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16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18 NATURAL RESOURCES DEFENSE
19 COUNCIL,

20 Plaintiff,

21 vs.

22 STEPHEN L. JOHNSON,
ADMINISTRATOR, UNITED
23 STATES ENVIRONMENTAL
PROTECTION AGENCY, and
24 UNITED STATES
ENVIRONMENTAL PROTECTION
25 AGENCY,

26 Defendants.

27 AND RELATED CLAIMS IN
28 INTERVENTION

Case No. 2:06-cv-04843-DSG (JTLx)

Hon. Phillip S. Gutierrez

**NACWA'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT ON REMEDY and**

**REPLY TO DEFENDANTS'
OPPOSITION TO NACWA'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

CLEAN WATER ACT CASE

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

1-8-08
2

INTRODUCTION

NACWA submits this Memorandum in opposition to the Defendants' Cross-Motion for Summary Judgment on Remedy and in reply to the Defendants' Opposition to NACWA's Motion for Summary Judgment (hereinafter referred to as "EPA Memorandum"). In its Memorandum, EPA actually does not oppose the entry of an order finding that EPA has not fully discharged its statutory obligations under Clean Water Act ("CWA") § 104(v), 33 U.S.C. § 1254(v). EPA Memorandum at 1, n. 1. CWA § 104(v) required the Agency to initiate, not later than 18 months after October 10, 2000, and complete, not later than 3 years after that date, studies that were to provide the basis for publishing the new or revised water quality criteria for pathogens and pathogen indicators required by CWA § 304(a)(9), 33 U.S.C. § 1314(a)(9). Pursuant to that section, EPA was required to publish those criteria not later than 5 years after October 10, 2000. As EPA notes in its Memorandum, this Court has already granted summary judgment against the Agency with regard to NRDC's claim that EPA has failed to discharge the latter obligation. EPA Memorandum at 20, n. 28, citing this Court's Order dated March 23, 2007. However, EPA suggests that this Court should now "bring this matter to an efficient and timely conclusion" by merely issuing an order enjoining EPA to publish the § 304(a)(9) criteria, without ordering EPA to perform the studies required by § 104(v). EPA Memorandum at 21-22.

Because the Defendant "does not dispute" that it has failed to discharge its obligations under CWA section 104(v), NACWA's Motion for Partial Summary Judgment should be granted. *See* EPA's Response to Separate Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion by NACWA for Partial Summary Judgment, at 3, ¶ 5. With regard to the Defendants' Cross Motion for Summary Judgment on Remedy, for the reasons discussed below, the order requested by the Defendant is inadequate to ensure that the Agency's statutory obligations will be fully performed and that the objectives of the BEACH

1 Act will be met. Further proceedings by this Court are needed in order to determine
2 what specific steps should be required and to establish the intermediate and final
3 deadlines by which they must be accomplished.

4 **I. INJUNCTIVE RELIEF IN THIS CASE MUST INCLUDE AN ORDER**
5 **REQUIRING EPA TO PERFORM THE STUDIES MANDATED BY**
6 **CWA § 104(v) AS WELL AS TO PUBLISH THE CRITERIA**
7 **REQUIRED BY CWA § 304(a)(9)**

8 EPA argues that this Court lacks the authority to issue an injunctive order
9 that does anything more than impose a final deadline for the Agency to complete a
10 nondiscretionary duty imposed by the Act. As discussed below, NACWA believes
11 this argument is invalid and is not supported by the cases cited in EPA's
12 Memorandum. Even if EPA's position were correct, however, the proposed order
13 requested by the Agency in its Cross-Motion for Summary Judgment on Remedy is
14 clearly inadequate, since it would impose a deadline for only one of the two
15 statutory duties that the Agency has failed to perform. There is no question that the
16 statute established two separate and distinct sets of deadlines – first, to initiate and
17 complete the studies enumerated in § 104(v), and second, to publish the criteria
18 specified in § 304(a)(9). The limitation which the Defendant seeks to impose on
19 the scope of the injunctive relief that may be ordered by the Court in this case
20 defies logic and ignores the fundamental structure and intention of the Act. As
21 EPA's Memorandum and its Critical Path Science Plan ("CPSP") make clear, the
22 Agency itself does not really believe that it either can or should publish the criteria
23 without first performing the studies that are required by the Act. Yet the Agency
24 asks this Court to issue an order which completely ignores the first of these two
25 obligations, and argues that the Court is without the authority to do anything more.

26 Sections 104(v) and 304(a)(9) each contain a series of detailed requirements,
27 defining the type of studies that EPA must perform and the nature of the criteria
28 that EPA must develop. Each section cross-references the other, and their
requirements are inextricably intertwined. The studies required by § 104(v) are to

1 be performed “after consultation and in cooperation with appropriate Federal, State,
2 tribal, and local officials (including local health officials),” and they are to be
3 completed “in cooperation with the heads of other Federal agencies.” They are to
4 provide additional information for use in developing (1) an “assessment” of
5 potential human health risks from exposure to pathogens in coastal recreation
6 waters, (2) “appropriate and effective” indicators for timely detection of pathogens
7 that are harmful to human health, (3) “appropriate, expeditious, and cost effective”
8 methods for timely detection of such pathogens, and (4) guidance for State
9 application of the criteria to be published under § 304(a)(9) “to account for the
10 diversity of geographic and aquatic conditions.” The criteria required by
11 § 304(a)(9) are to be published “after consultation and in cooperation with
12 appropriate Federal, State, tribal, and local officials (including local health
13 officials),” they are to be “based upon the results of the studies” required by
14 § 104(v), and they are to be for the purpose of “protecting human health in coastal
15 recreation waters.”

16 Clearly, the § 304(a)(9) criteria can only be developed after the § 104(v)
17 studies have been completed, and they must be “based upon” those studies. EPA
18 argues in its Memorandum that the language and structure of § 104(v) differ from
19 that found in a “typical” nondiscretionary duty provision such as § 304(a)(9). EPA
20 Memorandum at 31. Yet the authority cited by EPA for this proposition suggests
21 that what EPA calls a “typical” nondiscretionary duty provision will “categorically
22 mandate” that all specified action be taken by a date-certain deadline. *Sierra Club*
23 *v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). It is difficult to see how the statute
24 at issue in this case could be any more categorical: it states that EPA “shall
25 initiate” the studies enumerated in § 104(v) “not later than 18 months after October
26 10, 2000,” and that it “shall complete” those studies “not later than 3 years after
27 October 10, 2000.” EPA itself concedes that it has not completed those studies.
28 *See* EPA’s Response to Separate Statement of Uncontroverted Facts and

1 Conclusions of Law in Support of Motion by NACWA for Partial Summary

2 Judgment, at 3, ¶ 5. Consequently, because the Agency has failed to comply with
3 its nondiscretionary duties under this section, any injunctive relief granted by this
4 Court must include a requirement that those studies be initiated and completed on a
5 fixed timetable to be established by the Court.

6 **II. ANY ORDER ISSUED BY THE COURT SHOULD IDENTIFY THE**
7 **SPECIFIC TASKS THAT EPA MUST PERFORM, AND INCLUDE A**
8 **TIMETABLE WITH INTERMEDIATE AND FINAL DEADLINES**
9 **FOR THEIR COMPLETION**

10 In arguing that this Court lacks the authority to do anything more than order a
11 single fixed date by which the Agency must publish the final 304(a)(9) criteria,
12 EPA mischaracterizes the applicable case law. While recognizing that it should be
13 “mindful not to intrude upon the agency's realm of discretionary decision making,”
14 the Ninth Circuit has emphasized that a district court “has broad latitude in
15 fashioning equitable relief when necessary to remedy an established wrong.”
16 *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994).
17 In *Alaska Center*, EPA argued that the district court exceeded its remedial powers
18 under § 505 of the CWA when it ordered EPA to submit to the court a report on the
19 adequacy of water quality monitoring in Alaska, and to propose a long term
20 schedule for the establishment of “total maximum daily loads” of pollutants for
21 Alaskan waters. EPA stressed that the CWA does not require it to prepare or
22 present such a report, and that the statute leaves the pace at which TMDLs shall be
23 established entirely to the Agency’s discretion. The Ninth Circuit disagreed,
24 holding that the district court had correctly recognized that in order to bring about
25 any progress toward achieving the objectives of the CWA, the EPA would have to
26 be directed to take “specific steps.” *Id.*

27 Similarly, the D.C. Circuit has stated that, when the Agency has failed to
28 meet the statutory deadline for a nondiscretionary act, the authority to set
enforceable deadlines “of both an ultimate and an intermediate nature” is an

1 appropriate procedure for exercise of the court's equity powers to vindicate the
2 public interest. *Natural Resources Defense Council v Train*, 510 f.2d 692, 705
3 (D.C. Cir. 1974). In *Train*, the D.C. Circuit specifically found that the district
4 court's decision to incorporate a detailed timetable into its order constituted a
5 reasonable step to facilitate supervision of the decree and to ensure "early efforts"
6 by EPA toward eventual discharge of its statutory responsibility. *Id.* at 704.
7 Following the same procedure, the district court in *Sierra Club v. Johnson*, 444 F.
8 Supp. 2d 46, 61 (D.D.C. 2006) (one of the authorities cited by EPA in its
9 Memorandum), actually set a series of six enforceable deadlines extending over a
10 three-year period for the Agency to promulgate the standards the Agency was
11 required to issue under an analogous provision of the Clean Air Act. Similarly, in
12 *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 349 (D. Ariz. 1994), another
13 of the authorities cited by the Defendant, the court established a detailed schedule
14 and a specific series of tasks for the Agency to accomplish, including the
15 preparation of a criteria document, providing for review by an independent
16 scientific review committee, completing a staff paper setting forth the relevant
17 criteria data, allowing a specific period for review and revision, preparation of
18 proposed regulations, publication in the Federal Register, allowing a specific period
19 for public comment, and ultimately promulgating the final regulations.

20 Thus, while this Court cannot dictate the ultimate outcome of the process or
21 intrude upon the strictly discretionary aspects of the Agency's statutory obligations,
22 it can and should impose a series of specific steps that EPA must perform, with
23 both interim and final deadlines for their completion. Determining what those steps
24 should be, and setting the ultimate and intermediate deadlines to accomplish them,
25 will require further input from the parties and a determination by the Court as to the
26 "specific steps" that are "undeniably necessary" to accomplish the objectives of the
27 Act. *Alaska Center*, 20 F.3d 981, 986.

28 One of those steps, which is unequivocally required by the plain language of

1 the statute, is to provide an opportunity for consultation and cooperation with local
2 officials (including local health officials) in both the performance of the studies
3 required by § 104(v) and the publication of the criteria required by § 304(a)(9).

4 Another key step, the need for which is underscored by the peer reviewers
5 tasked by EPA to provide comments on its CPSP, is to provide a mechanism at
6 some interim stage in the research program for a potential “reassessment” of the
7 science plan based upon the outcome of the initial suite of studies. *See* Declaration
8 of Michael T. Purleski, Attachment A: “Critical Path Science Plan Review
9 Comments,” at 3. The specific example identified by the reviewer is that a
10 comparison of the results from the marine studies with the freshwater study results
11 will be “crucial to the whole undertaking,” and that different models or different
12 indicators may need to be used for marine vs. freshwater beaches. Thus, “the
13 outcome of the marine studies may necessarily lead to reassessment of the current
14 plan.” *Id.* Similar situations may arise with regard to the assessment of risk posed
15 by swimming in waters contaminated by non-human (i.e. animal) fecal
16 contamination vs. human fecal contamination, since previous studies did not
17 attempt to make that distinction, and one epidemiology study of one type of non-
18 human waste may not be informative for other types. *Id.*

19 According to Ephraim King, Director of EPA’s Office of Science and
20 Technology, EPA describes in the CPSP the research that it intends to conduct,
21 while recognizing “the potential that EPA may need to adjust the Plan” to ensure
22 that its research is well-founded. Declaration of Ephraim S. King, at 11 ¶ 32.
23 According to Mr. King, EPA’s recognition of the need for such flexibility is
24 consistent with its commitment to carry out the CPSP’s activities “as informed by
25 the results” of the research process. Consequently, in addition to setting forth
26 interim milestone dates for completion of the basic elements of the Agency’s
27 research program, the order to be issued by this Court should incorporate a
28 mechanism for reassessment or readjustment of the direction and timing of that

1 program in light of the results from previous stages of the research.

2 To that end, NACWA suggests that the requirement for one or more interim
3 status reports to the Court and the other parties in this case during the initial process
4 of data collection and study preparation pursuant § 104(v) is indispensable to
5 ensure that the goals of the Act are achieved when the criteria are subsequently
6 developed pursuant to § 304(a)(9). A status report requirement of this type was
7 included (along with interim and final dates for the issuance of proposed and final
8 standards) in the order issued by the district court in *Sierra Club v. Thomas*, 658 F.
9 Supp. 165 (N.D. Ca. 1987) – a case cited by EPA in its Memorandum, at 28, as an
10 example of an “efficient approach” to resolving a deadline suit. *See also* the
11 interim report required by the district court and approved by the Ninth Circuit in
12 *Alaska Center, supra*, 20 F.3d at 986.

13 In calling for a detailed schedule with intermediate and final deadlines for the
14 specific steps that EPA must perform in order to fulfill its duties under the statute,
15 NACWA does not suggest that the Court can dictate the content of the studies that
16 EPA will perform or the ultimate outcome of EPA’s research. Nevertheless, the
17 Court does have an obligation to ensure that the process to be followed by the
18 Agency will comply with the basic requirements of the Act. As the Ninth Circuit
19 recently held in *Our Children’s Earth Foundation v. Leavitt*, 506 F.3d 781, 2007
20 U.S. App. LEXIS 25299 (9th Cir. 2007), the line between a congressional mandate
21 and an area of agency discretion is not always easy to draw.

22 As the Supreme court teaches, the decision-making process does not
23 necessarily collapse into a single final decision. “It is rudimentary
24 administrative law that discretion as to the substance of the ultimate
decision does not confer discretion to ignore the required procedures
of decisionmaking.”

25 *Id.*, 2007 U.S. App. LEXIS at *12, quoting *Bennett v. Spear*, 520 U.S. 154, 172
26 (1997). Thus, where several interlocking statutory provisions mandate certain
27 criteria that are to inform discretionary determinations as to precise form of a final
28 regulation, “the overlying discretion does not render the mandated criteria

1 discretionary.” *Id.* at * 32. In other words, where a statute mandates certain factors
2 or criteria that the Agency must consider before reaching a final decision, those
3 factors must be addressed in the decision-making process. In the present case,
4 CWA §§ 104(v) and 304(a)(9) define a number of factors that EPA must consider.
5 For example, the studies that EPA is to perform must at a minimum include an
6 assessment of the potential risks to human health from exposure to pathogens in
7 coastal recreation waters, identify appropriate and effective indicators for timely
8 detection of pathogens that are harmful to human health, and they must account for
9 the diversity of geographic and aquatic conditions. If the studies planned by the
10 Agency fail to address these issues, the basic purposes of the statute will not have
11 been fulfilled.

12 CONCLUSION

13 For each of the foregoing reasons, the Court should grant Intervenor-Plaintiff
14 NACWA’s Motion or Partial Summary Judgment and deny the Defendants’ Cross-
15 Motion for Summary Judgment on Remedy. A hearing should then be held in
16 which the Court may take evidence as the specific tasks that EPA should be
17 required to perform in order to fulfill its nondiscretionary duties under CWA
18 §§ 104(v) and 304(a)(9) and determine the schedule on which those tasks should be
19 completed.

20 Dated: January 8, 2008

Respectfully submitted,

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1 **PROOF OF SERVICE**

2 The undersigned certifies and declares as follows:

3 I am a resident of the State of California and over 18 years of age and am not
4 a party to this action. My business address is 555 South Flower Street, Suite 3100
5 Los Angeles, California 90071-2300, which is located in the county where any
non-personal service described below took place.

6 On January 8, 2008, I served a copy of the following document(s):

7 **NACWA'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'**
8 **CROSS-MOTION FOR SUMMARY JUDGMENT ON REMEDY and**
9 **REPLY TO DEFENDANTS' OPPOSITION TO NACWA'S MOTION FOR**
10 **PARTIAL SUMMARY JUDGMENT**

11 on the persons identified on the attached service list:

12 Service was accomplished as follows.

13 ☒ **By U.S. Mail, According to Normal Business Practice.** On this date,
14 I sealed the above document(s) in an envelope addressed to the above, and I placed
15 that sealed envelope for collection and mailing following ordinary business
practices, for deposit with the U.S. Postal Service. I am readily familiar with the
business practice at my place of business for the collection and processing of
correspondence for mailing with the U.S. Postal Service. Correspondence so
collected and processed is deposited the U.S. Postal Service the same day in the
ordinary course of business, postage fully prepaid.

16 ☐ **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.

17 ☐ **By Federal Express Service Carrier.** On this date, I sealed the above
18 document(s) in an envelope or package designated by Federal Express, an express
19 service carrier, addressed to the above, and I deposited that sealed envelope or
20 package in a box or other facility regularly maintained by the express service
carrier, or delivered that envelope to an authorized courier or driver authorized by
the express service carrier to receive documents, located in Los Angeles, California
with delivery fees paid or otherwise provided for.

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

23 I declare under penalty of perjury under the laws of the United States of
24 America that the foregoing is true and correct, and that I am employed in the office
of a member of the bar of this court at whose direction the service was made.
Executed on January 8, 2008, at Los Angeles, California.

25 

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27 Vicki Scott

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