



July 26, 2024

Dr. Jennifer McLain
Director
Office of Ground Water and Drinking Water (OGWDW)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted Electronically

Re: Comments on Water System Restructuring Assessment Rule, [89 FR 46998](#), EPA–HQ–OW–2022–0678.

Dear Director McLain,

The Association of Metropolitan Water Agencies (AMWA) appreciates the opportunity to comment on EPA’s proposed Water System Restructuring Assessment Rule. AMWA is an organization composed of the largest publicly owned water systems in the United States, with members providing safe drinking water to over 160 million people. AMWA believes that water systems whose customers’ health is at risk due to repeated violations of one or more National Primary Drinking Water Regulations (NPDWR) should be encouraged to explore appropriate restructuring options that have the potential to address these violations. AMWA appreciates that the proposed rule would establish a structure through which states could voluntarily require public water systems that meet certain criteria to conduct a mandatory assessment of restructuring options, with the goal of identifying strategies that would protect public health.

However, AMWA believes the proposed rule carries several shortcomings that could limit its ability to promote effective restructuring plans that protect public health, including:

- A lack of full engagement of non-responsible water systems during the development of restructuring plans;
- Unnecessary limitations on enforcement relief and liability protections for non-responsible water systems; and
- A lack of consideration of the cost of restructuring on non-responsible water systems.

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AMWA's comments on this proposed rule provide additional details on each of these concerns and offer recommendations for improvements that its members believe will lead to the development of more collaborative and effective restructuring plans.

Engagement of non-responsible water systems in the assessment process

AMWA supports restructuring as a means of improving compliance with NPDWRs by systems that have been unable to rectify repeated violations likely to affect public health adversely. When water systems are carrying out mandatory restructuring assessments pursuant to a state directive arising from the proposed rule, AMWA members will often serve as the non-responsible system designated in the restructuring process, as they are generally better-resourced than smaller systems more likely to face persistent compliance challenges. The Association recognizes that the proposed rule limits state allowances to mandating restructuring assessments – and not requiring water systems to implement restructuring plans. For non-responsible utilities to be willing partners in restructuring, the proposed rule should be revised to incorporate two critical opportunities for increased engagement in this process:

AMWA requests that the final rule include a formal role for the non-responsible water system during the initial restructuring assessment by the non-compliant water system. The proposed §142.92 outlines requirements of the mandatory restructuring assessments, including “*at least one feasible restructuring alternative, and describes how the alternative will: (i) return the system to compliance as soon as practicable.*” At no point in the requirements for this assessment does it outline the need for consultation with, or consent by, the non-responsible system. If a non-compliant water system is tasked with developing a restructuring assessment that may include a plan for consolidation with another water system, it is logical that the other water system should have a role in this process. A non-responsible system must understand the context behind this proposal before agreeing to take on the short- and long-term risks associated with a resource-intensive endeavor like this, especially given that SDWA 1414(h)(5) limits liability protections only to violations listed in the restructuring plan. If a non-responsible utility is cited in a restructuring plan, it has a fundamental need to be involved in the development of the plan that it will be implementing.

Historically, AMWA members who have taken on restructuring have performed due diligence, including looking at historical citations. Even without noted citations, issues were discovered that were unknown by the non-compliant water system. A due diligence period would further protect the non-responsible water system by providing additional scrutiny and incentivizing it to assist the non-compliant system. To ensure appropriate involvement of non-responsible systems, a due diligence period should be provided for a non-responsible system to evaluate the non-compliant system, concurrent with the development of a restructuring plan. Any additional potential violations by the non-compliant system identified during this period would be incorporated into the restructuring plan, thereby providing the non-responsible system with appropriate enforcement relief and liability protections. Alternatively, AMWA requests additional relief for unknown systematic issues discovered during the restructuring process.

- An AMWA member recently absorbed two separate homeowner's association water systems and reviewed compliance history before the acquisition. No compliance issues were noted, but sampling found compliance issues despite the lack of known violations that were then promptly addressed.

AMWA appreciates the opportunity for the non-responsible system to submit plans for enforcement relief and liability protection. However, AMWA believes the opportunities for engagement of the non-responsible system should be involved even further in the initial assessment by the non-compliant water system, to the extent that a reasonable due diligence period must take place for acceptance of the plan. If the proposed rule is finalized as it is currently written, without these considerations, many non-responsible water systems will be reluctant to cooperate with non-compliant systems to implement restructuring plans based upon required mandatory assessments. Instead, many systems may choose to explore restructuring outside of the structure of this rule to protect the non-responsible system from hidden or unknown issues.

Restructuring Types

89 FR 47008 notes, "A plan for physical interconnection by itself would not be eligible for liability protection or enforcement relief." Achieving compliance by purchasing wholesale water through physical interconnections should be a recognized restructuring option. This may be one of the simplest, quickest, and most cost-effective ways for a utility to achieve compliance by restructuring its water utility to take advantage of economies of scale provided by a larger utility or several utilities cooperating on regional wholesale water solutions.

Additional clarification should be provided to incentivize flexibility when utilizing contractual agreements to correct violations. The rule language in §142.91 discusses that the contractual agreement should be for "significant management or administrative functions of the public water system to correct violations identified in the plan." The rule language should provide additional guidance or reassurance that the "significant" effect of the contractual relationship is that it leads to correcting the violations. The discussion at 89 FR 47009 on eligible plan types should be expanded upon and clarify that other types of contractual arrangements that lead to the correcting of the violations are eligible for restructuring incentives (e.g., P3 public-private partnerships).

Enforcement Relief

AMWA recognizes that SDWA 1414(h)(2) bars states or EPA from taking enforcement action related to a specific violation identified in an approved restructuring plan for at least two years after the plan's approval, or the completion of a related system consolidation. However, many issues identified in a restructuring plan will require more than two years to resolve, and restructuring plans will change, allowing for the provision of revised relief plans outlined in the rule. As stated in the section above, AMWA is concerned that enforcement relief is only from known problems with the non-compliant system and asks for an avenue for relief for unknown issues that emerge during the restructuring process.

Because the sec. 1414(h)(2) establishes a *minimum* timeframe during which enforcement action cannot be taken, AMWA requests that EPA provides guidance to states recommending that states also afford appropriate enforcement relief in the period following the two years until the issues identified during restructuring planning are resolved.

For example, any compliance data evaluated through a Running Annual Average (RAA), like those of trihalomethanes, could reach single-point compliance within 2 years but may not reach RAA compliance within that time frame. A utility would need to attain compliance for these issues within a year to meet compliance goals for RAAs within 2 years. For chronic issues, it can be unrealistic to facilitate plant improvements within the 2-year timeframe for enforcement relief. AMWA asks for latitude in these timelines, with a preferred timetable of a 2-year target or as otherwise agreed.

An AMWA member recently supported restructuring efforts of multiple neighboring systems in a state having an existing restructuring program. In each case, the state placed the non-responsible system under a consent order related to the violations they sought to correct. AMWA asks EPA to consider avenues for non-responsible systems to request enforcement relief if a state has chosen not to use its voluntary authority to mandate an assessment.

Liability Protection

AMWA strongly disagrees with the approach that “*the non-responsible water system would be required to transfer to the state any identified liquid assets or funds of the assessed system up to the amount necessary to pay the outstanding penalties or fines*” (89 FR 47012). AMWA believes that these assets would be better leveraged to address the source of the problems requiring restructuring. However, the Association recognizes that this requirement stems from statutory limitations in SDWA 1414(h)(5)(B). Given this, the Association asks EPA to encourage primacy agencies to maintain flexibility if fines have yet to be assessed to allow for those assets to be allocated towards remediation of the issues identified in the assessment, especially as the statute does not define potential penalties and damages. AMWA also asks EPA to give states maximum discretion and flexibility in defining liquid assets that are “available” to settle outstanding penalties for non-compliant systems. Providing this flexibility will allow the state, the non-compliant system, and the non-responsible system to have a range of options available to facilitate a beneficial partnership.

When water systems are evaluating restructuring options that involve consolidation, several complex financial questions are considered, including:

- What happens to bondholders if the non-compliant system has an outstanding bond? Does it transfer to the new entity?
- Do the liquid assets include cash receivables?

EPA should not answer these questions but, instead, permit states to perform the asset calculations in a manner that makes it most attractive for the acquirer to take on the challenge.

In 89 FR 47000, it is stated that “*The liability protection incentive would protect a compliant water system from liability for violations at an assessed water system until it has acquired an assessed water system through transfer of ownership or has completed physical or administrative consolidation with the assessed water system.*” AMWA requests clarity on what constitutes the “transfer of ownership” to a non-responsible utility. Based on the language throughout the rest of the proposed rule, AMWA understands that liability protection would apply only to violations specifically addressed in the restructuring plan. Then, these liability protections would take effect once the state determines the plan is complete ([Webinar](#)). The state is not listed in 89 FR 27012 “under the proposed rule all restructuring must be completed before the non-responsible system is eligible for liability protection.”

AMWA would not correlate liability protection with the transfer of ownership of a system but rather with whether the violations identified in the plan have been addressed. The term “complete” remains open-ended: AMWA recommends completion of the plan, correlated with the implementation of liability protection, to mean that the non-responsible water system has notified the state that all actions identified in the restructuring plan and its revisions have taken place and that the potential impacts on human health have been mitigated.

Costs associated with restructuring

Given that all available assets are allocated first towards fines, there may be limited assets available to pay for the improvements required. EPA cites studies that “consolidation can reduce costs per household by spreading the cost of service across a larger consumer base” (89 FR 46999). In practice, this is not always the case. While the non-responsible system, often a larger one, would likely have lower rates than the struggling system, there would still be ratepayer impacts with water consumers paying the bill for restructuring.

If states take advantage of their newfound authority to require non-compliant water systems to conduct restructuring assessments, and non-compliant systems move forward with the plans, then more water systems across the country will incur significant associated costs. For example,

- In one situation requiring restructuring, a system owner abandoned its system. A neighboring water system took over this system that no longer had management and identified that there were no water meters in this system – ratepayers in that area took on that direct cost.
- Another AMWA member typically adds a surcharge to the area served by a non-compliant water system to bring the system up to standards in lieu of shifting the cost to the rest of the rate base that isn't the source of the problem. It can be a significant load until the debt is paid off unless SRF funds are made available. However, many state SRF programs are already oversubscribed, and nationally the water infrastructure investment needs far outweigh available SRF assistance. Diverting additional SRF dollars to support these consolidation efforts, while worthwhile, will put additional strain on the program.

It is concerning that EPA failed to include the projected costs to PWSs for both the assessment and implementation of the proposed rule, given the logic that the “*proposed WSRAR does not mandate restructuring plans*” (89 FR 47015). PWSs already face significant restructuring costs and will incur even more, as a result of this proposed rule. Because the costs will be so substantial to systems and states, EPA should still consider these costs in the final rulemaking. It would be irresponsible to exclude impacts to these regulated entities.

State impediments on rate setting may also impact local government’s ability to participate in restructuring, particularly given the allocation of liquid assets towards fines, as discussed above. Many states have limitations on rate setting and rate structures that may limit a local government’s ability to acquire a utility and charge just and equitable rates needed to accomplish a restructuring. Take the example of a hypothetical Florida municipal utility that acquires a non-compliant utility outside its city limits through a restructuring. Under Florida law, the municipal utility could not charge the customers located in the non-compliant utility service territory more than 50 percent in excess of the total amount the municipality charges consumers served within the municipality for corresponding service per [section 180.191\(1\)\(b\), Florida Statutes](#). This is true even if charging higher rates to the customers in the non-compliant utility service territory would be considered affordable, just, and equitable under typical principles of rate setting.

Community Involvement

The proposed rule does not address the connection between water rates and the rest of city services. In many cases, water rate revenues are redirected to support other municipal functions, as a result, the removal of water as a source of income through the restructuring process can exacerbate other issues in communities. Environmental justice concerns may be exacerbated by the loss of this income to a community and the risk of rate increases to address the problems identified in the assessment.

AMWA appreciates that the proposed rule is not prescriptive on the means and methods of integration of a water system, as it allows the community and water boards to integrate slowly. Historically, AMWA members have partnered to retain the board of the restructured water system or provide a seat on the integrated system’s board. Both options, among others, are tools available to continue to engage the community involved in the water system.

AMWA cautions that, given that these efforts are motivated by protecting public health, community involvement needs to happen quickly to ensure a time-sensitive approach to addressing NPDWR violations.

Additional Considerations

AMWA notes that this rule applies to chronic compliance issues (89 FR 46999), though “chronic noncompliance” is not defined, and the four criteria for a mandatory assessment are not given time boundaries. AMWA acknowledges that this restructuring process likely would not be followed if it was motivated by an acute issue requiring immediate resolution (e.g., a main water

line breaking), but asks for consideration of relief of acute issues during the enforcement relief period.

While AMWA recognizes that the proposed rule is limited to evaluating restructuring options for public water systems, the Association believes it would be useful for EPA to offer guidance on the best practices for restructuring combined public water system-treatment works. Restructuring such joint systems adds a layer of complexity to the restructuring process, so AMWA requests the development of guidance to support these situations.

Conclusion

The Association values this rule's approach of providing an avenue for intervention before the water system faces a catastrophic problem. AMWA supports EPA's current approach of providing tools rather than a prescriptive or rigid approach. AMWA has concerns that non-responsible systems face risk with the rule, and asks for additional opportunities to engage these systems and incentives for their voluntary participation in the restructuring process.

AMWA thanks EPA for the opportunity to comment on this proposal and looks forward to working with the agency to identify strategies for promoting public health and regulatory compliance through effective partnerships between public water systems. For further discussion of AMWA's concerns, please contact Kaline Gabriel, Manager of Regulatory and Scientific Affairs, at gabriel@amwa.net.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Dobbins". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Tom Dobbins
Chief Executive Officer

CC: Will Bowman, EPA OW