



September 29, 2023

Amy B. Coyle, Deputy General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Submitted on Federal eRulemaking Portal: <http://www.regulations.gov>

RE: Comments on Notice of Proposed Rulemaking, National Environmental Policy Act Implementing Regulations Revisions Phase 2, Docket No. CEQ-2023-0003.

Dear Ms. Coyle:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ's) notice of proposed rulemaking on National Environmental Policy Act Implementing Regulations Revisions Phase 2 (Proposed Rule). WUWC is a coalition of 19 of the largest western water utilities¹ formed more than 30 years ago to address the unique water issues facing the western United States. Its members represent approximately 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 customers.

As WUWC has stressed previously in this docket and other proceedings, regulatory reform, particularly pertaining to the National Environmental Policy Act (NEPA), is needed to promote the sustainability and resiliency of water supply infrastructure and improve and protect our nation's water supplies. The replacement of aging water infrastructure and the development of new infrastructure is critical to complement the significant water conservation steps municipal water users are already taking 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.

¹ WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: Arizona (Central Arizona Project, City of Phoenix and Salt River Project); California (Eastern Municipal Water District, East Bay Municipal Utility 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 County Water Conservancy District); and Washington (Seattle Public Utilities). Please note that Seattle Public Utilities does not participate in this letter and these comments and proposed recommendations.

While WUWC supports CEQ's efforts to update and improve the NEPA process, we have strong concerns regarding specific elements of the Proposed Rule. After briefly discussing WUWC's interest and history of participation in NEPA reform, we outline these concerns in detail below.

I. WUWC History of Participation in NEPA Reform

WUWC is committed to presenting new and different perspectives on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to provide a reliable, high quality, sustainable urban water supply for present and future generations. As operators of public water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock every day of the year. 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.

Throughout its 29-year history, WUWC has been very active in legislative and regulatory 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 or 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). On June 28, 2021, we submitted a detailed letter to CEQ Chair Mallory providing an introduction to WUWC's past involvement in NEPA reform and proposing recommendations for NEPA regulatory reform. On November 22, 2021, WUWC submitted comments on the Notice of Proposed Rulemaking to modify certain aspects of the NEPA Implementing Regulations Revisions (CEQ-2021-0002-0002, Tracking ID kwb-1mcy-323p). Finally, on April 10, 2023, we submitted comments on CEQ's draft notice of proposed rulemaking (NPRM) to modify certain aspects of its regulations for implementing the procedural provisions of NEPA (Phase 2) (RIN 0331-AA07).

II. WUWC Concerns with the Proposed Rule

To meet NEPA's goals, WUWC has supported improving NEPA procedures to make them more efficient, timely, and effective. Notwithstanding the provisions for efficient, coordinated, and timely environmental reviews in CEQ's 1978 regulations, environmental reviews 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 seem to favor quantity over quality. Such exhaustive and voluminous analysis can frustrate public participation and informed decision making.

WUWC supports the recent 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 assurances of 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.

With that said, WUWC has concerns with the direction CEQ would take with many provisions of the Proposed Rule. The significant regulatory changes over the past few years have caused uncertainty, additional work, delays in project delivery, and litigation risks for projects. Rather than bring its NEPA regulations back to center, CEQ's Proposed Rule would unfortunately introduce new uncertainties and, in some cases, unjustified legal risk.

Modernizing NEPA might understandably entail major revisions to CEQ's rules. A substantially rewritten rule, however, must still provide a stable, predictable and defensible framework to implement NEPA's core goals of informing federal decision-making and fostering effective public engagement in that process. Navigating our increasingly complex world, agencies, project sponsors and applicants, and the public more than ever need clear direction from CEQ. WUWC is concerned that the Proposed Rule, in places, would deviate from well-established principles developed through decades of agencies' experience implementing NEPA. CEQ must justify its changes with care. In WUWC's specific comments below, we highlight where the CEQ's proposal would introduce new undefined terms and create new vague requirements that, without further guidance, run counterproductive to core interests of predictability, efficiency, transparency, and informed public participation.

WUWC's more specific comments are below, generally organized in the order of sections of the Proposed Rule (40 C.F.R. §§ 1500–1508).

Scope of Action and Analysis (§ 1501.3(b)).

CEQ proposes to delete text that guides the essential purpose of NEPA scoping: to focus the environmental review on the “significant issues to be analyzed in depth” and “eliminate from

detailed study the issues which are not significant” or may be addressed through tiering.² CEQ would instead require agencies to consider a proposed action’s “potential effects.”

WUWC is concerned that references to “potential” effects could be interpreted as requiring consideration of speculative scenarios or effects that are not reasonably foreseeable. WUWC recommends revising “potential” to “reasonably foreseeable” for consistency with the definition of “effects” in proposed Section 1508.1(g), as well as NEPA itself, which requires consideration only of “reasonably foreseeable” effects.³

CEQ also proposes to eliminate consideration of alternatives and impacts at the scoping stage of NEPA review. In CEQ’s view, consideration of alternatives and impacts at this stage would be “premature in the process, unnecessary, and unhelpful to address alternatives as part of determining the level of NEPA review.” Given that the deleted text has been part of the CEQ regulations since 1978 and was carried forward by the 2020 regulations,⁴ WUWC recommends that CEQ more fully explain why the practice has been unnecessary and unhelpful, as well as consider how the practice may be improved to further streamline and focus environmental review in subsequent stages of the NEPA process.

Significance Determination – Context and Intensity (§ 1501.3(d)).

The proposed language would require agencies to examine the context of an action (described in Section 1501.3(d)(1)) and the intensity of the effects (described in Section 1501.3(d)(2)) in determining whether the effects of the action are significant. In the Section 1501.3(d) introductory text, CEQ should specify that the determination of the significance of an impact can take into consideration mitigation and other measures that would be implemented as part of the project. This would improve efficiency and would be consistent with other sections of the regulations that allow for application of a categorical exclusion (CE) where the agency modifies the action to address extraordinary circumstances (Section 1501.4(b)(1)) and adoption of a mitigated finding of no significant impact (FONSI) (Section 1501.6(a)).

Context (§ 1501.3(d)(1))

The proposed revisions to Section 1501.3(d)(1) explain how agencies should consider the context of an action as part of the significance determination. The proposed text lacks the clarity of the 1978 regulations upon which it is based, including consideration of local effects of site-specific actions. WUWC supports restoration of the 1978 regulation with a significance determination that provides for consideration of local context for projects that involve only localized effects and non-mandatory language (*i.e.*, “should”) in this paragraph, because this will allow agencies flexibility based on their proposed actions. WUWC members can point to numerous types of projects – for example, a modest expansion of existing water distribution or

² 40 C.F.R. § 1501.7(a)(2), (3) (2019); 40 C.F.R. § 1501.3(e) (2020).

³ *See, e.g.*, NEPA §§ 102(C)(i), 102(C)(ii), 106(b); *see also* 169 Cong. Rec. H2704 (daily ed. May 31, 2023) (statement of Rep. Bruce Westerman); 169 Cong. Rec. E534 (daily ed. June 7, 2023) (statement of Rep. Garrett Graves).

⁴ 40 C.F.R. § 1508.27 (2019), 40 C.F.R. § 1501.9(e) (2020).

treatment infrastructure – where there are no effects of a national or global nature, and for which it would be excessive to analyze national and global contexts.

The second sentence of Section 1501.3(d)(1) would require agencies to consider the characteristics of the relevant geographic area, such as proximity to “unique or sensitive resources or vulnerable communities.” CEQ should define these terms, particularly “vulnerable communities.” Vague and unclear requirements will lead to delays in project delivery and will increase litigation risk.

The third sentence of the proposed Section 1501.3(d)(1) states that agencies should consider the “potential” global, national, regional, and local contexts as well as the duration, including short- and long-term effects. WUWC suggests changing “potential” to “reasonably foreseeable,” to make clear that agencies are not required to consider speculative scenarios or effects that are not reasonably foreseeable. *See* WUWC’s comments on Section 1501.3(b), above. We also note that duration (i.e. whether the impacts are short-term or long-term) relates more to the consideration of intensity as set forth in Section 1501.3(d)(2)(i).

Intensity (§ 1501.3(d)(2))

Section 1501.3(d)(2) would partially restore the ten factors for evaluating intensity that were included under the 1978 regulations, and which are widely used in agency implementing procedures. WUWC is concerned that the proposed amendments to these factors could unnecessarily disrupt agency NEPA practice. WUWC recommends that CEQ minimize disruption by revising Section 1501(d)(2) as follows:

- Sections 1501.3(d)(2)(ii), (iii), (v), (vii), (viii), and (x) should read “the degree of any reasonably foreseeable adverse effects from the proposed action”, and Section 1501.3(d)(2)(ix) should read “the degree of any reasonably foreseeable disproportionate and adverse effects from the proposed action on communities with environmental justice concerns.” These revisions would focus the agency’s consideration on “reasonably foreseeable” effects, consistent with the statute and congressional intent (*see* WUWC’s comments on Section 1501.3(b), above). The phrasing proposed by CEQ (“may adversely affect”) could be interpreted as suggesting that agencies consider speculative scenarios and effects that are not reasonably foreseeable.
- Section 1501.3(d)(2)(iii) would benefit from definition of “park lands,” “prime farmlands,” and “ecologically critical area.” Providing precise references or definitions for these terms would help to prevent confusion, delays and litigation risk.
- We understand CEQ’s intent in Section 1501.3(d)(2)(vi) to clarify that an agency or project proponent may not avoid a determination of significance based on the intensity of an impact by characterizing an action and its resulting impacts as temporary when it is in fact part of a repeating or ongoing action with repeating or recurring impacts. Nonetheless, we have some concerns that the proposed text could be misinterpreted. Section 1501.3(b) addresses the potential for an action to have some relation to other actions as part of the determination of the scope of the analysis. If CEQ desires to ensure that the potential for repetition or recurrence of an impact is considered in determining

the intensity of the impact and its significance, the text should be modified to state this more clearly.

WUWC supports CEQ's intention to clarify the prior text referencing effects that are "controversial." We support requiring agencies to consider the degree to which the potential effects involve a high degree of uncertainty and recommend that CEQ consider changing "highly uncertain" to "high degree of uncertainty" to avoid confusion. This is an improvement on prior regulatory text that required consideration of the degree to which effects are "highly controversial." WUWC agrees with CEQ's reasons for this change, as stated in the Preamble.⁵ The "highly controversial" factor was a frequent cause of confusion and unnecessary litigation.⁶

Categorical Exclusions (§ 1501.4).

In general, WUWC supports the use of categorical exclusions (CEs) and CEQ's efforts to broaden their use by agencies to streamline the NEPA process. Encouraging the development and use of CEs will more efficiently satisfy the agency's NEPA obligations where a proposed action would not result in significant adverse environmental effects. To promote efficiency and streamlining, CEQ should, with regulatory text (*e.g.*, in Section 1501.4 or Section 1500.5) encourage agencies to develop and apply CEs where appropriate.

WUWC supports the proposed revision to Section 1501.4(a) to allow agencies to establish CEs individually or jointly with other agencies. This change should improve flexibility and efficiency, while generally encouraging the use of CEs. We also support the continuation of a procedure to allow an agency to apply the CE listed in another agency's NEPA procedures. It is not uncommon for our members to be engaged in minor actions involving multiple federal agencies. For example, a minor alteration to a monitoring well on the land of one federal agency may have funding or require related authorizations from a separate federal agency; it makes sense to allow agencies to apply the CE of other federal agencies, particularly where the activity involved is something that is routine for the agency that has developed the CE but is simply not frequently authorized by the agency that will be applying that CE. To realize the efficiency that CEQ is seeking to promote, we recommend that the notice and publication requirements in proposed subsections 1501.4(e)(4) and (5) be removed or that CEQ make it clear that this applies only where an agency is applying another agency's CE to a category of actions rather than an individual action. If this notice and publication requirement applies in all circumstances, it could undercut the efficiency that CEQ is promoting, particularly if the notice and publication must be completed before the agency may act.

WUWC, however, recommends *against* permitting agencies to establish CEs outside of agency NEPA procedures. The Proposed Rule would permit agencies to establish a CE through a land use plan, a decision document supported by a programmatic environmental impact statement or environmental assessment, or other equivalent planning or programmatic decisions. Preserving agency NEPA procedures as the forum for CEs has the advantage of consistency and transparency. WUWC anticipates that the regulated community, public stakeholders, and perhaps even agencies themselves, may struggle to stay abreast of an expanding roster of available CEs if

⁵ 88 Fed. Reg. 49936.

⁶ See, *e.g.*, *Bair v. California Dep't of Transp.*, 2019 WL 2644074, at *2–3 (N.D. Cal. June 27, 2019), *rev'd*, 982 F.3d 569 (9th Cir. 2020).

agency NEPA procedures do not remain a central repository for CEs. Land use plans and other planning or programmatic decisions may also have varying procedures for public input, meaning that CEs could eventually come to reflect a range of public input and transparency. WUWC sees advantages to implementing this important aspect of NEPA streamlining through a common process.

Environmental Assessments (§ 1501.5(h))

CEQ proposes to add Section 1501.5(h) to explain when an agency may supplement or reevaluate an EA. The question of when to supplement or reevaluate a NEPA document is a critical and oft-litigated inflection point in the NEPA process and we support CEQ's efforts to clarify this.

WUWC recommends CEQ revise this section to clarify that reevaluation of an EA is only required "if a major Federal action remains to occur." In other words, CEQ should revise this section to clarify that new circumstances or information—in the absence of remaining discretionary approval involving a major Federal action—do not trigger a requirement to reevaluate or supplement an EA. The current regulatory text could be interpreted as suggesting that agencies are obligated to reevaluate an EA whenever new circumstances or information arise, which CEQ likely did not intend.

Finally, consistent with our comments on the proposed Section § 1502.9(d)(1)(ii) regarding Supplemental Environmental Impact Statements, WUWC suggests that CEQ change "substantial" to "significant." The term "substantial" is undefined and likely to cause confusion and uncertainty, whereas "significant" has long been applied by agencies and is the subject of a robust body of case law.

Mitigated Findings of No Significant Impact (§ 1501.6(a))

WUWC supports revising Section 1501.6(a) to recognize that an agency can prepare a mitigated FONSI if a proposed action will have no significant effects due to mitigation. An agency's use of a mitigated FONSI can promote efficiency in the NEPA process and expedite project delivery when mitigation has been incorporated to ensure there will be no significant adverse environmental effects.

WUWC, however, is concerned about CEQ's proposal to require lead or cooperating agencies to prepare a "monitoring and compliance plan for any mitigation the agency relies on as a component of the proposed action" and incorporate that plan as a binding aspect of the agency's decision document. Requiring a monitoring and compliance plan further complicates the NEPA process and may disrupt agencies' longstanding decision-making procedures and enforcement approaches. It could expose agencies to litigation over whether they had properly enforced the plan, and such exposure could deter agencies from considering mitigation measures that would otherwise be environmentally beneficial.

Deadlines and Schedule for the NEPA Process (§ 1501.10)

One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays and uncertainty in decision-making. The Proposed Rule

would establish deadlines for completion of an EA and an EIS consistent with Congress' recent enactment of NEPA Section 107(g). CEQ would also require the lead agency to develop a schedule for completion of an EA and EIS. When a lead agency or participating agency anticipates missing a milestone, the agency would be required to notify the responsible or lead agency and request action to comply with the schedule. CEQ would also require agencies to elevate any unresolved disputes contributing to a missed milestone to the appropriate officials for resolution within the deadlines for the individual action.

Deadlines and scheduling requirements hold promise for improving the efficiency and predictability of the NEPA process. Deadlines and schedules, however, will require accountability to meaningfully improve NEPA timeframes. WUWC is concerned that CEQ would no longer require a "senior agency official" to extend EA and EIS deadlines, instead placing the responsibility vaguely with "the lead agency." WUWC encourages CEQ to retain the elevation to a senior agency official for the purpose of process and timeline accountability. The NEPA process will benefit from policy leadership tasked with ensuring environmental review is prioritized and progressing. WUWC suggests that a senior agency official should also be required to include justification in the required written approval of deadline extension (*see* §§ 1501.10(b)(1), (2)).

While advocating for accountability in NEPA deadlines and scheduling requirements, WUWC members acknowledge the challenges agencies sometimes face in efficiently obtaining decisionmaker clearances. Efficient clearance processes can be a challenge at any level of agency authority. WUWC encourages CEQ to design for accountability that results in efficiency and effectiveness. As WUWC has commented previously, expediting the NEPA process and making it more efficient will require sufficient funding, staffing and other agency resources to conduct the necessary procedures.

Page Limits (§ 1502.7)

The Proposed Rule would no longer permit a senior agency official to approve page limits for an EIS in excess of 300 pages. WUWC understands that the page limits are now part of the statute at NEPA Section 107(e). However, consistent with our prior comments, WUWC encourages CEQ to retain flexibility for agencies to make exceptions to the page limits to the extent legally permissible and necessary to ensure that environmental documents serve their intended function in informing agency decisions.

Agency officials should approach requests for exceptions with the understanding that project-specific needs will sometimes require departures from the regulations. In practice, it often is necessary to exceed 300 pages to provide sufficient information addressing the wide range of environmental topics covered in an EIS, and to satisfy the hard-look standard of judicial review. CEQ's proposed regulations would add new requirements that will only make it more difficult to prepare EISs that meet the 300-page limit for complex projects. The practical effect will likely be agency transposition of core NEPA analysis to the appendices, which cuts against the accessibility of NEPA documents to the public.

Supplemental Environmental Impact Statements (§ 1502.9(d)(1)(ii))

CEQ proposes to revise the supplementation trigger in Section 1502.9(d)(1)(ii) to change “significant” to “substantial or important” new circumstances or information. The terms “substantial” and “important” are undefined and likely to cause confusion and uncertainty. WUWC recommends retaining the existing language (“significant”), which has long been applied by agencies and is the subject of a robust body of case law. If CEQ nevertheless adopts its proposed change, WUWC recommends clarifying the requirement for a supplemental EIS only if a major federal action remains to occur and the agency anticipates finding new significant impacts.

Methodology and Scientific Accuracy (§ 1502.23(a))

CEQ proposes to revise Section 1502.23(a) to require agencies to use “high-quality information, such as best available science and reliable data, models and resources, including existing sources and materials.” CEQ proposes a similar requirement in Section 1502.15(b).

WUWC is concerned by the new requirements to use “best available science.” The requirement that agencies use high quality information, such as “best available science” could be interpreted as requiring agencies to obtain any relevant information no matter the cost or effort involved. Unless CEQ is clear that this is not the intent, this new requirement will result in increased costs and delays that will outweigh the minimal benefit for the environmental review and decision-making processes. This new requirement also could increase litigation risk for projects; similar requirements in other environmental laws and regulations are the source of frequent litigation.⁷ The requirement to use “high-quality information” and reliable data and models is sufficient to ensure scientific integrity of EISs and is a more realistic and practical requirement.⁸

Limitations on Actions During NEPA Process (§ 1506.1(b))

CEQ proposes to revise Section 1506.1(b) to allow early actions before completion of the NEPA process if the agency is considering a proposal for federal funding and determines that the early actions will not limit the choice of reasonable alternatives and notifies the applicant that the agency retains discretion to select any reasonable alternative. WUWC supports the existing regulatory text as well as CEQ’s proposed revisions to Section 1506.1(b). WUWC recommends expanding the list of permissible early actions to include “long lead-time materials” as well as “utility relocations.” Utility relocations are a common source of delay in project schedules because they often require regulatory approvals and property acquisition outside the transportation right-of-way. Inclusion of these additional early action items will streamline project delivery. WUWC further recommends expanding the list of permissible early actions to

⁷ See, e.g., *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014) (litigation over whether Fish and Wildlife Service used “best scientific and commercial data available” as required by the Endangered Species Act (16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8))); *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017) (litigation over whether Forest Service used “best available scientific information” as required by its regulations (36 C.F.R. § 219.3)).

⁸ See *350 Montana v. Haaland*, 50 F.4th 1254, 1271–72 (9th Cir. 2022) (“NEPA does not require that we decide whether an EA is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology. What NEPA does require is that agencies provide ‘high quality’ information and ‘accurate scientific analysis.’”).

include “environmental mitigation or enhancements for mitigation purposes,” which might include, for example, purchasing mitigation lands.

Definition of Environmental Justice (§ 1508.1(k))

The Proposed Rule would, for the first time, codify a definition of “environmental justice” for NEPA purposes. WUWC has serious concerns regarding CEQ’s proposed definition, as well as the lack of definition of “communities with environmental justice concerns.” The Proposed Rule would benefit from clear, understandable, and legally sound definitions these terms.

WUWC agrees that environmental justice is a critical concern, and notes that federal agencies already consider environmental justice and related impacts under the current regulations. WUWC encourages CEQ to provide more detailed guidance to NEPA practitioners addressing consideration of environmental justice in the Proposed Rule. The proposed definition of “environmental justice” is exceedingly vague and presents serious implementation challenges that run counter to CEQ’s goals of providing for an effective and efficient review process that promotes better decision making, among other objectives.

WUWC members, who operate water supply infrastructure through and serving economically diverse urban communities throughout the West, have a host of questions regarding how to implement this language in practice. The following topics would benefit from greater clarity in the rule, as well as separate practitioner guidance from CEQ, to effectuate CEQ’s apparent intent with its proposed definition and other provisions concerning environmental justice:

- Identification of communities with environmental justice concerns.
- Consideration of public controversy as part of consideration of effects on communities with environmental justice concerns. Echoing our comment on Section 1501.3(d)(2), “uncertainty” would be preferable to use of “controversy” here.
- Approaches to evaluating the legacy of racism or other structural or systemic barriers.
- Further clarify what CEQ means by an environment in which to “play,” “grow,” and “worship,” and how agencies might assess effects on such qualities.
- What data related to environmental justice agencies should obtain, and how these data should be used in the NEPA analysis.
- Incorporation of mitigation measures for adverse effects on communities with environmental justice concerns.
- How to assess proportionality with regards to the adverse human health and environmental effects and hazards experienced by environmental justice communities.

The proposed definition of “environmental justice” incorporates a substantive standard to the effect of ensuring people “[a]re fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards....” In WUWC’s experience, environmental justice-related impacts are often categorized as cumulative impacts. Assuming

that remains the case, WUWC encourages CEQ to consider, for purposes of an agency's significance determination, whether any one project could ensure an environmental justice community is fully protected from disproportionate and adverse human health and environmental effects. Similarly, could any one project ensure an environmental justice community is "fully" protected from the effects of climate change, or the legacy of racism or other structural or system barriers? The proposed definition of environmental justice, in this way, arguably imbues the NEPA process with a substantive standard that could be difficult, if not impossible, to implement. These changes introduce unnecessary complexity and risk to the NEPA process.

Definition of Major Federal Action (§ 1508.1(u))

WUWC has previously sought clarification that NEPA does not apply to projects where the federal role is to provide funding that is minimal in comparison to the overall costs of the project. Section 1508.1(u)(2)(i)(A) would provide that non-Federal actions with no or minimal Federal funding are not "major Federal actions." WUWC recommends that CEQ's NEPA regulations either establish thresholds for determining that there is minimal Federal funding, or preferably that CEQ direct agencies to establish thresholds in their NEPA implementing procedures so that agencies can tailor this to their funding programs. Clear thresholds will improve efficiency and reduce litigation risk.

Consideration of Greenhouse Gas Emissions and 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.

In prior comments, WUWC had expressed its view that climate change is a factor that must be considered under NEPA. WUWC generally supports CEQ's proposed codification of agency NEPA practice with respect to studying climate change-related effects. At the same time, WUWC emphasizes that climate is a dynamic area of impact analysis that will require constant and active engagement from CEQ to provide specific and constructive guidance to practitioners.

In general, CEQ's Proposed Rule as well as its earlier interim guidance on the consideration of greenhouse gas emission and climate change prioritize an analysis of a project's direct and indirect GHG emissions. CEQ has not grappled with more nuanced concerns such as proportionality and causality in the NEPA analysis and development of mitigation for projects that experience climate-related impacts. 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 mitigation compliance and monitoring requirements, federal agencies may require the project to bear a disproportionate share of the mitigation burden. WUWC previously encouraged CEQ, in its development of NEPA guidance and these regulations, to avoid burdening certain types of

projects in this manner. WUWC reiterates here that CEQ has an opportunity to clarify, with the Proposed Rule, that projects will not be burdened in this way.

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Based on this extensive background and our members' experiences being on-the-ground partners with the CEQ, federal action agencies, 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. WUWC looks forward to continued dialogue and collaboration on how these new NEPA implementing regulations will impact water providers in the West.

Thank you for the opportunity to provide these comments. For more information, please contact me at 303-739-7378 or mbrown@auroragov.org, or WUWC's national counsel, Ted Boling of Perkins Coie at 202-661-5872 or tedboling@perkinscoie.com.

Very truly yours,



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