COLORADO
WATER CONGRESS
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March 10, 2020

Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503
Attn: Docket No. CEQ-2019-0003

Submitted electronically to https://www.regulations.gov

Docket Number CEQ-2019-0003 – Colorado Water Congress comments on CEQ Proposed Updates to NEPA Implementation Regulations pursuant to Notice of Proposed Rulemaking, 85 Fed. Reg. 1684 (January 10, 2020)

The Colorado Water Congress submits these comments pursuant to the Council on Environmental Quality (CEQ) notice of proposed rulemaking on updates to CEQ's Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) at 40 CFR parts 1500-1508.

The Colorado Water Congress is the premier statewide member organization whose members provide water supply for agricultural, municipal, domestic, commercial, recreation, and industrial uses. Members of the Colorado Water Congress frequently repair and construct water infrastructure facilities that require federal approvals and trigger the need for NEPA compliance. We support the CEQ's efforts to improve efficiencies and timeliness in the environmental review process under NEPA and believe that many of the proposed changes will enhance both the quality and defensibility of agency decision-making based on NEPA documentation.

We appreciate the opportunity to comment on CEQ's proposed regulatory revisions.[1]

1. Procedural nature of NEPA compliance.

NEPA compliance is fertile ground for litigation. And NEPA-based legal challenges to agency action add materially to regulatory uncertainty and to the cost and delay in implementing permitting decisions for many needed infrastructure projects. The proposed regulatory updates provide helpful clarification on the procedural nature of NEPA compliance and on what is required for litigants to sue. We support these changes, specifically the additions stating that:

- NEPA is a procedural statute that does not mandate particular results or substantive outcomes (§1500.1(a)) and that does not require adoption of particular mitigation measures (§1508.1(s)).

[1] Section citations herein refer to 40 C.F.R. Parts 1500-1508, and pertain to the sections as numbered in CEQ's proposed rule unless stated otherwise in these comments.

- Minor non-substantive errors are harmless and do not invalidate agency action (§1500.3(d)).
- Comments on NEPA documents must be specific and must show why an asserted mistake is significant (§1500.4(n); §1503.3(a)).
- Comments must be submitted within the comment periods, and comments not timely raised are deemed unexhausted and forfeited (§1500.3(b)(3)).
- NEPA confers no private right of action or remedies (§1500.3(d)).
- A showing of a NEPA violation alone does not create a presumption for a finding of irreparable harm or for injunctive relief (§1500.3(d)).

The proposed changes include a new provision for certification by an agency in its record of decision (ROD) that the agency has considered the alternatives, information, and analyses submitted by commenters during the EIS process, as summarized in a new section on "submitted alternatives, information, and analyses" (§1502.17). Comments are to be invited on the completeness of this summary in the draft EIS (§1502.17; §1503.1(a)(3)). CEQ proposes that such certifications create a conclusive presumption that the agency has considered the information (§1502.18; §1500.3(b)(4)). While we support this certification concept, we question CEQ's proposed approach of implementing it through an additional requirement that agencies provide a 30-day objection period post-publication of the final EIS (see §1500.3(b)(3); §1503.1(b); §1503.3(b)). This approach would require, for the first time, that a final EIS be released for a second public comment period, albeit potentially limited to solicitation of feedback on the section §1502.17 summary of submitted information. A mandatory post-FEIS objection opportunity is not a requirement under current practice and could add to the complexity of NEPA compliance late in the process. Accordingly, *we request that the rule clarify that comments submitted during this post-FEIS objection period be limited to those which: (a) were not previously submitted; (b) concern content that was not previously available or could not have reasonably been available; or (c) are in response to new positions or information not previously disclosed*.

2. Coordination and efficiencies among multiple agencies involved in environmental reviews and authorization decisions for a project.

It is common for multiple federal (and state/local) agencies to be involved in the environmental review and authorization of a resource project. A proposed water infrastructure project may, for example, require a U.S. Army Corps of Engineers Clean Water Act Section 404 permit, a U.S. Forest Service or Bureau of Land Management land use authorization, a Federal Energy Regulatory Commission hydropower license, and/or a Bureau of Reclamation authorization or contract. Those approvals may in turn implicate the need for a CWA Section 401 water quality certification, Endangered Species Act Section 7 consultation, and Section 106 National Historic Preservation Act compliance. Efficiencies among these multiple environmental reviews are most likely to be realized when they are incorporated structurally at the front end of the NEPA planning process. CEQ's proposed regulatory changes provide meaningful steps in this direction by codifying aspects of the One Federal Decision (OFD) approach established in Executive Order 13807 and related implementation guidance, and by providing greater

specificity and regulatory direction on the roles and responsibilities for lead federal agencies, for cooperating agencies with decision-making authorities, and for other participating agencies in the EIS process. We offer the following specific comments on the agency coordination procedures:

- Single EIS. We support the requirement that federal agencies evaluate proposals involving multiple federal agencies in a single EIS and joint ROD (or single EA and joint FONSI) where practicable (§1501.7(g)). *We request that the regulations explicitly state that, under such circumstances, the single EIS/EA shall contain an adequate level of detail to support decisions by all cooperating agencies with decision responsibilities for the project. We also request that the regulations allow for preparation of separate environmental documentation upon the request of a third-party project applicant.* There may be circumstances where an applicant may desire to sequence rather than combine the timing of environmental approvals for a project, and we believe an applicant should have the flexibility to request that procedure.

- Purpose and Need (P&N) and Alternatives. The proposed regulations state that the lead agency shall determine the P&N and the alternatives "in consultation with any cooperating agency" (§1501.7(h)(4)). The P&N and range of alternatives are two key framework elements for the NEPA analysis. We believe it important that there be documented concurrence in these elements by the agencies that will rely on the NEPA document for their decision-making, and that this concurrence be secured early in the NEPA process. For this reason, *we request that the regulations provide for a documented concurrence point on these two elements by the cooperating agencies with decision-making authorities, along with a speedy elevation/resolution process if there is disagreement.*

- Schedule. We strongly support the proposed section requiring the lead agency to develop a schedule and to set milestones for all environmental reviews and authorizations required for implementation of an action, in consultation with the applicant and other agencies (§1501.7(i)). We also support the provision for elevation of anticipated problems in meeting milestones to the appropriate officials of the responsible agencies for timely resolution (§1501.7(j); §1501.8(b)(6)). *We think this section would benefit from including a description of mandatory items in the schedule. Those should include, at a minimum:*

    - *Written concurrence points for defining the P&N and alternatives to be analyzed. See previous comment. Also, a written concurrence point for identification of the preferred alternative;*
    - *Identification of information (including data and assessment methodologies) needed to support the agencies' respective reviews and authorization decisions. A common problem is that agency information needs are too often identified relatively late in the NEPA process, many times after publication of a draft or final EIS; this can inadvertently create a need for supplemental analysis and NEPA documentation. The current regulations state that a commenting agency that criticizes a lead agency's predictive methodology should describe the*

alternative methodology which it prefers and why. 40 CFR 1503.3. This should be bolstered by a requirement that the schedule include a milestone for securing agreement early in the process on the employment of coordinated data collection, analytic procedures, and assessment methodologies that will be consistent, non-duplicative, and sufficient for use in the EIS and to support the agencies' respective decisions.

- *Completion dates for each agency's environmental review and feedback on intermediate NEPA documents; and*
- *The protocol and timeframe for elevating and resolving concerns on the above, consistent with §1501.8(b)(6). We also think it would be helpful to state that the schedule must be complied with to the maximum extent practicable and permitted by law.*

- Cooperating Agencies. The regulations provide helpful clarification on the role and responsibility of cooperating agencies. We support the approach of distinguishing agencies with decision-making responsibilities for a proposed action from agencies that may possess special expertise on relevant environmental impacts, with a requirement that the former *must* participate as cooperating agencies when invited by the lead agency whereas the latter may elect not to participate (§1501.8(a)). We appreciate including a recognition that State, Tribal, or local agencies of similar qualifications may, by agreement with the lead agency, become cooperating agencies (§1501.8(a)). We also support the express recognition that cooperating agencies shall meet the lead agency's schedule for providing comments and shall limit their comments to those matters for which they have jurisdiction by law or special expertise (§1501.8(b)(7); §1503.2).

3. Role of the Applicant.

A third-party project applicant frequently pays the costs of NEPA compliance, but lacks clarity on its opportunity to provide input on appropriate matters to support the process. We offer the following comments on the NEPA regulations as they relate to the role of an applicant:

- Time Extensions and Elevations. We believe it appropriate for senior agency officials who approve extensions of time in the NEPA process to consider a third-party applicant's position, if there is an applicant, on such extensions. *Language to this effect should be included in the regulatory sections on presumptive time limits for preparation of EAs and EISs (§1501.10) and in the section addressing the NEPA schedule and milestones (§1501.7(i)&(j)).* The implications to project cost and delay when there is agency disagreement and elevation to CEQ pursuant to §1504.1(c) may also be significant. For this reason, *we request that the applicant's position be included as a consideration for and during the referral process (§1504.2; §1504.3).*

- Purpose & Need. We support the explicit regulatory direction that agencies shall base the P&N statement on the goals of the applicant and the agency's authority, when an agency's statutory duty is to review an application for authorization (§1502.13).

- Preparation of NEPA documents. We are supportive of the proposed change to the regulations at §1506.5 allowing an applicant to prepare an EA or an EIS. We believe the conditions on the federal agency's use of applicant-prepared products (that the federal agency provide guidance, participate in preparation of the document, independently evaluate it, and take responsibility for its scope and contents) are sufficient to maintain the integrity of the analysis and the review and decision-making role of the federal agency.

4. NEPA Documentation.

- Time Limits. EISs on several large water infrastructure projects in Colorado have taken well in excess of 10 years per project at a cost of tens of millions of dollars. They need to be completed in a shorter period of time. We support the proposed changes to §1501.10 that EAs shall be completed within one year, and EISs within two years, unless a senior agency official of the lead agency approves a longer period of time in writing. This proposed change adds appropriate regulatory direction consistent with the current regulations stating that agencies shall reduce delay by establishing appropriate time limits for the EIS process. See 40 CFR §1500.5(e); §1501.7(b)(2); §1501.8. We also support the provision recognizing that agencies may set limits for each constituent part of the NEPA process to keep it on track (§1501.10(d)). We believe that the proposed revisions to other sections of the CEQ's regulations – aimed at targeting inefficiencies and improving coordination among lead and other agencies – are critical to assist the agencies in meeting these timeframes.

  One of the unintended consequences of the streamlining initiatives over the past few years has been that some federal agencies have deferred "starting the clock" on their preparation of NEPA documents due to concern with meeting the schedule for completion of those documents under Executive Order 13807 and the Interior Secretary's Order 3355. There have been extended periods of limbo before federal agencies have commenced the preparation of draft EAs and EISs, and this has compromised some of the benefit of the streamlining efforts. In this regard, we are concerned that the process of pre-notice scoping under §1501.9 may enable further delay before the start of the formal NEPA process. To encourage the process to move as quickly as practicable, *we request that the regulations set a 30-day time limit from the date of submission of an application for the lead agency to identify any additional information needed for the proposal to be "sufficiently developed" for purposes of commencing preparation of an EA or publishing a notice of intent to prepare an EIS.* This is consistent with the intent of §1502.5 that EAs or EISs shall be commenced as soon as practicable after the application is received. We also support the proposed statement in §1507.3(e)(3) that agency procedures shall provide for publication of supplemental notices to inform the public of any pause in the agency's preparation of an EIS.

- Page limits. We support the reinforcement of page limits for EAs and EISs, while allowing a senior agency official to approve documents in excess of those page limits

when it is useful to the decision-making process (§1501.5(e); §1502.7). This brings NEPA back to its original intent, will help focus NEPA documents on significant effects, and is fact responsive to a decision maker's practical ability to consider detailed information. See 40 CFR 1502.7 and Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, No. 36a, 46 Fed. Reg. 18,026, 18,037 (Mar. 23, 1981).

- Categorical Exclusions. We appreciate the greater detail that is proposed for Categorical Exclusions (CEs). In particular, we support the explicit recognition in §1501.4(b) that the presence of extraordinary circumstances in relation to a proposed action may not foreclose coverage by a CE if there is mitigation or other circumstances sufficient to avoid significant effects. We further support the provisions in §1506.3(f) and §1507.3(e)(5) that an agency may use a CE that is listed in another agency's NEPA procedures for an activity, by establishing a process that ensures application of the CE is appropriate.

- Environmental Assessments. *The regulations at §1501.5 should be revised to clarify that an Environmental Assessment can be scoped to cover multiple similar actions*. This would help avoid the current practice by some agencies of issuing repetitive EAs for similar activities.

- Findings of No Significant Impact. We appreciate the changes in the proposed regulations at §1501.6(c) that codify the practice of mitigated FONSIs consistent with CEQ's Mitigation Guidance.

- Environmental Impact Statements. We support the following changes related to EISs:

    - Tracking and disclosure of the costs of EIS-level NEPA reviews (§1502.11(g)).

    - The explicit option in §1502.15 of combining the sections on the Affected Environment and Environmental Consequences. This is being done in some EISs and can assist in reducing the bulk of EISs.

    - *We request that §1502.10 of the proposed regulations be revised to explicitly recognize the option of preparing "issue based" NEPA documents as a way of streamlining the documentation. An issue-based NEPA analysis would concentrate on issues that are most germane to the decisionmaker – namely those that are central to the proposed decision or are of material interest to the public, rather than automatically addressing the laundry list of standard resources as is done in the vast majority of EISs.*

- We also support the clarifications that seek to relate programmatic and narrow actions to avoid duplication and delay; specifically, we support the recognition that agencies may tier their environmental analyses to defer detailed analysis of the environmental impacts of specific elements until those are ripe for decisions that would involve an irreversible or irretrievable commitment of resources (§1502.4(d)). These changes are consistent with practices under several endangered species recovery programs that address the needs of federally listed species while facilitating approvals for the construction and operation of water projects in Colorado. These species programs utilize programmatic NEPA documents with tiered EAs to eliminate repetitive analyses and allow for streamlined ESA compliance in support of permitting for specific activities.

- Supplemental Statements. The proposed regulations provide helpful clarification on when supplemental statements are required. We support the clarification in §1502.9(d) that supplements only need to be prepared if, first and foremost, a major federal action remains to occur. This is consistent with caselaw. We also support the helpful explanation that an agency may find that changes to a proposed action or new information is *not* significant, and should document that finding consistent with its agency NEPA procedures or, if necessary, in a FONSI supported by an EA (§1502.9(d)(4)). The regulatory preamble explicitly recognizes the use of Supplemental Information Reports (SIRs) by the Corps and the use of Determinations of NEPA Adequacy by BLM (85 FR at 1701). *We request that the use of those types of documents be explicitly recognized in the body of the regulations. Moreover, it would be helpful for the regulations to recognize that these types of supplemental information reports need not necessarily be circulated for public comment in the same fashion as a draft or final statement.*

- Alternatives.

  - We support the clarification that agencies shall evaluate "reasonable alternatives" to the proposed action, rather than "*all* reasonable alternatives" (§1502.14(a)).

  - We support the definition of "reasonable alternatives" at §1508.1(z). This definition incorporates the concepts of a reasonable range of alternatives, of technical and economic feasibility, of meeting the P&N for the proposed action, and (where applicable) meeting the goals of the applicant. We also support the explanation in the regulatory preamble that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum (see 85 FR at 1702). *This is an important concept and we request that it be included in the body of the regulations.*

- We support the proposal to strike paragraph (c) of §1502.14 that addresses consideration of alternatives outside the agency's jurisdiction. It is not efficient or reasonable to require agencies to develop detailed analyses related to action alternatives that are not technically feasible due to the agency's lack of statutory authority to implement them.

- Incomplete or unavailable information. We support CEQ's revisions to §1502.24 providing that agencies should use reliable existing information and resources, and that they are not required to undertake new scientific and technical research to inform their analyses. We also support the change in wording to §1502.22 related to the inclusion of information essential to a reasoned choice among alternatives where the overall costs of obtaining it are "not unreasonable" rather than "not exorbitant." We also believe it important to recognize that such costs include both financial costs and other costs such as those associated with delay in the NEPA process. *While the relevant costs to be considered are discussed in the explanatory materials at 85 FR 1703, we request that this be included in the body of the regulations.*

- Mitigation.

  - Definition of Mitigation. We support the proposed amendment to the definition of mitigation at §1508.1(s) that clarifies that NEPA does not require adoption of any particular mitigation measures. This is consistent with the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). We further support the clarification that mitigation must have a nexus to the effects of the proposed action and be designed to mitigate those effects. This is consistent with CEQ's Mitigation Guidance.

  - Specificity of Mitigation. The current regulations contemplate that an EIS should include a description of the means to mitigate adverse environmental impacts. See, e.g., 40 CFR §1502.14(e). There is a difference between the description of mitigation needed to advise the agencies and public of the existence and likely effectiveness of measures to address project effects, and the specificity in a detailed Mitigation Plan that may be incorporated as part of a subsequent permit or other agency approval. As noted in the explanatory preamble to the proposed regulatory changes, the Supreme Court has held that NEPA requires ''mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,'' but does not establish ''a substantive requirement that a complete mitigation plan be actually formulated and adopted'' before the agency can make its decision. 85 FR 1709. *We request that this be included in the body of the regulations as part of the updated definition of mitigation at §1508.1(s).*

- Limitation of actions during the NEPA process. The current regulations recognize that agencies shall not commit resources prejudicing the selection of alternatives before making a final decision. 40 CFR 1502.2(f). No action shall be taken prior to the ROD if it would "have an adverse environmental impact" or "limit the choice of reasonable alternatives," 40 CFR 1506.1(a), while recognizing that this does not preclude applicants from developing plans and designs or performing other activities to support permit applications. 40 CFR 1506.1(d). *We request that §1506.1 be revised to add that minor ground disturbance associated with materials testing and investigations in furtherance of project planning or design does not constitute a pre-decisional commitment of resources that may limit the choice of alternatives, and that such work may be undertaken by a project applicant during the pendency of the NEPA process provided it will have no more than minimal adverse environmental impacts.* This is a common issue that arises during the planning of water infrastructure projects and it would benefit from explicit attention in the regulations.

- Effects.

    - The new definition of "effects" in §1508.1 would remove the categorization of effects into direct, indirect, and cumulative impacts. CEQ has invited comment on this approach, and has asked for specific input on whether the regulations should state that consideration of indirect effects is not required. 85 FR at 1708.

      We support the regulatory change that would remove the labeling of impacts as direct, indirect, or cumulative, on the basis that this terminology is not statutorily required under NEPA and has in the past added complexity and at times confusion in the characterization of the impacts of a proposed action. We believe that indirect effects should continue to be regarded as an effect of an action where those indirect effects are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. *For this reason, we do not think it appropriate for the regulations to affirmatively state that consideration of indirect effects is not required.*

    - The proposed regulatory changes would add the statement that "[a]nalysis of cumulative effects is not required" (§1508.1(g)(2)). Cumulative effects under NEPA have proven difficult to identify and meaningfully analyze, and have been confusing in terms of the responsibility of a proposed project in relation to those external impacts. *Nevertheless, we believe that a cumulative impacts analysis offers value to the decision-maker on a selective basis in instances where: (1) there is a significant concern regarding the condition of a particular resource likely to be affected by a proposed action; and (2) there are discernable future activities that will materially change that resource, thus informing whether a proposed action may exceed a resource degradation "tipping point." If a cumulative impacts analysis is retained in the final regulations, it should be made clear that the "effects of the proposed action" pertain only to the incremental*

impacts proximately caused by the proposed action and do not extend to those other cumulative impacts. This is consistent with CEQ's additional language clarifying that effects do not include effects that the agency has no authority to prevent or that would happen even without the agency action (§1508.1(g)(2)).

- The explanatory preamble to the proposed regulatory changes states that CEQ does not consider it appropriate to address a single category of impacts such as greenhouse gas emissions and potential climate change impacts. 85 FR at 1710. While climate change is not explicitly addressed in the proposed updates, CEQ's proposal states that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain. In concert with the proposal to remove consideration of cumulative effects, this may effectively put climate change impacts outside the purview of NEPA analysis.

- Major Federal Action. We support the clarifications to the definition of "major federal action" in §1508.1(q) that: (1) distinguish major federal actions from actions with minimal federal funding or with minimal federal involvement where the agency cannot control the outcome of the project; and (2) remove from the definition of federal action the circumstance where a responsible official "fails to act." Under that circumstance, there is no "proposed action" trigger for NEPA compliance.

The Colorado Water Congress appreciates the opportunity to comment on these aspects of the CEQ NEPA Implementation Regulations. Thank you for the opportunity to provide this input.

Sincerely,

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Federal Affairs Committee Chair