

Court Upholds U.S. EPA's Radionuclide Rules

In a decision having potentially broad implications, a federal Court of Appeals has upheld U.S. Environmental Protection Agency's (EPA) regulations establishing standards for radionuclides in public water systems. *City of Waukesha v. Environmental Protection Agency*, Case No. 01-1028, et al. (D.C. Cir. 2003).

This decision is broadly important for two reasons: it may put to rest the long-standing debate over whether water utilities must spend substantial monies to install treatment facilities to remove radionuclides or to obtain alternative water supplies; and it demonstrates the difficulty in challenging regulations, particularly MCLs, issued by EPA.

At issue was EPA's Final Rule on radionuclides, issued December 7, 2000. It retained the 1976 MCLs for radium-226 and radium-228 and for beta/photon emitters, established an MCL for naturally occurring uranium and instituted a separate radium isotope monitoring requirement for radium.

The City of Waukesha, Wisc., and others challenged these MCLs. They argued that the regulations violated the federal Safe Drinking Water Act (SDWA) and the federal Administrative Procedure Act. The Court, however, rejected all of the petitioners' assertions.

Petitioners had two major arguments: that EPA failed to do a cost-benefit analysis for the radium and beta/photon MCLs, and that the one it did for uranium was deficient; and that, on their merits, all of these MCLs were unsupported by best available scientific evidence.

Cost-Benefit Analysis

EPA asserted that it was not required to perform a cost-benefit analysis under the SDWA for the radium and beta/photon MCLs because a cost-benefit analysis is not required when EPA decides to retain an MCL existing prior to 1986.

The Court agreed with EPA. It noted the SDWA's "anti-backsliding" requirement that bars EPA from any revision to an MCL unless the revision maintains or provides for greater protection of health. The Court concluded, "where the agency proposes to retain an existing MCL and where (as here) there is no evidence that raising the MCL would provide equivalent health protection, a cost-benefit analysis would have no consequence and the agency is justified in concluding that Congress did not intend to require it to undertake such a futile exercise."

In the case of the uranium MCL, there was no preexisting standard. EPA performed a cost-benefit analysis that petitioners argued was deficient. The Court rejected their assertion that the analysis failed to evaluate costs and benefits arising from compliance with the MCL at hazardous waste sites under CERCLA. The Court said that there was no obligation to analyze costs and benefits under other regulatory schemes.

Merits of MCLs

In reviewing the merits of the MCLs for radium, the Court stated that it will reverse a rule only if EPA's action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The Court will give extreme deference to the agency when the agency evaluates scientific data within its technical expertise. However, the Court's review will assure that EPA has examined the relevant data and has given an adequate explanation for its action.

Petitioners argued that EPA did not reconcile the risk assessment model used for the Final Rule with earlier epidemiological studies and, therefore, the Final Rule was not based on "best available science." The Court disagreed, finding that the studies and model relied on by EPA were justified. The Court found that the substantial scientific support for the model used by EPA distinguishes the case from *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286 (D.C. Cir. 2000), where the Court held that EPA's assumption of linearity and a zero MCLG violated the SDWA because it overrode the best available scientific evidence.

Judicial Review of MCLs

The *Waukesha* decision illustrates the burden and frustration in attempting to convince a court to overturn an MCL or MCLG established by EPA. The scope of judicial review is very limited. Deference to the agency appears to increase with the increase in complexity of scientific data that is perceived to be within EPA's technical expertise.

The *Chlorine Chemistry Council* case cited by the Court in *Waukesha* is an example where the court more clearly could see that the best available scientific evidence was not used. Another similar case is *W.R. Grace & Co. v. EPA*, 261 F.3d 330 (3rd Cir. 2001). There, the court reversed an emergency order issued by EPA directing a fertilizer plant to reduce ammonia levels to 1.2 mg/L in the capture zone of drinking water wells. The Court found that the 1.2 mg/L standard was arbitrary and capricious because there was no technical study and no rational explanation for that standard.

In *U.S. v. Massachusetts Water Resources Authority*, 256 F.3d 36 (1st Cir. 2001), the Court held that it had equitable discretion to grant injunctive relief against enforcement of the filtration requirement under EPA's Surface Water Treatment Rule. Although the Court effectively held that the costs of filtration exceeded benefits in that situation, it is questionable whether a court will be willing to enjoin enforcement of an MCL. 

