

Trout, Raley, Montañó, Witwer & Freeman, P.C.

Attorneys at Law
1120 Lincoln Street • Suite 1600
Denver, Colorado 80203-2141
(303) 861-1963 • Fax (303) 832-4465
www.troutlaw.com

pmontano@troutlaw.com
Direct: 303-339-5833

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Sent via electronic submission

Terry Breyman
Associate Director of Natural Resources
Council on Environmental Quality
722 Jackson Place, NW
Washington, D.C. 20503

Re: Comments on Draft Interagency Guidelines for Implementing Principles and Requirements Associated with the Updated Principles and Guidelines for Water and Land Related Resources Implementation Studies

Dear Mr. Breyman:

These comments are submitted on behalf of the Northern Colorado Water Conservancy District (“Northern Water”) in response to the White House Council on Environmental Quality’s (“CEQ”) Draft Interagency Guidelines (“Draft Guidelines”) for implementing the Principles and Requirements associated with the updated Principles and Guidelines for Water and Land Related Resources Implementation Studies (“P&G”) released in March 2013.

Northern Water is a public agency created in 1937 to contract with the federal government to build the Colorado-Big Thompson Project, which provides supplemental water to more than 640,000 acres of irrigated farm and ranch land and about 850,000 people in Northeastern Colorado. Because future federal guidelines and requirements associated with water resources projects will directly or indirectly affect the activities of Northern Water, we sincerely appreciate the opportunity to comment on CEQ’s efforts to modernize the current

federal approach to water resources development. Please include these comments as part of the public record associated with the Draft Guidelines.

Since 1983, the P&G have outlined broad federal objectives and provided guidance to federal agencies for evaluating and selecting major projects, including projects related to wetland restoration, flood prevention, drought mitigation, wildfire planning and other water resource developments such as dams, reservoirs and canals. We understand that the Draft Guidelines are intended to be a central component of water resource policy in the U.S. and will directly influence the type, nature and specific features of the federal water projects agencies recommend for Congressional authorization. Northern Water supports the Federal Objective of encouraging economic development and protecting the environment in the water resources planning arena, but as written, the Draft Guidelines fall short and fail to adequately outline the measures for meeting the Federal Objective and guiding principles. Specifically, the Draft Guidelines fail to clearly articulate how they supplement existing requirements under the National Environmental Policy Act (“NEPA”), they fail to adequately define the limits of an agency’s discretion and they contain vague and ambiguous terminology which leaves Northern Water very unclear about how Northern Water’s activities will be affected in the future.

I. The Draft Guidelines fail to clearly articulate how they supplement existing requirements under NEPA

As a public agency engaged in water resource development projects, Northern Water and its Municipal Subdistrict (“Subdistrict”) have had extensive involvement with NEPA compliance. In addition to the Colorado-Big Thompson Project discussed above, Northern Water is currently participating in the environmental review process for the Northern Integrated Supply Project (“NISP”), a water storage and distribution project that will supply fast-growing Colorado cities and water districts with 40,000 acre feet of new, reliable water supplies. The Subdistrict operates and maintains the Windy Gap Project which consists of a diversion dam on the Colorado River, a 445-acre-foot reservoir, a pumping plant, and a six mile pipeline to Lake Granby. To improve the operation and reliability of the Windy Gap Project, the Subdistrict is pursuing the Windy Gap Firming Project (“WGFP”). The WGFP will consist of a 90,000 acre foot reservoir dedicated solely to storing and managing water produced by the Windy Gap Project. To date, Northern Water and the Subdistrict have each expended considerable time and resources on NEPA compliance on behalf of the respective participants in NISP and WGFP, including a nearly equal expenditure of \$10 million on each project for the environmental impact statement (“EIS”) and studies related to each of the two proposed projects.

Although the Draft Guidelines are designed to supplement a myriad of requirements specified in other laws such as the NEPA, the Draft Guidelines will only further complicate the decision-making process because they are overly duplicative of guidelines for environmental documents previously established by existing laws and regulations. By emphasizing the “ecosystems services approach”, the Draft Guidelines require agencies to organize the potential

effects of an action within a framework that explicitly recognizes their interconnected nature. P. 15. However, NEPA already provides this framework because it requires agencies to consider direct, indirect, connected or cumulative impacts, including impacts to aesthetic, environmental, economic, social, cultural and historical values. 40 C.F.R. § 1508.28. Unfortunately, the scope of analysis that would be required by the Draft Guidelines is vague and unclear. It appears that the "ecosystems services approach" discussed in the Draft Guidelines requires consideration of the same impacts already required under NEPA which will only result in additional costs and no meaningful gains in improving resource management, analysis, and decision-making.

Much like NEPA's threshold determination as to what level of environmental review is required for certain major federal actions, the Draft Guidelines call upon agencies to develop their own individual thresholds for determining what level of analysis (full, simplified, or exclusion) is required for proposed water resource development projects. P. 5. While the Draft Guidelines provide baselines for agencies to use in their selection of an appropriate analysis type, agencies are afforded wide discretion in choosing between full analysis, simplified analysis, or exclusion of a water resource development project from the analytical process altogether.

Although the overlap with NEPA is somewhat ambiguous, it appears that the varying levels of analysis envisioned in the Draft Guidelines simply mirror the varying levels of environmental review already required by NEPA. For example, the Draft Guidelines explicitly acknowledge that excluding certain water resource developments from the analytical process discussed therein is similar to categorical exclusions under NEPA. P. 8. Additionally, much like the lesser demanding environmental assessments envisioned by NEPA, the Draft Guidelines expressly indicate that simplified analysis is appropriate for low risk/low cost projects which are unlikely to result in significant impacts to the environment. *Id.*

Although not explicitly stated in the Draft Guidelines, full analysis is akin to and overlaps with the daunting and cumbersome EIS already required by NEPA. For example, where the Draft Guidelines require agencies to define the water resources challenges to be addressed as well as the decision context (including project study area), NEPA requires that an EIS contain a statement of purpose and need for the proposed action as well as a description of the affected environment. P. 12; 40 C.F.R. § 1502.10. Additionally, the Draft Guidelines require agencies conducting a full analysis to formulate and evaluate a range of alternative investments that will address the defined water resources challenges, including a forecast of future conditions in the study area absent the proposed investment. P. 13. Similarly, NEPA requires that an EIS contain discussion of the proposed action as well as other reasonable alternative actions, including a no-action alternative (i.e., forecast of a future condition absent the proposed action). 40 C.F.R. § 1502.14.

Not only do the Draft Guidelines fail to clearly differentiate themselves from the existing requirements outlined in NEPA, but they fail to clearly articulate exactly how the NEPA process is to be integrated with the process for implementing the Principles & Requirements. The

Principles & Requirements suggest that the NEPA process should be integrated with the processes developed to implement the Principles & Requirements so that production of a single decision document fulfills the requirements of both processes. P. 6. The Principles & Requirements further indicate that the Draft Guidelines are to provide additional guidance on how to effectively integrate these two processes. *Id.* However, the Draft Guidelines simply state that integration is the desired outcome and provide absolutely no concrete guidelines or examples of how this integration is to work. Without specific guidance on how to integrate these two processes or how these processes differ, agency decision-making will undoubtedly be impeded by duplication of efforts and unnecessary expenditures. Moreover, the public will be left to wonder exactly how the procedures for implementing the Principles & Requirements are any different from the existing processes procedures already required under NEPA. To the extent that they overlap with existing requirements under NEPA, the Draft Guidelines will simply pile on additional and unnecessary regulatory burdens and costs. These unnecessary, redundant, and duplicative burdens and costs will result in more conflict and worse decision-making rather than better resource management and more effective problem-solving.

II. The cost benefit analysis required by the Draft Guidelines is overly subjective and affords agencies unlimited discretion

In an effort to move away from the narrow set of parameters detailed in the 1983 P&G, the Draft Guidelines fail to adequately define the limits of an agency's discretion in evaluating the costs and benefits of a proposed Federal water resource investment. Both the Principles & Requirements and the Draft Guidelines emphasize the importance of evaluating potential federal water resources investments using a common framework which ensures that federal investments are justified by public benefits, particularly in comparison to costs associated with those investments. P. 6. Both documents emphasize the application of an "ecosystem services approach" in order to appropriately capture all effects (economic, environmental and social). *Id.* Unfortunately, in calling for this cost benefit analysis, the Draft Guidelines provide relatively minimal guidance on the scope of analysis or the specific framework to be employed when comparing public benefits to costs under an ecosystem services approach.

While the Draft Guidelines do provide a general framework, this framework is devoid of any specificity and leaves too many important considerations open to the subjective interpretations of agencies. For example, this framework requires agencies to focus on "the most important consequences" when measuring the economic, environmental and social changes within a watershed. P. 16. However, the Draft Guidelines provide no specifics as to how these changes are to be measured and the bases to be used for the agency's determination of what consequences are "most important" on vague, ambiguous and undefined considerations such as "reversibility, retrievability, and sustainability." *Id.*

Additionally, while the Draft Guidelines appropriately acknowledge that some costs and benefits cannot possibly be expressed in quantifiable, monetary terms, they call for an agency to

use “professional judgment” in determining how important the non-quantifiable benefits or costs may be in the context of the overall analysis. P. 17. By allowing for this subjective approach to the cost benefit analysis, the Draft Guidelines will allow agencies to artificially elevate non-quantifiable impacts above quantifiable economic benefits. This level of subjective analysis and uncertainty will potentially foreclose consideration of otherwise reasonable water resource development projects and it will increase the costs of participation in local, state and federal decision-making.

III. The Draft Guidelines contain several vague or ambiguous terms which should be reworded or clearly defined

In addition to the “most important consequences” consideration discussed above, the Draft Guidelines contain several other words or phrases which lack meaningful definitions or explanations of how these concepts will be evaluated in a realistic manner. For example, the Draft Guidelines indicate that certain projects will require an increased level of analysis if they are of “broad geographic scope” or “are substantially vulnerable to the effects of climate change.” P. 8. “Broad geographic scope” and “substantially vulnerable” are vague and ambiguous terms which require further explanation. Additionally, the Draft Guidelines provide factors to help guide an agency’s determination as to what level of detail is required for analyzing a proposed water resource development project. While no single factor is necessarily determinative, the Draft Guidelines indicate that “in some cases,” a single factor could drive a decision process to a higher level of detail if it were “especially significant.” P. 9. Unfortunately, the Draft Guidelines do not provide any examples of what cases will require a higher level of detail or what constitutes “especially significant.” Lastly, the Draft Guidelines indicate that alternative investments will only be considered valid for more detailed analysis and/or selection when they are considered “complete, effective, efficient, and acceptable.” P. 12. Again, these are all terms which must be clearly defined. By incorporating these and other difficult-to-decipher terms, the Draft Guidelines will only increase the opportunities for litigation and delay.

IV. Conclusion

In summary, the Draft Guidelines should be revised to clearly differentiate themselves from existing requirements under NEPA in order to eliminate (or if not possible to eliminate, minimize) the likelihood for confusion and bureaucratic redundancy. They should also provide more concrete guidance to clearly define the limits of an agency’s discretion in choosing the appropriate level of analysis so that agency discretion is not unlimited. Lastly, the Draft Guidelines should be revised to include definitions for vague, ambiguous or subjective terminology in order to minimize the opportunities for litigation and delay. Please do not hesitate to contact us if you have any questions or concerns regarding these comments.

Sincerely,

Mr. Terry Breyman
May 24, 2013
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Peggy E. Montano,
for
Trout, Raley, Montano,
Witwer & Freeman, P.C.

cc: Eric Wilkinson, NCWCD
Doug Kemper, Colorado Water Congress