

## **Arsenic Exemption *Extensions* Before the State Environmental Commission (SEC)**

November 12, 2008

**Background:** An exemption is an administrative tool allowed under the federal Safe Drinking Water Act and Nevada law. Exemptions can be used to grant water systems additional time to acquire financial and technical assistance to meet drinking water standards. The Nevada Division of Environmental Protection (NDEP), Bureau of Safe Drinking Water (BSDW) has worked with the State Environmental Commission (SEC) to exercise the exemption regulations for the revised arsenic standard, also known as the Arsenic Rule.

The revised arsenic standard of 10 parts per billion (ppb) was enacted on January 22, 2001 and became enforceable on January 23, 2006. The old standard of 50 ppb had been in place for more than 60 years. In 2006 and 2007 the SEC granted exemptions to 64 water systems; which provided them three additional years, until January 23, 2009, to comply with the new arsenic standard. Of those 64 water systems, 13 water systems have since become compliant and 51 water systems continue to work toward compliance.

Water systems that have not yet achieved compliance *may* receive an extension of time to an original exemption. To assist in this determination, the NDEP carefully considered relevant regulations and guidance documents to establish screening criteria. Water systems that do not meet these criteria are not considered by the NDEP to be eligible for an extension. The Agency's recommendations to the SEC reflect the following:

- ◆ The first of the criteria is found in Nevada Administrative Code (NAC) 445A.490.5. A water system may qualify for up to three additional two-year extensions if it serves a population of less than 3,300.
- ◆ NAC 445A.490.5 also includes the second criteria by stating, "...an exemption ... may be renewed ... if the public water system establishes that it is taking all practicable steps to meet the requirements of [regulatory criteria used for the original exemption]". The NDEP has worked with each exempted public water system to gauge their progress in taking "all practicable steps" and has used this information in its recommendations for exemption extensions to the SEC.
- ◆ The third criteria is that systems recommended for extensions must have an arsenic concentration less than, or equal to, 30 ppb. Additional discussion on the basis for this concentration criterion is included below.
- ◆ A final criterion is based in Nevada Revised Statute (NRS) 445A.935 which requires that a supplier of water notify all users of the water system of the time and place for the hearing on their proposed exemption from the drinking water regulations. This step was a clear requirement for all 64 systems who received original exemptions in 2006 and 2007. The NDEP believes that the intent of this Statute is to provide appropriate public notice to water

system customers of the quality of their water supply and other circumstances surrounding their water system’s regulatory compliance status. It also provided notice to the consumers of the open hearing for public input. Likewise, the NDEP again required public notice be sent for this hearing in which the SEC is contemplating extending these exemptions for an additional two years.

The concentration-based extension criterion is based in public health protection. While the intent of granting exemptions is to address the needs of economically challenged systems by providing additional time to achieve compliance, the granting of exemptions does require a determination that the exemption “will not result in an unreasonable risk to health” (NAC 445A.489). To aid in this determination relative to extensions, the NDEP utilized the *U.S. EPA Implementation Guidance for the Arsenic Rule, Appendix G, “Exemptions & the Arsenic Rule”* (August, 2002).

This Guidance documents an approach that helps to determine what does *not* constitute an unreasonable risk to health, rather than what does. The approach bases the total length of an exemption on the exposure concentration of arsenic delivered to the consumer. Table 1 depicts various concentrations of arsenic in drinking water and recommendations for the total time to comply with the revised standard. These recommendations are based on a formula derived by the US EPA and consider the total time of exposure to an arsenic concentration in excess of the revised standard.

**Table 1: Exemption & Extension Eligibility Recommendations** <sup>(1)</sup>

System Population Served	Total Time to Comply After Rule Revision- Jan 22, 2001	Exemption Periods Available	Recommended arsenic concentration criteria for granting an exemption or an extension			
			>30 ppb ≤50 ppb <sup>(2)</sup>	>25 ppb ≤30 ppb	>20 ppb ≤25 ppb	>10 ppb ≤20 ppb
>3,300 persons	8 years	3 year Exemption (to Jan 23, 2009)	Granted	Granted	Granted	Granted
<3,300 persons	8 years	3 year Exemption (to Jan 23, 2009)	Granted	Granted	Granted	Granted
	<b>10 years</b>	<b>1<sup>st</sup> Extension (to Jan 23, 2011)</b>	<b>Not Elig.</b>	<b>Eligible</b>	<b>Eligible</b>	<b>Eligible</b>
	12 years	2 <sup>nd</sup> Extension (to Jan 23, 2013)	Not Elig.	Not Elig.	Eligible	Eligible
	14 years	3 <sup>rd</sup> Extension (to Jan 23, 2015)	Not Elig.	Not Elig.	Not Elig.	Eligible

(1) Adapted from U.S. EPA Implementation Guidance for the Arsenic Rule, Appendix G-15, August 2002

(2) U.S. EPA’s recommendation was 35 ppb, Nevada chose the old standard of 50 ppb.

The timeframes and recommendations in Table 1 reveal an intent to address the systems with the highest exposure concentrations, and highest increased risk to health, first. Likewise, the NDEP selected the concentration threshold of 30 ppb as the next qualifying tier and recommends the SEC consider this stair-stepped approach as a factor in deciding to grant exemption extensions.

**NDEP Recommendations:** The NDEP recommends 32 water systems be granted extensions based on the technical criteria. However, as of October 28, 2008, 15 systems had not yet provided proof of public notice and are listed separately on the status summary page. The list of

facilities in each category (in compliance, recommended, and not recommended) is attached and was published on the SEC webpage for the November 12, 2008 hearing at <http://sec.nv.gov/>.

Extensions granted by the SEC will include an updated list of milestones that the systems will need to achieve during the extension period. A draft of the agreement has been provided to each system that the NDEP is recommending for an extension. This draft document is also attached and was published on the SEC webpage for the November 12, 2008 hearing at <http://sec.nv.gov/>. It should be noted that some systems, with the lowest arsenic concentrations, may be granted up to two additional two-year extensions, allowing some systems until January 23, 2015 to comply as shown in Table 1.

According to State and Federal laws and regulations, systems that are currently operating under an Arsenic Rule compliance exemption until January 23, 2009, that do not receive an extension and are not in compliance on that date will be in violation of such regulations on January 24, 2009. The NDEP must then pursue a Finding of Violation (FOV) and Administrative Order (AO) or Administrative Order on Consent (AOC) for each facility in violation of the arsenic standard. Each FOV and AO/AOC will be issued by the NDEP on January 26<sup>th</sup>, 2009. The attached summary status list includes 19 systems that are not considered eligible for extensions based on population or concentration. The NDEP believes that approximately 5 additional systems may achieve compliance by the deadline and therefore, approximately it is expected that 14 systems will receive an FOV and AO/AOC.