



**ASSOCIATION OF
METROPOLITAN
WATER AGENCIES**

LEADERS IN WATER

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September 29, 2023

The Honorable Brenda Mallory
Chair
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Docket CEQ-2023-003 National Environmental Policy Act Implementing Regulations
Revisions Phase 2

Submitted electronically

Dear Chair Mallory:

The Association of Metropolitan Water Agencies (AMWA) is pleased to have the opportunity to respond to the National Environmental Policy Act (NEPA) Implementing Revisions Phase 2, otherwise known as the “Bipartisan Permitting Reform Implementation Rule.” AMWA is an organization representing the largest publicly owned drinking water utilities in the United States, and its membership collectively serves more than 160 million people. Members serve communities of more than 100,000 people. AMWA recognizes NEPA as a cornerstone of U.S. environmental policy and is a staunch supporter of maintaining the integrity of NEPA and the assessment process. NEPA plays a vital role in protecting members’ water sources and the larger environment by requiring the development of environmental assessments (EA) and environmental impact assessments (EIS) to identify potential impacts of federal actions.

AMWA appreciates CEQ’s efforts to revise the NEPA regulations in a matter that will “provide for an effective environmental review process that promotes better decision making; ensure full and fair public involvement; provide for an efficient process and regulatory certainty; and provide for sound decision making grounded in science, including consideration of relevant environmental,

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climate change, and environmental justice effects.”¹ As leaders of drinking water utilities, AMWA members must, at times, invest in projects expanding or acquiring water supplies, among other key infrastructure projects; as such, members’ vital utility projects are sometimes subject to the NEPA review process. AMWA, therefore, believes it is essential that CEQ’s proposed revisions be implemented in a manner that facilitates the timely conduct of assessments while preserving the opportunity for public outreach, participation, and engagement. AMWA is pleased to provide the following feedback on CEQ’s proposed phase 2 revisions to the procedural provisions of NEPA. Our comments respond to the major categories of changes reflected in the proposed revisions.

AMWA remains concerned about the potential effects this draft guidance will have on the timeliness and related costs of NEPA review processes. One of AMWA’s main concerns is whether these revisions will achieve the more efficient and timely assessments required by the Fiscal Responsibility Act’s amendments² to NEPA. Having extremely long timeframes for project approvals under NEPA can stymie necessary projects that address critical needs, such as securing additional water supplies in climate-stressed communities. Persistent or unexpected delays to capital projects can affect the creditworthiness of utilities as credit agencies seek resilience and reliability when evaluating prospective borrowers. Perceptions of unreliability can lead to lower bond ratings, which result in increased project costs and, therefore, place a greater burden on community ratepayers at a time when affordability and justice are key priorities at all levels of government.

A few examples demonstrate the effects that complicated and extended NEPA review processes can have on water utilities, their infrastructure projects, and their ratepayers. In one high-profile challenge, an AMWA member sought a decision on an environmental review for over six years, a process hampered by the fact that federal partners determined that analyses conducted early in the process had expired and required the utility to reconduct them. This requirement costed the utility and its ratepayers more money in the long run due to no fault of the water utility. Furthermore, at least one AMWA member has expressed concerns that the anticipated timeline of a project’s NEPA review could potentially jeopardize the utilities’ ability to adhere to timeline requirements for a project the utility received federal loans to implement. As public agencies, AMWA member utilities are, just like their federal partners, stewards of public funds that aim to protect public health and safety through the most affordable options available. Therefore, it is imperative that the NEPA process is administered in a way that upholds the integrity of NEPA while also eliminating the potential for duplicative efforts or other inefficiencies, which AMWA recognizes CEQ has aimed to do in these proposed revisions.

¹ Council on Environmental Quality. (2023, July 31). Proposed Regulation: National Environmental Policy Act Implementation Revisions Phase 2. Federal Register 88, 49924-49988.
<https://www.federalregister.gov/documents/2023/07/31/2023-15405/national-environmental-policy-act-implementing-regulations-revisions-phase-2>

² Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023), <https://www.govinfo.gov/app/details/PLAW-118publ5>.

Expedient, thorough NEPA reviews are essential for implementing critical infrastructure projects. AMWA, therefore, is encouraged by CEO's proposed revisions aimed at increasing NEPA review and permitting efficiency and offers the following considerations.

AMWA members would benefit greatly from the proposed revisions' streamlined timelines and transparent schedules. AMWA supports the proposed revisions requiring the adoption of one- and two-year timelines for EA and EIS, respectively, as required by the Fiscal Responsibility Act.² Utilities would also benefit from agencies conducting NEPA reviews creating publicly available schedules for EA and EIS that include key milestones and schedules for any other required authorizations. While AMWA is greatly encouraged by the aims of these proposed revisions, the ability of agencies to meet the new one- and two-year timelines may require the successful deployment of adequate funding and resources to various federal agencies.

AMWA believes the proper use of categorical exclusions, as outlined in the revisions, could be advantageous in simplifying complex federal permitting processes across multiple federal agencies, including those affecting water infrastructure projects. As written, the proposed revisions would add flexibility for agencies establishing a categorical exclusion (CE) through two potential methods: allowing agencies to develop categorical exclusions outside of the normal NEPA process, such as through a land use plan or programmatic EIS, or allowing agencies to establish CEs with other agencies jointly. While AMWA reiterates that thorough NEPA processes protect water supplies, the Association also believes that appropriate use of the CE provisions could promote flexibility and efficiency of NEPA reviews.

Finally, regarding the proposed revisions' provisions aimed at increasing NEPA review and permitting efficiency, AMWA welcomes the proposed requirements regarding public communication, including requiring agencies to publish NEPA documents and supporting materials on their websites to establish tracking numbers for environmental assessments and environmental impact statements. These requirements will help staff across utilities and the public understand the standing of proposed projects and assessments.

There are many scenarios where innovative approaches to NEPA reviews could protect public safety by allowing for more efficient and flexible review processes. While the Proposed Rule does not establish procedures for innovative approaches, AMWA members could benefit from these kinds of procedures being used to address extreme environmental challenges, such as rising sea levels, increased wildfire risk and intensity, and water scarcity. For example, wildfires in arid and forested parts of the nation have the potential to permanently damage or destroy the infrastructure responsible for water storage, transfer, treatment, and other uses. Other natural disasters like floods, hurricanes, and tornadoes can permanently destroy or reduce the capacity water treatment plants, reservoirs, wells, or other critical facilities. As examples, member utilities in Western Oregon have plans to maintain operation if a wildfire burns down key facilities, and member utilities across the Plains states prepare for the potential of tornadoes to harm or destroy key assets. However, despite the best risk assessment and scenario planning, if a water utility's key infrastructure goes offline or is permanently destroyed, water utilities still need the ability to

create alternatives as soon as is feasible to protect public safety. Language allowing for alternative approaches could deliver the flexibility needed to provide the kinds of efficient reviews necessary in such urgent times. Given the increase in frequency and intensity of many natural disasters related to climate change, we urge CEQ to keep language in the final rulemaking for innovative approaches and solutions for NEPA reviews.

Water utilities face many challenges when confronted with several climate change risks, such as threats to facilities and treatment operations due to wildfire and floods and threats to a sustainable supply of water due to increased, sometimes unprecedented drought. As water utilities aim to deliver a critical service for their users, federal agencies should have access to flexibility and ingenuity where possible to protect public health and implement pressing climate change adaptation measures where necessary. Therefore, AMWA encourages CEQ to maintain the provisions allowing agencies to utilize an innovative approach in reviews pending CEQ approval.

AMWA strongly encourages CEQ to expand its beneficial effects provisions in the final rulemaking, as the proposed revisions pose both severe risks to and key opportunities for water utilities. The proposed revisions' language regarding §1501.3(d)(2)(i) introduces uncertainty regarding how exactly parties should account for whether an EIS is required and the exact measures necessary. Specifically, the proposed revisions state the following potentially conflicting two paragraphs:

“Paragraph (d)(2)(i) would mirror the 1978 rule's reference to beneficial effects with clarifying additions. CEQ proposes to state that only actions with significant adverse effects require an EIS. This is distinct from weighing beneficial effects against adverse effects to determine that an action's effects on the whole are not significant.”¹

“CEQ proposes to add to paragraph (d)(2)(i) clarification that agencies should consider the duration of effects and provide an example of an action with short-term adverse effects but long-term beneficial effects. While significant adverse effects may exist even if the agency considers that on balance the effects of the action will be beneficial, the agency should consider any related short- and long-term effects in the same effect category together in evaluating intensity. For example, an agency should consider short-term, construction-related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects. In this situation, the agency could reasonably determine that the climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required.”¹

AMWA is concerned that the listed examples of projects with short-term adverse effects but long-term beneficial effects, including renewable energy projects and forest restoration projects, could still have adverse impacts on water supplies that warrant adequate assessment. For example, the development of renewable energy projects could cause sedimentation or other runoff events into a water utility's source water supply with significant impacts on the operations of a utility's treatment. Furthermore, AMWA is concerned that agencies have much room for subjective evaluations without clearer guidance on reasonable determinations for beneficial effects that outweigh adverse effects.

On the other hand, these provisions, once clarified, could greatly streamline the NEPA process for water utility projects that protect a clearly beneficial goal: maintaining a sustainable, affordable drinking water supply. However, it is unclear based on the proposed revisions whether projects supporting the public good, such as augmenting strained water supplies or acquiring alternative water supplies in a drought-stricken area, would constitute projects with only beneficial effects or overall beneficial effects and therefore be exempt from an EIS. For example, water utilities engage with projects that could have some short-term adverse impacts but overall achieve an important goal of establishing a secure water supply. Among many potential examples, some water projects that could come under NEPA review include expanding a current water supply (e.g., expanding a reservoir) or developing an additional supply and piping infrastructure (e.g., developing piping and intakes from a surface water body not currently in use for drinking water). AMWA strongly encourages CEQ to weigh the risks of these provisions and provide further clarity and examples, including projects that ensure the continuation of essential services like drinking, storm, and wastewater, in its final rule.

CEQ should approach the expansion of the context of significant effects with caution to reduce additional reporting and analysis burdens in NEPA reviews. The proposed revisions would require agencies to consider the context of the action and intensity of the effects of the action in determining whether the effects are significant. Concerning context, the proposed revisions state that agencies should analyze the significance of an action in context, including global, national, regional, and local. With respect to intensity, CEQ indicates that agencies should consider the duration of the effects of the action.

CEQ should evaluate these additions and provide guidance on the levels of required analysis that are in line with parties' and agencies' analytical capabilities. While including various geographic levels of context and different levels of intensity can help put issues like greenhouse gas (GHG) emissions and climate change effects into the proper consideration of the effects of a project, the expansion of context may introduce more or unfair burdens in reporting for both parties and reviewing agencies. For example, utilities may have to rely on inadequate or nonexistent local GHG inventories to demonstrate the local or regional context of a project, demonstrating an additional burden or liability in the agency's review.

Furthermore, estimating the impacts of proposed actions at the national and global scale can be difficult or impossible. Without specific, tangible guidance on estimating impacts at local, regional, national, and global scales, agencies and parties may face too large of a burden of analysis. Guidance that emphasizes realistic but accessible estimations is necessary to help parties prepare the kinds of analysis CEQ is proposing here for the expanding definitions of context and intensity. AMWA welcomes holistic and expansive evaluation of impacts of projects in NEPA reviews but reiterates that CEQ should work to reduce burdens and decrease review timelines.

Regarding incorporating climate change considerations into NEPA review, AMWA encourages CEQ to address the potential hurdles the proposed revisions could impose on the timely completion of reviews. Although AMWA believes incorporating climate change considerations in NEPA reviews is essential to securing the long-term sustainability of water supplies, the Association also believes it is necessary to acknowledge that the proposed revisions will have the impact of imposing additional NEPA review documentation that could hinder timely reviews.

As AMWA members have long records of service to their communities – in some cases spanning parts of three centuries – AMWA is supportive but cautious of estimating climate change impacts of projects within the expanded context in reviews. The Proposed Rule adds climate change to effects that must be considered in NEPA reviews, specifically “climate-change related effects, including contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives.” As planners knowledgeable about the resilience of infrastructure, AMWA members appreciate CEQ’s recognition that climate change may impact a proposed infrastructure project or its alternatives and recognize that this revision will help agencies identify impacts and threats to a project’s long-term sustainability. For example, projects that fall under the purview of NEPA often will have far-reaching lifespans that must account for the projected changes in climate and related hazards. Water managers are familiar with creating resilient infrastructure, and while they are equipped to meet the challenges of estimating the impacts climate change will have on a proposed action, AMWA encourages CEQ to minimize the additional burden these requirements will have on NEPA reviews. For example, CEQ could add text in the final revisions that encourage programmatic reviews, which comprehensively evaluate the impacts of climate change, and separately promote tiering from a utility or agency-adopted climate adaptation/action plans or programs.

CEQ has requested that the public comment on whether CEQ should codify any or all of its 2023 GHG guidance. In response, AMWA holds that any final guidance should clarify specifically which GHG emission levels are unnecessary to quantify in analyses and should clarify the best available science recommendations in reviews, recognizing limitations in climate projections and

modeling capabilities. The Association has provided its comments on the interim guidance³ as a supplement to this comment letter for CEQ's review and maintains that CEQ should address all the outlined concerns if it chooses to codify the interim guidance.

While AMWA utilities are committed partners of the federal government in pursuing environmental justice,⁴ CEQ should clarify and expand on procedures the agency deems necessary for agencies to include environmental justice impacts in reviews. As written, the revisions are unclear on how agencies should adequately account for and prepare for environmental justice concerns. Specifically, the proposed revisions would require agencies to analyze disproportionate and adverse health and environmental health effects on communities with environmental justice concerns. However, the proposed rule does not define "communities with environmental justice concerns" and instead explains that these would be communities that do not experience environmental justice. AMWA is concerned that without adequate and thorough procedures, agencies may not only be unable to fully consider the impacts of a proposed action on communities but also may be held to an unfair standard that potential litigants could challenge due to the vague and subjective nature of the provisions. AMWA is committed to mitigating or removing negative impacts to communities inequitably burdened with environmental hazards and encourages CEQ to further spell out methods for agencies to accurately assess environmental justice concerns in NEPA reviews without posing undue burdens on applicants and reviewing agencies.

Conclusion

AMWA members recognize the importance of due diligence in the NEPA review process, as following NEPA procedures ensures that agencies recognize the full array of potential effects on the nation's water supplies when conducting reviews. At the same time, water utilities face an array of challenges that require robust management and adaptation efforts. Water utilities serving communities across the United States are facing clear and urgent operation challenges, such as droughts, severe storms, and wildfires. Ensuring timely and cost effective NEPA review processes guarantees that utilities can implement key capital projects when necessary.

Adaptation to a myriad of changing conditions requires that utilities can react swiftly to challenges as they appear. AMWA members serve the largest communities in the United States and while their records of sustained service speak to their ability to innovate and adapt in a changing world, their effectiveness is due in part to not just their willingness to act but also their ability to effect change following a careful consideration of the challenges before them. AMWA utilities, therefore, benefit from streamlined and efficient NEPA reviews that both protect precious water

³ AMWA. (April 10, 2023). AMWA comments on NEPA greenhouse gas and climate effects guidance. <https://www.amwa.net/testimonycomments/amwa-comments-nepa-greenhouse-gas-and-climate-effects-guidance>.

⁴ AMWA. (Adopted October 2022). Policy Resolution: Environmental Justice. <https://www.amwa.net/policy-resolution/environmental-justice>.

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resources by identifying project threats to them and allow utilities to face challenges quickly when necessary.

AMWA thanks CEQ for the opportunity to provide feedback on the NEPA Implementing Regulations Revisions Phase 2. If you have any questions or want to discuss our comments further, please contact Jessica Evans (evans@amwa.net), AMWA's Manager of Government Affairs and Sustainability Policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Dobbins". The signature is fluid and cursive, with a prominent initial "T" and a long, sweeping underline.

Thomas Dobbins
Chief Executive Officer

cc: Amy B. Coyle, Deputy General Council
Matthew G. Lee-Ashley, Chief of Staff
Jomar Maldonado, Director for NEPA