

National Rural Water Association

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TO: The City of Boulder, Montana
FROM: Mike Keegan, Analyst (202/294-4785)
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RE: Enforcement Action for Copper Drinking Water Rule Violation

After a review of the Department of Environmental Quality's March 1, 2006 enforcement action against the City (including civil penalties against the City for up to \$10,000 a day), it appears that the City was not provided all the compliance options available to small communities, like Boulder, that are permitted under the federal Safe Drinking Water (the federal act that delegates enforcement of regulatory drinking water programs to state agencies including Montana DEQ).

While the federal act does not mandate that state governments utilize all – or the most economical compliance options that are available – it is clearly the intent of the federal act (and also in the interest of maximizing local public health) that these compliance options be utilized by small communities because they provide the local citizens with safe water in the most economical manner. That is why these compliance options were authorized in the federal law – to assist small communities and to limit precipitous rate increases on economically disadvantaged populations (which are more prevalent in rural areas).

Recent consumer advocate studies document in detail the tradeoffs that low-income families are forced to make in order to pay for higher water rates. For example, a recent study conducted for the State of Iowa Department of Human Rights reached dramatic conclusions about the tradeoffs that low-income households must make in order to pay their utility bills (Mercier, Joyce M., Cletus R. Mercier, and Susan Collins, *Iowa's Cold Winters: LIHEAP Recipient Perspective* (Iowa Dept. of Human Rights, 2000)). That study concluded that, in order to pay their home-heating bill, low-income households made the following tradeoffs: over 12 percent went without food at some point during the month, more than 20 percent went without necessary medical care (failed to see a doctor when sick, failed to fill prescriptions for medicine, failing to take the full dosage of a prescription so it would last longer), nearly 10 percent were unable to pay their mortgage or rent, risking foreclosure or eviction, and almost 30 percent did not pay other bills or incurred debt to pay the heating bill. A researcher who has studied the problem for the U.S. Census Bureau concluded that one-third of households with incomes below \$10,000 per year were unable to meet at least one basic need (rent, utilities, food, medical care). In a later study, the same researcher concluded, "about 1 person in 5 lived in a household that had difficulty meeting at least basic needs. These included households that didn't pay utility bills, didn't pay mortgage or rent, needed to see the doctor or dentist but didn't go, had telephone or utility service shut off, were evicted, didn't get enough to eat, or otherwise didn't meet essential expenses."

Coincidentally, these special small community compliance options were written into the federal statute by Senator Baucus (who was Chairman of the Senate Environmental Committee at the time the law was crafted in 1995) to protect small and rural community families. With the final passage of the Safe Drinking Water Act in 1996, small town America welcomed a new law with provisions to assist small communities as described by Senator Baucus on the Senate Floor, "*The*

bill provides special help to small systems that cannot afford to comply with the drinking water regulations and can benefit from technologies geared specifically to the needs of small systems. Here is how it would work. Any system serving 10,000 people or fewer may request a variance to install special small system technology identified by EPA. What this means is that if a small system cannot afford to comply with current regulations through conventional treatment, the system can comply with the act by installing affordable small system technology."

Boulder should be a prime candidate to receive a **variance**, or a **small system variance technology approval**, or a **bi-lateral compliance agreement** under the Safe Drinking Water Act because the City meets the key federal prerequisites for access to these options. These options are all legal and safe options provided in the federal law to allow small communities to economically comply with federal standards and regulations.

However, the overriding fact that makes the City a prime candidate for these options is the fact that the water quality does not appear to present a risk to health. It has not been concluded by any regulatory or public health source that we are aware of – that the tested concentration of copper in the city’s drinking water (1.8 parts per million) has any appreciable or significant increase risk to the public relative to EPA’s standard or action level of 1.3 parts per million. This seems to be a de minimis exceedence of the standard, which the federal law provided the aforementioned compliance options to deal with such cases.

Compliance Option Available to the City Under the Federal Safe Drinking Water Act

Variations – this option provided under the variance section of the Safe Drinking Water Act (42 USC 42 § 300g–4 Variations¹) allows a community that has installed treatment for compliance, but did not achieve the desired compliance level, to be considered in compliance if the resulting level of the contaminant in the water does “*not result in an unreasonable risk to health.*” Because the city, at the directive of the state, installed new water lines to mediate the copper in water in recent years, and this treatment did significantly reduce the tested concentration of copper to the level very close to the EPA standard – it appears this is the type of situation the variance provision in the Act was specifically design to help. The City of Columbus, Ohio was granted a variance by the EPA² for less compelling reasons than exist in Boulder. In fact, Columbus’ treatment did not even include treating the drinking water and they were granted a variance from the standard costly compliance.

Small System Technology – this option provided under the small system technology section of the Safe Drinking Water Act (42 USC 42 § 300g–1 National Primary Drinking Water Regulations³) requires that the EPA list any compliance technologies that are affordable for small communities in various population size categories. Furthermore, the federal law requires that EPA is to “*include in the list any technology, treatment technique, or other means that is affordable...*” A plain reading of the statue reflects that the City’s plan to initiate a public education campaign to have all residents run the tap before drinking water (flush) to reduce copper levels below the EPA standard would be an “other mean” to achieve compliance. This contention is supported by the U.S. Court of Appeals’ 2001 ruling that any community’s selection of compliance technology is not necessarily limited to EPA’s treatment prescription under the law.⁴

¹ http://www4.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00000300---g004-.html

² <http://www.epa.gov/fedrgstr/EPA-WATER/2000/July/Day-27/w19012.htm>

³ http://www4.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00000300---g001-.html

⁴ <http://www.ruralwater.org/commerceclause/U.S.%20v.%20MWRA%20-%20MWRA%20opinion.pdf>

Bi-lateral Compliance Agreements – this option is provided under the exemptions section in the Safe Drinking Water Act (42 USC 42 § 300g-5 Exemptions⁵) and allows a community to provide one central source of treated water (i.e. treat one faucet at city hall or the fire station that is accessible to the entire community). Such an exemption was provided to the City of Andrews, Texas for a de minimis violation of the EPA fluoride rule⁶. EPA told Senator Domenici (NM) 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*”⁷.

The city may also be interested to know that there is no current or pending federal regulatory directive that mandates disinfection/chlorination in all small community water supplies. The federal rule that covers ground water disinfection, the October 2006 – EPA Ground Water Rule⁸, does not require disinfection for all ground water supplies. EPA is very clear that this rule (and the federal statute that governs this rule) does not require mandatory disinfection.

*This rule implements section 1412(b)(8) of the 1996 Safe Drinking Water Act (SDWA) Amendments to promulgate a rule requiring GWSs to disinfect “as necessary.” The risk-targeted approach in this rule is a critical distinction from the approach outlined in the 1986 SDWA, which would have required all PWSs using surface water or ground water to disinfect. Because there are so many GWSs (approximately 147,000) in the United States, such a requirement would have been a great challenge for systems and States to implement.*⁹

According to EPA, the rule is designed to “*to reduce the risk of exposure to fecal contamination that may be present in public water systems that use ground water sources.*” As you know, the City of Boulder has no history of fecal contamination. This federal rule establishes a risk-targeted strategy to identify ground water systems that are at high risk for fecal contamination, which includes testing source water for fecal contamination. After the evaluation of the water supply, the rule specifies when corrective action (which may include disinfection) is required. This risk strategy is not scheduled to be completed until December 31, 2012. According to EPA, the corrective actions (which could include disinfection) are reserved for water supplies that are found to have significant deficiency or source water fecal contamination.

The last point that may be relevant to the city, is the precedent setting decision by the U.S. First Circuit Court of Appeals that overturned EPA’s mandate for a specific treatment for the water supply that provides water for the City of Boston – and allowed for the locally preferred treatment option. The court ruled that this was permitted under the Safe Drinking Water Act (U.S. v. Massachusetts Water Resources Authority, July 2001).¹⁰

It would seem in the best interest of public health and for the maximum welfare benefit of the residents of the City of Boulder, for the City to be allowed (and encouraged) to apply for all the compliance options available under the law. Please contact me if I can be of any assistance.

⁵ http://www4.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00000300---g005-.html

⁶ <http://www.ruralwater.org/arsenic/artxpr1.pdf>

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

⁷ <http://domenici.senate.gov/news/topicrecord.cfm?id=249830&code=EnvPW>

⁸ <http://www.epa.gov/fedrgstr/EPA-WATER/2006/November/Day-08/w8763.htm>

⁹ Federal Register: November 8, 2006 (Volume 71, Number 216)

¹⁰ <http://www.ruralwater.org/commerceclause/U.S.%20v.%20MWRA%20-%20MWRA%20opinion.pdf>