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MOU number: 225-79-2001

Memorandum of Understanding

Between
The Environmental Protection Agency

and

The Food and Drug Administration

I. Purpose:

This Memorandum of Understanding establishes an agreement between the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA) with regard to the control of direct and indirect additives to and substances in drinking water.

EPA and FDA agree:

- A. That contamination of drinking water from the use and application of direct and indirect additives and other substances poses a potential public health problem;
- B. That the scope of the additives problem in terms of the health significance of these contaminants in drinking water is not fully known;
- C. That the possibility of overlapping jurisdiction between EPA and FDA with respect to control of drinking water additives has been the subject of Congressional as well as public concern;
- D. That the authority to control the use and application of direct and indirect additives to and substances in drinking water should be vested in a single regulatory agency to avoid duplicative and inconsistent regulation;
- E. That EPA has been mandated by Congress under the Safe Drinking Water Act (SDWA), as amended, to assure that the public is provided with safe drinking water;
- F. That EPA has been mandated by Congress under the Toxic Substances Control Act (TSCA) to protect against unreasonable risks to health and the environment from toxic substances by requiring, *inter alia*, testing and necessary restrictions on the use, manufacture, processing, distribution, and disposal of chemical substances and mixtures;
- G. That EPA has been mandated by Congress under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, to assure, *inter alia*, that when used properly, pesticides will perform their intended function without causing unreasonable adverse effects on the environment; and,
- H. That FDA has been mandated by Congress under the Federal Food, Drug, and

Cosmetic Act (FFDCA), as amended, to protect the public from, inter alia, the adulteration of food by food additives and poisonous and deleterious substances.

It is the intent of the parties that:

A. EPA will have responsibility for direct and indirect additives to and other substances in drinking water under the SDWA, TSCA, and FIFRA; and,

B. FDA will have responsibility for water, and substances in water, used in food and for food processing and responsibility for bottled drinking water under the FFDCA.

II. Background:

A. FDA Legal Authority

"Food" means articles used for food or drink for man or other animals and components of such articles. (FFDCA Section 201(f)). Under Section 402, inter alia, a food may not contain any added poisonous or deleterious substance that may render it injurious to health, or be prepared, packed or handled under unsanitary conditions. Tolerances may be set, under Section 406, limiting the quantity of any substance which is required for the production of food or cannot be avoided in food. FDA has the authority under Section 409 to issue food additive regulations approving, with or without conditions, or denying the use of a "food additive." That term is defined in Section 201(s) to include any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food, if such substance is not generally recognized as safe.

In the past, FDA has considered drinking water to be a food under Section 201(f). However, both parties have determined that the passage of the SDWA in 1974 implicitly repealed FDA's authority under the FFDCA over water used for drinking water purposes. Under the express provisions of Section 410 of the FFDCA, FDA retains authority over bottled drinking water. Furthermore, all water used in food remains a food and subject to the provisions of the FFDCA. Water used for food processing is subject to applicable provisions of FFDCA. Moreover, all substances in water used in food are added substances subject to the provisions of the FFDCA, but no substances added to a public drinking water system before the water enters a food processing establishment will be considered a food additive.

B. EPA Legal Authority

The SDWA grants EPA the authority to control contaminants in drinking water which may have any adverse effect on the public health, through the establishment of maximum contaminant levels (MCLs) or treatment techniques, under Section 1412, which are applicable to owners and operators of public water systems. The expressed intent of the Act was to give EPA exclusive control over the safety of public water supplies. Public water systems may also be required by regulation to conduct monitoring for unregulated contaminants under Section 1445 and to issue public notification of such levels under Section 1414(c).

EPA's direct authority to control additives to drinking water apart from the existence of maximum contaminant levels or treatment techniques is limited to its emergency powers under Section 1431. However, Section 1442(b) of the Act authorizes EPA to "collect and make available information pertaining to research, investigations, and demonstrations with respect to providing a dependably safe supply of drinking water together with appropriate recommendations therewith."

TSCA gives EPA authority to regulate chemical substances, mixtures and under some circumstances, articles containing such substances or mixtures. Section 4 permits EPA

to require testing of a chemical substance or mixture based on possible unreasonable risk of injury to health or the environment, or on significant or substantial human or environmental exposure while Section 8 enables EPA to require submission of data showing substantial risk of injury to health or the environment, existing health and safety studies, and other data. For new chemical substances, and significant new uses of existing chemical substances, Section 5 requires manufacturers to provide EPA with pre-manufacturing notice. Under Section 6 the manufacture, processing, distribution, use, and disposal of a chemical substance or mixture determined to be harmful may be restricted or banned. Although Section 3(2)(B) of TSCA excludes from the definition of "chemical substance" food and food additives as defined under FFDCa, the implicit repeal by the SDWA of FDA's authority over drinking water enables EPA to regulate direct and indirect additives to drinking water as chemical substances and mixtures under TSCA.

The FIFRA requires EPA to set restrictions on the use of pesticides to assure that when used properly, they will not cause unreasonable adverse effects on the environment. EPA may require, *inter alia* labeling which specifies how, when, and where a pesticide may be legally used. In addition, EPA has, under Section 409 of the FFDCa, required FIFRA registrants at times to obtain a food additive tolerance before using a pesticide in or around a drinking water source. Such tolerances establish further restrictions on the use of a pesticide which are enforceable against the water supplier as well as the registrant of the pesticide.

III. Terms of Agreement:

A. EPA's responsibilities are as follows:

1. To establish appropriate regulations, and to take appropriate measures, under the SDWA and/or TSCA, and FIFRA, to control direct additives to drinking water (which encompass any substances purposely added to the water), and indirect additives (which encompass any substance which might leach from paints, coatings or other materials as an incidental result of drinking water contact), and other substances.
2. To establish appropriate regulations under the SDWA to limit the concentrations of pesticides in drinking water; the limitations on concentrations and types of pesticides in water are presently set by EPA through tolerances under Section 409 of the FFDCa.
3. To continue to provide technical assistance in the form of informal advisory opinions on drinking water additives under Section 1442(b) of the SDWA.
4. To conduct and require research and monitoring and the submission of data relative to the problem of direct and indirect additives in drinking water in order to accumulate data concerning the health risks posed by the presence of these contaminants in drinking water.

B. FDA's responsibilities are as follows:

1. To take appropriate regulatory action under the authority of the FFDCa to control bottled drinking water and water, and substances in water, used in food and for food processing.
2. To provide assistance to EPA to facilitate the transition of responsibilities, including:
 - a) To review existing FDA approvals in order to identify their applicability to additives in drinking water.

b) To provide a mutually agreed upon level of assistance in conducting literature searches related to toxicological decision making.

c) To provide a senior toxicologist to help EPA devise new procedures and protocols to be used in formulating advice on direct and indirect additives to drinking water.

IV. Duration of Agreement:

This Memorandum of Understanding shall continue in effect unless modified by mutual consent of both parties or terminated by either party upon thirty (30) days advance written notice to the other.

This Memorandum of Understanding will become effective on the date of the last signature.

**Approved and Accepted
for the Environmental Protection Agency**

Signed by: Douglas P. Costle
Administrator
Environmental Protection Agency

Date: June 12, 1979

**Approved and Accepted
for the Food and Drug Administration**

Signed by: Donald Kennedy
Administrator
Food and Drug Administration

Date: June 22, 1979

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