Before the Council on Environmental Quality

Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies

Principles and Requirements for Federal Investments in Water Resources; Final Draft Interagency Guidelines; Solicitation of Public Comment

Comments of the NATIONAL WATERWAYS CONFERENCE, Inc.

The National Waterways Conference, Inc. (NWC or Conference) submits these comments in response to the Final Principles and Requirements and the draft Interagency Guidelines and request for comments on the draft guidelines published in the Federal Register on March 27, 2013. 78 Fed. Reg. 18562. The date for filing comments has been extended to June 27, 2013.

Established in 1960, the Conference supports national policy and laws that recognize the vital importance of America’s water resources infrastructure to our nation’s well-being and quality of life. Supporting a sound balance between economic and human needs and environmental and ecological considerations, our mission is to effect common sense policies and programs, recognizing the public value of our nation’s water resources and their contribution to public safety, a competitive economy, national security, environmental quality and energy conservation. Conference membership is comprised of the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

Our water resources infrastructure provides life-saving flood control, needed water supplies, shore protection, water-based recreation, environmental restoration, and hydropower production, essential to our economic well-being. Moreover, waterways transportation is the safest, most energy-efficient and environmentally sound mode of transportation. With that in mind, Federal policies governing agencies’ involvement in water resources projects, programs, activities or related actions must establish a
clear, concise, and workable framework to guide the development and implementation of these critical projects, and provide a path to balanced solutions, clear and consistent guidance to planners, and replicable results that are understandable to all stakeholders. Unfortunately, the Final Principles and Requirements and the Draft Interagency Guidelines do not achieve these results.

I. Administrative Process

A. CEQ is subject to the Administrative Procedure Act in publishing the Final Principles and Requirements and the draft Interagency Guidelines.

The Executive Branch proceedings to implement Principles and Requirements and Interagency Guidelines applicable to the planning and development of water resources projects are rulemakings subject to the requirements of the Administrative Procedure Act, 5 U.S.C. § 552. Failure to comply with the requirements of that Act requires these actions to be invalidated and set aside.

Section 2031 of the Water Resources Development Act of 2007 (WRDA 2007), Pub. L. 110-114, 121 Stat. 1041, directed the Secretary of the Army to revise the 1983 Principles and Standards applicable to planning studies of water resource projects. In furtherance of that directive, the Secretary issued a “Request for suggestions and notice of public meeting,” on May 8, 2008. 73 Fed. Reg. 26086. That notice sought suggestions for revising the Principles and afforded the opportunity to appear at a public hearing. Thereafter, the Secretary issued proposed Principles and again sought public comment. 73 Fed. Reg. 52960 (Sept. 12, 2008).

Subsequently, the Council on Environmental Quality (CEQ) took over the proceeding, with the stated goal of expanding application of the Principles to water resources development programs and activities government-wide. More than a year later, CEQ issued a Notice and Request for Comments, published in the Federal Register on December 9, 2009. 74 Fed. Reg. 65102. Now, more than three years later, CEQ has simultaneously published the Final Principles and Requirements (P&R) and the Draft Interagency Guidelines, requesting comments on the latter. 78 Fed. Reg. 18562. (March 27, 2013).

CEQ states in the notice of issuance of the Final P&R that the P&R “were developed through a collaborative interagency process that promoted the open exchange of information and perspectives. The process has engaged the public formal public review and
workshops, and included an external peer review by the National Academies of Science as required by [WRDA 2007].” 78 Fed. Reg. 18562.

Regrettably, however, neither the Final P&R nor the draft Interagency Guidelines provide any discussion of the extensive public comments submitted thus far in this process, nor is there any discussion of the extensive analysis and critique provided by the National Academies’ Water Science and Technology Board. As a consequence, the public, including non-Federal sponsors of water projects who have significant financial investments at stake, have not been provided with the benefit of CEQ’s reasoning, and thus are significantly disadvantaged in deciphering the P&R and attempting to contribute to the draft Interagency Guidelines in a meaningful way.

Notwithstanding CEQ’s characterization of the P&R as merely policy, by their very nature, the P&R constitute rules because they impose new substantive requirements. They are thus subject to the notice and comment requirements of the APA. The APA defines a “rule” to be “the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy.” 5 U.S.C. § 551(4). CEQ also contends that the Interagency Guidelines document is “a statement of policy, is not a regulation, concerns only expectations for the internal management of the government, does not impose any legally binding requirements on federal agencies, and does not create any rights in third parties.” However, this characterization ignores the mandatory language throughout the document and disregards the legal obligations imposed on non-federal project sponsors in numerous laws, most notably the Water Resources Development Act of 1986. Like the EPA “guidance” on periodic monitoring at issue in Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir 2000), the Interagency Guidelines document “reads like a ukase. It commands, it requires, it orders, it dictates.” Id. at 1023. Therefore, the proceeding to implement the Interagency Guidelines must also be conducted according to the notice and comment requirements of the APA.

The Administration’s failure to comply with the requirements of the APA means that these actions are arbitrary and capricious under the APA. The APA, applicable to every federal government “agency,” defines that term as:

Each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include – (A) the Congress;
(B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.

5 U.S.C. §§ 551(1), 701(b)(1). As a general principle, the President is not subject to the provisions of the APA out of respect for the separation of powers and the unique constitutional position of the President. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992). However, in circumstances like those present here, courts have treated the President and units within the Office of the President, including CEQ, as agencies for purposes of the APA and other related laws.

The U.S. Court of Appeals for the D.C. Circuit has ruled that the APA and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, confer agency status on “any administrative unit with the substantial independent authority in the exercise of specific function.” Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971). Relying on Soucie, the D.C. Circuit held in Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1262-63 (D.C. Cir. 1980), that CEQ is an “agency” for the purposes of the Government in the Sunshine Act and FOIA. Similarly, Meyer v. Bush, 981 F.2d 1288, 1292 (D.C. Cir. 1993), considered CEQ’s substantial independent authority based on the power emanating from several executive orders.

Also, in response to a petition requesting that CEQ amend its regulations to clarify that climate change analyses be included in environmental review documents, CEQ stated that it had "been asked to provide guidance on this subject informally by Federal agencies and formally by a petition under the Administrative Procedure Act." White House Council on Environmental Quality Announces Steps to Modernize and Reinvigorate the National Environmental Policy Act, Feb. 18, 2010, available at http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/February_18_2010. Notably, CEQ did not indicate in any way that it disagreed with the position advanced to it that it was subject to the APA.

Given the substantial independent authority CEQ is exercising in this proceeding, including the authority to take final and binding action affecting the rights of individuals, CEQ is not serving simply as an advisor to the President, but is acting as an “agency” pursuant to the APA. As such, CEQ is fully subject to the APA, including the APA’s requirement that agency action be set
aside if the agency fails to consider and address significant comments.

The agency’s failure to address the substantive issues and concerns raised both in comments in response to CEQ’s Notice and Request for Comments published in the Federal Register on December 9, 2009, 74 Fed. Reg. 65102, and the report issued by the Water Science and Technology Board, renders its action “arbitrary and capricious” under standards set out by the U.S. Supreme Court and the D.C. Circuit. Agency action is arbitrary and capricious if it impermissibly “failed to consider an important aspect of the problem,” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983), and did not “respond meaningfully to objections raised by a party.” PSEG Energy Resources & Trade LLC v. FERC, 665 F.3d 203, 208 (D.C. Cir. 2011)(citation omitted). “Unless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.” Canadian Ass’n of Petroleum Producers v. FERC, 254 F.3d 289, 299 (D.C. Cir. 2001). See e.g., PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005); Canadian Ass’n, , 254 F.3d at 299; Tesoro Alaska Petroleum Co. v. FERC, 234 F.3d 1286, 1294 (D.C. Cir. 2000); NorAm Gas Transmission Co. v. FERC, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

B. CEQ’s role in publication of the Principles and Requirements and the draft Interagency Guidelines does not comply with the Congressional mandate in Section 2031 of WRDA 2007.

As noted above, in 2008 the Secretary of the Army took action in response to the Congressional mandate in Section 2031 of WRDA 2007 to revise the 1983 Principles and Standards. Subsequently, CEQ took over the proceeding, expanding application of the revised Principles to water resources development programs and activities government-wide.

CEQ was not the agency directed by Congress to revise the Principles and Standards, and hence has no authority to carry out that mandate. It is axiomatic that an agency can only exercise the power delegated to it by Congress. See American Library Ass’n v. F.C.C., 406 F.3d 689, 698 (D.C. Cir. 2005) (a federal agency “literally has no power to act . . . unless and until Congress confers power upon it’”) (quoting La. Pub. Serv. Comm’n v. F.C.C., 476 U.S. 355, 374 (1986)). This principle has been applied to invalidate legislative rules issued by agencies not delegated the authority to do so. See Bowen v. Georgetown Univ. Hosp., 488 U.S.
204, 208 (1988)(“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”). This principle applies to the Principles and Requirements and the Interagency Guidelines at issue here.

Although Section 2031 directs the Secretary of the Army to consult with other specified agencies, including CEQ, in revising the Principles and Guidelines, CEQ’s right to be consulted does not give it the power to issue the revised Principles and Guidelines. See, e.g., Bayou Lawn & Landscape Services v. Solis, No. 12-12462, slip op at 5, 7 (11th Cir. April 1, 2013) (affirming grant of a preliminary injunction to prevent rules from taking effect when they were issued by an agency other than the one authorized by Congress to issue them).

In Bayou Lawn, the Department of Labor (DOL) asserted that as a result of permission granted to the Department of Homeland Security (DHS) to consult with DOL in issuing rules governing the employment of temporary, non-agricultural foreign workers, DOL itself was empowered to issue the regulations. Dismissing this argument, the court stated:

"Although there is no grant of rulemaking authority to DOL in this statutory section, DOL asserts that as the result of the permission it grants to DHS to consult with it, DOL "has authority to issue legislative rules to structure its consultation with DHS." The end result, in DOL’s view, is that it is empowered to engage in rulemaking, even without the DHS.

“We reject this interpretation of ‘consultation.’ Under this theory of consultation, any federal employee with whom the Secretary of DHS deigns to consult would then have the ‘authority to issue legislative rules to structure [his] consultation with DHS.’ This is an absurd reading of the statute and we decline to adopt it.

* * *

"DOL next argues that the ‘text, structure and object’ of the [the Immigration and Nationality Act of 1952] evidence a congressional intent that DOL should exercise rulemaking authority over the H-2B program. This would be a more appealing argument if Congress had not expressly delegated that authority to a different agency. Even if it were not axiomatic that an agency’s power to promulgate legislative
regulations is limited to the authority delegate[d] to it 
by Congress, see Bowen v. Georgetown Univ. Hosp., 488 U.S. 
204, 208 (1988), we would be hard-pressed to locate that 
power in one agency where it had been specifically and 
expressly delegated by Congress to a different agency."

As in Bayou Lawn, here Section 2031 expressly directs 
another agency, the Secretary of the Army in this case, to issue 
revisions to the Principles and Guidelines. Nothing in WRDA 
2007 suggests that Congress intended CEQ to exercise this 
authority. Congress is well aware of the long history and 
experience of the Army Corps of Engineers in managing the 
nation’s water resources pursuant to numerous Congressional 
enactments and meant to give that authority to the Secretary of 
the Army, and not to CEQ.

C. CEQ failed to comply with the Government in the 
Sunshine Act when it convened the Water Resources 
Council in an attempt to issue the Final Principles 
and Requirements.

Equally concerning is CEQ’s failure to comply with the 
public notice requirements of the Government in the Sunshine Act 
in its issuance of the Final P&R. CEQ convened the Water 
Resources Council for the sole purpose of issuing the Final P&R. 
Although conversations with CEQ staff confirmed this, no public 
notice of this meeting has ever been provided. Further, 
requests for any information have been rejected. Moreover, CEQ 
staff advised that any information about what should have been a 
public meeting must be obtained through a Freedom of Information 
Act (FOIA) request. Even if CEQ were to contend that the 
meeting deliberations could somehow be closed in accordance with 
an exemption in the Sunshine Act, the notice of the existence of 
the meeting itself must be public. Given this dearth of 
information, it is impossible to determine whether the WRC was 
properly convened or whether it followed any sort of rules or 
procedures in issuing the Final P&R. This astonishing lack of 
transparency undermines the stability of the planning process 
and is patently unfair to non-federal sponsors and the public 
alike.
II. Planning Principles

Section 2031 of WRDA 2007 states that:

It is the policy of the United States that all water resources projects should reflect national priorities, encourage economic development, and protect the environment by—1) seeking to maximize sustainable economic development; 2) seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and 3) protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.

42 U.S.C. §§ 1962-63. Section 2031 further provides that any revisions to the principles and guidelines address not only economic principles, but also public safety, the value of projects to low income communities, the interaction of a project with other water resources projects or programs within a region or watershed, the use of contemporary water resources, and evaluation methods that ensure water resources projects are justified by public benefits. Thus, WRDA 2007 contemplates water resources planning founded upon multiple national objectives: economic, environmental, and social well-being, including a public safety objective. Additionally, WRDA 2007 emphasizes a watershed approach to planning, recognizing the importance of collaborative planning and implementation.

Water resources planning ought to be governed by a well-defined set of over-arching principles which set forth the national interest in water resources planning decisions. While WRDA 2007 envisions multiple national objectives, it does not mandate that every project satisfy multiple objectives. CEQ goes well beyond what WRDA 2007 intends by requiring that every study include the multiple objectives of economic, environmental, and social benefits. This requirement will lead to including features in projects where they have lesser returns than in other projects, programs or plans. No doubt, there may be opportunities where multiple benefits – and a willing non-federal partner – will lead to a higher return on investment. However, imposing that requirement is impractical, does not reflect the reality of project development, and would result in a waste of scarce resources.

Requiring multi-objective projects will lead to a system of centralized planning and decision-making, contrary to the significant reforms and cost-sharing requirements introduced in
WRDA 1986. Non-federal sponsors, as well as federal planners, have a clear and important role in the decision process and must have a complete understanding of the process as they decide whether to expend financial resources for feasibility studies. The framework established in the Final P&R and the draft Interagency Guidelines places much less emphasis on the important partnership between the district engineer and the non-federal sponsor working collaboratively to develop a solution to a complex problem. As a consequence, less consideration is placed on the local and regional needs, creating more uncertainty and less predictability.

III. Draft Interagency Guidelines

The report issued by the National Academies’ Water Science and Technology Board criticized CEQ’s 2009 draft for using confusing and imprecise terminology, and using it interchangeably and in confusing ways. Unfortunately, the Final P&R and the draft Interagency Guidelines do not resolve these substantive concerns. Regrettably, this will lead to operational confusion on the part of planning practitioners. Study results will likely be unpredictable, not replicable, and unacceptably subjective. Interested parties—importantly including cost-sharing sponsors—won't be able to understand and support resulting decisions and recommendations. This critical failure does not offer a path to balanced solutions, clear and consistent guidance to planners, and replicable results that are understandable to all stakeholders.

The draft Guidelines, following the Final P&R, elevate ecosystem and social concerns over net national economic development benefits, contrary to the directive in WRDA 2007 to balance these objectives. Additionally, the Guidelines require the use of monetary and non-monetary measures, and consideration of quantified and unquantified costs. The utilization of such subjective standards and criteria will inject still more uncertainty into the process, exacerbating tensions between the economy and infrastructure on the one hand and ecology and environmental considerations on the other.

CEQ’s ill-advised expansion of the P&R to other agencies and activities, in addition to being beyond the scope of WRDA 2007, will add costs and delays to certain projects and interfere with the administration of other programs. For instance, in the case of federal hydropower, requiring full-blown studies—the cost of which is borne and repaid by hydropower customers—will produce very few benefits but result in increased costs and delay.
Imposing increased federal review of state-managed programs, including the state resolving funds, will not lead to greater efficiency, but will instead simply usurp what is intended to be state authority.

The draft Guidelines are written in such a way as to leave unacceptable discretion to Washington-level federal decision-makers, which, in turn, doesn’t allow any sort of repeatability in final recommendations coming from the planning process. As a result, local sponsors will have no idea whether their inputs to studies will be given weight in final planning decisions because, simply put, there will be few (if any) objective criteria to use as a gauge. Local sponsors can work with their local district engineers, jointly arrive at a project formulation, only to see that formulation rejected or substantially changed at the Washington level because, in someone’s judgment, the plan as formulated is unacceptable. That sort of unpredictability and capriciousness simply cannot be allowed.

IV. Conclusion

The President has repeatedly linked our nation’s future well-being to infrastructure and the competiveness of our great workforce in the global economy; water resources development is a critical component in realizing this vision. Executive Order 13563, Improving Regulation and Regulatory Review, emphasizes the parity of our national objectives for public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. In addition, the President has pledged transparency and a more open government, as articulated in the Open Government Partnership National Action Plan. A review of this plan easily identifies where CEQ has fallen short of this pledge. www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf.

Recognizing the critical role of our water resources infrastructure to a robust economy, job creation and environmental well-being, it is imperative that the Principles and Requirements, and Interagency Guidelines establish a clear, concise, and workable framework to guide the development of these critical projects. The Final P&R and the draft Interagency Guidelines miss the mark. The Administration must set aside these actions and take steps to ensure that the Principles and Guidelines are developed in
accordance with the directive in WRDA 2007 in an open and fully transparent manner.

Respectfully submitted,

Amy W. Larson, Esq.
President
National Waterways Conference, Inc.
1100 North Glebe Road
Suite 1010
Arlington, VA  22201
703-224-8007
Amy@waterways.org