DB

THE WHITE HOUSE

WASHINGTON

December 15, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES G. WATT, CHAIRMAN PRO TEMPORE
CABINET COUNCIL ON NATURAL RESOURCES AND THE ENVIRONMENT

SUBJECT: Amendments To The Safe Drinking Water Act (SDWA)

ISSUE: Should the President submit amendments to the Safe Drinking Water Act negotiated by EPA Administrator Gorsuch to Congress?

BACKGROUND:

The funding provisions of the Safe Drinking Water Act expired on October 1, 1982. The regulatory provisions have no expiration date, and many environmental programs continue long after the authorizations have expired if appropriations are provided.

Substantive changes in the SDWA will require Congressional action. EPA has developed draft amendments which would make significant changes in the process of establishing standards and assist in efficient implementation of the Act.

The draft amendments encompass recommendations of the National Association of Water Companies, the American Water Works Association and Congressman Phil Gramm. While not entirely consistent with Administration policy favoring State control the amendments reflect what Administrator Gorsuch believes to be politically pragmatic. Administrator Gorsuch and a majority of the CCNRE do not think it is politically possible to repeal the SDWA.

The current law requires EPA to promulgate health goals called recommended maximum containment levels (RMCL's) for any contaminant "which may have any adverse effect on the health of persons." The current law requires RMCLs to represent the level at which "no known or anticipated adverse effects" would occur and require "an adequate margin of safety." In addition, EPA must propose enforceable numerical standards called maximum containment levels (MCLs) on the same day it promulgates RMCLs.

The proposed amendments would change the statutory requirement for setting standards from "any adverse effect" to "no unacceptable risk." The new standard would be set at a level which the EPA Administrator found based on substantial evidence, could reduce or eliminate the health risk at a cost which was justified by the benefit. The change would require the use of cost/benefit analysis in setting an environmental standard. In addition, the language would eliminate the current requirement to promulgate a recommended maximum containment level.

The proposed EPA amendments would also address a number of specific problems which have arisen in the implementation of the current SDWA. These include the issue of exclusive jurisdiction in the Court of Appeals for the District of Columbia for challenges to SDWA regulations. In addition, the proposed changes would allow the Administrator to promulgate more flexible public notification requirements, and allow the use of Administrative Orders in States with primary enforcement responsibility.

Option: Propose EPA's Suggested Amendments:

Advantages:

- The proposal would address the most egregious provisions of the present SDWA.
- The proposal would have widespread backing by the water industry and provide a vehicle for their lobbying effort.
- The proposal would provide a focus for Congressional consideration.
- The proposal is moderate and Administrator Gorsuch believes it could be easily defended during Congressional deliberation.
- The Administration would exercise leadership. The Administration has been criticized for its lack of specific bills to amend both the Clean Air Act and Resource Conservation and Recovery Act in the last Congress.

Disadvantages:

- An Administration bill would provide a target for environmentalists and Democrats to charge that the Administration is intent on weakening environmental protection. Use of cost/benefit analysis for setting standards to protect public health will be controversial.
- The Democratic majority in the House would not be willing to use the Administration bill as the mark-up vehicle.

o The bill retains authority to establish federal standards. Under another Administration the possibility would still exist of new federal extensive regulations based on this law.

Cabinet Council Recommendation

Except for the Council of Economic Advisors, all members of the Cabinet Council recommend the adoption of the EPA proposal and the submittal to Congress of an Administration bill.

DECISION:

_____ Introduce an Administration bill based on the EPA proposal

_____ No Administration bill

THE WHITE HOUSE

WASHINGTON

December 17, 1982

MEMORANDUM FOR RICHARD G. DARMAN
CRAIG L. FULLER

FROM: DANNY J. BOGGS

SUBJECT: Safe Drinking Water Act

Attached is a decision memorandum to the President from Secretary Watt containing the results of the Cabinet Council on Natural Resources and Environment's deliberation and recommendation on the Safe Drinking Water Act.

Attachment

THE WHITE HOUSE

WASHINGTON

December 15, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES G. WATT, CHAIRMAN PRO TEMPORE
CABINET COUNCIL ON NATURAL RESOURCES AND THE ENVIRONMENT

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The draft amendments encompass recommendations of the National Association of Water Companies, the American Water Works Association and Congressman Phil Gramm. While not entirely consistent with Administration policy favoring State control, the amendments reflect what Administrator Gorsuch believes to be politically pragmatic. Administrator Gorsuch and a majority of the CCNRE do not think it is politically possible to repeal the SDWA.

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- The Administration would exercise leadership. The Administration has been criticized for its lack of specific bills to amend both the Clean Air Act and Resource Conservation and Recovery Act in the last Congress.

Disadvantages:

- An Administration bill would provide a target for environmentalists and Democrats to charge that the Administration is intent on weakening environmental protection. Use of cost/benefit analysis for setting standards to protect public health will be controversial.

- The Democratic majority in the House would not be willing to use the Administration bill as the mark-up vehicle.

- The bill retains authority to establish federal standards. Under another Administration the possibility would still exist of new federal extensive regulations based on this law.

Cabinet Council Recommendation

Except for the Council of Economic Advisors, all members of the Cabinet Council recommend the adoption of the EPA proposal and the submittal to Congress of an Administration bill.

DECISION:

_____ Introduce an Administration bill based on the EPA proposal

_____ No Administration bill

SDW

THE WHITE HOUSE

WASHINGTON

July 19, 1982

MEMORANDUM FOR SECRETARY WATT

FROM: DANNY J. BOGGS

SUBJECT: Safe Drinking Water Act (SDWA)

Attached is the signature copy of the Presidential Decision Memorandum on Safe Drinking Water. This has been reviewed by all the members of the Cabinet Council who expressed an interest and includes EPA's comments.

Attachment

DRAFT

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES G. WATT, CHAIRMAN PRO TEMPORE
CABINET COUNCIL ON NATURAL RESOURCES AND ENVIRONMENT

ISSUE: Safe Drinking Water Act (SDWA)

BACKGROUND:

The Safe Drinking Water Act (SDWA) was passed in 1974 in response to a report of chemical contamination of drinking water in New Orleans. Until that time, protection of drinking water was the responsibility of municipalities, states, and private water companies. The Public Health Service issued drinking water standards for the regulation of certain contaminants, but these were only federally-enforceable for the watering points for interstate carriers.

(1)

The SDWA empowers EPA to set national drinking water standards and to provide technical and financial assistance to states to run their own programs. The law now covers about 60,000 water systems, ranging in size from mobile home parks to the city of New York. EPA estimates that the law's annual compliance costs are about $300 million.

Under this statute, EPA has set enforceable standards for the traditional contaminants listed by the Public Health Service. EPA has established only one major new standard since the Act's passage. EPA's main activity under the law has been to provide extensive technical and financial assistance to states to help them run their own programs and improve compliance for the traditional contaminants. All but seven states and territories have now been delegated responsibility to run their own programs.

The SDWA, in any case, gives the EPA Administrator broad latitude to regulate. The Administrator is required to set health goals (not federally-enforceable) for contaminants "which in the judgment of the Administrator, may (emphasis added) have an adverse effect on health." The Administrator is then required to set federally-enforceable standards as close as "feasible" to the health goals. "Feasible" establishes an affordability test but does not require a consideration of costs versus benefits. Thus, the law's requirement to set goals and standards is potentially

very expansive, and might result in standards being set which provide only a small health benefit. EPA also has authority to prescribe specific technologies water systems must use to control contaminants for which it is technically infeasible to determine a performance standard, but which, nevertheless, are known to exist because of outbreaks of illness.

The Cabinet Council explored three approaches to changing the current law:

(1) The EPA/Working Group option would provide the EPA Administrator with broad discretion not to regulate by limiting EPA's standard-setting authority to contaminants which "in the judgment of the Administrator occur in public water systems at levels and frequencies warranting a national primary drinking water regulation." The Administrator would be required to set standards as close as "reasonable" to the health goals, based on a generalized weighing of the costs and benefits. Authority to prescribe treatment technologies would be retained, but application of this authority would be narrowed.

(2) Gramm/Gorton industry-backed bills would effectively eliminate the health goals as a step in standards-setting and allow the Administrator to regulate only when a contaminent "poses an unreasonable risk to human health." EPA's authority to prescribe treatment technology would be repealed.

(3) Repeal of the authority to set enforceable federal standards would restrict the federal role to that existing prior to the SDWA -- research, information dissemination, technical assistance, and the promulgation of health-based advisory standards.

DISCUSSION:

The Cabinet Council believes that the EPA Administrator's latitude to regulate must be curtailed, not only now, but in the future. The majority of the Cabinet Council feels that the minimum acceptable change would be the Gramm/Gorton proposal, and some would go further to repeal the standard-setting authority, leaving in place only federal guidelines and technical assistance. EPA, Justice and Commerce agree that the agency needs legal protection against suits charging insufficient regulation, and believe strongly that the goal can be accomplished through the EPA/Working Group option.

Both the working group option and the Gramm/Gorton option (1) attempt to narrow the Administrator's standard-setting authority; and (2) require a balancing of costs and benefits. The difference is the basis on which a standard is set and the amount of discretion which the Administator has in determining whether or not to regulate.

The working group option would require that a standard be based on a "levels and frequencies" test which would narrow the range of contaminants to be regulated to those that occur in a large enough number of systems and at sufficientlly high levels to justify federal action. The decision on whether to regulate would be left to administrative discretion. The option would also require, once a determination is made to regulate, that all standards be based on a generalized weighing of costs and benefits. This option would maintain the basic health protective nature of the law by not requiring actual proof of harm before a standard is set.

Gramm/Gorton, on the other hand, would require any Administrator to set a standard only where an "unreasonable risk" was present, taking costs and benefits into account. Thus, costs and benefits would be used to determine whether or not to regulate, as well as the level at which to set a standard. This option would curtail a future Administrator more than the working group option by deleting all provisions which allow standard-setting determinations to be made "in the judgment of the Administrator." However, these bills could signal some weakening of the scope of protection afforded public health as they might require actual proof of harm before a standard is set.

Support of the Gramm/Gorton legislation would also mean repeal of EPA's authority to dictate specific treatment technologies. EPA has not used this authority successfully to date. The Agency believes that this authority is necessary when specific pollutant monitoring is not feasible or too costly. In such cases, performance requirements would be replaced by technology requirements for direct control of the problem. EPA believes that such requirements would be most applicable to acute illness outbreaks. Opponents argue that blanket national technology requirements are not needed to control isolated acute illness and could lead to over-regulation, forcing communities to install technologies when they don't have a problem to treat. Local communities can, and have, moved swiftly to eliminate localized acute outbreaks once detected.

Those supporting repeal of authority to set federal standards argue that state and local governments have the incentive and authority to regulate drinking water quality, that the costs of meeting a federal standard differ very widely among water systems, and that the current federal standards have had no significant identifiable effect in improving health. A continuing federal program of research, information, technical assistance, and advisory standards should aid those local governments that may not have the analytic capability to determine the health effects of some contaminants.

EPA believes that under the SDWA, the quality of drinking water supplied nationwide has significantly improved in terms of monitoring and compliance. EPA further believes that there is no

significant support in Congress for repealing federal standards, that most of the water supply industry would oppose the elimination of a federal presence, and that the Administration would receive severe criticism for repealing federal standards which provide the last barrier to direct ingestion of toxics in water.

OPTION I (Working Group/EPA Proposal)

ADVANTAGES:

- Reduces the Agency's vulnerability to lawsuits for not regulating enough under the current law.
- Addresses both the problems of regulations that are too costly and regulations of contaminants which are not of national concern by allowing a weighing of costs and benefits.
- Would be subject to less environmental criticism than Gramm/Gorton because it preserves the preventive health nature of the Act and leaves the scope of contaminants to be regulated to some administrative discretion.

DISADVANTAGES:

- Might not adequately constrain a future Administrator from setting costly standards or from overregulating, since decisions are left largely to the Administrator's discretion.
- The language on "levels and frequencies" is subject to various interpretations unless it is further defined by regulation.
- Language might induce environmental criticism since environmentalists want no change in the current law and this approach explicitly attempts to narrow contaminants which can be regulated.

OPTION II (Gramm/Gorton)

ADVANTAGES:

- Would further reduce the likelihood of overly stringent standards by requiring a cost-benefit test through an "unreasonable risk" threshold.
- Would more extensively curtail a future Administrator than Option I.
- Requires only that the Administration support existing Senate bill and House bill (which has over fifty co-sponsors).

DISADVANTAGES:

- o May undermine the fundamental health-protective nature of the Act as it may require proof of harm before a standard is set.

- o Could lead to more litigation, unless language is clarified in testimony or amendment, over what constitutes an "unreasonable risk."

- o Would subject the Administration to strong environmental criticism.

OPTION III (Repeal of Federal Standards)

ADVANTAGES:

- o Consistent with the Administration's objectives of limiting federal involvement only to those problems for which the incentives and authority for state and local governments are inadequate.

- o Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional bases for federal environmental programs.

DISADVANTAGES:

- o Repeal of federal standards would eliminate assurances that citizens would be protected from harmful contaminants, in the event that state and local governments decline to regulate. Some states might lack the toxicological expertise to set standards for toxic contaminants.

- o The Administration would be subject to harsh criticism from the environmentalists and from the public for eliminating federal protection from direct ingestion of toxics.

RECOMMENDATION:

Option I - Working Group: EPA, Justice, Commerce
Option II - Gramm/Gorton: Interior, Agriculture, OMB
Option III - Repeal: CEA, DOE, HUD, OPD

DECISION:

_____ Option I _____ Option II _____ Option III

-SOLV

DOCUMENT NO. 085032 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/6/82 ACTION/CONCURRENCE/COMMENT DUE BY: 7/15/82

SUBJECT: Safe Drinking Water Act Decision Memo

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
✓ BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	OTHER		
FAIRBANKS	☐	☐	_____	☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

Danny Boggs:

1. Hold the memo for the time being.
2. Ed Meese said that the President must have all of the options.
3. Ann G. wants to make a presentation to the CCNR&E.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

THE WHITE HOUSE

WASHINGTON

OFFICE OF
POLICY DEVELOPMENT

1982 JUN 32 A 9:07

July 1, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: DANNY J. BOGGS
NANCY MALOLEY

SUBJECT: Safe Drinking Water Act Decision Memo

I have prepared a draft decision memo on the Safe Drinking Water Act (per the instructions of the Cabinet Council), which I circulated within the White House for comment. I will prepare another draft to incorporate those comments. You should be aware that EPA Deputy Administrator John Hernandez believes that the Cabinet Council clearly gave no instructions to do a decision memo for the President until EPA comes back with another proposal, and that, in any case, a decision memo should not include a repeal option. Hernandez intends to do the following:

- request that Gorsuch call Secretary Watt and ask that no decision memo be prepared;

- attempt to "cut a deal" with industry for a new proposal, tell Representative Gramm that he has to accept it, and then bring it back to the Cabinet Council for a decision.

If there is no recourse for EPA through Secretary Watt, EPA may attempt to stop the decision memo through other channels, as EPA did with the Clean Water Act.

① Hold the memo for the time being

② Ed Meese said that the President must have all of the options.

③ Ann G. wants to make a presentation to the CC NR+E.

ISSUE:

What Amendments to the Safe Drinking Water Act Should the Administraton propose?

BACKGROUND

Congress passed the first Safe Drinking Water Act in 1974. Until that time, protection of drinking water was the direct responsibility of either municipalities or locally regulated private firms. The law was passed in response to reports of chemical contamination of drinking water in New Orleans and the need for uniform regulation of drinking water contaminators.

The law directs EPA to set national drinking water standards to protect public health. To achieve the standards, EPA sets maximum contaminant levels (MCLs) for contaminants "which in the judgement of the Administrator may pose an adverse health effect". Where it is not practical to monitor for a contaminant, EPA is required to prescribe treatment technologies to protect against certain substances. The law also directs EPA to provide technical and financial assistance to states. EPA estimates that the law's annual compliance costs are about $300 million.

There are nearly 60,000 facilities regulated by the Safe Drinking Water Act. They range in size from mobile home parks to the New York City Sanitation District which serves over seven million people.

EPA's regulatory activity under this law has been very limited mainly because of the economic marginality of the private sector firms and the difficulty of enforcing against water supply operations or of suing municipalities.

In 1975, EPA issued interim standards for 10 inorganic pollutants and bacteria which had previously been listed by the Public Health Service. EPA has established only one major regulation outside that list since then.

EPA's concentration under the law has been to provide technical assistance to states and municipalities in improving their own programs and in providing grants to upgrade those programs. As a result, 50 states or territories are running their own programs; the number of systems covered by state or federal regulation has increased from 24,000 to almost 60,000; over 80% of those systems are monitoring for contaminants.

X ARE NOT.

The Agency intends to limit future regulatory activity to revising existing standards and regulating organic contaminants.

Nevertheless, the water companies regulated by the law are concerned about the EPA Administrator's latitude to regulate contaminants which "may" harm health. In fact, the

Environmental Defense Fund sued EPA in 1978 for not regulating enough under the present statute. The water companies argue that changing the law's standard-setting criteria to "unreasonable risk" makes it compatible with other federal statutes and places a greater burden on the federal government to ensure that standards are not set too low.

The water companies also oppose EPA's authority to prescribe treatment techniques which they believe should be determined by states and municipalities. In 1978, EPA attempted to require a technology which was withdrawn because of excessive costs and technological uncertainties. The water companies fear that EPA could again require expensive and unnecessary treatment if it is allowed to retain this authority.

Two industry-backed bills -- S. 1866 (Gorton) and H.R. 4509 (Gramm) -- propose a number of major changes in the current law, both procedural and substantive. They would increase the burden on EPA to prove a contaminant by changing "may adversely affect human health" to "poses an unreasonable risk to human health; repeal EPA's authority to prescribe treatment technologies; require EPA to undertake a benefit/cost analysis as part of any regulation; and require EPA to adopt a host of new judicial and administrative procedures, including cross-examination in agency hearings and a "substantial evidence" test.

The Congressionally-chartered Safe Drinking Water Act Advisory Commission supports some, but not all, of the changes proposed in the two bills. The Commission recommends basing a standard on "unacceptable risk" versus "unreasonable risk", opposes repeal of EPA's authority to prescribe treatment technologies, and supports the cost/benefit requirement and many of the Administrative procedure proposals.

DISCUSSION

EPA opposes most of the major changes embodied in Gramm/Gorton, described above, either because they would limit EPA's ability to protect health or because they are unnecessary. EPA is seeking a few procedural changes which would reduce the number of violations requiring public notification; speed the promulgation of regulations; and allow EPA to issue Administrative orders to non-complying states instead of bringing them into court.

EPA agrees that the Agency needs some legal protection against suits for not regulating enough under the present statute or for setting standards which are too lenient. EPA opposes the "unreasonable risk" language in the Gramm/Gorton bills on the grounds that such criteria might require proof of actual harm before a standard could be set. EPA and the Department of Justice prefer a less stringent criteria such as the "unacceptable risk" criteria proposed by the Advisory Council. The Council proposed "unacceptable risk" on the grounds that it

is a toxicological concept which scientists are accustomed to using. The Council moreover prefers "unacceptable risk" for public policy reasons as nothing is totally risk free and neither an actual threat to public health nor an outbreak of disease should be a prerequisite to regulation.

EPA further disagrees with the Gramm/Gorton proposals to eliminate EPA's authority to prescribe treatment technology. EPA believes that the current law contains safeguards against abuse of this authority. Moreover, elimination of the requirement would preclude EPA from controlling certain viruses for which analytical levels are unreliable but for which treatment technology is available. The Advisory Council agrees with EPA.

The water companies, on the other hand, argue that technology treatment may be neither uniformally necessary nor uniformly cost-effective and should, therefore, be left to the discretion and expertise of state sanitary engineers. EPA once in the past attempted to prescribe a treatment which would have cost $600 to $700 million. It was withdrawn because of strong industry reaction that it was unnecessary and based on unreliable data.

The cost/benefit provisions and many of the Administrative provisions included in Gramm/Gorton are also addressed in the pending regulatory relief legislation. EPA believes that these requirements should be addressed generically through those pending bills rather than by amending individual statutes. On the other hand, many of these provisions have already been endorsed by the Administration in the pending regulatory relief bills, so it would be consistent to support legislation which accomplishes the same goals.

The Advisory Council supports the cost/benefit language of the Gramm/Gorton bills as well as many of the bills' Administrative provisions which would incorporate a series of routine rulemaking procedures. The Advisory Council believes these provisions should be included in the Safe Drinking Water Act.

Most of the working group members concur with EPA's desire to confine changes in the law to some moderate restrictions on EPA's standard-setting authority and to the procedural changes proposed by EPA.

OMB and CEA believe that if a federal statute to protect drinking water is necessary at all, then the Administration should support the Gramm/Gorton bills.

The Gramm/Gorton bills are also supported by by many states, the Conference of State Sanitary Engineers, the National Association of Water Companies, the American Water Works Association, and the State Liaison Group of State Drinking Water Directors.

They are opposed by state public health department officials

and environmentalists who want, if anything, to strengthen the present statute.

The practical impact of these changes on future EPA activities is hard to measure. Clearly, these amendments establish a more difficult legal burden of proof on the Agency, but whether they would result in a larger number of remands or reversals of EPA regulations is of course up to the courts.

Options

I. Support all or some of the Gramm/Gorton bills.

-- The requirement that safe Drinking Water standards should be based on some kind of risk assessment would ensure that EPA is not forced to set unnecessarily low standards and, thereby, force unnecessary expenditures. State and local governments always have the authority to reduce contaminants further.

-- A risk assessment is consistent with other environmental statutes -- namely legislation to regulate pesticides and toxic substances.

-- Technology requirements may not be uniformally cost-effective or necessary. Moreover, prescription of treatment techniques should be left to state and municipal professionals who have the expertise to devise such treatments for their own systems. There is no guarantee that EPA would not prescribe expensive treatment, as it once attempted to do.

-- The cost/benefit requirements for rule-making have already been endorsed by the Administration through the Regulatory Reform Executive Order. Thus they are consistent with Administration initiatives and should be supported.

-- Many of the Administrative provisions will improve the Agency's rule-making procedures and codify many of the procedures which EPA follows in practice.

II. Oppose Gramm/Gorton

-- Support of the Gramm/Gorton bills, particularly of the standard-setting criteria and eliminiation of the technology requirements, will be viewed by environmentalists as a weakening of a law which protects the public from direct ingestion of contaminants.

-- Repeal of the technology requirements would leave EPA no alternatives to protect the public from contaminants for which it is not possible to set a standard because analytical methods are unreliable.

-- The law contains appropriate safeguards against abuse of the technology treatment requirement because EPA may only impose this requirement when a standard cannot be set.

-- The requirement for cost/benefit analysis should be addressed generically.

-- EPA has not overregulated under the Safe Drinking Water Act. Thus many of the changes proposed in Gramm/Gorton are unnecessary and would only result in more criticism against the Administration's environmental policies.

Dear Senator Gorton:

This is in response to your question at the May 26, 1982 hearing regarding the provision in S. 1866 to limit the contaminants for which the Agency might establish regulations from the contaminants that "may have any adverse effect" on human health to those that "pose an unreasonable risk". You wished to know whether, in my professional judgment, this would change the preventive nature of the Safe Drinking Water Act by requiring harm to be documented before the Agency could act. In addition, I wish to amplify my remarks on several other issues.

In my judgment, the change to "unreasonable risk" could be interpreted to change the preventative nature of the Act depending on future court determinations. The change might impose upon the Agency the burden of demonstrating that a serious threat to human health existed before taking any action to regulate. I also believe that the change might be interpreted to require the Agency to document that actual harm to human health had resulted from the presence of the contaminants in drinking water before it could regulate. Any person challenging an Agency decision to regulate undoubtedly would argue that the Agency failed to demonstrate sufficient risk to human health to justify regulation.

If enacted the bill would require the Agency to establish recommended maximum contaminant levels (health goals) for each contaminant that poses an "unreasonable risk" to public health at levels at which "no unreasonable risk occurs." The Agency must then establish regulatory MCLs (standards) as close to this level as "reasonable." The bill does not define the term "reasonable." The bill requires a standard for every contaminant for which a recommended MCL is established and requires the Agency to select it as close as "reasonable" to a recommended MCL that by definition is to be established at a level at which no unreasonable risk occurs. Is it reasonable to assume that the Agency could select a standard (MCL) that is less stringent than a level at which presumably no unreasonable risk occurs? I believe undefined terms and circular rulemaking processes will only lead to litigation when the Agency attempts to implement these provisions.

Furthermore, although the concept of "unreasonable risk" has been used in such statutes as the Federal Insecticide, Fungicide and Rodenticide Act and the Toxic Substances Control Act, these statutes were enacted to regulate the manufacture and use of toxic substances that also provide a benefit to society. In contrast, the Safe Drinking Water Act was enacted to protect public health from substances -- contaminants in drinking water -- that offer no countervailing benefit to society. This difference in context increases the uncertainty of the implementation of this "unreasonable risk" concept in the Safe Drinking Water Act.

It is my opinion that the Act could be amended to accommodate the concerns of those who believe the Agency may "overregulate," without changing the Act from a "health protective" statute to an "unreasonable risk" statute. In fact, I do not believe that S. 1866 adequately addresses the primary concern regarding the current Act's process and standards for establishing revised regulations. We are concerned that the Agency could be required, pursuant to a court order, to establish recommended MCLs and standards (MCLs) for a very large number of contaminants which are not true public health problems in public water supplies.

However, the range of potential contaminants for recommended MCLs or standards (MCLs) can be effectively narrowed without changing the Act to an "unreasonable risk" statute. One suggestion would be to add language in Section 1412(b)(1)(B) that limits the establishment of recommended MCLs to those contaminants that "occur in public water systems at levels that" may have an adverse effect on public health.

Similarly, the requirement in Section 1412(b)(3) for establishing standards for every contaminant for which a recommended MCL is established could be limited to those contaminants "which in the judgment of the Administrator occur in public water systems at levels and frequencies warranting a national primary drinking water regulation". These changes would narrow the range of contaminants for which the Agency should establish regulations to those that occur in a large enough number of systems and at sufficiently high levels to justify federal action to protect the public health.

Two additional issues remain which I did not address in my testimony. The first issue is the provision in S. 1866 which would remove the Administrator's authority to establish a treatment technique requirement in lieu of a numerical standard. The removal of this authority would seriously limit the Administrator's ability to protect the public health. There are situations in which contaminants cannot be routinely measured, such as viruses and Giardia. The Act currently contains limitations on the Agency's use of this authority:

1. Treatment technique requirements can only be set when monitoring is not "economically or technologically feasible".
2. Water systems have the opportunity to demonstrate that application of the technology in their system is not necessary "because of the nature of [its] raw water source". If the system can make such a demonstration, it may obtain a variance and need not apply the required treatment technology.

3. The system may use an alternative treatment technology if it is as effective as the required technology.

Therefore, I believe that this authority is important to enable the Agency to establish standards in the future for contaminants that cannot be measured but threaten the public health. I urge that this authority be retained.

The second issue that I did not address was that of adding a requirement for cost-benefit analysis to the Act. The current Act permits EPA to take costs into consideration when setting an MCL. In fact, the Agency does conduct cost benefit analyses for all major regulations as a requirement of EO 12291. We believe that this a useful part of the rulemaking process. However, we do have several concerns about the provision in S. 1866. First, as written, it would make cost benefit analysis judicially reviewable, giving to the courts an even greater role in the rulemaking process. Secondly, there are several generic bills (S. 1080 and H.R. 746) now before the Congress which address this and similar amendments to the Administrative Procedure Act. I believe that the cost benefit issue and other issues of administrative procedures should be addressed in the generic bills and recommend that they be deferred to the negotiations around those bills between the Congress and the Administration.

Finally, I would like to expand on my testimony regarding S. 2131. EPA has sufficient authority to protect ground water from the most serious threats of contamination through such statutes as RCRA, Superfund and SDWA. This authority, coupled with that of the States, can provide the necessary preventative and cleanup action.

The primary purpose of this bill is to provide Federal support for the purchase of recharge zones of Sole Source Aquifers. This represents a serious intrusion into local land use decisions that is unwarranted. It is also an unrealistic and expensive approach to ground water protection with a potential budgetary impact which is unjustified. I urge the committee to reject this approach.

← SOW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 6 1982

OFFICE OF
WATER

SUBJECT: EPA Comments on Reauthorization of the Safe Drinking Water Act

FROM: Victor J. Kimm, Director
Office of Drinking Water

TO: Nancy Maloley, Senior Staff Member
Office of Policy Development, White House

At requested at yesterday's meeting on potential changes in the Safe Drinking Water Act, the attached paper outlines EPA's position on this matter. Copies of this material are being hand delivered to all attendees at the meeting.

Please let us know if we can be of any additional assistance.

cc: Task Force Members

EPA Comments on Reauthorization of the Safe Drinking Water Act

EPA views the Safe Drinking Water Act (SDWA) as an essential link in the National effort to protect the public health from waterborne contaminants. The Act protects the public at the point of potential human exposure, while other EPA authorities (CWA, RCRA, Superfund) are oriented toward prevention of the contamination of drinking water sources.

The Agency considers the Act to be basically sound and would not object to a simple reauthorization with no substantive amendments. However, if the Congressional calendar allows, a small number of minor and largely non-controversial amendments would be desirable.

EPA proposed amendments

(1) Public notification. The Act provides that the water consumers be notified of violations of the drinking water regulations. This concept has proven sound and should definitely be retained. The current Act, however, required notification for all violations, no matter how minor or technical and specifies the method of notification in great detail. This has lead both to selective non-compliance and to dilution of notices of significant violations. We would propose an amendment which would allow the Administrator flexibility in specifying what violations require public notice and in the methods that can be used for notification.

(2) NAS Study. The Act envisioned that the NAS study would provide health goals to use as the starting point for the Revised Regulations. Since the NAS did not do so, EPA would propose an amendment that the Administrator may use the NAS study and other data in standard-setting, thus removing the potential legal liability.

(3) Recommended Maximum Contaminant Levels (RMCLs). The RMCLs are to be health goals for contaminants, independent of considerations of feasibility and cost. They are completely distinct from the maximum contaminant levels (MCLs) which are enforceable standards taking into consideration, cost and economic factors. The Act provides that the RMCLs health goals must be proposed and promulgated before proposal of enforceable revised MCLs standards. This system would be extremely confusing to the public and would interfere with our goal of an informed public debate as part of the standard-setting process. EPA would propose and amendment under which the health goal (RMCL) and enforceable standard (MCL) could be proposed together and promulgated together.

(4) Administrative Orders. This proposal is still under consideration by the Agency. Currently, EPA's only enforcement authority in non-primacy States is to bring a recalcitrant system into Federal court, a procedure which is so time-consuming and cumbersome that it has only been used less than ten times since passage of the Act in 1974. Under this proposal, EPA would be given the authority, in non-primacy-States only, to issue administrative orders to non-complying public water systems; such authority is generally used by primacy States under State law to administer the program. This concept is strongly supported by DOJ staff.

Comments of proposed bills.

Three bills to amend the SDWA have been proposed: S. 1866 (Sen. Gorton) and H.R. 4509 (Rep. Gramm) are almost identical and would amend the standard-setting process; a bill by Sen. Moynihan would expand the sole-source-aquifer program. The major provisions of these bills are discussed briefly below:

(1) "Unreasonable risk" standard for MCLs. Under the current Act, EPA may regulate any contaminant which "in the judgment of the Administrator, may have any adverse effect on the health of persons." (§ 1401(1)(B)). The bills would change this to "poses an unreasonable risk to the health of persons."

The Agency opposes this amendment. First, it is directed toward a non-existent problem. Even under previous Administrations, EPA has not promulgated large numbers of regulations. Only two new drinking water regulations have been promulgated since the passage of the Act in 1974 (THMs and radionuclides).

Second, it is not clear what the new standard would mean. The term "unreasonable risk" is used in TSCA and FIFRA in a context of balancing the desirable uses of substances against their potential adverse consequences. It is not clear how to extend this to setting numerical limits on exposure. To the extent that the new standard would require actual proof of harm, it would undo the protection thrust of public health activities which have served the Nation well. Most likely, the meaning of the term will not be known until after a series of court decisions, which will result in a long period of uncertainty. In general, it does not appear to be good public policy for the courts to set policy in such areas.

(2) Treatment technique requirements. The bills would eliminate EPA's authority to require use of particular treatment techniques (or equivalent) in certain circumstances. The Agency opposes this amendment.

The current Act contains appropriate safeguards against abuse of this authority. MCLs (performance standards) are clearly the preferred route when feasible. A treatment technique requirement can only be used when monitoring for a contaminant is "not economically or technologically feasible" (§ 1401(1)(C)(ii)). Where the contamination problem does not exist, the system can be relieved of the requirement through a variance procedure. Moreover, the provision would not, as claimed, retard technological progress, since the Act provides that other, equally effective treatment methods may be used.

EPA has not used this authority in the past (a 1978 proposal was withdrawn) and does not anticipate frequent use in the future. However, there are a number of cases where this authority may be the best way to proceed, and the Agency wants to retain this authority. The following potential examples come to mind: Giardia and viruses, pathogenic organisms for which analytical methods either do not exist or are unreliable, and asbestos, where the analytical technique, electron microscopy, is extremely expensive.

(3) Administrative procedures in rule-making. The bills contain a number of provisions to reform the regulatory process. They raise similar issues to those now before the Congress in H.R. 746 and S. 1080. EPA believes that these issues should be resolved generically and applied to all regulatory programs, rather than applying varying requirements to various programs. As far as possible, the administrative aspects of rule-making should be uniform across the Government.

(4) Sole-source aquifer. The Moynihan bill would provide Federal assistance for local planning to protect recharge areas of sole-source aquifers, followed by Federal assistance for implementation, including purchase of land. The impetus for the bill is a particular situation on Long Island. The bill is clearly inconsistent with the Administration's budget policy and its philosophy of the appropriate Federal role in local decisions.

Safe Drinking Water Act Task Force

May 4, 1982

The White House

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SDW

THE WHITE HOUSE

WASHINGTON

July 19, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: DANNY J. BOGGS

SUBJECT: Safe Drinking Water Act (SDWA)

Attached are EPA's comments on the draft Safe Drinking Water paper (circled in red). A final copy has been prepared and sent to Secretary Watt for signature.

Attachments

1. EPA's comments
2. Final copy

drinking water standards

DRAFT 4

The Safe Drinking Water Act (SDWA) was passed in 1974 in response to a report of chemical contamination of drinking water in New Orleans. Until that time, protection of drinking water was the responsibility of municipalities, states, and private water companies. The Public Health Service issued ~~guidelines~~ for the regulation of certain contaminants, but these were ~~not~~ only federally-enforceable for the watering points for interstate carriers.

The SDWA empowers EPA to set national drinking water standards and to provide technical and financial assistance to states to run their own programs. The law now covers about 60,000 water systems, ranging in size from mobile home parks to the city of New York. EPA estimates that the law's annual compliance costs are about $300 million.

~~EPA has rarely regulated~~ Under this statute, ~~aside from~~ ~~setting federally~~ enforceable standards for the contaminants listed by the Public Health Service; EPA has established only one major standard since the Act's passage. EPA's main activity under the law has been to provide extensive technical and financial assistance to states to help them run their own programs. All but seven states and territories have now been delegated responsibility to run their own programs.

The SDWA, in any case, gives the EPA Administrator broad latitude to regulate. The Administrator is required to set health goals (not federally-enforceable) for contaminants "which in the judgment of the Administrator, may (emphasis added) have an adverse effect on health." The Administrator is then required to set federally-enforceable standards as close as "feasible" to the health goals. "Feasible" establishes an affordability test but does not require a consideration of costs versus benefits. Thus, the law's requirement to set goals and standards is potentially very expansive, and may result in standards being set which provide only a small health benefit. EPA also has authority to prescribe specific technologies water systems must use to control contaminants for which it is technically infeasible to determine a performance standard, but which, nevertheless, are known to exist because of outbreaks of illness.

The Cabinet Council explored three approaches to changing the current law:

(1) The EPA/Working Group option would provide the EPA Administrator with broad discretion not to regulate by limiting EPA's standard-setting authority to contaminants which "in the judgment of the Administrator occur in public water systems at levels and frequencies warranting a national primary drinking water regulation." The option, moreover, requires the Administrator

to set standards as close as "reasonable" to the health goals, based on a generalized weighing of the costs and benefits. This option would also retain authority to prescribe treatment technologies, but narrow application of this authority.

(2) Gramm/Gorton industry-backed bills would allow the Administrator to regulate only when a contaminent "poses an unreasonable risk to human health." Gramm/Gorton would repeal EPA's authority to prescribe treatment technology.

(3) Repeal of the authority to set enforceable Federal standards would restrict the Federal role to ~~existing prior to the SDWA~~ research, information dissemination, technical assistance, and the promulgation of health-based advisory ~~standards~~.

DISCUSSION:

The Cabinet Council believes that the EPA Administrator's latitude to regulate must be curtailed not only now but in the future. The majority of the Cabinet Council feels that the minimum acceptable change would be the Gramm/Gorton proposal, and some would go further to repeal the standard-setting authority, leaving in place only federal guidelines and technical assistance. EPA, Justice and Commerce agree that the agency needs legal protection against suits charging insufficient regulation, and believe strongly that the goal can be accomplished through the EPA/Working Group option.

Both the working group option and the Gramm/Gorton option (1) attempt to narrow the Administrator's standard-setting authority; and (2) require a balancing of costs and benefits. The difference is the basis on which a standard is set and the amount of discretion which the Administator has in determining whether or not to regulate.

The working group option would require that a standard be based on a "levels and frequencies" test which would narrow the range of contaminants to be regulated to those that occur in a large enough number of systems and at sufficiently high levels to justify federal action. The decision on whether to regulate would be left to administrative discretion. The option would also require, once a determination is made to regulate, that all standards be based on a generalized weighing of costs and benefits.

Gramm/Gorton, on the other hand, would require any Administrator to set a standard only where an "unreasonable risk" was present, taking costs and benefits into account. This might require actual proof of harm before a standard is set. Gramm/Gorton would also require that a cost/benefit analysis be done to determine at what level to set a standard.

Thus, the working group option would maintain the basic health protective nature of the law by not requiring proof of harm, but would not necessarily curtail a future EPA Administrator, since the determination to regulate is based on wide discretion. Gramm/Gorton would more extensively curtail a future Administrator by increasing the burden of proof on any Administrator to demonstrate that a contaminant poses a risk. However, those bills could signal some weakening of the scope of protection afforded public health.

Support of the Gramm/Gorton legislation would also mean repeal of EPA's authority to dictate specific treatment technologies. EPA has not used this authority successfully to date, but the Agency believes that this authority is necessary when specific pollutant monitoring is not feasible or too costly. In such cases, performance requirements would be replaced by technology requirements for direct control of the problem. EPA believes that such requirements would be most applicable to acute illness outbreaks. Opponents argue that blanket national technology requirements are not needed to control isolated acute illness and will lead to over-regulation, forcing communities to install technologies when they don't have a problem to treat. Local communities can, and have, moved swiftly to eliminate localized acute outbreaks. ~~Moreover, acute illness problems tend to appear and disappear rapidly, rendering the Federal regulatory process late and ineffective.~~ once detected.

Those supporting repeal of authority to set Federal standards argue that state and local governments have the incentive and authority to regulate drinking water quality, that the costs of meeting a Federal standard differ very widely among water system, and that the current Federal standards, ~~which focus primarily on very low level organic contaminants,~~ have had no significant identifiable effect in improving health. A continuing Federal program of research, information, technical assistance, and advisory standards should aid those local governments that may not have the analytic capability to determine the health effects of some contaminants.

EPA believes that there is no support in Congress for repealing federal standards, that the water supply industry would oppose the elimination of a federal presence, and that the Administration would receive severe criticism for repealing federal standards which provide the last barrier to direct ingestion of toxics in water.

OPTION I (Working Group/EPA Proposal)

ADVANTAGES:

- Reduces the agency's vulnerability to lawsuits for not regulating enough under the current law.

- Addresses both the problems of regulations that are too costly and regulations of contaminants which are not of national concern

- Would be subject to less environmental criticism than Gramm/Gorton because it preserves the preventive health nature of the Act and leaves the scope of contaminants to be regulated to some administrative discretion.

DISADVANTAGES:

- Would not constrain a future Administrator from setting costly standards or from overregulating, since decisions are left largely to the Administrator's discretion.

- The language is subject to various interpretations unless it is further defined by regulation.

- Language might induce environmental criticism since environmentalists want no change in the current law and this approach explicitly attempts to narrow contaminants which can be regulated.

OPTION II (Gramm/Gorton)

ADVANTAGES:

- Would reduce the likelihood of overly stringent standards by requiring a cost-benefit test through an "unreasonable risk" threshold.

- Increases the burden of proof on any Administrator in ~~regulating a contaminant.~~

- Requires only that the Administration support existing Senate bill and House bill (which has over fifty co-sponsors).

DISADVANTAGES:

- May undermine the fundamental health-protective nature of the Act as it may require proof of harm before a standard is set.

- Could lead to more litigation, unless language is clarified in testimony or amendment, over what constitutes an "unreasonable risk."

- Would subject the Administration to strong environmental criticism.

OPTION III (Repeal of Federal standards)

ADVANTAGES:

- Consistent with the Administration's objectives of limiting Federal involvement only to those problems for which the incentives and authority for state and local governments are inadequate.

- Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional bases for federal environmental programs.

DISADVANTAGES:

- In instances where a contaminant is scientifically proven to be harmful to health, repeal of Federal standards would eliminate assurances that citizens would be protected, in the event that state and local governments decline to regulate. ~~Many~~ States (each the toxicological expertise to set standards for toxic contaminants. might

- The Administration would be subject to harsh criticism from the environmentalists and from the public for eliminating Federal protection from direct ingestion of toxics.

- ~~This would take the Federal Government out of a public health role which it has exercised since the turn of the century.~~

OMB deserved the word "might"

RECOMMENDATION

Option I - Working Group: EPA, Justice, Commerce
Option II - Gramm/Gorton: Interior, Agriculture, OMB
Option III - Repeal: CEA, DOE, HUD, OPD

DECISION

_____ Option I

_____ Option II

_____ Option III

not true. We would return to pre-1974 public health role.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES G. WATT, CHAIRMAN PRO TEMPORE
CABINET COUNCIL ON NATURAL RESOURCES AND ENVIRONMENT

ISSUE: Safe Drinking Water Act (SDWA)

BACKGROUND:

The Safe Drinking Water Act (SDWA) was passed in 1974 in response to a report of chemical contamination of drinking water in New Orleans. Until that time, protection of drinking water was the responsibility of municipalities, states, and private water companies. The Public Health Service issued drinking water standards for the regulation of certain contaminants, but these were only federally-enforceable for the watering points for interstate carriers.

The SDWA empowers EPA to set national drinking water standards and to provide technical and financial assistance to states to run their own programs. The law now covers about 60,000 water systems, ranging in size from mobile home parks to the city of New York. EPA estimates that the law's annual compliance costs are about $300 million.

Under this statute, EPA has set enforceable standards for the traditional contaminants listed by the Public Health Service. EPA has established only one major new standard since the Act's passage. EPA's main activity under the law has been to provide extensive technical and financial assistance to states to help them run their own programs and improve compliance for the traditional contaminants. All but seven states and territories have now been delegated responsibility to run their own programs.

The SDWA, in any case, gives the EPA Administrator broad latitude to regulate. The Administrator is required to set health goals (not federally-enforceable) for contaminants "which in the judgment of the Administrator, may (emphasis added) have an adverse effect on health." The Administrator is then required to set federally-enforceable standards as close as "feasible" to the health goals. "Feasible" establishes an affordability test but does not require a consideration of costs versus benefits. Thus, the law's requirement to set goals and standards is potentially

very expansive, and might result in standards being set which provide only a small health benefit. EPA also has authority to prescribe specific technologies water systems must use to control contaminants for which it is technically infeasible to determine a performance standard, but which, nevertheless, are known to exist because of outbreaks of illness.

The Cabinet Council explored three approaches to changing the current law:

(1) The EPA/Working Group option would provide the EPA Administrator with broad discretion not to regulate by limiting EPA's standard-setting authority to contaminants which "in the judgment of the Administrator occur in public water systems at levels and frequencies warranting a national primary drinking water regulation." The Administrator would be required to set standards as close as "reasonable" to the health goals, based on a generalized weighing of the costs and benefits. Authority to prescribe treatment technologies would be retained, but application of this authority would be narrowed.

(2) Gramm/Gorton industry-backed bills would effectively eliminate the health goals as a step in standards-setting and allow the Administrator to regulate only when a contaminent "poses an unreasonable risk to human health." EPA's authority to prescribe treatment technology would be repealed.

(3) Repeal of the authority to set enforceable federal standards would restrict the federal role to that existing prior to the SDWA -- research, information dissemination, technical assistance, and the promulgation of health-based advisory standards.

DISCUSSION:

The Cabinet Council believes that the EPA Administrator's latitude to regulate must be curtailed, not only now, but in the future. The majority of the Cabinet Council feels that the minimum acceptable change would be the Gramm/Gorton proposal, and some would go further to repeal the standard-setting authority, leaving in place only federal guidelines and technical assistance. EPA, Justice and Commerce agree that the agency needs legal protection against suits charging insufficient regulation, and believe strongly that the goal can be accomplished through the EPA/Working Group option.

Both the working group option and the Gramm/Gorton option (1) attempt to narrow the Administrator's standard-setting authority; and (2) require a balancing of costs and benefits. The difference is the basis on which a standard is set and the amount of discretion which the Administator has in determining whether or not to regulate.

The working group option would require that a standard be based on a "levels and frequencies" test which would narrow the range of contaminants to be regulated to those that occur in a large enough number of systems and at sufficientlly high levels to justify federal action. The decision on whether to regulate would be left to administrative discretion. The option would also require, once a determination is made to regulate, that all standards be based on a generalized weighing of costs and benefits. This option would maintain the basic health protective nature of the law by not requiring actual proof of harm before a standard is set.

Gramm/Gorton, on the other hand, would require any Administrator to set a standard only where an "unreasonable risk" was present, taking costs and benefits into account. Thus, costs and benefits would be used to determine whether or not to regulate, as well as the level at which to set a standard. This option would curtail a future Administrator more than the working group option by deleting all provisions which allow standard-setting determinations to be made "in the judgment of the Administrator." However, these bills could signal some weakening of the scope of protection afforded public health as they might require actual proof of harm before a standard is set.

Support of the Gramm/Gorton legislation would also mean repeal of EPA's authority to dictate specific treatment technologies. EPA has not used this authority successfully to date. The Agency believes that this authority is necessary when specific pollutant monitoring is not feasible or too costly. In such cases, performance requirements would be replaced by technology requirements for direct control of the problem. EPA believes that such requirements would be most applicable to acute illness outbreaks. Opponents argue that blanket national technology requirements are not needed to control isolated acute illness and could lead to over-regulation, forcing communities to install technologies when they don't have a problem to treat. Local communities can, and have, moved swiftly to eliminate localized acute outbreaks once detected.

Those supporting repeal of authority to set federal standards argue that state and local governments have the incentive and authority to regulate drinking water quality, that the costs of meeting a federal standard differ very widely among water systems, and that the current federal standards have had no significant identifiable effect in improving health. A continuing federal program of research, information, technical assistance, and advisory standards should aid those local governments that may not have the analytic capability to determine the health effects of some contaminants.

EPA believes that under the SDWA, the quality of drinking water supplied nationwide has significantly improved in terms of monitoring and compliance. EPA further believes that there is no

significant support in Congress for repealing federal standards, that most of the water supply industry would oppose the elimination of a federal presence, and that the Administration would receive severe criticism for repealing federal standards which provide the last barrier to direct ingestion of toxics in water.

OPTION I (Working Group/EPA Proposal)

ADVANTAGES:

- Reduces the Agency's vulnerability to lawsuits for not regulating enough under the current law.
- Addresses both the problems of regulations that are too costly and regulations of contaminants which are not of national concern by allowing a weighing of costs and benefits.
- Would be subject to less environmental criticism than Gramm/Gorton because it preserves the preventive health nature of the Act and leaves the scope of contaminants to be regulated to some administrative discretion.

DISADVANTAGES:

- Might not adequately constrain a future Administrator from setting costly standards or from overregulating, since decisions are left largely to the Administrator's discretion.
- The language on "levels and frequencies" is subject to various interpretations unless it is further defined by regulation.
- Language might induce environmental criticism since environmentalists want no change in the current law and this approach explicitly attempts to narrow contaminants which can be regulated.

OPTION II (Gramm/Gorton)

ADVANTAGES:

- Would further reduce the likelihood of overly stringent standards by requiring a cost-benefit test through an "unreasonable risk" threshold.
- Would more extensively curtail a future Administrator than Option I.
- Requires only that the Administration support existing Senate bill and House bill (which has over fifty co-sponsors).

DISADVANTAGES:

- o May undermine the fundamental health-protective nature of the Act as it may require proof of harm before a standard is set.

- o Could lead to more litigation, unless language is clarified in testimony or amendment, over what constitutes an "unreasonable risk."

- o Would subject the Administration to strong environmental criticism.

OPTION III (Repeal of Federal Standards)

ADVANTAGES:

- o Consistent with the Administration's objectives of limiting federal involvement only to those problems for which the incentives and authority for state and local governments are inadequate.

- o Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional bases for federal environmental programs.

DISADVANTAGES:

- o Repeal of federal standards would eliminate assurances that citizens would be protected from harmful contaminants, in the event that state and local governments decline to regulate. Some states might lack the toxicological expertise to set standards for toxic contaminants.

- o The Administration would be subject to harsh criticism from the environmentalists and from the public for eliminating federal protection from direct ingestion of toxics.

RECOMMENDATION:

Option I - Working Group: EPA, Justice, Commerce
Option II - Gramm/Gorton: Interior, Agriculture, OMB
Option III - Repeal: CEA, DOE, HUD, OPD

DECISION:

_____ Option I _____ Option II _____ Option III

The Safe Drinking Water Act was passed in 1974 in response to chemical contamination of drinking water in New Orleans. Until that time, protection of drinking water was left strictly to municipalities and private water companies. The Public Health Service issued guidelines for the regulation of certain contaminants, but these were not federally-enforceable.

The law empowers EPA to set national drinking water standards and to provide technical and financial assistance to states to regulate their own programs. The law now covers about 60,000 water systems, ranging in size from mobile home parks to the city of New York. EPA estimates that the law's annual compliance costs are about $300 million.

Although the law was passed almost ten years ago to provide federal drinking water standards, EPA has rarely regulated under this statute. Aside from setting federally-enforceable standards for the contaminants listed by the Public Health Service, EPA has established only one major standard since the Act's passage. EPA's main activity under the law has been to provide extensive technical assistance to states and grants to achieve delegation. This effort has been very successful. All but seven states and territories now run their own programs.

The Safe Drinking Water Act, in any case, gives the EPA Aministrator broad latitude to regulate. The Administrator is required to set standards for contaminants "which in the judgment of the Administrator, may have an adverse effect on health. Those regulated by the law are concerned about this latitude, particularly how it might be used by a future Administrtor, and the extent to which the law may require more costly regulations than necessary to protect public health. They have a third concern which is EPA's authority to prescribe what technologies water systems will use to regulate certain contaminants. The water companies favor repeal of this authority.

The Cabinet Council explored three approaches to changing the current law:

(1) The EPA/Working Group option would provide the EPA Administrator with broad discretion not to regulate by limiting EPA's standard-setting authority to contaminants which "in the judgment of the Administrator occur in public water systems at levels and frequencies warranting national primary drinking water regulation." This option would also retain treatment technologies but curtail application of this authority.

(2) Gramm/Gorton industry-backed bills would allow the Administrator to regulate only when a contaminent "poses an unreasonable risk to human health." Gramm/Gorton would repeal EPA's treatment technology authority.

(3) Total repeal would require the Administration to submit its own bill to eliminate the Act entirely and put drinking water regulation back in the hands of states and municipalities.

DISCUSSION:

The Cabinet Council believes that the EPA Administrator's latitude to regulate must be curtailed not only now but in the future. The strong consensus of the Cabinet Council is that the minimum acceptable change would be the Gramm/Gorton proposal, and some would like to go even further to repeal the Act or to leave in place only federal guidelines and technical assistance.

EPA, Justice and Commerce agree that the agency needs legal protection against suits charging insufficient regulating and believe strongly that the goal can be accomplished through the EPA/Working Group option.

Justice believes that the "unreasonable risk" language in the Gramm/Gorton bills is vague and would lead to considerable litigation over its meaning. The alternative language developed by the Working Group would retain the concept of standards based only on health considerations, but would narrow the range of contaminants to be regulated. This alternative would also require the EPA Administrator to determine that the standards are "reasonable," based on a generalized weighing of the costs and the benefits. Although this option would reduce the chances of litigation because it involves broad discretion, it would not be as effective as Gramm/Gorton in restraining future EPA authority.

As the Supreme Court pointed out in the Cotton Dust case, Congress has used the phrase "unreasonable risk" accompanied by explanation in legislative history, to signify a generalized balancing of costs and benefits. Putting "unreasonable risk" in the statute increases the burden of proof on any Administrator to demonstrate that a contaminant is worth regulating, without leaving that determination to an Administrator's judgment. This language has been used in other environmental statutes which regulate pesticides and toxics and is consistent with the Administration's present and future regulatory reform objectives. However, as Justice points out, this language itself could lead to litigation over what constitutes an "unreasonable risk."

Support of Gramm/Gorton would also mean repeal of EPA's technology treatment authority. EPA has not used this authority successfully in the past. Repeal of this authority would leave EPA with no means of protecting the public against viruses for which monitoring is technically infeasible or too costly, but which may cause acute or chronic illness. On the other hand, this authority is best used to treat contaminants which generally cause acute, rather than chronic illness, and states can and have controlled these pollutants under state public health laws. EPA has proposed curtailing the widespread applicability of treatment technologies to systems with similar characteristics such as their similar sources of water. However, a particular contaminant may remain highly localized, so the inherent problem of overregulation could remain.

Total repeal would place safe drinking water responsibilities in the traditional hands of municipal authorities and private water companies, who, until 1974, determined the quality of drinking water. Proponents for repeal argue that EPA has rarely used its regulatory authority under the Act, that enforcement has no teeth since it is highly impractical to threaten a recalcitrant water system with shutdown, and drinking water is solely a state issue which does not involve the interstate transport of pollutants.

EPA believes that there is no support in Congress for repealing the Act, the water supply industry would oppose the eliminaation of a federal presence, and that the Administration would receive severe criticism for repealing a law which provides the last barrier to direct ingestion of toxics in water.

OPTION I (Working Group/EPA Proposal)

ADVANTAGES:

- Might be viewed as a stand in favor of regulatory reform.
- Reduces the agency's vulnerability to lawsuits for not regulating enough under the current law.
- Addresses both the problems of regulations that are too costly and regulations which are not in the national interest.
- Would be subject to less environmental criticism than Gramm/Gorton because it preserves the health protective nature of the Act and leaves the scope of contaminants to be regulated to some administrative discretion.

DISADVANTAGES:

- May not constrain future Administrator's from setting costly regulations or from overregulating since decisions are left largely to the Administrator's discretion.
- The language is subject to various interpretations unless it is further defined by regulation.
- Language might induce environmental criticism since environmentalists want no change in the current law and this approach explicitly attempts to narrow contaminants which can be regulated.

OPTION II (Gramm/Gorton)

ADVANTAGES:

- Is a clear stand in favor of regulatory reform.

- Would reduce the likelihood of overly stringent standards by requiring a cost-benefit test through the language "poses an unreasonable risk."

- Increases the burden of proof on the Administrator in regulating a contaminant.

DISADVANTAGES:

- May undermine the fundamental health-protective nature of the Act as it may require proof of harm before a standard is set.

- Could lead to more litigation over what constitutes an "unreasonable risk."

- Will subject the Administration to strong environmental criticism.

OPTION III (Repeal)

ADVANTAGES:

- Consistent with the Administration's objectives of limiting federal involvement only to those problems that are national in scope.

- Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional bases for federal environmental programs.

DISADVANTAGES:

- Identification of organic contaminants and the determination of health effects of contaminants requires sophisticated analytic capabilities beyond the resources of local communities.

- The Administration would be subject to harsh criticism from the enviornmentalists and from the public for eliminating public protection from direct ingestion of toxics.

THE WHITE HOUSE

WASHINGTON

June 17, 1982

MEMORANDUM FOR THE CABINET COUNCIL ON NATURAL RESOURCES AND ENVIRONMENT

FROM: JAMES G. WATT, CHAIRMAN PRO TEMPORE

Per the Cabinet Council discussion on June 15, attached is an additional paper on the Safe Drinking Water Act. This paper amplifies the previous paper by describing the standard setting options in more detail and by adding a new option to repeal the Act.

What amendments to the Safe Drinking Water Act should the Administration support?

Issue I: Repeal of the Act

Allowing the Act to "expire" would not achieve the objective of repealing the Act. Only the funding provisions of the Act expire on October 1, 1982. The regulatory provisions have no expiration date. Many environmental programs continue for long periods of time after the authorizations have expired. Appropriation committees continue to fund these programs and absent a point of order, the appropriation bills are in order and pass.

To eliminate regulation under the Act, all or certain of its provisions must be repealed. EPA believes that there is no support in Congress for repealing the Act, that the water supply industry would oppose the elimination of a Federal presence and that the Administration would be buffeted with anti-environment rhetoric. On the other hand, given the marginal nature of the industry and the impracticability of shutting down a non-complying water supply system, environmental groups are not nearly as active in this program as they are in other environmental control programs that involve a large number of industries.

PROS

- The elimination of the Safe Drinking Water Act is consistent with Administration objectives of limiting Federal involvement to those problems that are national in scope.

- Providing for safe drinking water has traditionally been a state and local responsibility. Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional basis for the Federal role in environmental problems.

- A Federal involvement in municipal sewage treatment is based on the fact that municipalities have no incentive to bear the costs of control, since the benefits occur to downstream users. This is not the case for municipal water supply. Local residents have complete control (in terms of costs and benefits) over the quality of water they receive.

CONS

- It can be argued that while municipalities can often cope with traditional (viral) pollutants, the identification of organic contaminants and the determination of the health effects of the contaminants requires sophisticated analytic capabilities and toxological expertise beyond the resources of local communities.

- Repeal would be viewed by the public and environmentalists as elimination of a law which protects against direct ingestion of toxics.

- A Federal presence is merited because people travel from state to state and should be insured a uniform quality of drinking water. In fact, the primary Federal role should be the setting of national drinking water standards to insure that consistency, and standards should be set at levels to prevent health risks.

Issue II: Standard Setting

If the law is maintained, should the Administration attempt to amend the law to restrain present and future overregulation?

Background

The Act currently sets up the following sequence of events in setting Revised Primary Drinking Water Regulations:

- Recommendation of health goals by the National Academy of Sciences. The NAS completed its study in 1977.

- Within 90 days of publication of the NAS report, EPA must promulgate Health goals called Recommended Maximum Contaminant Levels (RMCL's), based on the NAS study, for any contaminant "which may have any adverse effect on the health of persons." The RMCL's are not enforceable and are to represent the level at which "no known or anticipated adverse effects" would occur and are to include "an adequate margin of safety."

- EPA must propose enforceable numerical standards called Maximum Contaminant Levels (MCLs), on the date it promulgates RMCLs, for each contaminant for which an RMCL is established, at levels which are as close to the RMCLs as "feasible... (taking costs into consideration)."

Problems with Current Act

The Work Group has focused on two problems which arise from this statutory structure:

- A broad range of contaminants "may have" some adverse effect on health. The mandatory duty to establish RMCLs and MCLs therefore is potentially very expansive. EPA would be vulnerable to a suit demanding the establishment of a large number of standards, many of which may not occur frequently enough or at high enough levels to warrant setting a national regulation.

- The current Act's requirement to set regulatory MCLs as close as "feasible" to the health goal (RMCL) basically establishes an affordability test which does not require consideration of costs versus benefits and thereby might result in standards being imposed, even though only a small health benefit would result.

Option A: Work Group Proposal

The Work Group developed an option which would amend the statute to address these problems. Suggested statutory language is attached. Briefly, this option would:

- Narrow the potential scope of the mandatory duty to set RMCLs and MCLs.

  RMCLs would only need to be set for contaminants which "in the judgment of the Administrator, may have any adverse effect on the health of persons and may occur at levels and frequencies warranting a national primary drinking water regulation." Enforceable MCLs would need to be set only for contaminants which "in the judgement of the Administrator, occur at levels and frequencies warranting a national primary drinking water regulations."

  Thus, at either stage in the logical process, the Administrator would be able to decide whether or not a national regulation was warranted. A reviewing court would judge whether the Administrator had acted arbitrarily and capriciously in making that decision; thus, EPA would bear an increased burden of justifying the decision that a national regulation, and therefore and RMCL and MCL, is warranted.

- Change the basis for setting an MCL. Rather than being "as close ... as is feasible" to the RMCL, it would be "as close ... as is reasonable" to the RMCL. EPA recommends that term "reasonable" be defined to specify those factors the Administrator should consider in making this determination.

Option B: Gramm/Gorton Proposals

S. 1866 and H.R. 4509 would amend the Act to require the Administrator to establish RMCLs and MCLs for each contaminant which "poses an unreasonable risk to the health of persons". Neither bill defines the term "unreasonable risk" but it generally is understood to imply a requirement to conduct a cost/benefit analysis. The test to be met by the Administrator in setting both RMCLs and MCLs would be the same. Therefore, the bills create a redundant process. Since cost is to be a factor in setting the RMCL, it eliminates the RMCL as a health goal. These changes would result in fundamental restructing of the Act.

Option A: Adopt the proposal of the Work Group.

PROS

- Could be viewed as a stand in favor of regulatory reform.
- Could be presented as preserving the basic health-protective nature of the Act, thus minimizing unfavorable publicity.
- Addresses both problems with the current law in an explicit and direct way.
- Reduces the Agency's vulnerability to lawsuits for not regulating enough under the current law.

CONS

- May not constrain future Administrators from setting costly regulations or from overregulating since the approach is left largely to the Administrator's discretion.
- The language is subject to various interpretations unless it is further defined by regulation.

Option B: Support the language on standard-setting in S. 1866 and H.R. 4509.

PROS

- Could be presented as a clear stand in favor of regulatory reform.
- Would reduce the likelihood of overly stringent MCLs by requiring a cost-benefit test through the language "poses an unreasonable risk".
- Increases the burden of proof on the Administrator to regulate.

CONS

- Effective elimination of the health goal by requiring consideration of costs in setting the RMCL would be a fundamental restructuring of the Act.

- Does not deal with the mandatory nature of the standard-setting process, because it would still require the setting of a standard for every contaminant which has a health goal. This would leave the Agency vulnerable to suits to set MCLs for all contaminants for which an RMCL is set and to justify why each unregulated contaminant does not pose an unreasonable risk.

- The term "unreasonable risk" is undefined and is likely to lead to litigation.

Option C: No action

PROS

- EPA would continue with a reasonable implementation of the Act as currently written.

- Avoids potential unfavorable publicity.

CONS

- Does not deal with either of the problems discussed above.

Proposed Amendment to Section 1412

(B) ~~Within 90 days after the date~~ the Administrator ~~makes the publication required by subparagraph (A), he~~ shall by rule establish recommended maximum contaminant levels for each contaminant which, in his judgment based on the report on the study conducted pursuant to subsection (e) and other data available to the Administrator, may have any adverse effect on the health of persons and may occur in public water systems at levels and frequencies warranting a national primary drinking water regulation. Each such recommended maximum contaminant level shall be set at a level at which, in the Administrator's judgement based on such report and other data available to the Administrator, no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety. In addition, he shall, on the basis of the report on the study conducted pursuant to subsection (e) and other data available to the Administrator, list in the rules under this subparagraph and contaminant the level of which cannot be accurately enough measured in drinking water to establish a recommended maximum contaminant level and which may have any adverse effect on the health of persons. Based on information available to him, the Administrator may by rule change recommended levels established under this subparagraph or change such list.

(2) On the date the Administrator ~~establishes~~ proposes pursuant to paragraph (1)(B) recommended maximum contaminant levels he shall publish in the Federal Register proposed revised national primary drinking water regulations if he deems such regulations are warranted (meeting the requirements of paragraph (3)). Within 180 days after the date of such proposed regulations, he shall promulgate such recommended maximum contaminant levels and revised drinking water regulations with such modifications as he deems appropriate.

(3) Revised national primary drinking water regulations promulgated under paragraph (2) of this subsection shall be primary drinking water regulations which specify a maximum contaminant level or require the use of treatment techniques for ~~each~~ those contaminants for which a recommended maximum contaminant level is established or which is listed in a rule under paragraph (1)(B) and which in the judgment of the Administrator, occur at levels and frequencies warrant national primary drinking water regulation. The maximum contaminant level specified in a revised national primary drinking water regulation for a contaminant shall be as close to the recommended maximum contaminant level established under paragraph (1)(B) for such contaminant as is ~~feasible~~ reasonable. A required treatment technique for a contaminant for which a recommended maximum contaminant level has been established under paragraph (1)(B) shall reduce such contaminant to a level for such contaminant as is ~~feasible~~ reasonable. A required treatment technique for a contaminant which is listed under paragraph (1)(B) shall require treatment necessary in the Administrator's judgment to prevent known or anticipated adverse effects on the health of persons to the extent ~~feasible~~ reasonable.

~~For purposes of this paragraph, the term "feasible" means feasible with the use of the best technology, treatment techniques, and other means, which the Administrator finds are generally available (taking cost into consideration).~~ For purposes of this paragraph, the term "reasonable" means reasonable in the judgment of the Administrator taking into consideration the magnitude of the health risk to be avoided, the economic impacts and the cost and availability of treatment technology.

The Safe Drinking Water Act (SDWA) was passed in 1974 in response to a report of chemical contamination of drinking water in New Orleans. Until that time, protection of drinking water was the responsibility of municipalities, states, and private water companies. The Public Health Service issued guidelines for the regulation of certain contaminants, but these were not federally-enforceable.

The SDWA empowers EPA to set national drinking water standards and to provide technical and financial assistance to states to run their own programs. The law now covers about 60,000 water systems, ranging in size from mobile home parks to the city of New York. EPA estimates that the law's annual compliance costs are about $300 million.

EPA has rarely regulated under this statute. Aside from setting federally-enforceable standards for the contaminants listed by the Public Health Service, EPA has established only one major standard since the Act's passage. EPA's main activity under the law has been to provide extensive technical and financial assistance to states to help them run their own programs. All but seven states and territories have now been delegated responsibility to run their own programs.

The SDWA, in any case, gives the EPA Administrator broad latitude to regulate. The Administrator is required to set health goals (not federally-enforceable) for contaminants "which in the judgment of the Administrator, may (emphasis added) have an adverse effect on health." The Administrator is then required to set federally-enforceable standards as close as "feasible" to the health goals. "Feasible" establishes an affordability test but does not require a consideration of costs versus benefits. Thus, the law's requirement to set goals and standards is potentially very expansive, and may result in standards being set which provide only a small health benefit. EPA also has authority to prescribe specific technologies water systems must use to control contaminants for which it is technically infeasible to determine a performance standard, but which, nevertheless, are known to exist because of outbreaks of illness.

The Cabinet Council explored three approaches to changing the current law:

(1) The EPA/Working Group option would provide the EPA Administrator with broad discretion not to regulate by limiting EPA's standard-setting authority to contaminants which "in the judgment of the Administrator occur in public water systems at levels and frequencies warranting a national primary drinking water regulation." The option, moreover, requires the Administrator

to set standards as close as "reasonable" to the health goals, based on a generalized weighing of the costs and benefits. This option would also retain authority to prescribe treatment technologies, but narrow application of this authority.

(2) Gramm/Gorton industry-backed bills would allow the Administrator to regulate only when a contaminent "poses an unreasonable risk to human health." Gramm/Gorton would repeal EPA's authority to prescribe treatment technology.

(3) Repeal of the authority to set enforceable Federal standards would restrict the Federal role to that existing prior to the SDWA -- research, information dissemination, technical assistance, and the promulgation of health-based advisory standards.

DISCUSSION:

The Cabinet Council believes that the EPA Administrator's latitude to regulate must be curtailed not only now but in the future. The majority of the Cabinet Council feels that the minimum acceptable change would be the Gramm/Gorton proposal, and some would go further to repeal the standard-setting authority, leaving in place only federal guidelines and technical assistance. EPA, Justice and Commerce agree that the agency needs legal protection against suits charging insufficient regulation, and believe strongly that the goal can be accomplished through the EPA/Working Group option.

Both the working group option and the Gramm/Gorton option (1) attempt to narrow the Administrator's standard-setting authority; and (2) require a balancing of costs and benefits. The difference is the basis on which a standard is set and the amount of discretion which the Administator has in determining whether or not to regulate.

The working group option would require that a standard be based on a "levels and frequencies" test which would narrow the range of contaminants to be regulated to those that occur in a large enough number of systems and at sufficientlly high levels to justify federal action. The decision on whether to regulate would be left to administrative discretion. The option would also require, once a determination is made to regulate, that all standards be based on a generalized weighing of costs and benefits.

Gramm/Gorton, on the other hand, would require any Administrator to set a standard only where an "unreasonable risk" was present, taking costs and benefits into account. This might require actual proof of harm before a standard is set. Gramm/Gorton would also require that a cost/benefit analysis be done to determine at what level to set a standard.

Thus, the working group option would maintain the basic health protective nature of the law by not requiring proof of harm, but would not necessarily curtail a future EPA Administrator, since the determination to regulate is based on wide discretion. Gramm/Gorton would more extensively curtail a future Administrator by increasing the burden of proof on any Administrator to demonstrate that a contaminant poses a risk. However, those bills could signal some weakening of the scope of protection afforded public health.

Support of the Gramm/Gorton legislation would also mean repeal of EPA's authority to dictate specific treatment technologies. EPA has not used this authority successfully to date, but the Agency believes that this authority is necessary when specific pollutant monitoring is not feasible or too costly. In such cases, performance requirements would be replaced by technology requirements for direct control of the problem. EPA believes that such requirements would be most applicable to acute illness outbreaks. Opponents argue that blanket national technology requirements are not needed to control isolated acute illness and will lead to over-regulation, forcing communities to install technologies when they don't have a problem to treat. Local communities can, and have, moved swiftly to eliminate localized acute outbreaks. Moreover, acute illness problems tend to appear and disappear rapidly, rendering the Federal regulatory process late and ineffective.

Those supporting repeal of authority to set Federal standards argue that state and local governments have the incentive and authority to regulate drinking water quality, that the costs of meeting a Federal standard differ very widely among water system, and that the current Federal standards, which focus primarily on very low level organic contaminants, have had no significant identifiable effect in improving health. A continuing Federal program of research, information, technical assistance, and advisory standards should aid those local governments that may not have the analytic capability to determine the health effects of some contaminants.

EPA believes that there is no support in Congress for repealing federal standards, that the water supply industry would oppose the elimination of a federal presence, and that the Administration would receive severe criticism for repealing federal standards which provide the last barrier to direct ingestion of toxics in water.

OPTION I (Working Group/EPA Proposal)

ADVANTAGES:

- Reduces the agency's vulnerability to lawsuits for not regulating enough under the current law.

- Addresses both the problems of regulations that are too costly and regulations of contaminants which are not of national concern.

- Would be subject to less environmental criticism than Gramm/Gorton because it preserves the preventive health nature of the Act and leaves the scope of contaminants to be regulated to some administrative discretion.

DISADVANTAGES:

- Would not constrain a future Administrator from setting costly standards or from overregulating, since decisions are left largely to the Administrator's discretion.

- The language is subject to various interpretations unless it is further defined by regulation.

- Language might induce environmental criticism since environmentalists want no change in the current law and this approach explicitly attempts to narrow contaminants which can be regulated.

OPTION II (Gramm/Gorton)

ADVANTAGES:

- Would reduce the likelihood of overly stringent standards by requiring a cost-benefit test through an "unreasonable risk" threshold.

- Increases the burden of proof on any Administrator in regulating a contaminant.

- Requires only that the Administration support existing Senate bill and House bill (which has over fifty co-sponsors).

DISADVANTAGES:

- May undermine the fundamental health-protective nature of the Act as it may require proof of harm before a standard is set.

- Could lead to more litigation, unless language is clarified in testimony or amendment, over what constitutes an "unreasonable risk."

- Would subject the Administration to strong environmental criticism.

OPTION III (Repeal of Federal standards)

ADVANTAGES:

- Consistent with the Administration's objectives of limiting Federal involvement only to those problems for which the incentives and authority for state and local governments are inadequate.

- Unlike air and water pollution, drinking water systems do not generate or involve the interstate transport of pollutants -- the traditional bases for federal environmental programs.

DISADVANTAGES:

- In instances where a contaminant is scientifically proven to be harmful to health, repeal of Federal standards would eliminate assurances that citizens would be protected, in the event that state and local governments decline to regulate.

- The Administration would be subject to harsh criticism from the environmentalists and from the public for eliminating Federal protection from direct ingestion of toxics.

RECOMMENDATION

Option I - Working Group: EPA, Justice, Commerce
Option II - Gramm/Gorton: Interior, Agriculture, OMB
Option III - Repeal: CEA, DOE, HUD, OPD

DECISION

_____ Option I

_____ Option II

_____ Option III

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 20, 1982

MEMORANDUM FOR WORKING GROUP ON SAFE DRINKING WATER ACT

FROM: DANNY J. BOGGS
NANCY MALOLEY

SUBJECT; SAFE DRINKING WATER ACT

Attached is a discussion paper for the Safe Drinking Water Act meeting scheduled for 2:00 p.m. on Friday, May 21, 1982 in room 330 of the OEOB.

Please review the paper before the meeting and be prepared to make any additions, deletions, or corrections as well as to elaborate on your Agency's views should there be any.

ISSUE: What Amendments to the Safe Drinking Water Act Should the Administraton propose?

Background

Congress passed the first Safe Drinking Water Act in 1974 in response to reports of chemical contamination of drinking water in New Orleans. The law directs EPA to 1) set national drinking water standards to protect public health, 2) implement standards and monitor compliance, or to delegate that responsibility to states with stricter programs, and 3) provide technical assistance to states. To achieve the standards, EPA sets maximum contaminant levels (MCL's) for contaminants "which may pose an adverse health effect". Where EPA cannot determine an MCL, it may prescribe treatment technologies to protect against certain substances.

EPA, as required by law, set interim standards specifying maximum contaminant levels for standards previously set by the Public Health Service. EPA, with the National Academy of Sciences, was to have issued revised standards within two years of the law's passage setting scientifically sound maximum contaminant levels. However, the National Academy of Sciences said it could not determine at what level a contaminant would be "safe". Thus, the interim measures still remain in effect.

These interim standards regulate ten inorganic contaminants, 6 pesticides, bacteria, turbidity (cloudiness) and radionuclides.

EPA has established only one major regulation outside the list generated by the Public Health Service since 1977. That regulation controls Trihalomethanes. The Agency unsuccessfully attempted to require large water systems to install a technology called Granular Activated Carbon in 1978. It was withdrawn because of excessive costs and lack of scientific evidence.

To date EPA has delegated to 49 states or territories the authority to run their own safe drinking water programs.

The law is estimated to cost water companies about $300 million a year in compliance costs.

Water companies who are regulated by the law, and environmentalists, agree that the Safe Drinking Water Act has resulted in improved drinking water supplies in the United States. The major impact of the program has been to bring 35,000 additional systems into compliance since the Act's passage. However, water companies and some states question the basis for standard setting, the treatment technology requirements, the need for cost benefit analysis, the judicial and administrative procedures, and the regulation of small systems.

S. 1866 (Gorton) and H.R. 4509 (Gramm) address most of those concerns and would amend the law by:

-- Increasing the burden on EPA to prove a contaminant by changing "may adversely affect human health" to "poses an unreasonable risk to human health";

-- Repealing EPA's authority to prescribe treatment technology standards; and

-- Requiring EPA to undertake a benefit/cost analysis as part of the rule-making process.

-- Requiring EPA to adopt a host of new judicial and administrative prodedures including cross-examination in agency hearings and a "substantial evidence" test.

The Senate bill has six co-sponsors, all committee members, and the House bill has fifty co-sponsors, ten of who are committee members.

Discussion

EPA considers the Safe Drinking Water Act essential to protecting the public from waterborne contaminants. The act protects the public at the point of human exposure, while other laws are oriented toward prevention of contamination from drinking water sources. EPA opposes the major changes embodied in S. 1866 and H.R. 4509, described above, and is seeking only a few minor adjustments in the law. These are:

Public Notification -- allowing the Administrator flexibility to determine which violations require public notification, as opposed to the current law which requires notification for all violations;

RMCL's and MCL's -- promulgation of the 1) Recommended Maximum Contaminant Levels (RMCL's) and 2) the Maximum Contaminant Levels (MCL's) together instead of separately (this is included in H.R. 4509 and S. 1866); and

Administrative Orders -- Currently, EPA's only enforcement authority against a non-primacy state is to bring that state into court. EPA and Justice would amend the law to allow EPA to issue administrative orders.

EPA opposes the amendments of S. 1866 and H.R. 4509 listed above for the following reasons:

1. Standard Setting: the amendment is directed toward a non-existant problem. Even under previous administrations EPA has not promulgated large numbers of regulations. Even though "unreasonable risk" is used in the Toxic Substances Control Act and the pesticides law, the Safe Drinking Water Act protects against direct injestion of a contaminant. The "unreasonalbe risk" standard would require that the public be exposed to harmful levels of substances before a standard is promulgated.

2. Technology Requirements: the current law contains appropriate safeguards against abuse of this authority. EPA has not used it in the past. However, elimination of it would preclude EPA from controlling certain substances such as Giardia and viruses, where analytical methods to determine contaminant levels are unreliable or too expensive.

3. Cost/Benefit in Rule Making: EPA believes this should be addressed generically through Executive Order 12291 and pending legislation.

The regulated community, on the other hand, suports amending the law along the lines of S. 1866 and H.R. 4509. They believe that:

1. the "may have an adverse health effect" standard allows EPA to issue regulations for substances which have not been scientifically proven to be contaminants.

2. water quality professionals and not EPA are better equipped to prescribe technology treatment.

3. credible cost/benefit analysis would reduce EPA's vulnerability to litigation.

EPA's views are shared by Commerce and HUD, as well as environmental groups, and state public health departments. Interior supports reauthorization of the act without major changes, but believes that the "unreasonable risk" approach and greater flexibility for treatment techniques need further considertion.

OMB and CEA believe that the law needs to be amended along the lines of S. 1866 and H.R. 4509. Their view, and those of the water companies, are supported by many states, the Conference of State Sanitary Engineers, the National Association of Water Companies, the American Water Works Association, and the State Liaison Group of State Drinking Water Directors.

The National Water Advisory Council, overall, favored amending the law to address standard setting, treatment technologies, and cost/benefit. The Council supports the cost/benefit language of the two bills. However, it believes standard

setting should be based on "acceptable risk", not "unreasonable risk" and that EPA should prescribe a variety of appropriate treatment technologies, with states should having the flexibility to apply other technologies, if effective.

The practical impact of these changes on future EPA activities is hard to measure. Clearly, these amendments establish a more difficult legal burden of proof on the Agency, but whether they would result in a larger number of remands or reversals of EPA regulations is of course up to the courts. The extent to which they will affect internal EPA decision-making processes also unclear. Although the agency has no intention of using the treatment technology authority at the present time, EPA still objects to its repeal because it would limit the number of regulatory options available.

An issue addressed partially in both bills is the regulation of smaller systems. The Act provides that MCL's be the same for all systems regardless of size. Yet these treatment technologies may be an impossible burden for smaller systems. The Act currently provides two forms of relief: exemptions and variances. Although EPA currently intends to exempt small systems through its variance procedures, statuatory clarification of EPA's ability to exempt drinking water systems based on economic impact may be necessary.

Options

I. Support EPA position for moderate change.

Arguments for:

-- Would allow EPA to prescribe treatment for contaminants for which standards cannot be set, thereby affording the public greater protection.

-- Would allow EPA to set standards for contaminants, without conclusive proof that they are harmful, thereby reducing the risk of public exposure to contaminants.

-- Would be viewed as maintaining the strength of the present law.

Arguments against:

-- Gives EPA broad latitude to set costly standards which may not be needed to protect public health.

-- States, not EPA, are better equipped to design their own treatment techniques.

-- EPA has used its technology treatment authority once in the past to propose a technology which was costly and scientifically unsupportable. It technically could repeat the error.

II. Support some or all of S. 1866 and H.R. 4509.

Arguments for:

-- Would ensure that standards are based on sound scientific evidence before committing funds for clean-up, by requiring a greater burden of proof on the federal government that a contaminant ought to be regulated.

-- Would allow the decision on treatment techniques to be made by the experts and those closest to the water supplies which need to be protected.

-- Changing the "may" clause to an "unreasonable risk" clause comports with other environmental statutes -- namely the Toxic Substances Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act.

Arguments Against:

-- The proposals are viewed as weakening a law which protects the public from direct injection of carcinogens.

-- EPA has not over-regulated under this law. Thus, the amendments are based on industry fears over what EPA could do, and not on what it has done.

-- Repeal of technology requirements could leave unregulated certain contaminants which pose a public health risk.

The National Drinking Water Advisory Council was created under the Safe Drinking Water Act to make recommendations to the EPA Administrator on the Safe Drinking Water Act. It consists of fifteen members -- five from state and local agencies, five from private water hygiene organizations, and five from the genereal public. The Council agrees with many, but not all, of the recommendations of S. 1866 and H.R. 4509.

Standard Setting: The Council proposes an "unacceptable risk" clause, as opposed to "unreasonable risk" recommended in the bills.

Treatment Technology: EPA should prescribe a variety of treatment technologies, and states should have the flexibility to apply other technologies where they can show a comparable effect.

Benefit/Cost Analysis: The Council recommends the language of S. 1866 and H.R. 4509.

Administrative Procedures and Judicial Review: The Council recommends that Judicial Review be conducted in the court of appeals, not the D.C. Circuit; that the EPA Administrator be required to consult with the Secretary of HHS and the Council to consider their advice; that various rule-making procedures be adopted. The Council rejects proposals that would require cross-examination during rule-making proceedings and raising the judicial test of the Administrator's rule-making judgement from "arbitrary and capricious" to "substantial evidence".

The Council recommended other changes incorporated in S. 1866 and H.R. 4509, but not discussed in the Working Group options paper. Those are:

Competing Risks: H.R. 4509 would require that proposed final rules include an evaluation of competing risks. The Council believes that this evaluation can be done through rule-making and proposes no statuatory change.

Operation and Maintenance Regulations: H.R. 4509 and S. 1866 would delete the reference to operation and maintenance in the definition of a primary drinking water regulation. The Council agrees.

Variances and Exemptions: H.R. 4509 and S. 1866 would allow cost considerations to be a part of variance decisions for systems which cannot meet the Act's requirements, and allow states, not the EPA Administrator, to determine generally available treatment methods on which to base a variance. The Council recommends that EPA determine treatment methods which do not preclude alternatives proposed by states, and recommends eliminating requirements that states install treatment technologies and demonstrate that those technologies do not work prior to the approval of a variance.

The Council also considered a policy for smaller systems whereby EPA would provide economic guidance for deciding whether technology was available, and the state would evaluate the compliance options on a site-specific basis.

-SON

THE WHITE HOUSE

WASHINGTON

June 10, 1982

TO: SECRETARIAT
CABINET COUNCIL ON NATURAL RESOURCES AND ENVIRONMENT

FROM: DANNY BOGGS

RE: Safe Drinking Water Act

Attached is a draft of the paper to be considered at our meeting tomorrow, Friday June 11, at 9:00 a.m. in Room 330, Old Executive Office Building. Please bring it with you to the meeting.

ISSUE:

What Amendments to the Safe Drinking Water Act Should the Administration support?

BACKGROUND

Congress passed the Safe Drinking Water Act in 1974. Until that time, protection of drinking water was the direct responsibility of either municipalities or locally regulated private firms. The law was passed in response to reports of chemical contamination of drinking water in New Orleans and the need for uniform regulation of drinking water quality.

The law directs EPA to set national drinking water standards to protect public health. To achieve the standards, EPA sets maximum contaminant levels (MCLs) for contaminants "which in the judgment of the Administrator may pose an adverse health effect". Where it is not practical to monitor for a contaminant, EPA is required to prescribe treatment technologies to protect against certain substances. The law also directs EPA to provide technical and financial assistance to states.

There are nearly 60,000 facilities, both private and municipal, regulated by the Safe Drinking Water Act. They range in size from mobile home parks to the New York City Sanitation District which serves over seven million people. EPA estimates that the law's annual compliance costs are about $300 million but could be lower based on regulatory reform efforts.

EPA's regulatory activity under this law has been very limited. Lack of clear-cut data concerning harmfulness of contaminants and their levels in drinking water has made the promulgation of regulations difficult. In 1975, EPA issued interim standards for 10 inorganic pollutants and bacteria which had previously been listed by the Public Health Service. EPA has established only one major regulation outside that list since then.

EPA has concentrated on providing technical assistance to states and municipalities on improving their own programs and in providing grants to upgrade those programs. As a result, 50 states or territories are running their own programs.

The Agency intends to limit future regulatory activity to revising existing standards and regulating harmful organic contaminants.

Nevertheless, the water companies regulated by the law are concerned about the EPA Administrator's latitude to regulate contaminants which "may" harm health and the extent to which the law may require more costly regulations than necessary to protect the public health.

The water companies support legislation -- S. 1866 (Gorton) and H.R. 4509 (Gramm) -- that would make the following changes in the Act: (a) increase the burden on EPA to regulate a contaminant by changing "may adversely affect human health" to "poses an unreasonable risk to human health"; (b) repeal EPA's authority to prescribe treatment technologies; (c) require EPA to undertake a benefit/cost analysis as part of any regulation; and (d) require EPA to adopt a host of new administrative procedures, including cross-examination in agency hearings and a "substantial evidence" test for judicial review.

The Congressionally-chartered National Drinking Water Advisory Council supports some, but not all, of the changes proposed in the two bills. The Council recommends basing a standard on "unacceptable risk" rather than "unreasonable risk"; opposes repeal of EPA's authority to prescribe treatment technologies; and supports the cost/benefit requirement and several of the administrative procedure proposals.

The Act's authorization expires in September of 1982. The Senate is holding hearings on the Gorton bill, but there is no action yet in the House. EPA testified before the Senate in May, recommending a few procedural changes in the law but deferring comments on the major aspects of the Gramm/Gorton bill.

DISCUSSION

A) Standard Setting: EPA, Justice, and all others in the Working Group agree that the Agency needs legal protection against suits charging insufficient regulating (the Environmental Defense Fund sued EPA in 1978 on that basis and partially won). There is concern, however, that the "unreasonable risk" language in the Gramm/Gorton bills and the Advisory Council's "unacceptable risk" approach are confusing and would move the Act away from its basic health protection goals.

EPA and Justice have developed alternative language that would retain the concept of a health-based standard but would give EPA wide discretion not to regulate. The alternative language narrows the range of contaminants such that the Agency could establish regulations only for those which occur in a number of systems and at levels sufficient to justify federal regulatory action. The alternative language would not restrain a future EPA from imposing costly regulations, but it is doubtful that the Gramm/Gorton language would either. As Justice points out, there is a trade-off between giving EPA enough discretionary authority to fend off unfriendly environmental litigations and restraining future EPA authority.

B) Technology Standards: EPA and some Working Group members support retaining the Agency's authority to prescribe treatment technologies as a means of protecting the public from contaminants such as viruses for which monitoring is technically infeasible or very costly but which may cause acute or chronic illnesses. Removal of this authority could impede EPA's ability to protect public health from these types of contaminants. Under the current law, a treatment technique requirement applies initially to all systems, even though only a small number might have the contamination problem; the remainder must obtain a variance. The law provides for waivers from this requirement. EPA proposes that the Act be amended to allow the Administrator to limit the classes of systems to which the requirement applies, based on the characterstics of the system's source of water and similar factors. Waivers would still be available. The Advisory Council agrees that this authority should be retained.

Gramm/Gorton would repeal this authority altogether. OMB and CEA concur. The Agency has not used this authority successfully in the past, and EPA has no current plans to use it in the future. Those health effects which are currently controlled by technology prescriptions are acute, rather than chronic, and states can and have controlled these pollutants under state public health laws. Moreover, technology requirements impose controls for contaminants which vary considerably in severity from system to system, and which, in the case of viruses, tend to appear and disappear rapidly. Variances from the requirement are extremely difficult to secure because they are based on proof by the system that a contaminant is not present. The absence of these contaminants is difficult to prove since they cannot be easily detected.

C) Cost/Benefit Analysis: If the Act's language were left unchanged, EPA would not be allowed to use a cost/benefit test as the basis for setting a standard. The Act requires that standards be set as close as "feasible" to the health goals, and the Supreme Court has interpreted the term "feasible" as precluding a weighing of benefits and costs as the basis for standard setting. Gramm/Gorton would change "feasible" to "reasonable," thereby allowing the standard to be set on the basis of a generalized cost/benefit test. In addition, the bills also specify certain procedural requirements for developing a cost/benefit analysis. The Working Group supports the change from "feasible" to "reasonable" but is concerned with the Gramm/Gorton procedural requirements for cost/benefit analysis and, in particular, the judicial reviewability of those procedures. EPA points out that there is generic legislation pending on regulatory reform that deals with all the different aspects of cost/benefit analysis, such as judicial reviewablity, and believes that the issue should be resolved through this generic legislation.

It should be noted that "reasonable" is undefined. While it is intended to require a cost/benefit analysis as the basis for setting a standard, lack of definition does not compel a future administrator from interpreting it differently.

D) Administrative Procedures: The Gramm/Gorton bills contain additional procedural requirements for promulgating regulations, such as provisions for cross-examinations and specific administrative record requirements. These procedural issues are addressed in the general regulatory reform legislation, and EPA believes that is the appropriate forum for resolving these issues.

Options

I. Standard-setting

a) Base standards on preventing "unreasonable risk". (Gramm/Gorton)

Arguments for:

-- The requirement would ensure that EPA is not forced to regulate pollutants that are not of national concern and is not forced to set unnecessarily stringent standards, thereby forcing unnecessary expenditures. State and local governments always have the authority to reduce contaminant levels further.

-- The unreasonable risk language automatically allows cost/benefit considerations to determine the level at which a standard is set.

-- Unreasonable risk is used in other environmental statutes which cover pesticides and toxics.

Arguments against:

-- Support of the Gramm/Gorton "unreasonable risk" approach will be viewed by environmentalists as a weakening of a law which protects the public from direct ingestion of contaminants. It undermines the preventive nature of the law as it may require proof of harm before a standard is set.

-- EPA has rarely regulated under the Safe Drinking Water Act. Thus, the change is unnecessary and would only result in more criticism against the Administration's environmental policies.

b) Limit Administrator's ability to regulate, based on frequency and levels of contaminants.

Arguments for:

-- This approach would give the Administrator wide discretion not to regulate, thereby satisfying some of the concerns of Gramm/Gorton over EPA's latitude to set unnecessary standards or standards which are too stringent.

-- Wider Administrative discretion not to regulate would reduce the Agency's vulnerability to suits charging insufficient regulation under the law.

-- This approach increases the burden of proof on the Agency to prove that contaminants being regulated are of national concern.

Arguments against:

-- The language is susceptible to various interpretations because the levels requiring regulation are not defined.

-- This does not constrain a future Administrator from setting costly regulations.

II. Technology Requirements

Arguments for repeal: (Gramm/Gorton, OMB, CEA)

-- Technology requirements may not be uniformly cost-effective or necessary, and they may be prescribed for the entire country to treat a problem which could be localized and, possibly, temporary.

-- Prescription of treatment techniques should be left to state and municipal professionals who have the expertise to devise such treatments for their own localized problems.

-- Technology requirements can clearly lead to over-regulation. It is virtually impossible to assess which systems need the treatment technology since the contaminant cannot be easily detected. This means the requirement is applicable everywhere unless a system can secure a variance. Even with EPA's modification, it will be difficult to limit application.

Arguments against repeal and for EPA modification:

-- Limiting the application of treatment technologies to streams with certain characteristics protects water systems from unilateral treatment technology requirements being imposed, but retains the Administrator's authority to protect the public from contaminants for which would be excessively costly or burdensome to administer.

-- The law contains appropriate safeguards against abuse of the technology treatment requirement because EPA may only impose this requirement when a standard cannot be set.

-- Total repeal leaves the Agency with no authority to protect the public from contaminants for which a standard cannot be set.

III. Cost/Benefit and Administrative Procedures

Arguments for: (Gramm/Gorton)

-- The changes in the language from "feasible" to "reasonable" would allow cost/benefit to be used as a basis for setting a standard.

-- The procedural cost/benefit provisions will improve the Agency's rule-making and codify many of the procedures which EPA follows in practice.

Arguments against:

-- The word "reasonable" is undefined. Thus, a future administrator may not interpret it as a cost/benefit test.

-- The procedural requirements for cost/benefit analysis should be addressed generically.

-- The procedural cost/benefit requirements should not be subject to judicial review, except as provided in the generic bill.