

National Rural Water Association

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TO: Senators Craig and Dorgan
FROM: Mike Keegan, Analyst
DATE: June 28, 2006
RE: EPA flexibility for small communities

Thank you for your help and assistance for small and rural communities trying to comply with EPA regulations. We are writing to urge your support of passage of a small and rural community “safe harbor” from enforcement of all EPA regulations (that could be made more reasonable under the SDWA’s small community variance provisions) for the following two reasons:

1. On March 2, 2006¹ (in response to an FY2002 requirement from the Appropriations Committee² for EPA to review its policy), the EPA declared that their current small community policy was unfair³ for small rural communities and stated that EPA would revise their policy. Shouldn’t we allow for the temporary moratorium on enforcement of the current rules until EPA has completed its revision? Otherwise, we will be enforcing rules that EPA has declared are inappropriate, and potentially harmful, for small communities – and are subject to change in the near future. The “safe harbor” would only apply to current regulations that are **not** an immediate threat to public health, according to EPA.⁴
2. EPA’s current exemptions polices are not working adequately to provide relief where appropriate.
 - **Some states are granting no exemptions.** For example, in Range Pond, Maine,⁵ a very, very small water supply – 12 apartments with 2 wells, and all low-income families on public assistance – is being mandated to comply with the arsenic rule even though they have no way to increase rates (which would have to drastically increase to cover compliance). Yet, the Maine enforcement letter mentions no time extensions, no economical treatment options, no grants for compliance, and no opportunity to receive SRF loan funds. The only compliance tool offered to this little water supply is multiple \$5,000 a day fines. According to this regulator, their arsenic levels are only slightly above the 10 parts per billion (ppb) standard (not presenting a risk to public health, according to EPA). When asked how they expected the community to comply and about the impacts in the community, they indicated that was not a concern and they were

¹<http://www.epa.gov/fedrgstr/EPA-WATER/2006/March/Day-02/w1917.htm>

²<http://www.ruralwater.org/ar-approps.pdf>

³EPA acknowledges their current policy is inadequate (unaffordable): “*stakeholders have argued that the current criteria are too stringent and fail to recognize situations in which a significant minority of systems within a size category may find a regulation unaffordable. After seven years of experience with the current criteria, EPA agrees it is time to consider refinements to address the situations of communities with below-average incomes or above-average drinking water and treatment costs.*”

⁴<http://whitehouse.fed.us/omb/inforeg/comments/comment44.pdf>

⁵<http://www.ruralwater.org/rangepond.pdf>

concerned with compliance. In other examples, like New Plymouth, ID, EPA is requiring more than what is required by the SDWA before granting a variance.⁶

- **This is not necessarily the states' fault** because it is not clear from EPA's policies when exemptions are appropriate. This puts states in the very difficult situation of exempting communities from rules that the EPA thought were necessary. Why does EPA set up a compliance program that, inferentially, includes compliance mandates for many communities that apparently should be granted exemptions? If, in certain cases, exemptions are appropriate, why wouldn't EPA simply provide for the exemptions in their initial rule? Furthermore, the granting of exemptions usually requires a community to submit to an enforceable compliance order, which may not be affordable even with the additional time.⁷
- **Bilateral Compliance Agreements are not a solution.** EPA told Senator Domenici on December 15, 2005, that EPA *"is willing to consult with the NMED [New Mexico Environmental Department] in developing bilateral compliance agreements with local water systems that are tested and found to be out of compliance with the new standard. The bilateral agreement would allow a noncompliant system time to develop a compliance plan."*⁸ This implies that these so-called bilateral compliance agreements would be a "safe harbor" extension for small communities. However, EPA's compliance database identifies communities using these agreements as being in out-of-compliance⁹ and open to fines. At the same time it allows state agencies to tell the same community that they are in compliance.¹⁰ We assume the cities are thoroughly confused about the legal status of their exemptions.

Also, EPA should allow any modification to their small community variance policies to be available under the arsenic rule. The arsenic rule is where this new potential policy is MOST needed and where it is most appropriate. The comments from Chairman Inhofe make clear the merit for including arsenic in EPA's review: *"The EPA proposal would prohibit any potential relief from applying to the arsenic rule – the main interest of the Congress in crafting the directive in the appropriations bill. The [EPA] proposal stipulates that, even though EPA utilized its [special] SDWA authority to establish the arsenic MCL at levels less stringent than the feasible levels, 'this authority will not ensure that a drinking water standard is affordable to small systems.' Additionally problematic is the fact that (under EPA's proposal) the arsenic rule would still hold that the 2.5% of median household income level would be affordable – and this same level would not be affordable under future rules. This does not seem consistent or explainable."*¹¹

⁶"EPA's reason for denying the additional compliance time to New Plymouth was their finding that 'EPA's role in evaluating exemptions is to ensure that New Plymouth expeditiously lowers the arsenic levels below 10 ppb.' However, the Safe Drinking Water Act requires the State (or EPA) to ensure compliance as 'expeditiously as practicable.' ... Does this indicate the law is being applied differently depending on which individual is charged with reviewing each community's applications? For example, in EPA's rejection of Castleford's application, EPA stated that they 'cannot' not grant open-ended exemptions. However, the City of Andrews, TX, was given an open-ended exemption that has gone unchallenged by EPA for over a decade. The law gives EPA the same authority for use in all states. Perhaps the people implementing the rules in Idaho are choosing not to provide open-ended exemptions – but the statement that they 'cannot' provide them confuses us."

[<http://www.ruralwater.org/arsenic/newplymouthnews.pdf>]

⁷<http://www.ruralwater.org/arsenic/castlerejectletter.pdf>

⁸<http://domenici.senate.gov/news/topicrecord.cfm?id=249830&code=EnvPW>

⁹<http://www.ruralwater.org/arsenic/andrewsSDWIS.htm>

¹⁰<http://www.ruralwater.org/arsenic/andrews-texas1.pdf>

¹¹<http://www.ruralwater.org/inhofe-johnson-arsenic.pdf>