



May 15, 2017

Submitted via Federal eRulemaking Portal
<http://www.regulations.gov/>

Sarah Rees, Director
Office of Regulatory Policy and Management
Office of Policy
1200 Pennsylvania Avenue NW
Mail Code 1803A
Washington, DC 20460

Re: Comments in Response to EPA’s Request for Input on Regulations Appropriate for Repeal, Replacement, or Modification
Docket ID No. EPA–HQ–OA–2017–0190

Dear Ms. Rees:

This letter provides comments on behalf of the Western Urban Water Coalition (“WUWC”) on the U.S. Environmental Protection Agency’s (“EPA’s”) Request for Input on Regulations Appropriate for Repeal, Replacement, or Modification in accordance with Executive Order 13777, 82 Fed. Reg. 17793, April 13, 2017 (“EPA’s Request”). WUWC appreciates the opportunity to comment on EPA’s Request.

Created in June 1992 to address the West’s unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in major metropolitan areas in the western states. The membership of WUWC includes the following urban water utilities: *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project; *California* – Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, and City and County of San Francisco Public Utilities Commission; *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

INPUT FROM THE WESTERN URBAN WATER COALITION

WUWC provides input below in response to EPA’s Request. WUWC has identified regulations, programs and policies that could be streamlined to reduce the burden on regulated entities without diminishing important environmental protections. WUWC’s input is focused on ways that EPA can work collaboratively with western water supply agencies to ensure these agencies can meet water supply needs and water quality requirements. A number of WUWC’s suggestions do not require any regulatory reform but rather only administrative action by EPA.

I. Tax Exemption for Water Conservation Rebates

Water supply and management utilities and companies throughout the country are implementing effective conservation programs to preserve and extend limited water supplies. These activities directly benefit infrastructure, both by extending the life of existing facilities and by supporting infrastructure enhancement that makes water delivery more efficient and reliable. A key aspect of these programs is to create the incentive for customers to conserve by providing rebates to lower the cost to the consumer for water-saving measures and equipment purchases.

Unfortunately, under the last Administration, the IRS determined that these rebates were taxable income. This has discouraged customers from taking these actions. A bipartisan group of members of Congress has urged the Treasury Department to treat these water conservation measures as included within the Tax Code exclusion for rebates for energy conservation measures, based on the commonly recognized energy-water nexus. The Obama Administration failed to respond to this request. The impact of the request on the federal treasury will be minimal.

The U.S. Environmental Protection Agency (EPA) can support these efforts by encouraging the Treasury Department to exempt water conservation rebates provided to customers from the definition of income for federal tax purposes, based on the connection between energy and water conservation.

II. Comprehensive Reimbursement Agreements

One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays in decision-making. These problems often arise because of insufficient staffing and lack of federal agency resources to conduct the necessary procedures. Delays caused by insufficient federal staff and resources are likely to increase with budget cuts. A partial solution to this problem would be to make agency review procedures more efficient and expeditious by adopting uniform policy guidance that allows non-federal parties to cover the costs of these reviews through the hiring of federal staff and other support by the involved agencies. Similar procedures exist in a few EPA programs, and a uniform policy should be established for all federal environmental review procedures.

EPA should develop comprehensive and uniform guidance that encourages the use of reimbursement agreements through which applicants can pay for permit processing costs. Such agreements must ensure the objectivity of the reviews and agency actions made pursuant to reimbursement programs.

III. Define Appropriate EPA Role in Permit Review Under Jurisdiction of Other Agencies

EPA often plays an important role as a cooperating agency or consulting party in permit reviews under the jurisdiction of other agencies. EPA also reviews EISs for sufficiency. EPA should be involved in a collaborative process with project applicants at the early development stages of water supply projects. In addition, federal agencies need to reach out to EPA and coordinate EPA involvement at the earliest stage of project review as possible. EPA should, in turn, play its

role in a timely manner as early in the process as possible and limit its role to its areas of expertise, not issues under the responsibilities of other agencies.

The Administrator should issue guidance that governs the consulting role of the EPA in permit reviews of other agencies to encourage collaboration between EPA and project applicants, and to require timely participation and a scope of involvement consistent with EPA's jurisdiction and expertise.

IV. Clean Water Act Jurisdiction (The “Waters of the United States” Rule)

EPA is in the process of proposing a new definition of “Waters of the United States” (WOTUS) which will determine CWA jurisdiction. The West is one of the regions that will be the most directly and significantly affected by implementation of a new rule because of its unique geology and hydrology, which includes dry arroyos, washes, ditches, isolated ponds, vernal pools, and ephemeral or intermittent water bodies. To meet water supply and wastewater treatment needs, as well as stormwater control requirements, western water agencies must make substantial infrastructure investments, often requiring creative and innovative approaches. It is essential that these critical activities, including those undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures.

In the new WOTUS rule, EPA should address the following:

Ditches and Canals: WUWC supports the development of a rule that exempts from jurisdiction ditches and canals that only carry intermittent flows of water, and are not a relocated tributary or excavated in a tributary from jurisdiction.

Erosional and Ephemeral Features: EPA should ensure that erosional and ephemeral features in the arid West, such as arroyos and dry washes, are non-jurisdictional.

Breaks in Tributaries: EPA should ensure that where there are overland flows through dryland breaks to a water of the United States, this type of break renders a tributary upgradient of the dryland break to be non-jurisdictional.

Features Without Flow Characteristics: EPA should explicitly recognize that features where water may be present (for instance, in residual ponds resulting from placer or other mining efforts) are not jurisdictional where a continuous physical channel is absent, a bed-and-bank is not discernible, an ordinary high water mark is not observable, and/or there are no flow characteristics.

Water Distribution and Storage Systems: EPA should ensure the new rule contains an exclusion for “water system components” to promote solutions in areas where drought has exacerbated supply issues. “Water distribution and storage system components” should include: (1) interconnected components that move, store and treat wastewater; (2) systems that handle “raw water”; and (3) systems that handle treated water.

Stormwater Control Features: EPA should ensure the new rule contains an exclusion for stormwater control features including those placed in low lying depressions or drainage ways that periodically flow in response to significant precipitation events.

V. Regulatory Flexibility to Adapt to Changing Natural Conditions

Although the CWA provides some flexibility tools that can assist states and water providers in addressing changing natural conditions, these tools are difficult to use and rarely employed. The frequency, intensity and unpredictability of droughts, floods and wildfires are increasing, and temperatures are rising. Western water providers are disproportionately experiencing the impact of these changes. The recent changes in natural conditions may impact water quality standards (including designated uses), effluent limitation determinations, total maximum daily load (TMDL) calculations, and section 401 water quality certifications. Water providers and wastewater dischargers need flexibility to adapt to the challenges brought about by changes in natural conditions.

The Administrator should issue guidance that explicitly endorses the use of the CWA flexibility tools — use attainability analyses, water quality standard variances, site-specific water quality criteria and permit compliance schedules — to address changing natural conditions. Moreover, the federal government should continue to advance research to assist water providers in adapting to changing natural conditions.

VI. Update Water Reuse Guidance

The use of alternative water supplies, including recycled water and gray water, is an increasingly important component of western water providers' water supplies. Population increases and changes in natural weather conditions in western urban areas, specifically prolonged drought increase the value of diverse water supply portfolios. In 2012, EPA issued its most recent guidance recommending a series of water reuse practices. *See* EPA, 2012 Guidelines for Water Reuse (EPA/600/R-12/618). The purpose of the guidance was to provide an overview of different states' regulatory practices to facilitate further development of water reuse. EPA, however, did not provide states with input on water reuse criteria. Many states are hesitant to more widely authorize water reuse without such guidance from EPA.

The Administrator should issue guidance on how to promulgate water reuse criteria for both potable and alternate water supplies, including gray water supplies, to assist state regulators. Such guidance would provide insight on acceptable uses of alternative water supplies and enable states to ensure the public that any type of reuse authorized is safe to human health.

VII. Water Quality Criteria

Water Quality Criterion for Selenium: Pursuant to Section 304(a)(1) of the Clean Water Act (CWA), in 2016, EPA issued its national recommended chronic aquatic life criterion for selenium in freshwater. In its 2016 recommendation, EPA expressed the criterion in terms of a fish tissue concentration in addition to a water concentration. Although EPA added a criterion expressed in terms of a fish tissue concentration, EPA has not consistently allowed for the use of

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the tissue-based criterion. *EPA should consistently apply its recommended chronic aquatic life criterion for selenium.*

Numeric Nutrient Water Quality Criteria: In many instances, EPA has worked collaboratively with states to assist states in the adoption of numeric nutrient criteria. Because of the complexity of this process, EPA must continue to provide states time and flexibility to adopt numeric nutrient criteria.

Thank you for your consideration of these comments. If you have any questions, please contact our counsel Donald C. Baur of Perkins Coie, LLP at (202) 654-6200.

Sincerely,

A handwritten signature in blue ink that reads "Michael P. Carlin". The signature is written in a cursive style with a large initial "M" and a distinct "P" and "C".

Michael P. Carlin
Chairman

cc: Donald C. Baur
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