

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6011-8]

Definition of a Public Water System in SDWA Section 1401(4) as Amended by the 1996 SDWA Amendments**AGENCY:** Environmental Protection Agency.**ACTION:** Notice, request for comments.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is seeking comments on the draft guidance "Definition of a Public Water System in SDWA Section 1401(4) as Amended by the 1996 SDWA Amendments." The draft guidance is published as an Appendix to this notice.

DATES: Comments must be submitted on or before June 22, 1998.

ADDRESSES: Comments should be addressed to Jon Merkle, Drinking Water Office—(WTR-6), EPA Region 9, 75 Hawthorne Street, San Francisco, California, 94105. Comments may also be submitted by E-mail to merkle.jon@epamail.epa.gov. Commenters who want EPA to acknowledge receipt of their comments must enclose a self-addressed, stamped envelope.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, toll free (800) 426-4791, or Jon Merkle, telephone (415) 744-1844.

SUPPLEMENTARY INFORMATION:**Purpose of this Notice**

This notice publishes draft guidance which is intended to interpret the broadened definition of what type of water suppliers will be defined as a "public water system" in light of revisions to this term by the 1996 amendments to the SDWA. Before the 1996 amendments, the SDWA defined a "public water system" as a system that provided piped water for human consumption to the public and had at least fifteen service connections or regularly served at least twenty-five individuals. The 1996 amendments expanded the definition of "public water system" to include systems providing water for human consumption that deliver this water by "constructed conveyances," such as irrigation canals.

The definition of a "public water system" is central to delineating the scope of many SDWA requirements and this notice is designed to solicit public comment on the specific provisions in the new definition and its suggested implementation.

Specific Issue for Commenters to Consider

The Agency is particularly interested in comments on the implementation of the provision regarding certain piped irrigation districts (Section III of this document) in new section 1401(4)(B)(ii) of the SDWA. The statute provides that a piped irrigation district in existence prior to May 18, 1994, which provides primarily agricultural service with only incidental residential or similar use shall not be considered a public water system (PWS) if it or its users comply with the alternative water or treatment exclusions for constructed conveyance suppliers in section 1401(4)(B)(i)(II) or (III).

The statutory language is ambiguous as to whether all connections to the system used for human consumption must comply with this provision, or whether only as many connections for human consumption must comply so as to reduce the remaining number of connections to fewer than fifteen.

The draft guidance would require all connections to the irrigation district that use the district's water for human consumption to comply with the alternative water or treatment exclusions. More of the States on the workgroup that commented on this question preferred the approach taken in this draft guidance over the approach discussed below as an alternative.

EPA's interpretation of this provision is based on the realities that these piped districts were already considered PWSs under the pre-1996 definition, that the only change in the status of these piped irrigation districts in the 1996 SDWA Amendments was to provide them an opportunity to use these exclusions to remove themselves from PWS status, that this opportunity is not available to any other types of piped water systems, and that compliance with these exclusions is much simpler and less costly than the compliance required of PWSs with the entire SDWA (which can be avoided by appropriate use of the exclusions). Under these circumstances, EPA believes that the approach taken in the draft guidance is equitable and appropriate and protective of public health.

The approach taken in the draft guidance is supported by Report 104-169 of the Senate Environment and Public Works Committee on S. 1316, which states that "[t]hese piped (irrigation) systems are not to be considered public water systems if all of the connections to the system comply with the requirements applicable under one or the other of the exclusions for alternative water or point-of-entry

treatment." (p. 89, emphasis added). The irrigation district provision enacted in the SDWA Amendments is identical to the one first adopted in S. 1316 by the Senate Committee.

Finally, this approach provides an incentive to piped irrigation districts to give equal protection to all their connections for human consumption. This would prevent situations from arising where some users could receive untreated water while users at the excluded connections receive water that meets the requirements of the exclusion, i.e. it meets the equivalent level of protection provided by the applicable national primary drinking water regulations (NPDWRs). EPA believes that the support of the majority of the workgroup States that expressed an opinion on this point indicates that they intend to apply it in a way that would avoid unfairness to irrigation districts which seek in good faith to comply with the exclusions, but are prevented from applying them to all connections because a few users refuse to allow the use of the exclusions for their water supply.

EPA and the workgroup considered an alternative approach, which would allow qualifying irrigation districts to use the same method of counting or excluding connections as suppliers of water through constructed conveyances. Specifically, they could remove themselves from PWS status by reducing the number of counted connections to fewer than 15. This alternative approach would prevent any possibility of unfairness to irrigation districts that seek in good faith to comply with the exclusions but find that a few users refuse to allow the system to take the actions necessary to qualify for the exclusions for their water supply.

If after receiving comments on these two approaches, EPA decides to revise the guidance to take the alternative approach, then questions and answers 8 and 9 in the *Questions and Answers* section of the guidance would be modified or deleted to reflect this decision.

Dated: May 5, 1998.

Robert Perciasepe,
Assistant Administrator for Water.

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Introduction

This document provides guidance to the primacy agencies¹ and the U.S. Environmental Protection Agency's (EPA's) regional offices in their implementation of the Safe Drinking Water Act's (SDWA) 1996 amendments to the definition of a public water system (section 1401(4)).

This document incorporates and replaces the preliminary guidance on this topic issued December 6, 1996, by Assistant Administrator for Water Robert Perciasepe entitled "Safe Drinking Water Act Amendment to Public Water System Definition." It is a collaborative effort between the Office of Water and the Office of Enforcement and Compliance Assurance (OECA). OECA has concurred with the contents of this document and will incorporate and implement it through their enforcement and compliance assurance directives and operating protocols.

Background

The term *public water system* (PWS) is central to delineating the scope of many SDWA requirements. Prior to the 1996 SDWA amendments, Section 1401 of the SDWA defined a *public water system* as "a system for the provision to the public of piped water for human consumption if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." In *Imperial Irrigation District v. United States Environmental Protection Agency*, 4 F.3d 774 (9th Cir. 1993), the court ruled that the SDWA provisions governing PWSs did not apply to an irrigation district supplying residences, schools and businesses with untreated water through open canals. In response, Congress changed the definition of public water system to regulate under SDWA "water (provided) for human consumption through pipes or other

constructed conveyances." This change reflected Congress' understanding that the human consumption of such untreated canal water could constitute a significant risk to public health, and that appropriate measures were warranted to provide consumers of this water with a level of health protection equivalent to that from drinking water standards. At the same time, Congress provided several means by which certain water suppliers could be excluded from this definition, and provided that systems newly subject to SDWA regulation under this amended definition would not be regulated until August 6, 1998.

The amended section 1401(4) does several things. First, effective August 6, 1998, section 1401(4)(A) expands the definition of a PWS to include suppliers of water for human consumption that deliver their water through canals and other constructed conveyances. Second, section 1401(4)(B)(i) supplies methods by which connections to these newly defined PWSs will not be considered "connections" if the systems or users at these connections have taken specific actions to ensure protection of public health. If, after the systems or users have taken these specific actions to ensure protection of public health and the systems no longer serve at least 15 service connections or 25 individuals, the systems will not be considered to be PWSs. Third, section 1401(4)(B)(ii) also allows certain piped irrigation districts to no longer be considered public water systems if the districts or their users take specific actions to ensure public health.

As promised in the December 6, 1996 guidance, EPA convened an EPA-State work group to develop more detail on the interpretation and application of this new definition. State members of this work group included drinking water program representatives for Arizona, California, Georgia, Idaho, Texas and Washington. The work group consulted with thirteen individual irrigation water suppliers and irrigation trade associations within these States. The workgroup also consulted with six organizations involved with community-based minority health and welfare issues and interviewed three persons who use canal water for human consumption.

Application of Section 1401(4)

I. Systems Newly Defined as Public Water Systems

A. Statutory Language

As described above, effective August 6, 1998, Section 1401(4)(A) of the

SDWA² expands the definition of a PWS to read as follows:

The term *public water system* means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes

- (i) any collection, treatment, storage and distribution facilities under control of the operator of such system and used primarily in connection with such system, and
- (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

This revised definition broadens the means for delivering water that will qualify a water supplier³ as being a public water system from pipes to "pipes or other constructed conveyances." Thus, as of August 6, 1998, in accordance with this provision and EPA's regulations, water systems providing water for human consumption through constructed conveyances to at least fifteen service connections or an average of twenty-five individuals daily at least 60 days per year will be defined as public water systems subject to SDWA regulation. See 40 CFR 141.2. EPA has interpreted the term *human consumption* to include drinking, bathing, showering, cooking, dishwashing, and maintaining oral hygiene, and this interpretation has been upheld by the courts. See *United States v. Midway Heights County Water District*, 695 F. Supp. 1072, 1074 (E.D. Cal. 1988) ("*Midway Heights*").

In order to obtain or maintain primacy, States must adopt this new definition of public water system or a more stringent definition and submit this portion of their State primacy programs for approval to EPA in accordance with Section 1413 of the SDWA and 40 CFR Part 142.

B. Interpretation of "Constructed Conveyance"

As of August 6, 1998, systems that deliver water for human consumption through constructed conveyances other than pipes to the requisite number of connections and/or individuals will be defined as PWSs subject to SDWA regulation. The term *constructed conveyance* is not limited by the SDWA as to the size of the conveyance or the

² All references in this Guidance to section 1401 refer to section 1401 of the SDWA.

³ As used in this Guidance, and as indicated in section 1401(4)(C), the term *water supplier* broadly refers to any water provider that may be subject to regulation as a public water system under the SDWA. This term should not be confused with *supplier of water*, which is defined in the SDWA as "any person who owns or operates a public water system". See SDWA Section 1401(7).

¹ Primacy agency refers to either the EPA or the State or the Tribe in cases where the State or Tribe exercises primary enforcement responsibility for the public water systems.

character of the delivery system. The term refers broadly to any manmade conduit such as ditches, culverts, waterways, flumes, mine drains or canals. The term constructed conveyance does not include water that is delivered by bottle, other package unit, vending machine or cooler, nor does it include water that is trucked or delivered by a similar vehicle.⁴

Water bodies or waterways that occur naturally but which are altered by humans may, in some cases, be constructed conveyances. Whether a particular water body or waterway is a constructed conveyance for purposes of section 1401(4) depends on the totality of facts that characterize whether the water body or waterway is essentially a natural water body or waterway, or whether it is essentially a manmade conduit. Specifically, the primacy agency should first decide whether a water body is manmade, or "constructed," by determining whether or not it exists in its current configuration substantially from human modifications such as mining, dredging, channelization, bed or bank modification, maintenance, etc. Second, the primacy agency should determine whether the water body is a conduit, or "conveyance," by examining who owns or controls the water and the reason why water is present: Whether it is present perennially through natural precipitation and runoff or discharge of natural springs, or whether its flow is present primarily by human means and in order to convey the water to users as part of a network under the management of the water supplier. If both of the above-described factors are present, at least as to particular users whose status as "connections" is in question, the water body is a constructed conveyance. Primacy agencies should also use the totality of circumstances to determine whether natural waterway portions of a water delivery system composed in part of constructed conveyances are part of a public water system.

While irrigation-related entities and their canals are likely to be the most common systems newly defined as PWSs under the expanded definition in section 1401(4), mining and other industrial entities that convey water may also fit within the definition if their water is used for human consumption.

C. Identification of Public Water Systems Under the Revised Definition

Primacy agencies should examine their areas of jurisdiction to determine if there are any water suppliers that meet the new public water system definition. Whether a water system is providing water through constructed conveyances to at least fifteen service connections or an average of twenty-five individuals daily at least 60 days per year should be determined by whether the water supplier knows or should know that the connections exist or that the individuals are using water from the water system for human consumption. In *Midway Heights*, the court held that the county water district either knew or should have known to a substantial certainty that individuals were using the district's water for human consumption based on the locations and arrangements of the pipes and plumbing, the fact that a pipe ran from the system into a number of homes, and a specific provision in an agreement between the water district and the users instructing the users to make the water potable before using it for human consumption. The court further found that a "waiver" agreement between the water district and the users that purported to limit the use of the district's water to irrigation was ineffective to remove the water system's liability under the SDWA. Likewise, EPA does not consider a waiver signed by water users stating that they must not use or are not using water for human consumption to preclude the water supplier from being considered a PWS when the system knows or should know that it is supplying water for human consumption to at least fifteen connections or an average of twenty-five regularly served individuals.

In order for water suppliers that may be newly defined as public water systems under the revised definition to determine whether they will, in fact, be defined as PWSs as of August 6, 1998, the suppliers should undertake before this date any necessary actions (e.g., a survey of any water users that might be using the water for human consumption) to ascertain their users' water use patterns. While water suppliers should take the initiative to assess and characterize their water use situations to the primacy agency as a core element of such surveys, such suppliers can also offer their users the opportunity to describe their water use situations to the supplier. Suppliers should determine from users that might be using their water for human consumption whether the water they supply is currently used for any of the human consumptive uses outlined

above, i.e., drinking, bathing, showering, cooking, dishwashing, or maintaining oral hygiene, and, if so, which such uses. Suppliers should also document whether additional or alternative sources of water are used for human consumption, e.g., whether a private well, bottled water, or hauled water is used, and for what purposes these additional sources of water are used. Suppliers should determine and document whether the users are connected to a central treatment plant or use a point-of-entry device. Some suppliers have already performed surveys to gather information regarding their users' water use patterns.

In addition to undertaking a survey or other action to document water use patterns, water suppliers will need to consider any other available information that indicates that their users are in fact using the water for human consumption. As stated above, where a water supplier knows or should know that the requisite number of connections and/or individuals are using its water for human consumption, the primacy State or EPA will consider the system to be a PWS. The results of any survey and other available information should provide a basis for ascertaining whether a water supplier has at least fifteen service connections or regularly serves at least twenty-five individuals and would therefore be considered a PWS. EPA or the primacy State will expect documented evidence of the suppliers' best efforts to ascertain these water uses. A supplier's failure to make such an effort to gather any necessary information and provide sufficient documentation will not excuse the supplier from liability under the SDWA.

Primacy agencies should determine what form of records they will need from water suppliers to implement this provision. In addition to surveys, primacy agencies may want to consider requiring suppliers to submit annual affidavits documenting such information as the number of connections and users to whom they serve water, the uses of that water, and whether alternative water is supplied. Primacy agencies should also determine how often they will need updated records and how suppliers should maintain these records (e.g., schedule, location, availability).

Pursuant to its regular oversight responsibilities, EPA can review State determinations of whether a system is a PWS. If EPA has serious concerns with the result of a State's determination, it will discuss these matters with the State regarding a potential reconsideration of the determination. In the event EPA cannot resolve the matter with the State,

⁴ One or more of these water delivery methods may under certain circumstances be considered public water systems under existing interpretations of other parts of the definition of a public water system.

SDWA Section 1414 continues to authorize EPA to bring an enforcement action against a system to support the position that the system is a PWS.

If a water supplier provides water for human consumption through constructed conveyances other than pipes to at least twenty-five individuals or fifteen connections at any time on or after August 6, 1998, the supplier will be considered a PWS. Such a supplier may avoid regulation as a PWS only if it qualifies for the exclusions provided in section 1401(4)(B)(i) and thereby reduces its "connections" to fewer than fifteen connections regularly serving fewer than twenty-five individuals. Information gathered in suppliers' surveys will aid the suppliers in deciding whether they may qualify for or should apply to the primacy agency for these exclusions, and in documenting their case for any such exclusions. The exclusions are described in detail in Section II below.

II. The Exclusions in Section 1401(4)(B)(i)

A. Statutory Language

Section 1401(4)(B)(i) provides limited exclusions to the "connection" component of the PWS definition to systems that deliver water through constructed conveyances other than pipes. These exclusions are not available to piped water systems, with the exception of certain piped irrigation districts described in section 1401(4)(B)(ii) and discussed in section III, below.

Specifically, Section 1401(4)(B)(i) provides that a connection to a system that delivers water through constructed conveyances other than pipes is excluded from consideration as a "connection" for purposes of section 1401(4)(A) under three circumstances:

(1) Where the water is used exclusively for purposes other than residential uses (consisting of drinking, bathing, and cooking, or other similar uses);

(2) Where EPA or the State (where the State has primary enforcement responsibility for PWSs) determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulations is provided for drinking and cooking;

(3) Where EPA or the State (where the State has primary enforcement responsibility for PWSs) determines that the water provided for drinking, cooking, and bathing is treated (centrally or by point of entry) by the provider, a pass-through entity, or the

user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

If the application of one or more of these exclusions reduces the "connections" of a system providing water for human consumption (through constructed conveyances other than pipes) to fewer than fifteen service connections that serve fewer than twenty-five individuals, the supplier's water system is not a PWS regulated under the SDWA.⁵

However, if the supplier's remaining connections number fifteen or more, or if its remaining connections (even if they number fewer than fifteen) regularly serve at least twenty-five individuals, then the system is a PWS, although the excluded connections are not considered part of the PWS for as long as the exclusions apply and the system complies with any conditions governing their applicability.

B. Application of Section 1401(4)(B)(i)

1. The "Other Than Residential Uses" Exclusion

Whether the first of the three exclusions in section 1401(4)(B)(i) applies depends on the facts surrounding a user's use of the water. If water provided by a water supplier to a particular connection is used exclusively for purposes other than residential uses, consisting of drinking, bathing, and cooking, or similar uses, the exclusion in section 1401(4)(B)(i)(I) applies automatically to that connection without a formal determination by the primacy agency as to its applicability. However, the primacy agency may still request that the supplier verify the nonresidential use of the water through a survey or other mechanism that evidences whether the supplier may be subject to regulation as a PWS. An example of where this exclusion would apply is when a user obtains all water for drinking, bathing, cooking, and similar uses from a private well, while the supplier provides the user with water for toilet flushing and/or outside irrigation.

2. The Alternative Water and Treatment Exclusions

The next two exclusions are not "automatic;" they apply only after the primacy agency has made the factual determination that the supplier complies with the exclusion criteria. If the primacy agency provides the supplier with a written determination

that the exclusions in sections 1401(4)(B)(i)(II) and (III) apply, then an eligible water supplier can reasonably rely on those exclusions, as long as they continue to be maintained in practice, to avoid classification as a PWS subject to the SDWA or to continue to provide users of "excluded connections" with water for human consumption that does not comply with the SDWA requirements applicable to PWSs. Suppliers seeking to exclude connections under section 1401(4)(B)(i)(II) and/or (III) are responsible for ensuring that the primacy agency has sufficient information and documentation to demonstrate compliance with the exclusion criteria prior to the primacy agency's making a determination.

The Alternative Water Exclusion. A water supplier seeking to exclude a particular connection pursuant to section 1401(4)(B)(i)(II) must demonstrate to the primacy agency that it is providing users at that connection with water for drinking and cooking from another source such as bottled water or hauled water. To qualify for this exclusion the supplier must provide the water to the users, at a reasonable location, not merely make it available. Whether the alternative water provided by the supplier is being provided at a reasonable location, such as on the user's doorstep or at the property line, will be determined by the primacy agency on a case-by-case basis. The supplier must demonstrate that it is actually providing to the users a minimum amount of water adequate to meet the users' drinking and cooking needs. The supplier need not provide alternative water to meet the users' bathing needs. The exclusion does not apply to a connection where the users, not the supplier, provide alternative water for drinking and cooking. In such cases, the supplier cannot ensure that the alternative water is reliably providing a level of public health protection equivalent to that provided by the applicable national primary drinking water regulations (NPDWRs).⁶

The primacy agency must also make the factual determination that the alternative water provided for drinking and cooking actually achieves the equivalent level of public health protection provided by applicable NPDWRs. The primacy agency will make this determination based on its own criteria regarding which alternative water sources, and which associated

⁵The three exclusions above do not otherwise affect the manner in which primacy agencies have defined a connection for the purposes of the SDWA.

⁶Applicable national primary drinking water regulations means the NPDWRs that would apply to the water supplier if all its connections excluded pursuant to the alternative water and treatment exclusions were counted as connections.

documentation, operational, monitoring, reporting or other requirements, achieve the equivalent level of public health protection provided by applicable NPDWRs. The primacy agency should not necessarily assume that all varieties of bottled or hauled water will achieve the requisite level of public health protection absent information about the source and quality of the water. Where existing State regulations governing bottled and/or hauled water provide the equivalent level of public health protection provided by applicable NPDWRs, an alternative water purveyor's compliance with such regulations would provide adequate assurance that the alternative water actually achieves the requisite level of public health protection.

The water supplier may charge the users for the reasonable cost of the water supplied. The water supplier may also contract with a third party to deliver the water at a reasonable cost to the user, but in such case the supplier remains responsible for ensuring that the alternative water is provided to the users.

The Treatment Exclusion. A water supplier seeking to exclude a particular connection pursuant to section 1401(4)(B)(i)(III) must demonstrate to the primacy agency that the water that it supplies for drinking, cooking and bathing at that connection is centrally treated⁷ or treated at the point of entry by the provider, a pass-through entity, or the user. A pass-through entity is an entity other than a water supplier referred to in section 1401(4)(B) or its users that has been contractually engaged by the water supplier or the user to provide the treatment described in section 1401(4)(B)(i)(III). The supplier must submit information and documentation to the primacy agency demonstrating that central treatment or a point-of-entry treatment device is actually in use and treating all water used for drinking, cooking and bathing at that connection.

The primacy agency must also make the factual determination that the treated water actually achieves the equivalent level of public health protection provided by the applicable NPDWRs.⁸ The primacy agency will make this determination based on its own criteria, which can include appropriate, independent third party (such as the National Sanitation Foundation) certification or

performance verification, regarding which types of treatment devices may be used, and which associated operational, monitoring, reporting or other requirements are necessary, to ensure that the provided water actually achieves the equivalent level of public health protection provided by applicable NPDWRs. This third party verification generally describes a range of contamination levels in the raw (untreated) water that the treatment device can effectively address. Where local variability of source water conditions indicates a need—as where the raw water is highly contaminated—primacy agencies could choose to require more site-specific pilot testing. National third party performance verification will still be helpful in such cases as a guide to the water quality parameters (levels of contamination) that will (or will not) present problems for technology performance with the type of contaminant and treatment process involved. EPA's listing of point-of-entry compliance technologies may also be helpful, as the listings may include a statement of certain limitations on the use of a specific technology for compliance that can focus primacy agencies' attention on key performance parameters.

The words "equivalent level of public health protection" are meant to distinguish the situation of providers covered by this section from the situation of public water systems which must comply with all relevant aspects of the applicable regulations, including sampling and testing requirements and sometimes details of treatment. For example, a point-of-entry treatment device for filtration and disinfection might not comply with all requirements of relevant drinking water rules for monitoring, extent of surveillance of the disinfection process, and so forth. But, it would meet the "equivalent level of public health protection" requirement of this section if the quality of the water it produces is similar to that from central filtration and disinfection. Thus, this requirement is a performance standard providing that the quality of the water that affected residential users get should be similar to that from central treatment.

As stated in section 1401(4)(B)(i)(III), treatment may be provided by the water supplier seeking to qualify for the exclusion, by a pass-through entity, or by the user. However, because the exclusion cannot be granted unless the treatment actually provides an equivalent level of public health protection, as a practical matter the supplier will need to be responsible for ensuring that this is the case to enable

the primacy agency to make the necessary determination.

III. The Exclusion in Section 1401(4)(B)(ii) for Certain Piped Irrigation Districts

All piped water systems providing water for human consumption to at least fifteen service connections or twenty-five regularly served individuals were defined as PWSs subject to SDWA regulation prior to the 1996 amendments. The amendments, however, provide a new exclusion for a specified group of these PWSs. Section 1401(4)(B)(ii) provides:

An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar use shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subclause (II) or (III) of clause (i).

The exclusion provisions for qualifying piped irrigation districts were effective immediately upon passage of the 1996 amendments, in contrast with the expanded definition of public water system in section 1401(4) as applied to constructed conveyance systems, which becomes effective on August 6, 1998.

An irrigation district referred to in section 1401(4)(B)(ii) that would otherwise be defined as a PWS may avoid regulation as a PWS only if the primacy agency determines that all connections to the district that use the district's water for human consumption comply with subclause (II) or (III) of section 1401(4)(B)(i). In contrast to systems providing water through constructed conveyances, these districts cannot avoid regulation as a PWS by simply "reducing connections" to fewer than fifteen connections serving fewer than twenty-five individuals by application of the exclusions in subclauses (II) and (III).

Only those irrigation districts that existed prior to May 18, 1994, and which provide primarily agricultural service through piped water systems with only incidental residential or similar use, are eligible to apply for these exclusions. The agricultural exclusion is available for commercial agriculture only. *Incidental residential or similar use* refers to human consumptive uses that are closely and functionally related to the primary agricultural service provided by the irrigation district. For example, the use of water for human consumption by the residents of a farmhouse working on agricultural property, from a connection used primarily for irrigation of that property, is incidental to the primarily

⁷ However, a system that centrally treats water for 15 or more connections or 25 or more individuals is itself a public water system and subject to the NPDWRs.

⁸ See footnote 5.

agricultural use of the water. Similarly, human consumptive use by farmworkers residing on agricultural property is incidental to the primary agricultural service provided to that property by the district. In contrast, the use of water for human consumption from a connection to an irrigation district's pipe by a cluster of homes in a subdivision is not "incidental" to the district's primary agricultural service. If the character of the irrigation district's service changes so that the district no longer provides primarily commercial agricultural service with only incidental residential or similar use, the district would no longer qualify for this exclusion.

Questions and Answers

Q1: How can primacy agencies identify water suppliers that may be newly defined as public water systems under the revised definition of public water system in section 1401(4)?

A1: Primacy agencies will likely benefit by tapping into the knowledge base of their inspectors, following up on citizen water quality complaints in irrigation and mining areas and developing inventories of irrigation and other constructed conveyance water suppliers. State agriculture departments, mining regulatory agencies and water resource departments can help develop these inventories. EPA recommends that the primacy agency send a letter to possible new PWSs informing them of the requirements of the 1996 amendments, the systems' potential SDWA responsibilities, and the systems' responsibility to determine whether and how many of their users are using their water for human consumption. EPA further recommends that primacy agencies suggest that the suppliers undertake any necessary actions (e.g., a survey of any water users that might be using the water for human consumption) to ascertain their users' water use patterns. Primacy agencies may wish to request that water suppliers providing water through constructed conveyances other than pipes provide them with annual, affirmative documentation such as affidavits or other certifications identifying the connections and users to whom they serve water, and identifying the connections and users using their water for human consumption and residential uses. This would be a means for primacy agencies to verify suppliers' documentation of the number of connections using their water for human consumption.

Q2: Because most water suppliers cannot inspect the interiors of their users' premises, on what evidence

should the suppliers base their conclusions about their users' water use?

A2: A survey of users by the supplier that includes affirmative documentation as to the types of uses made of the water would be sufficient in most cases. The supplier should look to evidence that may be available such as the likely availability of potable ground water in the area, empty water bottles awaiting pick-up, observations by company personnel and patterns of water use at that connection that indicate whether human consumption of the water provided by the supplier is probable.

Q3: Some water suppliers have warned their users that their water is nonpotable or is not for human consumption without treatment. Some have offered the water for sale only on the condition that it will not be used for human consumption. Other suppliers have required their users to sign statements that the water will not be used for human consumption or that the supplier is not liable (and the user assumes the risks) if the water is used domestically. If, nevertheless, a user uses water for human consumption in the face of these or similar conditions, must the water supplier count the user as a connection for the purposes of section 1401(4)?

A3: Yes. The controlling element here is whether the water supplier is delivering water that the supplier knows or should know is being used for human consumption.

Q4: There are several kinds of nonpaying water users. Some water suppliers are plagued by "midnight" or transient water thieves who take water for a very short period of time. Their identities are usually unknown. Other nonpaying users are found to have taken water surreptitiously for a longer period but still without the permission of the supplier. A third group consists of nonpaying users who have taken water openly for a considerable length of time with the knowledge but without the consent of the supplier. Some users have continued taking water directly from canals or ditches with buckets and other containers after their pump/siphon intakes were eliminated by the supplier. Which of these users are counted as "connections" within the meaning of section 1401(4)?

A4: The primacy agency should look at the totality of the relationship between the water supplier and the nonpaying user to determine if the relationship is of sufficient strength to constitute a "connection" or "individual served" by the system. The supplier's knowledge of water withdrawals and the permanency of the

withdrawals is more important in this relationship than the payment of fees. The supplier is expected to monitor its operation as a regular part of its business and to be aware of water withdrawals. If the water supplier knows or reasonably should know of the taking of the water, there is probably a connection within the meaning of section 1401(4).

Q5: Where a water supplier provides water for human consumption through pipes or other constructed conveyances, does the geographic isolation of that water supplier's users affect whether such users are counted as connections or individuals served by the supplier?

A5: No. All water users to whom the water supplier provides water for human consumption are counted as connections or individuals served by the supplier regardless of their geographic isolation from other users, unless such connections are otherwise excluded pursuant to section 1401(4)(B).

Q6: Are the exclusions in section 1401(4)(B)(i) available to a water supplier that operates a system that consists primarily of non-piped constructed conveyances, but which includes some limited "piping" such as siphons to pass under roads or washes, short tunnels through hills, etc.?

A6: Yes, assuming the exclusion criteria apply. Only those suppliers that convey water by means other than pipes, and which are newly defined as public water systems under the expanded definition in section 1401(4)(A), may use the exclusions available under section 1401(4)(B)(i) to avoid regulation as a public water system. Suppliers whose piping consists only of the limited piping described above are not considered to convey water by pipes. A primacy agency should not make a determination that a supplier is a piped water system, either as to specific connections or entirely, if it would not have been able to do so under SDWA prior to the changes enacted to section 1401(4). It should be noted that section 1401(4)(B)(ii) provides a separate exclusion to a specified group of piped irrigation districts, as discussed in Section III above.

Q7: If a water supplier delivers water for human consumption through a constructed conveyance other than a pipe and reduces its number of countable connections through the operation of 1401(4)(B)(i) to 15 connections using water for human consumption does it have to supply SDWA-complying water only to these 15 connections or to all of its connections?

A7: The water supplier is under an obligation to supply SDWA-complying water only to the 15 connections.

Q8: Is an irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar use considered to be a public water system if just one connection fails to comply with subclause (II) or (III) of clause (i)?

A8: Yes. All connections to this kind of public water system must comply with subclause (II) or (III) of clause (i) before the supplier will not be considered a public water system.

Q9: In the example immediately above, is the irrigation district under an obligation to comply fully with SDWA with regard to just the one connection described or to all of its connections?

A9: The water supplier must comply fully with SDWA with regard to all of the connections to the public water system using water for human consumption.

Q10: What financial options are available to water suppliers that will be newly defined as PWSs as of August 6, 1998 under the expanded definition of PWS in section 1401(4) and to suppliers

that wish to make use of the exclusions in section 1401(4)(B)?

A10: There are various financial options available to those water suppliers. First, public water systems are eligible for Drinking Water State Revolving Fund loans—with subsidies available to disadvantaged communities. Even those water suppliers that wish to exclude connections through use of point-of-entry treatment or central treatment pursuant to section 1401(4)(B)(i)(III) are eligible for these loans to provide such treatment. In addition, some communities known as “colonias” may be eligible for assistance through federal grants to border States intended to provide assistance to such communities to facilitate compliance with SDWA requirements, although such grant funding has not previously been appropriated for this purpose. Finally, water suppliers providing alternative treatment have all the financial options regarding amortization and charging costs to users they would have for any other capital investment.

Disclaimer

This document provides guidance to EPA Regions and States exercising primary enforcement responsibility under the SDWA concerning how EPA interprets the amended definition of *public water system* under the SDWA. It also provides guidance to the public and the regulated community on how EPA intends to exercise its discretion in implementing the statute and regulations defining *public water system*. The guidance is designed to implement national policy on these issues. The document does not, however, substitute for the SDWA or EPA's regulations, nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decisionmakers retain the discretion to adopt approaches that differ from this guidance on a case-by-case basis where appropriate. EPA may change this guidance in the future.

(Authority: 42 U.S.C. 300f(4))

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