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EPA TO REGULATE PERCHLORATE AND SIXTEEN OTHER CHEMICALS IN DRINKING WATER

To Our Clients and Friends:

On February 2, 2011, U.S. EPA announced that it will set drinking water limits on the chemical perchlorate, the solvents trichloroethylene (TCE) and tetrachloroethylene (PCE), and a number of other chemicals commonly used in industrial operations.

Perchlorate is particularly pervasive, occurring both naturally and through manufacturing. Because of its high oxygen content and stability, the chemical is an ideal oxidizer, commonly used to produce rocket fuel and explosives. It is also an ingredient in fireworks, flares, bleaches, some fertilizers, airbag inflation devices and other automotive components.

California and Massachusetts already have established limits on perchlorate in drinking water, but there has never been a national standard set by EPA. The decision to set a national standard for perchlorate reverses a 2008 Bush administration decision in which EPA determined that, under the Safe Drinking Water Act criteria, there was not "meaningful opportunity for health risk reduction" through a national drinking water regulation. Instead, the Bush administration recommended that concentrations of perchlorate not exceed a "health advisory level" of 15 parts per billion.

In a separate action, the agency is also moving towards establishing a drinking water standard to address a group of up to 16 volatile organic compounds (VOCs). These chemicals include industrial solvents such as trichloroethylene and tetrachloroethylene, as well as other regulated and unregulated chemicals that are discharged from industrial operations. The VOC standards will be developed as part of EPA's new "drinking water strategy" to address contaminants as groups rather than individually.

TCE, PCE and other organic solvents are the most widely identified contaminants addressed during cleanup of manufacturing or other industrial sites. EPA's move toward a drinking water standard for these VOCs are based on some studies that raise questions about the impact of these substances on long-term health.

New national standards could have a significant impact on the costs of cleanup involving these chemicals and on common law tort claims for property damage and personal injury.

Direct Effects of Drinking Water Standards

Under the Safe Drinking Water Act, an enforceable primary drinking water standard, also referred to as a "Maximum Contaminant Level" (MCL), is the maximum permissible level of a contaminant in water that may be delivered to any user of a public water system.

MCLs are also used to establish cleanup levels required under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This is because remedial goals under CERCLA must be developed by considering concentration levels to which the human population,

including sensitive subgroups, may be exposed without adverse effects over a lifetime. MCLs are often used as the cleanup standard for groundwater designated as drinking water.

After years of research and investigation, the EPA adopted an oral reference dose for perchlorate of 0.007 milligrams per kilogram of body weight based on a review by the National Research Council of the National Academies in February 2005. That reference dose translates to a "Drinking Water Equivalent Level" (DWEL) of 24.5 parts per billion. In January 2006, EPA issued protective guidance recommending 24.5 ppb as a preliminary cleanup goal for perchlorate. Currently, EPA's Regions consider the health advisory level of 15 ppb perchlorate as a remediation goal.

If EPA were to adopt a single-digit MCL for perchlorate (as California and Massachusetts have), it would significantly increase the cost of cleanups and the number of sites requiring cleanup. Similarly, if EPA adopted a particularly stringent MCL for VOCs, the cost and scope of cleanups could significantly increase.

The Indirect Legal Effects of EPA Regulation

The effect of a low MCL on litigation over perchlorate and solvents is unlikely to end with increased clean up costs and cost recovery litigation. Plaintiffs asserting common law property damage claims such as negligence, nuisance, and trespass often press courts to consider MCLs in evaluating whether contamination gives rise to property damage.

Moreover, although MCLs are not indicative of the level of exposure at which a chemical will likely cause injury, plaintiffs often argue that MCLs are based on the best available, peer-reviewed science, and are "safety levels" determined by government officials and scientists who have no stake in litigation. New national standards will undoubtedly spark an expansion of health claims associated with perchlorate and solvents.



Gibson, Dunn & Crutcher's Environmental Litigation and Mass Tort Practice Group has particular expertise in toxic tort and cost recovery actions related to perchlorate and volatile organic compounds. We also handle a range of other environmental litigation and counseling matters nationwide.

To learn more about the firm's environmental litigation, please contact the Gibson Dunn attorney with whom you work or practice group co-chairs Patrick W. Dennis (213-229-7567, pdennis@gibsondunn.com) or Jeffrey D. Dintzer (213-229-7860, jdintzer@gibsondunn.com) in Los Angeles, Alan N. Bick (949-451-4211, abick@gibsondunn.com) in Orange County, or Peter E. Seley (202-887-3689, pseley@gibsondunn.com) in Washington, D.C.

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