Family Farm ALLIANCE SM

P.O. Box 216 Klamath Falls, Oregon 97601

Protecting Water for Western Irrigated Agriculture

August 20, 2018

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 NEPA

Dear Mr. Boling;

On behalf of the Family Farm Alliance (Alliance), I thank you for the opportunity to comment on the Council on Environmental Quality's (CEQ) effort to update the regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA). We appreciate your proactive efforts to review and find ways of improving implementation of NEPA.

Family Farm Alliance Background

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. The Alliance believes that without new sources of water, increasing urban and environmental demands in a changing climate will deplete existing agricultural supplies and seriously threaten the future of Western irrigated agriculture. The often slow and cumbersome federal regulatory process is a major obstacle to realization of projects and actions that could enhance Western water supplies. NEPA implementation, in particular, can have a direct bearing on the success or failure of critical water supply enhancement projects. Further, our members include many Western water managers, who often use NEPA mechanisms like Categorical Exclusions (CEs) and Findings of No Significant Impact (FONSI) in conjunction with annual operations and maintenance activities on ditches or major rehabilitation and repair projects on existing dams.

Past Alliance Efforts to Engage in Efforts to Modernize NEPA

Over the past 15 years, the Alliance has engaged in several forums with the intent of providing

constructive recommendations to streamline federal environmental laws – most of them signed into law over 40 years ago.

1. House of Representatives NEPA Task Force

In 2005, we surveyed irrigators and water managers throughout the West and asked them to identify the regulatory impediments they most frequently encounter as they seek to construct projects that enhance water supplies. NEPA "horror" stories were abundant, and some of those impediments related to NEPA implementation will be described later in this letter. Later that year, Alliance representatives participated in hearings conducted by the Congressionally-directed NEPA Task Force. We used that forum to provide recommendations to streamline NEPA regulations as they relate to new water supply and conservation projects.

We worked closely with Congress as the NEPA Task Force was developed, and generally supported its findings and recommendations. In assessing the Task Force report, we compared it to the problems identified by the Alliance's survey and to recommendations we presented to the Task Force. Of course, our focus was more specifically directed at how the Task Force recommendations would contribute to a more streamlined regulatory process for water supply infrastructure projects. The federal NEPA examination culminated in 2007, when land management agencies adopted rules that clarified existing NEPA procedures and added new procedures to assure inclusion of modest NEPA-related requirements instituted in the Energy Policy Act of 2005.

2. Obama Administration CEQ NEPA Guidance

In August 2011, President Obama called for further steps to enhance the efficient and effective permitting and environmental review of infrastructure development "through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes." The December 7, 2012 guidance issued by CEQ intended to set forth straightforward ways by which the CEQ Regulations, properly understood and applied, support these strategies.

The draft guidance outlined principles for agencies to follow when performing NEPA environmental reviews. Importantly, as noted in the draft guidance, the principles simply provided CEQ's interpretation of existing regulations promulgated under NEPA, and did not change agencies' obligations with regard to NEPA and the CEQ Regulations. We developed multiple comment letters for CEQ during this process and could not argue with the overall philosophy embedded in these principles. However, at that time, it was difficult to see how the proposed guidance would actually change the status quo. There appeared to be nothing in the guidance that would likely have any impact on how agencies approach their NEPA responsibilities.

Response to June 2018 CEQ Questions

CEQ has requested comments on specific aspects of these regulations, and has requested that commenters include question numbers noted in its June 20, 2018 Federal Register notice when providing responses. This letter has been prepared to address your request, and where possible, we have provided specific recommendations on additions, deletions, and modifications to the text of CEQ's NEPA regulations and their justifications.

NEPA Process

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

Anything that can be done to streamline the overall permitting process (NEPA, Endangered Species Act -ESA, Clean Water Act, etc.) should be encouraged. For example, U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries are not compelled to consult with other agencies in a timely fashion, and frequently do not begin work on ESA biological opinions until after the NEPA process has been completed. In order to reap the maximum benefit of lead agencies, their authorities should be applied "horizontally" to cover all cases. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions.

As a first step, CEQ should conduct an update study that: a) Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and b) determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication. Other specific recommendations:

- Create a "NEPA Ombudsman" within the CEQ. This recommendation would direct the CEQ to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process.

- Add mandatory timelines for the completion of NEPA documents and hold the lead agency and cooperating agencies responsible for meeting those timelines with active CEQ coordination across agencies.

- Add a requirement that agencies "pre-clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. (The Family Farm Alliance notes that this is the basic function of the Categorical Exclusion that is almost never used because of the test of "significant impact".)

- Study NEPA's interaction with state "mini-NEPAs" and similar laws.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions

conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

NEPA –like so many federal laws and regulations – can be applied to any situation in a manner that is largely dependent on the demeanor of the agency staff that has jurisdiction in the manner. A consistent problem noted by several Western water users who have worked in NEPA processes are decisions made by the lead agency staff, who, due to perceived bias or lack of ability to adequately administer NEPA, routinely and habitually instigate "pre-decisional" actions. For example, during the scoping phase of a coal bed methane project in Wyoming, local project proponents voiced their expectations that a comprehensive water management plan, including the treatment and use of produced waters for beneficial use in agriculture, would be analyzed and included in the NEPA documentation. Instead, the lead federal agency - with no public disclosure or participation by cooperating agencies - internally decided on one course of action and required the methane production companies to re-inject all the produced water. This pre-decisional action by the federal agency was seen by local irrigators as a gross violation of NEPA.

A question comes to mind when problem-solving in this NEPA "streamlining" realm, coupled with reviewing the existing Regs (40 CFR 1500-1508). Is this a people or policy issue? Lead agency staff availability and level of expertise has proven to become an obstacle, in terms of timing, cost, and getting something accomplished. Our members have noted that federal regulators take a long time making decisions on projects, and at times they seem unable to even make decisions. CEQ should: 1) Issue directives to control and reduce NEPA related costs; and 2) Conduct a study that details the amount and experience of NEPA staff at key Federal agencies; and 3) Strive to create unambiguous criteria for the use of Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs). These criteria, once clarified, would encourage policymakers to also address the confusion that currently exists relative to what exactly constitutes a "significant" impact.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

Please see the responses to Questions #1, above.

Scope of NEPA Review

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

We have previously recommended and maintain our view that an EIS should normally be less than 150 pages with a maximum of 300 pages for complex projects. And, timelines should be no more than one year from NOI to final EIS. These strict page limits and timelines can be accomplished with more up-front planning and outreach work to ensure a more orderly and organized process for crafting concise, well written NEPA documents that will stand the test of

any challenges. We recommend that provisions for set timelines be established in reference to 40 CFR Part 1501.8- *NEPA & Agency Planning*.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?

NEPA analyses should require that value be assigned to continued agricultural production in a project area. Impacts of drought, water shortages and continuing water demands must be assessed and built into the NEPA process.

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

The Family Farm Alliance strongly encourages cooperative efforts to move projects through the NEPA and permitting processes. Appropriate tribal, state and local stakeholders should be granted cooperating agency status. The definition would include the term "political subdivisions" to capture the large number of local governmental units that provide vital services to the public but are generally ignored in the planning for NEPA. CEQ should promulgate regulations to encourage more consultation with stakeholders in advance of and during NEPA reviews.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

a. Major Federal Action;
b. Effects;
c. Cumulative Impact;
d. Significantly;
e. Scope; and
f. Other NEPA terms.

A new definition of "major federal action" should be created that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures. We caution, however, that any definition requiring NEPA for "continuing" projects should limited to those that require substantial planning, time, resources or expenditures. For example, the current application of NEPA generally does not pertain to the ongoing actions related to the operation, maintenance and/or repairs of a reservoir or irrigation canals from year to year under the normal range of operating parameters. Any new definition of "major federal action" should not include these reservoir and irrigation canal operations.

Federal agencies need to do a better job of defining and characterizing "cumulative impacts". As it currently stands, the characterization used by agencies to define cumulative impact is so subjective that some obstructionist activist groups are essentially provided tools to fight proposed projects and force a NEPA review process for actions that essentially should not require one.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

a. Alternatives;
b. Purpose and Need;
c. Reasonably Foreseeable;
d. Trivial Violation; and
e. Other NEPA terms.

CEQ should clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. Also, CEQ should narrow the use of multiple alternatives in the NEPA analysis to include only those which are reasonably foreseeable, and not create a matrix of possible alternative scenarios that will rarely or never be contemplated in the context of reality.

"Purpose and need" requirements related to potential benefits or uses of future water supplies are dismissed by agency regulators in NEPA. Planning opportunities and purposes for which a project may be permitted are restricted, which narrows the planning horizon, and makes it impossible to plan for projects with long-term benefits. The definition of "Purpose and Need" should be more robustly defined and be clarified as the driver of the NEPA process and document components. This would more directly narrow the focus of the document to be on the proposed action, its effects, and applicable alternatives. Further, a state's legislative and planning process should be considered in establishing purpose and need for construction of water supply dam and reservoir projects. CEQ should prepare regulations that provide the option of allowing existing state environmental review process to satisfy NEPA requirements.

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

a. Notice of Intent;
b. Categorical Exclusions Documentation;
c. Environmental Assessments;
d. Findings of No Significant Impact;
e. Environmental Impact Statements;
f. Records of Decision; and
g. Supplements.

We offer input on two of these items: categorical exclusions, and significant impacts.

First, we believe CEQ should strive to create unambiguous criteria for the use of CEs, EAs, and Environmental Impact Statements (EIS). These criteria, once clarified, would encourage policymakers to also address the confusion that currently exists relative to what exactly constitutes a "significant" impact (see response to Question #2, above).

A "categorical exclusion" describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and

applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs.

Applying for a new categorical exclusion, for example, could ease the Federal Energy Regulatory Commission permitting requirements for irrigators who want to install small hydroelectric projects in existing canals and ditches. These projects have minimal environmental impacts and offer over 50,000 opportunities in the U.S. to create new, clean, renewable sources of energy.

Properly developed and applied, CEs provide an efficient tool to complete the NEPA environmental review and can reduce paperwork and delay for proposed actions that do not raise the potential for significant environmental effects. Unfortunately, there are activist groups who use NEPA to delay and/or block efforts of some Western water users to perform the most routine (yet essential) actions.

While there is room for progress in streamlining CE documentation, the use of CEs is clearly a critically important tool for advancing projects that have no significant impacts. For example, the proper use of CEs can facilitate the transfer of title of federally owned Reclamation irrigation projects to the non-federal operating entities. Despite the many benefits associated with title transfers, local water agencies are at times discouraged from pursuing title transfer because the process is so expensive and slow. Environmental analyses can be time-consuming, even for uncomplicated projects that will continue to be operated in the same manner as they always have been. NEPA and the procedures required to address the transfer of real property, as well as cultural and historic preservation issues are often very inefficient, time consuming and expensive.

We encourage the continued use of CEs to streamline the NEPA process. In general, we urge CEQ to focus on ways to expedite the NEPA process, not add on layers of new requirements. We especially recommend that CEQ encourage the broader application of CEs for projects with no significant effects, such as facilitating simple, non-controversial title transfer proposals.

Regarding the definition of "significant impact to the human environment", our members believe this needs to be clarified and sharpened to minimize confusion and varying interpretations between various local and regional federal agency staff. We continue to believe that proper implementation of this recommendation has the potential to enhance federal agency NEPA engagement and reduce future litigation costs associated with project opponents.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

Mandatory timelines should be established for the completion of NEPA documents. Some examples of addressing the timing of agency action have been proposed in the Memorandum of Understanding developed in April 2018. This established a cooperative relationship for the timely processing of environmental reviews and authorization decisions for proposed major infrastructure projects under the One Federal Decision policy established in Executive Order

(E.O.) 13807. Other examples are included in "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects", an Interior Department Secretarial Order (No. 3355) intended to implement E.O. 13807.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

As we stated in Question 8, CEQ should develop a reasonable range of alternatives to facilitate project planning and the NEPA process. NEPA documents should only pertain to the proposed action and only address issues raised in public scoping that are directly tied to the proposed action. A common ploy of certain activist groups is to throw a "laundry list" of issues and concerns at a federal agency, knowing full well it will distract, confuse, and lengthen the process, thereby creating a document with potential loop holes that might later be challenged. We believe alternatives should be limited to the proposed action being analyzed. The number of alternatives should be constrained only to the range of activities and associated impacts of the proposed action in the context of reality. CEQ should require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible given the scope of the proposed action.

The alternatives proposed for assessment by NEPA regulators are frequently inappropriate, unrealistic, difficult-to-implement, and often in conflict with state and federal laws. We offer five recommendations to address this concern:

- Create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS) - see above responses to Question #2 and #9.
- Prepare regulations giving weight to localized comments.
- Create a "NEPA Ombudsman" within CEQ (see above response to Question #2).
- Control NEPA related costs (see above response to Question #2).
- Promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

As these NEPA criteria are clarified, it will force policymakers to also address the confusion that currently exists relative to what exactly constitutes a "significant" impact. The definition of "significant impact to the human environment" needs to be clarified to minimize confusion and varying interpretations between various local and regional federal agency staff. Ultimately, proper implementation of this recommendation has the potential to reduce future litigation costs.

General

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

Our members encourage eliminating redundant environmental review processes. They believe that actions subject to NEPA should only have to proceed through the environmental review process once. For example, if NEPA is completed on a water resources infrastructure project by one agency (e.g., the Bureau of Reclamation) then a second process should not be imposed by another agency on the same project (e.g., the Corps of Engineers when they consider an individual Clean Water Act Section 404 permit).

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

Earlier this year, we provided comments to the U.S. Forest Service to intended to streamline that agency's application of environmental laws. We reiterate two of those general recommendations here, as a spate of wildfires is scorching the Western U.S., related in part to forest mismanagement associated with federal environmental regulations :

- Allow landscape-level land management plans to guide individual actions on the ground without duplicative administrative process under federal environmental laws;
- Direct the creation and use of categorical exclusions already allowed under NEPA in preventing wildfires and restoring forest habitat and ecosystems more effectively and on a timely basis.

Landscape-level planning can be seen as a stewardship approach. Performing a larger review at the beginning as a programmatic approach with a landscape-level plan can serve as a spring board for implementation activities which would be treated as CEs.

Another notion is a magnified approach to pre-Scoping, which would be used to 'take a hard look' at the beginning of a project and thereby offer another method of sweeping a project off the EA/EIS tract and streamlining into a CE. While this many not exactly fit into the existing NEPA framework, such an approach could rely heavily upon the theories of tiering and incorporation by reference.

By eliminating duplicative or unnecessary processes, using streamlining tools already allowable under the law, and promoting actions instead of litigation, we believe these provisions could help these agencies use their limited resources to actually implement land management actions designed to prevent wildfires and improve habitat for priority, endangered and/or threatened species, instead of spending those resources on more bureaucratic process and litigation. These types of procedural changes to NEPA implementation would improve our Western landscapes, protect our valuable water supplies from the devastating effects of wildfires, and allow agencies to improve habitat and restore ecosystems for the benefit of federally important species to allow continued agricultural use of our public lands.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

Please see our earlier responses to Questions #1, #2, #4, and #13.

The Health of Rural Communities Depends on Less Regulation, Not More

Our farmers and ranchers in the past decade have been increasingly subjected to duplicative and expensive federal regulations and the related uncertainty of increased costs, lost critical farm inputs, and reduced water supplies, making it harder to survive in a competitive economy. And, forcing farmers out of business and taking farmland out of production so that water supplies can be redirected to new environmental demands will impart huge limitations on our future ability to feed our country and the world, in the larger economic and social context of this Nation's food security and the global hunger crises. With the right combination of tools and incentives (the latter, in part, in the form of modernized, streamlined regulations), as well as both public and private sector investments in water management infrastructure for the future, Western irrigated agriculture will be poised to help close the global food productivity gap and sustainably meet this Nation's and the world's food and fiber needs in 2050 and beyond.

Conclusion

Thank you for this opportunity to provide input on this matter, which is very important to the family farmers and ranchers of our membership. We are hopeful that a concerted good-faith effort working with CEQ will result in a streamlined regulatory process that will be efficient, fair and effective. We look forward to working with you toward that goal. If you have any questions about this letter, I encourage you or your staff to contact me at (541)- 892-6244.

Sincerely,

Dan Keppen
Executive Director