

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

USDC SDNY
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NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; GINA MCCARTHY,
in her official capacity as Administrator of the
United States Environmental Protection Agency,

Defendants.

No. 16 Civ. 1251 (ER) (GWG)

ECF Case

CONSENT DECREE

WHEREAS, on February 18, 2016, Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) filed its complaint in this matter (the “Complaint”) against the United States Environmental Protection Agency (“EPA”) and Gina McCarthy, in her official capacity as Administrator of the EPA (collectively “EPA”);

WHEREAS, the chemical perchlorate has been detected in public drinking water systems in the United States (76 Fed. Reg. 7762, 7763 (February 11, 2011));

WHEREAS, perchlorate contamination in public drinking water systems may pose a threat to human health (*id.*);

WHEREAS, section 1412(a) of the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300g-1(a), establishes procedures and criteria for EPA to determine whether or not to regulate particular contaminants in drinking water;

WHEREAS, SDWA Section 1412(a)(ii)(II) provides that “[a] determination to regulate a contaminant shall be based on findings that” the three criteria contained in Section 1412(b)(1)(A)

are satisfied: *i.e.*, (1) “the contaminant may have an adverse effect on the health of persons;” (2) “the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern;” and (3) “in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.” 42 U.S.C. § 300g-1(a)(ii)(II); *id.* § 300g-1(b)(1)(A)(i)-(iii).

WHEREAS, on October 10, 2008, EPA published a preliminary regulatory determination that perchlorate did not satisfy the Section 1412(b)(1)(A) criteria (73 Fed. Reg. 60262 (Oct. 10, 2008));

WHEREAS, in response to the October 2008 preliminary regulatory determination and two other public notices relating to perchlorate, EPA received over 39,000 public comments;

WHEREAS, after considering the public comments, on February 11, 2011, EPA published a determination to regulate (the “Determination to Regulate”) perchlorate in drinking water under the SDWA, finding that the Section 1412(b)(1)(A) criteria were all satisfied (76 Fed. Reg. 7762);

WHEREAS, EPA’s Determination to Regulate triggered a mandatory duty under SDWA section 1412, 42 U.S.C. § 300g-1(b)(1)(E), to propose a maximum contaminant level goal (“MCLG”) and national primary drinking water regulation (“NPDWR”) for perchlorate by February 11, 2013;

WHEREAS, EPA has not proposed an MCLG and NPDWR as required;

WHEREAS, this Court has held that EPA’s failure to propose an MCLG and NPDWR constitutes a “failure to perform [a] [non-discretionary] act or duty” under the Safe Drinking

Water Act, within the meaning of 42 U.S.C. § 300j-8(a)(2), noting that EPA did not contest this finding;

WHEREAS, NRDC alleges that EPA's Determination to Regulate triggered a mandatory duty under SDWA section 1412, 42 U.S.C. § 300g-1(b)(1)(E), to publish a final MCLG and promulgate a final NPDWR for perchlorate by August 11, 2014;

WHEREAS, NRDC also alleges that EPA has failed to comply with this second mandatory duty;

WHEREAS, the relief requested in NRDC's Complaint includes an order from this Court establishing deadlines by which EPA must (1) propose an MCLG and a NPDWR for perchlorate, and (2) publish a final MCLG and promulgate a NPDWR for perchlorate;

WHEREAS, after requesting comments from its Science Advisory Board, as required by SDWA, 42 U.S.C. § 300g-1(e), and considering such comments, EPA has developed a biologically based dose response ("BBDR") modeling approach to use in developing an MCLG for perchlorate under the SDWA;

WHEREAS, EPA has begun a peer review process for its BBDR modeling approach;

WHEREAS, EPA anticipates completing this external peer review process no later than October 18, 2017;

WHEREAS, NRDC and EPA have agreed to a settlement of this action without admission of any further issue of fact or law;

WHEREAS, NRDC and EPA consider this Consent Decree to be an adequate and equitable resolution of all the claims in this matter and therefore wish to effectuate a settlement;

WHEREAS, NRDC and EPA agree that resolution of this matter without further litigation is in the best interest of the parties, the public, and judicial economy;

WHEREAS, NRDC and EPA agree that this Court has subject matter jurisdiction over NRDC's claims, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 300j-8(a)(2), sufficient to enter this Consent Decree containing the relief described herein;

WHEREAS, the Court, by entering this Consent Decree, finds that the Consent Decree is fair, reasonable, in the public interest, and consistent with the SDWA;

NOW THEREFORE, without trial or determination of any additional issues of fact or law, and upon the consent of NRDC and EPA, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. GENERAL TERMS

1. This Court has jurisdiction to enter this Consent Decree and, pursuant to the Consent Decree, to order the relief stated herein.
2. This Consent Decree applies to, is binding upon, and inures to the benefit of the parties (and their successors, assigns, and designees).

II. EPA ACTIONS

3. EPA intends to complete the external peer review process no later than October 18, 2017. If EPA determines that it will not complete the external peer review process by that date, EPA shall file a status report on the docket of this case no later than October 30, 2017, describing the progress of the external peer review process, the reason(s) for the delay, and an updated timeline for its completion.
4. No later than October 31, 2018, EPA shall sign for publication in the Federal Register a proposed MCLG and NPDWR for perchlorate.
5. No later than December 19, 2019, EPA shall sign for publication in the Federal Register a final MCLG and NPDWR for perchlorate.

III. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

6. After publication in the Federal Register of notice of the final action required by paragraph 5, this Consent Decree shall terminate and the action shall be dismissed with prejudice and without further action of the parties or the Court. EPA may move the Court for an order reflecting that such termination and dismissal has occurred. NRDC shall have 14 days in which to respond to such motion.

IV. MODIFICATIONS AND EXTENSIONS

7. Any deadline in this Consent Decree may be extended by written stipulation of NRDC and EPA and notice to the Court. To the extent the Parties are not able to agree to an extension of any deadline set forth in this Consent Decree, EPA may seek a modification of the date in accordance with the procedures specified below.

- a. If EPA files a motion requesting a modification of any deadline established by this Consent Decree totaling more than thirty (30) days, provides notice to NRDC at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such automatic extension shall remain in effect until the earlier of (i) a dispositive ruling by this Court on such motion, or (ii) ninety (90) days following the date for which modification is sought. EPA may seek only one extension under this subparagraph for each date established by this Consent Decree. EPA may not seek an extension under this subparagraph for any deadline for which it has already sought an extension under subparagraph 7(b);

- b. If EPA files a motion requesting a modification of any deadline established by this Consent Decree totaling thirty (30) days or less, provides notice to Plaintiffs at least fifteen (15) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such extension shall remain in effect until the earlier of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in the motion. EPA may seek only one extension under this subparagraph for each date established by this Consent Decree. EPA may not seek an extension under this subparagraph for any deadline for which it has already sought an extension under subparagraph 7(a).
- c. EPA may file a motion for a modification of any deadline without providing notice pursuant to subparagraphs 7(a) or 7(b). No automatic extension will be given if EPA seeks an extension under this subparagraph, although the agency may move the Court for a stay of the date for which modification is sought.
- d. Any motion to modify the schedule established in this Consent Decree shall be accompanied by a motion for expedited consideration.

8. Any provision of this Consent Decree may be modified (a) by written stipulation of NRDC and EPA or (b) by the Court following motion of either NRDC or EPA for good cause shown, which may include a showing that the provision sought to be modified is no longer in the public interest, and upon consideration of any response by the non-moving party filed within 14 days of the initial motion. A modification of provisions pursuant to subsection (a) of this paragraph shall be noted by EPA on the docket of this case.

V. DISPUTE RESOLUTION

9. In the event of a dispute between NRDC and EPA concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall provide the other party with a written notice outlining the nature of the dispute and requesting informal negotiations. The parties shall meet and confer, either in person or over the telephone, to attempt to resolve the dispute. If the parties are unable to resolve the dispute within 30 days after receipt of the notice of dispute, either party may petition the Court to resolve the dispute.

10. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be properly filed unless the party filing the motion or proceeding has followed the procedure set forth in paragraph 9.

VI. CONTINUING JURISDICTION

11. The Court retains jurisdiction to enforce the terms of this Consent Decree and to consider any requests for costs of litigation, including attorney's fees.

12. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any final rule or determination issued by EPA pursuant to this Consent Decree.

VII. RESERVATIONS

13. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the SDWA or by general principles of administrative law. EPA's obligation to perform each action specified in this Consent Decree does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

14. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law. By entering into this Consent Decree, NRDC and EPA do not waive or limit any

claim, remedy or defense, on any grounds, related to any proposed or final action EPA takes with respect to the matters addressed in this Consent Decree. NRDC expressly reserves the right to challenge in any proper forum on any ground the lawfulness of any final maximum contaminant level goal and final national primary drinking water regulation for perchlorate. EPA expressly reserves all defenses to such a challenge.

VIII. ATTORNEY'S FEES

15. The deadline for filing a motion for costs of litigation, including attorney's fees, for activities performed prior to entry of the Consent Decree is hereby extended until 90 days after this Consent Decree is entered by the Court. During this 90-day period, the parties shall seek to resolve informally any claim for costs of litigation. If they cannot, NRDC may file a motion for costs of litigation, including attorney's fees.

16. NRDC reserves the right to seek additional costs of litigation, including attorney's fees, incurred subsequent to entry of this Consent Decree and arising from NRDC's need to (1) enforce the terms of the Consent Decree; (2) defend against efforts to modify the same; (3) prepare a motion for costs of litigation as described in paragraph 15; or (4) respond to any other unforeseen continuation of this action. EPA reserves the right to oppose any such request. In the event that NRDC intends to file a claim for any such additional costs of litigation, including attorney's fees, the parties agree to confer prior to filing of such claim to allow NRDC to assess the potential to resolve such a claim informally before acting.

IX. MUTUAL DRAFTING and HEADINGS

17. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by NRDC and EPA. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be

inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

18. Headings contained in this Consent Decree are for the convenience of the reader only and shall not affect the meaning of any of the Consent Decree's terms.

X. NOTICE AND CORRESPONDENCE

19. Any notices required or provided for by this Consent Decree shall be in writing, via electronic mail or certified mail, and sent to each of the following counsel (or to any new address of the parties' counsel as filed and listed in the docket of the above-captioned matter, at a future date):

a. For NRDC:

Sarah V. Fort
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
E-mail: sfort@nrdc.org

Nancy S. Marks
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
E-mail: nmarks@nrdc.org

b. For EPA:

Emily Bretz
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
E-mail: emily.bretz@usdoj.gov

Dawn M. Messier
EPA Office of General Counsel
Mail Code 2366A
1200 Pennsylvania Ave NW
Washington, DC 20460

E-mail: messier.dawn@epa.gov

X. APPROPRIATED FUNDS AND FORCE MAJEURE

20. EPA and NRDC recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

21. EPA and NRDC recognize that the possibility exists that circumstance outside the reasonable control of EPA could delay EPA's compliance with the obligations contained in this Consent Decree. Such circumstances include, but are not limited to, a catastrophic environmental disaster requiring an immediate and/or highly time-consuming response by EPA's Office of Ground Water and Drinking Water, or a lapse in appropriations by Congress resulting in a government shutdown. Should such a delay occur due to an EPA shutdown within one hundred twenty (120) days prior to a deadline set forth in this Consent Decree, such deadline shall be extended automatically one day for each day of the shutdown. Should a delay occur due to a catastrophic environmental disaster within one hundred twenty (120) days prior to a deadline set forth in this Consent Decree, such deadline shall be extended automatically for fourteen days, and after that period, to an alternative date jointly agreed upon by the Parties. EPA will provide NRDC with notice as soon as is reasonably possible in the event that EPA invokes this paragraph of the Consent Decree and will provide NRDC with an explanation of EPA's basis for invoking this paragraph. Any dispute regarding such invocation shall be resolved in accordance with the dispute resolution provision in Paragraph 9 of this Consent Decree.

XI. EFFECTIVE DATE

22. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either party, and the terms of the proposed Consent Decree may not be used as evidence in any litigation between the parties.

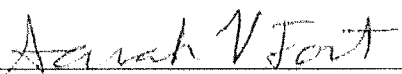
XII. REPRESENTATIVE AUTHORITY

23. The undersigned representatives of NRDC and EPA certify that they are fully authorized by the parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

COUNSEL FOR PLAINTIFF:

Dated: Washington, D.C.
October 17, 2016

By:



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Dated: New York, New York
October 17, 2016


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SO ORDERED on this 18th day of October, 2016.



Edgardo Ramos
United States District Judge

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