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August 20, 2018

Via regulations.gov

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

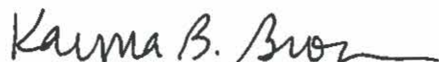
Re: Comments of the Utility Water Act Group in Response to the Council on Environmental Quality's Advance Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018), Docket No. CEQ–2018–0001

Dear Mr. Boling:

The Utility Water Act Group ("UWAG") submits the attached comments in response to the Council on Environmental Quality's Advance Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.

UWAG appreciates the opportunity to comment on this important issue.

Sincerely,



Karma B. Brown

Attachment

Comments of the Utility Water Act Group in Response to the Council on Environmental Quality's Advance Notice of Proposed Rulemaking, Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018)

Docket No. CEQ–2018–0001

August 20, 2018

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I. Introduction

The Utility Water Act Group (UWAG) strongly supports and appreciates the Council on Environmental Quality's (CEQ) intent to propose clarifications and improvements to its National Environmental Policy Act (NEPA or the Act) regulations. 83 Fed. Reg. 28,591 (June 20, 2018). UWAG welcomes this opportunity to provide early input, from the perspective of regulated entities with extensive NEPA experience, on ways to modernize, clarify, streamline, and reduce burdens of NEPA implementation – especially with respect to federal permits and other federal actions on which UWAG members rely for critical electric energy projects nationwide.

UWAG is comprised of a diverse and extensive range of public and private entities whose activities are conducted nationwide.[1] Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity and natural gas to their customers. The supply of electricity and natural gas throughout the country involves the construction, operation, and maintenance of electric generation facilities, electric and gas transmission and distribution lines, and other system control facilities. The construction of new generation facilities is needed to meet new federal and state energy and environmental requirements, and the construction of new transmission lines is needed to relieve congestion on the electrical grid, wheel power between utilities, connect supplies of natural gas to new generation facilities and other users, and connect new sources of electrical

[1] UWAG is a voluntary, non-profit, unincorporated group of 146 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG's purpose is to participate on behalf of its members in EPA's rulemakings under the CWA and in litigation arising from those rulemakings.

energy (such as wind and solar facilities) to the electric grid – all of which serve to increase the reliability and diversity, and manage the cost, of electricity.

In the course of providing electricity, UWAG's members must engage in activities that sometimes involve federal agency action. For example, UWAG members may perform work in wetlands and other waters of the United States (WOTUS), and, in such cases, must obtain permits under Clean Water Act (CWA) § 404, § 10 of the Rivers and Harbors Act (RHA), or both. The issuance of a permit by the U.S. Army Corps of Engineers (Corps) under either of these Acts is a federal action subject to review pursuant to NEPA. UWAG members also undertake activities that involve actions by other federal agencies that are subject to NEPA review. Accordingly, the implementation of NEPA, particularly (but not only) in connection with Corps permits, is important to UWAG members, as well as to the public at large, whose health, safety, and general welfare depend on a cost-effective and reliable supply of electricity.[2] Due to the nature of electric companies' operations, UWAG members expect to have a continuing need for federal agency permits and approvals that will undergo NEPA review.

In UWAG members' experience, NEPA reviews that are appropriately focused on the specific agency action under review, and on those effects actually caused by that action, best meet the purposes and requirement of NEPA. By contrast, lengthy or overly broad NEPA

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[2] UWAG has a longstanding interest in NEPA implementation, including CEQ's NEPA regulations and guidance and the Corps' NEPA regulations. UWAG has filed comments on numerous aspects of the NEPA program, including CEQ's 2010 Draft Guidance and 2014 Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (Dec. 24, 2014), and the Corps' amendment to its NEPA implementing rules in 1984. UWAG also participated in the referral of the Corps' NEPA rules for review by CEQ, which upheld those rules in 1987. 52 Fed. Reg. 22,517 (1987). In all of these regulatory activities, UWAG has sought a regulatory program that is administratively workable, as well as protective of the environment.

reviews add significant and unreasonable costs and delays to projects, increase litigation risks, and inhibit the viability of projects that grow the economy and provide affordable energy.

Drawing from our extensive experience with NEPA, UWAG recommends that CEQ address the following key principles in a rulemaking to revise the NEPA regulations.

A. CEQ Should Emphasize Simplicity and Streamlining.

CEQ's original NEPA regulations and guidance largely reflected the simplicity of the Act, emphasizing that environmental impact statements (EISs) should be "concise, clear, and to the point" (and normally less than 150 pages and completed within 1 year), that environmental assessments (EAs) should be no more than 10-15 pages and completed within 3 months, and that many actions could be categorically excluded (CATEX) from individual review under NEPA. In practice, however, NEPA reviews tend to be far more complex, lengthier, and take longer to complete than CEQ (or Congress) originally contemplated.

CEQ's proposed changes to its regulations should mark a return to the basics that reinforce the simplicity of the Act and the core principles that were originally recognized by CEQ. The proposed rules should affirmatively set appropriate page limits and time frames for NEPA reviews, emphasize the importance of focusing on the specific federal agency action being undertaken and those effects that are actually caused by and subject to the regulatory control and jurisdiction of the agency, and eliminate unnecessary burdens.

B. CEQ's Revisions Should Properly Cabin the Agencies' Scope of Analysis for NEPA Reviews.

An appropriate scope of analysis is central to ensuring that a NEPA review is efficient, effective, and appropriately tailored to best inform the agency's review of the proposed action. CEQ's regulations should ensure that the scope of analysis for a NEPA review is properly tailored to the specific federal agency action under review, those effects that are actually caused

by the proposed action and subject to the regulatory control and jurisdiction of the agency (a type of causation akin to proximate cause), and only those alternatives to the proposed action (if any) that are truly available, practicable, and realistic. NEPA reviews should not be used as a "federal handle" to subject an entire project to federal review where the federal agency action comprises only one portion of the project.

The Corps' NEPA regulations, for example, make clear that, because its jurisdiction under the CWA is limited to discharges into WOTUS, its NEPA duties are bounded by its authority under the CWA. 33 C.F.R. Part 325, App. B. Thus, for a specific activity requiring a CWA § 404 permit, the activity the Corps studies in its NEPA document is the relevant discharge of dredged or fill material into a WOTUS. Accordingly, where a UWAG member applies for a CWA § 404 permit to authorize construction of a utility line, the Corps' control and responsibility is properly limited to a small fraction of the construction of the overall utility line – the discharge of dredged or fill material – and does not extend at all to work outside of WOTUS, or to the entire utility line construction or operation. The Corps' NEPA analysis for a proposed § 404 permit should properly conform to that scope. Likewise, CEQ's proposed regulations should affirm these limits to the agency's scope of analysis.

C. CEQ Should Confirm that the Indirect Effects and Cumulative Impacts Analyses Are Limited to Effects Proximately Caused by the Action Under Review and Within the Agency's Control.

CEQ's regulations must adhere to and should reflect the Supreme Court's decision in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*"). Future environmental conditions not attributable to the agency action or agency control are not properly caused by the action under review, and thus, should not be attributed to the agency as direct or indirect effects in a NEPA analysis. Unfortunately, over time the indirect effects and cumulative impact analyses have become a "catch-all" to address a wide range of effects not actually caused

or controlled by the agency action under review, placing agencies under increasing pressure to consider far flung effects that the agency has no authority to regulate, such as greenhouse gas (GHG) emissions and climate change. CEQ must recognize the proper focus on agency actions and the limits of agency authority, respect fundamental principles of causation, and uphold the limits set by the Supreme Court. CEQ should adopt definitions and approaches that appropriately limit the description of the action and the identification of effects that should be considered in NEPA analyses.

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UWAG strongly encourages CEQ to undertake a rulemaking to modify its regulations to revise, modernize, and streamline the NEPA review process. Our recommendations are detailed below. CEQ's critical revisions to its NEPA regulations will focus limited agency resources on the most pertinent environmental issues, reduce duplication where appropriate, and provide more certainty and clarity to the public, which relies on UWAG members' activities to provide affordable and reliable sources of electricity across the country.

II. CEQ's Proposed Changes Should Reflect a Return to NEPA's Basic, Core Purposes.

Fundamentally, UWAG suggests that CEQ review its regulations in keeping with the initial intent and purpose of NEPA. The text of NEPA's environmental review requirement is short and straightforward:

> all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable

> commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332.

Beyond these five statutory requirements for an EIS, NEPA creates no substantive requirements. Instead, consistent with NEPA's purpose, the Act establishes a process to foster informed decision-making and public participation. Accordingly, NEPA mandates the *procedures* by which federal agencies are to consider the environmental impacts of major federal actions they are proposing to take; but NEPA does not dictate the substantive outcome when the agency exercises its statutory powers. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989) ("*Methow Valley*"). Aside from the preparation of EISs, NEPA is silent as to other forms of or process for environmental reviews – leaving CEQ discretion to determine appropriate procedures for NEPA compliance.

A. CEQ's 1978 Regulations Appropriately Emphasize Simplicity and Concision.

CEQ's original NEPA regulations largely reflected the simplicity of the Act, and established core principles to guide agencies in conducting their NEPA reviews, virtually all of which emphasize the importance of focus, clarity, and concision. For example:

- NEPA's purpose is "to help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).
- EISs shall "be concise, clear, and to the point," *id.* § 1502.1, "reduce paperwork and the accumulation of extraneous background data," *id.* § 1502.1, and discuss impacts "in proportion to their significance. There shall be only brief discussion of other than significant issues," *id.* § 1502.2; "no longer than absolutely necessary to comply with NEPA and with these regulations," *id.;* "normally be less than 150 pages," § 1502.7; and "be written in plain language." § 1502.8.

CEQ's regulations address when a federal agency action requires the preparation of an EIS, the preparation of EAs, and the establishment of categories of actions excluded from NEPA review. For those federal agency actions that fall under a CATEX or are reviewed in an EA,

CEQ's regulations contemplate that the actions involved can meet NEPA requirements promptly and expeditiously. Specifically, an action that falls within a CATEX is categorically excluded from further environmental review, 40 C.F.R. § 1508.4, and an EA is intended to be a "concise" document that serves to "briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]," *id.* § §1508.9, and which CEQ specified should be "not more than approximately 10-15 pages." 46 Fed. Reg. 18026 (March 23, 1981). However, in practice, as a Government Accountability Office (GAO) analysis and UWAG's experience confirm, NEPA reviews tend to take far longer to complete and have far more pages than CEQ contemplated.

B. Over the Years, Implementation of CEQ's Regulations Became Increasingly Lengthy and Complex.

In UWAG's experience, NEPA reviews have become increasing lengthy (both in terms of time and numbers of pages) and complex.

In a 2014 Report, GAO reviewed various issues associated with completing NEPA analyses to better understand the number and types of NEPA analyses, costs and benefits of completing those analyses, and frequency and outcomes of related litigation.[3] CEQ was provided with a draft of the report and generally agreed with GAO's findings. Based on information provided to CEQ by federal agencies, CEQ estimated that of all actions reviewed under NEPA, less than 1 percent require preparation of an EIS; approximately 95 percent qualify for CATEXs, and less than 5 percent require the preparation of EAs. GAO Report at 8.

Thus, of all federal agency actions government-wide, approximately 400-550 actions per year are reviewed via an EIS per year, and the remainder are reviewed in an EA or fall under a CATEX – both of which are types of reviews created by CEQ in its regulations (not by

[3] *See National Environmental Policy Act: Little Information Exists on NEPA Analyses,* GAO-14-370 (Apr. 2014), https://www.gao.gov/products/GAO-14-370 (GAO Report).

Congress). *Id*. at 11. But for those projects that require an EA or EIS, the time to complete the review can be considerable. As of 2012, the average EIS took 4.6 years to complete, and the average EA took 1-2 years to complete. *Id*. at 14-16.

C. CEQ's Proposed Changes Should Mark a Return to NEPA's Core Purposes and the Simplicity Envisioned in CEQ's 1978 Regulations.

The NEPA rules should reinforce the simplicity of the Act and the core principles that were originally recognized by CEQ. The proposed rules should reaffirm appropriate page limits and time frames for NEPA reviews and establish mechanisms for effective monitoring of agency compliance with those limits.

Furthermore, CEQ's proposed changes should emphasize the importance of agencies focusing on the specific federal agency action being undertaken, those effects that are actually caused by and subject to the regulatory control and jurisdiction of the agency (a type of causation akin to proximate cause), and only those alternatives (if any) that are truly available, practicable, and realistic.

III. CEQ's Proposed Changes Should Increase Coordination and Efficiency.

The changes proposed by CEQ should eliminate unnecessary burdens, remove unnecessary procedural obstacles, harmonize processes across the federal government, and promote one lead Federal agency, concurrent reviews, tiering, and other mechanisms to streamline review process. UWAG's specific recommendations, aligned to the questions presented in the ANPRM, follow.

<u>Question 1</u>: 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?

(Questions 1 and 3 are answered jointly below.)

Question 3: Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

(Questions 1 and 3 are answered jointly below.)

Much of the delay associated with NEPA reviews can be attributed to a lack of communication between the lead agency and other cooperating and participating federal agencies. UWAG recommends that CEQ adopt appropriate elements of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," which instructs federal agencies to, among other things, coordinate early with other Federal, State, tribal, and local agencies and the public to ensure a "coordinated, predictable, and transparent" review process for infrastructure projects, and adopt other measures to promote better coordination among agencies responsible for environmental reviews and authorizations for a particular project. 82 Fed. Reg. 40,463 (Aug. 24, 2017) (EO 13807).

EO 13807 directs CEQ to develop a "One Federal Decision" framework, in coordination with the Office of Management and Budget (OMB) and the Federal Permitting Improvement Steering Council (FPISC). UWAG supports this approach and encourages CEQ to revise its regulations to formally adopt a "One Federal Decision" process, including a single Record of Decision (ROD) to be issued by the lead agency, an agreed-upon schedule for cooperating and participating agencies to provide input to the ROD, and completion of all federal authorizations within 90 days of issuance of the ROD.

Twelve federal agencies, including the Corps, Environmental Protection Agency (EPA), and Federal Energy Regulatory Commission (FERC), have taken initial steps to implement the One Federal Decision process, by signing an April 9, 2018 Agreement to establish a cooperative relationship for timely processing of environmental reviews and authorization decisions for

proposed major infrastructure projects.[4] The Agreement serves as an important step forward in implementing EO 13807 and ensuring that there is a coordinated and cooperative process for review and permitting of major infrastructure projects.

UWAG supports the designation of a lead federal agency for the development of a single environmental review document to reduce duplicative efforts by multiple federal agencies reviewing the same project. CEQ should further incorporate this type of concurrent review process in the proposed revisions to the NEPA regulations. Roles and responsibilities for each participating agency should be clearly defined in the proposed revisions to the regulations, allowing the environmental review to jointly and cooperatively progress, culminating in issuance of one decision within a set, reasonably prompt, period of time. Such an approach would greatly improve communication and coordination in the NEPA process and ensure the timely processing of any required authorizations for projects involving multiple federal agencies.

EO 13807 sets a goal for agencies of reducing the time to complete environmental reviews and authorizations to no more than 2 years from publication of a notice of intent (NOI) to preparation of a final EIS. Establishing and meeting a clear, set timeline for issuance of all federal authorizations for a proposed project will provide much-needed certainty to the regulated community. UWAG members, for example, often require federal permits and authorizations, including CWA § 404 and RHA § 10 permits, as part of the necessary authorizations for their

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[4] The Agreement provides a more predictable, transparent, and timely federal review and authorization process for delivering major infrastructure projects; establishes standard operating procedures for concurrent and synchronized reviews; and eliminates duplication of effort. For each major infrastructure project, one lead federal agency will be responsible for navigating the project through the entire federal environmental review and permitting process. Other cooperating federal agencies will work with the lead agency for the project to develop a single permitting timetable, prepare a single EIS, sign a single ROD, and issue all necessary authorization decisions within 90 days of issuance of the ROD. The lead agency will seek written concurrence from other agencies at the appropriate times during the process.

energy infrastructure projects, including construction and maintenance of transmission and distribution lines. Timely issuance of all required authorizations for these projects is critical to ensure the reliability of the electric grid. Failure to meet and adhere to set deadlines for issuance of any necessary federal authorizations can negatively impact UWAG members' ability to obtain financing and meet other regulatory obligations, delay construction, and, ultimately, threaten the economic viability of a project, which may be contingent on the UWAG member's ability to begin operations by a date certain. Remaining on schedule for completion of construction by a specific date is often essential to the company's ability to meet contractual obligations that depend on meeting its in-service date. Any delay impedes the company's efforts to meet the growing demand for energy resources and ensure the continued and uninterrupted delivery of electricity.[5]

Accordingly, UWAG recommends that CEQ propose revisions in keeping with EO 13807 and the One Federal Decision framework. Establishing a concurrent review process and

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[5] Numerous courts have recognized that the supply of reliable, affordable energy is in the public interest, and thus CEQ should consider revisions to its NEPA regulations that ensure that such projects are not unnecessarily delayed due to inefficiencies in the NEPA review process. *See, e.g., E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) (construction of a natural gas pipeline is in the public interest because "it will bring natural gas to portions of southwest Virginia for the first time" and "will help in the efforts of local communities to attract much-needed new business"); *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002) ("the supply of energy to end users" is in the public interest); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1310-11 (11th Cir. 1999) (reduction or elimination of electrical generation would be a "great disadvantage [to] the general public"; a consistent supply of electric power is "critical" especially during the summer months); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 357 (10th Cir. 1986) (loss of electrical power and increased cost of electric power are against the public interest); *Reed v. Antwerp*, No. 4:09CV3096, 2009 WL 2824771, *28 (D. Neb. Aug. 28, 2009) ("the public's interest lies in completion of the [public utility] project and the provision of reliable electrical service"); *Gulf Crossing Pipeline Co. LLC v. Various Acres of Land in La.*, 2008 U.S. Dist. LEXIS 59495, at *26 (W.D. La. Aug. 5, 2008) (completion of a natural gas pipeline was in the public interest based on FERC's certificate of public convenience and necessity, and because it would "increase the overall supply of natural gas available for distribution to the public for the . . . winter heating season, providing downward pressure on natural gas prices").

issuing a single ROD, within reasonably prompt deadlines, will promote transparency and efficiency, and allow project proponents, including UWAG members, to plan with greater certainty, which will ultimately ensure the continued dependability and reliability of the electric grid, among other important resources.

Question 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?

- **Ability to Adopt or Incorporate State Environmental Analyses and Documentation**

CEQ should clarify in its regulations that where a State agency has performed an environmental analysis of the project, the federal action agency may adopt in whole or in part the State analysis to satisfy its NEPA obligations.

- **Emphasize Tiering and Incorporation by Reference**

CEQ should encourage tiering, adoption, or incorporation by reference of prior and existing environmental analysis and documentation. For example, during the scoping process, agencies could be required to review and determine whether prior analyses address the issue under review and how such information should be utilized and incorporated. Tiering allows an agency to avoid duplication of paperwork through the adoption or incorporation by reference of the general discussions and relevant specific discussions, from an EIS or other analysis of broader scope into one of lesser scope, or vice versa. The tiering process could make each broader EIS or analysis of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

- **Facilitate and Expand Use of Categorical Exclusions**

Agencies are not fully utilizing CATEXs as a means to satisfy NEPA obligations, without conducting an EA or EIS. An action that falls within a CATEX is categorically excluded from

further environmental review. 40 C.F.R. § 1508.4. CEQ should encourage agencies to identify and adopt additional appropriate CATEXs to maximize utilization of CATEXs, where applicable. Doing so will conserve agency resources for those actions that are more complex and warrant further environmental review, whether through an EA or EIS.

- **Streamline or Eliminate EPA's Role in the Review of Draft EISs**

The NEPA process could be made more efficient by addressing EPA's role in the review of Draft Environmental Impact Statements (DEISs). EPA has asserted authority, pursuant to Clean Air Act (CAA) § 309, to review and rate federal agency DEISs, including those prepared by the Corps. The CAA's statutory language does not require EPA to review and rate Corps DEISs (or those from other agencies). EPA, however, has adopted this practice through policy. In UWAG's experience, EPA's review and rating system does not assist the NEPA review process, but adds an extra layer of delay and cost. Accordingly, it would be beneficial to eliminate or at least streamline and reduce this practice.

To further the goals of CEQ's contemplated rulemaking, UWAG recommends that CEQ coordinate with EPA on ways to eliminate or streamline EPA CAA § 309 NEPA reviews, including through coordination between CEQ and EPA on a complementary EPA rulemaking, or guidance, as appropriate.

Question 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?

CEQ should encourage agencies to return to the structure originally contemplated by the Act. Agencies should utilize the most appropriate level of NEPA review. Thus, the majority of actions should be covered by a CATEX, or reviewed through an EA, and meet NEPA requirements promptly and expeditiously. EISs should only be required for major federal actions with significant environmental impact. CEQ should propose revisions to its regulations to codify

appropriate page and time limits, or, at a minimum, reinforce the existing page and time limits for preparation of NEPA documents.

- **Set, and Require Agencies to Adhere to, Reasonable Time and Page Limits for Preparation of NEPA Documents**

NEPA reviews tend to take far longer to complete and have far more pages than Congress expected when adopting the statute, and CEQ contemplated in its original NEPA regulations. An EA is intended to be a "concise" document, 40 C.F.R. § 1508.9, which should not contain long descriptions or detailed data which the agency may have gathered. Rather, an EA should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. And, in keeping with this statutory intent, CEQ has advised action agencies that an EA should be "not more than approximately 10-15 pages" and take no more than 3 months, and in many cases substantially less, to complete. Council on Environmental Quality: Memorandum to Agencies - Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (March 23, 1981) (CEQ 40 Q&As). The Corps has also expressly provided a 10-15 page guideline.

As is to be expected, when an EIS is required, the process will take longer. But CEQ has advised agencies that even large, complex energy projects should require only about 12 months for the completion of the entire EIS process. CEQ's Q&As recognize that an EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined.

But, in practice, EAs and EISs are more lengthy, voluminous, and burdensome to develop than CEQ originally contemplated. Contrary to CEQ's guidance, the time to complete an EIS

has increased by 34 days per year between 2000 and 2012, and, by 2012, the average EIS took 4.6 years to complete. GAO Report at 14-16. The average EA took some agencies 13 months (Department of Energy) or even 18 months (U.S. Forest Service) to complete, as of 2012. *Id*. at 15. These lengthy review times are consistent with UWAG's experience. In practice, it can often take 1-2 years for an EA, and much more, up to a decade, to complete an EIS.

UWAG recommends that CEQ consider codifying appropriate deadlines and page limits for EISs and EAs, and, at a minimum, reiterate the expected timelines and limits set forth in the Q&As, and take steps to ensure that agencies follow through on these limits, for example, by establishing a permit tracking database (or utilizing an existing tracking process) that ensures deadlines are met. By setting and tracking such limits, CEQ and the lead agencies can frame the expected level of analysis, and project proponents can more accurately anticipate the timeline and costs associated with permitting processes.

Time and page limits can also inform the public, and help set reasonable expectations about the nature and level of review expected under NEPA. A lack of such limits, on the other hand, can leave the public, the courts, and other stakeholders uncertain about the level of detail expected in a NEPA review. The Corps' NEPA regulations, for example, state that most CWA permits "normally only require an EA." 33 U.S.C. § 230.7(a). It may also be useful for CEQ to encourage agencies, such as the Corps that commonly utilize EAs, to prepare EA templates, which can be appropriately modified for each proposed action. Such templates could serve as model language for "concise" EAs, thus providing a streamlined mechanism for more efficiently preparing EAs for certain routine types of actions.

UWAG recommends that CEQ evaluate the timeframes established by EO 13807, which adopts a 2-year timeline for NEPA review for major infrastructure projects, when considering an

appropriate timeline for revisions to its regulations. The Department of the Interior (DOI) has taken important steps to implement the goals of EO 13807. Deputy Secretary David Bernhardt signed an August 28 Secretarial Order recognizing that "the purpose of NEPA's requirements is not the generation of paperwork, but the adoption of sound decisions based on an informed understanding of environmental consequences." The Order encourages focus on "issues that truly matter," reduction of paperwork, a brief discussion of issues that are not significant, and analytic ("rather than encyclopedic") documents.

The DOI Order and later implementing guidance provide, on a prospective basis, specific page and time limits for EISs and EAs where DOI Bureaus are the lead. All EISs must be no more than 150 pages (or 300 pages for complex projects), excluding appendices, and each DOI Bureau is directed to complete any final EIS for which it is the lead agency within 1 year of the NOI for the EIS. Timelines exceeding the 1-year target by more than 3 months must be approved by the relevant Assistant Secretary. With respect to EAs, DOI Bureaus are instructed to produce EAs of approximately 10-15 pages in 3 months or less.

To ensure compliance with these deadlines, DOI has established a NEPA permit and tracking database, which will aid in judging compliance with Secretarial Order 3355 and ensure that DOI Bureaus are appropriately meeting the established timelines. Similarly, the FAST Act established a permitting database, which allows the lead agency to identify and keep track of all federal and non-federal agencies likely to have financing, environmental review, authorization, or other responsibilities associated with a proposed project and facilitates a coordinated and concurrent review of the project. UWAG encourages CEQ to consider whether a similar approach would be appropriate to adopt in the updates to the NEPA regulations, complementing, without duplicating, such existing tracking approaches.

CEQ should consider adopting specific time and page limits in the proposed revisions to the NEPA regulations, and a tracking mechanism to ensure compliance. At a minimum, CEQ should reaffirm the page and time guidelines set forth in CEQ's 40 Q&As and a return to the principles underlying NEPA analyses.

IV. CEQ Should Propose Reasonable Limits on the Scope and Effects Analyses for NEPA Reviews Consistent with the Activities Subject to the Agency's Control and Responsibility and the Supreme Court's Decision in *Public Citizen.*

Question 7: Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how? a. Major Federal Action; b. Effects; c. Cumulative Impact; d. Significantly; e. Scope; and f. Other NEPA terms.

A. The *Scope* of an Agency's NEPA Evaluation Should Be Appropriately Limited.

CEQ should revise its NEPA regulations to more accurately reflect the limitations on the scope of an agency's review. The Supreme Court has stated that a "rule of reason" limits an agency's review under NEPA. *Public Citizen*, 541 U.S. at 767-70. NEPA, however, does not specify the scope of analysis that a federal agency must review in order to determine whether its actions require an EIS. Rather, each federal agency must implement regulations that govern the scope of NEPA review based on that agency's jurisdiction and responsibilities. *See* 40 C.F.R. § 1507.3. Thus, the scope of a federal agency's analysis under NEPA is determined by the precise nature and extent of the agency's action, which in turn depends on those activities that are subject to the agency's control and responsibility.

But challengers often argue that agencies should consider a broader scope for a NEPA analysis, and thus analyze effects well beyond the agency's control and jurisdiction. Undertaking such broader analyses confuses the proper focus of a NEPA review, wastes time and resources, and increases litigation risks by failing to set and follow clear limits. CEQ should confirm that an agency should focus on those effects caused by its action and subject to its

regulatory jurisdiction and control, and the agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." *Public Citizen*, 541 U.S. at 767. Appropriate limits not only promote informed agency decisionmaking by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also protect agencies and those private entities whose permit or license applications are subject to a NEPA process against unnecessary delay, burden, and litigation over hypothetical or tangential environmental impacts. Confirming an appropriate scope of review is critical to the efficient and timely review and authorization of permits that allow important energy infrastructure to be constructed and maintained.

The Corps' regulations, for example, establish that NEPA review will cover only "the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325, App. B § 7.b. Under the Corps' regulations, therefore, the focus of the NEPA review for a CWA § 404 permit is the activity subject to the Corps' regulatory authority – *i.e.*, the discharge of fill material for which federal authorization is sought. As explained in the preamble to the Corps' rules, "the activity the Corps studies in its NEPA document is the discharge of dredged or fill material." *See* Environmental Quality; Procedures for Implementing the NEPA, 53 Fed. Reg. 3,120, 3,121 (Feb. 3, 1988). The Corps appropriately recognized that "NEPA does not expand the authority of the Corps to either approve or disapprove activities outside waters of the United States." *Id*. And courts have consistently upheld the Corps' scope of NEPA review.[6]

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[6] The Corps' discretion to consider environmental impacts "must be exercised within the scope of the agency's authority" – which extends only to the Corps' issuance of a CWA § 404 permit. *See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-

The Corps' regulations further provide that, if a project has "independent utility," then it can be properly excluded from the scope of review under NEPA. For example, Corps regulations state that "[p]hases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility." 82 Fed. Reg. 1860, 2006 (Jan. 6, 2017); 33 C.F.R. § 330.2(i).

CEQ should likewise ensure that the scope of analysis for a NEPA review is tailored to the specific activity within the agency's regulatory authority.

B. NEPA Reviews Should Not Be Manipulated to Create "Federal Handles" that Subject Private Projects to Broad Federal Reviews.

A NEPA issue that arises with some regularity is the extent to which federal involvement in a non-federal project may "federalize" the project for purposes of NEPA compliance. That is, where a portion of a project requires a federal permit (such as a stream crossing), must a NEPA review of the stream crossing permit analyze the effects of the entire project even where the federal agency has no jurisdiction or control over the remainder of the project? CEQ should consider applying the Corps' approach more broadly to make clear that, for most – if not all – federal actions, the answer is no.

For example, the Corps' NEPA regulations recognize that "in some situations, a permit applicant may propose to conduct a specific activity requiring a [Corps] permit (*e.g.*, construction of a pier in a navigable water of the United States) which is merely one component

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17 (9th Cir. 2000) (Corps' NEPA review for a CWA permit need not include the effects of the larger development project); *Save The Bay, Inc. v. U.S. Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir. 1980) (NEPA review of Corps authorizing the discharge of dredged material in connection with the construction of a wastewater pipeline was not required to consider impacts from the manufacturing facility to be served by the pipeline); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 177, 195 (4th Cir. 2009) ("fact that the Corps' § 404 permit is central to the success of the valley-filling process [as part of a coal mine] does not itself give the Corps 'control and responsibility' over the entire fill").

of a larger project (*e.g.*, construction of an oil refinery on an upland area)." 33 C.F.R. pt. 325, App. B § 7.b.(1). In those cases, as discussed above, the scope of the Corps' NEPA review is limited to "the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." *Id*. The Corps is considered to have "control and responsibility" over non-federal portions of a project only where "the Federal involvement is sufficient to turn an essentially private action into a Federal action," *id.* § 7.b(2), and where "the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." *Id*. § 7.b(2)A. "These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation or approval." *Id*.

The Corps' NEPA regulations set forth four factors the Corps typically will consider when determining whether there is sufficient federal control and responsibility to expand its NEPA review beyond the activity over which the Corps has jurisdiction – the filling of waters and wetlands. These factors include:

- whether or not the regulated activity comprises "merely a link" in a corridor-type project (*e.g.*, a transportation or utility transmission project);
- whether aspects of an upland facility in the immediate vicinity of the fill affect the location and configuration of the fill;
- the extent to which the entire project is within the Corps' jurisdiction; and
- the extent of cumulative federal control and responsibility. *Id*. § 7.b(2).[7]

[7] The factors specified in the Corps regulations for determining the scope of its NEPA analysis have been upheld by CEQ and the courts. In addressing the factors specified in the Corps' regulations, CEQ evaluated the statutory requirements of NEPA, its own NEPA regulations, and relevant case law and concluded that the factors are "within reasonable, implementing agency discretion." Implementation of National Environmental Policy Act; Council Recommendations, 52 Fed. Reg. 22,517, 22,518 (June 12, 1987). Shortly after the

The Corps' NEPA regulations provide the following example to illustrate the proper scope of NEPA review in the context of a permit for a small component of a larger project:

> If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect [sic] the location and configuration of the regulated activity.

33 C.F.R. Part 325, App. B § 7.b(3).

The limited scope of NEPA review required for a Corps permitting action is well recognized in the case law. In *Winnebago Tribe of Nebraska*, the Eighth Circuit reviewed the Corps' issuance of an RHA § 10 permit for a river crossing, which comprised approximately 1.25 miles of a 67-mile transmission line. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980). The Tribe argued that the Corps should have considered the impacts posed by the entire transmission line, rather than just the river crossing, 621 F.2d at 272, on the basis that the Corps "wields such control and responsibility over the entire project that nonfederal segments must be included" and, alternatively, "assuming limited federal involvement … the Corps nevertheless must consider the impacts of nonfederal segments as secondary effects of the proposed action." The Eighth Circuit rejected these claims, holding that the Corps' discretion to consider environmental impacts "must be exercised within the scope of the agency's authority [which] extend[ed] only to areas in and affecting navigable waters." *Id*. at

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Corps issued regulations adopting these factors, their validity was challenged in *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394 (9th Cir. 1989). The Ninth Circuit comprehensively rejected the challenge. The *Sylvester* court observed that, because NEPA does not specify a scope of analysis for determining a "federal action," the Corps' regulations are entitled to deference. *Id*. at 399.

272. Further, the Corps did not have sufficient control and responsibility over the other portions of the transmission line to require it to study the entire project.

The Tenth Circuit, applying the factors set forth in the Corps' regulations, in *Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), upheld a Corps' Nationwide Permit (NWP) 12 verification associated with construction of a segment of the Gulf Coast oil pipeline, over claims that the Corps was required to consider the overall impacts of the pipeline including, for example, the risk of oil spills along the entire pipeline. The court determined that the challengers could not demonstrate that the Corps had "sufficient 'control and responsibility'" over the entire pipeline project, such that the scope of the NEPA review should extend beyond the impacts of the discharge of dredged and fill material authorized by the NWP. *Id.* at 1054.

CEQ should confirm the appropriate scope of the federal agency's NEPA review, consider more broadly adopting the Corps' approach to the small federal handle issues, or, at a minimum, provide guidance to clarify how agencies should address small federal handle issues that have arisen.

C. CEQ Should Adopt Appropriate Limits on Agencies' Evaluation of Indirect and Cumulative Effects.

Once the appropriate scope of NEPA review is determined, the next step is to evaluate the direct, indirect, and cumulative effects associated with the proposed federal action.[8] CEQ's NEPA regulations and *Public Citizen* place important limits on the scope of an agency's evaluation of direct, indirect, and cumulative impacts to ensure that agencies properly focus on the proposed federal action, and do not unnecessarily expand their evaluation to impacts of other

[8] "Direct effects" are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). "Indirect effects" are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). And an agency's cumulative effects analysis reviews the "incremental impact of the action" when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7.

actions that are beyond their control. But, in recent years, some agencies and courts have also considered effects that exceed these limits, including effects that are speculative, such as climate change and GHG emissions, and/or those effects that are well beyond the agencies' control and authority. CEQ should confirm that the proper limits are followed, including recognition of the proximate cause requirement, which, in turn, will promote timely evaluation of projects and reduce litigation risk.

1. Effects Must Be "Proximately Caused" Within the Legal Control of the Agency or Within the Scope of the Agency's Authority.

The indirect effects analysis should be focused and circumscribed. NEPA reviews must adhere to and should reflect fundamental principles of causation, including "proximate cause" as the governing standard for determining the effects of the action under NEPA, and the limits set by *Public Citizen*. CEQ should confirm that indirect effects are limited to those effects within the legal control of the agency or within the scope of the agency's authority that are reasonably foreseeable and proximately caused by the agency action.

The Supreme Court has established that a mere "but for" causal relationship between an agency action and an effect is *not* sufficient to attribute that effect to the agency action under NEPA.[9] Instead, there must be "a 'reasonably close causal relationship' between the environmental effect and the alleged cause," analogous to the concept of proximate cause, before the action is construed to be the "cause" of an environmental effect that must be considered. *Pub. Citizen*, 541 U.S. at 767.

[9] The law generally distinguishes between proximate cause and but for causation: Proximate cause is "[a] cause that is legally sufficient to result in liability[;] [a] cause that directly produces an event and without which the event would not have occurred." Black's Law Dictionary 213. "But for" causation, on the other hand, casts a wider net, capturing a broader series of events that can be traced to a particular action without regard to whether the actor is in a position to control those events, and considers whether an injury would have occurred "but for" the action at issue.

In *Public Citizen*, the Court rejected a NEPA challenge to regulations issued by the Federal Motor Carrier Safety Administration (FMCSA) that established safety and inspection requirements for trucks and buses crossing the border from Mexico to operate in the United States. Petitioners contended that FMCSA had violated NEPA by not considering the environmental impacts of those trucks and buses. While FMCSA's issuance of the regulations allowed the President to lift a congressionally imposed moratorium on the entry of Mexican trucks into the United States, and thus were a "but for" cause of increased truck traffic from Mexico, the Supreme Court deemed that causal connection insufficient to require FMCSA to consider the environmental effects of increased Mexican truck traffic as part of its NEPA review. *Id.* at 768. According to the Court, the "legally relevant" cause of any increased truck traffic would be the President's lifting of the moratorium, not the issuance of the FMSCA regulations. *Id*. at 769. Moreover, because FMCSA had no authority to prevent cross-border truck movements, the Court found that requiring the agency to evaluate the environmental effects of increased truck traffic "would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the [NEPA review]." *Id*. at 768.

An "agency need not consider" effects that it "has no ability to prevent." *Id.* at 770; *see also Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (where an agency "has no ability to prevent a certain effect due to [its] limited statutory authority over the relevant action[], then that action 'cannot be considered a legally relevant cause'" of the effect); *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008) ("an agency cannot be held accountable for the effects of actions it has no discretion not to take").

CEQ should clarify and confirm the proximate causation standard because some courts have misconstrued this standard or could be misinterpreted to suggest that the broader "but for" standard is acceptable. Such courts, for example, have opined that the indirect effects analysis should include consideration of GHG emissions or climate change. In *Sierra Club v. FERC*, a divided panel of the D.C. Circuit held that FERC, in authorizing the Sabal Trail natural gas pipeline project, must address the effects of "downstream" GHG emissions from power plants receiving gas from the pipeline. 867 F.3d 1357, 1371–75 (D.C. Cir. 2017) (hereinafter Sabal Trail). The majority held that FERC's approval of the pipeline "caused" those emissions simply because the future burning of natural gas delivered by the pipeline and resulting GHG emissions were reasonably foreseeable. The D.C. Circuit majority did not mandate that FERC analyze the effects of GHG emissions. Rather, the holding was much narrower, requiring only that FERC quantify the GHG emissions that will result from the projected delivery of natural gas via the FERC authorized pipeline, in circumstances where such emissions are clear and quantifiable. *Id*. at 1374 ("EIS … should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.").

Under general causation principles, however, the effects of global climate change are not cognizable under NEPA, and CEQ should confirm that federal agencies are *not* required to consider these effects during the NEPA process because climate change effects are global in nature. A single project is not the proximate cause, or even the "but for" cause, of global climate change or its effects. A specific project is not the "but for" cause of climate change or its effects because, even if the project was not built, the phenomenon of climate change would nevertheless occur. And a specific project is certainly not the proximate cause of specific climate change

impacts because individual project contributions to GHG emissions are *de minimis* by comparison to world-wide emissions, and there are multiple links between any specific project and the potential impacts of climate change, which have not been isolated or established. Thus, when a federal action consists of a project, or a portion thereof, climate change does not qualify as an indirect effect cognizable under NEPA.

Finally, under the current regulations, indirect effects may include "growth inducing effects." 40 C.F.R. § 1508.8(b). CEQ should remove language from § 1508.8(b) suggesting that growth inducing effects should be analyzed by the agency. Such effects are generally not proximately caused by the project or within the legal control of the agency. More importantly, most non-federal projects seeking federal authorization, including, for example, transmission lines, are developed to *accommodate* growth, not to *induce* growth.

2. CEQ Should Clarify That Effects Must Be "Reasonably Foreseeable," Not Speculative.

An agency's obligation to evaluate indirect and cumulative impacts is limited to those effects that are "reasonably foreseeable." To be "reasonably foreseeable," the effect must be "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)). Federal agencies should not consider speculative effects under NEPA. *See, e.g., City of Riverview v. Surface Transp. Bd.*, 398 F.3d 434 (6th Cir. 2005). Speculation as to potential effects does not serve the purpose of NEPA – to provide federal agencies with useful information regarding the effects of their proposed actions and to ensure that federal agencies take account of those effects as part of the decisionmaking process. Indeed, courts routinely affirm agency decisions to exclude consideration of speculative future events. *See, e.g., See Friends of the Capital Crescent Trail v.*

Fed. Transit Admin., 877 F.3d 1051, 1065 (D.C. Cir. 2017) (distinguishing Sabal Trail decision, and affirming agency's decision not to consider effects that were not susceptible to quantification and thus speculative); *Gulf Restoration Network v. Dep't of Transp.*, 452 F.3d 362, 370 (5th Cir. 2006) (affirming action agency's decision to exclude, from its cumulative impacts analysis of a proposed LNG facility, the potential environmental effects of other proposed federal projects for which DEISs had not yet been prepared). Accordingly, CEQ should clarify that speculative effects, those regulated by State and federal agencies other than the regulatory agency undertaking the action, and any environmental effects associated with other projects, facilities, etc. are excluded from the cumulative effects analysis.

As discussed, at pages 25-26, some courts have opined that speculative effects, such as climate change and GHGs, should be evaluated as cumulative effects under NEPA. A cumulative effects analysis considers effects of other activities that may combine with the specific effects of the federal action to produce a cumulative impact on a specific environmental resource, and is not designed to consider effects of other activities that do not combine in a meaningful way to produce cumulative impacts. The proper focus of an agency's cumulative effects analysis is thus the incremental impact of "its action" when added to the effects of other activities. *Pub. Citizen*, 541 U.S. at 769.

Under this standard, an analysis of the regional and local effects of climate change on resources would be speculative due to the limitations of climate change science and predictive modeling. Available climate change information does not provide reliable predictions of climate change impacts in specific geographic areas. Until accurate and well-tested downscaling models exist, any analysis of the regional and local effects of climate change on water resources, among other environmental resources, would be unduly speculative and would be likely to confuse or

unbalance, rather than enhance, an environmental effects analysis. CEQ should provide clear guidance to the agencies that NEPA review should not be expanded to include unrelated, speculative, or remote effects, including GHG-related effects.

Consistent with *Public Citizen,* CEQ should clarify and confirm in its proposed revisions to § 1508.8 of the NEPA regulations that the effects of the action, including indirect effects, must be limited to those effects that are reasonably foreseeable and proximately caused by the action. CEQ should clarify that "but for" causation is not sufficient to make an agency responsible for a particular effect under NEPA. UWAG further recommends that CEQ define the term "reasonably foreseeable" in the CEQ regulations to properly limit the consideration of reasonably foreseeable effects to those that the agency has the authority to prevent and that are not speculative, unrelated, or remote.

V. CEQ Should Revise Key Definitions and Provisions in the NEPA Regulations

A. CEQ Should Modify the Definition of "Major Federal Action" to Give Independent Meaning to the Terms "Major" and "Significantly."

NEPA applies to "major Federal actions significantly affecting the quality of the human environment…." 42 U.S.C. § 4332(C). "Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18. Thus, a federal action is "major" if it significantly affects the quality of the human environment. CEQ should modify § 1508.27 to provide that "major" has meaning independent of "significantly."

Principles of statutory interpretation, including the rule against surplusage, dictate that different words have different meanings. CEQ's regulations, however, "give virtually no effect to the word 'major,' and run counter to the requirement that a court give effect to all words of a statute when construing it." *NAACP v. Medical Ctr., Inc.*, 584 F.2d 619, 627 (3d Cir. 1978). Including the word "major" before federal actions makes clear that there is a distinction between

federal actions that are major, and other "non-major," or minor, federal actions. To ignore this distinction and fail to give major independent effect would erode Congress' decision to include the term. *See Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972) ("There is no doubt that the Act contemplates some agency action that does not require an impact statement because the action is minor….").

The legislative history confirms that Congress intended for "major" and "significant" to have independent meaning, and an agency's determination of a major action's environmental impact is separate from determining that an action is major:

> Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. ….

S. Rep. No. 91-296, at 20 (1969). Major and significant "are different [concepts] and … the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary." *Hanly*, 460 F.2d at 644. "'[M]ajor Federal action' refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it, but does not refer to the impact of the project on the environment." *Id*.

CEQ should provide independent meaning to the term "major." For example, a major federal action could be defined as an action meeting certain thresholds, such as a dollar amount. The FAST Act requires a total investment of $200 million or more in the project. Or, "major" could be defined as the annual proposed effect on the economy for regulatory actions. EO 12866 uses a threshold of effect of $100 million. Providing further meaning to the term "major" will ensure that only those actions that clearly qualify as "major actions" with significant effects will rise to the level of requiring an EIS.

B. CEQ Should Modify the Definition of "Significantly."

1. CEQ Should Require That More Than One Intensity Factor Be Present to Result in Preparation of an EIS.

CEQ's NEPA regulations set forth criteria for assessing the significance of the effects of a proposed federal action. 40 C.F.R. § 1508.27. Whether an effect "significantly" impacts the quality of the human environment requires consideration of both context and intensity. *Id.* The inclusion of ten factors in the evaluation of "significance" establishes that no one factor should be dispositive. The presence of one intensity factor does not, by itself, cause an agency to prepare an EIS. *See Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000) (considering the unreasonableness of directing an agency to prepare an EIS when the agency's action produced a certain degree of controversy, yet did not implicate any other listed intensity factor). Rather, each factor should contribute to the result, the agency's determination whether an action "significantly affect[s] the quality of the human environment." CEQ should confirm that the presence of one factor alone is insufficient to determine that the environmental effects of an action are "significant" and thus warrant preparation of an EIS.

2. Certain Intensity Factors Should Be Removed or Amended.

UWAG recommends that CEQ clarify or remove certain of the intensity factors in the evaluation of significance.

First, the fourth intensity factor, which addresses "the degree to which the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. §1508.27(b)(4), should be revised or deleted. As currently written, this factor may serve to incentivize project opponents to create and raise disputes simply to assert that there is controversy and thus force an agency to prepare an EIS. The case law, however, confirms that the term "controversial" "refers to cases where a substantial dispute exists as to the size, nature

or effect of the major federal action, rather than to the existence of opposition to a use, the effect of which is relatively undisputed…." *Soc'y Hill Towers*, 210 F.3d at 183–84; *accord Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 234 (5th Cir. 2006); *Indiana Forest All., Inc. v. U.S. Forest Service*, 325 F.3d 851, 857–58 (7th Cir. 2003). Thus, courts have rejected the notion that "controversial" means the mere presence of neighborhood opposition to an agency action. *Soc'y Hill Towers*, 210 F.3d at 184 (citing *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972)); *Wild Wilderness*, 871 F.3d at 728. CEQ should remove or amend the "highly controversial" factor to clarify that mere claims that environmental effects of a project are highly controversial are not enough to require preparation of an EIS.

Second, UWAG recommends amending the seventh factor, which asks whether the action "is related to other actions with individually insignificant but cumulatively significant impacts," 40 C.F.R. § 1508.27(b)(7). This factor is overly broad because there is no limit to the phrase "other actions." The phrase should be substantially limited in both time and space to ensure that the analysis remains focused on the proposed action.

Third, although rare, there are circumstances when significant beneficial impacts on the environment have triggered the preparation of an EIS. CEQ must clarify that this is not necessary. Only major federal actions significantly (and *adversely*) affecting the quality of the human environment require an EIS.

<u>Question 8</u>: Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms? a. Alternatives; b. Purpose and Need; c. Reasonably Foreseeable; d. Trivial Violation; and e. Other NEPA terms.

C. An Applicant's Project Purpose Should Be Presumptively Valid.

The project purpose is a basis for establishing the bounds for the alternatives analysis. Only those alternatives that can achieve the project's purpose need be discussed. The Corps'

regulations, for example, state that an alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics *in light of overall project purposes*." 40 C.F.R. § 230.3(1) (emphasis added).

Private entities are in the best position to know and understand their business and their objectives. Too often, however, an agency will modify the applicant's stated project purpose to expand the scope of the alternatives analysis. Courts have confirmed that the federal agency should consider the needs of the applicant in setting the project purpose and identifying appropriate alternatives. *See, e.g., Carmel-By-the-Sea v. DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997).

CEQ should revise § 1502.13 of its regulations to provide presumptive validity to a non-federal applicant's project purpose. While it is appropriate for permitting agencies to work with applicants to address environmental impacts, allowing a permitting agency to redefine an applicant's purpose, which may have the effect of expanding the scope of alternatives to be evaluated, is not supported by NEPA and should be rejected by CEQ. CEQ should propose revisions to its regulations accordingly.

D. Reasonably Foreseeable Should Be Defined.

As discussed in response to question 7, *see* pages 26-28, UWAG recommends that CEQ define the term "reasonably foreseeable" in the CEQ regulations to properly limit the consideration of reasonably foreseeable effects to those the agency has the authority to prevent and that are not speculative, unrelated, or remote.

<u>Question 11</u>: 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?

E. CEQ Should Facilitate Applicant Participation in NEPA Reviews.

UWAG encourages CEQ to better facilitate non-federal applicants' participation in the development of NEPA documents. Private entities applying for authorization from a federal agency should be involved in drafting both EAs *and* EISs, provided the federal agency exercises appropriate oversight, control, and responsibility over the final document such that the analysis is that of the agency. The applicant is in the best position to provide information about the project and its potential effects. Allowing applicants to undertake drafting of NEPA documents can reduce burdens on the agencies, while ensuring that critical timelines are met.

Under the current NEPA regulations, an agency may permit an applicant to prepare an EA, and the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the EA. 40 C.F.R. § 1506.5(b). The extent of involvement by project applicants in the EIS process, however, varies considerably depending on the lead agency that is responsible for preparing the EIS. The current regulations provide that an EIS may be prepared directly by the lead agency or by a third-party contractor selected by the lead agency. 40 C.F.R. § 1506.5(c).

Agencies have a tendency, at times, to exclude the applicant from the drafting process, reducing transparency and ignoring input from the party with the most data and information about the project, as well as considerable financial involvement. CEQ should revise §§ 1506.5(b) and (c) to clarify that either the agency, an applicant, or a consultant working with the agency or applicant may prepare EAs and EISs, subject to the agency's independent evaluation and responsibility, and with appropriate opportunity for input and review by the applicant. Revisions to these aspects of the regulations should facilitate the applicant's ability to directly prepare and

to provide input to NEPA documents, with the proper role for independent evaluation by the agency.

<u>Question 12</u>: Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

F. CEQ Should Broadly Support the Use of Programmatic EISs.

Programmatic reviews should be considered where an agency is approving several similar actions or projects in a region or nationwide (*e.g.*, a large-scale utility corridor project) or a suite of ongoing, proposed or reasonably foreseeable actions that share a common geography or timing, such as multiple activities within a defined boundary (*i.e.*, federal land or facility). Once programmatic reviews are completed, agencies should tier off of or incorporate relevant analyses by reference. As discussed in response to question number 2, CEQ should encourage tiering and incorporation by reference, where appropriate.

<u>Question 13</u>: Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

G. Only Practicable Alternatives in the Action Agency's Jurisdiction Should Be Included in the Alternatives Analysis.

At the "heart" of the EIS is the alternatives analysis. Agencies must only evaluate "all *reasonable* alternatives," 40 C.F.R. § 1502.14(a) (emphasis added), consistent with the "underlying purpose and need to which the agency is responding," *id.* § 1502.13, and briefly discuss the rationale for why certain alternatives were eliminated from study. In practice, however, the alternatives analysis often entails substantial time and resources, and agencies often analyze alternatives that are not practicable or within their jurisdiction. CEQ should reinforce the proper focus of the alternatives analysis.

If an alternative is not consistent with the purpose of the proposed federal action and otherwise "reasonable," an agency is not required to consider it in NEPA documentation. *See,*

e.g., Citizens Against Burlington v. Busey, 938 F.2d 190, 195-96 (D.C. Cir. 1991). Moreover, an agency need not consider an alternative that is already an integral part of a project. *Envtl. Defense Fund v. Costle*, 657 F.2d 275, 297-98 (D.C. Cir. 1981). The range of alternatives to be considered is governed by a "rule of reason." *City of Grapevine v. Dept. of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Citizens Against Burlington*, 938 F.2d at 195.

Alternatives that are beyond the jurisdiction of the federal agency are not reasonable, and those alternatives should be excluded from the alternatives analysis. Agencies and applicants should not waste time and resources evaluating alternatives beyond the scope of the federal agency's jurisdiction. CEQ should clarify in § 1502.14 that alternatives can only be "reasonable" if they are within the jurisdiction of the action agency. CEQ should also confirm that, in some circumstances, the proposed action and the "no action" alternative are sufficient to satisfy the alternatives requirement.

Question 20: Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

H. NEPA Is a Procedural Statute that Does Not Authorize the Imposition of Mitigation Measures.

Under longstanding case law, NEPA does not provide federal agencies with authority to impose substantive mitigation requirements. *Methow Valley*, 490 U.S. at 352-53. NEPA is a procedural statute only; it mandates that federal agencies follow certain procedures, but it does not impose substantive standards on the decisionmaking process. *Id.* at 350, 353. Thus, NEPA does not require federal agencies to adopt or enforce mitigation measures discussed in NEPA documents. *Nat'l Parks & Conservation Ass'n v. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000).

Courts have routinely confirmed that there is no substantive obligation to adopt mitigation measures identified in an EIS. *See, e.g., Westlands Water District v. DOI*, 376 F.3d

853, 873 (9th Cir. 2004); *Mississippi Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000). NEPA "does not require agencies to discuss any particular mitigation plans that they might put in place," nor does it "require agencies -- or third parties -- to effect any." *Citizens Against Burlington*, 938 F.2d at 206 (agency not required to finish mitigation studies or execute mitigation plans before project begins). NEPA only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated. *Methow Valley*, 490 U.S. at 352.

CEQ's regulations already allow agencies to incorporate appropriate mitigation measures in EAs to avoid an action rising to the level of a significant impact to the environment. By adopting such measures in a "mitigated FONSI," agencies can avoid preparing an EIS while ensuring that environmental impacts are minimized. Thus, the decision whether to address (and ultimately include) mitigation measures in an EA/FONSI are left to the discretion of the agency conducting the NEPA analysis.

Neither NEPA nor CEQ's implementing regulations impose a duty on federal agencies to adopt mitigation measures in a FONSI or ROD. UWAG supports this current approach, which is in keeping with NEPA's mandate. To the extent CEQ addresses mitigation measures, it should specifically affirm that a federal agency may adopt binding mitigation measures only if, and to the extent that, such measures are authorized by the agency's organic statute.

VI. Conclusion

UWAG appreciates this opportunity to provide CEQ with our suggestions to modernize, clarify, streamline, and reduce burdens of NEPA implementation – especially with respect to federal permits and other federal actions on which UWAG members rely for critical electric energy projects nationwide. We respectfully request that CEQ adopt the recommendations and

clarifications discussed in these comments in any forthcoming proposal to revise the NEPA regulations.