



P.O. Box 216 Klamath Falls, Oregon 97601

April 5, 2010

Mr. Terry Breyman
Associate Director for Natural Resources
Executive Office of the President
Council on Environmental Quality
722 Jackson Place NW
Washington, D.C. 20503

Re: Proposed National Objectives, Principles and Standards for Water Resources Studies

Dear Mr. Breyman:

On behalf of the Family Farm Alliance (Alliance), I would like to thank you for the opportunity to review the proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies (P&S). We look forward to working with you further in this process as it evolves, because much work remains to be done. In its present form, the draft P&S carries very few benefits and presents many risks, complications, additional costs and uncertainty for our members.

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. We are also committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental and national security reasons – many of which are often overlooked in the context of other policy decisions.

As an organization, we pride ourselves in bringing a proactive and constructive approach to problem-solving in the Western water arena. We have developed substantial comments on the draft proposal with the assistance of Western farmers, ranchers, irrigation and flood control district managers, and water professionals who fear the broad and unintended problems that this proposal carries with it. We have prepared these comments to provide you with a sense of the types of concerns you will hear from Western irrigated agriculture on this matter. Our general and specific comments follow, as well as recommendations to consider.

General Reaction of Alliance Members to the Actual Draft Legislation

The proposed P&S will form a central component of water resources public policy in the U.S.

and will directly influence the type, nature and specific features of federal water resources projects agencies recommend for Congressional authorization. They are critical to determining what federal investments are made in water resources and how they are made. Congress recognized this, too, when it passed the Water Resources Development Act (WRDA) in 2007.

Our members are very concerned that CEQ's draft proposal falls short of enacting the policy model envisioned by the Congress in WRDA 2007. In fact, the draft does not really establish a set of principles at all, but instead uses the concepts of "principles," "guidelines," "procedures," and "standards" interchangeably. As a result, the draft is vague and it is difficult to see how it will be actually implemented. It is disturbing to visualize the amount of detail (much will be duplicative of already established guidelines for environmental documents) that will be required to implement the P&S.

It was our understanding that the intent of 2007 WRDA was to provide a more balanced approach to water resources management decision making. Section 2031 of 2007 WRDA notes 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.

Unfortunately, the draft document clearly elevates the non-structural and environmental elements over economic and human benefits and safety. This apparent bias is viewed with great concern by our members, who run irrigation systems and flood control works throughout the Western United States. Without more emphasis on the economic impacts, human benefits and safety issues, jobs will continue to be lost and communities will become increasingly threatened by natural disasters that are avoidable.

The federal government should look back at the past 100 years and recognize that existing federal water projects have been successful in providing agricultural products, flood control and hydroelectric power. We should build on that success. In the West, the federal government has played a pivotal role in the development and subsequent regulation of water resources over the past century. However, this involvement has grown exponentially over the past several decades through legislative enactments such as the Endangered Species Act (ESA) and the Clean Water Act (CWA). Implementation of these and other laws has challenged traditional notions about continued control of water resources by the states.

Specific Concerns

The increased control exerted by federal agencies through a variety of means has increasingly led to gridlock in the management of water supplies in the West. We fear that the draft P&S, if implemented, will lead to more of the same. Here is a summary of our current concerns.

1. The Water and Related Resources Implementation Study standards must respect and reflect existing contracts and comply with Reclamation law.

The draft (p. 2) directs that the planning process complies with existing statutes and specifically names the CWA, ESA, National Environmental Policy Act (NEPA), Fish and Wildlife Coordination Act, National Historic Preservation Act (NHPA), and Wild and Scenic Rivers Act. The report also recommends that potentially viable alternatives must comply with existing federal statutes, specifically citing the CWA, ESA and NEPA. CEQ also needs to consider how compliance with the Reclamation Act and existing specific federal water project authorizations will be met, although we acknowledge that trying to address every unique project authorization would be a daunting task.

Federal reclamation projects divert and store water pursuant to water rights decrees that have largely been obtained under state law in accordance with Section 8 of the Reclamation Act. In some cases, the water rights for the reclamation project are held by nonfederal parties. Even where title to the water right is held by the United States, the federal government holds these rights in trust for the project beneficiaries.

The draft P&S also allows for alternatives that are limited by “existing statutes, laws, and other barriers”, to be considered as viable as long as there is a “plan” to remove the said barriers. This allows alternatives to be considered even if illegal, and clearly violates the directive that an agency cannot “lobby” Congress to change a law that would allow for an alternative to become legal (e.g. the removal of Glen Canyon Dam - an extreme example).

Federal agencies must also continue to adhere to existing water supply contracts and renew contracts to provide dependable supplies. The basis for the delivery of water from a federal project to water users is typically a contract between the U.S. and a water delivery entity such as a canal company, irrigation district, or water district. The federal government's commitment to these contracts is vital to Western agriculture. Moreover, in the case of projects for which the project beneficiaries have repaid the federal government for project construction costs, water users have obtained a perpetual right to the use of project water. In other cases, water users have a "water service" contract which allocates project water. These are binding contracts which must be honored by the U.S., and water cannot be reallocated by the federal government without payment of just compensation or liability for breach of contract. The federal government must realize that the beneficial holders of the water rights underlying federal water contracts are the water users, and that the U.S. acts solely as a trustee with fiduciary obligations to those water users circumscribed by applicable state law.

2. It is unclear how the P&S will apply to non-federal entities involved with federal partners.

The report (p. 4) states that the Principles and Standards do not apply to routine project

operations, basic maintenance and minor repairs, or watershed plans or regulatory activities. Additionally, the Principles and Standards do not apply to grants, technical assistance, and other financial assistance or authorization for work implemented by non-Federal entities on facilities to which the United States does not hold title.

In this section and elsewhere, the draft fails to recognize that, in today's world, non-federal sponsors share in the financing and decision-making for federally authorized water resources projects (see previous comments). The reality of cost-sharing must be incorporated into the decision-making process. Regarding grants, the draft P&S should clearly indicate whether there is a threshold dollar amount for grants (e.g. WaterSMART Grants, formally Challenge Grants) that triggers compliance with these standards by local sponsors for work performed on federal facilities. Additional clarification and detail is required to better define what types of financial assistance work proposals would be subjected to these proposed standards, particularly where non-federal partners are involved.

The P&S should not apply to “extraordinary operations and maintenance” in the same way that “basic maintenance and minor repairs” are currently exempted. If these types of activities are not exempt, then one must assume that an analysis completed under these P&S will include some alternatives that could impact or eliminate the very purpose of the Federal project in the first place. This is another one of those “legal barriers” that can we fear can be explained away as “viable”. The danger of not excluding or limiting the application of the P&S on these projects includes reducing water deliveries to benefit the environment.

3. In several parts of the proposed principles and standards, vague terminology must be re-defined with clarity.

The proposed P&S directs that proposals developed through studies shall “assure the appropriate use of these limited resources and avoid their unwise use” (p. 5). Further, the draft P&S proposes that the appropriateness of modifying water resources shall be based on evaluations of the services gained and lost, and only those actions that provide a “net national gain” shall be considered further or selected. “Appropriate” and “unwise” use of resources and “net national gain” are three terms which must be defined.

The proposed P&S (p. 6) directs that water resources implementation studies must recognize floodplains as critical components of watersheds and “avoid the unwise use of floodplains and flood-prone areas”. This draft principle – in addition to other parts of the draft document – calls for “full and equal treatment to nonstructural approaches”. As discussed later in this letter, this reference is one of many in the proposed P&S that display a marked bias towards nonstructural flood control measures. While directing avoidance of the “unwise use” of floodplains, the draft does not provide criteria for determining what this would be. Instead, it appears to create a bias for selecting non-structural approaches. In practice, this would essentially limit a full consideration of all alternatives.

The draft P&S clearly emphasizes watershed and ecosystem based study approaches, but the theory surrounding these philosophies can sometimes be difficult for the reader to understand. For example, the proposal advocates that appropriate examination is needed to identify the full range of potential impacts associated with a given alternative. As a first step, the proposal suggests using the best available methods in the “ecological, social, and behavioral sciences” to develop an “explicit list” of the services derived from an ecosystem. This is a challenging order, made even more so by the lack of specific examples that might better explain the intent behind the standard. We look forward to seeing a practical example that explains exactly what is being proposed here.

Similar examples would help clarify other parts of the somewhat disconnected discussion associated with the watershed and ecosystem planning standards. The draft includes many amorphous concepts like "ecosystem processes", “ecosystem processes and functions”, “biophysical relationships¹”, “intrinsic natural values” and “biodiversity”. Unfortunately, the draft is devoid of any meaningful explanation of how these vague concepts will be evaluated in a realistic manner.

These concerns point to a bigger question needs to be addressed in this process: Are all ecosystems worth protecting?

4. The addition of difficult-to-decipher terminology and uncertain scope and study processes for new projects may increase the potential for litigation and delay.

a. Scope of Study Area

The standard proposed for a watershed based approach (p.7) and the discussion on the scope of study is vague and uncertain. In an attempt to move away from focusing on a single water body segment or other “narrowly defined areas” and towards a more “holistic” analysis, several selected scales are proposed, based on a wide range of non-hydrologic considerations. These include proximity to key stakeholders, relationship to regional transportation sectors, and “ecoregions” that “define the species habitat throughout its life cycle”. The ecosystem approach standard proposes that the study area “explicitly accounts for the interconnectedness within systems, recognizing the importance of interactions between many target species or key services and other non-target species”. The P&S draft (p. 14) suggests that the watershed, and its surrounding ecosystems, including the coastal and ocean waters into which the watershed may be connected, is the most appropriate geographic study area.

This is not clear guidance, and would subject the “study area” proposed by a lead agency to second-guessing by “stakeholders” (and likely, critics) far removed from a project. A watershed-wide study area may be appropriate for larger projects, but appears to be overkill for smaller federal water projects. The proposed ecosystem considerations will increase the time required to

¹ “...that have value regardless of whether humans recognize the benefits.”

develop studies and will widen the vulnerability and exposure of lead agencies. For example, how many “target” and “non-target” species (which are not defined) must be accounted for to satisfy this standard?

b. Uncertain Processes, Uncertain Outcomes

The proposed P&S direct under “Natural Resources Subcategory” (p. 20) that the effects of alternatives on significant ecological resources and attributes of the NEPA human environment shall be displayed. These include:

- “Effects”, measured as favorable and unfavorable changes in significant natural resource quality and quantity;
- “Value”, indicated by the scarcity and significance of ecosystem components; and
- Relationships between short-term use of the human environment and the maintenance and enhancement of long-term productivity.

“Urban and Community” impacts that must be assessed include effects on human population groups with such difficult-to-quantify aspects like:

- Community cohesion.
- Any disproportionately high and adverse human health or environmental effects on minority populations.
- Effects on low-income populations (in order to assure environmental justice) and the relative value of alternatives to any potentially affected low-income communities.

An analysis must also demonstrate that the project alternatives would not exclude people from participation or benefits, or subject them to discrimination because of their race, color, or national origin. Types and locations of significant impacts, broken down by “salient population groups and geographic areas”, may also be reported to comply with this standard.

The draft P&S proposes new processes that are very difficult to decipher. As presently described, the above requirements appear to be very qualitative and subjective. It is our understanding that the details of the methodologies that will actually be employed to satisfy these standards will be spelled in the next phase of this process. We look forward to that.

Of particular concern, as currently presented, it would appear that after a very exhaustive, time-consuming and expensive analysis performed to address all of the standards proposed in the draft P&S, the “Secretary or Independent Agency Head” is granted ultimate discretion to recommend the final alternative. Unfortunately, the proposed standards have bias embedded within them that will influence that final discretionary decision. The proposed standards actually grant an exception to allow the decision maker to recommend an alternative that does not provide the

greatest net overall contribution to the National Objectives where there are overriding reasons for recommending another alternative, including environmental justice issues. This provision – in essence – means that, in the end, vague and subjective environmental justice issues can trump other well-documented, public safety and property damage concerns that can be described with much better quantitative detail.

We believe that the emphasis on this new level of subjective analysis and the uncertainty of the related process could lead to increased conflict between stakeholders, increase the cost of participation in local, state, and federal decision-making, and result in more, not less, "gridlock." It could expand the opportunities for litigation and delay, resulting in more conflict and worse decision-making rather than better resource management and more effective problem-solving.

5. The proposal promotes redundant and questionable processes.

The draft document seeks to ensure environmental justice for low income, tribal and minority communities by requiring specific efforts to be made to provide opportunities for effective participation by minority and low-income communities in the planning process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, documents, and notices (p. 12). This seems redundant and unnecessary. Similar opportunities should be provided to all sectors of the public impacted by a proposed project.

One or more of the study objectives must clearly contribute to the National Objectives and one or more of the agency's missions (p. 16). The study objectives must be broadly defined to avoid dictating a specific or narrow range of alternatives. They shall reflect the specific effects that are desired by groups and individuals external to the agency as well as any declared to be in the National interest by the Congress or the Executive Branch. Does this mean that every desire made by any group or individual external to the agency – no matter how close to the proposed project, or how ludicrous the request – must be reflected in study objectives? This is unrealistic and will lead to obstruction, not progress.

6. No standards are provided for quantification of benefits and costs.

The P&S document requires quantifying monetary and non-monetary benefits and costs whenever possible, yet provides no standard or basis for doing so. We look forward to the next phase of this process, where we understand that details on suggested metrics and methodology will emerge. For example, the document suggests that, when comparing and screening alternatives (p. 22), consideration shall be given to monetary and non-monetary impacts, including significant impacts that are not quantified. Obviously, additional detail is needed to better understand how to conduct such an analysis.

Both monetary and non-monetary assessments need to factor in any impacts to agriculture, especially agricultural lands that may be lost or protected, depending upon the action alternative.

These impacts include economic, food security, open space, and habitat values associated with agriculture and the communities that rely upon farming and ranching.

7. The draft proposal establishes a predetermined set of priorities and biased watershed, ecosystem and non-structural assessment approach.

Public safety concerns are addressed in four short sentences on pages 11-12. The report later (p. 16) directs that if any reasonable and viable alternative is determined to be “*environmentally preferable*”, then the appropriate NEPA documentation must identify it as such. The very brief discussion on the critically important topic of public safety— especially when compared to the lengthy discourse in other parts of the report on watershed, ecosystem and environmental justice matters – is telling. This contrast, more than anything else, may best illustrate the bias embedded in this report towards the environment and “non-structural” flood control measures. Such a bias could very well lead to incomplete and flawed analyses of Western watersheds and preclusion of possible solutions that are realistic and cost-effective. This becomes critically important for some small rural communities in the West that, due to terrain considerations, are in areas that require structural flood protection and that can be protected no other way.

The document directs that the range of alternatives must allow due consideration of all reasonably practicable solutions, including a full range of potential contributions, and ensure the one with the greatest net contribution to the National Objectives is identified (p. 16). However, regardless of the outcome of these considerations, at least one alternative with nonstructural measures shall be formulated and identified as the “*primarily nonstructural alternative*.” On Page 23, the proposal emphasizes that the “rationale shall be fully explained and highlighted in the decision document” when nonstructural alternatives or alternatives that would achieve environmental justice or equal treatment for low income and minority communities are screened from further consideration”. Further, if the recommended plan is not a primarily non-structural alternative, the decision maker must explicitly address the reasons why these objectives are not reasonably achievable.

In a related matter, it is important to point out the proposed P&S does not mention the need to protect project purposes when existing infrastructure is being modified.

The document clearly appears to create a bias for selecting non-structural approaches thus limiting, in practice, a full consideration of all alternatives. This narrow bias – intentional or not – could lead to ineffective decision making and serious ramifications that will become more important in these times of economic stress, where water needs for agriculture, industry and energy will assume greater importance to our country.

8. Peer review standards that are consistent with the Information Quality Act and Endangered Species Act should be promoted.

The draft emphasizes that peer review of applied science and analytical techniques is a particularly valuable practice integral to successful water resources planning. In our view, environmental restoration or enhancement projects should not be undertaken without the benefit of peer-reviewed, sound science. The federal government should decline to accept any proposal which cannot be supported by sound science. We further believe that all peer review should be truly independent and receive the kind of scientific rigor and review that is required by the Endangered Species Act (ESA) and the Information Quality Act (IQA). ESA and IQA set strict standards to ensure that federal agencies use the best available scientific data and not their own assumptions and speculation. These same laws establish a formal procedure enabling the public to ask questions and to request corrections. And they define the requirements that these agencies have to meet to ensure that independent peer reviews of proposed regulations are truly independent and objective.

9. This is not the proper forum to address national water policy implications.

The proposed standards state that ecosystem-based management “recognizes that natural ecosystem boundaries are more important for consideration in management efforts than political jurisdictions and that ecosystem boundaries are porous”. We doubt whether this statement – while theoretically admirable – is shared by the public and Congress. This example points out a critical concern many water users have with this document and process: is it really the appropriate forum to set the stage for future federal water policy?

10. Miscellaneous Comments

- Page 1 of the draft document lists “irrigation” as a purpose supported by water resources. “Agriculture is not listed, but should be. Not all agriculture is irrigated.
- Principle J (p. 1) should be modified to read “Incorporate public safety and protect the human environment.”
- The proposed Planning Guidelines and Procedures note that CEQ will coordinate with the Water Resources Council to issue Interagency Guidelines to implement the Principles and Standards (p. 3). The authority behind the creation of the Water Resources Council and make-up of the Council should be explained. Also, the difference between the “standards” and “agency procedures” needs to be clarified. This could lead to differences of opinion which could lead to lawsuits and other delays.
- The P&S directs (p. 9) that no data over five years old shall be used to portray existing and future conditions, unless the data are clearly shown to remain valid and representative of current conditions, or unless no other data are available or can be reasonably developed. We have two concerns here. First, how can anyone determine this? Second, does this also apply to species assessments associated with ecosystem characterizations, which are emphasized in other parts of the document? Will the U.S.

Fish and Wildlife Service and National Marine Fisheries Service be up to the task of providing up-to-date population estimates of species protected under the ESA?

- There are many references to NEPA which could lead one to assume that an Environmental Impact Study may no longer be necessary, especially for those projects with a long and complicated planning process under the CEQ proposed P&G.
- The draft document recommends that water-related studies address risk and uncertainty, including the effects of climate change and future development (p.11). We recommend an adaptive approach to dealing with the uncertainties of climate change, which we detail in the 2007 Family Farm Alliance report “Water Supply in a Changing Climate: The Perspective of Family Farmers and Ranchers in the Irrigated West”. It is time to start developing and implementing the water infrastructure needed to cope with a changing climate, meet the needs of a growing population, protect our environment, and support a healthy agricultural base in the West. We must streamline the often slow and cumbersome federal regulatory process to modernize and expand water infrastructure. Unfortunately, we fear the draft P&S document will move us in the opposite direction.
- As noted earlier, it seems as if the concern for mitigation and protection is focused more on how the "urban sector" - including low income areas - will be impacted. Agriculture is virtually ignored in the draft P&S. The underlying message that comes out of the draft document is an assumption that this country and our impacts on the world food market can continue and be viable with potentially significantly less agricultural acreage. How are we to feed ourselves and a good portion of the world with fewer land and water resources? The revised document needs to include a reference that irrigated agriculture is a significant contributor to the nation’s food supply which, if constrained or restricted, could have a major impact on the national security of the U.S.

Conclusions

There is a growing sense among western water users, particularly farmers, ranchers, and municipalities that the federal government no longer considers itself accountable for policy and operational decisions which adversely affect the operations of others. Information is sometimes extremely difficult to obtain and requests for clarification or explanation are often ignored.

The once effective working relationship between the federal government and water users has become increasingly strained over the past decade. Mutual respect has in many cases given way to deep distrust, and a once cooperative working relationship has deteriorated into an adversarial one. While it is not reasonable to expect that the federal government and water users will always be in agreement, the current relationship is ultimately counterproductive. Many issues might be addressed more effectively if the regulators had a greater appreciation of the impacts caused by regulatory actions. Improved decision making and reducing areas of conflict are important goals. Where the federal agencies have operated in a supportive and cooperative manner, the result has often been successful. There is a need for federal agencies to operate in a collaborative manner, without creating new levels of bureaucracy.

We fear this proposal as currently drafted could bring water project development to a halt. The process it creates is daunting and uncertain, and the costs and delays it would impose could preclude many planning and development efforts. We do not want to see a program that becomes mired in a process that ultimately delays implementation of critical projects. Those projects – especially those that enhance water supplies – already are very time-intensive and any additional delay for planning and studies will only add to the time frame for providing relief. Thank you for this opportunity to comment on this draft document. We look forward to seeing how our concerns are addressed and working with you further in the coming months on this important process.

If you have any questions, I encourage you or your staff to contact me at (541)-892-6244.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Keppen', with a stylized flourish at the end.

Dan Keppen
Executive Director