UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	No. 16 Civ. 1251 (ER) (GWG) ECF Case

RESPONSE TO MOTION TO MODIFY CONSENT DECREE DEADLINES

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In 2011, the U.S. Environmental Protection Agency (EPA) identified perchlorate as a chemical that occurs in public drinking water "at levels of public health concern." 76 Fed. Reg. 7762, 7762 (Feb. 11, 2011). Nearly eight years later, the public is still waiting for the agency to set and enforce limits on perchlorate levels in drinking water.

Despite a commitment, endorsed by the Court, to propose a perchlorate regulation by October 31, 2018, EPA has not done so. Instead, the agency has moved to modify the consent decree to extend the deadline for proposing a perchlorate regulation by six months, to April 30, 2019. *See* Mem. in Supp. of Mot. to Modify the Consent Decree 2, ECF No. 43.

NRDC has had the opportunity to question Mr. Eric Burneson, the Director of the Standards and Risk Management Division in EPA's Office of Groundwater and Drinking Water, about the status of EPA's work towards issuing a perchlorate regulation.[1] Based on Mr. Burneson's testimony, NRDC will not oppose Defendants' motion to modify the consent decree. The proposed perchlorate rule remains unfinished. Burneson Dep. 85:6-86:25.[2] Thus, enforcing the consent decree's terms without modification would be futile, and would not serve the public interest. *See Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992) (finding

[1] Mr. Burneson's office holds primary responsibility for proposing perchlorate regulations. *See* Ex. 1, Burneson Dep. 23:11-24.

[2] Mr. Burneson has reviewed the deposition transcript and corrected various transcription errors, including in page ranges cited herein. The corrections do not materially alter the substance of his testimony, and are included in the excerpted transcript provided at Exhibit 1.

modification of a consent decree appropriate when enforcement of existing terms "would be detrimental to the public interest").

NRDC's consent to an extension should not be mistaken for an endorsement of the agency's efforts to meet the consent decree's deadline. The entirety of the delay to date has resulted from EPA's decision, at the suggestion of its Science Advisory Board, to use a novel modeling approach to deriving a Maximum Contaminant Level Goal (MCLG) for perchlorate. Burneson Dep. 47:12-49:12. Though EPA correctly notes that the Safe Drinking Water Act mandates that the agency seek comments from the Science Advisory Board before proposing a new national primary drinking water regulation, Mem. in Supp. of Mot. to Modify 2-3, it reads out Congress's express admonition that this consultation "shall, *under no circumstances*, be used to delay final promulgation of any national primary drinking water standard." 42 U.S.C. § 300g-1(e) (emphasis added). The years of delay that have been spent developing a model for deriving an MCLG for perchlorate violate both the text and the purpose of this clear directive.

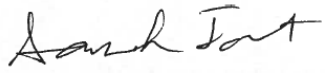
Moreover, Mr. Burneson's testimony revealed no evidence that the delays described in Defendants' papers rendered compliance with the consent decree's terms "substantially more onerous." *Rufo*, 502 U.S. at 384. Of the 56 federal employees in the Standards and Risk Management Division, Mr. Burneson estimates that fewer than six full-time employee equivalents were dedicated to perchlorate over the past two years. *See* Burneson Dep. 13:4-6; 30:16-36:13. At no time did Mr. Burneson's division add staff to the project or authorize overtime to

minimize delays. Burneson Dep. 65:6-9, 67:19-68:3. And though the agency had a clear sense by early January 2017 of the nature of the revisions to the agency's scientific model that peer reviewers would recommend, it waited months before beginning to make those changes. *See id.* at 60:6-63:20. The agency has provided no evidence that a faster response would have been onerous.

Nonetheless, "regardless of the reasons therefor, . . . the delay is now a reality." *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000). Mr. Burneson has testified that significant work remains, and that "[t]he quality of [the proposed rule] would suffer" if the Court were to require the agency to move more quickly on the tasks that remain. Burneson Dep. 87:11-16. One of the primary considerations in evaluating whether modification of a consent decree is warranted is whether "enforcement of the decree . . . would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. Because the public's interest in sound and protective regulations is paramount, *Cronin*, 90 F. Supp. 2d at 373-74, NRDC does not oppose EPA's proposed modification.

A six-month extension will provide ample time for the agency to complete remaining drafting, reviews, and revisions on a proposed perchlorate rule. NRDC anticipates the agency will complete its work promptly and publish a proposed perchlorate rule without further delay.

Respectfully submitted,



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