



**American Water Works
Association**



March 16, 2009

Office of Information and Regulatory Affairs (OIRA)
Records Management Center
Office of Management and Budget
Attn: Mabel Echols
Room 10102, NEOB
725 17th Street NW
Washington, DC 20503

Re: Federal Regulatory Review

Dear Ms. Nichols:

The American Water Works Association (AWWA) and the Association of Metropolitan Water Agencies (AMWA) are submitting this joint letter to comment on the recommendations being developed for the President for a new Executive Order on Federal Regulatory Review as published in the February 26th *Federal Register* (74 FR 8819). AWWA and AMWA together represent drinking water utilities of all sizes that serve more than 90% of the U.S. population. AWWA is an international, nonprofit, scientific and educational society dedicated to the improvement of drinking water quality and supply. Founded in 1881, the Association is the largest organization of water supply professionals in the world. Over 60,000 AWWA members represent the full spectrum of the drinking water community: treatment plant operators and managers, environmental advocates, engineers, scientists, academicians. AMWA was formed in 1981 and is the nation's only organization of the largest publicly owned drinking water systems in the United States. Member representatives to AMWA are the general managers and Chief Executive Officers (CEOs) of these large water systems.

National drinking water regulations developed by the Environmental Protection Agency (EPA) under the Safe Drinking Water Act (SDWA) significantly impact the 53,000 community water systems (CWSs) regulated under the SDWA. More than 80% of these CWSs are public systems with some type of linkage to local government. Members of both AWWA and AMWA hold a genuine interest in water supply and public health. The mission statements of both organizations reflect their members' commitment to protecting public health and ensuring safe and affordable drinking water. Everyone in the drinking water community wants the drinking water to be safe and wants EPA to use the latest scientific research and the latest risk assessment processes as the benchmark for

determining what is considered “safe”. Good science must be the foundation for the rulemaking process.

Risk management is where cost-benefit analysis (CBA) becomes part of the decision-making process for a national drinking water regulation and for any other federal regulation. EPA has developed 18 national primary drinking water regulations since the initial SDWA was passed in 1974, and the total estimated national cost of compliance with these regulations is \$4.5 billion per year in 2008 dollars. This estimated national compliance cost is spread across the 53,000 CWSs and does not necessarily characterize the financial impacts of drinking water regulations to individual systems and their customers.

Both costs and benefits have to be appropriately balanced to provide “safe and cost effective regulations” and “...safe and sufficient water for all...” If the regulations are established with very low numerical standards, then additional advanced treatment will be necessary, rates will have to go up to pay for the advanced treatment, and affordability will become an issue for both small systems and lower-income customers for any system size. If the regulations are set on the high side, then public health could potentially be compromised. Cost-benefit analysis is an important informative tool in SDWA rulemakings and should clearly reflect the risk-cost tradeoffs that drinking water regulations will impose on utilities’ customers.

While improvements in drinking water quality in the U.S. over the past century have led to unquestionable improvements in public health, as we move forward to address more subtle and perhaps even uncertain risks, the tendency is for further improvements to produce a small benefit, but at a much higher cost. Therefore, the use of CBA to justify future drinking water regulations becomes an increasingly difficult, yet increasingly critical, task.

Given the potential consequences of inappropriate risk balancing in regulations, President Obama, the new Administration, and the Office of Information and Regulatory Affairs (OIRA) should be cautious and thoughtful in the development of the new Executive Order (EO) on Federal Regulatory Review. Even the best of intentions can have unintended consequences.

Below are our specific comments on the eight topics from the *Federal Register* notice:

I. The relationship between OIRA and the agencies

AWWA and AMWA support OIRA’s role in reviewing federal regulations “...to ensure consistency with Presidential priorities, to coordinate regulatory policies, and to offer a dispassionate and analytical ‘second opinion’ on agency action”. AWWA and AMWA recommend that the White House and OIRA develop clear guiding principles on the purpose and nature of regulations and the regulatory process. These principles should clearly state what the regulations are trying to achieve and should be included in any revised Executive Order (EO) on regulations.

II. Disclosure and transparency

AWWA and AMWA support full disclosure, transparency, and reproducibility in the regulatory development process. We have stressed these issues in our comments on many SDWA rulemakings and in comments to OMB on previous Reports to Congress on the Costs and Benefits of Federal Regulations. Merely posting all background documentation on the Internet may not satisfy disclosure and transparency needs, as volume does not necessarily equal clarity for background information. This is especially true when modeling approaches and the underlying assumptions need to be clear and understandable. “Black box” modeling approaches where a third party cannot reproduce model outputs should not be allowed in any federal regulatory development process.

III. Encouraging public participation in the agency regulatory processes

AWWA and AMWA support public participation in the regulatory development process, but this participation needs to be meaningful and not just meet the letter of the law. Stakeholders should feel that their input has been adequately considered in the rulemaking process. Over the past decade, EPA’s Office of Ground Water and Drinking Water (OGWDW) has substantially increased public participation in its regulatory development process through the use of negotiated rulemakings and Federal Advisory Committees (FACs) input from the National Drinking Water Advisory Council (NDWAC) and its associated Workgroups, and other informal stakeholder input. AMWA and AWWA applaud OGWDW’s efforts in this regard.

Negotiated rulemakings and FACs with all of the affected stakeholders require a substantial commitment of resources from all parties, but provide the maximum opportunity for stakeholder involvement at a very early point in the regulatory development process. Using an agreement as a foundation for a proposed rule maximizes stakeholder involvement – particularly when the rulemaking agency provides updates for stakeholders about rule development through additional stakeholder meetings after the FAC process closes.

However, a sudden closing of communications after a stakeholder process until a rule is proposed can erode the benefits achieved from the public participation process. Some form of continued communication with participants and the public following a stakeholder process would address the issue of transparency.

The comment response document component of the regulatory development process needs some improvement. In many SDWA rulemakings, our organizations developed substantive comments. In many cases, the comment response document does not provide any insight as to whether or not the comment was incorporated into the final rule. It can be difficult to tell if our organizations’ comments have had an impact on the final rule.

If public participation process were optimal, then “back door” remedies such as lobbying Congress and the Executive Branch would be decreased. Litigation after the final regulation would also likely decrease. This new public process might initially be messier, but the possibility of more complicated outcomes would be decreased.

IV. The role of cost-benefit analysis

AWWA and AMWA firmly believe that cost-benefit analysis (CBA) is a vitally important and useful tool that should be routinely applied to all federal regulatory proposals and programs. It is a systematic way to better understand the extent to which a regulatory option is (or is not) providing a net increase in public welfare. CBA is a tool that – where done properly – will support better informed decision-making on the complex suite of regulatory and other public policy issues facing the nation.

While CBA is a very important and informative tool that can be used to better illuminate public policy discourse, AWWA and AMWA also recognize several inherent limitations in its application. First, some statutes do not enable or allow the use of CBA for selecting specific regulatory standards (e.g. technology-driven provisions of the Clean Water Act, [CWA]). In these cases, regulations need to follow the intent and letter of the governing statutes. However, a careful and objective CBA is still valuable and should be developed as a matter of policy – i.e., as a means of gaining knowledge about the ways that statutes are perhaps steering the nation in a less than optimal manner, and indicating where future amendment may be in the public interest.

Second, it is vitally important that CBAs be conducted in an accurate, balanced, technically robust, comprehensive, transparent, and objective manner. Appropriate guidance and review is needed – including a strong role by OIRA in promoting and ensuring sound analyses. Ultimately, the goal is to ensure that CBAs adhere to sound principles, do not overlook important ancillary costs and benefits, apply central tendency estimates (rather than upper or lower bounds), properly reflect uncertainty and variability (where use of upper and lower bounds may be appropriate), and convey important qualitative information as well as the quantified outcomes.

Third, it is equally important to recognize that while CBA is a very useful and necessary tool for establishing effective regulations, it should not become the sole decision criteria in the regulatory development process. Affordability is an issue for all sizes of water utilities (large and small) and must be considered, along with other priority challenges that water utilities face, such as substantial financial needs for coping with aging infrastructure.

Under the SDWA, the Health Risk Reduction and Cost Analysis (HRRCA) provisions included in the 1996 Amendments to the Act have required EPA to develop CBAs of both the proposed and final drinking water regulations. The addition of the HRRCA requirement has improved the regulatory decision-making process by presenting the EPA Administrator with make better informed and more flexible choices. The routine development by EPA of HRRCA-driven CBAs has also led to more informed and constructive discussions among EPA, AWWA, AMWA and other stakeholders about the regulatory options.

Our organizations' experience with EPA on the HRRCA-based CBAs has been valuable and informative, but not perfect. There are several technical issues for which we believe EPA can and should improve specific components of its CBAs (and AWWA and AMWA

will be happy to share specific issues and suggestions with OMB on the technical concerns we've had with EPA's CBAs). Nonetheless, we believe that the HRRCA's provide an example of how useful CBAs can be, and we support the continued mandate for CBAs across the spectrum of regulatory programs and policies.

V. The role of distributional considerations, fairness, and concern for the interests of future generations

AWWA and AMWA believe it is important for regulatory analyses and reviews to consider the implications of regulations on fairness and equity. Awareness and concern about who bears the costs compared to who receives the benefits of a federal program or rulemaking are fundamental American values.

In the context of the SDWA, AWWA and AMWA believe it is important to understand how SDWA regulations may raise water rates to an extent that may adversely impact low income consumers and households served by small community water systems (where per household costs typically are high due to the inability to enjoy the economies of scale in treatment processes typically necessary for regulatory compliance). AWWA and AMWA have remained actively engaged in the issue of "affordability" in this regard, and we hope to work with EPA and OMB to address this challenging issue.

Another distributional and fairness issue arises in the SDWA context with regard to efforts to protect sensitive subpopulations. In many cases, regulations can protect sensitive subpopulations without imposing appreciable added cost to the balance of water consumers. However, there are some instances where the national cost to protect a small subpopulation may be considerable, and greater attention is needed in such circumstances to consider the opportunity for cost-effective alternatives, including non-regulatory alternatives, that provide a more suitable balance of tradeoffs in risk management. Additionally, good science is needed to accurately determine which populations are indeed "sensitive" to particular contaminants. The science surrounding sensitive populations is not always as strong as it should be, and sensitive populations can change over time due to their health status, ongoing medical treatments, etc.

AWWA and AMWA also note that it is important to be mindful about the future implications of our nation's current policy choices on our children and grandchildren. Discounting future benefits and costs to present value is a sound and objective practice for impacts that affect us over the decade(s) to come (assuming suitable discount rates are applied).

VI. Methods of ensuring that regulatory review does not produce undue delays

In the current review process, OIRA has 90 days to review proposed and final regulations. From AWWA and AMWA's perspectives, this timeframe for regulatory review seems appropriate and does not result in undue delays. A typical rule can take 2-4 years to develop within the Agency, as EPA must assemble and analyze the appropriate science, draft a proposed rule, and pass that rule through the Agency Workgroup and in some cases, the Inter-Agency Workgroup. The additional 90 days for OIRA regulatory

review adds 6%-12% to the overall regulatory development timeframe, which is not excessive.

To improve the speed of the overall process, OIRA could also be involved earlier in the regulatory development process, as opposed to its first review of a proposed regulation. As a result, OIRA may need more resources in order to provide more input throughout the regulatory development process.

VII. The role of behavioral sciences in formulating regulatory policy

More behavioral science and social science research is needed to feed into the regulatory development process. Limited research has been conducted on the “willingness to pay” concept as it applies to potential health effects, both fatal and non-fatal endpoints, and yet it is used throughout cost-benefit analyses. Even less research has been conducted on the “willingness to sell” concept, which should go beyond academic theory and be thoroughly researched by social scientists prior to its use in any federal regulatory development process.

VIII. The best tools for achieving public goals through the regulatory process

The best tools for achieving public goals through the regulatory process may not always be clear, and the public goals themselves may not even be well articulated. Again, AWWA and AMWA recommend that the White House and OIRA develop explicit guiding principles on the purpose and nature of regulations and the regulatory process.

Performance metrics are one tool that can be used to ensure that the public goals are met in the regulations. Performance metrics are an important component of the Government Performance and Results Act (GPRA) and their identification should be an integral part of the regulatory development process and not as an afterthought. Performance metrics can be built into the data system that will be designed to ensure compliance with the new regulation.

A clear and explicit statement of the objective of each regulation in both the preamble and the regulatory language will help in the formulation of associated performance metrics. If for some reason the objective cannot be measured, then the objective should be reconsidered and revised so that it is measurable. If the objective is still not measurable, then the preamble and the regulatory language should clearly explain why this is the case and how the regulating agency will measure the regulation’s success.

A new Executive Order on Federal Regulatory Review could help in breaking down the Agency programmatic silos that have evolved via each statute over time. Cross-cutting issues need a more thorough examination during the regulatory development process. For example, under the Clean Water Act (CWA), some contaminants such as *Cryptosporidium* do not have a water quality criterion to prevent source water contamination, yet are regulated under the SDWA. Another example is the potential regulation of a contaminant that occurs in both food and water. If the food contribution to the overall risk exposure (i.e., the “risk cup”) is greater than the water contribution,

this now results in a much stricter drinking water standard because it is typically much more “difficult” to regulate a specific contaminant in food.

Another important issue is that the current regulatory framework for the CWA does not provide an effective incentive for upstream non-point dischargers to accept responsibility for their discharges and meaningfully support source water protection. This is unfortunate as contaminants can often be controlled more effectively and more economically at their point of generation rather than at a water treatment plant. The issue is becoming a critical one as new analytical methods can detect contaminants of emerging concern at parts per trillion and beyond, and the potential adverse health effects of these contaminants are not clear at this time. The potential treatment to remove these contaminants could significantly add to the financial burden of drinking water utilities. AWWA and AMWA recommend that OIRA lead the effort to address this issue and put this responsibility for clean up where it belongs, i.e., on the generator of these contaminants. Such a change would not only relieve the water utilities from a heavy financial burden, but also provides an effective incentive for controlling contaminants at their generation points.

In closing, AWWA and AMWA have discussed the above ideas in comments on previous proposed SDWA rulemakings and would be willing to share those detailed comments, if needed. AWWA and AMWA appreciate the opportunity to comment on these important regulatory issues. If you have any questions about these comments, please feel free to call Tom Curtis or Alan Roberson at AWWA or Diane VanDe Hei or Erica Brown at AMWA.

Best regards,



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cc: Eric Burneson, EPA/OW/OGWDW
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