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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

ANDREW WHEELER, MAJORITY STAFF DIRECTOR
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September 7, 2005

The Honorable Stephen Johnson
Administrator
U.S. Environmental Protection Agency
Washington, DC 20460

Dear Administrator Johnson:

Thank you for accepting these comments for the administrative record for the promulgation of the Stage 2 Disinfection and Disinfection By-Products (DBPs) Rule.

I appreciate your acceptance of these comments considering EPA is well into the process of determining the final rule. All of these comments have been brought to the attention of the EPA; however, I am not aware that they have all been made part of the formal rulemaking record of the Stage 2 rule.

I am writing on behalf of the small water systems in Oklahoma who are currently struggling to comply with the Stage 1 rule. Nearly 80 percent of our state's systems did not meet the most recent compliance deadline which makes it all the more remarkable to me that the agency is considering imposing additional requirements. Further, in the cost analysis for Stage 2, the preamble to the rule states, "more systems than projected in the primary analysis may already be in compliance with the Stage 2 DBRP." Given that nearly 80 percent of small systems in Oklahoma are not in compliance with Stage 1, how can EPA base any of its cost analysis on a questionable belief that systems would already be complying with Stage 2?

I am quite concerned about the science being used to justify these new requirements and believe that perhaps EPA should do additional analysis before proceeding. In their comments on the rule, the Association of Metropolitan Water Agencies (AMWA) points to several problems with EPA's characterization of the health effects of DBPs in the proposed rule's preamble. AMWA states, "the characterization of the health effects and other information related to any rulemaking is as important to the public and the drinking water community as it is to the EPA. It is important as the public has the right to know the quality of its health effects. Accordingly, the participants [in the FACA], led by EPA, actively participated in or supported research to resolve uncertainties. All expected that at least some of the major reproductive or developmental issues would be solved by the research prior to the Stage 2 negotiations. This did not happen."

The public policy issues surrounding disinfection byproducts and risks to fetal development and miscarriages are very serious and emotional. It is critical to public confidence that the agency utilizes the best science and draws solid, defensible policy conclusions. The agency must consider all data and scientific studies as it proceeds. A new study by AWWARF/USEPA directly contradicts EPA's scientific reasoning behind its decision to lower the regulated levels of disinfection by-products from the levels in the Stage I Rule to the levels in this proposed rule. (USEPA and AWWARF's University of North Carolina (UNC) at Chapel Hill Study, July 29, 2005). A principal investigator for the study David Savitz of the UNC School of Public Health said the study's methods make it "the most ambitious and sophisticated study ever done on this issue." The UNC researchers did not find the threat to public health in their research that EPA assumes in justifying the proposed rule. As such, the study states, "The failure to provide strong evidence in support of the hypothesized associations is worth noting as well, in that the methodological refinements in our epidemiologic study should have generated more persuasive evidence of adverse effects if such effects are indeed associated with DBP exposures."

Further, the proposed rule may lead to the formation of additional or alternative disinfection by-products from treatment changes that will result from the rule. A recent study released by the EPA Office of Research and Development concluded that alternatives to drinking water chlorination, such as chloramines, may produce "increased concentrations" of some byproducts. This EPA study indicated the proposed rule may result in unintended consequences including exposure to unregulated disinfection by-products including "certain dihalogenated disinfection by-products and iodo-trihalomethanes." Many are particularly concerned by the EPA report's conclusion: "*Important observations included finding the highest levels of iodo-trihalomethanes (THMs) at a plant that used chloramination without pre-chlorination... Another important observation involved finding the highest concentration of dichloroacetaldehyde at a plant that used chloramines and ozone disinfection. Therefore, although the use of alternative disinfectants minimized the formation of the four regulated THMs, certain dihalogenated DBPs and iodo-THMs were formed at significantly higher levels than in waters treated with chlorine. Thus, the formation and control of the four regulated THMs is not necessarily an indicator of the formation and control of other halogenated DBPs, and the use of alternative disinfectants does not necessarily control the formation of all halogenated DBPs, and can even result in increased concentrations of some. Moreover, many of these halogenated DBPs—including certain dihalogenated and brominated species—were not studied in the ICR.*" The rule may require water supplies to switch from their current disinfection process to chloramines or other alternatives, which according to the EPA's report, may have unknown public health risks that may be more harmful than chlorine.

Unintended Consequences of Changes in Treatment

In addition to the probability of the formation of "new" disinfection by-products, recent studies and experience with the Lead and Copper rule indicate a new federal directive toward treatment changes in water supplies including chloramines could change the dynamics and cause unintended concerns like increased lead concentrations in the water supply.

Environmental Justice Concerns

Under the proposed rule, EPA did not adequately consider the ability of **low-income populations** to afford compliance with the rule as required by the EPA's Environmental Justice policy. The proposed rule will likely require many small water supplies to spend hundreds of thousands to millions of dollars to comply - more than double water rates in many small communities and threaten low-income consumers' ability to pay for water service and other public health necessities. To determine "affordability" [(42 U.S.C. 300g-1(b)(15)(A)], EPA adopted a policy that families can afford annual water rates of 2.5% of median household income (MHI) (or \$1,000 per household or a quadrupling of water bills). EPA has stated that the purpose of their affordability determination is to *"look across all the households in a given size category of systems and determine what is affordable to the typical, or middle of the road household"* [Federal Register (Jan. 22, 2001) 6975-7066]. EPA's MHI standard does not consider the quantity, concentration, rural demographics, and financial abilities of low-income families or disadvantaged populations to afford the rule as required by the Agency's Environmental Justice policy [Executive Order 12898]. EPA did not consider the important differences between median-income households and low-income households who would be unable to finance and pay costs of this magnitude. EPA concluded that it does not accept the contention that *"an increase in water bills would force a low-income household to trade off health care or some other 'essential' expenditure to pay the water bill"* [Federal Register (Jan. 22, 2001) 6975-7066]. EPA's affordability standard concludes that low-income families could afford over \$50 a month in rate increases. However, data from the U.S. Bureau of Labor Statistics, Consumer Expenditure Survey and numerous other studies show that low-income households already are forced to make serious tradeoffs that affect the health and well being of their members – including foregoing food and medical care.

Identify Unreasonable Risk to Health

EPA should identify what constitutes "protection of public health" and "unreasonable risk to health" as contemplated by the SDWA for all contaminants or provide a clear definition of the principles for determining such level. Can EPA identify a drinking water standard above the MCL that is protective of public health (PPH) or an unreasonable risk to health (URTH)? That is what the law assumes; however, it has not been adequately implemented. For example, in March, EPA did not find that arsenic concentrations above their standard necessarily present an unreasonable risk to health (URTH). Instead of identifying the levels of arsenic that are protective of public health as contemplated by the variance technology provision in the Act, EPA identified what these levels are not. "EPA is... determining what does not pose an unreasonable risk to health with respect to arsenic, rather than addressing the much more complex issue of what does constitute an unreasonable risk to health." EPA cannot say what "is" a health risk, only what is "not" a health risk. This is not adequate and promotes a lack of public confidence in EPA's ability to make health and environmental safety decisions. If EPA cannot determine PPH or URTH, Congress should know that.

Use of Small Systems Variance Technology

The final rule should include a reasonable and workable small systems variance technology program as mandated in the SDWA and needed to allow small and low-income communities to

comply with rules without experiencing harmful tradeoffs. Before any variance technology is identified, EPA must conclude that the variance technology is “protective of public health.” Cost is a factor in public health protection for low-income households. Since every variance must be protective of public health and is a cost savings to low-income families, the more variances granted, the greater the public health. Who could credibly argue that 1 ppb of a regulated disinfection by-product above the proposed MCL is unsafe, while 1 ppb under the proposed MCL is safe? However, by denying all access to variances, EPA regulators are forced to treat high concentrations of contaminants above the MCL exactly the same as the concentrations less than 1 ppb above the MCL which is arbitrary and forces the compliance at the expense of public health. Under the SDWA, EPA is required to exploit the small systems’ variance provisions when triggered by mandated EPA determination (i.e., affordability). Congress has already agreed that EPA must implement a small system treatment variance program as dictated in the Act.

Ensuring SDWA’s Constitutionality (Nebraska v. EPA, No. 01-1101 DC Circuit 2003)

In State of Nebraska, et al vs. EPA (D.C. Circuit 2003), the State of Nebraska argued the Arsenic rule exceeded the federal government’s power under the Commerce Clause and violated the tenth amendment because it regulated noncommunicable contaminants. The state did not present this argument to EPA during the rule’s public comment period because it believed “EPA could not have tailored the Arsenic Rule in response to their arguments” because agencies do not ordinarily have jurisdiction to pass on the constitutionality of federal statutes. However the court stated that “the Act [SDWA] did not bar EPA from considering the petitioners’ arguments regarding the regulation and it did not necessarily preclude EPA from designing a rule in response to their arguments, gathering evidence to evaluate their claims, or interpreting the Act in light of their position.” It goes on to say, “perhaps EPA could have formulated a rule containing an exception for any public water system that could prove it had no connection to interstate commerce – rules that might have met petitioners’ objections to the regulation of entirely intrastate water.” In light of the Court’s ruling, is the Agency considering any changes to how it regulates community water systems under the SDWA?

Total Organic Carbon

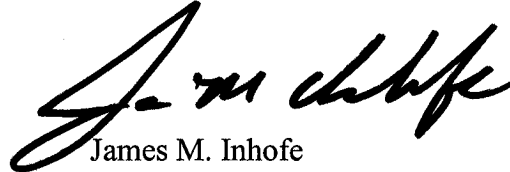
While I appreciate EPA’s effort to provide systems with flexibility by allowing them to reduce their monitoring if they reduce their TOC, I am quite concerned about EPA’s contention that it can regulate Total Organic Carbon (TOC) as an indicator of regulated disinfection by-products because it is not a consistent indicator. It appears TOC should not be an enforceable National Primary Drinking Water Regulation unless EPA has made a finding that the contaminant poses a public health risk consistent with the statute (1412(b)(i)). EPA cannot regulate TOC as an enforceable MCL if the nature of its health effects is not consistent with the requirements of the SDWA and it is not an indicator of regulated disinfection by-products. If it is an indicator of a non-regulated disinfection by-products, please make the determinations mandated by the SDWA for those non-regulated contaminants before regulating their indicators

Initial Distribution System Evaluation (IDSE)

With regard to the requirement that each system conduct an IDSE, it has come to my attention that EPA may require each system to provide a detailed schematic of its distribution system to EPA. Such a requirement creates a serious national security threat. It is unlikely EPA would be able to keep such information secure from the general public, potentially making it vulnerable to those who seek to harm the nation's drinking water supply. I urge you to please reconsider this requirement.

Thank you for considering these comments as you finalize the Stage 2 rule

Sincerely,

A handwritten signature in black ink, appearing to read "James M. Inhofe". The signature is written in a cursive, flowing style.

James M. Inhofe
Chairman

cc: John Graham, Director, Office of Management and Budget