



EPA Announces Plan to Set New Drinking Water Standards - Water Agencies and Parties to Superfund Cleanups Beware

02.18.2011 | By **Reed W. Neuman**

On February 2, 2011, the Environmental Protection Agency ("EPA") announced plans to set drinking water standards under the Safe Drinking Water Act ("SDWA") for 16 volatile organic compounds ("VOCs"), perchlorate and other substances. This new initiative could have far-reaching impacts for the 170,000 water systems that provide drinking water to the public. EPA's new standards could also become the target level for cleanup of contaminated surface and ground water resources and real estate.

In addition to perchlorate, which is used to produce rocket fuel, fireworks and explosives, EPA's list reaches a broad spectrum of chemicals used in a variety of industrial and commercial settings. The VOCs listed in the rulemaking are among the most frequently detected constituents in terrestrial and aquatic environments, including benzene, 1,2-dichloroethane, 1,2-dichloropropane, dichloromethane, tetrachloroethylene (also known as perchloroethylene ("PCE" or "PERC")) trichloroethylene ("TCE"), vinyl chloride, and benzyl chloride.

How EPA Sets Drinking Water Standards

The SDWA authorizes EPA to set health-based standards for drinking water, in a three-part process. First, EPA identifies contaminants that are or may be in drinking water that may affect public health -- the step EPA took on February 2 for a group of sixteen (16) VOCs and perchlorate. EPA already has in place federal drinking water standards for TCE and PCE but plans to revise those standards in this rulemaking.

Next, EPA sets a maximum contaminant level goal ("MCLG"), the concentration of a contaminant in drinking water below which there is no known or expected risk to health. Finally, EPA specifies the maximum contaminant level ("MCL"), the permissible concentration of a contaminant in drinking water delivered by a

public water system. The MCL is set as close to the MCLG as is "feasible." The SDWA defines "feasible" as the level achievable using the best available technology and treatment techniques, taking cost into consideration. If setting an MCL is not technically or economically feasible, or if there is no reliable method to detect contaminants, EPA will specify a required treatment technique.

Potential Impacts of New Drinking Water Standards

EPA's track record suggests the entire process will take about four years. Once finalized, the MCL becomes a legal standard, to be met by all drinking water suppliers. The costs of acquiring or upgrading equipment and techniques necessary to treat water to achieve the new standards can be very high. In addition, while it has garnered a very high public profile as a "bad actor" chemical in water resources, perchlorate presently is found in only a small percentage of surface and ground water resources around the country, and in only 4% of water supply systems. Thus, the relative cost of a national, generally-applicable "cure" for a fairly limited problem may be quite high.

Moreover, the impact of EPA's action extends far beyond public water companies. EPA's new drinking water standards can become the required cleanup standard at impacted sites being addressed under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," commonly known as "Superfund"). CERCLA requires that cleanup actions attain or waive Federal applicable or relevant and appropriate requirements ("ARARs"). Since groundwater contamination sites account for about 70% of all Superfund sites, the new rulemaking could have major implications.

"ARAR" has two different parts: "applicable" and "relevant and appropriate." Legally, an MCLG is never "applicable" because it is not enforceable. An MCL, however, is an enforceable, applicable ARAR under EPA standards if water at the CERCLA site is delivered through public water systems with at least 15 service connections or that serve at least 25 year round residents.

However, both an MCL and an MCLG may be "relevant and appropriate." That decision is a site specific determination when the groundwater is, or may be, a source of drinking water. But recall that MCLGs can be a much stricter standard than MCLs. EPA's regulations require that MCLGs set at levels above zero must be attained at any Superfund site where the MCLG is a "relevant and appropriate" standard. If the MCLG is zero, the MCL becomes the potentially "relevant and appropriate" standard. Where groundwater at the Superfund site is, or can reasonably be expected to be, a source of drinking water, the SDWA standard will almost always be found to be "relevant and appropriate."

CERCLA provides that an ARAR can be waived in limited circumstances, including that compliance will increase risks to human health, compliance is technically impracticable, or the selected cleanup action will attain an equivalent performance standard. Otherwise, the ARAR applies. Thus, any new SDWA drinking water standards that emerge from this rulemaking likely will trigger a determination of whether the presence of those chemicals requires that the new standard becomes the new cleanup requirement. Given that over 70% of Superfund sites have impacted ground water, the new standards could materially change the scope, stringency and cost of Superfund cleanups.

As for perchlorate, were EPA to follow the lead of the two states (California and Massachusetts) that already have adopted drinking water standards for perchlorate below 10 ppm, the "risk" to be addressed at Superfund sites could increase dramatically. In addition, new standards for perchlorate or the VOCs could bring onto the Superfund radar additional sites that, because of the new standards, would now warrant

attention. Indeed, new standards could also trigger reevaluation of the risks addressed, and the adequacy of cleanup measures, at a host of closed sites. This "reopener" risk could affect both public and private cleanup decisions and agreements.

New drinking water limits also could be employed to support toxic tort and similar claims for personal injury and/or property damage. Likewise, adoption of new standards could complicate or hamper land transfers and site redevelopment efforts, as sites currently seen as moderately contaminated "brownfields" sites could move into higher risk categories.

EPA's February 2 action sets EPA on a pathway that could impose new responsibilities, costs, and liabilities on public water systems. It also could materially increase the scope and cost of site remediation across the country.

A partner with Nossaman, George Mannina, Jr. has more than three decades of experience with environmental litigation and government relations. He can be reached at 202.887.1491 or gmannina@nossaman.com.

Reed Neuman is an environmental litigator with over three decades of experience representing major manufacturers and other private interests throughout the U.S. on environmental compliance and responsibility disputes in administrative and trial courts. He can be reached at 202.887.1480 or rneuman@nossaman.com.