UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency, Defendants.	No. 16 Civ. 1251 (ER) (GWG) ECF Case

PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION TO ENFORCE CONSENT DECREE
AND IN OPPOSITION TO DEFENDANTS' TERMINATION MOTION

Gabriel J. Daly
Nancy S. Marks
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
Phone: (212) 727-4671
Fax: (415) 795-4799
Email: gdaly@nrdc.org

Counsel for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

I. Statutory and Regulatory Background 2

II. Procedural History 6

ARGUMENT 9

I. The Consent Decree requires EPA to issue final perchlorate regulations 9

II. EPA may not withdraw the 2011 Determination to regulate 10

A. The SDWA does not allow EPA to withdraw a final determination to regulate 10

B. EPA's arguments that it can withdraw the 2011 Determination are wrong 15

C. Because EPA cannot withdraw the 2011 Determination, it must comply with the Consent Decree 21

III. EPA has not met its burden to modify or terminate the Consent Decree 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Am. Ass'n of Retired Pers. v. EEOC,
823 F.2d 600 (D.C. Cir. 1987) 17

Am. Nurses Ass'n v. Jackson,
No. Civ. A. 08-2198-RMC, 2010 WL 1506913 (D.D.C. Apr. 15, 2010) 23

Atl. City Elec. Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 17

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 17

Berger v. Heckler,
771 F.2d 1556 (2d Cir. 1985) 9, 21, 22, 23, 26

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa,
708 F. Supp. 2d 890 (D. Minn. 2010) 21

Cronin v. Browner,
90 F. Supp. 2d 364 (S.D.N.Y. 2000) 25

EEOC v. Abercrombie & Fitch Stores, Inc.,
135 S. Ct. 2028 (2015) 15

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 24

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 11

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 9

In re Idaho Conservation League,
811 F.3d 502 (D.C. Cir. 2016) 23

L.A. Lakers, Inc. v. Fed. Ins. Co.,
869 F.3d 795 (9th Cir. 2017) 17

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 17

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001) 17

NAACP v. Donovan,
737 F.2d 67 (D.C. Cir. 1984) 25

NRDC v. Abraham,
355 F.3d 179 (2d Cir. 2004) 17

NRDC v. EPA,
542 F.3d 1235 (9th Cir. 2008) 12, 13, 14

NRDC v. EPA,
No. 16 CIV. 1251 (ER), 2018 WL 8367607 (S.D.N.Y. Dec. 11, 2018) 25

NRDC v. NHTSA,
894 F.3d 95 (2d Cir. 2018) 17

Rufo v. Inmates of Suffolk Cty. Jail,
502 U.S. 367 (1992) 21, 24

Stotts v. Memphis Fire Dep't,
679 F.2d 541 (6th Cir. 1982) 9

Statutes

33 U.S.C.
§ 1314(m) 13
§ 1314(m)(1)(B) 12
§ 1314(m)(1)(C) 12

42 U.S.C.
§ 300f(1)(C) 4
§ 300f note 11, 13, 16
§ 300g-1(a)(3) 4
§ 300g-1(b)(1) 2
§ 300g-1(b)(1)(A) 3, 4, 11
§ 300g-1(b)(1)(A)(i)-(iii) 3
§ 300g-1(b)(1)(B)(i)(I) 3, 4, 11, 20
§ 300g-1(b)(1)(B)(ii)(I) 3, 11, 14
§ 300g-1(b)(1)(B)(ii)(II) 3, 20

§ 300g-1(b)(1)(B)(ii)(IV) 18
§ 300g-1(b)(1)(E) 1, 3, 4, 11, 12, 13, 14
§ 300g-1(b)(2)(A) 15
§ 300g-1(b)(2)(B) 15
§ 300g-1(b)(3)(A) 4
§ 300g-1(b)(3)(A)(i) 20
§ 300g-1(b)(4) 3
§ 300g-1(e) 4, 8, 20, 22
§ 300j-7 ..... 19, 26
§ 300j-8(a)(2) 26
§ 7412(c)(5) 14
§ 7412(c)(9)(B) 15
§ 9613(h) 18

Pub. L. No. 93-523, 88 Stat. 1660 (1974) 4

Pub. L. No. 99-339, 100 Stat. 642 (1986) 5, 16

Pub. L. No. 104-182, 110 Stat. 1613 (1996) 5, 16

Regulations

National Interim Primary Drinking Water Regulations,
Control of Trihalomethanes in Drinking Water
44 Fed. Reg. 68,624 (Nov. 29, 1979) 4

Drinking Water: Preliminary Determination on Perchlorate,
73 Fed. Reg. 60,262 (Oct. 10, 2008) 6, 24

Drinking Water: Perchlorate Supplemental Request for Comments,
74 Fed. Reg. 41,883 (Aug. 19, 2009) 6, 24

Drinking Water: Regulatory Determination on Perchlorate,
76 Fed. Reg. 7762 (Feb. 11, 2011) 3, 6, 7, 11, 18, 23, 25

81 Fed. Reg. 81,099 (Nov. 17, 2016) 2

84 Fed. Reg. 30,524 (proposed June 26, 2019) 8

22 Cal. Code Regs. § 64431 6

310 Mass. Code Regs. § 22.06(2)(q) 6

Legislative History

H.R. Rep. No. 104-632(I) (1996),
reprinted in 1996 U.S.C.C.A.N. 1366 ..... 5, 11, 13, 16, 17

S. Rep. No. 99-56 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1566 ..... 4, 5, 13

S. Rep. No. 104-169 (1995) 13, 16, 20

INTRODUCTION

Over one hundred contaminants are likely prevalent in U.S. drinking water yet remain unstudied and unregulated. To ensure that a reticent Environmental Protection Agency (EPA) responds, the Safe Drinking Water Act (SDWA) requires EPA to evaluate five chemicals every five years based on their toxicity and prevalence. EPA must determine whether it will regulate those chemicals or not. But once the agency decides to regulate, it must actually do so. Congress impressed on EPA two mandatory duties: after issuing a determination to regulate, it "shall propose" and "shall publish" regulations for that contaminant by set statutory deadlines. 42 U.S.C. § 300g-1(b)(1)(E).

In 2011, EPA made a "final determination to regulate" perchlorate, a dangerous chemical found in millions of Americans' drinking water, which increases the risk of neurodevelopmental impairment in fetuses of hypothyroid mothers. But in the ensuing five years—until 2016, when NRDC brought this lawsuit to compel EPA to perform its mandatory duties—EPA failed to act. In this litigation, recognizing the SDWA's clear, mandatory directive, this Court ruled that the agency had a nondiscretionary duty to act, and EPA agreed by consent decree to "propose[]" a regulation and "publi[sh]" a final regulation by the end of 2019. ECF No. 38 ¶¶ 4-5 (the Consent Decree). EPA subsequently requested a six-month extension, and NRDC agreed based on "the public's interest in sound and protective regulations," despite concerns about further delay. ECF No. 55 at 3; *see also* ECF No. 60.

EPA now purports to "withdraw" its 2011 Determination to regulate perchlorate in drinking water. With that determination wiped from the books, EPA believes it can wiggle out of the Consent Decree entered by this Court. But the SDWA does not give EPA the authority to withdraw a final determination to regulate. Once EPA issues a final determination to regulate, the statute's clear, mandatory directive requires that EPA actually regulate.

Because EPA's withdrawal is unlawful, EPA still has a mandatory duty to issue final regulations for perchlorate levels in drinking water. The SDWA, the Consent Decree, and sound principles of equity demand that EPA issue final regulations now. As this Court has already found, EPA's 2011 Determination compelled EPA to issue *proposed* regulations. Just the same, the 2011 Determination compels EPA to issue final regulations, too.

Accordingly, NRDC asks that this Court exercise its equitable powers to protect the integrity of its orders by enforcing the plain terms of the Consent Decree and compelling EPA to regulate perchlorate levels in drinking water.

BACKGROUND

I. Statutory and Regulatory Background

The SDWA directs EPA to set enforceable limits for contaminants found in drinking water that may harm public health. *See* 42 U.S.C. § 300g-1(b)(1). Although EPA has made progress, over one hundred contaminants likely found in U.S. drinking water are not currently regulated. *See* 81 Fed. Reg. 81,099, 81,102 (Nov. 17, 2016). To address this longstanding problem of under-regulation, the SDWA sets

up a funneling process that requires EPA to regularly evaluate and promulgate new regulations. Every five years, EPA must publish a list (called the Contaminant Candidate List) of currently unregulated drinking water contaminants that it believes may require regulation. 42 U.S.C. § 300g-1(b)(1)(B)(i)(I). EPA must then decide whether or not to regulate at least five contaminants from that list. *Id.* § 300g-1(b)(1)(B)(ii)(I); *see also* Drinking Water: Regulatory Determination on Perchlorate, 76 Fed. Reg. 7762, 7762 (Feb. 11, 2011) (the 2011 Determination).

A determination to regulate is subject to its own notice and comment process separate from any substantive regulation. For each of the five contaminants under consideration, EPA must make an initial, preliminary determination whether or not to regulate, and take public comment on that proposal. 42 U.S.C. § 300g-1(b)(1)(B)(ii)(I). In determining whether to regulate, EPA must consider three factors: (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); *see id.* § (b)(1)(A)(i)-(iii).

Once the agency determines to regulate a contaminant, the SDWA *requires* EPA to establish limits for that contaminant. *Id.* § 300g-1(b)(1)(A), (b)(1)(E).[1]

[1] These limits take two forms. First, EPA must establish maximum contaminant level goals (MCLG), 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 (NPDWR), *id.* § 300g-

Specifically, EPA "shall propose" regulations within 24 months of its determination to regulate and "shall publish" final regulations 18 months thereafter; EPA may extend the deadline to issue final regulations by a further nine months only after public notice. *Id.* § 300g-1(b)(1)(E). The SDWA requires EPA to use a scientifically rigorous process when compiling the Contaminant Candidate List and promulgating regulations, such as by directing EPA to consult with its Science Advisory Board. *See id.* § 300g-1(b)(1)(B)(i)(I), (e); *see also id.* § 300g-1(b)(3)(A) (requiring EPA to use the best available science). Nonetheless, the statute still prioritizes public safety over absolute certainty. For example, the statute states that "under no circumstances" should consultation with the Science Advisory Board "be used to delay final promulgation of any national primary drinking water standard." *Id.* § 300g-1(e).

The SDWA's regulation-forcing structure grew out of congressional frustration with EPA inaction. As originally enacted in 1974, the SDWA did not set targets for the number of contaminants that EPA should regulate. *See* Pub. L. No. 93-523, § 1412, 88 Stat. 1660, 1662-65 (1974). But between 1976 and 1986, EPA issued only a single new regulation for chemicals in drinking water. National Interim Primary Drinking Water Regulations; Control of Trihalomethanes in Drinking Water, 44 Fed. Reg. 68,624 (Nov. 29, 1979); *see* S. Rep. No. 99-56, at 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1566, 1570-71.

1(b)(1)(A), which generally set a binding maximum contaminant level (MCL), *id.* § 300f(1)(C). These two limits must be set simultaneously. *Id.* § 300g-1(a)(3).

To "rectify major deficiencies in [EPA's] implementation," S. Rep. No. 99-56, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 1567, Congress amended the SDWA in 1986 to impose mandatory targets and deadlines. *See* Pub. L. No. 99-339, § 101, 100 Stat. 642, 642-47 (1986). 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," S. Rep. No. 99-56, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 1567, Congress set an aggressive schedule for establishing limits on eighty-five contaminants within three years, Pub. L. No. 99-339, § 101(b)(1), 100 Stat 642, 643 (1986); *see also* S. Rep. No. 99-56, at 3. The 1986 amendments also required the agency to regulate twenty-five new chemicals every three years thereafter. § 101(b)(3)(A), (C), 100 Stat. at 644.

In 1996, in response to EPA's concerns, Congress amended the SDWA again. EPA had reported that the twenty-five-contaminant requirement diverted resources away from studying the contaminants it viewed as posing the most serious threats to public health. *See* H.R. Rep. No. 104-632(I), at 8-9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1366, 1371-72. To allow EPA to target "the drinking water problems of greatest public health concern," Congress removed the twenty-five-contaminant target and replaced it with the Contaminant Candidate List evaluation process. Pub. L. No. 104-182 § 3(8)(A), 110 Stat. 1613, 1615 (1996) (codified at 42 U.S.C. § 300f note). Congress gave EPA more flexibility but also acknowledged that "[a] number of serious contaminants remain unregulated." H.R. Rep. No. 104-632(I), at 9, *reprinted in* 1996 U.S.C.C.A.N. at 1372.

II. Procedural History

Perchlorate is a chemical found in rocket fuel, munitions, and certain imported fertilizers. *See* ECF No. 31 at 2. It has been on EPA's Contaminant Candidate List since the agency first began publishing such lists in 1998. *See* 76 Fed. Reg. at 7763. In the absence of EPA action, two states have promulgated their own drinking water regulations for perchlorate, limiting it to 2 to 6 parts per billion (ppb). *See* 310 Mass. Code Regs. § 22.06(2)(q); 22 Cal. Code Regs. § 64431.

In 2011, EPA issued a final determination to regulate perchlorate in drinking water following notice and multiple rounds of public comment over the course of four years. 76 Fed. Reg. at 7762-63; *see* Drinking Water: Perchlorate Supplemental Request for Comments, 74 Fed. Reg. 41,883 (Aug. 19, 2009); Drinking Water: Preliminary Determination on Perchlorate, 73 Fed. Reg. 60,262 (Oct. 10, 2008). EPA "evaluated the approximately 39,000 public comments received" and "made a determination to regulate perchlorate in drinking water." 76 Fed. Reg. at 7763. EPA considered a range of potential "health reference levels"—contamination concentrations that might pose a public health concern—from 1 ppb (for the most vulnerable age group of children) to 47 ppb (for those who are least vulnerable). *Id.* at 7764-65. The agency concluded that perchlorate "increas[es] [the] risk of neurodevelopmental impairment in fetuses of hypothyroid mothers" and occurs, or is substantially likely to occur, with a frequency and at levels of public health concern. *Id.* at 7763-64. And EPA concluded that it could reduce the risks of perchlorate exposure for millions of Americans by regulating perchlorate in public

water systems. *Id.* at 7765 & tbl.2. That final determination "initiate[d] the process to develop a national primary drinking water regulation (NPDWR) for perchlorate." *Id.* at 7762. This marked the first (and thus far, only) time that EPA decided to regulate a contaminant from the Contaminant Candidate List in the nearly 24 years since the SDWA was amended in 1996.

Despite EPA's 2011 findings, by May 2015 (the absolute latest date allowed under the SDWA), EPA had not proposed either a maximum contaminant level goal or regulation for perchlorate. In 2016, NRDC filed this citizen suit, alleging that EPA violated the SDWA by (1) failing to propose perchlorate regulations by the statutory deadline and (2) failing to finalize perchlorate regulations by the statutory deadline. *See* ECF No. 1.

On September 19, 2016, this Court issued an Order finding that, by not proposing perchlorate regulations, EPA had failed to perform a non-discretionary act or duty under the SDWA. Order, ECF No. 24. NRDC moved for summary judgment on its claim that EPA had a mandatory duty to *finalize* a perchlorate regulation, but the parties agreed to, and this Court entered, a Consent Decree. ECF No. 38. In that Decree, the parties agreed to settle this litigation on the condition that EPA would issue proposed and final regulations for perchlorate in drinking water by specified deadlines: proposed regulations by October 31, 2018, and final regulations by December 19, 2019. *See id.* ¶¶ 4,5. The Consent Decree provides for this Court's continuing jurisdiction to enforce its terms. *Id.* ¶ 11.

On August 30, 2018, EPA moved to amend the Consent Decree, claiming that a six-month delay in its peer review process (including creating a novel modeling approach to address comments from the Science Advisory Board) would prevent it from meeting the October 31, 2018, deadline. *See* ECF No. 43 at 16-18. Although the SDWA makes plain that such consultation should not delay the promulgation of final regulations, *see* 42 U.S.C. § 300g-1(e), the parties and this Court agreed that delay was an unfortunate necessity, and extended EPA's deadline to propose a perchlorate regulation by six months, *see* ECF Nos. 55, 57.

In June 2019, EPA issued a proposed rule, in which it proposed a maximum contaminant level goal of 56 ppb for perchlorate—more than nine times above the highest state limit—and did not analyze perchlorate's occurrence at levels below 18 ppb. 84 Fed. Reg. 30,524 (proposed June 26, 2019).

On October 1, 2019, the parties agreed by stipulation, pursuant to paragraph 7 of the Consent Decree, to extend EPA's deadline to issue final regulations to June 19, 2020. ECF No. 60-1.

On June 18, 2020, EPA issued the 2020 Determination, in which it purported to withdraw the 2011 Determination based on its reconsideration of the public health concern posed by perchlorate in public water systems. *See* ECF No. 65-1. Based on the new, higher limits EPA proposed in 2019, and has now adopted, EPA concluded that perchlorate did not occur at levels of public health concern. ECF No. 65-1 at 6-8.

ARGUMENT

The SDWA and the Consent Decree both mandate that EPA issue final regulations for perchlorate. Contrary to the agency's protestations, EPA's duty to promulgate final regulations is not legally impermissible, but mandatory; there has been no change of circumstances, merely further obfuscation and delay; and there is no cause to terminate the Consent Decree on its own terms, but rather good reason to enforce the Decree's terms. This Court should enforce the Consent Decree's plain language—consistent with the mandatory duty the SDWA itself imposes—and direct EPA to promptly issue final perchlorate regulations.

I. The Consent Decree requires EPA to issue final perchlorate regulations

This Court "has an affirmative duty to protect the integrity of its decree" by enforcing its terms. *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (quoting *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 557 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)); *see also id.* ("Consent decrees are subject to continuing supervision and enforcement by the court."); Consent Decree ¶ 11. The Consent Decree entered by this Court required EPA to promulgate final regulations for perchlorate in drinking water by June 19, 2020. *See* Consent Decree ¶ 5; ECF No. 60-1 (extending deadline). That language is clear: "EPA shall sign for publication in the Federal Register a final MCLG and NPDWR for perchlorate." Consent Decree ¶ 5. EPA has not done so. The agency's violation of the Decree is plain.

No other action is contemplated by the Consent Decree. It allows EPA only one choice: promulgate final perchlorate regulations. To be sure, EPA retains some discretion as to the stringency of those regulations. *See id.* ¶ 13. But the Consent Decree maintains only that "discretion accorded EPA by the SDWA or by general principles of administrative law." *Id.* Indeed, EPA does not dispute that the Consent Decree requires it to do what it now refuses to do; rather than argue about the Consent Decree's terms, EPA is moving to vacate.

EPA's attempt to relieve itself of that obligation must fail: the agency does not have authority to withdraw the 2011 Determination. As discussed below, neither the SDWA nor any other principle of law allows EPA to withdraw the 2011 Determination. *See* Part II.A., *infra*. Accordingly, the 2020 Determination is *ultra vires* and cannot justify relieving EPA of its duty under the Consent Decree. But even if the 2020 Determination were lawful, it would not justify the inequitable relief EPA seeks. *See* Part III, *infra*.

II. EPA may not withdraw the 2011 Determination to regulate

EPA's attempt to withdraw the 2011 Determination is unlawful. The SDWA does not authorize EPA to rescind a prior determination to regulate, and EPA's several claims for authority to rescind the 2011 Determination are all invalid.

A. The SDWA does not allow EPA to withdraw a final determination to regulate

The SDWA's text makes clear that, once EPA makes a final determination to regulate, the agency has a mandatory duty to regulate and no authority to withdraw that determination. The statute directs EPA to set enforceable limits for

contaminants in drinking water that may have adverse health impacts. If EPA finds that a contaminant meets the statute's three criteria, EPA *must* regulate the contaminant. *See* 42 U.S.C. § 300g-1(b)(1)(E). The text is plain: "For 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." *Id.*; *see also id.* § 300g-1(b)(1)(A) (EPA "shall" regulate "if the Administrator determines" that a contaminant meets the criteria). "Congress' use of the term 'shall' indicates an intent to impose discretionless obligations." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (quotation marks omitted).

The SDWA's regulation-forcing structure confirms this interpretation. To be sure, as amended in 1996, the statute affords EPA discretion to set its own priorities. 42 U.S.C. § 300f note. The agency determines for itself which contaminants merit consideration for regulation, and thus deserve inclusion on the Contaminant Candidate List. 42 U.S.C. § 300g-1(b)(1)(B)(ii)(I); *see also* 76 Fed. Reg. at 7762-63. And the SDWA allows EPA to select, from among those candidates, which five contaminants to review for regulation. 42 U.S.C. § 300g-1(b)(1)(B)(i)(I), (b)(1)(B)(ii)(I). But Congress intended that EPA would *regulate*. As Congress recognized in 1996, "[a] number of serious contaminants remain unregulated and other contaminants are in serious need of review." H.R. Rep. No. 104-632(I), at 9, *reprinted in* 1996 U.S.C.C.A.N. at 1372. Thus, once EPA makes a final determination to regulate a particular contaminant, the statute requires EPA to

propose and promulgate a "maximum contaminant level goal" and regulation by statutory deadlines. EPA must propose a maximum contaminant level goal and regulation "not later than 24 months after the determination to regulate." 42 U.S.C. § 300g-1(b)(1)(E). And EPA must publish a final goal and promulgate a final regulation within 18 months of its proposal, subject only to a nine-month extension with public notice. *Id.*

In other, similar contexts where Congress has compelled agency action after years of agency intransigence, courts have recognized that reconsideration authority cannot be inferred. In *NRDC v. EPA*, for example, the Ninth Circuit interpreted a Clean Water Act provision similar to section 300g-1 of the SDWA and concluded that EPA could not reverse its final determination triggering a mandatory duty. 542 F.3d 1235, 150-53 (9th Cir. 2008). The provision at issue, section 304(m) of the Clean Water Act, required EPA to publish a list of unregulated "nonconventional pollutants" every two years and stated that the "promulgation of guidelines shall be no later than . . . 3 years after the publication" of the list. 33 U.S.C. § 1314(m)(1)(B), (C). As with perchlorate, EPA found construction stormwater pollution was a "nonconventional" pollutant, proposed its regulation, and then attempted to withdraw its determination to regulate. *See NRDC*, 542 F.3d at 1240-41. The Ninth Circuit rejected that attempt, finding that Congress's "intent to require the EPA to promulgate guidelines is clear." *Id.* at 1250.

The SDWA operates in much the same way. Like the Clean Water Act provision at issue in *NRDC*, the SDWA requires EPA to identify contaminants for

regulation, and then imposes a mandatory duty to regulate those pollutants. The SDWA directs that "[f]or each contaminant that the Administrator determines to regulate," EPA "*shall* publish" final regulations 18 months after issuing proposed regulations. 42 U.S.C. § 300g-1(b)(1)(E) (emphasis added). Similarly, in *NRDC*, the court emphasized that section 304(m) mandated that "the promulgation of [regulations] '*shall* be no later than . . . 3 years after the publication of the plan.'" 542 F.3d at 1253 (quoting 33 U.S.C. § 1314(m) (emphasis added by court)). Under both statutes, once EPA makes a determination, "publish[ing]" or "promulgat[ing]" a regulation are the only actions authorized by the statutes' plain text.

The structure of both statutes reflects "Congress' stated desire to force the EPA to more rapidly promulgate [regulations]." *Id.* As the *NRDC* court explained, the statutory provision at issue there "stemmed from Congress' frustration with 'the slow pace in which . . . regulations [were] promulgated.'" *Id.* at 1251 (quoting S. Rep. No. 99-50, at 3 (1985)). The same is true of the SDWA. In amending the statute in 1996, Congress recognized that "contaminants that pose the highest health risks" were still not being regulated. S. Rep. No. 104-169, at 1 (1995); *see* H.R. Rep. No. 104-632(I) at 9, *reprinted in* 1996 U.S.C.C.A.N. at 1372 ("A number of serious contaminants remain unregulated and other contaminants are in serious need of review.").

In directing EPA to make determinations about whether to regulate five contaminants every five years, Congress granted EPA the ability to target "the drinking water problems of greatest public health concern." 42 U.S.C. § 300f note.

But Congress still anticipated EPA's bringing more contaminants under regulation through the five-year listing cycle (just as it had through the two-year listing cycle interpreted in *NRDC*). Allowing EPA to revisit the findings triggering its mandatory duty would be inconsistent with this purpose because, then, "EPA could delist any [contaminant] to avoid the deadline." *NRDC*, 542 F.3d at 1253.

Finally, both statutes provide separate comment periods for the predicate decisions and the proposed regulations. *Compare id.*, *with* 42 U.S.C. § 300g-1(b)(1)(B)(ii)(I), (b)(1)(E). Because EPA "must have already engaged in a review process to consider whether the category should be listed," it "follows logically that the . . . delay provided for in [the deadline for a final regulation] is not to decide *whether* to list a [contaminant], but to allow the EPA to consider what the *substance* of the [regulations] should be." *NRDC*, 542 F.3d at 1253. The SDWA does not authorize EPA to use the periods for proposing and finalizing its maximum contaminant level goal and regulation to revisit the final determination to regulate perchlorate.

Where Congress intends for an agency determination to regulate to be reversible, it says so. For example, the Clean Air Act requires EPA to identify categories of sources of hazardous air pollutants. 42 U.S.C. § 7412(c)(5). Once a source is listed, regulations for that source "shall be promulgated" within two years. *Id.* But unlike the SDWA provision at issue here or the Clean Water Act provision in *NRDC*, the Clean Air Act provides that EPA "may delete any source category from the list under this subsection, on petition of any person or on the

Administrator's own motion." *Id.* § 7412(c)(9)(B). Any similar provision is conspicuously absent from the SDWA.[2] EPA cannot explain why this Court should "add [those] words" to the statute. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

B. EPA's arguments that it can withdraw the 2011 Determination are wrong

In the 2020 Determination, EPA advances a series of cursory justifications for its authority to withdraw the 2011 Determination.[3] None are meritorious. First, the SDWA's legislative history provides no support for EPA's claim of extra-statutory authority. Second, EPA has no inherent authority to rescind a prior determination, and EPA's suggestion that the prior "final determination to regulate" is not "final" is baseless. Finally, EPA's duty to rely on the best available science does not license the agency to withdraw a determination to regulate.

First, without any footing in the statute's text, the agency invokes the legislative history to the 1996 Amendments to the SDWA, 2020 Determination 8, but that history does not support EPA's claim of authority. EPA relies on a

---

[2] Indeed, the 1986 Amendments to the SDWA *did* include an analogous provision. In that version of the statute, Congress directed EPA to issue regulations for certain specific contaminants. *See* 42 U.S.C. § 300g-1(b)(2)(A). But Congress allowed EPA to substitute alternative contaminants, if doing so would be more protective of public health. *Id.* § 300g-1(b)(2)(B). In the 1996 Amendments, by contrast, Congress granted EPA greater discretion to determine in the first instance which contaminants to regulate, but did not authorize EPA—by substitution, reconsideration, or any other mechanism—to revoke a determination to regulate.

[3] EPA's Termination Motion is altogether silent on the agency's legal authority to withdraw the 2011 Determination. *Cf.* ECF No. 64 (EPA Br.) at 16-19, 22-23.

characterization of the pre-1996 SDWA as "one size-fits-all," which unduly forced "water quality experts to spend scarce resources searching for dangers that often do not exist." *Id.* (quoting S. Rep. No. 104-169 at 13).[4] That statement, EPA contends, suggests Congress intended that its 1996 amendments would allow EPA to "prioritize actual health risks in determining whether to regulate any particular contaminant." *Id.* As detailed above, that is precisely what the 1996 Amendments accomplished: unlike the 1986 Amendments, which compelled EPA to regulate a prescribed number of contaminants every three years, §§ 101(b)(1), (b)(3)(A), (C) 100 Stat. at 643-44; *see also* H.R. Rep. No. 104-632(I), at 8, *reprinted in* 1996 U.S.C.C.A.N. at 1371, the 1996 Amendments allow EPA to target "the drinking water problems of greatest public health concern," § 3(8)(A), 110 Stat. at 1615 (codified at 42 U.S.C. § 300f note). But it simply does not follow that, by allowing EPA to set priorities, Congress also implicitly authorized EPA to later rescind its determinations.

Rather, Congress struck a balance: the choice of which contaminants to regulate would be EPA's, but once EPA determined to regulate a contaminant, a compulsory timeline would channel EPA inevitably towards regulating in a similar manner as the 1986 Amendments. That was a legislative compromise: in its original form, the SDWA gave EPA too much discretion, *see* H.R. Rep. No. 104-632(I), at 7-8,

[4] The statement EPA quotes comes from the testimony of Governor George Voinovich of Ohio. *See* S. Rep. No. 104-169, at 13. Whatever value legislative history may have in elucidating the intent of Congress, the testimony of a state governor cannot supplant Congress's plain text.

reprinted in 1996 U.S.C.C.A.N. at 1370-71; the 1986 Amendments, some in Congress believed, too little, *see id.* at 8-9. Because "statutes are records of legislative compromise," the best evidence of the balance Congress struck in 1996 is in the text of those amendments. *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 803 (9th Cir. 2017) (quoting *Am. Ass'n of Retired Pers. v. EEOC*, 823 F.2d 600, 604 (D.C. Cir. 1987)); *see Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184 (2003) (Scalia, J., dissenting) ("The best way to be faithful to the resulting compromise is to follow the statute's text. . . ."). EPA's attempt to undo that compromise to expand its own authority must be rejected.

Nor does EPA have any inherent authority to do what Congress has not authorized. *Contra* 2020 Determination 9. The Second Circuit has repeatedly rejected the contention that an agency has any inherent reconsideration authority. *See NRDC v. NHTSA*, 894 F.3d 95, 112-13 (2d Cir. 2018); *NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004). Where a statute "do[es] not provide for reconsideration following prescription of a final rule," an agency simply lacks that authority. *Abraham*, 355 F.3d at 202. That limit follows from the "well-established principle that 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'" *Id.* (quoting *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986)); *see also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (noting federal agency, as "creature of statute" has "*only* those authorities conferred upon it by Congress" (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001))). For any agency to have authority to rescind or withdraw a prior decision, it must be

authorized by statute to do so. But the "SDWA does not include a provision explicitly authorizing withdrawal of a regulatory determination." 2020 Determination 9. The necessary conclusion is that EPA lacks authority to withdraw a regulatory determination.

EPA contends that a determination to regulate is "not itself final agency action," such that it remains subject to reconsideration until the agency issues final regulations. 2020 Determination 10. That argument, however, conflates two separate concepts: EPA's reconsideration authority and the judiciary's authority to review final agency action. The fact that a determination to regulate is not final agency action does not mean that the determination is subject to agency reconsideration. It simply means that the decision is not subject to immediate judicial review. But EPA's "final determination to regulate" is still "final" for the agency's purposes. *See* 76 Fed. Reg. at 7762 (announcing "EPA's *final* determination to regulate" (emphasis added)).

Congress often defers judicial review of agency action, as it did here, based on public health concerns. *See, e.g.*, 42 U.S.C. § 9613(h) (deferring review of EPA Superfund cleanup orders until cleanup is complete). Here, Congress was most concerned with EPA's persistent failure to regulate dangerous contaminants in drinking water. *See supra* pp. 4-5. Thus, Congress authorized immediate judicial review of a decision *not* to regulate. 42 U.S.C. § 300g-1(b)(1)(B)(ii)(IV). Conversely, Congress deferred review of EPA's decision *to* regulate until EPA fulfilled its mandatory duty and promulgated a regulation. Litigation around EPA's

determination to regulate would result in even further delay of necessary public health regulations. True, an incorrect *positive* determination carries the risk of a misallocation of EPA's resources. But if EPA incorrectly reconsidered its determination to regulate, that would result in precisely the delay of public health regulation that Congress sought to avoid. Instead, Congress reasonably chose to err on the side of health protection and regulation, deferring until after EPA promulgated a regulation any challenge to, or reconsideration of, the agency's determination to regulate. Contrary to EPA's arguments, Congress's decision to defer judicial review of a determination to regulate only underscores EPA's lack of authority to reconsider its decision.

Finally, EPA goes on at length about the supposed improvements in the agency's understanding of the science underlying its determination to regulate. *See* EPA Br. 9-11, 12-15; 2020 Determination 8-9. But as EPA recognizes, *see* EPA Br. 23, this Court lacks jurisdiction to review the merits of the agency's decision. *See* 42 U.S.C. § 300j-7(a). This Court need not—indeed, may not—consider whether EPA's reasoning, in withdrawing the 2011 Determination, is arbitrary and capricious.[5] Rather, this Court has jurisdiction only to consider whether EPA has failed to perform a mandatory duty.

In any event, EPA is wrong to insist that it "followed the procedure contemplated by the Consent Decree by completing the necessary scientific process in order to promulgate a perchlorate regulation." EPA Br. 24. EPA gets the SDWA's

[5] NRDC intends to challenge the merits of EPA's decision in a separate action.

sequencing backwards. The statute requires EPA to "consult[] with the scientific community, including the Science Advisory Board," prior to publishing its initial list of contaminants that "may require regulation." 42 U.S.C. § 300g-1(b)(1)(B)(i)(I). The SDWA then requires that, when EPA selects one of those contaminants to regulate, it must make its determination to regulate "based on the best available public health information." *Id.* § 300g-1(b)(1)(B)(ii)(II). Of course, EPA must always rely on "the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices," *id.* § 300g-1(b)(3)(A)(i), but the statute does not contemplate EPA's returning again and again to the Science Advisory Board to revisit a final determination to regulate. After EPA has determined to regulate a contaminant, the Science Advisory Board is expected to consult on the MCLG and NPDWR. *Id.* § 300g-1(e). But the SDWA makes explicit that such consultation may never "be used to delay final promulgation of any national primary drinking water standard." *Id.*[6]

[6] If, after issuing a perchlorate regulation, EPA were to determine that certain water systems have very low levels of perchlorate, the SDWA provides EPA and state agencies flexibility. For example, 42 U.S.C. § 300g-7 allows states to tailor monitoring requirements as long as they assure adequate compliance. Congress recognized that systems with no detectable levels of a contaminant, and which are incurring high monitoring costs, might need to be exempted from monitoring requirements. *See* S. Rep. No. 104-169, at 15. Congress envisioned accommodations of that kind, not the wholesale withdrawal of a contaminant from regulation, to account for changing circumstances like the (supposed) decrease in drinking water systems with levels of perchlorate that present a public health risk. *See* 2020 Determination 20-28; EPA Br. 11-12.

C. Because EPA cannot withdraw the 2011 Determination, it must comply with the Consent Decree

Because the 2011 Determination remains in effect, EPA's "obligation[]" has not "become impermissible under federal law," *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 388 (1992), but rather remains compulsory under both the SDWA and the Consent Decree. Nor has there been any change in circumstances warranting modification of the Consent Decree. To change the law, the 2020 Determination must have legal effect. *Cf. City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 708 F. Supp. 2d 890, 901 (D. Minn. 2010) (guidance letters, without force of law, do not effect change in law under *Rufo*). But of course, an unlawful agency rule has no legal effect. Accordingly, there has been no change in legal circumstances. EPA cannot be allowed to now ignore its sole remaining obligation under the Consent Decree. This Court can, and must, order EPA to comply.[7]

III. EPA has not met its burden to modify or terminate the Consent Decree

EPA's equity arguments also fail. Allowing EPA to shirk its duty would pervert the logic underlying parties' reliance on consent decrees. "A defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative

[7] To be clear, NRDC does not seek to hold EPA in contempt. "Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Berger*, 771 F.2d at 1569.

obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568. That is just what EPA seeks to accomplish here.

Since the Consent Decree was signed in October 2016, EPA has enjoyed the Decree's benefits. By entering into the Consent Decree, EPA succeeded in delaying by years its obligation to issue final perchlorate regulations. Had NRDC not agreed to settle this litigation, there is every likelihood that this Court would have found that EPA not only had a mandatory duty to propose a regulation, but also to publish one. *Cf.* ECF No. 24 at 2 (finding "ECF'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"); ECF No. 31 at 10-11 (NRDC summary judgment brief arguing that EPA had a mandatory duty to not only propose but also *promulgate* a perchlorate regulation).

In addition, NRDC did not oppose EPA's motion to amend the Consent Decree to further extend EPA's deadlines based on EPA's representations that incorporating comments from its Science Advisory Board and peer reviewers were taking longer than anticipated. ECF No. 55 at 2-3. Under the SDWA, NRDC had a right to demand that EPA take a precautionary approach and regulate with the information it had. See 42 U.S.C. § 300g-1(e) ("[U]nder no circumstances" should EPA's consultation with the Science Advisory Board "be used to delay final promulgation of any national primary drinking water standard."); *see also* ECF No. 55 at 2-3 (noting that EPA's decision to create a new model for perchlorate "violate[s] both the text and the purpose of this clear directive"). Nonetheless,

NRDC agreed to EPA's requested extension based on NRDC's sensible belief that EPA would use the extra scientific consultation to propose a "sound and protective regulation[]" that was in the public interest. ECF No. 55 at 3. NRDC did not think that EPA would instead use that extra time to reconsider its decision to regulate.

NRDC's reliance on the Consent Decree's plain language was reasonable. EPA's past practice shows that, where the agency intends to retain discretion to regulate *or not*, it makes its discretion clear. Thus, consent decrees that retained agency discretion not to regulate committed the agency only to issuing a "final action" by a particular date. *See, e.g.*, *In re Idaho Conservation League*, 811 F.3d 502, 514 (D.C. Cir. 2016). But where the agency commits to issuing a particular regulation, because it has a non-discretionary duty to regulate, EPA employs language like that in Paragraph 5 of this Consent Decree. *See Am. Nurses Ass'n v. Jackson*, No. Civ. A. 08-2198-RMC, 2010 WL 1506913, at *1 (D.D.C. Apr. 15, 2010) (reviewing industry intervenor's objection that consent decree should provide deadline for "final agency action" rather than a "regulation" and noting EPA's position that it had a mandatory duty to promulgate a regulation).[8]

Moreover, for years EPA has recognized that a final determination to regulate must inexorably lead the agency to propose and finalize an NPDWR. *See* 76 Fed. Reg. at 7762 ("Once EPA makes a determination to regulate a contaminant

[8] Nor is there anything improper about such an agreement. While a court cannot order an agency to regulate in a particular manner, it may order that an agency issue *some* regulation, particularly where, as here, the agency has a nondiscretionary duty to do so. *Berger*, 771 F.2d at 1578.

in drinking water, SDWA requires that EPA issue a proposed NPDWR within 24 months and a final NPDWR within 18 months of proposal."); 74 Fed. Reg. at 41,884 ("Once EPA determines to regulate a contaminant in drinking water, EPA must issue a proposed national primary drinking water regulation (NPDWR) and final NPDWR within certain set time frames."); 73 Fed. Reg. at 60,264 (similar). Across multiple administrations, in proposed and final rules resulting from notice-and-comment rulemaking, the agency has repeatedly taken this position. NRDC reasonably relied on this interpretation when it agreed to EPA's requests for extensions. It would be inequitable to allow EPA to modify the Consent Decree now. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding it is arbitrary for an agency to reverse a legal interpretation without acknowledgement and after it has engendered reliance interests).

EPA's change of heart about the dangers of perchlorate is not a basis for disrupting the parties' settled expectations. *Cf. Rufo*, 502 U.S. at 388-89 (stressing the importance of finality for consent decrees involving the government and explaining that mere clarifications in the law do not automatically warrant modifications of a consent decree). True, changes in law, either by statute or intervening precedent, can render an obligation under a consent decree illegal. *See id.* at 388. But no change in the law has occurred here. *Contra* EPA Br. 16. All that has changed is EPA's *application* of the law to perchlorate. EPA may be concerned about a challenge to its 2011 Determination, but any such challenge is not for this Court to resolve. *See supra* p. 19. What is clear is that EPA made a determination to

regulate, has no power to withdraw that determination, and under the Consent Decree and the statute, must now regulate.[9]

Finally, there is no cause to terminate the Consent Decree under its own terms. *Contra* EPA Br. 24. The public interest is undoubtedly served by the prompt issuance of a final regulation that reduces the prevalence of a dangerous chemical that "increas[es] [the] risk of neurodevelopmental impairment in fetuses of hypothyroid mothers" and that "occur[s] or [for which] there is a substantial likelihood that [it] will occur with a frequency and at levels of health concern in public water systems." 76 Fed. Reg. at 7763-64. This Court's prior decision modifying the Consent Decree only underscores that point. *Contra* EPA Br. 25. As this Court recognized, "the public certainly has an interest in 'the prompt issuance of a [r]egulation.'" *NRDC v. EPA*, No. 16 CIV. 1251 (ER), 2018 WL 8367607, at *1 (S.D.N.Y. Dec. 11, 2018) (alteration in original) (quoting *Cronin v. Browner*, 90 F. Supp. 2d 364, 374 (S.D.N.Y. 2000)). It was only because EPA's unwarranted

[9] EPA points to no authority for the remarkable proposition that an agency may unilaterally reverse its application of a statute and thereby avoid a consent decree compelling compliance with that statute. *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), is no support. *Contra* EPA Br. 17. There, the district court twice found that, in setting rates under a "nonimmigrant" labor law, the Department of Labor had failed to comply with its own implementing regulations. *NAACP*, 737 F.2d at 70. But, the court held, the Department had discretion under the statute to set rates as it chose. In response, the Department promulgated new regulations, with which its rate setting complied. The district court enjoined the implementation of those regulations, too, but the D.C. Circuit reversed, concluding that the Department retained discretion to modify its regulations because "an agency can engage in new rulemaking to correct a prior rule which a court has found defective." *Id.* at 72. That uncontroversial principle has no relevance here. No court has found EPA's 2011 Determination defective. Quite the opposite: this Court has found that the 2011 Determination compelled EPA to issue proposed regulations for perchlorate.

delay had made issuance of a proposed regulation impossible under the Consent Decree's deadline that the Court allowed the parties to modify that deadline. But the public's interest in regulation was "outweighed" only "in the short term" by the need for an extension. *Id.* The public's ultimate interest is in seeing the dangers of perchlorate in drinking water ameliorated. The SDWA demands EPA promulgate regulations to do so, as does this Court's Consent Decree.

***

In the exercise of its equitable powers, this Court has considerable discretion. The Court has jurisdiction to enforce the Consent Decree and EPA's mandatory duty to publish perchlorate regulations without the need for any review by a court of appeals. 42 U.S.C. § 300j-8(a)(2).

Alternatively, if the Court disagrees, the Court could enforce the Consent Decree's mandate to regulate—consistent with the Court's "duty to protect the integrity of its judgments" and its equitable powers to do so, *Berger*, 771 F.2d at 1569—while modifying the Consent Decree to accommodate the parties' anticipated litigation over the merits of EPA's 2020 Determination in the proper forum, *see* 42 U.S.C. § 300j-7. This Court could do so by compelling EPA to issue final regulations, as the Consent Decree requires, while providing that the effective date of those regulations is stayed pending resolution of litigation over the merits of EPA's decision not to regulate. Such a modification would avoid the inequitable result of rewarding EPA for disregarding this Court's order, while facilitating the orderly resolution of the parties' dispute. It would also ensure that, in the event the 2020

Determination is set aside as a result of such litigation, a final regulation for perchlorate will come into effect immediately, rather than after further unjustified delay. NRDC would not oppose such a modification.

CONCLUSION

Under both the plain mandates of this Court's Order and the dictates of the SDWA, EPA remains obliged to issue final regulations for perchlorate in drinking water. This Court should enforce its Consent Decree and require EPA to promptly issue final regulations.

Dated: July 9, 2020

Respectfully submitted,

s/ Gabriel J. Daly
Gabriel J. Daly
Nancy S. Marks
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
Phone: (212) 727-4671
Fax: (415) 795-4799
Email: gdaly@nrdc.org

Counsel for Plaintiff