WUWC
WESTERN URBAN WATER COALITION

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Water Permits Division
Office of Wastewater Management
Mail Code 4203M
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Comments on the Proposed National Pollutant Discharge Elimination System: Applications and Program Updates Rule, Docket ID No. EPA-HQ-OW-2016-0145

Dear Ms. Flannery-Keith:

This letter provides comments on behalf of the Western Urban Water Coalition ("WUWC") on the U.S. Environmental Protection Agency's ("EPA's") Proposed National Pollutant Discharge Elimination System: Applications and Program Updates Rule, 81 Fed. Reg. 31344, May 18, 2016 ("Proposed Rule"). WUWC appreciates the opportunity to comment on the Proposed Rule.

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, City and County of San Francisco Public Utilities Commission, and Santa Clara Valley Water District; *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water; *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

WUWC members have a strong interest in clean water for municipal water supplies. In particular, WUWC members are concerned with the predictability and certainty of the Clean Water Act ("CWA") permitting process, and in reducing costs and delays in obtaining permits. The requirements for issuance of National Pollutant Discharge Elimination System ("NPDES") permits under section 402 of the CWA are of great significance to WUWC members as permit holders. We have historically been, and will continue to be, ardent supporters of the goals of the CWA. We are the on-the-ground partners with EPA and the states in the implementation of the

CWA. For these reasons, WUWC members are concerned with any proposed changes to the NPDES permitting process.

BACKGROUND

The CWA establishes a comprehensive statutory system for controlling water pollution. *See* 33 U.S.C. § 1311(a). To that end, CWA § 1342 establishes the NPDES permitting program and authorizes EPA to issue regulations implementing the program. *Id*. at § 1342(a). Although EPA is charged with administering the NPDES permitting program, any state wishing to issue its own NPDES permits may submit a plan for approval to EPA. *Id*. at § 1342(b). EPA, however, retains oversight of the permitting process. *Id.* at § 1342(d).

The Proposed Rule attempts to revise the NPDES regulations to ensure the regulatory program is consistent with the CWA and recent case law. Specifically, the Proposed Rule attempts to provide clarification on the level of documentation permit writers must provide for permitting decisions, creates uniform standards for incorporating data into permitting decisions and updates the public notice procedures. EPA states that the revisions contained in the Proposed Rule will not increase the work load or regulatory burden on the states and regulated community. As explained below, we believe this conclusion is incorrect.

GENERAL COMMENTS

WUWC has the following general comments on the Proposed Rule:

I. EPA's Proposal to Designate Certain Administratively Continued Permits as Proposed Permits Presents Concerns

The Proposed Rule significantly revises 40 C.F.R. § 123.44 to allow EPA to designate certain state-issued administratively continued permits as proposed permits. This designation grants EPA the authority to review and, ultimately, to object to a state-issued administratively continued permit. This proposal is problematic for multiple reasons.

A. The proposal presents federalism concerns

The Proposed Rule concludes that "this action does not have federalism implications," and "will not have substantial direct effects on the states…or on the distribution of power and responsibilities among the various levels of government." 81 Fed. Reg. 31344, 31367 (May 18, 2016). This, however, is not the case. While it is undisputed that EPA maintains oversight authority over the permitting process, even when the NPDES program has been delegated to a certain state, this oversight authority does not give EPA unfettered discretion over state permitting programs and priorities.

By allowing EPA to designate certain administratively continued permits as proposed permits, the Proposed Rule improperly allows EPA to reprioritize a state's NPDES permitting priorities and allows EPA to abrogate a state's decision about which permit applications are the most compelling. Further, the proposal fails to set forth objective criteria by which EPA will

exercise this authority. Rather, it allows EPA on a case-by-case basis with few guidelines to take over review of State-issued NPDES permits. Given the limited resources states have and the complexity of permit decisions, a state must have discretion to prioritize its permit actions. EPA, itself, has argued this must be the case. *See* Respondent EPA's Response to Petition for Mandamus, *In re Sierra Club*, Case No. 12-1860 (1st Cir. March 14, 2013).

By granting itself authority to usurp an authorized state's NPDES permitting duties, the Proposed Rule upsets the balance of federal and state power carefully cultivated by the CWA. *See e.g. Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874 (7th Cir. 1989) (stating that courts should "construe the Act to place maximum responsibility for permitting decisions on the states where the EPA has certified a NPDES permitting program.") Therefore, we ask EPA to acknowledge that this proposed modification has federalism implications, and to reject it accordingly.

B. The proposal places an unfair regulatory burden on the regulated community

The Proposed Rule states that this mechanism is important "given the current backlog of administratively extended permits." 81 Fed. Reg. at 31357. An existing permit is only administrative continued where a permittee has submitted a timely and complete NPDES permit renewal application. The delay is caused by the failure of the state to act on the application before the permittee's current permit expires. Thus, permittees who have used good-faith efforts to comply will have to go through what appears to be an added process and burden to renew their permits because of state delays.

C. The CWA currently grants EPA adequate oversight authority to address permit delays

The proposal to allow EPA to designate administratively continued permits as proposed permits is offered to address what EPA perceives as lack of authority to deal with "indefinite delays in permit reissuance." 81 Fed. Reg. at 31356. EPA, however, has adequate oversight tools to address state delays in permit issuance. The CWA authorizes EPA to initiate discussions with a state in the event of indefinite permit delays and allows EPA to request a state take appropriate corrective action to address the failure to issue permits. *See* 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63. In the event this action does not lead to a solution, EPA has the authority to withdraw its approval of a state's NPDES program. *See id.* By utilizing the authority already granted by the CWA, EPA can address permit delays without subjecting permittees to additional process.

II. The Proposed Rule Will Likely Impose a Significant Burden on Regulators and the Regulated Community

The additional requirements imposed by the Proposed Rule on regulators and the regulated community will place a significant burden on affected states and permittees, as compared to the current rules. EPA acknowledges that the Proposal Rule contains "numerous revisions" to the regulations. 81 Fed. Reg. at 31364. EPA further acknowledges that the

Proposed Rule is a "significant regulatory action" under EO 12866 because it raises "novel legal and policy issues." *Id.* In its assessment of the Proposed Rule, however, EPA states in a conclusory manner that the revisions would "generally" not result in new or increased impacts or information collection by authorized states or the regulated community. *Id*. The extent and character of the proposed revisions do not support the conclusion that the Proposed Rule only minimally burdens affected states and the regulated community.

The Proposed Rule contains significant changes from the current regulatory scheme that are likely to significantly increase the burden on regulators and the regulated community. For example, the proposed revisions to 40 C.F.R. § 124.56 require specific documentation in the permit fact sheet to ensure "comprehensive and focused fact sheets." 81 Fed. Reg. at 31360. The impetus for this change was "widespread deficiencies in state fact sheet quality." *Id*. If current practices are largely deficient and the Proposed Rule requires additional documentation, this will increase the burden on regulators and the regulated community. In addition, depending on the procedures utilized by a particular state to develop permit terms and conditions, the addition of an antidegradation reference, new processes for establishing dilution allowances and new reasonable potential determination analysis mandates may increase the burden on states and permittees beyond what the Proposed Rule indicates in its conclusory analysis. Further, a permittee operating under an administrative continued permit may experience a significantly increased burden in the event its permit is designated a "proposed permit" under the novel regulatory scheme set forth in the Proposed Rule.

Given the significant changes proposed, it does not appear that EPA completed sufficient inquiry to conclude that the Proposed Rule will not impose significant burden on states or the regulated community. Therefore, we request EPA reconsider this conclusion and, if it is unsupported, not adopt the Proposed Rule.

III. Requiring Effluent Limitations to be Based on Point of Discharge Criteria in Certain Circumstances Disallows States to Make Reasonable Assumptions

States generally handle dilution allowance analyses, including the determination of background pollution concentrations. Under current regulations, states can make reasonable assumptions to determine background pollution concentrations when data is unavailable for purposes of a dilution analysis. The Proposed Rule, however, requires states to base effluent limitations on the application of criteria at the point of discharge in the event the assimilative capacity of the receiving water cannot be accurately determined. 81 Fed. Reg. 31353. This requirement is problematic for two reasons. First, it removes from the states the ability to use flow assumptions in determining background pollution concentrations and dilution capacity, potentially leading to unduly stringent effluent limitations and unnecessary and costly infrastructure investment. Second, it improperly undermines the authority of states to exercise best professional judgment in the establishment of permit conditions deemed adequate to protect state established water quality standards and designated uses. Accordingly, this requirement should not be adopted.

IV. Codification of Additional Procedures for Conducting Reasonable Potential Determinations is Unnecessary

Under the current regulatory scheme, states are required to ensure permits contain limits that control all pollutants that "cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard. . . ." 40 C.F.R. § 122.44(d)(1)(i). EPA guidance details the procedures that states should follow when conducting a reasonable potential determination. The Proposed Rule codifies the type of data, analysis and additional representative information that must be considering when conducting a reasonable potential determination. We question the need for adding these requirements in a codified regulation rather than continuing to provide guidelines and training, or other assistance. This latter approach would be more cost-effective, consistent with delegation of NPDES programs to states, and give EPA important flexibility to change or update the requirements periodically without having to undergo formal rulemaking.

V. The Proposed Change to the Modification Process for CWA Section 401 Certifications Creates Uncertainty and Risk for Permittees

The Proposed Rule broadens the scope of EPA's authority to "reopen" an EPA-issued NPDES permit to include more stringent permit conditions resulting from state administrative or judicial decisions. This "reopener" would allow EPA to add or tighten effluent limits and other restrictions and make other modifications after a permit has been issued and certified. In addition, it would allow third parties to initiate a modification process by requesting such changes. We understand that it makes sense for EPA to have the authority to add or delete permit conditions based on state administrative and judicial decisions. This proposal, however, could substantially increase uncertainty and risk for a permittee. State administrative and judicial decisions are often issued long after a permittee initially receives its permit. In the interim, permittees may have already invested in treatment facilities and other infrastructure in reliance on the permit terms that are arrived at and certified by the state initially. Accordingly, it is critical that EPA take such circumstances into account when deciding whether to modify an already-issued permit.

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,

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Chairman

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