UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Perchlorate—a chemical that presents a known threat to human health—is in our drinking water. It has been detected hundreds of times in samples from public water systems in twenty-six states. Yet there are currently no national limits on perchlorate levels in drinking water. Public water system operators are not required to monitor for the chemical or disclose its detection.

The United States Environmental Protection Agency has a duty to place limits on perchlorate levels in public drinking water systems. The agency admits as much. It also acknowledges that it has missed the deadline Congress set for issuing draft regulations. The sole question currently before the Court is whether the agency has also missed Congress's deadline for issuing *final* regulations; that is, whether the agency has failed to regulate perchlorate according to the timeline set forth in the Safe Drinking Water Act.

As described more fully below, the answer is plainly yes. The statute establishes a straightforward timeline for proposing and finalizing new contaminant regulations that is designed to ensure swift regulation once a new public health threat is identified. This timeline—a deadline for proposal, followed by a deadline for publication—echoes the language of another environmental statute that courts interpret as establishing binding final deadlines. The legislative history of the Act further confirms Congress's intent that the agency rapidly regulate new contaminants found to pose a risk to human health. By contrast, the

agency's interpretation is illogical, would reward agency delay, and would undercut the public's ability to enforce the Safe Drinking Water Act's requirements.

Plaintiff Natural Resources Defense Council (NRDC), on behalf of its members, asks the Court to compel the United States Environmental Protection Agency and Gina McCarthy[1] to protect public health by limiting the levels of perchlorate that can lawfully occur in public drinking water. Because there are no disputed material facts related to the agency's failure to perform a mandatory duty, this Court should enter summary judgment in favor of NRDC on the issue of liability.

FACTUAL BACKGROUND

The chemical perchlorate occurs in both man-made and natural forms. Pl.'s Statement of Undisputed Material Facts (PSUMF) ¶ 1. Man-made perchlorate is primarily used in rocket fuel, fireworks, munitions, and other explosives. PSUMF ¶ 2. It has been used and manufactured by the United States military and the defense industry for decades. PSUMF ¶¶ 2, 5. Perchlorate also develops as a byproduct of hypochlorite, an agent sometimes used as a disinfectant in water. PSUMF ¶ 3. Perchlorate occurs naturally in some soils, and has been found in certain fertilizers imported from Chile. PSUMF ¶ 4.

Although the full extent of perchlorate contamination in the United States is unknown, there is reason to believe it is widespread. Sampling conducted by various

[1] NRDC has sued the United States Environmental Protection Agency and Gina McCarthy in her official capacity as Administrator of the agency. To avoid confusion, this brief will refer to defendants collectively as "EPA."

federal agencies has detected perchlorate in drinking water, ground water, surface water, soil, and sediment. PSUMF ¶ 5. Between 1997 and 2009, a Department of Defense sampling program detected perchlorate at seventy percent of the over 400 installations where samples were collected. *Id.* NASA sampling detected perchlorate at four of the seven facilities sampled. *Id.* Taken together, perchlorate detections by federal agencies span forty-five states, the District of Columbia, and three U.S. territories. *Id.*

Perchlorate is highly soluble in water. PSUMF ¶ 6. Perchlorate contamination can easily transfer from one medium to another; once perchlorate is in soil, it can readily move into and through ground and surface water that may be sources of public drinking water. *Id.*

This risk is not hypothetical; perchlorate has already been detected in public drinking water systems across the United States. PSUMF ¶ 9. EPA does not currently require water system operators to monitor for the chemical. PSUMF ¶ 7. However, when monitoring was last required nearly fifteen years ago, over 600 drinking water samples tested positive for perchlorate, including samples from twenty-six different states. PSUMF ¶ 9. These samples came from public water systems that may serve as many as 16.6 million Americans. PSUMF ¶ 10. Without more recent testing, it is impossible to know whether this number has grown, remained flat, or decreased. PSUMF ¶ 11.

The presence of perchlorate in drinking water presents a threat to public health. PSUMF ¶¶ 12-17. If ingested, perchlorate can interfere with proper thyroid

functioning. Specifically, perchlorate impairs the uptake of iodine into the thyroid gland, which disrupts thyroid hormone production. PSUMF ¶ 14. This disruption is particularly problematic for fetuses, infants, and young children, as thyroid hormones are critical to many aspects of early growth and development. PSUMF ¶¶ 15-16. Scientific studies have linked decreased thyroid function in pregnant women, infants, and children to delayed development, reduced growth, and impaired learning capabilities. PSUMF ¶ 15.

STATUTORY AND REGULATORY BACKGROUND

In 1974, Congress passed the Safe Drinking Water Act (the Act) with the goal of protecting public drinking water from contamination. *See United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 38 (1st Cir. 2001); H.R. Rep. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6454. Congress charged EPA with administering the Act. *See* 42 U.S.C. § 300f(7)-(8); *see also Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 401 (4th Cir. 2006). Specifically, the Act directed EPA to set enforceable standards "limiting the amount of specified contaminants permitted in drinking water from public water systems." *Nebraska v. EPA*, 331 F.3d 995, 997 (D.C. Cir. 2003).

From the beginning, EPA struggled to fulfill its Congressional mandate. Between 1976 and 1986, EPA did not promulgate a single new chemical regulation. H.R. Rep. 104-632(I), at 7-8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1366, 1370-71. The agency's regulatory pace fell far short of expectations, and prompted a highly critical Congress to amend the statute in 1986 to "rectify major deficiencies in the

implementation" of the Act. S. Rep. No. 99-56, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1566, 1567. Noting that the agency had regulated "only a small fraction of the contaminants that are found in public water systems and that may have an adverse effect on human health," *id.*, Congress amended the Act, setting an aggressive schedule for establishing limits on eighty-five contaminants within three years, *id.* at 3, 1568. The amendments also required the agency to regulate twenty-five new chemicals every three years thereafter. *Id.*

The years that followed saw a dramatic increase in EPA's regulations of new chemicals under the Act. The agency published limits for a total of eighty new chemicals within the decade. H.R. Rep. 104-632(I), at 9, 1996 U.S.C.C.A.N. at 1372. This swift regulatory schedule prompted criticism of its own, however, as some questioned whether the statute prioritized chemicals that posed the most significant risk to human health. *Id.* at 9, 1372. Accordingly, in 1996, Congress again amended the statute's process for regulating new chemicals.

The 1996 Amendments to the Safe Drinking Water Act eliminated the requirement that EPA regulate twenty-five new contaminants every three years. *Id.* at 25, 1388. In its place, the Act set forth a new process for EPA to employ in determining which contaminants to regulate, with the goal of addressing the most pressing health hazards first. Under that process, EPA is charged with periodically evaluating whether to regulate new contaminants based on presence in drinking water, health risks, and opportunity for health risk reduction. Every five years, the agency must publish decisions as to whether it will regulate at least five new

contaminants. 42 U.S.C. § 300g-1(b)(1)(B)(ii)(I). Three factors must drive its determinations: (i) whether the contaminant may have an adverse effect on human health; (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. *Id*. § 300g-1(b)(1)(B)(ii)(II), (b)(1)(A)(i)-(iii). If the agency determines that a contaminant meets all three criteria, it *must* regulate that contaminant under the Safe Drinking Water Act. *Id.* § 300g-1(b)(1)(A).

Once the agency makes the determination to regulate a contaminant, the statute requires EPA to establish limits for that contaminant. These limits take two forms. First, EPA must establish maximum contaminant level goals (MCLGs), 42 U.S.C. § 300g-1(b)(1)(A), which are to be set "at the level at which no known or anticipated adverse effects on the health of persons occur," allowing for a margin of safety, *id.* § 300g-1(b)(4). Second, the agency must promulgate national primary drinking water regulations (NPDWRs), *id.* § 300g-1(b)(1)(A), which must either set a binding maximum contaminant level (MCL) or mandate water treatment techniques. *Id*. § 300f(1)(C). These two limits must be set simultaneously. *Id.* § 300g-1(a)(3).

The statute specifies a timeline for proposal and promulgation of regulations. It provides:

> The Administrator shall propose the maximum contaminant level goal and national primary drinking water regulation for a contaminant not later than 24 months after the determination to regulate . . . , and may publish such proposed regulation concurrent with the determination to

> regulate. The Administrator shall publish a maximum contaminant level goal and promulgate a national primary drinking water regulation within 18 months after the proposal thereof. The Administrator, by notice in the Federal Register, may extend the deadline for such promulgation for up to 9 months.

42 U.S.C. § 300g-1(b)(1)(E).

Completion of this regulatory process triggers additional monitoring and reporting requirements. Once a contaminant is regulated, water system operators must provide information to customers annually about detection frequency and levels. 42 U.S.C. § 300g-3(c)(4). Regulation also triggers a duty for public water system operators to promptly notify customers of violations of binding MCLs. 40 C.F.R. § 141.201.

In the twenty years since Congress first established the Safe Drinking Water Act's current contaminant evaluation process, EPA has identified only one unregulated contaminant that warrants regulation. PSUMF ¶ 18. In 2011, the agency issued a final determination to regulate perchlorate. PSUMF ¶ 17. It 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 public health concern; and (iii) regulation of perchlorate in drinking water systems presents a meaningful opportunity for health risk reduction. *Id.* Nearly six years later, the agency has neither proposed nor finalized perchlorate regulations. PSUMF ¶¶ 20, 22.

PROCEDURAL HISTORY

NRDC filed this citizen suit on February 18, 2016. Prior to filing, NRDC provided EPA with written notice, delivered on November 30, 2015, of the statutory violations alleged by NRDC in this case. PSUMF ¶ 23; 42 U.S.C. § 300j-8(b)(2). NRDC's complaint alleges that EPA has violated the Safe Drinking Water Act in two ways: first, by failing to propose perchlorate regulations by the statutory deadline; and second, by failing to finalize perchlorate regulations by the statutory deadline. NRDC seeks a declaratory judgment and injunctive relief in the form of Court-ordered deadlines for proposal and finalization of perchlorate regulations.

On September 19, 2016, the Court issued an Order finding that, by not proposing perchlorate regulations, EPA failed to perform a non-discretionary act or duty under the Safe Drinking Water Act. Order, ECF No. 24. Thus, the Court has established liability as to NRDC's first claim.

That same day, the Court issued a Scheduling Order governing further proceedings. Scheduling Order, ECF No. 25. Pursuant to that order, NRDC now moves for summary judgment as to liability on its remaining claim.[2]

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[2] On September 28, 2016, the parties jointly advised the Court that they had reached a tentative settlement, subject to final approvals from various governmental entities, and therefore consented to a one-week extension to the briefing deadlines set forth in the Court's Scheduling Order. Joint Letter, ECF No. 26. Defendants have thus far been unable to procure final approval of the tentative settlement. Given the public health concerns at issue in this case, the delays that have already occurred, and this Court's request that this case move forward "as quickly as the parties possibly can make it move along," Tr. of Initial Conf., ECF No. 22-3 at 12:18-19, NRDC is proceeding in compliance with the Court's Scheduling Order. If Defendants are able to secure final approval on the tentative settlement, the parties will promptly inform the Court.

STANDARD OF REVIEW

NRDC's outstanding claim alleges a violation of EPA's duty to finalize perchlorate regulations by the deadline mandated by the Safe Drinking Water Act. The Act provides any aggrieved party the right to bring suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary." 42 U.S.C. § 300j-8(a)(2). Failure to comply with a statutory deadline constitutes a failure to perform a non-discretionary act. *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) (so holding in context of analogous Clean Air Act citizen suit provision).

Summary judgment is appropriate if "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An "issue of fact" is genuine if "a reasonable jury could return a verdict for the non-moving party." *Windsor v. United States*, 699 F.3d 169, 192 (2d Cir. 2012) (internal quotation marks omitted). A fact is "material" if "it might affect the outcome of the suit under the governing law." *Id.* (internal quotation marks omitted).

An agency's interpretation of a statute that is advanced for the first time in litigation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). Such

interpretations should be accepted only to the extent they are persuasive. *SEC v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011).

ARGUMENT

I. EPA has a non-discretionary duty to finalize perchlorate regulations

On February 11, 2011, EPA published a final determination to regulate perchlorate under the Safe Drinking Water Act. 76 Fed. Reg. 7762, 7762 (Feb. 11, 2011); PSUMF ¶ 17. In that determination, the agency concluded that "perchlorate meets the criteria for regulating a contaminant in Section 1412(b)(1)(A)" of the Act. 76 Fed. Reg. at 7765. Accordingly, the agency announced that it "has made a determination to regulate perchlorate in drinking water." *Id.* at 7763.

That determination triggered a non-discretionary duty to actually regulate perchlorate in drinking water. Despite EPA's contention that "Congress did not impose a duty on EPA with respect to the Final Rule until after the Proposed Rule has been promulgated," EPA Letter re: Proposed Orders 3, ECF No. 23, the statute's text is clear that the duty to regulate arises as a direct result of the regulatory determination itself. Section 1412(b)(1)(A) provides that, if the Administrator determines that the criteria have been satisfied, the agency "*shall*, in accordance with the procedures established by this subsection, publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for a contaminant." 42 U.S.C. § 300g-1(b)(1)(A) (emphasis added). The statute reiterates the duty to regulate in subsection (b)(1)(E), mandating that "[f]or each contaminant that the Administrator determines to regulate . . . the

Administrator *shall* publish maximum contaminant level goals and promulgate, by rule, national primary drinking water regulations under this subsection." 42 U.S.C. § 300g-1(b)(1)(E) (emphasis added).

There is no ambiguity or discretion in this language. Congress's use of the word "shall" denotes a mandatory duty. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661-62 (2007); *accord Katz v. Cellco P'ship*, 794 F.3d 341, 345 (2d Cir. 2015). Therefore, once EPA published its determination to regulate, the agency had a non-discretionary duty to issue maximum contaminant level goals and promulgate national primary drinking water regulations for perchlorate.

II. EPA has missed the Safe Drinking Water Act's binding deadline for issuing final regulations

EPA is not only subject to a non-discretionary duty; it has missed the statutory deadline for fulfilling that duty. A statute may establish a deadline for agency action even if a date certain is not identified in the statute, so long as it is "readily-ascertainable" when such action becomes due. *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C. Cir. 1987), *superseded by statute on other grounds*, Clean Air Act Amendments, Pub. L. No. 101-549, § 707(f), 104 Stat. 2399, 2683 (1990), *as recognized in Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). When a statute "sets forth a bright-line rule for agency action, . . . [C]ongress has prescribed a categorical mandate that deprives EPA of all discretion over the timing of its work." *Am. Lung Ass'n*, 962 F.2d at 263. The Safe Drinking Water Act provides exactly such a bright-line rule.

A. The plain language of Section 1412(b)(1)(E) sets a deadline for issuing final regulations

EPA's contention that the agency's unlawful failure to propose regulations somehow means that "the period in which to promulgate a Final Regulation has not begun to run," EPA Letter re: Proposed Orders 2, ECF No. 23, is illogical and contrary to the plain language of the relevant provision of the Act. The timeline for agency action is "readily-ascertainable" from the plain language of the statute. It provides:

> For each contaminant that the Administrator determines to regulate under subparagraph (B), the Administrator shall publish maximum contaminant level goals and promulgate, by rule, national primary drinking water regulations under this subsection. The Administrator shall propose the maximum contaminant level goal and national primary drinking water regulation for a contaminant not later than 24 months after the determination to regulate . . . , and may publish such proposed regulation concurrent with the determination to regulate. The Administrator shall publish a maximum contaminant level goal and promulgate a national primary drinking water regulation within 18 months after the proposal thereof. The Administrator, by notice in the Federal Register, may extend the deadline for such promulgation for up to 9 months.

42 U.S.C. § 300g-1(b)(1)(E).

In drafting the statute, Congress employed a combination of mandatory and permissive language that clearly divides the areas where the agency is, and is not, free to exercise discretion. The statute uses mandatory language for both the timeline for proposal and the timeline for promulgation. EPA "*shall*" propose an MCLG and national primary drinking water regulation "*not later than* 24 months after the determination to regulate," and "*shall*" publish an MCLG and promulgate an NPDWR "within 18 months after the proposal." *Id.* (emphasis added). By

contrast, the agency "may" publish proposed regulations at the time of the regulatory determination, and "may" obtain a nine-month extension. *Id.* The effect of this language is to make it ascertainable, as of the date of the regulatory determination, the latest date on which binding regulations could be issued. Regulations were due within forty-two months of the regulatory determination.[3]

EPA essentially asks this Court to interpret "not later than" to mean "whenever the agency chooses." Such a reading cannot be squared with the language Congress selected. The deadline for final regulation is easily ascertainable from the statute's structure: even if EPA had properly invoked the statute's discretionary extension provision, the agency had an absolute maximum of fifty-one months from the date of the regulatory determination to comply with the statute's command that the agency *shall* publish drinking water regulations. Those fifty-one months—which ended in May 2015—have long passed.

B. Courts have interpreted analogous provisions as setting mandatory final deadlines

The statutory structure chosen by Congress in the Safe Drinking Water Act is not unique. The Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, also uses sequenced deadlines, and courts have held that agencies must comply with subsequent deadlines even if the earlier ones are not met.

[3] The statute provides one means of extending this "deadline"—a nine-month discretionary extension. 42 U.S.C. § 300g-1(b)(1)(E). It also provides a procedure the agency must follow to invoke this extension provision—"notice in the Federal Register." *Id.* EPA did not follow the procedure to extend the deadline.

The ESA provides for the preservation of threatened and endangered species in a variety of ways. Like the Safe Drinking Water Act does for new contaminants, the ESA requires the implementing agency to evaluate new species for inclusion on the list of endangered and threatened species. 16 U.S.C. § 1533(a)(1). It also provides for the designation and protection of certain essential geographic areas, deemed "critical habitat." *Id.* § 1533(a)(3)(A).

The statute sets out a clear timeline for the listing and designation process, whereby an initial action triggers two subsequent deadlines. Once the agency proposes to list a species as threatened or endangered, the ESA requires the agency to publish a final decision on the proposed listing within one year of proposal. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999); 16 U.S.C. § 1533(b)(6)(A). The statute further requires the agency to designate critical habitat for each species it chooses to list under the Act. 16 U.S.C. § 1533(b)(6)(C). Such habitat must generally be designated "concurrently with the final regulation"; however, the agency may under some circumstances extend the deadline for designating critical habitat "by not more than one additional year." *Id.*

The ESA's critical habitat provisions, though complicated, operate in the same fundamental way as the provision of the Safe Drinking Water Act at issue in this case. A threshold action by the agency—the regulatory determination under the Safe Drinking Water Act and the proposal to list a new species under the ESA—triggers deadlines for additional agency actions. The deadline for the first such action is calculated from the date of the triggering event. Under the Safe Drinking

Water Act, a proposed regulation is due within 24 months of the regulatory determination; under the ESA, a final regulation is due within one year of the proposal to list. Those deadlines, in turn, are used to determine the outer-bound date by which the agency must take subsequent acts. Under the Safe Drinking Water Act, the agency must finalize within 18 months of proposal; under the ESA, the agency must designate critical habitat within one year of the final listing decision.

EPA contends that this structure creates only one deadline at a time. Yet in interpreting the ESA's critical habitat provisions, courts have repeatedly referred to the two-year "deadline" by which the agency must designate critical habitat. *E.g., Forest Guardians v. Babbitt*, 174 F.3d at 1182 (referring to agency's failure to meet "deadline"); *Butte Envtl. Council v. White*, 145 F. Supp. 2d 1180, 1183 (E.D. Cal. 2001) ("In sum, the ESA places a two-year limitation on the final designation of a critical habitat.").

The Tenth Circuit's reasoning in *Forest Guardians* makes clear not only that the statute sets forth multiple, binding deadlines, but that the agency's failure to meet the first deadline does not postpone later deadlines. On March 1, 1993, the agency published a proposed rule to list the Rio Grande silvery minnow as endangered. 174 F.3d at 1181. The agency then "failed to meet its March 1, 1994 deadline" for publishing a final rule, issuing the rule instead on July 20, 1994. *Id.* at 1182. Nonetheless, the court calculated the deadline for designating critical habitat as March 1, 1995. *Id.* & n.4. In other words, the court calculated the deadline from

the date of the triggering action, not from the date on which the agency took its unlawfully delayed earlier action.

The ESA directs the implementing agency to act, and sets out a clear and detailed timeline for multiple agency actions; courts have properly interpreted those directions as establishing "deadlines" for the final action. The same is true here.

C. It was Congress's intent to set a mandatory deadline for finalizing new contaminant regulations

Even if the plain language of section 1412(b)(1)(E) did not decide the question, EPA's interpretation is contrary to Congress's intent to create a streamlined regulatory process that would better protect public health. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

In 1996, Congress sought to revise a statute that had already gone through two very different phases of new chemical evaluation and regulation. From 1974 through 1986, the Act did not provide any rigorous process by which EPA was required to analyze new contaminants for regulation. During this time, there were "major deficiencies" in EPA's implementation of the Act, S. Rep. No. 99-56, at 2, 1986 U.S.C.C.A.N at 1567; only one of twenty-two interim regulations was revised, and no new regulations were promulgated between 1976 and 1986. H.R. Rep. 104-632(I), at 8, 1996 U.S.C.C.A.N. at 1371.

Congress sought to solve this problem with the 1986 Amendments to the Act. Following those amendments, EPA was subject to strict Congressional

requirements for agency action. In the decade that followed, EPA regulated 80 new contaminants under the Act. *Id.* at 9, 1372. But by 1996, critics of the 1986 amendments took issue with the Act's aggressive timeline—particularly the requirement that the agency regulate twenty-five new contaminants every three years. At one Congressional hearing, an EPA official summarized such critiques, opining in part that the Act's structure "dilut[ed] limited resources on lower priority contaminants" and "hinder[ed] more rapid progress on high priority contaminants." *Id.* at 10, 1373.

Accordingly, Congress amended the statute again in 1996 with the purpose of enabling EPA to focus its resources on regulating high-priority contaminants. In those amendments, Congress chose the statutory structure now at issue in this case, setting a timeline first for the interim step of proposing regulations and then a timeline for final regulation. This structure is not a signal that Congress did not intend for these subsequent deadlines to have meaning. Rather, it is best understood as a middle ground between the absence of deadlines in the early years of the Safe Drinking Water Act and the aggressive regulatory pace set by the 1986 amendments. Congress sought to provide the agency with adequate time to engage in a "scientifically defensible" regulatory process, *id.* at 10, 1373 (quoting EPA official), while also recognizing that the agency had previously struggled to implement the Safe Drinking Water Act, *id.* at 8, 1371, and that "[a] number of serious contaminants remain unregulated," *id.* at 9, 1372. Thus, Congress established a statutory scheme that combined scientific rigor with a schedule that

would allow "more rapid progress on high priority contaminants," *id.* (quoting EPA official), in order to "attempt[ ] to address these concerns," *id.* at 11, 1372.

When the legislative history of a statute reveals "the importance Congress attached to the time limitations for agency action," to ignore those time limitations would "flout the considered judgment of Congress." *New York v. Gorsuch*, 554 F. Supp. 1060, 1063 (S.D.N.Y. 1983) (interpreting Clean Air Act deadlines). The same remains true even when the deadlines set by Congress might require the agency to act in the absence of perfect scientific data or analysis. *See id.* at 1064 ("The deadlines imposed, when viewed against the various statements of purpose, show simply that Congress concluded that prompt, though imprecise, regulations were preferable to no regulations . . . .").

Indeed, the balance between speed and precision that Congress intended for EPA to strike is evident in the Act itself. Section 1412(e) requires the Administrator to seek comment from the Science Advisory Board as part of the process for establishing regulations for a new contaminant. *See* 42 U.S.C. § 300g-1(e). However, it provides that "[t]his subsection shall, under no circumstances, be used to delay final promulgation of any national primary drinking water standard." *Id.*[4] While Congress sought to have a scientifically robust process, it recognized that there must be some end to that process. To allow the agency to wait indefinitely for more

[4] This whole case has arisen in the context of EPA's using the Science Advisory Board consultation process as justification for its delay in promulgating a final rule, thus defying Congress's explicit direction that the consultation process would "under no circumstances" excuse such delay. *See* Tr. of Initial Conf. 4:21-5:14, ECF No. 22-3.

perfect science would undermine the balance that Congress chose, and would fail to give effect to the statute's clear purpose.

D. EPA's reading would be illogical, would reward agency delay, and would undermine the public's ability to enforce its rights

Even if EPA's reading of the Safe Drinking Water Act were not contrary to the statute's clear language, it simply does not make sense. Accordingly, if the Court rejects NRDC's other arguments, it should find this to be "one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Hayden v. Pataki*, 449 F.3d 305, 322-23 (2d Cir. 2006) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). In such cases, "the intention of the drafters, rather than the strict language, controls." *Id.*

The obvious and oft-expressed intention of Congress was to ensure timely regulation of chemicals that pose a threat to human health. Yet EPA's interpretation of the statute is "demonstrably at odds" with that goal. It undermines not only Congress's intent that the agency rapidly regulate dangerous pollutants, but also Congress's purposeful decision to empower members of the public to bring suit to compel the agency to fulfill its duties under the Act. In passing the Safe Drinking Water Act, Congress purposefully included a citizen suit provision to allow the public to protect its rights under the statute. That provision allows citizens to sue the agency for "failure . . . to perform any act or duty . . . which is not discretionary." 42 U.S.C. § 300j-8(a)(2).

Yet EPA's interpretation of the statute would severely undermine the citizen suit enforcement mechanism provided by Congress. According to EPA's reading, if the agency fails to comply with its statutory duties under section 1412(b)(1)(E), aggrieved parties would be forced to bring two separate suits in order to bring the agency into compliance. In the first suit, plaintiffs would be entitled to seek a court-ordered deadline only for proposed regulations. If EPA failed to promulgate final regulations within eighteen months of the court-ordered deadline, plaintiffs would need to file a second suit to obtain a binding deadline for final regulations.

Even if a would-be plaintiff took action the day after proposed regulations were due, EPA's scheme would likely add years to the regulatory process. A plaintiff would need to send a notice of violation; wait two months for the agency to cure the violations; file suit; wait two months for the agency to answer; and proceed with litigation. Even under the best of circumstances, the initial round of litigation could easily last a year.[5] The remedy a successful plaintiff would receive at that point would be a court-ordered deadline—likely months to years in the future—as to when the agency must *propose* regulations. The public would then need to wait for that deadline, wait an additional eighteen months after that deadline to see if the agency would finalize regulations, and then start the whole process over in the event the agency did not promptly finalize regulations. Thus, according to EPA's

[5] According to Federal Court Management Statistics, the average civil case length from filing to disposition in the Southern District of New York for the year ending in June 2016 was approximately eight months. *See* U.S. District Courts—Federal Court Management Statistics–Profiles—During the 12-Month Periods Ending June 30, 2011 through 2016, p. 11, *available at* http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2016/06/30-1.

interpretation, to use this provision to enforce one of the most fundamental agency duties under the Act—the duty to set limits on unregulated chemicals—citizen plaintiffs would need to be prepared to bring multiple rounds of duplicative litigation over a number of years. The burden of this approach would limit the class of plaintiffs that could and would choose to bring such litigation, and would undercut the role of the citizen suit as a backstop protection against agency inaction.

Finally, EPA's interpretation simply is not a logical reading of the statute. Imagine a law school professor who gave her students the following assignment:

> If you are enrolled in this class, you must complete a legal memo. You must complete your legal research no later than October 15. You may complete your research earlier. You must submit the completed memo to me within two weeks of completing your research.

Is the assignment imperfectly worded? Perhaps. But there can be no real doubt as to whether a student must complete the assignment, and when the assignment is due. The same is true here. The Safe Drinking Water Act set a deadline for issuing final regulations, and EPA has missed that deadline.

III. NRDC has standing to bring this suit on behalf of its members

NRDC brings this suit on behalf of its members who are harmed by EPA's failure to regulate perchlorate in drinking water. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash.*

State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). As discussed below, NRDC members have standing. The interests at stake are directly germane to NRDC's interests in protecting families and communities from toxic chemicals. *See* Declaration of Jennifer Sass, Ph.D. (Sass Decl.) ¶ 1. And there is no reason why the relief requested—ordering EPA to regulate perchlorate in drinking water nationwide—would require the participation of any individual member.

For Article III standing, an organization must show that (1) at least one of its members suffers an injury in fact, (2) the injury is fairly traceable to the challenged action (or, as in this case, inaction), and (3) the injury is likely to be redressed by a favorable decision of the Court. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

The attached declarations demonstrate NRDC's standing. NRDC's members live in communities served by public water systems where perchlorate has been detected multiple times. Declaration of Yoonhee Andrea Wallace (Wallace Decl.) ¶ 6; Declaration of Thomas Carpenter ¶¶ 8-10 (Carpenter Decl.). They have children and may have more in the coming years. Wallace ¶ 2; Carpenter ¶ 2. These members are concerned about their, and their children's, exposure to perchlorate. Wallace Decl. ¶¶ 13-14; Carpenter Decl. ¶¶ 13-16. These concerns are reasonable, in light of the documented health harms from human exposure to perchlorate. *See* Sass Decl. ¶¶ 24-39. If NRDC were to prevail in this lawsuit, forcing EPA to regulate perchlorate, its members would feel safer about letting their families use and drink the water, and would be able to control their exposure if monitoring

revealed contamination. Wallace Decl. ¶¶ 22-23; Carpenter Decl. ¶¶ 23-24; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) (holding that individuals have standing if their reasonable concerns affect their interests). Accordingly, NRDC has standing.

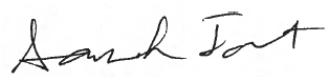
CONCLUSION

We take for granted the safety of the water coming out of our faucets. Yet the agency tasked with ensuring the safety of our tap water is failing to properly implement the central federal law designed to protect the quality of the water we drink. EPA has decided to regulate one new contaminant in the last twenty years, and yet has violated the statute's deadline for doing so.

When Congress directed EPA to propose regulations "not later than" a certain date, it fairly assumed that the agency would fulfill its statutory mandate. Accordingly, when Congress directed EPA to finalize regulations eighteen months after proposal, it fairly assumed that it was setting a time for regulation of forty-two months or, if the agency invoked the statutory extension provision, no more than fifty-one months. Sixty-eight months after the triggering event, EPA has failed to regulate perchlorate. It is in violation of both the duty to propose *and* the duty to finalize perchlorate regulations.

For the reasons set forth above, NRDC asks the Court to declare EPA in violation of its non-discretionary duty to publish final regulations for perchlorate, and to move the agency one step closer toward meeting its obligations to protect public health.

Respectfully submitted,



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