

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-4843 PSG (JTLx)	Date	April 7, 2008
Title	Natural Resources Defense Council, et al. v. Johnson, et al.		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez

Not Present

n/a

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings: (In Chambers) Order on Plaintiffs' Motions for Partial Summary Judgment;
Defendants' Motion for Partial Summary Judgment

Before this Court are Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment. The Court heard oral argument on these motions on March 24, 2008.

I. BACKGROUND

The Natural Resources Defense Council ("NRDC") has brought a lawsuit against Stephen L. Johnson, the Administrator for the United States Environmental Protection Agency ("EPA") and the EPA, for violations of the Clean Water Act. The County of Los Angeles and the Los Angeles County Flood Control District ("L.A. County"), along with the National Association of Clean Water Agencies ("NACWA"), have joined in the lawsuit as Plaintiff-Intervenors.

Specifically, the Plaintiffs allege that the EPA has violated the mandatory duties imposed by 33 U.S.C. § 1254(v) and 33 U.S.C. § 1314(a)(9)(A).¹ On March 21, 2007, this Court entered partial summary judgment for NRDC finding that the EPA violated 33 U.S.C. § 1314(a)(9)(A)

¹ These statutes are also known as sections 104(v) and 304(a)(9) of the Clean Water Act ("CWA"), as amended by the Beaches Environmental Assessment and Coastal Health Care Act of 2000 ("BEACH Act")

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by failing its non-discretionary duty to publish new or revised water quality criteria prescribed in the statute.

Now, the Plaintiffs have brought a motion asking the Court to find that the EPA has also violated its non-discretionary duties imposed under 33 U.S.C. § 1254(v).² However, beyond that, the Plaintiffs ask for different remedies. NRDC requests that the Court simply rule that the EPA has violated its statutory duties and conduct a trial to determine the proper remedy. NRDC believes that the EPA's statutory duties require it to conduct specific studies, the exact nature of which should be determined at trial. L.A. County requests that the Court order the EPA to submit to the Court within 30 days (a) a description and schedule of studies to be performed by the Defendants that meet the requirement of section 1254(v), (b) a schedule for publication of guidance for state application of the criteria for pathogens and pathogen indicators to be published under 33 U.S.C. § 1314(a)(9), and (c) a schedule for publishing new or revised water quality criteria, including a revised list of testing methods as appropriate, that meet the requirements of 33 U.S.C. § 1314(a)(9)(A). NACWA requests that, after determining that the EPA is in violation of its statutory duties, the Court allow further briefing on the appropriate remedy.

In response, the EPA has filed a cross-motion for summary judgment requesting that the Court order a specific remedy. EPA requests that the Court simply order that EPA publish the section 304(a)(9) criteria by December 15, 2012, without addressing specific studies that the EPA must conduct.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

² L.A. County and NACWA ask the Court to again rule that EPA violated 33 U.S.C. § 1314(a)(9)(A) by failing its non-discretionary duty to publish new or revised water quality criteria prescribed in the statute, despite the Court's previous ruling disposing of this issue. At oral argument, counsel for L.A. County argued that, as full parties to the lawsuit, these plaintiffs are also entitled to this ruling for purposes of appeal.

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256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.* at 257.

A non-moving party who bears the burden of proving at trial an element essential to its case must sufficiently establish a genuine dispute of fact with respect to that element or face summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *See Anderson*, 477 U.S. at 250-51.

III. DISCUSSION

A. EPA's Violation of its Statutory Duties

As the Court previously determined in its March 21, 2007 Order, the EPA is in violation of 33 U.S.C. § 1314(a)(9)(A) by failing its non-discretionary duty to publish new or revised water quality criteria prescribed in the statute. Now, the Court addresses whether EPA is in violation of 33 U.S.C. § 1254(v).

That statute states:

Not later than 18 months after October 10, 2000, after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials), the Administrator shall initiate, and, not later than 3 years after October 10, 2000, shall complete, in cooperation with the heads of other Federal agencies, studies to provide additional information for use in developing –

- (1) an assessment of potential human health risks resulting from exposure to pathogens in coastal recreation waters, including nongastrointestinal effects;
- (2) appropriate and effective indicators for improving detection in a timely manner in coastal recreation waters of the presence of pathogens that are harmful to human health;
- (3) appropriate, accurate, expeditious, and cost-effective methods (including predictive models) for detecting in a timely manner in coastal recreation waters the presence of pathogens that are harmful to human health; and
- (4) guidance for State application of the criteria for pathogens and pathogen

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indicators to be published under section 1314(a)(9) of this title to account for the diversity of geographic and aquatic conditions.

33 U.S.C. § 1254(v).

Here, the EPA has admitted that it has not completed the statutorily required studies “not later than 3 years after October 10, 2000.” (EPA’s Response to NRDC’s Statement of Undisputed Facts, ¶ 22.) Thus, the Court finds that EPA is in violation of 33 U.S.C. § 1254(v). As the parties suggest, the Court’s next step will be to address the remedy for EPA’s violations of 33 U.S.C. § 1254(v) and 33 U.S.C. § 1314(a)(9)(A).

B. The Remedies Available for EPA’s Violation

Each of the Plaintiffs request that the Court delve into the specifics of water quality criteria and the studies necessary to determine these criteria. EPA, on the other hand, asks that the Court simply set a deadline for the EPA to complete the necessary studies and publish the required water quality criteria. EPA essentially argues that the Court does not have the authority to delve into the specifics of the water quality criteria, and even if the Court did have that authority, it should still refrain. EPA argues that (1) the Court’s authority is limited under the CWA to ordering the EPA to complete its statutory duties by a deadline, without specifying how EPA accomplishes those duties, (2) the EPA should be given deference in its decision-making, and (3) any request to order the EPA to conduct particular studies is non-justiciable. The Court addresses these arguments in turn.

1. The Court’s Authority to Fashion a Remedy

Here, as an initial matter, the Court finds that 33 U.S.C. § 1254(v) imposes clear substantive requirements on the EPA. The statute states that EPA, “not later than 3 years after October 10, 2000, shall complete, ... studies to provide additional information for use in developing -

- (1) an assessment of potential human health risks resulting from exposure to pathogens in coastal recreation waters, including nongastrointestinal effects;
- (2) appropriate and effective indicators for improving detection in a timely manner in coastal recreation waters of the presence of pathogens that are harmful to human health;
- (3) appropriate, accurate, expeditious, and cost-effective methods (including predictive

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models) for detecting in a timely manner in coastal recreation waters the presence of pathogens that are harmful to human health; and

(4) guidance for State application of the criteria for pathogens and pathogen indicators to be published under section 1314(a)(9) of this title to account for the diversity of geographic and aquatic conditions.”

33 U.S.C. § 1254(v). Thus, rather than being vague about the specific duties imposed, the statute requires studies that address the substantive issues stated.

EPA argues that the statute necessarily gives the EPA discretion to conduct the studies as it sees fit. EPA argues that, while it must conduct one study, it is not clear that EPA must conduct two or more studies. However, whether several studies are required or a study that is divided into sub-parts is irrelevant to the question of whether or not the studies addresses the substantive issues enumerated in the statute. EPA also argues that the statute only requires that it only must conduct studies “to provide additional information,” a term too vague to impose specific requirements. However, in context, the statute clearly indicates that the “additional information” that must be obtained relates to the enumerated substantive issues. Also, the statute clearly indicates that the Administrator shall initiate these studies only “after consultation and in cooperation with appropriate Federal, State, tribal, and local officials (including local health officials).” 33 U.S.C. § 1254(v). Thus, while the EPA must have some discretion to conduct the studies required, that discretion does not extend to failing to study the enumerated substantive issues that the statute addresses. Nor does EPA have the discretion to fail to consult and cooperate with the appropriate Federal, State, tribal, and local officials.

This Court’s authority to fashion a remedy derives from the Clean Water Act’s Citizen Suit provision. That provision states that “any citizen may commence a civil action on his own behalf ... against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365. Furthermore, that section also states that the “district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, ... to order the Administrator to perform such act or duty” *Id.* Thus, sovereign immunity does not bar the Court from considering this lawsuit, and the Court has jurisdiction to order the EPA to fulfill its duty.

EPA argues that the Court’s order to the EPA to fulfill its duty may not extend to ordering the EPA how it must fulfill its duty. EPA cites cases to support its argument that a Court may

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not read into a statute a remedy where the statute itself provides a clear remedy. However, the EPA's cited cases are inapplicable here because 33 U.S.C. § 1254(v) explicitly states that the EPA must perform studies to obtain information about particular issues, rather than generally requiring EPA to conduct any study it deems appropriate.

More relevant than EPA's cited cases is the United States Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). In that case, the plaintiffs claimed that a Fish and Wildlife Service Biological Opinion violated the Endangered Species Act's ("ESA") mandate to take into account "the economic impact, [...] and any other relevant impact[s]." *Id.* at 172 (citing 16 U.S.C. § 1533(b)(2); citation corrected). The Supreme Court held that the plaintiffs' claim fell within the scope of the ESA's citizen-suit provision to force the agency to fulfill a non-discretionary duty. The relevant statutory provision states that "[t]he Secretary shall designate critical habitat, and make revisions thereto, ... on the basis of the best scientific data available and after taking into consideration the economic impact, ... and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

Here, as in *Bennett*, the relevant statute requires the government agency to consider certain scientific data in performing its non-discretionary duty. In *Bennett*, the Supreme Court found that it was proper for the courts to consider whether the government agency properly considered the statutorily required scientific data including "the economic impact, and any other relevant impact." Here, in determining a remedy for EPA's statutory violations, it is proper for this Court to require the EPA to conduct studies that consider the statute's enumerated issues.

2. Scope of the Remedy in This Case

The Citizen Suit provisions of the CWA allow a district court to "order the relief it considers necessary to secure prompt compliance with the Act." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982) (discussing the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.). The Ninth Circuit has also explained that "[t]he district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Center for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (considering a district court's order to the EPA to report on water quality monitoring and to develop a schedule to implement measures identified in the report, despite the CWA's lack of provision for these remedies) (citation omitted).

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Here, the Court finds that it is appropriate to allow a trial to determine the appropriate remedies for the EPA's statutory violations, including the appropriate studies that the EPA must conduct to satisfy the requirements of 33 U.S.C. § 1254(v). *See NRDC v. Kempthorne*, 2007 WL 4462391 *1 (E.D. Cal. Dec. 14, 2007) (noting that "a seven-day evidentiary hearing was held ... to determine what interim remedies to impose" for a government agency's failure to perform its duties); *Sierra Club v. El Paso Gold Mines, Inc.*, 2002 WL 33932715 *16 (D. Colo. Nov. 15, 2002) (granting summary judgment for plaintiffs in a CWA citizen suit and holding a separate trial on remedy). Here, there are issues of material fact concerning whether EPA's proposed plans to belatedly satisfy its statutory duties complies with the statutory requirements regarding studies that must be performed.

3. Deference to the EPA and Justiciability

Finally, while it is true that courts accord the EPA a high degree of deference when it is evaluating "scientific data within its technical expertise," *City of Waukesha v. E.P.A.*, 320 F.3d 228, 247 (D.C. Cir. 2003) (citations omitted), the Court determines that EPA's requested level of deference is inappropriate in this case. *See Earth Island Inst. v. Hogarth*, 494 F.3d 757, 764-65 (9th Cir. 2007) (rejecting the EPA's request for deference where one agency study was statistically deficient and the agency failed to conduct other required studies).

Ultimately, after the hearing on the appropriate remedy for EPA's violations, the Court could very well decide that EPA's proposed course is the appropriate remedy. However, the plaintiffs will be allowed to present evidence on the issue.

Furthermore, the issues presented are justiciable because, here, the EPA admitted violating a statutory duty and the statute authorizes judicial review. *See National Coal Ass'n v. Marshall*, 510 F. Supp. 803, 805 (D.D.C. 1981) ("Justiciability is a threshold requirement arising out of the Article III 'case or controversy' clause.") Thus, because the CWA allows the Plaintiffs to bring this suit, there is a justiciable controversy.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS-IN-PART each of the plaintiff's motions for partial summary judgment. Specifically, the Court finds that the EPA Defendants have violated EPA's non-discretionary duties under both 33 U.S.C. § 1254(v) and 33 U.S.C. § 1314(a)(9)(A).

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Furthermore, the Court orders a trial on the issue of the appropriate remedy pursuant to the following schedule:

Close of Expert Discovery:	May 30, 2008
Opening Briefs on Remedy:	June 16, 2008
Responsive Briefs on Remedy:	June 30, 2008
Pre-Trial Conference:	July 7, 2008
Trial on Remedy:	July 22, 2008

IT IS SO ORDERED.