



# MPUA

## Missouri Public Utility Alliance

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WATER PROTECTION P...

October 26, 2011

Mr. John Madras, Director  
Water Protection Program  
Missouri Department of Natural Resources  
PO Box 176  
Jefferson City, MO 65102

Dear Mr. Madras:

Thank you for your willingness to review these observations regarding the implementation of provisions within HB89. For the record, we understand that the Interim Procedures were created solely to allow the Department to issue permits in a timely manner on a temporary basis during a period of transition. We acknowledge that the Department has not officially established a final policy approach to this issue.

However, the history of interim procedures demonstrates that often the administrative processes begun during the interim period become a powerful leverage point when establishing final procedures. In other words, the interim process essentially becomes the final process with some minimal modifications.

We also take the Department at its word that the Memo is a living document subject to further review and modification. It is in that attitude of encouraging further review and modification that we offer the following comments and observation.

We have reviewed several of the Department's findings of affordability beginning with that for Essex (Permit MO-0089273) and ending with that for Bismarck (MO-0022942). While they are different, we do find trends of concern.

The foundation of our concern is rooted in the significant penalty contained in this section of the law: a permit issued without a proper finding of affordability is null and void. There appears to be no specific legal guidance on who may and who may not file suit to challenge the sufficiency of the Department's finding. Because of that, we assume that it must be an aggrieved party. Given the nature of litigation in society, finding someone who claims they are having financial problems paying a higher sewer bill may not be that difficult. It would then be up to a judge to determine whether the construction permit a city relied on to build a new wastewater treatment plant is valid. There is a potential that a city may in good faith construct a multi-million dollar facility they cannot legally use, but for which they have to make 20 or more years of payments. Getting this process correct and legally defensible is a significant issue for our members.

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We are also concerned that the Department is building a precedent of Affordability Findings that may not meet the statutory definition of affordability. When a revised process is implemented, it may be difficult to reverse the administrative momentum toward these findings.

At the outset of our memo, we would like to applaud one provision in the MEMO that we believe is very positive. The MEMO mentions plans to notify permit holders of significant new or upcoming requirements and the potential level of effluent limitations prior to expiration of the current permit. We believe this prior notice will provide cities with an invaluable planning tool.

**1. The process of determining affordability needs to give weight to the impact on individual rate payers.**

The current procedure appears to be focused primarily on what the law defines as “financial capability” or the ability of the local government to pay the loan payments necessary for the project. It essentially ignores affordability as defined as the impact of any required rate increase on **individual** rate payers:

**RSMo 644.145.2(1) "Affordability", with respect to payment of a utility bill, a measure of whether an individual customer or household can pay the bill without undue hardship or unreasonable sacrifice in the essential lifestyle or spending patterns of the individual or household, taking into consideration the criteria described in subsection 3 of this section;**

An analysis in compliance with this definition needs to evaluate the ability of the general population of the city to modify their budgets and their lifestyle in order to pay the increases necessitated by the required project. It would be impractical to make an evaluation of every person in the community, but some evaluation needs to be conducted of some quantifiable portion of the population. For sake of discussion, we would propose that analysis focus on the lowest quartile, although another segment could be substituted.

However within that selected segment, there needs to be some documented effort to determine the quantifiable financial condition of those individuals and determine what changes they might have to make in their lives as the result of increases in the sewer rates required to allow the city to meet increased repayment schedules for new wastewater treatment and delivery improvements.

Some areas of review should include evaluation of:

- Percentage of the lowest quartile families living at or below the poverty level?
- Percentage of households with a median household income (MHI) at or below the state's median household income?
- Unemployment rate for the community?
- Percentage of students participating in the reduced price or free lunch program?
- Percentage of households receiving federal or state assistance?
- Percentage of households at or below the federal poverty threshold?
- Population trends (decline or increase) in the past 10 years, in the past 4 years?
- Changes in Median population age over the past census period?

It should be noted that each of these datasets are, or will shortly be, readily available through government agencies to the general public as well as the Department. However nowhere in the current findings of affordability is any of this information referenced.

And all of these also need to be evaluated to consider changes over a 10 or 15 year period. In other words, is the community as whole improving financially or in decline? The financial impact of a rate increase on individuals in a community in decline is expected to be much greater than a community where financial strength is growing.

As one example of concerns over an analysis, the affordability finding for the City of Bismarck claims that the proposed replacement of the wastewater system is “affordable” even though the necessary \$51.00 per month rate will necessitate almost a tripling of the previous monthly rate, that the rate will be 2.2% of MHI in a community where the MHI is only 5.6% larger than the Federal Poverty threshold for a family of four including two children under the age of 18. On an annual basis the increase in the wastewater rate represents 26.7% of the difference between the MHI and the poverty threshold.

Despite consuming over a quarter of the poverty buffer for half the families in Bismarck and consuming more than 2% of the MHI, the Department determined the project was affordable.

**2. The affordability analysis must be a reasoned defensible decision on the part of the Department, rather than a default finding if countervailing data is not provided.**

HB89 requires the agency to make a deliberative decision about the affordability of projects. It appears that the Department has constructed a process that becomes a presumptive process, e.g., all submitted projects are affordable, unless some party other than DNR submits data to the contrary.

In support of this concern, we offer the following excerpts from the Memo

Page three: “The Department’s affordability finding may rely on such conclusions [that a municipal government can make loan payments], unless information to the contrary is provided during the permitting process.”

Page three: “The Department will generally deem a permit affordable when it is a permit for an action that is taken at the discretion of the system”. NOTE: It is interesting that only a community objection is accorded weight in contesting the conclusion and not an individual.

Page three: “The Department will consider readily available information related to a community’s financial capability to complete an upgrade, as well as affordability for individual customers. This will consist of median household income, any ongoing projects of which the Department has knowledge, and other information the community may provide as contemplated by section 644.145.3”

Finding of Affordability Form – Page 1:

“The search [for empirical financial data] consisted of a review of department records that might contain economic data on the community, a review of information provided by the applicant as part of the application, and public comments received in response to public notices of this permit...”

Finding of Affordability Form – basis for decisions

- 1) The applicant states that the terms and conditions are available for the community;
- 4) The department is not aware of any significant economic impacts this permit would cause on distressed populations;
- 5) No comments indicating such impact were received during the public comment period on the draft permit;
- 7) The Facility Plan on the construction permit contained an affordability finding;

In each of these cases, the Department abrogates its responsibility to make the determination based on readily available data to some other person, or to the municipality. As one example, the MEMO cites RSMo 644.145.3 as requiring the city to provide certain information. A close reading shows the responsibility belongs to the Department:

**3. The department of natural resources shall adopt procedures by which it will determine whether a permit or decision is affordable. Such determination shall be based upon reasonably available empirical data and shall include an assessment of the affordability of the permit or decision to any private or public person or entity affected by such permit. The determination shall be based upon the following criteria: *[emphasis added]***

Additionally, the MEMO says that it will only consider Departmental records of financial data for a given community. This review of information covers a much smaller universe than what appears to have been contemplated in the law. This ignores the virtual realms of verified data available from state sources such as the Department of Labor and Industrial Relations, the Department of Economic Development as well as data from the Bureau of the Census and the US Department of Labor.

Perhaps the most egregious part of the MEMO is the following statement contained on the form for a finding of affordability underneath what appears to be Reason 11) Others which states:

“Note: The City or Municipality has low utility rates as compared to other communities with similar types of facilities; therefore, the department considers this permit affordable based on this information.

In other words if the City of Hayti and the City of Webster Groves had a similar treatment system and Hayti’s sewer rates were lower than Webster Groves, the Department has already decided that Hayti can afford to spend more on sewage treatment solely because of that. They conveniently ignore the fact that Hayti’s median household income is one fifth that of Webster Groves (\$13,996 vs \$72,391).

And this has already happened. The draft permit for the city of Birch Tree (MO-0050598), a town with an MHI of \$18,570 (2009 data) and current rates of 1.56% of MHI are being told that they must spend hundreds of thousands, if not millions of dollars to achieve new ammonia

limits and that it is affordable, because Birch Tree would have similar utility rates as compared to other communities with similar types of facilities.

Again, the law requires DNR to take affirmative steps to conduct an analysis to determine whether individuals AND the local municipality can afford the new system without undue hardship or unreasonable sacrifice.

3. **The analysis for a determination of affordability must include a review of readily available data beyond what is provided by the applicant.**

See comments in paragraphs above.

The MEMO makes it clear that the Department will not consider data from sources outside DNR documents. That was clearly not the direction provided by the change in law that required the Department to use “reasonably available empirical data”. That threshold is not the same as readily available data” which is the threshold used in the MEMO (see page 3 referenced above).

One might argue that within the meaning of the Missouri Open Meetings and Records Law, that once data is downloaded from sources such as the Missouri Department of Labor and Industrial Relations, the Missouri Department of Health, the Missouri Department of Economic Development, the US Department of Labor and the Bureau of the Census, to name a few, the data would become a DNR document. That is not the sense that one receives from reading this MEMO.

Repeatedly the Department makes it clear that they expect the applicants to deliver all the data necessary for consideration. Further the Department specifically relies on findings of affordability contained in other administrative processes, although there is no evidence that the process in these cases would comply with those outlined in this law.

Additionally the Department needs to do a more thorough job of seeking relevant data. In the case of Essex, the permit writer used MHI data that is 11 years old. Much has changed in the last 11 years, including a recession and the MHI in Essex which appears from 2009 data to have dropped by 25%. The data for 2009 MHI is readily available.

4. **The analysis process should reduce reliance on the 2% MHI Guideline to determine affordability**

RSMO 644.145.4 provides:

**4. Prescriptive formulas and measures used in determining financial capability, affordability, and thresholds for expenditure, such as median household income, should not be considered to be the only indicator of a community's ability to implement control technology and shall be viewed in the context of other economic conditions rather than as a threshold to be achieved.**

However in each finding of Affordability, the 2% MHI computation or reference is the ONLY empirical analysis on the record. And in fact in the case of Bismarck, the permit writer acknowledges that the proposed project will increase individual costs over 2% of

MHI. The facts on the face of this permit appear to be in violation of this section of the law. The permit writer's justification for proceeding with the project is that the only way to afford it is to go over that amount although it will require sewer rates to increase four-fold.

There are other measures of individual financial stability such as rates of default on home loans, percentage of the population living beneath either the federal poverty level or the federal poverty threshold, unemployment rates, percentage of federal and state support as a percentage of total community income, etc. None of those are referenced or apparently even considered.

**5. The process in the MEMO and in all subsequent Findings of Affordability are silent on an environmental cost/benefit analysis for the improvement.**

RSMo 644.145.3 requires that one of the criteria used in a find of affordability is:

**(3) An evaluation of the overall costs and environmental benefits of the control technologies;**

Presumably some cost/benefit evaluation was done as part of the Regulatory Impact Report (RIR) at the time that the rule used by the Department to require this modification of the local wastewater treatment system was adopted. However in the finding of affordability, specific costs are known for construction as well as future operation, and similar RIR methodology presumably can be used to project financial benefits for the ecology of the receiving stream and all downstream waters.

Failure to document this step can leave the Department's conclusions open to future challenges from sources outside the Department and outside the control of the permittee.

**6. The affordability record of decision needs to include a scenario in which there is no impact because no rates will be increased to meet the new requirements or obligations**

We believe the reasons offered on the form for a Finding of Affordability fails to recognize what we hope can become a more often used reason: The permittee has sufficient resources to pay for the improvement without changing rates.

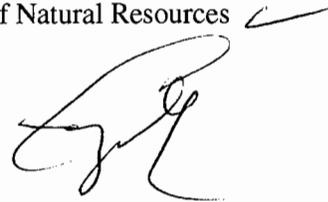
We are aware of at least one municipal construction permit that has been "on hold" while being evaluated for affordability despite the fact that the city already has all of the money for the project in the bank. In all probability one or more of the 11 noted reasons could be extended to include this situation.

Again, we offer all these observations in the spirit of beginning or continuing the dialogue on the requirements outlined in HB89 within RSMO 644.145. We are anxious to participate in this conversation and ask that you provide interested stakeholders with additional formal opportunities to participate in that process. Thank you for your consideration.

Sincere regards,

H. Floyd Gilzow  
Director of Member Relations and Public Affairs  
Missouri Public Utility Alliance

Cc: Alan Reinkemeyer, Acting Director, Division of Environmental Quality  
Leanne Tippett-Moseby, Deputy Director – Administration, Missouri Department of Natural  
Resources  
Dru Buntin, Deputy Director – Policy, Missouri Department of Natural Resources ✓

A handwritten signature in black ink, appearing to read 'H. Gilzow', with a checkmark to its right.