



February 6, 2006

NEPA Draft Report Comments  
c/o NEPA Task Force Committee on Resources  
1324 Longworth House Office Building  
Washington, D.C. 20032

**Re: WUWC's Comments on Draft Report on NEPA**

Dear Sir/Madam:

The Western Urban Water Coalition (WUWC) submits these comments in response to the request of the House Task Force on Updating NEPA for responses to its draft report of December 21, 2005. NEPA reform is an issue of significant interest to the WUWC, and we are pleased to submit these comments.

The WUWC consists of the largest urban water utilities in the West, serving over 30 million consumers in 16 metropolitan areas in seven states. The WUWC represents the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix, City of Tucson; California – East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado – Denver Water Department, City of Aurora; Nevada – Las Vegas Valley Water District, Truckee Meadows Water Authority, Southern Nevada Water Authority; Oregon – Portland Water Bureau; and Washington – City of Seattle.

The members of WUWC generally support efforts to "modernize" implementation of NEPA and foster improved coordination among agencies and the public. WUWC members frequently are involved in large-scale water supply projects that are subject to NEPA. This experience gives the WUWC a wealth of experience upon which to base these comments. We have participated extensively in the administrative reform initiative conducted in recent years by the Council on Environmental Quality (CEQ), and the comments set forth in this letter are consistent with our recommendations in that review. As discussed in greater detail below we do not generally hold that NEPA requires broad legislative reform. Indeed, sweeping amendments could be counterproductive by creating new litigation opportunities and undermining the

sufficiency of environmental review documents. The WUWC favors more targeted reform actions, many of which can be undertaken administratively.

The WUWC believes the following fundamental principles should guide NEPA reform:

**Predictability:** Water supply utilities are involved in major projects that entail long-term planning and therefore need certainty regarding costs and regulatory demands. Needing to revisit previously made decisions is very difficult in this context. Thus, the WUWC favors the use of comprehensive NEPA analyses that will serve as the basis for long-term planning. We need procedures that provide for major new developments and continuing agency involvement that establishes decision-making duties on an ongoing basis.

**Comprehensive Analysis:** Along the same lines, WUWC members favor coordinated NEPA processes that allow all requisite federal and state actions to be covered in a single review. The NEPA guidance should put a premium on comprehensive review procedures that, in a single procedure, involve all required agencies in the most efficient manner possible. We need guidance that improves coordination between state, federal and local agencies and Indian tribes.

**Cost Efficiency:** The NEPA process itself can be very expensive to complete. In addition, delays in decision-making can greatly add to project costs. NEPA and its implementing guidance must insure timely and cost-effective review, and clear, recommended schedules for completion of various NEPA tasks. This can be done through guidance that specifies, among other issues, how interagency teams will function and by establishing recommended timeframes; how to "tier off" of previous NEPA compliance<sup>1</sup>; how to incorporate applicants into the process; and how to ensure that other procedures that cover the same action (e.g., consolidation under the Endangered Species Act, the Fish and Wildlife Coordination Act and other procedural laws) are coordinated with the NEPA review.

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<sup>1</sup> "Tiering" is recognized in CEQ guidance as a mechanism to improve efficiency by incorporating the analyses from previous NEPA documents into the analysis for subsequent federal actions subject to NEPA.

Consistent with these general principles, the WUWC has several specific recommendations concerning the draft report.

1. **Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents** – The NEPA Task Force is recommending that the timeline to complete an EA not exceed nine months and an EIS should not exceed 18 months. CEQ may extend the time of completion by three months for an EA or six months for an EIS, if a written determination approving such an extension is issued. While the WUWC is concerned about delays in the NEPA process, we do not believe that mandatory deadlines are the solution. Current timelines in NEPA are not conformed to, and it would be difficult to conform to the even shorter timelines proposed in the report. Indeed, some of the other recommendations in the report add extra requirements to the NEPA process, which would make it even more difficult to conform to these timelines. These deadlines also would create an additional source of litigation. The failure to meet deadlines has been a major source of litigation under other laws, such as the Endangered Species Act, and those lawsuits have actually increased delay and cost. On balance, we do not believe that deadlines for the overall NEPA review of a particular action are the best solution. Instead, other reform measures that improve the efficiency of the process are desirable. These other reforms would include: more specific administrative deadlines; better use of pre-existing NEPA analyses and reports; reliance of programmatic analyses for large-scale projects that can be used as the basis for streamlined NEPA reviews on subsequent actions; improved agency staffing and resources to facilitate completion of NEPA work on a timely basis; better coordination with related reviews under other federal and state laws; and improved procedures for efficiently soliciting and responding to public comments. Many of these reforms can be achieved administratively by the federal action agencies and CEQ, and the Task Force could constructively assist in such actions without a major rewrite of the law itself.

2. **Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7** – The NEPA Task Force has recommended that EIS documents be normally less than 150 pages and not exceed 300 pages. It is unclear whether this includes appendices or not. Either way, this arbitrary limit could result in substandard documents and lawsuits. Many federal actions require more detailed analysis than would be possible within these page limits. Forcing them to conform with these limitations could result in the omission of important information and analysis, which would leave the EIS vulnerable to legal challenge and undermine the value of the document to decision-makers. It also can be more expensive and

burdensome to try and write EIS's that meet specified page limits. On balance, this recommendation could create more problems than it solves.

3. **Recommendation 3.1: Amend NEPA to grant tribal, state, and local stakeholders cooperating agency status** – Under this recommendation, state and tribal governments must be granted cooperating agency status if they request it, unless there is clear and convincing evidence that the request should be denied. The recommendation should be clear that any party requesting to be a cooperating agency must be able to demonstrate that it would bring relevant expertise or information to the NEPA process. Unless such a showing can be made, cooperating agency status should be denied. Granting cooperating agency status to all state, local and tribal governments that request it would significantly slow down the NEPA process and would be in conflict with recommendation 1.2.

4. **Recommendation 4.1: Amend NEPA to create a citizen suit provision** – The NEPA Task Force recommends that lawsuit settlements must include the businesses and individuals to be affected by the decision. Many EIS projects are large-scale, and it would be virtually impossible to include all businesses and individuals in a lawsuit settlement for a complex action. This recommendation should be revised to limit the parties included within a lawsuit settlement discussion to the project applicant, rather than all potentially affected parties.

5. **Recommendation 4.2: Amend NEPA to add a requirement that agencies "preclear" projects** – The suggested title for this amendment is not accurate, as there is no discussion about "preclearing" projects. The text of the recommendation states that CEQ should be responsible for interpreting NEPA litigation. If litigation results in a procedural change to NEPA, CEQ would be responsible for providing the interpretation of that judicial decision and its applicability. This recommendation does not give any timeline for when CEQ would provide this information. This could cause a problem if CEQ takes too long to interpret a decision, potentially resulting in project delays. In addition, CEQ is a small, overworked organization, and it lacks the staff capability and expertise to assume this very significant responsibility. The WUWC believes that CEQ should be given flexibility in deciding which decisions to interpret and what schedule to follow for doing so. In addition, CEQ must be provided with sufficient resources for its duties.

6. **Recommendation 5.1: Consideration of alternatives** – The detailed specific studies set forth in the draft recommendation which would be required for each

alternative considered would put a costly and excessive burden on federal agencies and applicants seeking agency approval. This requirement would conflict with recommendation 1.2 to accomplish environmental reviews more quickly by adding significant tasks to the NEPA process. This requirement also could lead to additional litigation by creating a new target for lawsuits over the sufficiency of these studies and the failure to prepare them. This could lead to more litigation, not less. As a result, the WUWC does not support this recommendation.

**7. Recommendation 5.2: Clarification that alternative analysis must include environmental impact of taking no action** – This provision recommends that CEQ clarify NEPA's "no action" alternative in a manner such that "[a]n agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision." This approach is undesirable because it puts a limitation on the agency's permitting decisions that currently does not exist under NEPA. It is the permitting statute for the underlying agency action (for example 404(b)(1) of the Clean Water Act), not NEPA that should be what the agency makes its permitting/licensing decision on. The WUWC does not favor adding a limitation to the agency's decision-making under NEPA. An EIS is intended to be an information document by which the agency considers environmental impacts; NEPA is not a substantive decision-making law, and this recommendation could lead to that result.

**8. Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory** – Under the recommendation, CEQ would require agencies to make mitigation a mandatory component of the Record of Decision and provide sufficient resources to implement to mitigation. The WUWC is concerned that such a requirement would add an undesirable extra layer of regulation that may make it difficult to renegotiate terms of the mitigation, if changes are required. Adding a mandatory mitigation component to the NEPA process creates yet another litigation target, and also takes away desired flexibility from the resulting agency action. It is often necessary to retool mitigation measures through adaptive management or other mechanisms. The WUWC therefore recommends that the manner by which mitigation is handled should be addressed on a case-by-case basis without rigid legal requirements.

**9. Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders** – This recommendation would require agencies to have formal consultations with interested parties throughout the

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NEPA process. Assuming this is above and beyond the current requirements for public meetings, such a recommendation places an additional burden on the process that may conflict with recommendation 1.2 above for more streamlined procedures. The WUWC favors public involvement and transparency in decision-making, but this recommendation appears to add process without a clear purpose. The existing public involvement procedures of NEPA are adequate in our experience, and we do not see the need for additional consultation.

In conclusion, the WUWC commends the Task Force for conducting this review. A considerable amount of useful information and a number of helpful reform ideas are contained in the report. As discussed in this letter, the WUWC recommends carefully targeted reform primarily through priority administrative action. Legislative reform, if undertaken at all should be carefully and narrowly focused as discussed in this letter.

We would be pleased to discuss further our views with the Task Force and its members. Please feel free to contact me at 202-434-1650 or Don Baur at 202-434-1621 to arrange such a discussion.

Thank you for this opportunity to comment.

Very truly yours,



Guy R. Martin

GRM:dml