State Water Resources Control Board

Division of Drinking Water

# **Final Statement of Reasons for Rulemaking**

# **Including Comments and Agency Response**

# **PERCHLORATE DETECTION LIMIT FOR PURPOSES OF REPORTING**

 Public Hearing Date: 28 April 2020

Board Meeting Date: 6 October 2020

Agenda Item No. 3

## **General**

At its 6 October 2020 public meeting, the State Water Resources Control Board (State Water Board), in Resolution No. 2020-0036, adopted regulations to lower the perchlorate detection limit for purposes of reporting (DLR) from 0.004 mg/L to 0.002 mg/L, and then to 0.001 mg/L as of 1 January 2024. The regulations also include the reincorporation of lost definitions for “Source Water Assessment” and “Potentially Contaminating Activity” that are still referenced within the current regulations.

The State Water Board, in its 6 March 2020 Notice of Proposed Rulemaking, initially proposed a DLR of 0.002 mg/L, with an alternative of 0.001 mg/L which it initially rejected on the basis of insufficient current laboratory capacity at this level. Based on written and oral comments received during the 45+-day comment period and at the 28 April 2020 public hearing, State Water Board staff revised the proposed regulations. A Notice of Public Availability of Changes to Proposed Regulations, Addendum to the Initial Statement of Reasons (ISR Addendum), and revised proposed regulation text were released for public comment on 20 July 2020; a revised Notice of Public Availability of Changes to Proposed Regulations was released on 7 August 2020 to extend the comment deadline from 12:00 p.m. (noon) on 7 August 2020 to 12:00 p.m. (noon) on 18 August 2020. On 6 October 2020, the State Water Board adopted the proposed regulations without any further changes.

## **UPDATE OF INFORMATION CONTAINED IN THE INITIAL STATEMENT OF REASONS AND ADDENDUM** (Gov. Code, §11346.9(a)(1))

The information contained in the Initial Statement of Reasons (ISR) published on 6 March 2020 and the ISR Addendum released on 20 July 2020, which are hereby incorporated by reference, remains unchanged except for the following:

* 1. **ECONOMIC IMPACT ASSESSMENT** (Gov. Code, §11346.3(a))

As described in the ISR Addendum, the underlying assumptions regarding both (1) per-analysis costs at 0.002 mg/L and 0.001 mg/L and (2) which water sources would be most likely to see new detections of perchlorate and be subject to increased sampling and analysis frequencies remained the same. While the original proposal would have resulted in cost increases only as a result of increased monitoring frequencies for water sources projected to be most likely to see new detections of perchlorate, the revised proposal is expected to add per-analysis cost increases for all sources subject to perchlorate monitoring requirements.

Although the ISR Addendum identified the increased costs to the regulated community in both the first and second phases, some costs were inadvertently not included in the total statewide costs for the second phase of the regulation. Sources with testing schedules not expected to change, whether because they are already on an increased monitoring schedule (4 analyses annually) or because they are located in a county with no prior perchlorate detections and therefore expected to continue with routine monitoring (1 analysis every three years) would still experience increased costs during the second phase of the regulation’s implementation due to the increased per-analysis costs. Although these costs were identified, the total costs for the 304 sources already on increased monitoring ($272,384 annually) and for the 4,849 sources expected to remain on routine monitoring ($362,059 annually) were not included in the statewide total costs. The inadvertent omission of these updated total costs is nonsubstantial in nature, as it did not impact the costs to the public water systems identified in the ISR Addendum. Based on the comments received, these omissions do not appear to have impaired understanding of the effect and impact of the change to the proposed regulations.

* 1. **EXPRESS TERMS**

As described in the ISR Addendum, the State Water Board has adopted the following revised text for the proposed perchlorate DLR:

* In Table 64432-A, replace the current perchlorate DLR of 0.004 mg/L with a revised perchlorate DLR of 0.002 mg/L and 0.001 mg/L (effective January 1, 2024).
	1. **TYPOGRAPHICAL ERRORS**
* In the ISR Addendum (page 11), the table titled “Table 4 - Highest Annual Statewide Costs for Perchlorate Monitoring Based on System Ownership for Phase I and Phase II” is incorrect. The table should be titled “Table 3 - Highest Annual Statewide Costs for Perchlorate Monitoring Based on System Ownership for Phase I and Phase II”. Table 3 is referred to properly in the remainder of the document. In addition, in Table 3, there is a typographical error found in the last row under the column heading “Phase II Cost (January 1, 2024 – Subsequent Years)”. The value $6,444,824 should be $6,445,824. All subtotals in the column are correct.
* In the Regulation Text (page 3), there was a typographical error in the heading, “TITLE 22, CALIFORNIA CODE OF REGULATIONS, DIVISION 4, CHAPTER 15, ARTICLE 5.5”. The correct heading is “TITLE 22, CALIFORNIA CODE OF REGULATIONS, DIVISION 4, CHAPTER 15, ARTICLE 4”. This error has been corrected in the regulation text provided with the six copies of the Form 400. This error affected only the instructions to printer and not any regulatory language, and therefore had no impact on regulated entities.
	1. **DOCUMENTS RELIED UPON** (Gov. Code,§11346.2(b)(3))

While all material relied upon was identified in the ISR and available for review during the 45-day public comment period that began 6 March 2020, the internet website address for the document titled *Public Health Goal, Perchlorate in Drinking Water, California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, February 2015* (ISR, IX.1, p. 14) has since been revised by the authoring state agency. The document can now be found at: <https://oehha.ca.gov/media/downloads/water/chemicals/phg/perchloratephgfeb2015.pdf>

**LOCAL MANDATE** (Gov. Code, §11346.9(a)(2))

As described in the Notice of Proposed Rulemaking, which is hereby incorporated by reference, the proposed regulations would not impose a mandate on local agencies or school districts. While there are costs associated with the regulation, none would require state reimbursement.

As described in the Notice of Proposed Rulemaking, local agencies and school districts currently incur costs in their operation of public water systems. The costs imposed by these regulations are not the result of a “new program or higher level of service” within the meaning of Article XIIIB, section 6 of the California Constitution because they apply generally to all individuals and entities that operate public water systems in California, and do not impose unique requirements on local governments (County of Los Angeles v. State of California, et al., 43 Cal. App. 3d 46 (1987)). In addition, the publicly owned systems can pass on the costs in increased service charges, fees or assessments.

**SUMMARY OF COMMENTS AND AGENCY RESPONSES**(Gov. Code, §11346.9(a)(3))

Written comments were received during an initial 45-day comment period in response to the Public Notice of Proposed Rulemaking, issued 6 March 2020; the comment period closed at 12:00 p.m. (noon) on 1 May 2020. Oral comments were received during the 28 April 2020 APA public hearing. Additional written comments were received during the 15-day comment period that began on 20 July 2020 and was extended to 18 August 2020. All comments received were included in the record, including one late comment. Attachment 1 contains an introduction and notes on comments received. Specific comments and detailed responses are presented in Attachment 2.

In addition, two persons spoke at the 6 October 2020 Board meeting to consider adoption of these regulations: Andria Ventura of Clean Water Action and Patricia (Patty) Avila‑Garcia of Community Water Center. Both spoke in support of the proposed regulations. Specifically, Ms. Ventura commented that it is the responsibility and law of this state to try to set drinking water standards as close as possible to the public health goal, that knowing it is technologically feasible to measure to 0.001 mg/l it was her initial position that a detection limit for purposes of reporting (DLR) of 0.002 mg/l would pose a barrier to eventual lowering of the maximum contaminant level (MCL) to the public health goal of 0.001 mg/l, that State Water Board staff clearly communicated the thinking on laboratory capacity and COVID impacts, and that her organization now thinks that the current proposal makes sense. Ms. Avila-Garcia expressed support of the proposed plan and agreement with the comments from Clean Water Action, adding that the proposed establishment would allow collection of information needed to determine a new MCL later, so that if an MCL determination is made, the DLR concentration would not preclude setting the MCL at the public health goal. These comments are appreciated.

**CONSIDERATION OF ALTERNATIVES** (Gov. Code, §11346.9(a)(4) and (5))

As described in the Initial Statement of Reasons, public water systems are water companies and/or utilities providing drinking water to the public and, pursuant to Government Code section 11342.610, are excluded from the definition of a small business.

The State Water Board, in its 6 March 2020 Notice of Proposed Rulemaking, initially proposed a DLR of 0.002 mg/L, with an alternative of 0.001 mg/L initially rejected on the basis of insufficient current laboratory capacity at this level. Based on public comments received during the 45-day comment period, the State Water Board reconsidered that alternative.

Health and Safety Code 116365 requires the State Water Board to adopt primary drinking water standards for contaminants at levels as close as feasible to the corresponding public health goal, placing primary emphasis on the protection of public health, and meeting, to the extent technologically and economically feasible, specified conditions. California’s public health goal for perchlorate is 0.001 mg/L. The perchlorate DLR is a monitoring and reporting element of California’s primary drinking water standard for perchlorate. As there is no technological barrier to reliably quantifying perchlorate in drinking water to concentrations as low as 0.001 mg/L, the State Water Board is obliged to set the perchlorate DLR as close to the public health goal of 0.001 mg/L as is economically feasible. Therefore, to address the issue of insufficient current laboratory capacity at this level, the State Water Board revised the regulation proposal to include phased, or stepped, implementation to allow time to develop the necessary laboratory capacity at the 0.001 mg/ L level—a hybrid of the original proposal and alternative.

As described in the ISR Addendum, to adequately allow for variability in financing, approval, and procurement process across commercial and municipal laboratories, and in consideration of the current economic uncertainty associated with the COVID-19 pandemic, the State Water Board adopted a proposed effective date of 1 January 2024 to allow adequate time for the laboratory industry to develop sufficient analytical capacity at 0.001 mg/L. In summary, the adopted proposed regulations would initially lower the perchlorate DLR from 0.004 mg/L to 0.002 mg/L, then from 0.002 mg/L to 0.001 mg/L on 1 January 2024.

The revised perchlorate DLR allows for determination of perchlorate occurrence in drinking water sources at concentrations below the current DLR. Also, as noted in the ISR, the cost for revising the DLR to 0.002 mg/L and then to 0.001 mg/L on
1 January 2024 is approximately 4 times that of the initial proposal, but the alternative DLR of only 0.002 mg/L is less effective in the protection of public health.

A DLR closer to the public health goal (*i.e*., 0.001 mg/L vs. 0.002 mg/L) would afford the data necessary to evaluate the feasibility of revising the primary drinking water standard for perchlorate—the maximum contaminant level—to a concentration closer to the public health goal, would be more effective than the initial proposal or any other alternative proposed in carrying out the purpose for which the regulatory action is proposed (*i.e*., increased protection of public health), and would be more effective than the initial proposal or any other alternative proposed in implementing the statutory policy or other provisions of law.

For the reasons set forth in the Initial Statement of Reasons, the ISR Addendum, in staff’s comments at the 6 October 2020 State Water Board adoption hearing, and in this Final Statement of Reasons, the State Water Board determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law than the action taken by the State Water Board.

**ATTACHMENTS**

* Attachment 1: Introduction and Notes for Comments Received
* Attachment 2: Responses to Comments