

1 UNITED STATES DISTRICT COURT
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA

3
4 NATURAL RESOURCES DEFENSE
COUNCIL,

5 Plaintiff,

6 COUNTY OF LOS ANGELES and LOS
7 ANGELES COUNTY FLOOD CONTROL
DISTRICT,

8 Plaintiff-Intervenors,

9 NATIONAL ASSOCIATION OF CLEAN
WATER AGENCIES,

10 Plaintiff-Intervenor,

11 v.

12 STEPHEN L. JOHNSON, Administrator,
United States Environmental Protection
13 Agency, and UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

14 Defendants.
15

No. CV06-4843 PSG (JTLx)

16
17 **CONSENT DECREE**

18 WHEREAS the Natural Resources Defense Council ("Plaintiff") filed a complaint in
19 this action (CV Number 06-4843) against Defendants the United States Environmental
20 Protection Agency ("EPA") and Stephen L. Johnson, in his official capacity as Administrator
21 of EPA, on August 3, 2006; and the National Association of Clean Water Agencies and the
22 County of Los Angeles and Los Angeles County Flood Control District ("Intervenors")
23 subsequently filed complaints in intervention against Defendants (the signatories to this
24 Consent Decree are collectively referred to as "the Parties");
25

26 WHEREAS the subject of this action is EPA's obligations to perform mandatory duties
27 to complete studies under Section 104(v) of the Clean Water Act ("CWA"), 33 U.S.C §
28

1 1254(v), by October 10, 2003, and to publish water quality criteria under CWA § 304(a)(9)(A),
2 33 U.S.C. § 1314(a)(9)(A), by October 10, 2005;

3 WHEREAS by Court order dated November 19, 2007, all Administrative Procedure
4 Act claims in Plaintiff's and Intervenor's Complaints were dismissed pursuant to stipulation of
5 voluntarily dismissal;
6

7 WHEREAS by orders dated March 21, 2007 and April 7, 2008, the Court has ruled that
8 EPA failed to perform its mandatory duties to complete the required studies under Section
9 104(v) of the CWA, 33 U.S.C § 1254(v), by October 10, 2003, and to publish water quality
10 criteria under CWA § 304(a)(9)(A), 33 U.S.C. § 1314(a)(9)(A), by October 10, 2005;

11 WHEREAS in order to resolve this lawsuit, the Parties also have entered into a
12 Settlement Agreement, which has been provided separately to the Court for informational
13 purposes only; its terms are not incorporated into this Consent Decree and the Settlement
14 Agreement is not an enforceable order of the Court;
15

16 WHEREAS by entering into this Consent Decree, the Parties do not waive or limit any
17 claims or defense on any grounds related to any claims that are not resolved by this Consent
18 Decree;
19

20 WHEREAS it is in the interest of the public, the Parties and judicial economy to resolve
21 the issues in this action without protracted litigation, including a trial;

22 WHEREAS the Court finds and determines that this Consent Decree represents a just,
23 fair, adequate, and equitable resolution of the claims raised in this action;
24

25 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as
26 follows:
27
28

I. GENERAL TERMS

1. The Parties to this Consent Decree understand that (a) Stephen L. Johnson was sued in his official capacity as Administrator of the United States Environmental Protection Agency; and (b) obligations arising under this Decree are to be performed by EPA and not Stephen L. Johnson in his individual capacity.

2. This Consent Decree applies to, is binding upon, and inures to the benefit of the Parties (and their successors, assigns, and designees).

3. For purposes of entry and enforcement of this Consent Decree only, the Parties to this Consent Decree agree that the Court has jurisdiction over any disputes pertaining to any alleged violations of this Consent Decree.

II. DEFINITIONS

4. For purposes of this Decree, the following terms shall have the meanings provided below:

- a. "APA" means the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.
- b. "Consent Decree" means this document.
- c. "Settlement Agreement" means the Settlement Agreement signed by the Parties in this case.
- d. "Clean Water Act" or "CWA" means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.
- e. "EPA" means Stephen L. Johnson, the Administrator of EPA, or the Administrator's duly authorized representative, and the United States Environmental Protection Agency.
- f. "Plaintiff" means the Natural Resources Defense Council; "Intervenors" means the National Association of Clean Water Agencies and the County of Los Angeles and Los Angeles County Flood Control District.
- g. The "Complaints" means the complaint filed in this case by the Natural Resources Defense Council on August 3, 2006, to initiate the lawsuit titled

1 above, and the complaints in intervention filed by the National Association
2 of Clean Water Agencies, and the County of Los Angeles and Los Angeles
3 County Flood Control District on March 19, 2007, and February 6, 2007,
4 respectively.

- 5 h. "New or revised water quality criteria for pathogens and pathogen
6 indicators pursuant to 33 U.S.C. § 1314(a)(9)(A)" means new or revised
7 water quality criteria that may be measured by one or more pathogens or
8 "pathogen indicators" or both.
- 9 i. "Pathogen indicator" has the meaning provided at 33 U.S.C. § 1362(23).
- 10 j. "Water quality criteria" has the meaning provided in the definition of
11 "Section 304(a) Criteria" at 40 C.F.R. 131.3(c).
- 12 k. "Coastal recreation waters" has the meaning provided at 33 U.S.C. § 1362
13 (21) or as subsequently amended.
- 14 l. "Critical Path Science Plan" ("CPSP") means the document EPA released on
15 August 31, 2007, which describes, among other things, the studies EPA
16 indicated it intended to conduct for the purpose of developing new or
17 revised water quality criteria pursuant to Section 304(a)(9)(A) of the CWA,
18 33 U.S.C. § 1314(a)(9)(A).
- 19 m. "Complete," when modifying any form of the word "study" in Paragraph 5
20 of this Consent Decree, means EPA has (a) concluded its work related to the
21 project identified in Paragraph 5 of this Decree including, as EPA deems
22 necessary, internal and/or external peer review and addressing comments
23 from such peer reviews, and (b) provided written notice to Plaintiff and
24 Intervenor as described in Paragraph 9(a) of this Decree.
- 25 n. "Epidemiological Study" means a study of human populations exposed to
26 coastal recreation waters that attempts to statistically link human health
27 effects to concentrations of a substance or substances that indicate the
28 potential for human infectious disease.
- o. "Marine waters impacted by urban runoff" means marine waters impacted
by urban sources of pollution, including possible discharges of storm water
or storm water runoff. Marine waters impacted by urban runoff do not
include marine waters that are known to EPA, at the time EPA makes the
final selection of the site for the study, to be impacted by (1) discharges from
publicly owned treatment works or combined sewer overflows or (2)
identified discharges of untreated human waste from sanitary sewer systems
that would interfere with the ability to accurately determine the relationship
between human illness and fecal indicators that originate from urban runoff.

- 1 p. "Tropical region" includes waters in Puerto Rico, Hawaii, Guam, the Virgin
2 Islands and south Florida (below 28 degrees latitude).

3 **III. TERMS OF AGREEMENT**

4 5. Pursuant to CWA § 104(v), no later than December 15, 2010, EPA shall
5 complete the following studies:

6 (a) an epidemiological study in marine waters impacted by urban runoff in a
7 temperate region, and

8 (b) an epidemiological study in a tropical region.

9 6. No later than October 15, 2012, EPA shall sign for publication in the Federal
10 Register a notice announcing the availability of new or revised water quality criteria for
11 pathogens and pathogen indicators pursuant to 33 U.S.C. § 1314(a)(9)(A).

12 7. Contempt of court shall not be a remedy for any failure to comply with the
13 requirements of Paragraph 5 above.

14 8. In selecting a site for an epidemiological study in a tropical region pursuant to
15 Paragraph 5(b) of this Decree, EPA will determine if there is a suitable location in Puerto Rico,
16 Hawaii, Guam or the Virgin Islands for conducting the study. If EPA determines there is not a
17 suitable location in Puerto Rico, Hawaii, Guam or the Virgin Islands, EPA will document its
18 determination, including the basis for that determination, and provide a copy to the parties to
19 this Decree. If EPA makes such a determination, EPA may select a suitable location in south
20 Florida for the study.

21 9. (a) When it completes a study described in Paragraph 5 of this Decree, EPA will
22 provide written notice to the other Parties, including a summary of the study and findings, and
23 a statement that the study has been completed.

1 (b) EPA will submit to the Court, the Plaintiff, and Intervenor a semi-annual
2 status report concerning the actions of EPA under the Consent Decree for the six-month
3 periods from January 1 – June 30 and July 1-December 31 each calendar year from January 1,
4 2009 until July 1, 2012. Each report shall be in writing, shall be provided within fifteen days
5 after the conclusion of the six-month period to which it relates (January 15 or July 15), and
6 shall include a description of the actions taken by EPA with respect to its obligations under the
7 Consent Decree during the preceding six-month period and a description of the actions EPA
8 intends to take with respect to its responsibilities under the Consent Decree during the
9 following six months.
10

11 **IV. EFFECTIVE DATE**

12
13 10. This Consent Decree shall become effective upon the date of its entry by the
14 Court. If for any reason the District Court does not enter this Consent Decree, the obligations
15 set forth in this Consent Decree are null and void.
16

17 **V. REMEDY, SCOPE OF JUDICIAL REVIEW**

18 11. Nothing in this Consent Decree shall be construed to confer upon the Court
19 jurisdiction to review any decision, either procedural or substantive, to be made by EPA
20 pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with
21 this Consent Decree.
22

23 12. Nothing in this Consent Decree alters or affects the standards for judicial
24 review, if any, of any final EPA action.

25 **VI. RELEASE BY PLAINTIFF AND INTERVENORS**

26 13. Upon entry of this Consent Decree by the Court, this Consent Decree and the
27 Settlement Agreement (provided separately for informational purposes only) shall constitute a
28

1 complete and final settlement of all claims that were asserted, or that could have been asserted,
2 by Plaintiff and Intervenor against Defendants relating to the allegations in the Complaints.

3 14. Plaintiff and Intervenor hereby release, discharge, and covenant not to assert
4 (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an
5 existing action, or in any other fashion) any and all claims, causes of action, suits or demands
6 of any kind whatsoever in law or in equity that they may have had, or may now have, against
7 Defendants related to the allegations in the Complaints, expressly including any allegation that
8 EPA has failed to comply with CWA § 104(v), 33 U.S.C. § 1254(v). Plaintiff and Intervenor
9 expressly reserve the right to challenge in any forum and on any ground (including that the
10 criteria are based on improperly designed, or improperly conducted studies) the lawfulness of
11 the recreational water quality criteria EPA ultimately adopts pursuant to CWA § 304(a)(9)(A),
12 33 U.S.C. § 1314(a)(9)(A). Defendants reserve all defenses to any such challenge.

13 **VII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS**

14 15. This Consent Decree shall terminate after fulfillment of EPA's obligations
15 under this Decree. Upon termination of this Consent Decree, this case shall be dismissed with
16 prejudice.

17 **VIII. FORCE MAJEURE**

18 16. The Parties recognize that the performance of this Consent Decree is subject to
19 fiscal and procurement laws and regulations of the United States which include, but are not
20 limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq. The possibility exists that
21 circumstances outside the reasonable control of EPA could delay compliance with the
22 obligations in this Consent Decree. Such situations include, but are not limited to, a
23 government shutdown; catastrophic environmental events requiring immediate and/or
24 time-consuming response by EPA; and extreme weather events (including but not limited to
25
26
27
28

1 drought and hurricanes) that interfere with the completion of field data collection. Should a
2 delay occur due to such circumstances, any resulting failure to fulfill any obligation set forth
3 herein shall not constitute a failure to comply with the terms of this Consent Decree, and any
4 deadline so affected shall be extended one day for each day of the delay, or if a force majeure
5 event interferes with EPA's collection of field data, the deadline shall be extended for a
6 reasonable period to allow EPA to complete data collection, and the deadline in Paragraph 6 of
7 this Consent Decree shall be extended to April 30, 2013, or to an alternative date jointly agreed
8 upon by the Parties. EPA will provide Plaintiff and Intervenors with reasonable notice in the
9 event that EPA invokes this Paragraph. Any dispute regarding such invocation shall be
10 resolved in accordance with the dispute resolution provision of Paragraph 17 below.
11
12

13 **IX. DISPUTE RESOLUTION**

14 17. In the event of a disagreement among the Parties concerning the interpretation
15 or performance of any aspect of this Consent Decree, the dissatisfied Party shall provide the
16 other Parties with written notice of the dispute and a request for negotiations. The Parties shall
17 meet and confer in order to attempt to resolve the dispute within 21 days of the written notice,
18 or such time thereafter as is mutually agreed. If the Parties are unable to resolve the dispute
19 within 21 days of such meeting, then any Party may petition the Court to resolve the dispute.
20
21

22 **X. MODIFICATIONS AND EXTENSIONS**

23 18. Any dates set forth in this Consent Decree may be extended by written
24 agreement of the Parties and notice to the Court. To the extent the Parties are not able to agree
25 to an extension of any date set forth in this Consent Decree, EPA may seek modification of the
26 date in accordance with the procedures specified below.

27 (a). If EPA files a motion requesting modification of any date or dates
28 established by this Consent Decree totaling more than thirty (30) days for each date and

1 provides notice to Plaintiffs at least thirty (30) days prior to filing such motion, and files the
2 motion at least sixty (60) days prior to the date for which modification is sought, then the filing
3 of such motion shall, upon request, automatically extend the date for which modification is
4 sought. Such automatic extension shall remain in effect until the earlier of (i) a dispositive
5 ruling by this Court on such motion, or (ii) the date sought in such motion. EPA may seek only
6 one extension under this subparagraph for each date established by this Consent Decree.
7

8 (b). If EPA files a motion requesting modification of a date or dates
9 established by this Consent Decree totaling thirty (30) days or less for each date, provides
10 notice to Plaintiffs at least fifteen (15) days prior to the filing of such motion, and files the
11 motion at least seven (7) days prior to the date for which modification is sought, then the filing
12 of such motion shall, upon request, automatically extend the date for which modification is
13 sought. Such extension shall remain in effect until the earlier of (i) a dispositive ruling by this
14 Court on such motion, or (ii) the date sought in the motion. EPA may seek only one extension
15 under this subparagraph for each date established by this Consent Decree.
16

17 (c). If EPA does not provide notice pursuant to Subparagraphs 18(a) or 18(b)
18 above, EPA may move the Court for a stay of the date for which modification is sought. EPA
19 shall give notice to Plaintiff and Intervenors as soon as reasonably possible of its intent to seek
20 a modification and/or stay of the date sought to be modified.
21

22 (d). If the Court denies a motion by EPA to modify a date established by this
23 Consent Decree, then the date for performance for which modification had been requested shall
24 be such date as the Court may specify.
25

26 (e). Any motion to modify the schedule established in this Consent Decree
27 shall be accompanied by a motion for expedited consideration.
28

XI. CONTINUING JURISDICTION

1 19. The Court retains jurisdiction for the purposes of resolving any disputes arising
2 under this Consent Decree, and issuing such further orders or directions as may be necessary or
3 appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and
4 for granting any further relief as the interests of justice may require.
5

6 **XII. AGENCY DISCRETION**

7 20. Except as expressly provided herein, nothing in this Consent Decree shall be
8 construed to limit or modify the discretion accorded EPA by the CWA, the APA, or by general
9 principles of administrative law.
10

11 21. Nothing in this Consent Decree shall be construed to limit or modify EPA's
12 discretion after EPA performs any action pursuant to this Consent Decree to conduct additional
13 studies or publish superseding water quality criteria. Nothing in this Consent Decree relieves
14 EPA of the obligation to act in a manner consistent with the CWA and other applicable law.
15

16 **XIII. ATTORNEYS' FEES AND COSTS**

17 22. EPA agrees that Plaintiff and Intervenors are prevailing or substantially
18 prevailing parties within the meaning of CWA § 505(d), 33 U.S.C. § 1365(d), and that they are
19 entitled to reasonable attorneys' fees and costs accrued as of the effective date of this Consent
20 Decree. The Parties will attempt to reach agreement as to the appropriate amount of the
21 recovery. If they are unable to do so, Plaintiff or any of the Intervenors may file an application
22 with the Court for the recovery of reasonable fees and costs within 60 days of entry of this
23 Consent Decree, or by such later date as set by the Court upon motion or otherwise, and the
24 United States shall have 45 days to respond to any such application.
25
26
27
28

1 **XIV. NOTICE AND CORRESPONDENCE**

2 23. Any notice required or made with respect to this Consent Decree shall be in
3 writing and shall be effective on the date that notice is delivered by an overnight mail/delivery
4 service. For any matter relating to this Consent Decree, the contact persons are:
5

6 For the Plaintiff, Natural Resources Defense Council:

7 Aaron Colangelo
8 Natural Resources Defense Council
9 1200 New York Avenue NW, Suite 400
10 Washington, D.C. 20005

11 For Intervenor, National Association of Clean Water Agencies:

12 David W. Burchmore
13 Squire, Sanders & Dempsey L/L/P.
14 4900 Key Tower
15 127 Public Square
16 Cleveland, OH 44114

17 For Intervenor, The County of Los Angeles and Los Angeles County Flood Control District:

18 Rossana D'Antonio
19 Principal Engineer
20 L.A. County Department of Public Works
21 Watershed Management Division
22 900 South Fremont Avenue
23 Alhambra, CA 91803

24 Laurie E. Dods
25 Deputy County Counsel
26 Los Angeles County Hall of Administration
27 500 West Temple Street
28 Los Angeles, CA 90012

29 For the Defendants:

30 Chief, Environmental Defense Section
31 Environment & Natural Resources Division
32 United States Department of Justice

1 P.O. Box 23986
2 Washington, D.C. 20026-3986

3 Associate General Counsel
4 Water Law Office
5 Office of General Counsel
6 U.S. Environmental Protection Agency
7 1200 Pennsylvania Avenue, N.W.
8 Mail Code 2355A
9 Washington, DC 20004 20460

10 Upon written notice to the other Parties, any Party may designate a successor contact person for
11 any matter relating to this Consent Decree.

12 **XV. REPRESENTATIVE AUTHORITY**

13 24. Each undersigned representative of the Parties to this Consent Decree certifies
14 that he or she is fully authorized by such Party to enter into and execute the terms and
15 conditions of this Consent Decree, and to legally bind such Party to this Consent Decree. By
16 signature below, the Parties consent to entry of this Consent Decree.

17 **XVI. MUTUAL DRAFTING**

18 25. It is expressly understood and agreed that this Consent Decree was jointly
19 drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of
20 construction to the effect that ambiguity is construed against the drafting Party shall be
21 inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent
22 Decree.

23 **XVII. COUNTERPARTS**

24 26. This Consent Decree may be executed in any number of counterpart originals,
25 each of which shall be deemed to constitute an original agreement, and all of which shall
26 constitute one agreement. The execution of one counterpart by any Party shall have the same
27 force and effect as if that Party had signed all other counterparts.
28

1 **XVIII. EFFECT OF CONSENT DECREE**

2 27. This Consent Decree shall not constitute an admission or evidence of any fact,
3 wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person
4 affiliated with it. Nothing in this Consent Decree shall constitute, or be used as evidence of, a
5 determination by EPA that any study conducted to comply with Paragraph 5 of this Consent
6 Decree is required by Section 104(v) of the CWA.
7

8 **XIX. COMPLIANCE WITH OTHER LAWS**

9 28. No provision of this Consent Decree shall be interpreted as or constitute a
10 commitment or requirement that EPA obligate or pay funds in contravention of the Anti-
11 Deficiency Act, 31 U.S.C. § 1341, or take any action in contravention of the CWA, or any
12 other law or regulation, either substantive or procedural.
13

14 **XX. APPLICABLE LAW**

15 29. This Consent Decree shall be governed by and construed under the laws of the
16 United States.
17

18 **XXI. THIRD-PARTY BENEFICIARIES**

19 30. Nothing in this Consent Decree shall be construed to make any other person or
20 entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.
21

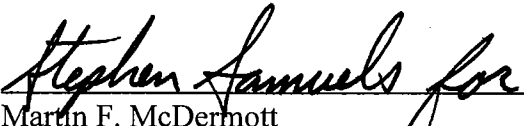
22 The Parties consent to the form, substance and entry of the foregoing Consent Decree.
23
24
25
26
27
28

1
2 FOR THE DEFENDANTS:

3 Ronald J. Tenpas
4 Assistant Attorney General
5 Environment and Natural Resources Division

6 Dated: 8/7/08

7 By:


8 Martin F. McDermott
9 Environmental Defense Section
10 Environment and Natural Resources Division
11 U.S. Department of Justice
12 P.O. Box 23986
13 Washington, D.C. 20026-3986

14 Of Counsel for the United States
15 Environmental Protection Agency:

16 Leslie J. Darman
17 Office of General Counsel
18 U.S. Environmental Protection Agency
19 1200 Pennsylvania Avenue, N.W.
20 Mail Code 2355A
21 Washington, D.C. 20460
22
23
24
25
26
27
28

1
2 FOR THE PLAINTIFF, Natural Resources Defense Council:

3
4 Dated: 8/7/08

5 By: Aaron Colangelo
6 Aaron Colangelo
7 Natural Resources Defense Council
8 1200 New York Avenue NW, Suite 400
9 Washington, D.C. 20005
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

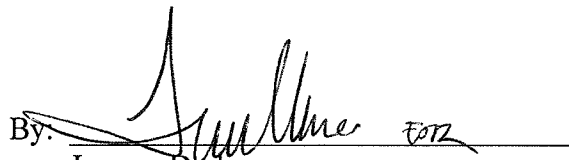
1
2 FOR INTERVENOR, National Association of Clean Water Agencies:

3
4 Dated: 8/7/08

5 By: David W. Burchmore
6 David W. Burchmore
7 Squire, Sanders & Dempsey L/L/P.
8 4900 Key Tower
9 127 Public Square
10 Cleveland, OH 44114
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 FOR INTERVENORS, the County of Los Angeles and Los Angeles County Flood Control
3 District:

4 Dated: 8/7/08

5 By: 
6 Lauren Dods
7 Deputy County Counsel
8 Office of the County Counsel
9 County of Los Angeles
10 500 W. Temple St.
11 Los Angeles, CA 90012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

UPON CONSIDERATION OF THE FOREGOING, this Consent Decree is hereby
APPROVED AND ENTERED.

SIGNED and ENTERED this ____ day of _____.

United States District Judge
Philip S. Gutierrez