



November 24, 2015

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

*Via Certified Mail, Return Receipt Requested*

**Re: Notice of Intent to Sue under Safe Drinking Water Act Section 1449(a)(2) for Failure to Propose and Issue Regulations for Perchlorate in Public Drinking Water**

Dear Administrator McCarthy,

Nearly five years ago, the U.S. Environmental Protection Agency (EPA or the agency) determined that the chemical perchlorate poses a threat to human health that could meaningfully be reduced by regulating its presence in public drinking water. This determination triggered a mandatory duty under the Safe Drinking Water Act (the Act) for the agency to propose and publish regulations for limiting perchlorate in public drinking water supplies. EPA has missed the statute's deadlines for doing so.

Under section 1449(a)(2) of the Act, any person may commence a civil action against the Administrator for failure to perform a nondiscretionary duty.<sup>1</sup> On behalf of the Natural Resources Defense Council (NRDC), we hereby notify you that, sixty days from your receipt of this letter, NRDC intends to file suit against EPA and you in your official capacity as Administrator for failure to perform the nondiscretionary duty to regulate perchlorate under the Act. As required by regulation, we are sending a copy of this notice letter by certified mail to the Attorney General of the United States.<sup>2</sup>

NRDC is a national membership organization committed to protecting public health and the environment and to reducing the exposure of all communities to toxic chemicals. NRDC's members are harmed by the agency's failure to comply with the Safe Drinking Water Act, detailed below.

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<sup>1</sup> 42 U.S.C. § 300j-8(a)(2).

<sup>2</sup> 40 C.F.R. § 135.11(b).

**I. Perchlorate contamination in drinking water presents a significant threat to public health**

Perchlorate is a chemical used primarily in rocket fuel, fireworks, and explosives.<sup>3</sup> Perchlorate has been widely used by the military and defense industry for decades.<sup>4</sup> Indeed, some sources estimate that as much as 90% of man-made perchlorate compounds are used by the defense and aerospace industries.<sup>5</sup>

Perchlorate has been broadly detected in public drinking water systems across the United States. Between 2001 and 2005, monitoring of public water systems detected measurable concentrations of perchlorate<sup>6</sup> in twenty-six states and two U.S. territories.<sup>7</sup> In 2011, EPA estimated that as many as 16.6 million Americans' drinking water may be served by public water systems containing perchlorate.<sup>8</sup> Perchlorate contamination is a longstanding concern in the western and southwestern United States, where discharges from chemical manufacturing and use sites have led to serious and prolonged contamination of drinking water sources.<sup>9</sup> Perchlorate contamination is not simply a regional concern, however; the

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<sup>3</sup> See Nat'l Research Council, *Health Implications of Perchlorate Ingestion* 24 (2005), available at <http://www.nap.edu/catalog/11202.html>.

<sup>4</sup> See Clayton W. Trumpolt et al., *Perchlorate: Sources, Uses, and Occurrences in the Environment*, Remediation, Winter 2005, at 65, 70, available at <http://digitalcommons.unl.edu/usnavyresearch/25/>.

<sup>5</sup> See *id.* at 70.

<sup>6</sup> "Measurable concentrations of perchlorate" are those that were equal to or above the monitoring protocol's Method Reporting Limit of 4 micrograms per liter (ug/L), or parts per billion. See 73 Fed. Reg. 60,262, 60,269 (Oct. 10, 2008). Even in this concentration range, perchlorate contamination is worrisome. Massachusetts has enacted a state limit for perchlorate of 2 ug/L. California has a state limit for perchlorate of 6 ug/L, as well as a Public Health Goal for perchlorate in drinking water of 1 ug/L.

<sup>7</sup> 73 Fed. Reg. at 60,269.

<sup>8</sup> 76 Fed. Reg. 7762, 7765 (Feb. 11, 2011).

<sup>9</sup> See, e.g., U.S. EPA, *Known Perchlorate Releases in the U.S.* (Mar. 25, 2005), available at <https://clu-in.org/download/contaminantfocus/perchlorate/detect0305.pdf>.

Department of Defense has identified dozens of sites in states across the country at which perchlorate has contaminated water resources.<sup>10</sup>

As EPA has itself concluded, perchlorate poses a threat to human health by inhibiting the uptake of iodine into the thyroid, which interferes with healthy thyroid functioning.<sup>11</sup> Because thyroid hormones are critical to growth and development, fetuses, infants, and young children are particularly vulnerable to perchlorate contamination. Scientific studies have linked decreased thyroid function in pregnant women, infants, and children to delayed development, reduced growth, and impaired learning capabilities.<sup>12</sup>

## **II. EPA has failed to comply with its nondiscretionary duty to propose and publish perchlorate regulations under the Safe Drinking Water Act**

In 1974, Congress passed the Safe Drinking Water Act with the goal of protecting public drinking water systems from contamination.<sup>13</sup> The Act, as amended in 1996, directs EPA to establish national standards for water quality in public drinking water systems through the publication of primary drinking water regulations and maximum contaminant level goals.<sup>14</sup> The Act as amended sets forth a multi-step process that the agency must employ in determining which contaminants to regulate.

Every five years, the Act requires EPA to publish a list of contaminants which are not subject to national primary drinking water regulation, but which nonetheless “are known or anticipated to occur in public water systems and which may require regulation.”<sup>15</sup> In choosing which contaminants to list, the statute directs the agency to select those contaminants that “present the greatest public health concern,” taking into account factors including the contaminant’s effects on subpopulations like infants, children, and pregnant women.<sup>16</sup>

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<sup>10</sup> *See, e.g.*, U.S. Gov’t Accountability Office, GAO-10-769, *Perchlorate* app. III (2010), *available at* <http://www.gao.gov/products/GAO-10-769>.

<sup>11</sup> 76 Fed. Reg. at 7763.

<sup>12</sup> *Id.*

<sup>13</sup> *See United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 38 (1st Cir. 2001).

<sup>14</sup> *See generally* 42 U.S.C. § 300f *et seq.*

<sup>15</sup> 42 U.S.C. § 300g-1(b)(1)(B)(i)(I).

<sup>16</sup> *Id.* § 300g-1(b)(1)(C).

Once EPA has published this contaminant candidate list, the Act directs the agency to make a final determination as to whether or not to regulate at least five of the contaminants on the list.<sup>17</sup> This determination must be based on the agency's analysis of three criteria:

- (i) whether the contaminant may have an adverse effect on the health of persons;
- (ii) whether the contaminant occurs or is substantially likely to occur in public water systems with a frequency and at levels that cause a concern for public health; and
- (iii) whether regulation of the contaminant presents a meaningful opportunity for health risk reduction.<sup>18</sup>

If a contaminant meets all three criteria, the agency *must* publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for that contaminant.<sup>19</sup>

EPA published its first contaminant candidate list in 1998.<sup>20</sup> The agency published a second contaminant candidate list in 2005<sup>21</sup> and a third in 2009.<sup>22</sup> Perchlorate was included as a candidate for regulation on all three lists.<sup>23</sup>

On February 11, 2011, EPA issued a regulatory determination to regulate perchlorate under the Safe Drinking Water Act.<sup>24</sup> In that determination, the agency concluded that: (i) perchlorate may have an adverse effect on human health; (ii) perchlorate is known to occur or there is a substantial likelihood that perchlorate will occur in public water systems with a frequency and at levels of

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<sup>17</sup> *Id.* § 300g-1(b)(1)(B)(ii)(I).

<sup>18</sup> *Id.* § 300g-1(b)(1)(B)(ii)(II); *id.* § 300g-1(b)(1)(A)(i)–(iii).

<sup>19</sup> *Id.* § 300g-1(b)(1)(A).

<sup>20</sup> 63 Fed. Reg. 10,274 (March 2, 1998).

<sup>21</sup> 70 Fed. Reg. 9071 (Feb. 24, 2005).

<sup>22</sup> 74 Fed. Reg. 51,850 (Oct. 8, 2009).

<sup>23</sup> 74 Fed. Reg. at 51,852; 70 Fed. Reg. at 9072; 63 Fed. Reg. at 10,275.

<sup>24</sup> 76 Fed. Reg. at 7763.

public health concern; and (iii) regulation of perchlorate in drinking water systems presents a meaningful opportunity for health risk reductions.<sup>25</sup>

Under the Act, the agency's determination that perchlorate meets all three criteria set out in section 1412(b)(1) triggers a mandatory duty to publish a maximum contaminant level goal and to promulgate a drinking water standard for perchlorate.<sup>26</sup> Further, the Act sets a firm deadline by which the agency must act. Once EPA has made a determination to regulate a contaminant, section 1412(b)(1)(E) of the Act requires the agency to propose a drinking water standard within 24 months, and to promulgate a final standard within 18 months after the proposal.<sup>27</sup> The statute also requires that a maximum contaminant level goal be proposed and promulgated simultaneously with the drinking water standard.<sup>28</sup>

EPA announced its regulatory determination for perchlorate in February 2011. Accordingly, EPA's proposed perchlorate regulation was due in February 2013, and its final perchlorate regulation was due no later than August 2014.<sup>29</sup> The agency has failed to issue either a proposed or final regulation, and is therefore in violation of section 1412 of the Safe Drinking Water Act.

### III. Conclusion

By failing to propose and publish primary drinking water regulations and maximum contaminant level goals for perchlorate according to the statutorily prescribed deadlines, EPA has violated its nondiscretionary duties under the Safe Drinking Water Act. These violations continue, and NRDC members are harmed by the agency's failure to fulfill its statutory obligations.

Pursuant to sections 1449(a)(2) and 1449(b)(2) of the Act, NRDC hereby gives notice of its intent to sue to remedy the agency's failure to perform the above-described nondiscretionary acts. If EPA fails to cure these violations within sixty

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<sup>25</sup> *Id.* at 7764-65.

<sup>26</sup> 42 U.S.C. § 300g-1(b)(1)(A).

<sup>27</sup> *Id.* § 300g-1(b)(1)(E).

<sup>28</sup> *Id.* § 300g-1(a)(3).

<sup>29</sup> *See* 76 Fed. Reg. at 7763 ("Once EPA makes a determination to regulate a contaminant in drinking water, [the Act] requires that EPA issue a proposed [primary drinking water regulation] within 24 months and a final [regulation] within 18 months of proposal.").

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days of receipt of this letter, NRDC intends to file suit in federal district court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate.

As required by 40 C.F.R. § 135.12(b), the name, address, and telephone number of the person giving notice pursuant to this letter are as follows:

Natural Resources Defense Council  
1152 15th Street, N.W., Suite 300  
Washington, DC 20005  
(202) 513-6247  
Attention: Sarah Fort

Please do not hesitate to contact us if you would like to discuss this matter further.

Respectfully,



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cc via certified mail, return receipt requested:

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