



April 19, 2013

Hon. Nancy H. Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, NW  
Washington, CD 20503

Ken Alex  
Director  
Governor's Office of Planning and Research  
P.O. Box 3044  
Sacramento, CA 95812-3044

Re: NEPA and CEQA: Integrating State and Federal Environmental Reviews

Dear Ms. Sutley and Mr. Alex:

This letter provides comments on behalf of the Western Urban Water Coalition (WUWC) regarding the draft handbook *NEPA and CEQA: Integrating State and Federal Environmental Reviews*, released by the Council on Environmental Quality (CEQ) and the California Governor's Office of Planning and Research (OPR) on March 5, 2013.

The WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in five states. The membership of the WUWC includes the following urban water utilities: *Arizona* – Central Arizona Project, City of Phoenix; *California* – East Bay Municipal Utility District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, Santa Clara Valley Water District; *Colorado* – City of Aurora, City of Colorado Springs, Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; and *Washington* – Seattle Public Utilities.

The members of the WUWC generally support the CEQ's efforts to modernize federal agencies' National Environmental Quality Act (NEPA) analyses and to foster improved coordination among agencies and the public. The WUWC has consistently commented in favor of genuine NEPA reform that would reduce inefficiency and delays while providing increased certainty for WUWC members' vital water supply projects. *See, e.g.*, the WUWC comment letter on *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act* (January 27, 2012) (copy attached). Similarly, in California

the WUWC and its members have supported efforts to improve the efficiency and usefulness of California Environmental Quality Act (CEQA) reviews.

The WUWC's California members frequently must analyze the environmental effects of projects that trigger both NEPA and CEQA reviews. Our members are very familiar with the delays and inefficiencies that often arise in these processes, particularly where more than one federal agency must take action on a proposal. The WUWC strongly supports CEQ's and OPR's development of a handbook to help guide federal and state agencies through NEPA/CEQA reviews. We believe that some of the difficulties our members have faced in these processes result from agencies' lack of familiarity with existing law and best practices. As we have noted in the past, however, legislative and regulatory action – not guidance documents or handbooks – will be essential to consistent, rational and efficient environmental analyses by all of the agencies that must enforce these statutes.

Accordingly, some of our comments below are directed toward improving the Draft Handbook's characterizations of existing law and best practices. Other comments suggest legislative or regulatory changes that we believe would produce greater improvements than a handbook can accomplish.

#### **I. Participation by Non-lead Federal Action Agencies in the NEPA/CEQA Process**

The WUWC's members have experienced many delays and unnecessary difficulties in NEPA and NEPA/CEQA processes when – as is almost always the case – more than one federal agency must take action on a project. Typical problems include:

- Co-lead agencies that have inconsistent or competing NEPA regulations, or competing policy goals that confuse and slow down the process;
- Cooperating or commenting agencies that wait until late in the NEPA process to raise concerns or objections, resulting in lost time, inefficiency, and conflict;
- The failure of the lead federal agency to effectively coordinate with other federal agencies, which similarly leads to lost time, inefficiency and conflict, often near the very end of the NEPA process;
- The practice by some non-lead federal agencies of ignoring the lead agency's EIS or EIS/EIR for the whole of the project, and preparing their own environmental assessments for small aspects of the project (*e.g.*, a wetland fill or a utility right-of-way). This practice both wastes time and effort and introduces unnecessary legal risk into the NEPA process.

As we explained in our January 2012 comment letter, CEQ should address these problems through regulatory action. Agencies that hold veto power or must take action in order for a proposed activity to proceed should be required to raise any issues or potential objections early in the NEPA process as part of the scoping process. Furthermore, all agencies that are potentially involved in a federal action subject to NEPA should be required to participate in the process defined by the lead agency, and should adhere to play by the same rules and procedures and operate within the same timeline as the lead agency.

Until legislative or regulatory action is taken to enforce such common-sense rules under NEPA, the WUWC believes the Draft Handbook could be strengthened to encourage them. We strongly endorse the advice, at page 6 of the Draft Handbook, that “the Federal agencies should endeavor to have one lead for purposes of developing the environmental review with the CEQA co-lead.” In our opinion, having multiple federal lead agencies would not foster efficient completion of a joint NEPA/CEQA review. The handbook could, however, more strongly encourage federal agency coordination, particularly in its recommendations for MOUs. Whenever possible, programmatic MOUs shall be encouraged. We also believe that the efficiency of NEPA and CEQA would be enhanced by having single lead agencies on both the federal and state sides.

Section III of the Draft Handbook provides a suggested “MOU Framework” for federal and state lead agencies. It states: “The writing of an inter-agency MOU should take place through meaningful communication and collaboration between the agencies involved and should occur **before** starting to develop the NEPA/CEQA review planning and documentation.” Draft Handbook, p. 41 (emphasis original). The MOU Framework would be far more useful, and could help to address the federal agency coordination failures listed above, if it encouraged the federal and state lead agencies to include non-lead federal agencies in the NEPA/CEQA MOU.

All of the benefits of early, meaningful communication and collaboration between the federal and state lead agencies apply with equal or greater force to the non-lead federal action agencies. Whereas the MOU Framework currently advises only that the lead agencies identify other parties that must be consulted and consider “how to include other agencies that may become involved in review” (Draft Handbook, pp. 46, 47), the MOU Framework should encourage the federal and state lead agencies to bring other federal agencies to the table early, to plan their participation in the process, and include them as signatories to the MOU. Each federal agency has its own NEPA procedures (40 CFR 1507.3) that describe the agency’s internal review and approval process. Ideally, the MOU should lay out the procedures for the various agencies and describe how those will be integrated to ensure all agencies are moving forward together.

## **II. Role of Environmental Assessment/Initial Study Where EIS/EIR Will be Prepared**

At page 13, the Draft Handbook characterizes as typical a practice that, in the experience of the WUWC’s members, slows NEPA and CEQA compliance without providing benefits that would

justify that delay. The Draft Handbook correctly states: “If a project will clearly have one or more significant impacts, agencies can immediately proceed to preparing an EIS/EIR without first preparing an Environmental Assessment or an Initial Study (40 CFR § 1501.3(a); 14 CCR § 15063(a)).” The draft then continues, however: “Generally, agencies prepare a less detailed analysis (Initial Study or Environmental Assessment) to get a sense of the potential extent of any impacts and whether such impacts can be mitigated.” This sentence appears to endorse the practice of preparing an Environmental Assessment or Initial Study even where the lead agency already knows that an EIS or EIR will be needed. In the experience of our members, adding this layer of paperwork to the EIS/EIR process is almost always a waste of time and effort; it is more efficient to proceed directly to preparation of the EIS/EIR. We request that the quoted sentence either be deleted or be revised to begin, “Where it is not clear whether an EIS/EIR will be required, agencies prepare a less detailed analysis ....”

### **III. Purpose and Need and Project Objectives**

In its discussion of “purpose and need” under NEPA and “project objectives” under CEQA, the Draft Handbook implies that a proposed project’s purpose and need and project objectives are only those of the agencies that are considering project approvals. In some cases that is accurate, but in many cases the purposes, needs and objectives of a project are primarily those of an outside applicant, and the Draft Handbook should be revised accordingly.

### **IV. Effects of the Environment on the Project Under CEQA**

The Draft Handbook notes that CEQA Guidelines section 15126.2(a) – unlike NEPA and its regulations – indicates that impacts *of* the environment *on* a project must be considered. Draft Handbook, p. 30. The Draft Handbook also notes that the decision in *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455 (2011) questioned the validity of section 15126.2(a). Although the WUWC’s members carefully consider the potential effects of the surrounding environment on their projects as a matter of sound planning, we agree with the *Ballona Wetlands* court that CEQA concerns the effects of a project on the environment rather than vice versa. We also note that other courts have made the same fundamental point. See *Baird v. County of Contra Costa*, 32 Cal. App. 4th 1464, 1468 (1995); *City of Long Beach v. Los Angeles Unified School Dist.*, 176 Cal. App. 4th 889, 905 (2009); *South Orange County Wastewater Authority v. City of Dana Point*, 196 Cal. App. 4th 1604, 1614-1618 (2011).

The effect of expanding CEQA to encompass planning issues has been to increase the length, complexity and legal vulnerability of CEQA documents. As California attempts to modernize CEQA to reduce unnecessary delays, we hope that this fundamental principle from CEQA’s earliest days – that the statute addresses impacts *of* project *on* the environment – will continue to be reaffirmed. If that occurs, one potential and troublesome point of inconsistency between CEQA and NEPA practice will be removed.

## **V. Coordination of Disparate Environmental Impact Standards**

The Draft Handbook suggests that federal and state agencies can, and even should, import each other's unique analysis topics into their own analyses. Draft Handbook, p. 30. The practical difficulty with this approach is that once a non-CEQA topic is imported into a CEQA document, some litigants and courts will treat that topic as if it were required by CEQA. Accordingly, the WUWC requests that the following sentence be deleted from page 30 of the Draft Handbook: "Similarly, issues raised in a NEPA analysis of environmental justice would be appropriately addressed in the environmental setting and cumulative impacts analysis of a CEQA document." This statement is simply inaccurate under CEQA, which does not encompass socioeconomic effects of proposed projects. The Handbook's next sentence accurately describes the best practice: "If there is a particular issue area that a NEPA or CEQA agency does not typically analyze, that analysis can be labeled a NEPA-only or CEQA-only analysis."

## **VI. Recirculation and Supplementation Under CEQA**

The Draft Handbook's summaries of CEQA requirements for recirculation of draft EIRs and supplementation of previously certified EIRs are not precise and might confuse agencies that rely on them. At page 34, the Draft Handbook states: "Significant new information can mean *changes to the project*, a new significant environmental impact, a substantial increase in severity of an impact, or another feasible alternative that would reduce impacts and is considerably different from other alternatives (14 CCR § 15088.4(a))" (emphasis added). This text implies that changes to the project alone might be sufficient to trigger recirculation of an EIR. Therefore, the text could reinforce a common misconception that CEQA requires EIRs to be recirculated or supplemented if there are changes to the project.

To more accurately summarize the lengthy provisions of section 15088.5, we recommend the quoted sentence be revised to read: "Significant new information can mean information showing: a new significant environmental effect; a substantial increase in severity of an impact; a feasible alternative or mitigation measure which the project's proponents decline to adopt, but which would clearly lessen the project's significant environmental effects; or a draft EIR that was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded."

To be useful to the reader, the Draft Handbook's description of the circumstances triggering preparation of a subsequent or supplemental EIR should also be revised for accuracy. We suggest that the first sentence of the last full paragraph on page 34 be revised to read: "Following certification of an EIR, new information will only trigger a subsequent or supplemental EIR if the project requires further discretionary approval and that information reveals that the project will cause a new or substantially more severe impact *or that there are mitigation measures or alternatives which would substantially reduce one or more significant*

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*impacts, but which the project proponent declines to adopt (14 CCR § 15162)."* (Added text in italics.)

When the CEQA standards for recirculation and supplementation are accurately described, it becomes apparent that CEQA's standards are more dissimilar from NEPA's than the "Opportunities for Coordination" discussion at page 35 of the Draft Handbook suggests. We suggest that this difference be acknowledged, that the first three paragraphs of "Opportunities for Coordination" be deleted, and that the final paragraph be retained.

## **VII. NEPA Coordination Reform**

To truly coordinate NEPA and CEQA – and other states' environmental review laws – the NEPA regulations should be revised. Currently, a large project that requires only a narrow federal permit often triggers the preparation of a full EIS to address upland, indirect and cumulative impacts, even though the same impacts are also being fully addressed in a CEQA Environmental Impact Report for the whole of the action. This duplication of effort, sometimes required under existing law, is tremendously wasteful of time and resources. NEPA regulations should be reformed, consistent with some existing case law, to provide that if the whole of a proposed action is analyzed under a state environmental law such as CEQA, a federal agency considering a small aspect of that action should analyze only the effects of that aspect – not prepare a duplicative analysis of the effects of the project as a whole. Alternatively, the federal agency should be allowed to simply adopt the state environmental analysis as a way to satisfy NEPA, even if the state process does not completely match NEPA requirements.

Another opportunity for NEPA coordination reform is to create additional programs modeled on the surface transportation project delivery program. Under this program the U.S. Department of Transportation delegates responsibility for NEPA compliance to the state agency responsible for highway projects. 23 U.S.C. § 327. Caltrans has successfully handled NEPA compliance since 2007 and its MOU was recently renewed. Many other types of projects could benefit from similar programs.

Thank you for considering these comments. If you have any questions or require further assistance, please contact our counsel at Perkins Coie, Donald Baur, (202) 654-6234, [dbaur@perkinscoie.com](mailto:dbaur@perkinscoie.com) or Julie Jones, (415) 344-7108, [jjones@perkinscoie.com](mailto:jjones@perkinscoie.com).

Sincerely,



Hon. Nancy H. Sutley and Ken Alex  
April 19, 2013  
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David Modeer  
Chairman, Western Urban Water Coalition

Enclosure



January 27, 2012

**Filed electronically and via FedEx**

<http://www.regulations.gov>

Hon. Nancy H. Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, NW,  
Washington, DC 20503

**Re: Improving the Process for Preparing Efficient and Timely Environmental Reviews  
under the National Environmental Policy Act**

Dear Ms. Sutley:

This letter provides comments on behalf of the Western Urban Water Coalition (WUWC), regarding the proposed *Memorandum for Heads of Federal Departments and Agencies concerning Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*, 76 Fed. Reg. 77,492 (Dec. 7, 2011) (Proposed Memorandum).

The WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 13 metropolitan areas in five states. The membership of the WUWC includes the following urban water utilities: *Arizona* – Central Arizona Project, City of Phoenix; *California* – East Bay Municipal Utility District, Metropolitan Water District of Southern California, Los Angeles Department of Water and Power, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; *Colorado* – Aurora Water, Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; and *Washington* – Seattle Public Utilities.

The members of the WUWC generally support the Council on Environmental Quality's (CEQ) efforts to "modernize" federal agencies' National Environmental Policy Act (NEPA) analyses, and to foster improved coordination among agencies and the public. WUWC members have extensive experience with NEPA, and with the counterpart state laws. Because WUWC members are regularly involved in large-scale water supply projects that require federal permit or

funding approvals, they are frequently subject to NEPA. This experience gives the WUWC a broad perspective upon which to base these comments.

The WUWC has long supported the principles reflected in the Proposed Memorandum, and has submitted comments on prior proposals related to NEPA, including: the 2002 CEQ proposal to create a NEPA Task Force, the December 2005 House NEPA Task Force draft report, and the January 2008 Department of the Interior proposed NEPA regulations. In those letters, the WUWC specifically commented that the NEPA process should be predictable to permitted parties and the public, provide comprehensive analysis sufficient to satisfy numerous regulatory demands over a long period of time, and use efficient and cost-effective procedures.

As a preliminary issue, the WUWC fully embraces each of the six basic principles<sup>1</sup> identified in the Proposed Memorandum and supports any measures that CEQ might take to implement these principles in a meaningful and binding way.

While the Proposed Memorandum contains desirable goals to improve the decision-making process under NEPA, the advisory nature of the document will prevent it from bringing about the lasting change necessary to improve agency procedures. As guidance, the Proposed Memorandum does not impose actual requirements on federal agencies undertaking NEPA review. We recommend that CEQ develop meaningful ways to incorporate the six principles identified in the Proposed Memorandum into binding requirements. This could be accomplished through the amendment of the current CEQ NEPA regulations. Simply issuing yet another CEQ guidance memorandum will not achieve the desired result. It is now time to amend the CEQ NEPA regulations to include definitive time schedules, mandatory measures, and federal agency incentives to ensure that more efficient procedures can be enforced.

The WUWC also believes that, in addition to the six principles in the Proposed Memorandum, better coordination with federal agencies that have approval authority independent from that of the NEPA lead agency is necessary. In our experience, one major source of delay in project permitting is the failure of the lead federal agency to coordinate with other federal agencies, and with the practice of agencies that have independent authority to veto or condition proposed action to withhold NEPA participation or to assert objections late in the decision-making process.

The Proposed Memorandum addresses this concern but does not go far enough. For example, the Proposed Memorandum provides:

To increase efficiency, the lead agency can solicit cooperation at the earliest possible time from other agencies that have jurisdiction by law or special

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<sup>1</sup> The six principles outlined in CEQ's Proposed Memorandum are: 1) NEPA encourages simple, straightforward, and concise reviews and documentation that are proportionate to and effectively convey the relevant considerations in a timely manner to the public and decisionmakers while comprehensively addressing the issues presented; 2) NEPA should be integrated into project planning rather than be an after-the-fact add-on; 3) NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference; 4) Early and well-defined scoping can assist in focusing environmental reviews to appropriate issues that would be meaningful to a decision on the proposed action; 5) Agencies are encouraged to develop meaningful and expeditious timelines for environmental reviews; and 6) Agencies should respond to comments in proportion to the scope and scale of the environmental issues raised.

expertise on any environmental issue that should be considered. Cooperating agencies with jurisdiction by law or special expertise can work with the lead agency to ensure that, whenever possible, one NEPA review process informs all the decisions needed to determine whether and, if so, how a proposed action will proceed.

Proposed Memorandum, at 8. This principle should be achieved through regulation and include additional language to ensure compliance by agencies with independent authority.

For example, EPA holds potential veto power under section 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), and land management agencies such as the U.S. Forest Service hold the authority under section 4(e) of the Federal Power Act to condition licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. § 797(e). These agencies can often use, or threaten to use, their independent authority to delay, impede, or interfere with action agency decisions or to create ancillary disputes that undermine the otherwise clearly defined path to final action under NEPA.

CEQ should deal with this potential problem by requiring agencies that hold such authority to raise any issues or potential objections early in the NEPA process. They also should be required to set forth objections in a publicly accessible and fully transparent manner that will ensure that the public involvement purpose of NEPA is fulfilled and that new issues are not raised so late in the game that they jeopardize otherwise viable projects. All agencies that are potentially involved in any way in a federal action subject to NEPA should be made a part of the process defined by the lead agency and be expected to play by the same rules and procedures and operate within the same timeline, as described in the Proposed Memorandum.

Thank you for the opportunity to provide comments on the Proposed Memorandum as published in the December 7, 2011 Federal Register. If you have any questions regarding the comments in this letter, please contact me at (623) 869-2331, or our counsel, Guy R. Martin or Donald C. Baur of Perkins Coie, LLP at (202) 654-6234.

Sincerely,

A handwritten signature in cursive script that reads "David Modeer". There are some additional scribbles and initials above the name, possibly "ekr".

David Modeer  
Chair, Western Urban Water Coalition  
General Manager, Central Arizona Project