

Water affordability regulations hit small systems hard

At the recent National Rural Water Association conference held in Dallas, Texas, a session on the affordability of water service, with particular reference to the cost of compliance of existing and future regulations, drew considerable interest. While water system officials may have previously heard discussion on the topic of affordability, the recent conference session presented information that was alarming to many in the audience.

The affordability of costs to comply with drinking water regulations is again becoming an increasingly important issue at the local, state and national levels. In 2001, I was privileged to serve as a member of the Affordability Task

Force – a group of water industry representatives that attempted to put some perspective on the issue of how water systems, and particularly small water systems, could be expected to comply with regulations given the significant costs that some of

these regulations would impose. It does not make me proud to say that my opinions on affordability, which I believe represented the interests of small systems, were challenged by most members of the Task Force. While it costs perhaps a penny or two or three per thousand gallons for a large system to comply with a specific regulation, that same regulation can cost a small system a

disproportionate amount of money. What's EPA's criteria to determine affordability? EPA has determined that the regulations are affordable, based on its standard of a total water bill of 2.5% of median household income on a national level.

In 2001, the National Rural Water Association took exception to

'white paper' on the topic, written by Scot Rubin, an authority on water utility issues.

Here we are, five years after those first Affordability Task Force meetings and there is a historic debate being conducted in Washington again. The Environmental Protection Agency

What's EPA's criteria to determine affordability? EPA has determined that the regulations are affordable, based on its standard of a total water bill of 2.5% of median household income on a national level.

the Affordability Task Force's report and instead, submitted its own 'minority report.' That report was subsequently the subject of a

has put out a proposal to evaluate the financial impact of future drinking water regulations on small communities, and to issue a variance to those systems if the



*Dennis Schwartz
KRWA President*



The Total Organic Carbons (TOCs) occurring in surface water enter the supply anywhere along a basin drainage. This forested section with a small tributary stream is no exception.

particular rule is deemed unaffordable. USEPA has already stated that the method it currently uses to determine affordability is not realistic. EPA's proposal is the direct result of an educational campaign by the National Rural Water Association. After many presentations and meetings, Ben Grumbles, USEPA Assistant Administrator for Water, has now apparently, fundamentally agreed with NRWA's position.

As was recently rhetorically asked by Matt Holmes, Executive Director of New Mexico Rural Water Association, "With USEPA on our side, what could possibly go wrong?" Well, lots.

First, the agency proposed modifying the criteria used to determine the affordability of new regulations, and implementing variances to qualifying systems allowing up to three times the proposed Maximum Contaminant Level (MCL). Under the variance, the system (or the state) would need to show that the new MCL would

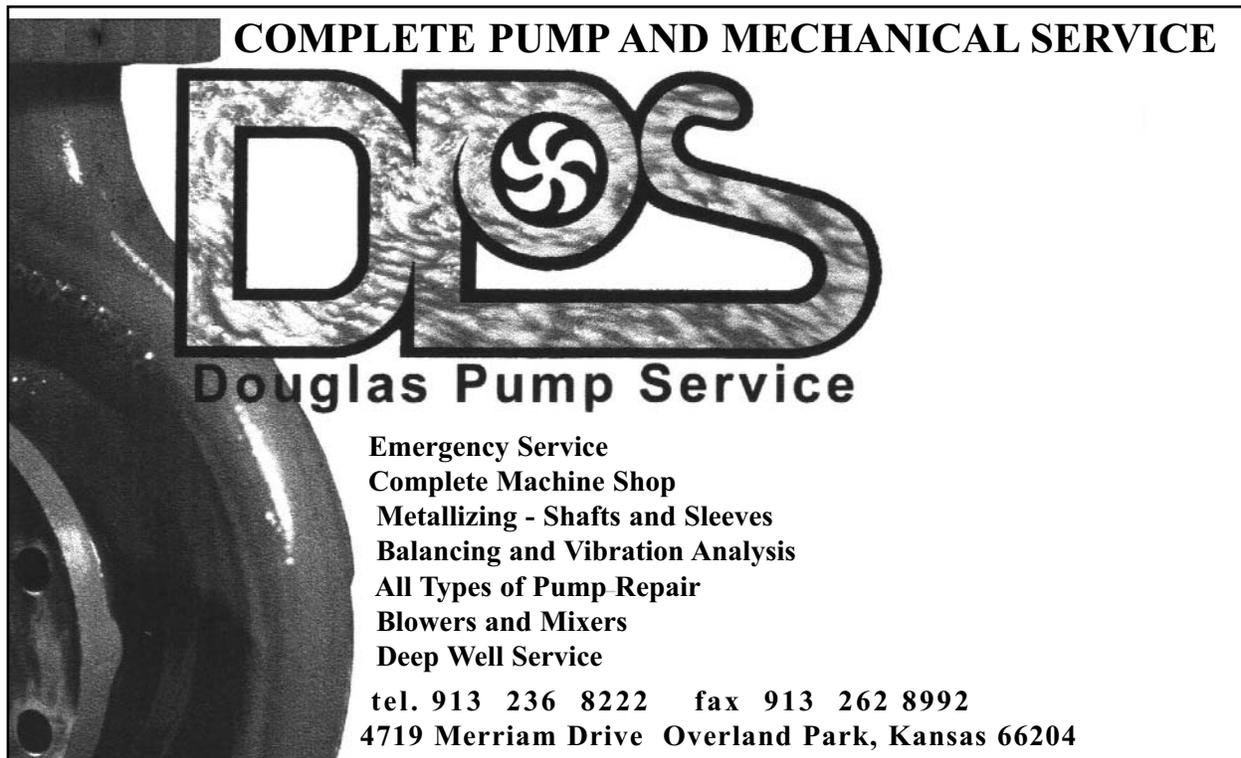
not pose an Unreasonable Risk to Health (URTH).

To date, the National Rural Water Association is the only national organization that has supported USEPA's proposal. Many other national organizations have openly opposed it, including the American Water Works Association, the Association of State Drinking Water Administrators, the National Resource Defense Council and the Rural Community Assistance Program. As Matt Holmes in New Mexico, which has a high number of systems out of compliance with the arsenic standard, commented, "The proposal has been criticized on many levels, as an anti-environmental initiative, jeopardizing public health and the Safe Drinking Water Act, and an attempt to revoke the arsenic rule. A large part of this rhetoric is propaganda and either untrue or irrelevant."

Those who are opposed to the present EPA affordability proposal argue that small communities

deserve the same level of public health protection as urban areas. Even though Congress specifically directed EPA to consider affordability for small systems in the 1996 reauthorization of the Safe Drinking Water Act, it has never really done so. I recall KRWA's meetings with Kansas' regulatory officials in 1995 and 1996 when then Congressman Slattery from Kansas introduced bi-partisan legislation to amend the Safe Drinking Water Act. There was debate then that if, for example, Pretty Prairie wanted to provide water with 16 parts per million nitrate and if the citizens knew and understood the risks (or lack of risks) in doing that, then so be it. In 1996, just as today, there are people who are uncomfortable letting small systems off the regulatory hook as it raises a question of favoritism. How could a community be allowed to provide water that was not 'safe'?

The new Stage 2 Disinfection ByProducts Rule is driving many



COMPLETE PUMP AND MECHANICAL SERVICE

DPS

Douglas Pump Service

- Emergency Service**
- Complete Machine Shop**
- Metallizing - Shafts and Sleeves**
- Balancing and Vibration Analysis**
- All Types of Pump Repair**
- Blowers and Mixers**
- Deep Well Service**

tel. 913 236 8222 fax 913 262 8992
4719 Merriam Drive Overland Park, Kansas 66204

small surface water plants out of business. Five years ago, many of these plants produced water that met all standards. Today many of these plants are seen as “problems” as they cannot comply with the new regulations. The suggestion to build large new public wholesale water supply districts might allow the surface plants in scattered small towns to close, but where are the millions upon millions of dollars going to come from to finance the new systems? Plus, there are further problems in that water that is in transit in distribution systems over such large geographic areas brings on questions of additional compliance issues that EPA is now only beginning to develop.

There is no question that water rates will continue to increase because of regulatory requirements. Systems also have needs to replace aging infrastructure. But given that some of the new regulatory requirements do nothing to protect or improve public health (eg., testing and compliance with the Total Organic Carbon rule), we seem to be in a spiral of increasing regulations and an inability of small systems to be able to comply with them because of costs. After a while, the question is where it will all end.

I encourage you to try to stay informed on this issue. The 2007 KRWA conference will hold special discussions on affordability and costs of compliance. I hope you will be in Wichita, March 27 – 29 for the debate on this and many other topics relevant to all systems in Kansas.

Texas towns and Kansas systems press for lawsuit over constitutionality of SDWA

Several small, rural towns may take part in a lawsuit challenging the constitutionality of the Safe Drinking Water Act (SDWA), renewing a hard-fought legal battle utility advocates began three years ago that now threatens again to contest EPA's regulations on arsenic and may bring new arguments against the agency's Disinfection Byproduct (DBP) Rule.

In Kansas, small water systems are considering a challenge to the SDWA's DBP standard limiting the Total Organic Carbon (TOC) level, which measures the amount of organic carbon compounds in a given water sample. These compounds react with disinfectants to form DBPs. At the time of this writing, utility advocates and representatives of the water systems in Kansas have yet to make a decision on whether the systems will choose to pursue litigation.

Attorneys with the free-market think tank Competitive Enterprise Institute (CEI) want to pursue the case against EPA, in conjunction with representatives of the towns' water systems, as a way to revive the argument made in *State of Nebraska vs. EPA*, a 2003 challenge to SDWA regulations based on the constitution's commerce clause.

Even though the U.S. District Court for the District of Columbia rejected the 2003 case, the Court left open the possibility of bringing an applied challenge to the act contesting specific enforcement actions, according to CEI attorneys.

There is some question as to whether CEI's search for small systems willing to sue will be successful. The list includes unnamed Texas systems with disputes on arsenic levels. The Kansas systems' problems are with the TOC levels leading to problems with the DBP Rule.

In the case of the Texas systems, in 2006 USEPA used a bilateral compliance agreement with the systems and Texas regulators. As described by CEI sources, the “inconsistent approach” has forestalled USEPA from taking enforcement actions against the systems even though they are still listed as in non-compliance with the MCL. USEPA has said that they could take action at any time but at present have no such plans.

Now it looks as there is a “see who blinks first” standoff in the Lone Star State. Will the Texas systems receive the dreaded “official enforcement letter” if they decide to join the suit, or vice versa? USEPA has since extended the arsenic standards exemption to the state of Oklahoma. If USEPA would not have listed the individual systems as in non-compliance, rural water advocates would push for similar agreements outside of Texas and Oklahoma – so similar agreements have also been forestalled.

The CEI source says if the pending lawsuit succeeds on its merits, EPA would be barred from enforcing the contaminant level criteria on systems that do not play a role in interstate commerce. Yet the agency would still retain the authority to enforce most other water and air regulations addressing elements that cannot be contained by state borders.

We will see if Kansas can find a win-win situation where either a favorable Federal Court ruling on TOCs or at least if a “who blinks first” situation with USEPA might be attainable.