U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

May 10, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Comments on EPA's proposed rule "Revisions to the Unregulated Contaminant Monitoring Rule for Public Water Systems" (EPA Docket EPA-HQ-OW-2020-0530-0001).

Dear Administrator Regan:

On March 11, 2021 the Environmental Protection Agency (EPA) published a proposed rule titled "Revisions to the Unregulated Contaminant Monitoring Rule for Public Water Systems."[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule, which may also be referred to as "UCMR 5" in this letter.

As written, EPA's proposed rule creates a confusing regulatory framework for small PWS which may be left wondering whether they are obligated to collect and analyze samples without funding from EPA. Advocacy encourages EPA to revise the proposed rule to expressly conform to existing statutory requirements as well as to streamline the necessary sample collection and analysis by eliminating duplicative sampling and analysis requirements already required by EPA and states under other regulations.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA)[2], as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)[3], gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

[1] 86 F.R. 13846 (March 11, 2021).
[2] 5 U.S.C. § 601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy[4]. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so[5]. Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

The Proposed Rule

Congress enacted the Safe Drinking Water Act[7] (SDWA) in 1974 to "establish standards and treatment requirements for public water supplies, control underground injection of wastes, finance infrastructure projects, and protect sources of drinking water."[8] In 1986, the SDWA was amended to require the EPA to "promulgate regulations requiring every public water system to conduct a monitoring program for unregulated contaminants."[9] In 1996, the SDWA was again amended to require the EPA to "publish a list of contaminants . . . not subject to any proposed or promulgated national primary drinking water regulation, which are known or anticipated to occur in public water systems, and which may require regulation under this title."[10] EPA subsequently promulgated the First Unregulated Contaminant Monitoring Rule, or UCMR 1, on September 17, 1999.[11] Since that time, EPA has promulgated three additional UCMRs: UCMR 2, UCMR 3, and UCMR 4.[12] Each of these UCMRs identified unregulated contaminants that required monitoring by certain PWS. In 2018, the SDWA was again amended by the America's Water Infrastructure Act of 2018[13], which mandated the monitoring of the UCMR specified unregulated contaminants by "public water systems serving between 3,300 and 10,000 persons" but only "subject to the availability of appropriations for such purposes." Similarly, the 2018 amendment authorized EPA to require "a representative sample of public water systems serving fewer than 3,300 persons . . . to monitor [the unregulated contaminants]" also only "subject to the availability of appropriations for such purposes."[14]

On March 11, 2021 the EPA issued this proposed rule under the statutory authority of the SDWA as amended. The proposed rule identifies 30 new unregulated contaminants, including 29 PFAS chemicals as well as lithium, to be monitored by certain PWS. In addition, the proposed rule

[4] Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.
[5] Id.
[6] 5 U.S.C. § 601 note.
[7] 42 U.S.C. § 300(f) et seq.
[8] Congressional Research Service. *Safe Drinking Water Act (SDWA): A Summary of the Act and Its Major Requirements* (7-5700), Prepared by Mary Tiemann. March 1, 2017, accessed May 3, 2021.
[9] Pub. L. 99-339, Title III, 100 Stat. 666 (1986).
[10] Pub L. 104-182, Title I, 110 Stat. 1615 (1996).
[11] 64 F.R. 50556 (Sept. 17, 1999).
[12] 72 F.R. 367 (Jan. 4, 2007), 77 F.R. 43523 (July 25, 2012), 81 F.R. 92666 (Dec. 20, 2016).
[13] Pub. L. 115-270, Title I, 132 Stat. 3765 (2018).
[14] Pub. L. 115-270, § 2021(j)(A)-(B).

modifies certain procedural and substantive requirements for those PWS regulated by the proposed rule as discussed further below.

EPA and Advocacy have previously agreed that, for purposes of the RFA and the UCMR, "small public water systems" or "small PWS" include those public water systems serving 10,000 or fewer persons.[15]

Advocacy Comments and Recommendations

1. *Wholesale and consecutive systems should be exempted from UCMR 5 obligations if such system receives its water from a PWS already obligated to monitor under UCMR 5.*

The purpose of the UCMR is to provide EPA and the public with data on the occurrence of unregulated contaminants in drinking water supplies so that EPA can make better informed regulatory and other risk management decisions.[16] If an unregulated contaminant is detected in a PWS, it follows that all households that acquire their water from that PWS will be consuming or using water with that unregulated contaminant. Comparably, if an unregulated contaminant is detected in one PWS, it follows that the same unregulated contaminant will be detected in all water that is purchased or acquired through that PWS, including by other PWS.

In section 141.35(a) of the proposed rule EPA has revised the definition of "population served," which is used to identify what entities are regulated under UCMR 5 and are subject to UCMR 5 monitoring requirements. In the existing rule (UCMR 4), "population served" is defined as "the retail population served directly by the PWS as reported to the Federal Safe Drinking Water Information System (SDWIS/Fed); wholesale or consecutive populations are not included." In the proposed rule, the definition of "population served" would be defined as "the retail population served directly by the PWS as reported to the Federal Safe Drinking Water Information System (SDWIS/Fed)," thus eliminating the exemption for "wholesale or consecutive populations." A wholesale water system is defined as "a public water system that treats source water as necessary to produce finished water and then delivers some or all of that finished water to another public water system." A consecutive water system is defined as "a public water system that receives some or all of its finished water from one or more wholesale systems."

In many cases, the wholesale water system and the consecutive water system have obtained its source water and/or its finished water from another PWS that is already subject to the UCMR obligations, and, therefore, whose water has already undergone the required sampling and analyses under the UCMR program. Requiring these water systems to repeat sample collection and analyses for the same water source is inherently duplicative in nature and does not provide any additional data to EPA or to the public. Requiring duplicative sample collection and analysis creates an

[15] 63 F.R. 44512 (August 19, 1998.)
[16] Environmental Protection Agency, *Learn About the Unregulated Contaminant Monitoring Rule | Monitoring the Occurrence of Unregulated Drinking Water Contaminants*, available at https://www.epa.gov/dwucmr/learn-about-unregulated-contaminant-monitoring-rule

unnecessary economic burden on PWS by imposing quarterly and/or bi-annual sampling and analysis requirements.

Advocacy recommends that either (1) EPA not revise the definition of "population served" in section 141.35(a), or (2) EPA clarify that any PWS that receives water from another PWS that has already complied with the UCMR obligations is exempt from all monitoring and reporting obligations under UCMR 5. If a PWS obtains water from both a UCMR-regulated water system as well as a non-UCMR-regulated water system or source, the PWS should be exempt from all UCMR monitoring and reporting obligations for the water obtained from the UCMR-regulated water system to the extent that the water does not co-mingle with the obtained water from the non-UCMR-regulated water system or source.

2. *EPA should exempt all PWS from UCMR 5 monitoring and reporting obligations where such PWS are already required by other federal, state, or local law to collect and report data on the unregulated contaminants identified in UCMR 5.*

Certain PWS are already obligated pursuant to other Federal, State, or local law to monitor for and collect data on the 29 PFAS and lithium identified in UCMR 5. These obligations arise from other federal law and regulations such as the NPDES permit program under the Clean Water Act as well as comparable requirements under state and local law. As this data is already made available to EPA, EPA should prioritize making this data readily transferrable to the UCMR 5 database for UCMR 5 purposes to eliminate any duplicative cost burden that rests on PWS.

3. *Small PWS have no obligations under UCMR 5 unless EPA funds all non-labor monitoring and reporting costs and notifies small PWS funding is available.*

As amended by the America's Water Infrastructure Act of 2018, PWS "serving not fewer than 3,300 persons and not more than 10,000 persons" are required "to monitor for [PFAS]" subject to the "availability of appropriations." Similarly, PWS "serving fewer than 3,300 persons are required to monitor for [PFAS]" subject to the "availability of appropriations." The Act further clarifies that "[t]he Administrator shall pay the reasonable cost of such testing and laboratory analysis as is necessary to carry out the monitoring required" for PWS serving 10,000 or fewer persons. In summary, all non-labor sampling and laboratory analysis costs for small PWS must be paid for by EPA funds. If EPA does not provide such funding, small PWS have no monitoring or reporting obligations under UCMR, including UCMR 5.

Pursuant to the proposed section 141.35(d), EPA will "notif[y]" small PWS if they "have been selected for UCMR monitoring." Such notifications should only be provided if EPA has the necessary funds available to pay for all small PWS non-labor costs to comply with monitoring and reporting obligations under UCMR 5.

4. *Small PWS should have at least 120 days' notice from EPA of its monitoring and reporting obligations under UCMR 5.*

EPA has proposed in section 141.35(d)(2) that a small PWS "must provide [its] inventory information by December 31, 2022" without confirming when EPA plans to notify any small PWS pursuant to section 141.35(d) that they are obligated to comply with UCMR 5 obligations. Advocacy recommends that EPA either (1) clarify it will distribute such notifications to small PWS by a certain date well in advance of the December 31, 2022 deadline, or (2) revise the Section 141.35(d)(2) proposed language to "by the later of December 31, 2022 or 120 days from receiving notice from EPA identified in this section (d)."

5. *EPA needs to define "inventory information" to provide clarification for the regulated community.*

Section 141.35(d)(2) currently requires small PWS to "provide [its] sampling location(s) by December 31, 2017, using EPA's electronic data reporting system, as specified in paragraph (b)(1) of this section." EPA has proposed to modify this section by requiring small PWS to "provide [its] inventory information by December 31, 2022, using EPA's electronic data reporting system, as specified in paragraph (b)(1) of this section." EPA has not defined or clarified what "inventory information" is and has not explained why it has chosen to use the phrase of "inventory information" instead of the phrase of "sampling location(s)" used in previous UCMR rules. If "inventory information" is meant to be the term that means "a list of all sampling location(s)," or if it is meant to be the term for some other concept, EPA should include that information in the rule's definitions.

6. *Small PWS should not be required to ask EPA if they are required to monitor and report unregulated contaminants under UCMR 5.*

EPA has proposed to revise section 141.35(d)(3) to require small PWS to "send a letter to EPA" if the small PWS is "subject to UCMR requirements" and it has "not been contacted by either EPA or [its] State by [120 days after publication of the Federal Register." The proposed rule further states that "regardless of whether you have been contacted by the State or EPA" and you "meet[] the applicability criteria specified in Section 141.40(a)(2)(ii)", the small PWS is "subject to the UCMR monitoring and reporting requirements." The "applicabl[e] criteria" identified in Section 141.40(a)(2)(ii) references the definition of a small PWS as one that "serves a retail population of 3,300 to 10,000 people, or if you serve a population of fewer than 3,300 people."

EPA has also proposed to revise section 141.40(2)(ii)(A) to require all small PWS serving a population between 3,300 and 10,000 to "monitor for the contaminants on List 1 per Table 1", "monitor for the contaminants on List 2 of Table 1", and "monitor for the contaminants on List 3 of Table 1." Comparable to EPA's proposed language in section 141.35(d)(3), EPA has failed to limit the aforementioned monitoring obligations to instances in which EPA has provided or will provide the necessary funds to small PWS to comply with these obligations.

As summarized previously, small PWS are required to adhere to the monitoring and reporting obligations of UCMR 5 only if EPA provides the funds to comply with such obligations. Despite these clear statutory requirements EPA is placing the burden on small PWS to self-identify if they haven't been contacted by either EPA or their state about monitoring and reporting requirements,

and by improperly requiring small PWS to comply with monitoring and reporting requirements under UCMR 5 without an assurance that EPA will provide the required funding.

Advocacy appreciates that small PWS may want to participate in the UCMR program if funds are provided by EPA for the sample collection and analysis, as participation provides important information regarding the chemical composition of small PWS' water supply. However, in the absence of funding from EPA, small PWS have no monitoring or reporting obligations under UCMR 5, and the regulatory language should properly and expressly acknowledge this statutory condition.

Advocacy recommends that section 141.35(d)(3) be deleted in its entirety, so no burden is placed on small PWS to (1) contact EPA if neither EPA nor the State has contacted them, and (2) adhere to monitoring and reporting requirements under UCMR 5 if no statutorily required appropriations have been made to EPA to fund all non-labor costs associated with the monitoring and reporting requirements. In lieu of the proposed section 141.35(d)(3), Advocacy recommends including language that would encourage small PWS to contact EPA if they have any questions regarding the availability of funding to participate in the UCMR 5 program.

Advocacy recommends that EPA revise section 141.40(2)(ii)(A) to clearly state that monitoring is not required for any small PWS if EPA has not received the necessary appropriations to fund all non-labor costs of monitoring and reporting for small PWS. Advocacy also recommends revising the proposed language from "[i]f you own or operate a PWS . . . that serves a retail population of 3,300 to 10,000 people, or if you serve a population of fewer than 3,300 people and you are notified of monitoring requirements . . ." to "[i]f you own or operate a PWS . . . that (1) serves a retail population of 10,000 people or fewer, and (2) you are notified of monitoring requirements . . ."

Conclusion

EPA's proposed rule creates a confusing regulatory framework for small PWS which may be left wondering whether they are obligated to collect and analyze samples without funding from EPA. Advocacy encourages EPA to revise the proposed rule to expressly conform to existing statutory requirements as well as to streamline the necessary sample collection and analysis by eliminating duplicative sampling and analysis requirements already required by EPA and states under other regulations. If you have any questions, please contact me or Assistant Chief Counsel Astrika Adams at Astrika.adams@sba.gov. Thank you for your consideration.

Sincerely,

/s/
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/s/
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Copy to: Sharon Block, Acting Administrator
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