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March 10, 2020

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 Notice of Proposed Rulemaking, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020), Docket No. CEQ-2019-0003

Dear Mr. Boling:

The Utility Water Act Group ("UWAG") submits the attached comments in response to the Council on Environmental Quality's Notice of Proposed Rulemaking, Update to the Regulations 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

UWAG
Utility Water Act Group©

Comments of the Utility Water Act Group in Response to the Council on Environmental Quality's Notice of Proposed Rulemaking, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020)

Docket No. CEQ-2019-0003

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Table of Contents

I. Introduction

The Utility Water Act Group (UWAG) appreciates the Council on Environmental Quality's (CEQ) proposal to clarify and improve its regulations implementing the National Environmental Policy Act (NEPA or the Act). 85 Fed. Reg. 1684 (Jan. 10, 2020). UWAG members have extensive experience with NEPA implementation. UWAG welcomes this opportunity to express its support for the proposal and offer further suggestions to strengthen the final rule, in keeping with the Act and prevailing case law.

A. UWAG Members Have Extensive Experience with NEPA Implementation.

UWAG members frequently undertake projects that require federal permits and, as a result, are subject to NEPA review. UWAG is a voluntary, non-profit, unincorporated group of 138 energy company systems, which own and operate over fifty percent of the nation's total generating capacity. The Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association also are UWAG members. UWAG's purpose is, among other things, to participate on behalf of its members in federal agency rulemakings under the Clean Water Act (CWA) and related statutes, such as NEPA, and in litigation arising from those rulemakings.

Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers. To meet their obligations to supply electricity and natural gas to institutions and individuals across the country, UWAG members must construct, operate, and maintain facilities that generate electricity (including renewable energy facilities such wind, solar, and hydroelectric facilities), transmission and distribution lines (including lines that connect new wind and solar facilities to the electric grid), and other system control facilities. These activities often require UWAG members to cross or perform work within wetlands or other waters of the United States (WOTUS) that requires

federal authorization, such as CWA § 404 permits and Rivers and Harbors Act (RHA) § 10 permits. The issuance of a permit by the U.S. Army Corps of Engineers (Corps) is a federal action subject to review under NEPA. In addition to obtaining federal permits from the Corps, UWAG members undertake other activities that are subject to NEPA review.

B. UWAG Supports the Efficient and Effective Implementation of NEPA.

The preparation of a NEPA review can add significant time and costs to a project, thereby potentially delaying a critical infrastructure project that will deliver needed power from a renewable energy source or adding costs to a transmission line repair that will be borne by ratepayers who rely on affordable and dependable sources of energy. Ideally, a NEPA review will avoid costs and delays through efficiency, and will improve environmental outcomes by focusing on issues that are under the control and jurisdiction of the federal agency and that can directly benefit from the agency action (such as wetland impacts authorized by a CWA § 404 permit and related conditions designed to offset and, in many cases, improve wetland functions and values). Thus, implementation of NEPA, particularly, but not only, in connection with Corps permits is highly important to UWAG members.

Environmental protection is a top priority for UWAG members, who undertake numerous activities and spend millions of dollars annually to study, avoid impacts to, preserve, and enhance environmental resources. Conservation is also a high priority for UWAG member customers, who increasingly advocate for energy choices that are both cost efficient and environmentally protective. In an effort to meet these goals, the electric utility industry is rapidly transitioning toward the use of low-emission and renewable generation sources. One UWAG member, for instance, currently owns or operates more than 4,000 megawatts of renewable generating capacity at 40 wind and solar facilities across the country. Developing these types of energy projects often requires new transmission lines to connect to the grid. At the

same time, utilities must continually maintain and upgrade existing lines from current sources to ensure reliability.

In UWAG members' experience, NEPA reviews often lead to significant and unreasonable costs and delays to projects; consideration of tangential issues outside the jurisdiction of the federal agency, which distract from rather than advance environmental benefits; serious litigation risks; and a loss of projects that grow the economy and benefit the environment. As a result, UWAG members strongly support CEQ's efforts to reform the NEPA regulations. UWAG submitted comments to inform this process in response to CEQ's Advanced Notice of Proposed Rulemaking (ANPRM). *See* 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), CEQ-2018-0001-11886 (Aug. 20, 2018). UWAG's comments in response to the ANPRM and this proposal are consistent with its longstanding position that the NEPA review process should be a regulatory program that is administratively workable, as well as protective of the environment.[1]

C. UWAG Submits the Following Key Recommendations.

UWAG endorses, and is encouraged by, CEQ's efforts to clarify and improve its NEPA regulations in a manner that reduces inefficiencies and promotes more focused reviews. UWAG supports many of CEQ's proposed modifications, which are consistent with the Act and related

[1] 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 (June 12, 1987).

case law and reflect concerns UWAG expressed in prior comments and litigation. In addition, there are several areas where UWAG recommends CEQ provide additional detail or explanation to improve implementation of the Act and ensure consistency with the statute and settled precedent.

In particular, the final rule should:

- Clarify that effects analyses should focus on effects within the agency's authority and control.
- Codify "proximate cause" as the governing standard for determining effects in a NEPA analysis.
- Clarify that the effects of an action should be measured against the actual (not hypothetical) conditions that would exist without the action.
- Explain that the statement of project purpose and need should be based on the applicant's goals and the agency's authority.
- State that a non-federal applicant's stated project purpose is presumed valid, absent information to the contrary.
- Require alternatives to be within the jurisdiction of the agency to be reasonable.
- Modify the definition of "major Federal action" to exclude portions of non-federal projects over which there is no – or only minimal – federal funding or involvement.
- Establish limits on threshold NEPA applicability and the appropriate level of NEPA review.
- Encourage the further use of categorical exclusions (CATEXs) where appropriate.
- Clarify that mitigation measures included in a mitigated finding of no significant impact (FONSI) should be within the agency's statutory authority to implement.
- Facilitate agency cooperation during NEPA reviews.
- Encourage incorporation, integration, and reliance on other environmental reviews, including Endangered Species Act (ESA) § 7 consultations.
- Allow for greater applicant participation in the NEPA process.
- Establish presumptive time and page limits for Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

- Limit other federal agencies from imposing additional NEPA procedures or requirements.

- Refrain from applying the new regulations to ongoing NEPA reviews, unless requested by an applicant.

UWAG believes these changes would 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.

II. NEPA Reviews Should Be Streamlined and Focused to Provide Efficient Reviews of Critical Energy Projects and Effectively Achieve NEPA's Goals.

NEPA establishes a policy to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). To achieve this policy, NEPA requires the preparation of environmental impact statements for "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C).

For over forty years, CEQ's regulations have emphasized that "NEPA documents must concentrate on the issues that are truly significant *to the action in question* rather than amassing needless detail," with the goal "not to generate paperwork . . . but to . . . help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c) (1978). Accordingly, CEQ's regulations have specified that NEPA should be "useful to decisionmakers .... reduce paperwork ... [and] be concise clear and to the point...." *Id.* § 1500.2(b).

Many of the proposed changes to the regulations represent a critical and important focus on the goals and text of NEPA and a return to the goals of CEQ's original regulations, including the proposed changes to § 1500.1. As CEQ appropriately recognizes, NEPA is intended "to

ensure Federal agencies consider the environmental impacts of *their action* ... not to generate paperwork or litigation but to provide for informed decision making and foster excellent action." 85 Fed. Reg. at 1712 (emphasis added). Naturally, agencies are in the best position to design their decisions to effectively protect, restore, and enhance the environment if their NEPA analyses are focused on impacts actually caused by the actions, within their expertise, and subject to their jurisdiction and regulatory control. Conversely, expanding a NEPA review to address effects not caused by the agency action or within the agency's jurisdiction to control diverts time and resources away from "excellent action" informed by agency NEPA review, which CEQ's original NEPA regulations sought to foster. 40 C.F.R. § 1500.1(c) (1978).

Over the years, some agencies have been drawn away from the Act's and regulations' focus on their specific actions and into peripheral issues outside of the agencies' jurisdiction and control, causing the NEPA process to become increasingly burdensome and confused. CEQ rightly recognizes the NEPA review process "can be lengthy, costly, and complex," and that "the NEPA process and related litigation has slowed or prevented the development of new infrastructure and other projects that required Federal permits or approvals." 85 Fed. Reg. at 1685.

NEPA issues most commonly arise for UWAG members when they seek federal permits for work related to construction or maintenance of energy projects. For instance, UWAG members may seek a CWA § 404 permit authorizing the discharge of dredged or fill material into a WOTUS that is necessary to construct a portion of a utility line.

UWAG members often expend substantial time, money, and resources to comply with NEPA, yet without commensurate environmental benefits. A government entity that is a member of the American Public Power Association (APPA), which in turn is a member of

UWAG, incurred, for example, $17 million in costs, in the form of studies, consultants, and contractors, associated with the NEPA review conducted for a water delivery project.[2] Those costs are often ultimately borne by the rate-paying public.

III. The Proposed Rule Appropriately Recognizes Limits on the Scope of the Effects Analysis, and Supreme Court Precedent Supports Further Modifications.

An appropriate scope of analysis is crucial to ensuring that a NEPA review is efficient, effective, and tailored to best inform the agency's review of the proposed action. UWAG appreciates CEQ's efforts to modify its regulations to properly frame the scope of the effects analysis in a manner that is consistent with CEQ's core principles and the case law. Specifically, UWAG supports, with further clarification, CEQ's proposal to limit effects to those that are within the agency's authority to control. The proposal would be strengthened by codifying the proximate cause standard, consistent with the Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), and clarifying that effects be measured against actual, and not hypothetical, conditions.

A. UWAG Supports, with Clarification, Properly Focusing the Effects Analysis on Those Effects within the Agency's Jurisdiction and Control.

UWAG supports limiting the effects analysis to effects within the agency's jurisdiction and authority to control. CEQ properly acknowledges that effects, for the purposes of NEPA, "do not include effects that the agency has no authority to prevent or would happen even without the agency action." 85 Fed. Reg. at 1708. To make this clear, CEQ proposes amending the

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[2] Although UWAG's comments focus on the considerable difficulties private entities face when complying with NEPA, federal agencies, too, expend substantial funds and time to conduct NEPA reviews, at taxpayers' expense. For example, the Department of Energy reported that it spent, on average, over $5 million to complete an EIS in 2016. DEPT. OF ENERGY, NEPA: LESSONS LEARNED THIRD QUARTER FY 2016 (2016), available at https://www.energy.gov/sites/prod/files/2016/09/f33/LLQR-2016-Q3.pdf.

definition of "effects" to exclude "effects that the agency has no ability to prevent due to its limited statutory authority." *Id.* at 1729; proposed 40 C.F.R. § 1508.1(g)(2).

CEQ's proposal is consistent with prevailing case law. The Supreme Court has held that a "rule of reason" limits an agency's obligation to analyze effects under NEPA to those effects caused by the agency action. *See Public Citizen*, 541 U.S. at 767-70. The scope of a federal agency's analysis under NEPA is determined by the precise nature of the federal action, which in turn depends upon the activities subject to the agency's control and responsibility. In particular, NEPA does not require an agency to consider effects beyond its regulatory control or jurisdiction. Thus, an 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." *Id.* at 767.

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 into the United States. Petitioners contended FMCSA violated NEPA by not considering the environmental impacts of those trucks and buses. The Supreme Court acknowledged that 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, making it a "but for" cause of increased truck traffic from Mexico. *Id.* at 772. Nonetheless, 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.

In the context of CWA permits, which are especially relevant to UWAG members, the Corps' substantive authority is limited to the discharge of dredged or fill material into "waters of the United States" (WOTUS). *Ctr. for Biological Diversity v. U.S. Army Corps of Engr's*, 941 F. 3d 1288, 1296 (11th Cir. 2019). And the Corps' NEPA obligation is similarly limited to environmental effects proximately caused by discharges of dredged or fill material authorized by the Corps permit. *Id.* The Corps' NEPA regulations governing individual CWA permits, which were approved by CEQ decades ago and upheld by the U.S. Court of Appeals for the Ninth Circuit, *see Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 399 (9th Cir. 1989), are instructive as to the appropriate scope of a NEPA effects analysis. Those regulations appropriately specify that "the activity the Corps studies in its NEPA document is the discharge of dredged or fill material," 53 Fed. Reg. 3120, 3121 (Feb. 3, 1988); 33 C.F.R. Part 325 App. B, not any broader activity that would fall outside the Corps' jurisdiction and control.

The Corps' regulations reflect decades of court decisions, both before and after the Corps' NEPA regulations were promulgated, and confirm that the Corps is not required to review the effects of portions of a project beyond its jurisdiction and control. *See, e.g.*, *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (NEPA review of transmission line project properly limited to river crossing permitted by Corps and need not include other portions of overall project); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 327 (5th Cir. 1980) (NEPA did not require the Corps to consider broader impacts of

plant when issuing CWA permit for construction of facility's wastewater pipeline); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 197 (4th Cir. 2009) (Corps' NEPA analysis properly limited to stream fill and need not consider upland components).

Codifying the appropriate scope of effects analysis will also help limit the kind of "unnecessary litigation" CEQ described in the proposed rule's preamble. 85 Fed. Reg. at 1707. For example, project opponents often accuse the Corps of violating NEPA when issuing CWA § 404 or RHA § 10 permits based on effects entirely outside the Corps' regulatory authority. The courts, however, have repeatedly confirmed the Corps' § 404 NEPA obligation extends only to environmental effects proximately caused by discharges of dredged or fill material into WOTUS. *See, e.g.*, *Kentuckians for Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 706-07 (6th Cir. 2014) (Corps did not violate NEPA when limiting the scope of its environmental analysis to effects proximately caused by the discharge of dredged or fill material into jurisdictional waters, rather than consequences stemming from coal mining in general); *Ohio Valley Envtl. Coal. Inc., v. Army Corps of Eng'rs*, 828 F.3d 316, 322 (4th Cir. 2016) (Corps properly limited NEPA review to environmental impacts associated with specific discharge of fill material authorized by Corps' issuance of CWA permit).

Similarly, groups have argued that the Corps' NEPA analysis for the nationwide permits (NWPs) should be enlarged to evaluate effects beyond the minor, and often temporary, discharges of dredged or fill material authorized by those NWPs. *See, e.g.*, *Sierra Club v. Bostick*, 787 F.3d 1043, 1051-52 (10th Cir. 2015) (rejecting claims that Corps was required to analyze effects outside its jurisdiction, like oil spills, when reissuing NWP 12); *Northern Plains Resource Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-00044 (D. Mont. 2019) (challenging Corps' 2017 reissuance of NWP 12). NWPs are critical to UWAG member

activities. UWAG members often undertake large utility line projects, small portions of which may require federal permitting for work in a WOTUS. UWAG members rely on NWP 12, in particular, to undertake critical "utility line" activities, including construction, maintenance, repair, and removal of utility lines and associated facilities in WOTUS.[3]

CEQ's proposed changes would reinforce the proper scope of analysis established by Supreme Court and other federal court decisions, and help ensure that NEPA reviews of CWA permits focus on those effects caused by and subject to control under the permit (thus sharpening the focus on measures that can actually be required and most likely to be environmentally beneficial).

UWAG notes that the proposal no longer categorizes effects as direct, indirect, or cumulative, and instead "consolidate[s] the definition" by requiring consideration of *all* reasonably foreseeable effects that have a reasonably close causal relationship to the agency action (including effects that are later in time or further removed in distance), including consideration of the affected environment. 85 Fed. Reg. at 1708 (purpose of proposal is "to focus agency time and resources on considering whether an effect is caused by the proposed action rather than on categorizing the type of effect"); proposed 40 C.F.R. §§ 1502.15, 1508.1(g). UWAG agrees that this change can help agencies avoid wasting time and resources on categorizing the type of effect, and instead focus their limited time and resources on analyzing effects caused by the proposed action.

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[3] Specifically, NWP 12 authorizes discharges of dredged or fill material into WOTUS for the construction, maintenance, or expansion related to utility lines, so long as the activity does not result in more than a ½ acre of impact to a WOTUS. The Corps estimated that NWP 12 would be used approximately 11,500 times per year on a national basis. U.S. ARMY CORPS OF ENGINEERS, DECISION DOCUMENT, NATIONWIDE PERMIT 12 (2016).

UWAG generally supports the proposed changes regarding the "effects" definition. UWAG understands that any analysis of effects proximately caused by a proposed agency action would necessarily require consideration of the context of those effects, as opposed to viewing the proposed action in complete isolation. *See* 85 Fed. Reg. at 1697 ("agency may contrast the impacts of the proposed action and alternatives with current and expected future conditions of the affected environment in the absence of the action"); 40 C.F.R. §§ 1508.7, 1508.8 (under current regulations, consideration of "Indirect effects" includes consideration of reasonably foreseeable effects "caused by the action [] later in time or farther removed in distance," while a "Cumulative impact" is the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions").

Proper consideration of proximately caused effects within the context of existing and reasonably foreseeable environmental conditions aligns with the overall purpose of NEPA, as well as the original objective of CEQ's current regulations. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (agencies must assess the impacts of a proposal on the "existing environment," which "presumably will reflect earlier proposed actions and their effects."). To confirm this understanding, **UWAG suggests that CEQ clarify in the final rule's preamble that agencies would still consider all effects reasonably foreseeable and proximately caused by the proposed action, within the context of reasonably foreseeable conditions, regardless of whether those effects would have been previously considered "direct," "indirect," or "cumulative."**

B. UWAG Urges CEQ to Codify "Proximate Cause" as the Governing Standard for Determining Effects under NEPA.

The proposed rule clarifies that effects and alternatives must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives," and that a

"but for" causal relationship is insufficient. 85 Fed. Reg. at 1708; proposed 40 C.F.R. § 1508.1(g). The preamble further explains that "reasonably foreseeable" and "close causal relationship" are analogous to the proximate cause standard in tort law. 85 Fed. Reg. at 1708. UWAG agrees with this limiting principle, which is firmly established by governing case law. UWAG recommends CEQ explicitly codify the "proximate cause" standard in the definition of effects to ensure that the standard is not misconstrued or misinterpreted.

Codifying the proximate cause standard is consistent with Supreme Court NEPA case law, as well as decisions from numerous federal circuit courts of appeal. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (NEPA requires "a reasonably close causal relationship between a change in the physical environmental and the effect at issue"); *Public Citizen*, 541 U.S. at 754 ("NEPA requires a 'reasonably close causal relationship' akin to proximate cause in tort law."); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) ("[A] plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action."); *Center for Biological Diversity v. U.S. Army Corps Eng'rs*, 941 F.3d 1288, 1292 (11th Cir. 2019) ("the Supreme Court has made clear that indirect effects must be proximate, and do not include effects that are insufficiently related to an agency's action.").

Codifying the proximate cause standard will provide agencies clear guidance on the causal relationship required under NEPA between a proposed action and an effect, making it less likely that agencies will be drawn into analyzing effects beyond what NEPA requires. Clearly laying out the proximate cause standard in CEQ's regulations will also furnish agencies with greater legal support to defend their effects analyses if they are subsequently challenged. Accordingly, the final rule should specify that effects must be:

> ... reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives **analogous to the proximate cause standard in tort law.**

Suggested language in bold underline.

C. UWAG Urges CEQ to Clarify that Effects Should Be Measured Against Actual Conditions that Would Exist Without the Major Federal Action.

UWAG urges CEQ to clarify that effects of agency actions, including rulemakings, should be measured against actual – not hypothetical – conditions likely to exist in the absence of the specific action under review. For instance, where an agency proposes to establish new regulatory requirements governing an activity, and the activity would otherwise continue in the absence of the agency action, the NEPA review should compare the effects of the activity under the proposed requirements against the effects of the activity that would continue in the absence of those requirements, and not against a hypothetical baseline condition (such as a condition in which the activity does not occur at all).

This clarification is consistent with the explanation in the preamble that an "agency may contrast the impacts of the proposed action and alternatives with the *current* and *expected future* conditions of the affected environment in the absence of the action, which constitutes consideration of a no-action alternative." 85 Fed. Reg. at 1697 (emphasis added). This clarification would also help harmonize NEPA and ESA § 7 reviews, which define the environmental baseline as the "condition of the listed species or its designated critical habitat in the action area, without the consequences ... caused by the proposed action." 50 C.F.R. § 402.02. Therefore, UWAG recommends the final rule specify at § 1502.16(a)(1) that the:

> ... comparison of the proposed action and reasonable alternatives shall be based on this discussion of impacts**, and limited to effects likely to actually occur under the alternatives (not based on hypothetical effects that are not reasonably foreseeable.)**

Suggested language in bold underline.

IV. The Proposed Rule Properly Limits the Range of Alternatives Agencies Must Consider When Conducting Alternatives Analyses.

UWAG generally supports CEQ's proposed changes related to alternatives analyses under NEPA. UWAG endorses CEQ's decision to base a non-federal applicant's purpose and need statement on the applicant's goals and agency's authority. UWAG recommends this provision provide presumptive validity to a non-federal applicant's project purpose. UWAG also supports CEQ's efforts to clarify what constitutes a range of "reasonable alternatives" necessary to satisfy NEPA.

A. UWAG Generally Supports the Proposed Changes to the Purpose and Need Statement Provision, But Further Changes Are Warranted.

The project purpose and need statement establishes the bounds for the alternatives analysis because only those alternatives that can achieve the project's purpose need to be analyzed. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project."). *See, e.g., Little Traverse Lake Property Owners Ass'n v. Nat'l Park Serv.,* 883 F.3d 644, 656 (6th Cir. 2018) (National Park Service's alternatives analysis properly excluded consideration of plaintiffs' alternative route for a trail because it would not achieve the project's stated purpose and need).

Where an agency action is being proposed based on an application from a non-federal party (*e.g.*, a CWA § 404 permit application from an energy company), § 1502.13 of the proposed rule requires the agency to base the purpose and need statement on the applicant's goals and the agency's authority. 85 Fed. Reg. at 1710; proposed 40 C.F.R. § 1502.13. UWAG supports this provision because it appropriately acknowledges that permit applicants are uniquely positioned to understand the reason, need for, and objectives of the action, which in turn helps determine a reasonable range of alternatives.

UWAG urges CEQ to further tailor this provision to provide presumptive validity to a non-federal applicant's project purpose. Under CEQ's current regulations, agencies often establish a project purpose that does not accurately reflect the applicant's purpose and objectives, resulting in agencies wasting time and resources studying alternatives that are not realistic or viable for either the agency or the applicant.

To ensure agencies do not improperly redefine an applicant's purpose, and thereby expand the scope of an alternatives analysis, UWAG recommends CEQ include a discussion in the preamble or a provision in § 1502.13 clarifying that, absent information to the contrary, an agency should presume a non-federal applicant's stated purpose and need are valid.

B. UWAG Supports CEQ's Proposal to Refine the Definition of "Reasonable Alternatives."

UWAG supports CEQ's proposal to refine the "reasonable alternatives" definition in a manner that would place appropriate limits on the alternatives to be reviewed in NEPA documents. CEQ's proposed definition of "reasonable alternatives" requires alternatives to be both technically and economically feasible, which the preamble explains would generally "preclude alternatives outside the agency's jurisdiction because they would not be technically feasible due to the agency's lack of statutory authority to implement that alternative." 85 Fed. Reg. at 1702; proposed 40 C.F.R. § 1502.14. CEQ also appropriately acknowledges that in some cases, "such as where the Federal agency's authority to consider alternatives is limited by statute, the range of alternatives may be limited to the proposed action and the no action alternative." 85 Fed. Reg. at 1702

The proposed clarification aligns the NEPA alternatives analysis more closely with the CWA § 404(b)(1) Guidelines and their notion of practicability. Under the Corps' regulations, practicable alternatives to the discharge of dredged or fill material are those alternatives that are

"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. § 230.10(a)(2).

Alternatives that are beyond the jurisdiction of the federal agency are not reasonable because implementing those alternatives is not an option available to the agency. Yet, agencies often dedicate substantial time and resources to requiring an analysis of alternatives outside of their jurisdiction. For example, a permitting agency evaluated an alternative transmission line route for a transmission line project undertaken by an APPA member even though: the applicant had already identified other potential alternative routes that were evaluated during project scoping; the route was not identified as an available alternative by the applicant; the agency had no jurisdiction or ability to implement the alternative route; the route would have added substantial costs to the project that would have been borne by ratepayers; and the route would have required approvals from other agencies. The scoping process considered many potential routes, and included extensive public participation. The agency nonetheless included in its final EIS a detailed analysis of its new alternative route, confusing the issues and providing project opponents a separate basis for challenging the project.

Bounding the scope of the alternatives analyses based on the agency's jurisdictional authority will protect applicants, including those seeking CWA § 404, RHA § 10, or other federal permits from the costs and burdens of analyzing alternatives that are unrelated to or beyond the agency's regulatory authority to implement.

V. The Proposed Rule Improves the NEPA Regulations by Revising Key Definitions and Provisions.

The proposal amends key definitions, including "major Federal action," and adds new provisions meant to streamline the NEPA review process by clarifying the appropriate level of NEPA review and modifying the FONSI provision.

A. UWAG Supports Amending the Definition of "Major Federal Action," with Further Clarification.

UWAG generally supports CEQ's proposed definition of "major Federal action," but recommends further modifications to the definition to avoid the possibility of misinterpretation. The proposed rule modifies the definition of "major Federal action" in § 1508.1(q) to exclude non-federal projects with minimal federal funding or involvement where the agency cannot control the outcome of the project. 85 Fed. Reg. at 1709; proposed 40 C.F.R. § 1580.1(q). The amended definition aligns with CEQ's stated purpose to update the regulations to facilitate more efficient, effective, and timely NEPA reviews because it would "reduce costs and delays by clearly defining the kinds of actions that are appropriately within the scope of NEPA." *Id.*

Project opponents often attempt to compel a federal agency to analyze the effects of an entire private project under NEPA where the agency lacks jurisdiction over or the ability to control the outcome of the overall project or most of its components. *See, e.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980). In the preamble, CEQ appropriately recognizes that attempts to subject an entire project to NEPA review where there is only minimal federal involvement, also referred to as "the small handle problem," is a recurring issue in the NEPA context. 85 Fed. Reg. at 1709. This can occur, for example, in projects where the Corps has jurisdiction over a few acres of WOTUS impacts on an ancillary component of a large-scale private project that is otherwise subject only to state, county, and local regulations.

The proposed definition of "major Federal action" is consistent with focusing the NEPA analysis on the specific agency action and helps avoid the risk of assertions of authority over private activities well beyond the limits of federal regulatory jurisdiction and encroachment into state and local regulation. This clarification is also consistent with the Corps' NEPA regulations, which specify that the NEPA analysis should "address the [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).

UWAG supports amending the definition of "major Federal action." UWAG is concerned, however, that the last sentence in the first paragraph of proposed § 1508.1(q) could be misinterpreted to suggest that either: (1) an entire non-Federal project could be deemed federalized for NEPA purposes (even if federal involvement or funding is minimal) so long as the agency *could* control the overall outcome of the project (*e.g.*, impact the viability of the project by denying a permit, such as in a *Winnebago Tribe* scenario), or (2) an agency need not consider the effects of its actions *at all*, even if those effects may be significant, if the federal involvement or funding in the project is minimal or could not control the overall outcome of the project. To clarify, UWAG suggests modifying that sentence to read:

> Major Federal action also does not include **portions of non-Federal projects that are not subject to federal jurisdiction or control, or** non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency **does not have jurisdiction or control over a discrete portion of the project and** cannot control the outcome of the project.

Suggested language in bold underline.

B. UWAG Supports Provisions that Clarify the Appropriate Level of NEPA Review.

UWAG supports proposed changes to CEQ's NEPA regulations that concern the proper level of NEPA review. In particular, UWAG supports CEQ's proposal to add a new NEPA threshold applicability analysis and facilitate the increased use of CATEXs. UWAG also generally supports CEQ's proposed changes to its FONSI provision, but seeks further clarification on the requirements for issuing mitigated FONSIs.

1. UWAG Supports the Addition of Provisions on Threshold Considerations and Determining the Appropriate Level of NEPA Review.

The proposed rule would create in § 1501.1 a threshold applicability analysis that provides a series of considerations to assist agencies in determining whether NEPA applies to a proposed action. 85 Fed. Reg. at 1695; proposed 40 C.F.R. § 1501.1. These considerations include whether: (1) the action is a major federal action, (2) the agency has discretion to consider environmental effects, (3) compliance with NEPA would conflict with the requirements of another statute, or (4) environmental review or analysis under another statute is functionally equivalent to relevant NEPA requirements. Proposed 40 C.F.R. § 1501.1(a)(1)-(5). As CEQ notes, these considerations consolidate factors that courts have applied to determine the applicability of NEPA. 85 Fed. Reg. at 1695.

Additionally, the proposed rule would create in § 1501.3 a framework for determining the appropriate level of NEPA review. 85 Fed. Reg. at 1695; proposed 40 C.F.R. § 1501.3. The proposed section would more clearly set out the decisional framework agencies should rely on when assessing the appropriate level of review for their proposed actions. 85 Fed. Reg. at 1695. UWAG supports these important clarifications on the requisite level of review, which will allow agencies to increase their use of CATEXs and EAs for those proposed actions that normally do not have, and are likely not to have, significant effects on the environment.

Project opponents often argue for a higher level or more detailed review than is necessary. *See, e.g.*, *Soda Mountain Wilderness Council v. U.S. Bureau of Land Mgmt.*, 607 Fed. Appx. 670, 672 (9th Cir. 2015) (dismissing plaintiffs' challenge that BLM should have conducted an EIS, rather than an EA); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156 (10th Cir. 2012) (upholding Corps' decision to prepare an EA instead of an EIS for the issuance of CWA permit for construction of a rail terminal). CEQ's proposal

provides valuable guidance that will assist agencies in determining the proper application of NEPA and applying the most appropriate level of NEPA review.

2. UWAG Supports the Expanded Use of Categorical Exclusions.

The proposal suggests that CEQ recognizes that agencies do not fully utilize CATEXs as a means to satisfy NEPA obligations, 85 Fed. Reg. 1695-96, which results in agencies spending time and resources undertaking EAs and EISs for proposed actions, where such detailed review is not required and often provides no environmental benefit. UWAG concurs, and supports provisions of the proposal that would facilitate greater use of CATEXs.

Maximizing utilization of CATEXs is consistent with CEQ's original NEPA regulations and guidance, which emphasized that many actions could be categorically excluded from individual review in NEPA. The proposed rule confirms at § 1501.4 that CATEXs can be developed for actions that normally would not have a significant effect, and, even where "extraordinary circumstances" are present that might otherwise preclude reliance on the CATEX, an agency can rely on the CATEX if mitigating circumstances (*e.g.*, modification of the proposed action) are sufficient to avoid significant effects. 85 Fed. Reg. at 1696; proposed 40 C.F.R. § 1501.4(a)-(b). UWAG strongly supports this confirmation because greater utilization of CATEXs, where appropriate, will conserve agency resources for those actions that warrant further environmental review through an EA or EIS.

C. UWAG Supports, with Clarification, CEQ's Proposed Changes to the FONSI Provision.

UWAG urges CEQ to explicitly state that FONSIs may only include commitments to mitigation measures within the agency's legal authority. NEPA requires that agencies discuss mitigation in sufficient detail to ensure that environmental consequences have been fully evaluated. *Robertson v. Methow Valley*, 490 U.S. 332, 352 (1989). Neither NEPA nor CEQ's

implementing regulations, however, impose a duty on federal agencies to adopt mitigation measures in a FONSI or a record of decision (ROD).

The focus of a NEPA review must be on the effects of the proposed agency action that the agency has the ability to prevent or control. *See supra* Section III.A. Correspondingly, any mitigation necessary to prevent significant effects generally should be within the agency's jurisdiction and control to implement or require. In the preamble, CEQ explains that an agency can commit to mitigation measures for a mitigated FONSI only "when the agency has sufficient legal authority to ensure implementation of the proposed mitigation measures." 85 Fed. Reg. at 1698; proposed § 1501.6(c). While UWAG supports the ability of applicants to voluntarily propose a range of mitigation measures, UWAG agrees that an agency should generally focus its analysis of a mitigated FONSI on mitigation measures within its ability to implement. Accordingly, UWAG supports including this requirement in proposed § 1501.6(c) on mitigated FONSIs, provided that doing so does not preclude applicants from voluntarily proposing additional mitigation measures or agencies from considering such measures.

VI. The Proposed Rule Includes Procedural Changes to the NEPA Process that Will Increase Coordination and Efficiency.

UWAG supports CEQ's proposed procedural changes to its NEPA regulations, which will contribute to more efficient and targeted NEPA reviews. In particular, UWAG supports the provisions that facilitate agency cooperation, encourage incorporation and reliance on other environmental documents, promote greater applicant involvement, establish presumptive time and page limits for NEPA documents, and limit agencies from promulgating additional procedures and requirements through their own regulations, as explained in further detail below. Additionally, UWAG recommends that CEQ limit the applicability of the final rule to NEPA

reviews that commence after the final rule's effective date, unless an applicant explicitly requests that the regulations apply retroactively for a specific project.

A. UWAG Supports CEQ's Proposal to Facilitate Agency Cooperation.

UWAG supports the proposal's efforts to promote greater interagency coordination when conducting NEPA reviews. Specifically, the proposed rule encourages the issuance of a single EIS and joint ROD or single EA and joint FONSI for proposals that require action by more than one federal agency when practicable. 85 Fed. Reg. at 1698; proposed 40 C.F.R. § 1501.7(g). These changes are consistent with the One Federal Decision (OFD) policy established by Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects." 82 Fed. Reg. 40,463 (Aug. 24, 2017) (EO 13807).

Twelve federal agencies, including the Corps, Environmental Protection Agency (EPA), and Federal Energy Regulatory Commission (FERC), have taken initial steps to implement the OFD policy by signing an April 9, 2018 agreement to establish a cooperative relationship for timely process of environmental reviews and authorization decisions for proposed major infrastructure projects. UWAG supports efforts to implement EO 13807, which have already improved the NEPA review process. Codifying aspects of the OFD policy in CEQ's regulations will ensure that all federal agencies utilize a coordinated and cooperative process when reviewing and issuing permits for major infrastructure projects.

In UWAG's experience, much of the delay associated with NEPA reviews can be attributed to a lack of communication between the lead agency and other participating federal agencies. The proposed changes, including designating a lead agency tasked with developing a single environmental review document, should significantly reduce duplicative efforts by

multiple federal agencies reviewing the project and, in turn, simplify and expedite the overall review process.

B. UWAG Supports CEQ's Proposed Changes Encouraging the Incorporation and Reliance on Other Environmental Reviews.

UWAG supports proposed changes to §§ 1501.2, 1501.11, and 1502.25, which instruct agencies to consider previously developed analyses, clarify that federal agencies may rely, in whole or in part, on a state environmental review, clarify that tiering and incorporation by reference are appropriate in a wide range of circumstances, and instruct agencies to prepare NEPA analyses in a concurrent and integrated fashion with other environmental reviews, including reviews under the ESA such as Biological Assessments and Opinions. 85 Fed. Reg. at 1699-70; proposed §§ 1501.2(a), 1501.11(a), 1502.25(a).

These measures will make the NEPA process more efficient and reduce burdens on federal agencies and non-federal applicants. Tiering allows an agency to avoid duplication of paperwork through the adoption or incorporation by reference of general discussions and relevant specific discussions from an EIS or other analysis of broader scope into one of lesser scope, or vice versa.

CEQ should further clarify that, when an analysis of a specific resource is undertaken pursuant to a separate federal scheme, the analysis is presumed sufficient for the studied resource for NEPA purposes. For instance, an agency should be able to adopt an analysis on impacts on a listed species conducted pursuant to an ESA § 7 consultation in its NEPA evaluation of the proposed activity's impacts to those species. A Biological Assessment or Biological Opinion would not replace an EA or EIS, but the NEPA document could include excerpts from the Biological Assessment or Biological Opinion, or incorporate the documents. CEQ should

encourage agencies to integrate and harmonize their NEPA reviews with ESA § 7 consultations to the extent practicable and with the goal of efficiency and effectiveness of those reviews.

C. UWAG Supports Greater Applicant Involvement in the NEPA Process.

UWAG supports CEQ's proposed revisions to the NEPA regulations that would allow applicants and contractors to assume greater roles in contributing information and preparing environmental documents. 85 Fed. Reg. at 1705; proposed 40 C.F.R. § 1506.5. The current regulations allow applicants to prepare EAs, but require that federal agencies directly prepare or hire third-party contractors to prepare EISs. 40 C.F.R. § 1506.5(c). The proposed rule would allow applicants to prepare EISs, so long as the federal agency provides guidance, participates in the preparation of the document, independently evaluates it prior to approval, and takes responsibility for the document's scope and contents. Proposed 40 C.F.R. § 1506.5(c)(1).

In UWAG's experience, agencies, at times, have excluded applicants from the NEPA drafting process, reducing transparency and ignoring input from the party with the most data and information about the project. An applicant for a large infrastructure project, for example, will be best equipped to ensure that the NEPA review is properly informed and focused on the impacts of the action requiring federal approval, given its specific and holistic knowledge of the project. Moreover, non-federal applicants are particularly motivated to conduct efficient and thorough NEPA reviews because they have the potential to incur considerable losses of time and costs if a federal authorization is delayed or overturned.

D. UWAG Supports Presumptive Page and Time Limits for NEPA Documents.

UWAG supports CEQ's proposed presumptive time and page limits for EAs and EISs. The preamble notes that preparation of NEPA review documents takes much longer than CEQ had envisioned and that these review documents often exceed CEQ's recommended page limits. 85 Fed. Reg. at 1687-68. According to CEQ's report, the preparation of an EIS took an average

of 4.5 years, well over CEQ's recommended 1-year timeline. *Id.* at 1687. Under the proposed rule, federal agencies would have 1 year to prepare EAs and 2 years to prepare EISs. Proposed 40 C.F.R. § 1501.10. Page limits would be set at 75 pages for EAs and either 150 or 300 pages for EISs, depending on their scope and complexity. Proposed 40 C.F.R. § 1502.7. Both the page and time limits could be exceeded if approved by the agency.

In UWAG's experience, preparation of NEPA documents often takes multiple years. One UWAG member, for instance, reported that, in recent years, it has taken approximately three years to complete EAs for single projects. Even after completion of an EA, the member noted that some projects required additional federal authorization (*e.g.*, federal easements and U.S. Fish and Wildlife Service authorizations), which can even further delay project construction.

Establishing these presumptive limits should help streamline and focus the NEPA review process, while leaving sufficient latitude for agencies to exceed those limits where necessary to ensure compliance with NEPA. Set time and page limits will also allow project proponents to better anticipate the timeline and costs associated with permitting processes. Additionally, such limits will also provide the public with useful barometers to help set reasonable expectations about the nature and level of review expected under NEPA for any proposed major federal action. This increased transparency can greatly improve the overall NEPA review process.

E. UWAG Supports Limiting Other Agencies from Imposing Additional Procedures or Requirements through NEPA Regulations.

UWAG supports provisions that prohibit other federal agencies from imposing additional NEPA procedures or requirements beyond those set forth by CEQ. 85 Fed. Reg. 1693; proposed 40 C.F.R. §§ 1500.3 (a), 1507.3(a). CEQ properly acknowledges that the provisions "prevent agencies from designating additional procedures that will result in increased costs or delays." 85

Fed. Reg. 1693. Consistency in NEPA implementation across federal agencies will allow the reviews to be done more efficiently and quickly, while being less burdensome for applicants.

F. UWAG Recommends the New Regulations Only Apply Retroactively Upon an Applicant's Request.

UWAG recommends that the new regulations apply only to NEPA reviews initiated after the effective date of the final rule, unless an applicant specifically requests otherwise. The proposed rule would grant agencies discretion to apply CEQ's new regulations to ongoing NEPA reviews when a final rule is issued. 85 Fed. Reg. 1706; proposed 40 C.F.R. § 1506.13. UWAG supports the new provisions and their application to NEPA analyses; however, implementation of the new regulations to ongoing reviews could cause disruptions and delays. Therefore, UWAG urges CEQ to revise § 1506.13 to clarify that new regulations will only apply to NEPA reviews that commence after the rule's effective date, unless an applicant specifically requests that the agency apply the new regulations retroactively to an ongoing review.

VII. Conclusion

UWAG supports CEQ's effort to comprehensively modernize and clarify its regulations to facilitate more efficient, effective, and timely NEPA reviews to reflect CEQ's significant experience in implementing the statute. UWAG encourages CEQ to expeditiously complete the proposed rulemaking, consistent with the recommended suggestions.