



Campaign for Safe and Affordable Drinking Water

August 2, 2002

Mr. Tracy Mehan, Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Constitution Ave., NW
Washington, D.C. 20460

Cc: W-01-03 Comments Clerk
Water Docket (MC-4101)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Concerns Regarding the Announcement of Preliminary Regulatory Determinations for Priority Contaminants on the Drinking Water Contaminant Candidate List.

We write to express our profound concerns about EPA's June 3, 2002 announcement in the Federal Register that after over six years and millions of dollars in public investment into EPA and other government studies of the toxicity and occurrence of unregulated drinking water contaminants, the agency still lacks sufficient information to warrant the regulation of *a single contaminant in drinking water* that is not already regulated.

We strongly believe that EPA's decision not to follow through with the initiation of regulatory action for any of the 60 contaminants that were part of the original Contaminant Candidate List (CCL) published in March of 1998 is unjustified by the science or the law. Most urgently, we believe that EPA has dangerously misconstrued the Safe Drinking Water Act (SDWA) and has failed to appropriately apply the CCL provision by refusing to make determinations that regulations are warranted for several specific contaminants for which EPA has: (1) peer-reviewed scientific information indicating that they are toxic at levels known to be present in drinking water; (2) occurrence data showing that they occur in many public water systems affecting tens of thousands or millions of Americans, and (3) therefore, clear information indicating that these contaminants present meaningful opportunities for health risk reduction.

For example, EPA has ample data for perchlorate to warrant immediate regulation. EPA is well aware of data showing that perchlorate contaminates the drinking water of over 15 million people at levels above EPA's draft Drinking Water Equivalent Level (DWEL) of 1 ppb in California and Massachusetts alone, and that it has been found in source water for major U.S. cities outside of these states. EPA also has data showing that there have been confirmed perchlorate releases in at least 20 states throughout the United States. (See EPA, Perchlorate available online at <http://www.epa.gov/safewater/ccl/perchlor/perchlo.html>). Similarly, EPA has sufficient toxicity and occurrence data to warrant immediate control for other contaminants discussed below, yet the agency has failed to carry out its statutory and ethical obligation to protect the nation's health by initiating regulatory action for these contaminants.

Specific Areas of Concern:

Development of CCL 1 and Regulatory Determinations:

- We call into question how EPA interprets and applies the statutory criteria for developing the list of contaminants. Several emerging contaminants, including perchlorate, MTBE, triazines and their metabolites, and metolachlor are commonly found in drinking water, and pose significant health risks, yet EPA makes no regulatory determination for them.

Protocol for Making Regulatory Determination for CCL 1:

- After researching all of the 60 contaminants from the original Contaminant Candidate List, the Agency concluded that only 9 were to be placed on a priority list and reviewed for further regulatory determination. Of those nine contaminants, EPA has now announced that it did not feel it was appropriate to move forward with regulating *any* of them.
- We do not accept EPA's conclusion that all unregulated contaminants posed an insufficient risk to proceed with the regulatory process. It is clearly incorrect for EPA to conclude that NONE of the nine priority contaminants, NONE the other 51 chemicals from the initial CCL, and particularly that NONE of the emerging, widespread contaminants like perchlorate; (i) may have adverse effects on the health of persons; (ii) are known to occur or there is substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and (iii) that regulation of such contaminant presents a meaningful opportunity to for health risk reduction for persons served by public water systems.
- We are concerned that EPA has essentially amended by administrative fiat the statutory occurrence criterion, by requiring that the agency must have national occurrence monitoring data showing actual levels of the contaminant in large numbers of public water systems across the nation, to trigger regulatory action. The statute is far broader than EPA asserts, requiring only that the contaminant is known to occur or there is substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern. The Agency apparently reads this provision to require that EPA must collect nationwide data through the Unregulated Contaminant Monitoring Regulation (UCMR) and collect that data in its National Contaminant Occurrence Database (NCOD) before finding that it is worthy of regulation. The statute charges the Administrator only with identifying if a contaminant is known to occur OR is likely to occur in public water supplies. Finalized UCMR or NCOD data from all states is not needed for the Agency to establish actual or potential occurrence in public water supplies. EPA has done nothing less than read out of the statute the provision charging EPA with regulating where there is a *substantial likelihood* that the contaminant will occur at levels of concern and *may have* adverse health effects.
- This unduly narrow interpretation of the SDWA is particularly a problem as applied to perchlorate. EPA is fully aware of data from California, Massachusetts, and many other states indicating that over 7 million people drink perchlorate at a level above EPA's draft DWEL of 1 ppb. (See e.g. California Department of Health Services, California's Experience with Perchlorate in Drinking Water, available online at <http://www.dhs.cahwnet.gov/ps/ddwem/chemicals/perchl/perchlindex.htm>; Bourne (Massachusetts) Closes Third Well, available online at <http://www.capecodonline.com/cctimes/archives/2002/apr/4/bourne closes4.htm>). Moreover, according to press accounts, perchlorate occurs in Las Vegas and much of Southern Nevada's drinking water at levels that have reached as high as 20 to 40 times EPA's HRL. See, e.g. Keith Rogers, Perchlorate Level Hits Record High, Las Vegas Review (December 1, 2000); see also, Kevin Dennehy, Political, Environmental Hurdles Delay Setting of Chemical Standards, Cape Cod Times (June 23, 2002) (In Lake Mead, Nevada, the source of drinking water for Las Vegas and Phoenix, the chemical already has been found at levels [above EPA's DWEL]. Even in the Colorado River, which provides water for much of Southern California, the chemical has been found at 8 parts per billion.) available online at <http://www.capecodonline.com/cctimes/archives/2002/jun/23/politicalenvironmental23.htm>; see also <http://www.serdp.org/research/CU/CU-1222.pdf> (noting that perchlorate levels are well documented in Lake Mead and lower Colorado system).
- Thus, EPA is fully aware of data indicating that millions of Americans drink perchlorate at a level above EPA's draft DWEL of 1 ppb. EPA also admits that perchlorate is known to have been released in at least 20 states. (See EPA, Perchlorate available online at <http://www.epa.gov/safewater/ccl/perchlor/perchlo.html>). Yet the agency insists that it needs nationwide UCMR data in the NCOD before it will take any action. This is an unlawful and unwise approach to making regulatory determinations that undermines public health.
- We also are concerned that EPA has determined that it will not regulate any of the nine priority contaminants, including several that are found at levels of health concern in tens of thousands and in some cases millions of Americans tap water. For example, we are deeply troubled by EPA's decision on hexachlorobutadiene (HCBD). EPA found based on second round sampling by water systems that serve about one-fourth of the U.S.

population, that 1.6 *million* people's tap water contained HCBD at a level just below the EPA's Health Reference Level (HRL), which was set to protect against kidney damage (these systems contained HCBD at a level between half the HRL and the HRL). Moreover, over 22,000 people's tap water contained a level known to be above the HRL in this sampling. A national survey undoubtedly would multiply the number of Americans known to drink this toxin at unsafe levels by several fold. In addition, if EPA were only slightly high in its estimate of a safe level for the HRL, as is quite possible in light of major toxicity data gaps, the number of people drinking water with HCBD above safe levels would be in the many millions. By deciding not to regulate, EPA has effectively ended the quest to further evaluate and control the problem of hexachlorobutadiene in drinking water.

- Similarly, manganese, sodium, and sulfate were all found at levels of health concern in what EPA show is likely to be millions of Americans drinking water. In each case, EPA has excuses for not regulating. For manganese, EPA says it has low toxicity so rules are unwarranted, yet EPA finds that nearly 3% of the population millions of people exceeded EPA's HRL. For sodium, EPA admits that millions of Americans have too much sodium in their tap water (i.e. levels above the HRL), yet the agency says no regulation is warranted because food sources of sodium are a more significant problem. Under this argument, EPA would never regulate many tap water contaminants of significant public health concern, including lead and radon, because some other (often more difficult to control) source is larger. For sulfate, EPA data show that hundreds of thousands or more likely millions of Americans have too much sulfate in their water (above the HRL), and that infants and other sub-populations are at risk. Yet EPA decides that temporary diarrhea and other symptoms are insufficient to warrant regulation.

CCL 1 Approach to Making Regulatory Determinations:

As discussed below, it is simply incorrect to assert that all contaminants included in the CCL did not warrant any regulatory action by the Agency. EPA has adequate toxicity and occurrence information on many contaminants to warrant the agency's determination to move forward with National Primary Drinking Water Regulations.

- The examples cited above show that EPA has set an unlawful and public health unfriendly set of hurdles in front of any potential new drinking water regulation. EPA seems to have found an excuse to do nothing about any contaminant, despite over six years of study and in some cases decades of study. Congress could not have intended that EPA shut the regulatory program down in this manner.
- The agency seeks to soften the blow from its decision refusing to move forward with any new standards for contaminants for which it makes no regulatory determination by asserting that it may later make off cycle regulatory determinations. However, EPA's performance to date in making regulatory determinations not to regulate contaminants found in hundreds of thousands or millions of people's tap water at levels of health concern provides little or no evidence that the agency truly is willing or able to make such off-cycle determinations. Our concern about how seriously and aggressively EPA intends to pursue off-cycle determinations for additional contaminants was reinforced when EPA representatives stated during the Stakeholder Meeting on July 16th that EPA is unable to request early reporting of UCMR data from utilities. Since the Agency is relying so heavily on occurrence data, how then does EPA plan to make timely determinations without it? We feel strongly that if EPA insists on collecting more nationwide occurrence data for contaminants for which it has made no determination (a decision that we feel is unjustified under the law), then at a minimum EPA must issue a clear ironclad commitment and timetable for collecting the data and making off-cycle regulatory determinations for emerging contaminants, including perchlorate, and that this will require EPA to be far more proactive in obtaining occurrence data from utilities.
- In addition, we are profoundly troubled by EPA's repeated references to the role of costs in making regulatory determinations. There is nothing in the statute that directs or authorizes EPA to decide, at the stage of determining whether to move forward with regulations, that a widespread contaminant of public health concern will not be regulated because of EPA's vaguely-defined or even veiled concerns about costs. The SDWA provides that EPA is authorized to consider only whether the contaminant may have adverse health effects, is substantially likely to occur at levels of health concern, and presents a meaningful opportunity for health risk reduction. If the contaminant may adversely affect health, is likely to be in significant numbers of people's tap water, and is

feasible to remove from drinking water, it meets the test. While the agency certainly is free to consider costs of treatment at a later point in which it is determining feasibility of an actual standard, the agency is not free to decide simply to ignore obvious health threats because it will cost money to address them. This is a dangerous and risky precedent for the agency to set, and has no basis in the statute.

Approach to Future CCLs:

- It was stated in the July 16th Stakeholder meeting on this topic that contaminants on the current CCL do not automatically make it to the next CCL. We believe that leaving contaminants off of future CCLs reflects a determination by the Agency to not regulate these contaminants, and that under the SDWA, EPA is authorized to make such a determination only through the statutory process of making a determination not to regulate. Otherwise, EPA could inappropriately seek to avoid the carefully negotiated statutory provision in SDWA 1412(b)(1)(B)(ii)(IV), which specifically states that a determination not to regulate a contaminant shall be considered final agency action and subject to judicial review, simply by failing to include a contaminant from a previous CCL on future CCLs. All contaminants that were included in the previous CCL where no regulatory action was pursued and no regulatory determination was made must be included in the next CCL.
- Though we have some concerns about the Agency's ability to complete a CCL using the National Research Council's (NRC) proposed model we look forward to having these concerns addressed through the National Drinking Water Advisory Council's Working Group. However the approach recommended by the NRC in no way addresses the inadequacies of the regulatory determination process that is being employed by the EPA. The Agency needs to find a better way to make these determinations and move away from sinking resources into developing a list and then doing nothing to regulate these contaminants that are potential hazards to the safety of our drinking water.

We appreciate the opportunity to provide comment to the Agency on this issue. We recognize the tremendous time and effort that was put into this process by all parties. However, the lack of proposed action being taken to protect public health begs the question of the adequacy of the process. If you would like to further discuss the concerns set forth in these comments please feel free to contact Erik Olson with the Natural Resources Defense Council at 202-289-2360.

Sincerely,

Erik Olson
Natural Resources Defense Council

Nancy Raeder, Chair
Experience Appalachia!

Phyllis Rowe
Arizona Consumers Council

Nancy Hirschfeld
Informed Choices

Roberta Chase
Citizens' Environmental Coalition

Nancy Raeder, Chair
Keepers of the Duck Creek Watershed

Caroline Snyder
Citizens for a Future New Hampshire

Antigone Hodgins
National Association of People With AIDS

Paul Schwartz
Clean Water Action

Rev. Charles Lord
Obed Watershed Association

Nancy Raeder, Chair
Concerned Citizens Committee of SE Ohio

Susan West Marmagas, MPH
Physicians for Social Responsibility

Diana Neidle
Consumer Federation of America

Donald B. Clark
UCC Network for Environmental & Economic Responsibility

Rev. Walter Stark
Cumberland Countians for Peace & Justice

Rev. Robert Francis Murphy
Unitarian Universalist Migrant Ministry