Testimony
Administrative Rules Committee
Tuesday, March 9, 2010; 3:40 p.m.
North Dakota Department of Health

Good afternoon, Chairman Klein and members of the Administrative Rules Committee. My name is L. David Glatt, and I am chief of the Environmental Health Section for the North Dakota Department of Health. I am here today to respond to your request for information relating to the legal authority the U.S. Environmental Protection Agency (EPA) has to require states to comply with or implement federal rules. This is a question that is periodically brought forward by individual states, and I will attempt to answer it by first referencing a response from the U.S. EPA and then highlighting some recent court cases addressing the question.

As requested, we directed the committee's question to the U.S. EPA Region VIII for a response. In short, as it relates to the implementation of the Safe Drinking Water Act (SDWA), the U.S. EPA has referenced the authority provided by Congress pursuant to the authorization of 42 U.S.C. Section 300g-1. I have attached a copy of EPA's response letter for your records and review.

To provide further insight into the federal legal authority to require that states comply with the Safe Drinking Water Act, it is important to note some recent court cases. With the assistance of our attorney, we have highlighted two cases, namely Nebraska v. EPA and a recent decision from the U.S. District Court for the District of Idaho.

In the 2003 Nebraska v. EPA case, the state of Nebraska challenged the constitutionality of the Safe Drinking Water Act. After reviewing the facts of the case, the court held that the SDWA does not exceed Congress's authority under the Commerce Clause to "regulate Commerce … among the several states" and is therefore constitutional. U.S. Const. art. I, 8, cl. 3; See Nebraska v. EPA, 331 F. 3d 995, 998 (D.C. Cir 2003). In reaching this conclusion, the court relied on the fact that "a number of water utilities sell substantial volumes of drinking water across state lines." But the court did "not address whether the intrastate sale of drinking water has a sufficiently substantial impact on interstate commerce to justify federal regulation." Id.

Last year, the U.S. District Court for the District of Idaho addressed the SDWA's constitutionality in relation to a completely intrastate activity. The

court held that Idaho's federally approved underground injection control program is permissible under the Commerce Clause. U.S. v. King, 2009 WL 940600, at *7 (D. Idaho April 6, 2009). The court found that, although the injections at issue all occurred within Idaho, Congress could still regulate the activity under the Commerce Clause because "a rational basis exists to conclude that the regulated activity substantially affects interstate commerce." Id. at *7. In reaching this conclusion, the court noted Congress's "extensive findings on the degradation of drinking water on the interstate economy." Id. at *6. These findings show that "Congress feared that, without legislation, waterborne disease outbreaks would, among other things, inhibit interstate travel and tourism, reduce economic productivity, and spread across state lines." Id. And, in its findings, "Congress noted that underground drinking water supplies and illnesses caused by contaminants do not abide by state lines, and thus degradation would have interstate impacts." Id.

It is important to note that under the SDWA, EPA must grant a state primary enforcement authority if the state meets certain requirements. See 42 U.S.C. § 300g-2. One of these requirements is that the state adopts "drinking water regulations that are no less stringent than the national primary drinking water regulations" adopted by EPA. 42 U.S.C. § 300g-2(a)(1). EPA may take away a state's primary enforcement authority if it determines that the requirements are no longer met. 42 U.S.C. § 300g-2(b). The Supreme Court has held that this type of state/federal partnership is permissible. See New York v. U.S., 505 U.S. 144, 167 (1992) ("where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation"). In North Dakota, as with the majority of other states, the state legislature has determined it to be in the best interest of the state to implement the SDWA at the state level rather than have it directly implemented by the federal government. This is the case for most of the federally mandated environmental protection programs in the state.

This concludes my testimony. I am happy to answer any questions you may have.

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RE: Congressional Authorization to
The Environmental Protection Agency

Dear Mr. Thelen:

Thank you for your letter relaying North Dakota Representative Jim Kasper's request. The request, as characterized in your letter, is for the Environmental Protection Agency (EPA) to explain what authority it has to mandate new drinking water rules. Congress authorized and directed EPA to promulgate drinking water regulations in the Safe Drinking Water Act (Act) 42 U.S.C. Section 300g-1. The Act requires that EPA, review and revise the drinking water regulations at least every six years, 42 U.S.C. Section 300g-1(b)(9).

Please feel free to contact me if you have any further questions.

Sincerely,

Jack A. Rychecky, Chief
Drinking Water Unit A