraging non-federal parties to cover the costs of these reviews through the hiring of federal staff and other support by the involved agencies. In addition, developing and using standard form agreements as the basis for allowing project sponsors to assume the cost of permitting procedures, including EISs for “gray” infrastructure projects (<i>i.e.</i> human engineered, new construction or upgrading dams, pipelines, roads etc.), would expedite decision-making and make procedures more reliable and certain. A standard form could easily be adjusted to apply to an Environmental Assessment as needed. Reimbursable agreements could contain elements necessary to expedite the permitting process via the project applicant paying for a full-time agency project manager and other personnel as well as EIS and other contractor consultants. These can also provide at least in basic general terms for Service coordination with other consulting/cooperating agencies to meet timelines, and they can be adapted to or paired with an interagency agreement for the project. II. Agency Responsibility Currently, cooperating agencies (<i>i.e.</i>, agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. 40 C.F.R. §§ 1503.2, 1508.5. As a practical matter, cooperating agencies that submit comments do not strictly limit their comments to matters within their special expertise or jurisdiction. Comments and recommendations from cooperating agencies outside their area of expertise are often given undue weight because of the “cooperating agency” designation. This is particularly true for those outside of the decision-making process, including courts that come across these comments in administrative records in NEPA litigation. The CEQ regulations should be amended to encourage or expressly limit cooperating agencies to commenting only on issues within their areas of jurisdiction or special expertise. The regulations should further provide that any comments outside of a cooperating agencies’ jurisdiction or expertise can be considered but are entitled to no deference or additional weight by the lead agency. These changes will improve efficiency and reduce the likelihood that a cooperating agency’s comments that are beyond its expertise will be afforded undue deference. In addition, strict time limits should be established. Failure to meet on deadline should prevent the cooperating agency (or any other agency) from commenting at all, without the consent of lead agency and applicant. Finally, such comments should be submitted as early in the process as possible.
12. Should the provisions in CEQ’s NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?	When properly applied, programmatic EISs and tiering can be very efficient, and the use of these NEPA processes should be encouraged. Regulations should regulate the use of tiering when a specific proposed action falls within the scope of a programmatic EIS and should avoid the temptation to reinvent the wheel through a new EIS created out of “whole cloth” when a pre-existing NEPA document can be used.
13. Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which	CEQ regulations refer to a “range of alternatives” that are discussed in environmental documents, 40 C.F.R. § 1505.1, which includes “all reasonable alternatives, which must be “rigorously explore[d] and objectively evaluate[d]” 40 C.F.R. § 1502.14(a).

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alternatives may be eliminated from detailed analysis be revised, and if so, how?	While the analysis of alternatives is the “heart” of an EIS, 40 C.F.R. § 1502.14, determining what alternatives are “reasonable,” and how many alternatives suffice, is often an issue that is subject to confusion and delay, as there is often a debate about how many alternatives to consider and often there are too many. CEQ should revise its regulations to place an emphasis on generally narrowing the number and range of alternatives considered. To that end, CEQ should consider its regulations to incorporate the Department of the Interior’s (DOI) regulations and CEQ 40 Question Guidance regarding alternatives; specifically, that alternatives must be “technically and economically feasible”: DOI regulations specifically provide that “reasonable alternatives” includes those that are “technically and economically practical or feasible....” 43 C.F.R. § 420(b). <i>See also</i> the Forty Questions Guidance, which states that “[r]easonable alternatives include 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.” 46 Fed. Reg. 18027. Thus, CEQ could revise its regulations to require analysis of only “an appropriate number of reasonable alternatives given the nature of the proposed action.” The alternatives should not change the scope or economic basis for a proposed action and, when an applicant is involved, should be consistent with the scope of the project as proposed and fulfill the project goals as defined. In addition, any alternative considered must be significantly distinguishable from or have substantially different consequences than alternatives considered, as well as technically and economically feasible. A good way to narrow the range of alternatives is through the scoping process and the consideration of alternatives eliminated from further review.
General	
14. Are any provisions of the CEQ’s NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.	
15. Which provisions of the CEQ’s NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?	Section 1506.6 should be updated to clearly allow notice to be given by electronic means such as email or by publication online on an agency’s website. Section 1506.9 should be updated to allow EIS to be filed with EPA electronically.
16. Are there additional ways CEQ’s NEPA regulations should be revised to promote coordination of	CEQ should consider revising those defined terms in its NEPA regulations that are identical or substantially similar to defined terms in other statute’s implementing regulations, including the ESA, to more closely align the definitions.

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environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?	
17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?	As discussed above, NEPA procedures should take full advantage of current electronic databases and means of communications to reduce time delays, promote efficient public comments and establish a "virtual record" that will aid in compiling administrative records and records of decision.
18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?	Tribal governments should be encouraged to participate as cooperating agencies, but must be required to do so under the same rules of the road and procedural directives as other agencies. The rule should provide that tribal government participation as a cooperating agency satisfies general policy directives to consult with tribes when undertaking agency action. CEQ should clarify the role of tribal governments in situations in which a tribal government is acting as both as cooperating agency and an interested party. In cases where the Tribe has an interest in the outcome, it should be recused from its role as cooperating agency on the specific issues where it has the direct interest. This rule should apply to any cooperating agency.
19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?	On April 9, 2018, the heads of a dozen federal agencies executed a memorandum of understanding (MOU) on implementing Executive Order 13807, which directed federal agencies to expedite environmental review and permitting for major infrastructure projects. As relevant here, EO 13807 directed federal agencies to use a single, coordinated process for compliance with NEPA, including preparation of a single environmental impact statement and a single record of decision. To that end, the MOU instituted a new policy requiring that lead agencies obtain written concurrence at three key milestones from all cooperating agencies whose authorizations are required for the project. The required concurrence points include in (1) determining the purpose and need for the project; (2) identifying the range of alternatives to be carried forward for analysis in the EIS; and (3) identifying the preferred alternative. While the goal of these concurrence points may be understandable, they should not be codified in the NEPA regulations. Written concurrence points are not mandated by NEPA, nor by the executive order. Nor is it clear what constitutes an "authorization," or whether lead agencies can proceed without written concurrence from all cooperating agencies. If it cannot, such a requirement will likely bog down the NEPA process while time-consuming and document-intensive disagreements between agencies are resolved.

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	Given the strong policy direction to maintain a two-year schedule and CEQ’s goal of reducing unnecessary burdens and delays, CEQ should not impose any requirement that lead agencies obtain written concurrence from cooperating agencies. To the extent CEQ is considering guidance regarding “concurrence points,” it should ensure that lead agencies retain flexibility to keep the NEPA process moving while continuing to negotiate with the cooperating agency to obtain concurrence, rather than halting the process due to an impasse at a concurrence point.
20. Are there additional ways CEQ’s NEPA regulations related to mitigation should be revised, and if so, how?	The Obama and Trump Administrations have issued competing visions of how mitigation should work, with Trump policies and directives taking the place of the Obama era initiatives. As a result, and due to the number of these policies/directives, the status quo is confusing and potentially inconsistent. It would be beneficial to have a singular regulatory definition of the scope and meaning of mitigation. Such a rule should encourage the use of mitigation, because it promotes flexibility in project development and can result in important environmental benefits. The rule should provide that mitigation should be assumed to be satisfied when impacts are addressed on a one-to-one basis, and need not be limited to “in kind” mitigation. The rule should also provide that in cases where mitigation is difficult to define precisely, it can be implemented after project approval through means of adaptive management. In addition, CEQ should revise its regulations to make clear that agencies should consider “impacts” after having taken into account the mitigation offered and clarify that a project proponent is responsible for mitigating only the incremental impact of its proposed project in a cumulative impacts situation.