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DAILY NEWS

Utilities Urge EPA To Fix SDWA Constitutional Concern In Perchlorate Rule

November 30, 2018

Rural water utilities are suggesting that a provision in the Safe Drinking Water Act (SDWA) that gives the EPA administrator “sole judgment” to determine new contaminants may be vulnerable to a constitutional challenge under the “non-delegation” doctrine, and are urging the agency to address the issue in an upcoming rule governing perchlorate.

“Given the premise that the SDWA provides the Administrator with 'sole judgment' to determine new contaminants to regulate and that we are not aware of any intelligible principle administering the delegated authority, we are concerned that the SDWA may not withstand a non-delegation doctrine challenge under Article One, Section 1 of the United States Constitution,” the National Rural Water Association (NRWA) says in **a Nov. 21 letter** to EPA water chief David Ross. “We urge the Agency to identify an intelligible principle for implementing the *'sole judgment'* SDWA authority and to make a finding that SDWA does not violate the non-delegation doctrine in any proposed and final rule.”

Under the non-delegation doctrine, when Congress gives EPA or any other agency the power to craft an enforceable rule it must also specify an "intelligible principle" to limit the regulators' discretion.

As such, it represents an opportunity for rule critics -- or the Supreme Court -- to limit EPA's rulemaking discretion by arguing that interpretations of SDWA or other statutes that give the agency broad authority run afoul of the little-used doctrine that bars Congress from giving the executive branch “unbounded” discretion to regulate.

Some observers say they expect supporters of the Trump administration's deregulatory agenda to support use of the doctrine as a way to limit EPA and other agencies' discretion, possibly as an alternative to -- or in addition to -- an expected narrowing of the *Chevron* precedent, under which courts defer to agencies' interpretations of ambiguous statutory text.

The non-delegation doctrine dates back to the New Deal era but has only been used to strike down parts of two statutes, both in 1935, although there are at least two pending Supreme Court cases making non-delegation arguments.

While the high court has rarely ruled on the issue, the justices **are poised to decide** as soon as Nov. 30 whether to accept a petition over environmental limits on a border wall, *Animal Legal Defense Fund, et al., v. Department of Homeland Security (DHS), et al.*, that argues in part DHS' broad authority to waive environmental and other laws in order speed construction on border-security projects violates the non-delegation doctrine.

A criminal law sex offender registries case, *Gundy v. United States*, that was argued before the high court Oct. 2 also raises non-delegation issues. The conservative Pacific Legal Foundation, a frequent challenger to what it sees as expansive EPA authority, filed an *amicus* brief in *Gundy* where it links **the case** to the fight over Clean Water Act jurisdiction.

And the Center for Biological Diversity (CBD) **has invoked** the non-delegation doctrine in *CBD v. Zinke, et al.*, a case that aims to find the Congressional Review Act unconstitutional. That case is pending in the U.S. Court of Appeals for the 9th Circuit.

Industry and other critics of broad environmental regulations have previously sought to use the non-delegation doctrine to limit EPA's power, most prominently in 2001's *American Trucking Associations, Inc. et al v. EPA*, where a unanimous high court rejected a non-delegation challenge to the Clean Air Act.

Should the doctrine be strengthened by a new decision, an industry attorney says environmental cases would almost certainly follow.

And an NRWA source says the addition of Justices Neil Gorsuch and Brett Kavanaugh could make the court more amenable to such arguments.

Perchlorate Rule

NRWA's letter addresses a pending EPA rulemaking that requires the agency to set first-time standards for perchlorate, the rocket fuel ingredient, in drinking water.

The rulemaking is subject to a court-ordered deadline that requires EPA to develop a health-based drinking water goal and enforceable drinking water standard for perchlorate. The deadline to propose both the goal and the rule was originally set for Oct. 31, but EPA **has asked the court** to extend that until April as it is struggling to peer review a model likely to form the basis for the rule. Environmentalists **have grudgingly agreed** to the agency's extension request although a judge has not yet ruled on whether to grant it.

Once completed, the rule will mark the first SDWA regulation since Congress amended the law in 1996.

But NRWA is raising concerns with provisions in the law that give the EPA administrator sole authority to determine whether to regulate contaminants.

The letter notes that at the end of the Bush administration, EPA determined in 2008 that a perchlorate drinking water regulation would not present a meaningful opportunity for health risk reduction for persons served by public water systems -- one of three criteria under SDWA the agency must meet before setting drinking water standards.

But the Obama administration in 2011 revised that determination and said perchlorate meets SDWA's criteria for regulation. That is, perchlorate may have an adverse effect on human health; it is known to occur or is likely to occur in public drinking water systems with a frequency and at levels of public health concern; and in the sole judgment of the administrator, regulation presents a meaningful opportunity for public health risk reduction.

“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 letter says.

An NRWA source says that if there were an intelligible principle, the determination on whether to regulate or not would not change due to a new administration. The “sole judgment” language, contained in the 1996 amendments to SDWA, “is an anathema to non-delegation,” the source says.

“It's not EPA's fault” that the language may be unconstitutional, but the agency needs to answer the question in any proposed and final perchlorate rule, the source says.

The source says NRWA likely lacks the expertise to make a non-delegation argument in litigation but notes a recent increase in both regulated parties and environmentalists making such arguments pending Supreme Court cases. And having raised the question in the SDWA context, “I think it's going to attract attention,” the source says.

In addition to its constitutional concerns, NRWA also backs technical concerns raised by other utility groups that have questioned the model EPA is seeking to develop as a basis for its rule. For example, Kevin Morley of the American Water Works Association (AWWA) earlier this year suggested the model may not be **the best available science** that SDWA requires, suggesting that a risk value the National Academy of Sciences generated in 2007 may be a better option. But experts peer reviewing the model released a report April 5 that **generally supported** EPA's approach and called it “fit for purpose."

NRWA is now joining AWWA in objecting to the model. The letter backs April 10 comments from AWWA to the agency that say the agency's model likely to underpin the perchlorate rule “is not fit for purpose and, if accepted, would set a troubling precedent for the scientific integrity of the Agency's regulatory process.” -- *Lara Beaven*(**lbeaven@iwpnews.com**)

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