



PFAS & Wisconsin Drinking Water Systems

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Public drinking water supplies are regulated by the federal Safe Drinking Water Act (SDWA). Under the SDWA, EPA has established enforceable Maximum Contaminant Levels (MCLs), as well as treatment requirements, for over 90 different contaminants.

Wisconsin has been “delegated” the authority to enforce the SDWA in this state. A state may be delegated SDWA enforcement responsibility if it has regulations for contaminants regulated by the SDWA that are “no less stringent than” the regulations promulgated by EPA. Wisconsin has incorporated all SDWA MCLs into its administrative code.

To date, EPA has not adopted any MCLs for any PFAS compounds. An unenforceable Health Advisory level for two PFAS compounds (PFOS and PFOA) was set by EPA at 70 ppt (parts per trillion) combined in 2016, but no enforceable federal standard has been set.

On February 20, 2020, EPA issued its preliminary determination to regulate PFOS and PFOA under the SDWA. The SDWA includes a statutorily defined process for setting new standards. Under this process, a health goal is set that considers risks to the most sensitive populations including infants, pregnant women, and the immuno-compromised. The next step sets the enforcement standard (the MCL) to be as close to the health goal as feasible, considering available treatment technologies and costs.

This SDWA cost-benefit analysis is a critical component of the SDWA standard-setting process. In order to evaluate the cost of achieving a proposed standard, the relative cost, benefit, and feasibility of different contaminant removal and treatment options must be considered. In order to evaluate the benefit of a proposed standard, the human health problems associated with the presence of the contaminant in drinking water must be understood, along with the degree of harm, if any, expected from various levels of exposure to the contaminant.

Inherent in every MCL established under the SDWA is a determination that the marginal benefit of a stricter standard is outweighed by the additional cost to achieve that standard. If

an MCL is set too low, the cost of achieving the standard will be greater than the additional health benefits provided.

Some states have been concerned that EPA has not acted more quickly under the SDWA to develop enforceable MCLs related to PFAS. Six states (Massachusetts, Michigan, New Jersey, New Hampshire, New York, and Vermont) have already adopted their own drinking water standards for PFAS. Six other states, including Wisconsin (and Connecticut, Maine, Pennsylvania, Rhode Island, and Virginia), are working to do so.

In the summer of 2019, the DNR began the process of revising its administrative code, chapter NR 809, to include a new Wisconsin specific MCL of 20 ppt for PFOS and PFOA combined. The proposed 20 ppt standard is based upon the Department of Health Services’ (DHS) groundwater quality standard recommendation for PFOS and PFOA.

This rulemaking is the first time that the DNR has sought to adopt an MCL that was not already included in the SDWA. In taking this step, the DNR is relying upon its authority under Wis. Stat. § 281.17(8)(a) that provides that “the department may establish, administer and maintain a safe drinking water program no less stringent than the requirements of the safe drinking water act.”

The DNR is currently working on the proposed rule and is following Wisconsin’s administrative rulemaking process set out in Wis. Stat. Ch. 227. The DNR is preparing an economic analysis of the rule assuming a 20 ppt MCL.

The DNR is not following the SDWA standard-setting process which would have required a cost-benefit analysis of the proposed standard. This means that the DNR will not be analyzing whether the health benefits provided by a 20 ppt MCL justify the costs to achieve that standard or whether those health benefits could still be attained if the MCL was higher.

The DNR will soon begin the process of establishing Wisconsin-specific MCLs for more PFAS compounds. In November, DHS provided groundwater quality standard recommendations for an additional 16 PFAS compounds and the DNR intends to rely upon these recommendations to develop additional drinking water standards.

DNR's willingness to promulgate new Wisconsin-specific MCLs – where no SDWA MCL exists – and without following the SDWA standard setting process is concerning. Wisconsin's public water systems face many challenges that require significant public investment. According to Wisconsin's 2019 Annual Drinking Water Report, Wisconsin's public water systems already face costs of over \$8.5 billion over the next 15 years to meet existing drinking water priorities, like the elimination of lead service lines. Public dollars should be focused on addressing the issues of greatest need that will provide the greatest benefit. It is important that PFAS be given the same level of scrutiny and analysis that all other contaminants of concern receive.

As DNR proceeds with the PFAS rulemaking, it will also be gathering information about the prevalence of PFAS in municipal water supplies. The DNR will pay to sample 75 to 100 municipal water systems for PFAS this year. The DNR will be identifying systems with risk factors (like airports near municipal wells) that make them more susceptible to PFAS contamination.

Tested communities should be prepared to inform their residents about sampling results. Communicating with residents about what the detection of PFAS means in the absence of consistent nationwide standards is challenging. Looking at the information developed by other utilities that have already faced this challenge can be helpful.

About the Author:

Lawrie Kobza is a partner at the Madison law firm of Boardman & Clark LLP where she has represented municipal water systems and other utilities on a full range of legal matters for over 30 years. Lawrie serves as legal counsel and lobbyist for the Municipal Environment Group – Water Division, a coalition of Wisconsin municipalities that provide water utility input on water supply legislation and regulation. She has also served as Chair of the Wisconsin Water Association, and she received the Section's George Warren Fuller Award. Lawrie is a graduate of the University of Wisconsin Law School and Business School. Contact Lawrie at lkobza@boardmanclark.com



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