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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE  
COUNCIL,

Plaintiff,

vs.

STEPHEN L. JOHNSON,  
ADMINISTRATOR, UNITED  
STATES ENVIRONMENTAL  
PROTECTION AGENCY, and  
UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY,

Defendants.

Case No. 2:06-cv-04843-<sup>PSG</sup>~~DSG~~ (JTLx)

Hon. Phillip S. Gutierrez

**NOTICE OF MOTION AND  
MOTION BY NATIONAL  
ASSOCIATION OF CLEAN WATER  
AGENCIES FOR PARTIAL  
SUMMARY JUDGMENT ON ITS  
COMPLAINT-IN-INTERVENTION**

[Statement of Uncontroverted Facts and  
Conclusions of Law, Declaration of  
Michael T. Purleski filed concurrently  
herewith]

**CLEAN WATER ACT CASE**

**Hearing date: February 11, 2008  
[Per order of Court]**

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AND RELATED CLAIMS IN INTERVENTION
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**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

NOTICE is hereby given that on February 11, 2008 at 10:00 a.m. or as soon thereafter as counsel may be heard, Intervenor-Plaintiff NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES ("NACWA") will move and hereby does move for Partial Summary Judgment on the First and Third Claims for Relief in its Complaint-In-Intervention ("Complaint") against Defendants STEPHEN L. JOHNSON, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("Defendants"). The grounds for this Motion are that, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), there is no genuine issue of material fact and NACWA is entitled to summary judgment as a matter of law as to the following issues:

The Beaches Environmental Assessment and Coastal Health Act of 2000 ("BEACH Act"), Pub. L. 106-284, Oct. 10, 2000 (amending the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251 et seq.) required Defendant EPA, by fixed statutory deadlines, to conduct studies on the health effects of pathogens in coastal recreational waters and to promulgate new or revised water quality criteria to protect beachgoers against illnesses caused by these pathogens. There is no genuine issue as to any material fact that EPA has failed to comply with the BEACH Act's requirements to (i) initiate and complete appropriate studies to provide additional information for use in developing an assessment of potential human health risks resulting from exposure to pathogens in coastal recreational waters and (ii) publish revised water quality criteria for pathogens and pathogen indicators (including a revised list of appropriate testing methods) based

1 on those studies. These failures violate express statutory deadlines contained in the  
2 BEACH Act.

3 NACWA requests that the Court direct the entry of final judgment in favor of  
4 NACWA as a final determination of the above claims, pursuant to Fed. R. Civ. P.  
5 54(b).

6 NACWA has filed this Motion pursuant to a briefing and hearing schedule to  
7 which all parties stipulated and as ordered by this Court. NACWA anticipates that  
8 Defendants will oppose this Motion pursuant to said briefing schedule.

9 This Motion is based on this Notice, the accompanying Memorandum of  
10 Points and Authorities, the Separate Statement of Uncontroverted Facts and  
11 Conclusions of Law, the accompanying Declaration of Michael T. Purleski, and the  
12 exhibits attached thereto, and other documentary evidence and argument that the  
13 Court may receive or hear at or before the hearing on the Motion.

14 Dated: October 23, 2007

Respectfully submitted,

15 SQUIRE, SANDERS & DEMPSEY L.L.P.

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18 David W. Burchmore  
Michael T. Purleski

19 Attorneys for Intervenor-Plaintiff National  
20 Association of Clean Water Agencies  
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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

NACWA moves for Partial Summary Judgment on the First and Third Claims for Relief in its Complaint because, based upon the admissions made in Defendant EPA's Responses to Plaintiff NRDC's First Set of Requests for Admissions and to Plaintiff-Intervenor LA County's First Set of Requests for Admissions, there is no genuine issue of material fact that Defendants have failed to comply with statutory deadlines contained in the BEACH Act and NACWA is entitled to summary judgment as a matter of law as to the issues raised by its Claims.

## II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure authorize summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under such circumstances, summary disposition is favored "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). If the evidence offered by the moving party establishes each essential element of its claim, it is unnecessary for the moving party to negate or disprove any matter for which the non-moving party has the burden of proof at trial. *Id.* at 323.

The standards that apply to a motion for partial summary judgment, sometimes called summary adjudication, are the same as the standards that govern summary judgment. *Green v. Sun Life Assur. Co.*, 383 F. Supp. 2d 1224, 1226 (C.D. Cal. 2005) (citing *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998); 11 James Wm. Moore *et al.*, Moore's Federal Practice § 56.40 (3d ed. 1999)). If, as here, judgment on the entire case is not sought, the Court may adjudicate those issues about which the facts are undisputed, and treat those issues as established for

1 trial. Fed. R. Civ. P. 56(d). In such cases of partial summary judgment, the Court  
2 should issue an order “specifying the facts that appear without substantial  
3 controversy . . . and directing such further proceedings in the action as are just.” *Id.*

4 If no material question of fact is in dispute, or it is shown that the non-  
5 movant cannot prevail on its version of the facts, summary judgment is appropriate.  
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Matsushita Elec.*  
7 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In *Anderson*, the  
8 Supreme Court observed that, “[b]y its very terms, this standard provides that the  
9 mere existence of *some* alleged factual dispute between the parties will not defeat  
10 an otherwise properly supported motion for summary judgment; the requirement is  
11 that there is no *genuine* issue of *material* fact.” 477 U.S. at 247-48 (emphases in  
12 original); *see also Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989);  
13 *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d  
14 1466, 1468 (9th Cir. 1987). Thus, if “the moving party has carried its burden under  
15 Rule 56(c), its opponent must do more than simply show that there is some  
16 metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

### 17 **III. ARGUMENT**

#### 18 **A. The BEACH Act Required Defendants To Initiate And Conduct** 19 **Health Effects Studies And Publish Water Quality Criteria Within** 20 **Prescribed Time Periods.**

21 In October 2000, Congress enacted the BEACH Act to address the significant  
22 health concerns posed by contaminated water and to improve water quality  
23 protections for the Great Lakes and other coastal recreational waters. Congress  
24 enacted the BEACH Act “to give the public confidence in the quality of the  
25 nation’s coastal water” and to protect “the tourism and recreation industries that  
26 rely on safe and swimmable coastal waters.” H.R. Rep. No. 106-98, at 5 (2000).  
27 Congress further explained that “EPA’s 1986 criteria need to be updated to improve  
28 the scientific basis for identifying pathogens in coastal recreation waters.” *Id.* at 6.

The BEACH Act requires EPA, “after consultation and in cooperation with

1 appropriate Federal, State, Tribal and local officials (including local health  
2 officials),” to conduct studies on the health effects of pathogens in coastal  
3 recreational waters to form the basis for updating public health standards and  
4 methods for detecting pathogens.

5 Specifically, the BEACH Act requires EPA perform studies to provide  
6 additional information for use in developing “an assessment of potential human  
7 health risks resulting from exposure to pathogens in coastal recreation waters,  
8 including nongastrointestinal effects.” 33 U.S.C. § 1254(v)(1). Congress also  
9 mandated that EPA perform studies to provide additional information for use in  
10 developing “appropriate and effective indicators for improving detection in a timely  
11 manner in coastal recreation waters of the presence of pathogens that are harmful to  
12 human health.” *Id.* § 1254(v)(2).

13 The BEACH Act requires that EPA “shall initiate” the required studies not  
14 later than 18 months after the date of enactment of the BEACH Act (i.e., by April  
15 2002) and “shall complete” these studies not later than 3 years after the date of  
16 enactment of the BEACH Act (i.e., by October 2003). *Id.* § 1254.

17 The BEACH Act further requires EPA to develop new or revised water  
18 quality criteria for pathogens and pathogen indicators for use in recreational waters,  
19 based on the studies outlined above. Specifically, the law requires that EPA “shall  
20 publish,” not later than 5 years after the date of enactment of BEACH Act (i.e., by  
21 October 10, 2005), “new or revised water quality criteria for pathogens and  
22 pathogen indicators (including a revised list of testing methods, as appropriate),  
23 based on the results of the studies conducted under section 104(a), for the purpose  
24 of protecting human health in coastal recreation waters.” *Id.* § 1314(a)(9)(A).

25 **B. Defendants Failed To Initiate And Conduct Health Effects Studies**  
26 **And Publish Water Quality Criteria Within The Prescribed Time**  
**Periods.**

27 NACWA alleged in ¶¶ 27-30 of its Complaint (“First Claim for Relief”) that  
28 EPA had failed to initiate studies that satisfy the criteria of the BEACH Act by

1 April 2002 and to complete these studies by October 2003, as required by 33 U.S.C.  
2 § 1254(v), that in doing so EPA failed to perform a non-discretionary duty within  
3 the meaning of 33 U.S.C. § 1365(a)(2), and that EPA should be compelled to  
4 comply with 33 U.S.C. § 1254(v) without delay. In the Defendants' Responses to  
5 Plaintiff NRDC's First Set of Requests for Admissions, at 1, Defendants admit that  
6 "EPA has not initiated all studies required by 33 U.S.C. 1254(v)," and that "EPA  
7 has not completed all studies required by 33 U.S.C. 1254(v)." [Separate Statement  
8 at Undisputed Material Fact No. 5]

9 NACWA alleged in ¶¶ 34-37 of its Complaint ("Third Claim for Relief") that  
10 EPA had failed to publish new or revised water quality criteria for pathogens or  
11 pathogen indicators (including a revised list of testing methods, as appropriate) by  
12 the statutory deadline contained in 33 U.S.C. § 1314(a)(9), that in doing so EPA  
13 failed to perform a non-discretionary duty within the meaning of 33 U.S.C. §  
14 1365(a)(2), and that EPA should be compelled to comply with 33 U.S.C. §  
15 1314(a)(9) without delay. In Defendants' Responses to Plaintiff-Intervenor County  
16 of Los Angeles' First Set of Requests for Admissions, at 1-2, Defendants admit that  
17 EPA "has not published new or revised water quality criteria for pathogens and  
18 pathogen indicators as required by 33 U.S.C. 1314(a)(9)(A)," and that EPA "has  
19 not published a revised list of testing methods as required by 33 U.S.C. §  
20 1314(a)(9)(A)." [Separate Statement at UMF No.6]

21 Based upon the admissions contained in Defendant EPA's Responses to  
22 Plaintiff NRDC's First Set of Requests for Admissions and to Plaintiff-Intervenor  
23 LA County's First Set of Requests for Admissions, it is undisputed that EPA has  
24 not initiated or completed studies that satisfy the requirements of the BEACH Act,  
25 and has failed to meet the October 10, 2005 deadline to publish new or revised  
26 water quality criteria. By failing to initiate and complete the required studies and to  
27 publish new or revised water quality criteria, EPA is in violation of its statutory  
28 mandate.

1 **IV. CONCLUSION**

2 For the reasons set forth above, NACWA asks for Partial Summary Judgment  
3 on the First and Third Claims for Relief set forth in its Complaint at ¶¶ 27-30 and  
4 ¶¶ 34-37. This motion seeks a declaratory judgment by the Court that EPA has  
5 unlawfully failed to meet its statutory deadlines to initiate and complete appropriate  
6 water quality studies and to publish new or revised water quality criteria and  
7 appropriate test methods. NACWA anticipates future briefing on the appropriate  
8 remedy for EPA's failure to meet to meet these deadlines.

9 Dated: October 23, 2007

Respectfully submitted,

10 SQUIRE, SANDERS & DEMPSEY L.L.P.

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13 David W. Burchmore  
14 Michael T. Purleski

15 Attorneys for Intervenor-Plaintiff National  
16 Association of Clean Water Agencies  
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I am a resident of the State of California and over 18 years of age and am not a party to this action. My business address is 555 South Flower Street, Suite 3100 Los Angeles, California 90071-2300, which is located in the county where any non-personal service described below took place.

**NOTICE OF MOTION AND MOTION BY NATIONAL ASSOCIATION OF  
CLEAN WATER AGENCIES FOR SUMMARY JUDGMENT ON ITS  
COMPLAINT-IN-INTERVENTION**

Service was accomplished as follows.

☐ **By Personal Delivery by Beverly Hills Express Attorney Services** of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **By Electronic Mail Transmission With Attachment.** On this date, I transmitted the above-mentioned document(s) by electronic mail transmission with attachment to the parties at the electronic mail transmission number set forth below.

Angeles, California.

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