

November 29, 2022

Radhika Fox
Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Water System Restructuring Assessment Rule (RIN: 2040-AF96)

Dear Assistant Administrator Fox,

Thank you for providing the opportunity for several of the undersigned organizations to meet with your senior staff regarding our concerns about the Water System Assessment Restructuring Rule (the “Rule”), which is currently under development.

All of the undersigned now write to request that EPA hold listening sessions and/or roundtables to solicit wider input from community-based and environmental justice organizations and other relevant stakeholders, before completing work on a Notice of Proposed Rule Making. We also urge the Office of Water to seek input on the Rule from EPA’s new Office of Environmental Justice and External Civil Rights and the National Environmental Justice Advisory Council.

On August 15, 2022, several of our organizations wrote to you, urging EPA to ensure the Rule protects impacted communities’ interests in decisions regarding the water systems that serve them. The letter (attached below) offered several specific recommendations for the Rule. As follow-up, on October 28, 2022, representatives of three of those organizations (Michigan Welfare Rights Organization, Community Water Center, and Natural Resources Defense Council) met with Deputy Assistant Administrator Bruno Pigott, Director of the Office of Ground Water and Drinking Water (OGWDW) Jennifer McLain, and several OGWDW staff. We appreciate that Dep. Asst. Admin. Pigott and Dr. McLain were keenly interested in understanding how the concerns raised in the August 15 letter play out in practice at the community level—particularly in communities facing environmental justice and water equity challenges—and how the Rule might address those concerns. We will follow-up with them soon to provide additional information.

All of the undersigned organizations believe, however, that EPA and state primacy agencies need to hear directly from residents of impacted communities **across the country** that may be affected by the Rule. Consolidation, transfer of ownership, or “other actions” contemplated by the Rule can have profound effects on the community served by a water system, often against a backdrop of systemic racism that has led to historic disinvestment in water systems or failure to provide water service to certain communities. At the same time, the Bipartisan Infrastructure Law and other EPA initiatives can offer water systems more equitable access to funding improve upon their SDWA compliance. To craft a Rule that protects impacted communities’ interests, EPA must hear directly from those communities about their experiences, goals, and concerns and how they wish to be engaged in decision-making about their water systems.

To our knowledge, EPA has not done any pro-active, public-facing, stakeholder outreach to seek input on the Rule. Nor has the agency done any other outreach to community-based or environmental justice organizations, or to regional or national environmental organizations. Before proceeding with a proposed Rule, EPA should hold listening sessions and/or roundtables to seek the critical input it has been missing.

We would welcome the opportunity to discuss this further with you, and to assist in engaging communities in this effort. Please contact Lawrence Levine (llevine@nrdc.org) with any questions.

Sincerely,

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Program
American Rivers

Kyle Jones
Policy & Legal Director
Community Water Center

Julian Gonzalez
Senior Legislative Counsel
Earthjustice

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Encl.

cc:
Bruno Pigott, Dep. Asst. Administrator for Water
Jennifer McClain, Director, Office of Ground Water and Drinking Water

August 15, 2022

Radhika Fox
Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Water System Restructuring Assessment Rule (RIN: 2040-AF96)

Dear Assistant Administrator Fox,

On behalf of the undersigned groups, we write concerning the Water System Assessment Restructuring Rule (the “Rule”), which the Environmental Protection Agency (“EPA”) is currently developing under the Safe Drinking Water Act (“SDWA”). We ask you to ensure that the Rule protects impacted communities’ interests in decisions regarding the water systems that serve them. We also ask you to ensure that this rulemaking is aligned with critical EPA initiatives that seek to provide technical assistance and Justice40 program outcomes and benefits to communities experiencing water-related environmental justice problems.

In line with the above goals, we identify below several critical considerations that we urge EPA to address in its Notice of Proposed Rulemaking (“NPRM”) for the Rule, as well as in direct outreach to impacted communities during the rulemaking process.¹

EPA is required to promulgate the Rule pursuant to SDWA amendments enacted by the America’s Water Infrastructure Act of 2018. See 42 U.S.C. 300g-3(h)(6). The Agency’s Unified Agenda identifies October 2022 as the anticipated date for a NPRM. Pursuant to the SDWA amendments, the Rule must address three topics:

- authority for primacy agencies (or EPA, where there is no state primacy agency) to require public water systems, under certain circumstances, to assess options for consolidation, transfer of ownership, or “other actions” to remedy repeated violations of primary national drinking water regulations, 42 U.S.C. 300g-3(h)(3);
- provision of loans under the Drinking Water State Revolving Fund program to carry out consolidation, transfer, or other actions pursuant to the assessment, 42 U.S.C. 300g-3(h)(4); and
- limitation on liabilities for penalties and damages arising from specific violations identified in the assessment, if a system completes the recommendations of an approved assessment, 42 U.S.C. 300g-3(h)(5).

EPA’s website states that the Rule will also address another “incentive,” providing that “if a primacy agency approves an eligible restructuring plan, then for up to two years... no enforcement action may be taken against the noncompliant system for any violation that is

¹ To our knowledge, in developing a proposed Rule, EPA has not yet done any stakeholder outreach to community-based or environmental justice organizations, or to regional or national environmental organizations.

identified in the approved plan.” This anticipated provision of the rule appears to be intended to implement 42 U.S.C. 300g-3(h)(2).

EPA should make clear in the proposed Rule that the goals of any mandatory assessment, and any actions taken pursuant to such assessments, are to ensure that every person served by the public water system receives safe, sufficient, affordable, and reliable drinking water services.²

In developing the Rule, EPA must recognize that consolidation, transfer of ownership, or “other actions” contemplated by the Rule can have profound effects on the community served by a water system. Accordingly, the EPA must ensure that assessments evaluate a wide range of impacts of potential alternatives, while ensuring robust and effective public participation. We summarize our three key concerns below.

First, water system assessments must compare alternatives based upon factors that include effects on the governance structure, solvency, public oversight, and transparency of a water system and the resulting degree of accountability the system has to the people it serves; the cost of water service to residents, particularly low-income households; the long-term sustainability of proposed actions; and, of course, the safety and reliability of drinking water and the community’s public health and economic wellbeing.

Second, assessments must examine not only consolidation and transfer of ownership, but also other alternatives that do not involve transfer of management or ownership of a public water system—especially in environmental justice communities where systemic racism has led to historic disinvestment in water systems. This includes conducting an analysis of the socioeconomic and regulatory factors that contributed to the local utility’s non-compliance, as well as the impact of the establishment of adjacent water systems and demographic and economic changes, including detrimental redlining. Contributing factors may include a long-term lack of technical assistance, inability to access low-cost financing options, public and private disinvestments, and inequitable rate structures.

In consideration of such analyses of root causes, alternatives to consider may include public investment in improvements to water system infrastructure (funded by sources that are not limited to customer-derived revenue); providing adequate opportunity for technical assistance initiatives to build-up a system’s technical, managerial, and financial capacity; and partnerships with other water systems to jointly purchase equipment and supplies and share expert operators and other staff.

Third, to ensure that assessments and any resulting actions meet the needs and desires of the community served by a public water system, the Rule must ensure that all assessments are conducted with full transparency and robust and meaningful participation by members of the communities served. This must include engagement not only with local officials from jurisdictions within the water system’s service area, but also community-based organizations and residents served by the system. Meaningful participation includes, among other things, providing

² Where a public water system also provides wastewater or stormwater services, assessments must also ensure (and promote) the safe, affordable provision of those essential services and avoid any detrimental impacts on the operations and solvency of wastewater and stormwater facilities.

extended time for community feedback and accommodations in a variety of formats (e.g., in-person and online), incorporating community feedback into an assessment and its recommendations, and responding substantively to community concerns and questions. Further, the Rule must ensure robust public participation in primary agencies' review and approval of assessments, as well as in water systems' implementation of actions recommended by an approved assessment (including, but not limited to, a water system's establishment of customer rates and terms of service).

We urge EPA to make clear in the NPRM that all of the above considerations are within the scope of the rulemaking, propose draft rule language addressing these concerns, include in the NPRM a specific invitation for public comment on these issues, and conduct extensive outreach to impacted communities through multiple channels to seek feedback.

We would welcome the opportunity to discuss these issues with you further and look forward to offering more detailed comments in response to the NPRM. Please contact Lawrence Levine (llevine@nrdc.org) with any questions or to schedule a time to meet.

Sincerely,

Kyle Jones
Policy & Legal Director
Community Water Center

Maureen Taylor
Chair, Board of Directors
People's Water Board Coalition

Sylvia Orduño
Organizer
Michigan Welfare Rights Organization

Sheyda Esnaashari
Drinking Water Program Director
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Lawrence Levine
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cc:

Jennifer McClain, Director, EPA Office of Ground Water and Drinking Water
Yu-Ting Guilaran, Deputy Director, EPA Office of Ground Water and Drinking Water
Will Bowman, EPA Office of Water