

Rural Water Issues Advisory [6/2/2019]

Four Observations Regarding EPA's Proposed Perchlorate Rule Signed on May 23: EPA is asking for comments on the proposal within 60 days.

1. EPA's rule prohibits any access to the Safe Drinking Water Act's (SDWA) small system variance technology. NRWA has urged the Agency to update the current affordability standard in order to allow rural and small communities to utilize the most economical and safe treatment options (the so-called small system variance technologies). Under the SDWA, EPA must make a finding that their rules are "affordable." To determine affordability, EPA adopted a policy that families can afford annual water rates of 2.5% of median household income (MHI). NRWA believes that the use of MHI computed as a national aggregate to be the sole metric for determining affordability has many problems and should be revised to be reasonable for small communities and allow access to affordable compliance treatment options. EPA's MHI standard does not consider the quantity, concentration, rural demographics, and financial abilities of low-income families or disadvantaged populations to afford the rule as required by the Agency's Environmental Justice policy. In 2006, EPA found that "some stakeholders have argued that the current criteria are too stringent and fail to recognize situations in which a significant minority of systems within a size category may find a regulation unaffordable. After seven years of experience with the current criteria, EPA agrees it is time to consider refinements to address the situations of communities with below average incomes or above average drinking water and treatment costs." EPA has not finalized a new policy after making this declaration in 2006 and retains the 2.5% MHI standard in the perchlorate rule.
2. The proposed regulation relies on a risk assessment model that AWWA has found lacking. According to AWWA's April 9, 2018 correspondence with the Agency regarding the modeling that is used to determine the MCL under the proposed rule, *"The Agency's current draft approach has not allayed our concerns. Our review supports the conclusions of prior studies that low levels of perchlorate have no demonstrated health consequence that can be scientifically validated with the confidence necessary to support regulatory action. While we support the modeling efforts applied by the Agency, the perchlorate model is not fit for purpose and, if accepted, would set a troubling precedent for the scientific integrity of the Agency's regulatory process."* NRWA has supported AWWA's finding that the current risk assessment modeling is not fit for the purpose and would set a troubling precedent.
3. The proposed rule does not explain what principle EPA relied on to determine how to select perchlorate for a SDWA regulation. On October 10, 2008, the EPA announced a negative regulatory determination for perchlorate in accordance with the SDWA, *"The Agency determined that a national primary drinking water regulation (NPDWR) for perchlorate would not present a meaningful opportunity for health risk reduction for persons served by public water systems."* On February 11, 2011, the Agency revised the 2008 determination with an affirmative conclusion, *"EPA has determined that perchlorate meets SDWA's criteria for regulating a contaminant -- that is, perchlorate may have an adverse effect on the health of persons; 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 in the sole judgment of the Administrator, regulation of perchlorate in drinking water systems presents a meaningful opportunity for health risk reduction for persons served by public water systems. Therefore, EPA will initiate the process of proposing a national primary drinking water regulation (NPDWR) for perchlorate."* NRWA is not aware of any "intelligible principle" articulated by the Agency on how the Administrator implements the "sole judgment" SDWA authority in determining whether a contaminant meets the SDWA criteria for regulation. The U.S. Supreme Court has determined that *"when conferring decision-making authority upon agencies, Congress must lay down an intelligible principle to which the person or body authorized to act is directed to conform."*
4. EPA has asked for stakeholders if they believe that EPA should *"withdraw the agency's 2011 [positive] determination to regulate perchlorate in drinking water."* In 2008, NRWA commented to EPA that *"a national standard for perchlorate would not result in a meaningful opportunity for health risk reduction. Based on the occurrence, health risk, and related findings presented in the Agency's analysis we also believe that a health advisory is appropriate. It is evident that perchlorate is a problem in specific targeted areas. A health advisory will provide the acceptable levels that are safe for local communities with contaminated source water... it is particularly important that the benefits of a regulation be carefully weighed against the costs and only those with an overriding benefit/cost advantage be promulgated. For perchlorate it is clear that this advantage does not exist uniformly and in fact, for some communities the aforementioned reference provides evidence that the adverse health effects caused by the cost of the regulation may equal or outweigh the projected benefits may outweigh the projected benefits of the regulation... when evaluating whether a regulation will result in a meaningful health benefit, EPA must take these effects into consideration."*