

FEDERAL REGULATION OF STATES' DRINKING WATER UNCONSTITUTIONAL

by
The Honorable Don Stenberg

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (“SDWA”), by its delegation to the Environmental Protection Agency (“EPA”) of vast rulemaking authority over community water systems, grants the federal government immense regulatory authority over the general health and welfare of local citizens — an authority which has been constitutionally reserved to the state governments. Through the SDWA and its resulting regulations, the federal government has imposed millions of dollars in expenses upon state and local communities. These legislative and regulatory actions far exceeded the federal government’s authority under the Commerce Clause of the U.S. Constitution.

The SDWA was passed by Congress in 1974 and has been amended several times. Its operative language provides that “national primary drinking water regulations . . . shall apply to each public water system in each State.” 42 U.S.C. § 300g. Clearly, the SDWA seeks to impose drinking water standards on state and local water systems. In addition, the SDWA gives the EPA authority to pass subsequent quality standards for drinking water, and requires affirmative statements by community water systems regarding the presence of contaminants in their water supplies.

On January 22, 2001, the EPA, pursuant to its authority under the SDWA, promulgated a rule entitled “National Primary Drinking Water Regulations: Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring Final Rule,” 66 Fed. Reg. 9679-01 (Jan. 22, 2001), (the “Arsenic Rule”) which established an enforceable Maximum Contaminant Level (“MCL”) for arsenic in drinking water at ten parts per billion. This exercise of federal power usurps the police power of the States, thereby imposing impermissible economic and regulatory burdens on state and local governments. As a result, the State of Nebraska has petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the Arsenic Rule and the constitutionality of the SDWA. *State of Neb. v. EPA*, No. 01-1011, consolidated into *Am. Wood Preservers Inst. v. EPA*, No. 01-1097.

After years of heated debate regarding the actual harm presented by trace amounts of arsenic, and the weighing of estimated health benefits from the lower standard versus costs of implementation and compliance thereto, the EPA issued the Arsenic Rule in the final days of Clinton administration without ever adequately addressing these issues. They substantiated the regulation with questionable health studies from foreign countries with arsenic levels much higher than those existing in the United States, while disregarding scientific data and studies available in the United States involving arsenic levels at or near those to be regulated.

New EPA Administrator Christine Todd Whitman recognized that there were substantial issues yet to be addressed by the regulation, and on April 23, 2001, EPA announced that it would reassess the Arsenic Rule.

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However, during this allegedly independent reassessment process, EPA appointed many of the vocal supporters of the Arsenic Rule to essentially reassess their own work, while removing the voices of reason that questioned the regulation during the original rulemaking process. Then, without completing the administrative procedures required in such a reassessment, the EPA ceased its review of the Arsenic Rule and announced that the standard set on January 22, 2001 would stand.

Practically speaking, the SDWA leads to congressional regulation of small, local public water systems. According to the Arsenic Rule itself and many of the comments submitted in response thereto, a large portion of the water systems affected serve small communities of less than 10,000 people and obtain their water from groundwater that is not part of interstate waterways. Compliance with the Arsenic Rule will cost Nebraska communities over 110 million dollars for initial implementation alone, not taking into account annual operating cost of water treatment facilities, waste disposal costs, and costs to address water security concerns. These costs (ranging from \$222 to \$1727 per household annually) may be shifted to local households, and, in some communities, may result in reversion to private wells, which in some cases could pose health risks much greater than trace amounts of arsenic.

The Framers of the Constitution did not intend to authorize the federal government to regulate local public water systems' treatment of drinking water, when such actions are wholly intrastate and noncommercial. As a safeguard against this occurrence, several mechanisms were put into the Constitution to limit federal power and to prevent federal intrusion into fundamentally local issues. According to the Tenth Amendment, the federal government was given only specific enumerated powers, and all other powers were reserved to the States and the people. Except for the Fourteenth Amendment, which is not at issue here, the Constitution has never been amended to increase federal power at the expense of state power.

Congress' primary legislative power derives from the Commerce Clause of the Constitution, which allows Congress to regulate *interstate commerce*. The Supreme Court recently held that Congress may regulate purely *intrastate, noncommercial* activities only if "those activities . . . substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000). The local provision of drinking water by community water systems does not substantially affect interstate commerce.

Treatment of drinking water is not a commercially-related regulation, but is instead a health-related one, reserved to the States under the Tenth Amendment. According to the Supreme Court, "it is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Because establishing and enforcing quality standards and treatment requirements for drinking water relates to the health of local citizens, this area is clearly within States' police powers, and therefore outside of congressional reach.

Just as the Framers of the Constitution envisioned, the States are in a better position to make decisions relating to the health and welfare of their citizens. Instead of utilizing national statistics to determine feasibility, each State should be able to use the facts relevant to their own citizens to determine the regulatory burdens that they can withstand without excess costs imposing negative health consequences (such as the reversion from public water systems to private wells). For example, the EPA uses national statistics, such as Median Household Income and the mineral composition of groundwater to be regulated, to determine financial and technological feasibility of treatment. Whereas the median household income of Nebraska is much lower than the national average, and in many parts of the country the mineral composition of the groundwater makes EPA's proposed treatment technologies impractical.

If Congress wants to legislate such burdens via its power under the Spending Clause by offering to fund compliance costs itself, it is free to do so. However, the federal government may not impose such regulatory burdens on localities. If the federal government can exercise regulatory power this broad, then the Framers' effort to limit the power of the federal government will have entirely failed.