



**ASSOCIATION OF
METROPOLITAN
WATER AGENCIES**

LEADERS IN WATER

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March 6, 2020

Mary B. Neumayr
Chairman
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, DC 20503

Re: Docket ID No. CEQ–2019–0003, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*

Dear Chairman Neumayr,

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to comment on the Council on Environmental Quality’s notice of proposed rulemaking, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*. AMWA is an organization representing the largest publicly owned drinking water utilities in the United States.

AMWA is supportive of NEPA as a cornerstone of our country’s environmental protection laws. NEPA is an important component of federal decision making, particularly as it relates to protecting our nation’s water resources. Our members are affected by actions on federal lands that could have environmental impacts on drinking water, such as projects on national forest lands, where many metropolitan cities’ drinking water originates, or projects on federal reservoirs where our members have drinking water storage contracts. NEPA plays a vital role in protecting these water sources and the larger environment by requiring the development of environmental assessments and environmental impact assessments to identify potential impacts of federal actions. Our members are often applicants for projects that require NEPA reviews, such as projects for water supply and delivery that will receive funding via drinking water or clean water State Revolving Fund loans or through the Water Infrastructure Financing and Innovation Act.

Our comments specifically address five areas where the Administration has proposed to update NEPA. These are: simplifying the NEPA process; transparency, including local government and public input; federal funding minimum threshold for projects; the definition of effects or impacts; and resilience and climate change considerations.

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AMWA appreciates the opportunity to comment. If you would like to further discuss the details of our letter, please call Erica Brown, Chief Strategy and Sustainability Officer at 202-331-2820.

Sincerely,

A handwritten signature in blue ink that reads "Diane VanDe Hei". The signature is written in a cursive, flowing style.

Diane VanDe Hei
Chief Executive Officer

cc: Edward A. Boling

Attachment

Introduction

AMWA supports CEQ's efforts in improving the efficiency of the NEPA process. As AMWA's members are regularly involved in projects which require NEPA review, such as reservoir construction or rehabilitation and other water infrastructure projects, difficulties within the current NEPA process can at times prevent public water systems from completing their projects in a timely manner resulting in wasted resources. Our comments support aspects of the Council on Environmental Quality (CEQ) proposal that aim to improve NEPA, including integrating the NEPA process early into federal agency planning as well recommendations to improve transparency. However, with this in mind, it is important for the integrity of NEPA to be maintained and the opportunity for public participation and comment remain intact.

AMWA also encourages CEQ to acknowledge in its final rule that projects or events that happen over time are not simply discrete events with only direct effects. Projects which fall under the purview of NEPA can oftentimes have far-reaching impacts in both time and space. Our environment does not exist as a mesocosm but rather a system in which multiple projects will often have cumulative and compounding effects on that system. As a result of NEPA, much progress has been made in this country to reduce environmental degradation. In the words of CEQ on the 25th anniversary of the statute¹, NEPA has caused federal agencies to "take a hard look at the potential environmental consequences of their actions and brought the public into agency decision making processes like no other statute." Restricting this critical avenue for environmental protection by limiting its scope in the proposed rule is short-sighted at best and extraordinarily detrimental at worst.

Our detailed comments provide specific questions and suggestions about the Administration's proposal in this regard.

Simplifying the NEPA process

As a concept, AMWA supports the administration's one federal decision goal of NEPA reviews being conducted in two years or less provided there is still sufficient opportunity for public input and CEQ provides guidance for the types of detailed projects for which reviews could take longer. As mentioned in previous comments to CEQ, AMWA appreciates that the proposal recognizes that in some cases the complexity of a project itself – such as the number of federal agencies involved in the project review, or the scope of the project – could require a longer timeframe for review.

For example, a longer review period may be warranted when the NEPA analysis requires multi-seasonal data about natural resources related to the project in order to adequately assess the impacts to the environment the project may have. Therefore, AMWA recommends that CEQ provide guidance about what would constitute a project that deserves more time, or more pages.

¹ <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>

1. Length of environmental assessments and EIS documents

AMWA recommends that CEQ provide additional information in the final rule and/or in guidance, where appropriate, to define what is meant by “unusual scope or complexity” regarding the page limit for documents. Does the page limit include pictures, tables and maps?

NEPA documents are often necessarily complex, as fully assessing the potential environmental effects for proposed actions and possible alternatives can require an immense amount of information, oftentimes resulting in documents consisting of multiple volumes. If there are pages, graphs and charts that are necessary to add clarity to the EIS, these should be included within the document regardless of whether this would bring the document over an arbitrary number of pages. EAs and EIS documents need to be long enough to adequately disclose and evaluate potential impacts; the proposed limits would open up the opportunity for litigation.

2. Time limits

AMWA recommends that CEQ provide additional information regarding when the two-year clock starts for the EIS time limits proposed. AMWA also asks CEQ to make clear where the public comment period fits within the NEPA process timeline. It is important for the integrity of NEPA to be maintained and the opportunity for public participation and comment to remain intact. These critical components should not be compromised simply to speed up the overall review process. CEQ should also specify as to whether there is a process in which the public or federal agencies involved can request additional time for review processes.

AMWA is optimistic that the assignment of a lead agency will help to facilitate the timely completion of reviews. However, our members have experienced significant delays in project reviews due to turnovers or reassignments of personnel at federal and state agencies with expertise relevant to the project. AMWA asks CEQ to address in its response to comments and in future guidance, how this might impact lead agency designations, time limits or any other area of the rule that could be affected by this issue.

3. Categorical exclusions

In general, AMWA supports the use of categorical exclusions and findings of no significant impacts (FONSI) so as to reduce the number of actions requiring a full EIS review. However, AMWA is concerned about the new definition of categorical exclusions with regard to the human environment (§1500.4(a)) and the clarity of its usage within the proposal as certain components appear to contradict each other.

Specifically, CEQ states in 85 FR 1720 that economic or social effects by themselves do not require preparations of an EIS, but do when economic and social effects are interrelated with physical or natural environmental effects. Yet, CEQ proposes in 1507.4(m) that human

environment means the natural and physical environment and the relationship of present and future generation of Americans with the environment.

AMWA believes that CEQ's intention here is not to suggest that certain infrastructure projects would not impact the human environment, as the earth we inhabit is a complex system, and therefore it would seem that any infrastructure project would certainly impact the human environment as well as the natural environment. However, if this is indeed CEQ's objective, AMWA asks CEQ to provide examples of projects that would be covered under NEPA but which would not have a significant effect on the human environment. AMWA also requests that CEQ include a list of examples of categorical actions that would not have a significant effect on the human environment and would therefore be exempt from EIS requirements under §1501.4 if finalized as proposed.

4. Integrating the NEPA process into early planning

Conceptually, AMWA believes that integrating the NEPA process into early planning is a good idea. For example, if an agency has identified a potential project that will necessitate a NEPA analysis, it should consult and coordinate as early as possible with other federal agencies to determine the appropriate level of NEPA review. AMWA recommends that CEQ develop or update guidance, as appropriate, on how to accomplish this as it would seem that CEQ's guidance could assist agencies in coordinating their efforts early, to allow for a smoother NEPA process. This would be in addition to the requirements outlined in §1501.1(ii) for consultation with state, tribal and local governments and other members of the public.

5. Consultation with local agencies and allowance for local agencies as joint lead agencies

AMWA supports increased coordination and joint preparation of state, local and federal review documents as noted in §1500.4, §1500.5 (p), §1506.2 and §1506.3. AMWA also supports permitting local agencies to serve as joint lead agencies (§1501.7 (b)) or as outlined in §1501.8 (a) and (b), to be a cooperating agency with a substantial role in the review process.

However, there are some important considerations that AMWA would like to highlight which CEQ seems to have overlooked. Our members have experienced significant delays in NEPA reviews for several reasons. These may be due to turnovers or reassignments of personnel at both state and federal agencies, or due to time sensitive studies that are no longer relevant by the time the agency reviews a project. In the case of staff turnovers, oftentimes the staff assigned to a project with expertise relevant to the project resign or are reassigned leaving the reviews of these projects to new staff who are regularly unaware of the history and complexities of the projects they are now overseeing. In the case of time sensitive studies, our members have experienced the results of their studies "timing out" before the respective agency completed its review. Specifically, one member performed an endangered species study and purchased mitigation credits but never received a record of decision (ROD) and permit to begin work before the

agency required the utility to perform another mandatory study because the one initially submitted had “timed out.”

Events like these have caused major disruptions to a project’s timeline and have caused AMWA members to expend large amounts of resources either by redoing studies and re-submitting materials, or by causing severe delays while waiting for new staff to review their projects for a second or third time. AMWA asks CEQ to clarify in the final rule how the consultation and coordination should occur to ensure that study requirements are not needlessly extended so that the relevance of the study “times out” before a ROD is made. AMWA asks CEQ to address in its response to comments and in future guidance, how this might impact lead agency designations, time limits or any other area of the rule that could be affected by this issue.

Transparency and public input, including coordination with local agencies

AMWA supports improvements to NEPA regulations that would improve the efficiency of environmental reviews and authorizations involving multiple agencies, provided that the decision process remains transparent to the applicant and the public’s opportunity for input remains intact. AMWA also supports the proposed NEPA rules in providing for input from affected state and local agencies at the draft EIS stage. Therefore, AMWA supports CEQ’s proposed rule language specified in §1507.4, §1503.1 and §1503.2.

Finally, AMWA supports a timely dispute resolution process through CEQ when interagency disagreements cannot be worked out between those agencies, as outlined in §1504.

Federal funding and minimum threshold for projects

AMWA does not support the idea of defining thresholds of certain dollar amounts that would trigger (or exclude) a NEPA analysis. Similarly, AMWA does not think that projects that receive federal loans or loan guarantees should be excluded from NEPA because it seems unlikely that the quantity or severity of impacts from a project would correspond to these thresholds or qualifiers.

However, AMWA acknowledges that there may be cases where there is a category or type of project where an exclusion or a non-monetary threshold might be appropriate. AMWA urges CEQ to consider the ways the Fish and Wildlife Service and the US Army Corps of Engineers considers exemptions to some of its rules for projects that receive federal funding as potential examples for how a categorical exclusion could work.

“Effects or impacts” (Definitions under §1508.1(g))

AMWA urges CEQ to both better define “reasonably foreseeable” under §1508.1(g) and make clear whether NEPA analyses can consider cumulative effects under the rule. CEQ’s proposal

states under §1508.1(g)(2) that, “Analysis of cumulative effects is not required.” However, AMWA asks CEQ to make clear in the final rule whether this phrase precludes permit seekers from performing such analyses, or precludes agencies from requiring such analyses?

As an example, if multiple projects are occurring on the same watershed, either at the same time or within a meaningful timeframe, this could have lasting impacts on the source waters downstream which are used by drinking water utilities. Requiring a NEPA analysis for each of these which does not consider the combined cumulative effect could have unforeseen consequences to areas downstream.

As noted in CEQ’s document assessing 25 years of NEPA², the assessment of cumulative effects is often a challenge for NEPA practitioners. However, the goal of the analysis of cumulative effects is to help an agency arrive at a more comprehensive and defensible decision, rather than a perfect analysis of all potential effects. Assessing cumulative effects under NEPA is a well-established practice, with years of case law that guide the way this practice is implemented under NEPA.

With this in mind, has CEQ performed a detailed review of the case law and determined how each of the major aspects of this case law are appropriately responded to within the proposed rule, so that if the rule is finalized without a requirement for analysis of cumulative effects, then project proponents are not left at risk of litigation?

Finally, AMWA recommends that CEQ develop guidance that encourages analyses of cumulative effects under NEPA that include climate impacts. Specifically, impacts that result from increased greenhouse gas (GHG) concentrations in the atmosphere, including temperature effects that result in warmer and shorter winter seasons, increased drought and more frequent and intense rainfall events. These effects³ will be borne across all regions of the country in various ways and degrees of intensity. But what is certain is that all around the nation, these effects will be felt on our water resources and also on the infrastructure projects related to water supply and treatment that may require a NEPA analysis.

Therefore, this reality will require recognizing climate change impacts under NEPA as “reasonably foreseeable.” As a result, it would also require allowing agencies the ability and flexibility to account for both the short- and long-term benefits of adaptation projects by considering cumulative effects of climate change and the varying benefits of a given project option. Water utilities and federal organizations such as the US Army Corps of Engineers (USACE) and Department of Defense are currently considering and/or retrofitting large

² The National Environment Policy Act. A study of its effectiveness after 25 years: <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>

³ For general information about climate impacts, see the 2018 Fourth National Climate Assessment (<https://nca2018.globalchange.gov/>), for specific impacts to water suppliers, see AMWA’s 2007 document, Implications of Climate Change for Urban Water Utilities, https://www.amwa.net/galleries/climate-change/AMWA_Climate_Change_Paper_12.13.07.pdf.

infrastructure projects to be more resilient to future climatic conditions so it would seem logical for CEQ to follow this trend in developing a more modernized NEPA.

Resilience, climate change impacts and consideration of GHG emissions

In capital planning processes, drinking water utilities, by necessity, must look years, and even decades, ahead in order to ensure that they will have adequate water supplies to support the generations to come, and that the infrastructure needed will last for decades. Part of that planning requires that infrastructure be resilient to extreme weather events. Utilities have planning processes of many decades to ensure adequate water supply as well as the infrastructure to treat and deliver it. Utilities are utilizing current scientific information, including observations and forecast models from NOAA, EPA and USACE to understand the impacts a changing climate might have on the environment – particularly our water resources – to help with these planning processes.

For example, a utility may determine, based on projections using NOAA's sea level rise viewer and USACE's simple and/or detailed tools for planning for sea level change, that it should build a new, needed facility at a higher elevation to mitigate expected sea level rise, and add additional natural buffers to protect from storm surge. The main driver for proposing the project in this case results from climate change impacts.

As proposed, it appears that under the definition of effects or impacts under §1508.1(g) that CEQ is looking to specifically exclude climate change impacts in an environmental analysis under NEPA. As AMWA noted in its August 22, 2019⁴ comment letter on CEQ's draft NEPA guidance on consideration of GHG emissions, policies and guidelines related to GHG emissions must not only address the impact of these emissions on the environment but also facilitate climate adaptation planning. In the case of drinking water utilities, this planning includes projects necessary to mitigate threats to water supplies and, by extension, the life-sustaining critical infrastructure sector that they represent.

Therefore, AMWA urges CEQ to strongly reconsider the complete exclusion of climate change-related impacts and instead allow NEPA reviews to take into account the environmental impacts that may occur due to increased GHG emissions in the atmosphere. As illustrated by the previous example, the climate science and modelling surrounding the impacts of sea level rise is particularly robust for the United States and is used by USACE in its planning processes. Utilities *are already* considering the cumulative impacts of climactic and environmental changes observed over the last 20 years, such as sea level rise coupled with storm surge. Therefore, it is important and practical for CEQ to recognize that environmental impacts related to climate change are reasonably foreseeable based on what utilities and other water resources planners are observing now.

⁴ See: <https://www.amwa.net/sites/default/files/AMWA-finalNEPAcchGHG-25mar15.pdf>

Finally, with regard to CEQ's request for comment about whether CEQ should codify any part of its draft GHG guidance in regulation, AMWA does not think CEQ should codify this guidance into regulation. However, AMWA firmly reiterates, as we have done in at least three comment letters to CEQ since 2013, that it is important that NEPA policies and guidelines facilitate adaptation approaches, including projects developed to address future needs for resilience to extreme events and weather disasters, such as storms and droughts. The increase in frequency and severity of these events in United States over the past 20 years has been well documented and to ignore this data is ill-advised, particularly as federal agencies, such as USACE and DoD are currently using this information to make major project decisions and infrastructure investments.

As noted in our August 2019 letter, AMWA is concerned about CEQ's draft GHG guidance because it only addresses accounting for GHG emissions as an environmental impact. Unlike the 2016 CEQ guidance it replaces, this draft does not acknowledge that some infrastructure projects might be undertaken for the purposes of climate resilience, i.e., constructing adaptive measures in response to the negative environmental impact of heightened levels of GHG emissions in the atmosphere. AMWA is concerned that this omission could prevent NEPA assessments from considering scenarios where climate resilience benefits could outweigh the impacts of a project's GHG emissions.

Other specific requests for comment

AMWA supports CEQ's proposal to revise sentences in the rule from passive voice to active voice where it will be helpful to identify responsible parties as well as its plan to add paragraph numbers where it would improve clarity.