August 20, 2018

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

Re: Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act  
Docket No. CEQ-2018-0001

Dear Mr. Boling:

The National Waterways Conference (NWC) submits these comments in response to the Council on Environmental Quality’s (CEQ) request for comment regarding CEQ’s regulations implementing the National Environmental Policy Act (NEPA). 83 Fed. Reg. 28,591 (June 20, 2018); 83 Fed. Reg. 32,071 (July 11, 2018). We appreciate this opportunity to share our views.

About NWC

NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation’s water resources infrastructure. 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 diverse and includes the full spectrum of water resource stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Some of our members are public entities, some are private corporations, and some are individuals.

1. We Support CEQ’s Efforts and Specifically Support Improving Efficiencies in the NEPA Process.

In the experience of our members, the NEPA process for actions that relate to water resource projects can be lengthy and expensive. Two of the central purposes of NEPA are to improve federal decision-making and public participation. Ironically, however, a NEPA process that is too intensive can
unnecessarily complicate decisions and frustrate public participation. Too often the process takes too long and applies expansive analysis to issues that are too far removed from the original purpose of the proposal. A lengthy and complex NEPA process can actually inhibit decision-making by forcing consideration of issues that are irrelevant or beyond the agency’s authority or ability to affect. It also can lead to documentation that is too lengthy and technical for the public to digest within the limited periods allowed for review and comment.

In response to these considerations, we specifically support:

- strengthening the authority of the lead agency to manage the NEPA process, including authority to set and enforce reasonable deadlines and timelines for other participating agencies (Questions 1 and 3);
- clarifying existing regulations to facilitate reliance on existing studies and documentation prepared by other federal, state, tribal, and local agencies, as long as any previous work is reasonably thorough, rigorous, and timely (Question 2); and
- revisiting and emphasizing existing provisions limiting page numbers (§ 1502.7), to encourage studies of an appropriate and manageable length and complexity (Question 4).

2. **CEQ Should Revise Definitions of Key Terms to Ensure Appropriate Focus on Federal Agencies’ Authority and Ability.**

NEPA requires federal agencies to consider the consequences of the proposed action and reasonable alternatives to the proposal. Too often, however, agencies and the courts have required consideration of issues that are too far removed, in that they are not caused by or even related to the proposal, or they are beyond the agency’s statutory authority or ability to influence.

In the area of water resources, the NEPA process often results in a tangled and confusing discussion of the environmental baseline. A federal agency may consider changes to the operation of its own dikes or dam, or a private permittee may seek federal approval to continue operating an existing facility. In such an instance, NEPA requires consideration of how any continued or changed operations may affect fish, water quality, and other factors, compared to the status quo. The agency must also identify a reasonable range of alternatives to the proposed action and the environmental consequences of those alternatives. However, in general, the agency or permittee should not be required to devote endless resources and analysis to reconstruct and consider the impacts that resulted from the original construction of a dam decades ago. A proposed action is necessarily forward-looking, and those impacts are in the past. The only relevant question when attempting to reach a decision for a proposed action is how environmental values
are affected by the proposal, compared to current conditions. Consideration of preconstruction conditions does not add substantially to the question before the agency, which is how the proposed action will affect the environment going forward. To be sure, federal agencies also have an obligation to inform the public of impacts that may result from proposed actions before committing to a particular decision. Any benefit to the public is nullified if the NEPA process is not conducted in a timely manner.

With that in mind, we urge CEQ to consider review and revision of the following terminology (Question 7):

- **Cumulative impact** (§ 1508.7): The current definition refers to “the incremental effect of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions” (emphasis added). The “action” referenced here is the proposed action subject to the NEPA process. This definition means the agency is not entitled to ignore or minimize the effects of the action simply because the impact is significant only when added to some other set of conditions beyond the agency’s control. This is not, however, an invitation—much less a requirement—to exhaustively catalogue every past action and impact that ever occurred in relation to a project. Historic conditions require consideration only to the extent they are necessary to fully understand the effects of the action compared to current conditions and operating parameters. If the NEPA documentation develops a baseline focused on current conditions, and includes a full and robust consideration of the impacts of the proposal in light of the baseline, as well as a reasonable range of alternatives, that is what NEPA is designed and intended to accomplish.\(^1\) CEQ’s regulations should clearly signal to agencies and the

---

\(^1\) For comparison, we refer CEQ to a definition of “environmental baseline” proposed by the Fish and Wildlife Service and the National Marine Fisheries Service for purposes of consultations under the Endangered Species Act:

*Environmental baseline* includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

83 Fed. Reg. 35,178, 35,191 (July 25, 2018). This language is drawn from an existing definition for “effects of the action,” see 50 C.F.R. § 402.02, and the Services have requested comments on other proposed language to clarify the baseline concept further. 83 Fed. Reg. at 35,184. In this context, the Services also explained that determinations as to the environmental impacts of a proposed action “are not determinations made about the environmental baseline or about the pre-action condition of the species.” *Id.* at 35,182.
courts that such a baseline is sufficient. An academic review of historic actions and impacts may be interesting, but it is not necessary except to the extent needed to measure the impacts of the proposed action and reasonable alternatives. Information not needed for that purpose does nothing to inform the agency’s decision-making and thus serves no purpose.²

- **Effects** (§ 1508.8): The definition of “effects” refers to “indirect effects,” meaning those “caused by the action and are later in time or farther in distance, but still reasonably foreseeable.” The definition offers the examples of “induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” Thus, the agency cannot ignore the consequences of its actions simply because they are somewhat removed in time or farther away. However, this is not an open-ended mandate to speculate or draw inferences beyond a reasonable connection.

- **Scope** (§ 1508.25): A clear lesson of the Supreme Court’s decision in *Department of Transportation v. Public Citizen* is that it is important for the agency to understand the limits of its statutory authority. The specific holding of that case was that any agency need not consider the effects of actions beyond the agency’s ability to effectuate for purposes of determining whether the proposal amounts to a “major Federal action.”³

We urge CEQ to integrate a similar concept into the determination of the scope of a proposed action. Specifically, the agency should not be required to consider the effects of courses of action that are beyond the agency’s authority to implement or compel. Similarly, where the proposal involves a nonfederal party’s application for a permit or license, the agency should defer substantially to the applicant’s determination of the purpose, scope and scale of the proposal. The agency should not redefine the scope of the proposal over the applicant’s objections into something the applicant cannot or will not implement.

---


³ Id. at 2217.
Thank you for this opportunity to share our views. We look forward to CEQ’s next steps in its consideration of its NEPA regulations. In the meantime, please feel free to contact me if I may provide additional information.

Respectfully submitted,

Amy W. Larson, Esq.
President