

Perchlorate/Safe Drinking Water Act: U.S. Environmental Protection Agency Determination to Not Regulate



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/23/2020

The United States Environmental Protection Agency (“EPA”) issued a June 18th pre-publication notice (“Notice”) addressing perchlorate.

EPA announced it is withdrawing its 2011 determination to regulate perchlorate in accordance with the Safe Drinking Water Act (“SDWA”).

Perchlorate is an inorganic ion composed of one chlorine atom bound to four oxygen atoms and is derived from both natural and manmade sources. It is produced in the United States by industrial processes and used primarily as oxidizers in solid fuels to power rockets, missiles, and fireworks. The chemical is highly stable and mobile in the aqueous environment. Perchlorate exposure generally occurs through the ingestion of contaminated food or drinking water.

EPA’s action addresses whether the agency should issue a Maximum Contaminant Level Goal (“MCLG”) and promulgate a National Primary Drinking Water Regulation (“NPDWR”) for perchlorate.

The SDWA requires that EPA address three criteria to issue a MCLG. They include:

1. the contaminant may have an adverse effect on the health of persons;
2. the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and
3. in the sole judgment of the EPA Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.

See SDWA 1412(b)(1)(A).

EPA determined in 2011 that perchlorate met the three SDWA statutory criteria. As a result, it published a proposed drinking water standard.

Nevertheless, in the Notice EPA states that it has since reviewed data and concluded the chemical does not meet the SDWA criteria for regulation. It argues that data and analysis in the record support the proposition that the chemical does not occur in public water systems with a frequency and at levels of public health concern.

EPA states in the June 18th preamble that it has never previously withdrawn a SDWA regulatory determination. However, it states that the decision is supported by the legislative history associated with the 1996 amendments to the SDWA.

Cited is the repeal of the statutory requirement that the agency regulate an additional 25 contaminants every three years. This was replaced with the current SDWA requirement that the agency determine whether regulation is warranted for five contaminants every five years. A Committee Hearing view is expressed which stated:

. . . the current law is a one-size-fits-all program. It forces our water quality experts to spend scarce resources searching for dangers that often do not exist rather than identifying and removing real health risks from our drinking water. Citing S. Rep. 104-169 (1995) at 12.

This amendment is argued to have reflected Congress' intent that EPA prioritize actual health risks in determining whether to regulate any particular contaminant.

EPA's decision is highly likely to be challenged by any number of environmental and public interest organizations through a SDWA citizen suit action.

Thanks to David Carstens, Senior Project Manager at Harbor, who passed along a link to the EPA pre-publication notice.

A link to the pre-publication rule can be found [here](#).