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April 9, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

I am writing to express my serious concern about an Environmental Protection Agency (EPA) proposal that significantly weakens the public health protections provided by the Safe Drinking Water Act for small communities. If finalized, EPA's proposal would ignore the views of its outside expert advisors and could expose significant populations in the United States to contamination levels in drinking water that are up to three times what the law now allows.

Under current law, public water systems of every size protect the public from waterborne illness and toxic chemicals by providing drinking water that meets rigorous regulatory standards. For public water systems serving small communities, the Safe Drinking Water Act requires EPA to identify technologies that are both affordable and help small systems comply with drinking water standards. To date, EPA has determined that affordable compliance technologies are available for small systems for every drinking water regulation.

Under your leadership, EPA has proposed to radically change the agency's drinking water regulations for small public water systems.[1] This change, if finalized, would allow small systems to use "variance" technologies even if it means allowing three times more contamination in the drinking water of small communities than is permitted under current law. EPA's own expert panel, the National Drinking Water Advisory Council, advised EPA against this approach, citing "significant practical, logistical, and ethical issues" and instead offered a comprehensive

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[1] U.S. EPA, *Small Drinking Water Systems Variances—Revision of Existing National-Level Affordability Methodology and Methodology to Identify Variance Technologies That Are Protective of Public Health*, 71 FR 10671-10685 (Mar. 2, 2006) (proposed rule) (hereinafter "EPA Affordability Proposal").

approach to making drinking water affordable while maintaining important public health protections.[2]

Your staff has informed the Committee that this proposal remains one of your priorities, despite significant opposition from the environmental and public health community, state regulators, and industry. According to press accounts, the White House has also urged EPA to finalize this rule.[3]

The EPA proposal could undermine the Safe Drinking Water Act's public health protections. Essentially, EPA is proposing to create a two-tiered system in which the drinking water of smaller and lower-income communities could contain contaminants at levels considered unacceptable for the rest of the country. This is simply unjustifiable from a public health and ethical standpoint.

Background

Since the Safe Drinking Water Act was enacted in 1974, EPA has set a maximum contaminant level (MCL) for regulated drinking water contaminants. Public water systems are required to monitor for and ensure that levels of contamination do not exceed the MCL.

In 1996, Congress amended the Safe Drinking Water Act to provide additional assistance and consideration for small public water systems (those serving fewer than 10,000 people). EPA is required to identify compliance technologies to achieve the MCL that are affordable for small public water systems. If EPA determines, based upon its affordability criteria, that achieving the new standard is unaffordable for small systems, EPA must identify a small system "variance" technology. By statutory definition, variance technologies may remove less contamination than the best available technologies and may not achieve the MCL but are still required to be protective of public health.

EPA has found little real-world need for variance technologies. Under its current regulations, EPA considers compliance technologies affordable to small public water systems if the current household cost of water plus the estimated additional cost to comply with a new rule is less than 2.5% of median household income (MHI). To date, EPA has deemed all drinking water regulations affordable using the 2.5% threshold and therefore has not allowed small

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[2] National Drinking Water Advisory Council, *Recommendations of the National Drinking Water Advisory Council to U.S. EPA on Its National Small Systems Affordability Criteria* (July 2003) (hereinafter "NDWAC Recommendations").

[3] *EPA, White House Clash Stalls Guide for Waiving Drinking Water Rules,* Inside EPA (July 13, 2007).

systems to adopt variance technologies. As a result, small public water systems must provide their consumers with the same quality water as the rest of the country.

Recommendations of EPA's Drinking Water Experts

Congress established the National Drinking Water Advisory Council (NDWAC) to provide the agency with expert advice on important drinking water policy issues.[4] In 2002, NDWAC formed a working group to advise EPA specifically on small system drinking water affordability issues. The working group included 18 representatives of small and large water utilities, small system advocacy and technical assistance organizations, academics, state and local governments, tribes, and environmental and consumer groups.

In 2003, NDWAC completed a 170-page report outlining a comprehensive approach to helping small water systems comply with federal drinking water standards. In addition to answering six specific questions posed by EPA about how to structure small system affordability criteria, NDWAC explored ways that small systems can "achieve compliance in a more cost-effective and/or less financially burdensome manner."[5] NDWAC detailed several ideas for making drinking water compliance affordable for small systems while protecting public health, such as providing financial support to struggling small water systems, consolidating systems where possible, optimizing system capacity and cooperation, and creating a Low Income Water Assistance Program (LIWAP) to assist individuals.

NDWAC also registered its concerns with proposals to increase the use of variance technologies, stating in its report to EPA:

> The NDWAC believes that alternatives to the variance process identified by the Work Group in this report (such as cooperative strategies, targeted use of funding to disadvantaged water systems, a LIWAP, etc.) are more appropriate means to address the affordability problem. Therefore, if a variance process is deemed necessary to achieve affordability, it should only be pursued after all other alternatives presented in this report are given due consideration.[6]

In this limited context, NDWAC recommended changing EPA's affordability threshold for small water systems. NDWAC suggested using an incremental, rule-by-rule affordability

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[4] SDWA § 300j–5.

[5] NDWAC Recommendations, v.

[6] NDWAC Recommendations, 99.

threshold of 1.0% of MHI after considering several factors, including spending on bottled water, willingness to pay, and comparison to other household expenditures.[7]

EPA's Proposal

In proposing a new rule in 2006, EPA ignored NDWAC's comprehensive and near-consensus approach. Instead, EPA proposed lowering the affordability trigger to as low as 0.25%.[8] This is a significant decrease from the 2.5% threshold under current law and NDWAC's proposal of 1.0%. The 0.25% threshold would set as little as $100 per household per year (about $8 per month) as the maximum cost that is affordable to customers served by small systems, making way for the widespread use of variances.[9] In addition, EPA sought comments on affordability thresholds of 0.50% and 0.75%, both of which are also significantly lower than the current standard and the NDWAC recommendation.

In a second significant change, EPA proposed allowing variance technologies that would result in significant increases in drinking water contamination. Under current law, a small public water system obtaining a variance is permitted to use a treatment technology that provides the maximum contaminant removal that is both affordable and "protective of public health" but does not remove the contaminant to the degree specified by the drinking water standard (the MCL). EPA's proposed regulation would define a variance technology as "protective of public health" if the treated water contains no more than three times the MCL established in the national drinking water standard.[10] EPA admits that this could result in "greater exposure" and "may translate to a greater risk of adverse health effects."[11]

Problems with the Proposal

A diverse set of stakeholders submitted comments to EPA, most overwhelmingly rejecting all or part of EPA's proposal to revise its affordability methodology. In addition to the environmental and public health community, organizations that have opposed or expressed concerns about all or part of EPA's proposal include:

- State and local regulators, including the Association of State Drinking Water Administrators, the National Governors Association, the Alaska Department of Environmental Conservation, the Indiana Department of Environmental Management, the

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[7] NDWAC Recommendations, xii.

[8] EPA Affordability Proposal, 10679.

[9] *Id.* at 10680.

[10] *Id.* at 10683.

[11] *Id.*

Maine Department of Health and Human Services, the Missouri Department of Natural Resources, the Nebraska Department of Health and Human Services, the Ohio EPA, the Vermont Department of Environmental Conservation, and the Washington Department of Health;

- Industry representatives, including the American Water Works Association, which represents water utilities that supply 80% of the nation's drinking water; American Water, which owns or operates more than 400 drinking water systems and is the largest privately-owned water company in the United States; the Water Quality Association, a not-for-profit international trade association representing 2,500 corporations in the household, commercial, industrial, and small community water treatment industry; and the Water and Wastewater Equipment Manufacturers Association; and

- The Rural Community Assistance Partnership, a federally-funded non-profit that provides training and technical assistance on water issues for small, rural communities.

In its comments on the proposed rule, the Campaign for Safe and Affordable Drinking Water, an alliance of more than 300 public health, consumer, rural, environmental, medical, nursing, and other groups, said that EPA is "blessing a two-tiered drinking water system, in which rural and low-income residents are second-class citizens, undeserving of high quality tap water."[12] This is an apt description. EPA's proposal seems to contradict the agency's principles of environmental justice, which it defines as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[13]

According to state water regulators, EPA's proposal could inundate state agencies with demands for variances, which require time and resources to evaluate and process. NDWAC warned that "the cost of establishing the appropriateness of a variance for a specific small system is significant. The heightened monitoring and regulatory burden that would fall to State and local authorities is unacceptable for many of them."[14] The Association of State Drinking Water Administrators, the professional association that represents the state drinking water primacy agencies responsible for implementing the Safe Drinking Water Act, noted in its comments to EPA that the "technical, administrative, and logistical challenges to states ... would be daunting"

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[12] Campaign for Safe and Affordable Drinking Water comments, Docket Id. No. EPA–HQ–OW–2005–0005 (May 1, 2006).

[13] U.S. EPA, Environmental Justice (online at www.epa.gov/environmentaljustice/index.html).

[14] NDWAC Recommendations, 99.

and "would represent an enormous potential workload that many states simply could not manage."[15] Ohio EPA similarly questioned whether administering numerous variances "would be a wise use of the limited resources we have available to implement the [Safe Drinking Water Act]."[16]

The Rural Community Assistance Partnership, which represents the interests of rural consumers, also has raised concerns, stating that EPA's proposal "would jeopardize public health while providing little if any financial relief for small communities and would create a useless and unproductive administrative burden on states and small communities."[17] Similarly, the American Water Works Association strongly recommended that EPA "develop regulations with a single regulatory standard based on sound science and that reflects community-level costs and benefits rather than expend resources developing a second pseudo-standard and justifying which level really is necessary to protect public health."[18]

Conclusion

All Americans deserve access to clean and affordable drinking water. Regrettably, the EPA proposal would undermine this basic principle. Rather than assuming we cannot achieve safe drinking water at an affordable cost, EPA should drop its proposal and develop a comprehensive strategy that makes the best available technology affordable to those who need it.

If you have any questions concerning this letter, please contact Greg Dotson or Alison Cassady of the Committee staff at (202) 225-4407.

Sincerely,

Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member

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[15] Association of State Drinking Water Administrators comments, Docket Id. No. EPA–HQ–OW–2005–0005 (Apr. 28, 2006).

[16] Ohio EPA comments, Docket Id. No. EPA–HQ–OW–2005–0005 (Apr. 26, 2006).

[17] Memorandum from RCAP as provided to OMB, *Rural Community Assistance Partnership Discussion on Small Drinking Water Systems Variances* (May 11, 2007).

[18] AWWA comments, Docket Id. No. EPA–HQ–OW–2005–0005 (May 1, 2006).