On behalf of the National Rural Water Association (NRWA), a nonprofit, community-based environmental organization of over 25,000 rural and small communities, we are writing to nominate the EPA’s *affordability and small systems variance policies* under the Safe Drinking Water Act for consideration by the Small Business Administration for reform under the agency’s Small Business Regulatory Review and Reform Initiative.

In order to prohibit small communities from utilizing economical treatment options (the so-called small system variance technologies), under the Safe Drinking Water Act – the EPA must make a finding that their rules are "affordable" [(42 U.S.C. 300g-1(b)(15)(A))]. To determine affordable, EPA adopted a policy that families can afford annual water rates of 2.5% of median household income (MHI) (or approximately $1,000 per household). The use of MHI computed as a national aggregate as the sole metric for determining affordability has many problems (explained in the following bullet points) and should be revised to be reasonable for small communities and allow access to affordable compliance treatment options.

The Congressional Research Service (Tiemann – October, 2007) just published a report on the Safe Drinking Water Act for Congress, including a section on variances and affordability for small communities containing the following:

“Prompted by intense debate over the revised arsenic standard and its potential cost to small communities, the [Congressional] conference report for EPA’s FY2002 appropriations (H.Rept. 107-272) directed EPA to review its affordability criteria and how small system variance programs should be implemented for the arsenic rule. EPA began the review and sought the advice of the EPA’s National Drinking Water Advisory Council (NDWAC) and Science Advisory Board (SAB). After considering recommendations from its affordability work group, the NDWAC reported to EPA in 2003. The council acknowledged the statutory basis for small system variances and recommended changes, but cautioned that “significant practical, logistical, and ethical issues mitigate against the use of variances.” The National Rural Water Association, a member of the NDWAC work group, dissented and issued a separate report urging EPA to adopt a safe and affordable variance approach that would make variances available to small communities, as authorized by Congress.”
It appears EPA agrees that their affordability policy is not appropriate for small communities. After reviewing the competing recommendations cited in the CRS report, EPA concluded the following in March, 2006, “*some 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* (FR p.10671 – March, 2007).” EPA has not finalized a new policy after making this declaration in 2006.

**Problems with the Current EPA Policy**

- 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’s current policy does not consider the important differences between median-income households and low-income households who are unable to finance and pay costs of this magnitude. MHI masks the financial hardship that low-income communities and low-income households have in meeting many of the existing regulations. The purpose of a national affordability determination should be to identify the likelihood that small water systems will be able to afford to comply with a regulation without creating a serious risk of adverse health consequences. The fact that a certain level of expenditure is affordable to the median income household in a community tells us very little about the ability of the low-income households in the community to afford the same level of expenditure. EPA’s current affordability policy assumes that low-income families can 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. For example, a study conducted for the State of Iowa Department of Human Rights concluded that, in order to pay their home-heating bill, low-income households made the following tradeoffs: over 12% went without food at some point during the month, more than 20% 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% were unable to pay their mortgage or rent, risking foreclosure or eviction, and almost 30% did not pay other bills or incurred debt to pay the heating bill. 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].

- There is weak correlation between MHI and the level of poverty in a community (Scott J. Rubin, Criteria to Assess Affordability, NRWA 2002). In this study, Scott Rubin found
that at the median income, the level of poverty ranged from zero to more than 20 percent in U.S. countries. That is, communities with the same median income can have poverty rates, and the presence of low-income households, that vary drastically from one another.

• MHI derived policies do not adequately deal with the fundamental differences between rural and urban communities. Some of these differences are obvious: rural communities are less densely populated and tend to have smaller water systems. Some of the differences are not so readily apparent: there are a large number of small water systems in urban areas, and income levels are substantially higher in urban areas than they are in rural areas. As a result, rural households tend to spend a higher percentage of their income on utilities and other necessities than do urban households. In fact, the typical rural household tends to spend essentially all of its after-tax income, while the typical urban household tends to have a surplus of nearly $4,000 per year (Scott R. Rubin, Economic Characteristics of Small Systems, NRWA, 2001).

• Some stakeholders have mentioned that low-income families are already paying over 2.5 percent MHI for water. While some may be paying more than 2.5 percent of MHI, this perspective misses the main point of affordability, which are tradeoffs. Yes, a small fraction of families are paying more than 2.5 percent; however, they are trading off more important expenditures (food, health, doctors, etc.), which they have more discretion over. Low-income families will indeed pay more for water; Rubin has shown that families will always pay for rent and water. However, families will be forced to choose between paying for medical care, food, heat, or other necessities that directly impact public health.

• A study by Scott Rubin (The Relationship Between Household Financial Distress and Health) evaluated the 2005 Behavioral Risk Factor Surveillance System database which is maintained by the Center for Disease Control. This data clearly shows that a strong correlation exists between financial distress and disease (i.e. higher disease in lower income households) and between financial distress and disease prevention activities (less disease prevention measures when financially distressed). The study found families were forced into tradeoffs (to do without) essentials in order to continue to pay for water service occurred when low income households were faced with an increase of $25 per month in expenses.

• The problems caused by EPA’s determination not to consider the ability of low-income consumers to afford significantly higher water rates, regional differences, varying community poverty levels, and urban versus rural differences is currently illustrated under the EPA Arsenic Rule in western states where there is; (1) a greater concentration of the occurrence of arsenic, (2) lower median household incomes, and (3) higher existing water rates already. This so-called “Rubin-Effect” is most clearly seen in the attached map (created by Consumer Advocate Scott Rubin) in Texas, New Mexico, Arizona, and Montana. The attached map shows the 461 counties that have at least one water system that has recorded an arsenic reading of 10 µg/L or above (from EPA’s database). The shadings on the map show how the county’s median household income in the 1990 census compares to the national median household income of $30,000 at that time. The pink and red counties have incomes below the national median, while the two shades of green show incomes above the national median. Over half of the counties
shaded have median household incomes below the national average – with many well below. The map also shows that some of the states that will be seriously affected by a lower arsenic standard have some of the highest water rates in the country already, particularly when compared to income levels. For example, in 1990, the three states where water bills were the highest as a percentage of median income were Texas, New Mexico, and Arizona – and these three states will be seriously impacted the arsenic regulation. More than half of the lowest-income counties (counties with median household incomes below $20,000 per year) that would be affected by this regulation are located in these three states.

- In 1996, with the passage of the Safe Drinking Water Act, 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." To date, EPA has determined all regulations are affordable for small communities and therefore has not allowed any use of small system variance technologies.

- Recognizing that any increase in water rates for economically “sensitive subpopulations” is unaffordable and that the variance technology is always “protective of public health,” EPA should list variance technologies for all applicable rules. We believe that the granting of variances should be embraced and used as widely as possible, to provide the greatest potential for public protection in low-income and rural households. As Scott Rubin’s research revealed, cost is a function of, and arguably the most critical component of, public health protection for low-income households. Since every variance is de facto: (1) protective of public health; and (2) a cost savings to low-income families, the more variances granted, the greater the over-all public health. Before any variance technology is identified, EPA must conclude that the variance technology is “protective of public health.” Who could credibly argue that 10.1 ppb of arsenic is unsafe, while 10.0 ppb is safe? Even under the most legally liberal federal policy of granting variances, local and state oversight still exists. States may use the EPA authorization of variance technology at their discretion; there is no right to install the EPA identified variance technology.

- 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 spoken on this issue, and has overwhelmingly agreed that EPA must implement a small system treatment variance program consistent with the Act (see recent Congressional comments attached).

EPA’s policy of assuming all families and communities can afford the same rate increases appears to adversely impact rural communities that have higher percentages of people living in poverty. We believe that EPA's affordability determinations need to be modified to adequately reflect the ability of low-income families and communities to afford the rule without harming their communities.
In addition to revising EPA’s affordability threshold, we urge the agency to identify the specific level of a contaminant in drinking water that does not pose a "unreasonable risk to public health" (URTH) as envisioned by the Safe Drinking Water Act’s variance provision [42 USC Sec. 300g-4 (a)(1)(A)]. To avoid as much local opposition and confusion as possible, we believe EPA should identify the URTH levels which will allow small community officials to explain the public health necessity of reducing contaminant levels to their local citizens, allow them to effectively plan to comply with rules, or determine if they may be eligible for a variance. State agencies should not be the in the position of determining the adequate level -- if states can determine this level, why can't they determine the MCL?

Thank you for your consideration and please consider the exceptional circumstances of small communities. Every community wants to provide safe water and meet all drinking water standards. After all, local water systems are operated by people whose families drink the water every day and who are locally elected by their community. Any questions or concerns regarding these comments can be directed to Mike Keegan, Policy Analyst or Ed Thomas, Environmental Engineer.

National Rural Water Association
101 Constitution Ave., NW Suite 900
Washington, DC 20001
[t] 202-294-4785
[f] 866-385-3160
keegan@ruralwater.org
MHI (1989) in Counties with an Arsenic Reading of 10 ug/L or Above

<table>
<thead>
<tr>
<th>Arsenic Range</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-20,000</td>
<td>66</td>
<td>14.3%</td>
</tr>
<tr>
<td>20-25,000</td>
<td>169</td>
<td>36.7%</td>
</tr>
<tr>
<td>25-30,000</td>
<td>123</td>
<td>26.7%</td>
</tr>
<tr>
<td>30-35,000</td>
<td>62</td>
<td>13.4%</td>
</tr>
<tr>
<td>35,000+</td>
<td>41</td>
<td>8.9%</td>
</tr>
</tbody>
</table>
May 30, 2006

Dear Administrator Johnson:

To begin, we commend the Agency for undertaking this task and for correctly proposing to apply any changes to the affordability standard to the Disinfection Byproducts (DBP) Stage II rule. However, we begin our comments by noting that this effort was begun at the direction of Congress over concern with the high cost of arsenic treatment in small communities. Therefore to exclude the arsenic rule from the proposed rule's benefits contradicts the intent of Congress and the Safe Drinking Water Act. Further, the rule should extend to both DBP rules, which are very technically complex and with which small communities have difficulty complying. The statute requires “affordability” for all rules.

Thank you for making the bold finding that the current EPA policy is not working or acceptable for small communities. EPA acknowledges the current affordable level is not affordable or fair for small communities - the proposal concludes: “some 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.”

This acknowledgement alone is a significant and positive determination. Now that there is consensus that the current process is not working for small communities we want to work with you to fix it. As you know, making the law work for small communities was one of the main concerns of Congress in 1996. The Senate report accompanying S. 1316, the Safe Drinking Water Act Amendments states:

As with most public utilities, there are significant economies of scale in drinking water supply. EPA and the Congressional Budget Office have published estimates indicating that systems serving more than 10,000 people experience costs that average less than $20 per household per year to comply with the current requirements of the Safe Drinking Water Act. By way of comparison, the average annual incremental household cost to comply with the requirements of the Safe Drinking Water Act for systems serving 25 to 100 persons is $145. Costs for some systems may be much higher than these national averages.
EPA has asked for comments on several issues, a few of which we will address as well as our overarching concerns with the existing affordability standard. EPA asked for comments on whether the cost to the consumer of each individual rule should be the basis for an affordability determination or should the cumulative impact of all rules be the basis. Despite the recommendations of the NDWAC to the contrary, the cumulative impact of existing rules should continue to be the determining factor. To do otherwise is to understake the true cost of federal regulations serving only to create what appears to be less of a burden and justify unsubstantiated regulations.

The current EPA policy is having unintended consequences. Some communities are spending close to $100 per month to comply with the arsenic rule, and many communities exceed the current standard by less than one part per billion. No one thinks mandating such expense on low-income families, for de minimus public improvement, is good public health policy. For a non-theoretical reference, a small community in Idaho was recently mandated to comply with the arsenic rule. The resulting compliance cost forced the rates in the community to $96.00 a month for each family. Further, there are numerous communities with arsenic levels of 11-13 parts per billion.

EPA is clearly seeking to address this problem through a few of the questions it has sought input including asking for comments on whether it is more appropriate to base its affordability determination of incremental costs of treatment for the system at the 10th percentile or the 50th percentile of system size in each small system category as well as what is the appropriate national-level percentage threshold. The 10th percentile seems far more relevant when trying to determine what the most disadvantaged systems can afford. One argument against EPA’s current system is that by looking only at the 50th percentile, EPA does not get a sense for the impact a regulation will have on those below the 50th percentile and these are the systems most likely to be negatively impacted by a regulation. These are the systems that have ratepayers struggling to pay water as well as food, medicine, health care, housing, and gas. In the proposal, EPA states “[It] does not believe that the economic circumstances of the poorest households within a system should drive its national level affordability methodology.” We would argue however that these are exactly the people for whom the EPA should be looking out – especially with regard to Environmental Justice. As noted in a letter from Chairman Inhofe on the disinfection byproducts stage II rule,

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.

As noted in the proposal and by the NDWAC, the way the law is constructed, it is conceivable that it could result in different maximum "levels" of contamination for large and small communities. It is entirely reasonable for the Agency to determine that a contaminant level within three times the MCL is protective of public health, if in fact that is where the health effects science leads the Agency, and we believe it could be for a number of contaminants. An arbitrary cap, however, at three times the MCL may in some cases still be very costly for small systems while a level of four times the MCL could be protective of public health and more affordable for more systems. The "protective of public health" level should not be arbitrary.

EPA needs to make the legally binding economic determinations for small and large communities fair. It is not fair for the affordable level in small communities to be higher (more expensive) than the feasible level for large communities. EPA acknowledges in the proposal, the Act’s level of "feasible" equates to the Act’s level of "affordable." Therefore, if the affordable level is set higher than the feasible level, the affordable level will be unfeasible for some communities. Thus the problem that Congress asked EPA to look at – the unaffordability of some rules to some communities – has not been solved. If EPA cannot implement the statute with this parity or fairness for small and large communities – please tell this to Congress to allow us to address the problem.

We should note that most importantly while there could be different levels of regulated substances permitted for various sized communities, there is only one acceptable public health "standard" that cannot be exceeded by anyone. The reason this hypothetical situation could occur is because the large community level is largely driven by technology, and those technologies are often unaffordable and infeasible to small communities. One need only review the comments of Senator Max Baucus, one of the authors of the 1996 amendments, during floor consideration of S. 2019 during the 103rd Congress. S. 2019 served as the basis for S. 1316, ultimately enacted as the Safe Drinking Water Act amendments. It contained many of the same provisions, including the allowance of variances for small systems. This is how Senator Baucus described the variances:

"... one of the most critical problems that this legislation addresses is the disparity in compliance costs between large and small systems. Some 87 percent of the drinking water systems in this country are small, serving fewer than 3,300 persons. While they serve about 10 percent of the population, they bear about 40 percent of the cost of the Safe Drinking Water Act.

This bill helps small systems that cannot afford to use conventional treatment and that can benefit from technologies geared specifically to the needs of small systems.

Here is how it works: Any system serving 10,000 people or less may request a variance to install special small system technology identified by EPA. This means if a small system cannot afford to comply with current regulations through conventional treatment, system restructuring or finding an alternative source of water, the system can comply with the act by installing affordable small system technology.
Small systems that seek a variance will be protected from financial penalties while their application is being reviewed. If approved, they would have 3 years to install the affordable technology. States approve the initial variances for a 5-year period and may renew them for additional 5-year periods. A variance cannot be approved unless the technology provides adequate protection of human health. (emphasis added)

But the paramount consideration, however, that underlies the granting of a variance or exemption is that there be adequate protection of public health.¹

We are concerned that EPA has been and will continue to implement the law in an alternative way because they have listened to stakeholders who claim, incorrectly, that it is unethical to implement the law as written. If EPA agrees with these stakeholders – we urge you to tell Congress that the law as written by Congress is, in the Agency’s opinion, unworkable.

We would encourage any creative solutions and recommendations from EPA. One simple solution could be to retain the current standard setting provision for all communities and exempt all small communities from fines for non-compliance. The national policy could be that alternative methods for compliance would be used for small communities, including State Revolving Loan Fund funding, Department of Agriculture funding, local political pressure and innovative treatment approaches including point of use, point of entry and bottled water. These approaches would provide small communities with more time to comply.

While recognizing the potential difficulty in applying the new affordability criteria retroactively, EPA’s position that it will not apply to arsenic or disinfection byproduct stage I is troubling and inexplicable. These two recent rules are those with which communities today are struggling the most. Further, arsenic in particular was the rule that got Congress’ attention resulting in their direction to EPA to examine the affordability criteria.

With the publication of this proposal, EPA has acknowledged that previously promulgated regulations are unaffordable. We must question the wisdom of forcing small and disadvantaged communities to comply with rules such as arsenic and DBPs-I when they are so clearly unaffordable and infeasible to so many of these communities. We would urge the Agency to support a moratorium on enforcement until this matter is corrected.

Sincerely,

James M. Inhofe
E. Benjamin Nelson
Mike Crapo

Patricia Logue
Pete V. Domenici
Larry Craig

¹ Congressional Record, May 9, 1994. Page S5396