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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 ALERT PROJECT/EARTH ISLAND  
15 INSTITUTE; ALASKA COMMUNITY  
16 ACTION ON TOXICS; COOK  
17 INLETKEEPER; CENTER FOR  
18 BIOLOGICAL DIVERSITY; ROSEMARY  
19 AHTUANGARUAK; AND KINDRA  
20 ARNESEN,

21 Plaintiffs,

22 vs.

23 ANDREW WHEELER, in his official capacity  
24 as Administrator of the United States  
25 Environmental Protection Agency; and the  
26 UNITED STATES ENVIRONMENTAL  
27 PROTECTION AGENCY,

28 Defendants.

Case No. 3:20-cv-00670-WHO

**DEFENDANTS' NOTICE OF MOTION  
TO DISMISS, MOTION, AND  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO DISMISS  
FIRST CAUSE OF ACTION**

**Hearing Date and Time: May 6, 2020 at  
2:00 p.m.**

**Location: Courtroom 2 – 17<sup>th</sup> Floor, San  
Francisco Courthouse**

**NOTICE: Pursuant to General Order  
72, all civil matters will be decided on the  
papers, unless the assigned judge  
determines a telephonic or  
videoconference hearing is necessary**

**STATEMENT PURSUANT TO L.R. 7-2(b)**

PLEASE TAKE NOTICE that all above-captioned defendants will move for an Order of this Court dismissing plaintiffs' First Cause of Action. Pursuant to Rule 7-2 of the Civil Local Rules for the United States District Court for the Northern District of California ("L.R.") and District Court Judge William H. Orrick's Standing Order, the hearing has been scheduled for May 6, 2020 in Courtroom 2 – 17<sup>th</sup> Floor, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102. However, under General Order 72, all civil matters will be decided on the papers, unless the assigned judge determines a telephonic or videoconference hearing is necessary. Responding papers, if any, must be served upon all defendants pursuant L.R. 7-3.

PLEASE TAKE FURTHER NOTICE that Defendants will move this Court for an Order of Dismissal for the First Cause of Action pursuant to Rules 12(b)(1) and, alternatively, 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and the authorities cited in the Memorandum of Law that follows. More specifically, Defendants seek an Order of this Court dismissing Plaintiffs' First Cause of Action for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which this Court can grant relief.

PLEASE TAKE FURTHER NOTICE that Defendants submit the following in support of this Motion to Dismiss the First Cause of Action: Statement Pursuant to L.R. 7-2(b), Notice of Motion, Motion to Dismiss the First Cause of Action, and Memorandum of Law (L.R. 7-4), and Proposed Order (submitted herewith as Attachment 1).

1 **INTRODUCTION**

2 Plaintiffs filed this action against Defendants, United States Environmental Protection  
3 Agency and Andrew Wheeler, in his official capacity as Administrator (jointly referred to as  
4 “EPA”), pursuant to the citizen suit provision of the Clean Water Act (“CWA”), 33 U.S.C. §  
5 1365(a), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702-06. Plaintiffs assert  
6 two separate counts in the Complaint. This motion is directed towards Plaintiffs’ First Cause of  
7 Action, in which Plaintiffs contend that under the CWA citizen suit provision, 33 U.S.C. §  
8 1365(a), this Court should compel EPA to modify or amend the National Contingency Plan  
9 (“NCP”), 40 C.F.R. pt. 300, promulgated by EPA pursuant to CWA section 311(d), 33 U.S.C. §  
10 1321(d).

11 The citizen suit provision, 33 U.S.C. § 1365(a)(2), authorizes actions to compel EPA to  
12 perform nondiscretionary duties imposed by the CWA. Plaintiffs’ First Cause of Action should  
13 be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because the  
14 CWA does not impose a mandatory duty on EPA to amend or modify the NCP. The Act  
15 imposes “a nondiscretionary duty . . . only when [its] provision[s] set [ ] bright-line, date-  
16 specific deadlines for specified action.” *Defenders of Wildlife v. Jackson*, Civil Action No. 10-  
17 1915-RWR, 2012 WL 896141, at \*4 (D.D.C. Mar. 18, 2012) (quoting *Raymond Proffitt Found.*  
18 *v. EPA*, 930 F. Supp. 1088, 1098 (E.D. Pa.1996)). Because the CWA does not impose any  
19 specific deadlines for promulgation or revision of the NCP, including Subpart J, Plaintiffs cannot  
20 demonstrate federal jurisdiction over the First Cause of Action.

21 Alternatively, the First Cause of Action should be dismissed for failure to state a claim  
22 upon which relief can be granted. Here, Plaintiffs have not and cannot identify a  
23 nondiscretionary duty under the CWA that EPA has failed to perform. The First Cause of Action  
24 should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Sierra Club v. Jackson*,  
25 648 F.3d 848, 853 (D.C. Cir. 2011).

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## BACKGROUND

### A. THE CLEAN WATER ACT

The Clean Water Act establishes a comprehensive program “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by reducing and eventually eliminating the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). Section 311 of the CWA, as amended by the Oil Pollution Act of 1990, focuses on the prevention of and response to oil spills and CWA listed hazardous substances. *See* 33 U.S.C. § 1321. Section 311(d)(1) provides that “[t]he President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.” *Id.* § 1321(d)(1). “The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances.” *Id.* § 1321(d)(2). Section 311(d)(3) states: “[EPA] may, from time to time, as [EPA] deems advisable, revise or otherwise amend the National Contingency Plan.” *Id.* § 1321(d)(3). Section 505, 33 U.S.C. § 1365, provides a limited waiver of sovereign immunity for citizen suits alleging EPA’s failure “to perform any act or duty under [the CWA] which is not discretionary.” 33 U.S.C. § 1365(a)(2).

### B. THE FIRST CAUSE OF ACTION

In the First Cause of Action (Compl. ¶¶ 126-32), Plaintiffs allege that EPA has failed to perform a mandatory duty to update the NCP under 33 U.S.C. § 1321(d)(3). Plaintiffs rely upon the CWA’s citizen provision, 33 U.S.C. § 1365(a)(2), which provides for actions to compel EPA to perform nondiscretionary duties imposed by the CWA. *See* Compl., ¶¶ 130-131.

## STANDARD OF REVIEW

In reviewing a Rule 12(b)(1) facial challenge to a court’s subject matter jurisdiction, the court accepts all well-pleaded allegations in the complaint as true and views them in the light most favorable to the plaintiff. In such an attack, the challenger asserts that the complaint’s allegations are insufficient on their face to invoke federal jurisdiction. Here, the First Cause of Action presents a question of law: Does EPA have a nondiscretionary duty under the CWA to amend or revise the NCP as set forth in the Complaint? *See, e.g., McKibben v. McMahon*, No.

1 EDCV 14-02171 JGB (SPx), 2015 WL 10382396, at \*6 (C.D. Cal. Apr. 17, 2015) (“Whether an  
2 enactment is intended to impose a mandatory duty is a question of law.”).

3 **Alternatively, the question of whether a complaint has identified a nondiscretionary duty**  
4 **as required by the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2), can be resolved through a**  
5 **motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R.**  
6 **Civ. P. 12(b)(6). See *Sierra Club v. Jackson*, 648 F.3d at 853 (dismissing citizen suit under**  
7 **similar provision in the Clean Air Act, 42 U.S.C. § 7604(a)(2)). To survive a motion to dismiss,**  
8 **a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that**  
9 **is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).**

## 10 ARGUMENT

### 11 **I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE** 12 **PLAINTIFFS’ FIRST CAUSE OF ACTION.**

13 Plaintiffs’ First Claim for Relief must be dismissed for lack of subject matter jurisdiction  
14 because Plaintiffs have failed to identify a statutory provision under the CWA that creates a  
15 nondiscretionary duty for EPA to revise the NCP. Plaintiffs’ claim is founded on the CWA  
16 citizen suit provision, which provides for any citizen to sue the EPA Administrator for failure to  
17 perform a non-discretionary duty required by the statute. See Compl. ¶¶ 129-130, *citing* 33  
18 U.S.C. § 1365(a)(2) (citizen suit provision) and § 1321(d)(3) (provision authorizing revision and  
19 amendment to the NCP).

20 **When a plaintiff sues EPA for failure to perform an act or duty that is not discretionary,**  
21 **“the nondiscretionary nature of the duty must be clear-cut – that is, readily ascertainable from the**  
22 **statute allegedly giving rise to the duty.” *WildEarth Guardians v. McCarthy*, 772 F.3d 1179,**  
23 **1182 (9th Cir. 2014). The agency’s duty cannot exist “only [as] the product of a set of inferences**  
24 **based on the overall statutory scheme.” *Our Children’s Earth Found.*, 527 F.3d 842, 851 (9th**  
25 **Cir. 2008) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)). **A**  
26 **nondiscretionary duty actionable under the citizen suit provision must be unequivocal. See**  
27 ***WildEarth Guardians*, 772 F.3d at 1182; see also, *Dep’t of Energy v. Ohio*, 503 U.S. 607, 615**  
28 **(1992) (discussing specificity required for waiver of sovereign immunity).****

1 Plaintiffs' allegation that EPA has a nondiscretionary duty to amend the NCP is refuted  
 2 by the plain language of the Act. The CWA provides that EPA "may, from time to time, as the  
 3 [Administrator] deems advisable, revise or otherwise amend the [NCP]." 33 U.S.C. §  
 4 1321(d)(3) (emphasis added). Thus, the statute specifically provides that revisions and  
 5 amendments to the NCP are initiated at the discretion of the agency. Clearly, EPA is not  
 6 required to take a specific action by a date-certain deadline, as necessary to constitute a  
 7 nondiscretionary duty. See *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("In  
 8 order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must  
 9 'categorically mandate[e]' that all specified action be taken by a date-certain deadline."); see  
 10 also *Murray Energy Corp. v. EPA*, 861 F.3d 529, 536 (4th Cir. 2017) (finding no  
 11 nondiscretionary duty where statutory section in question "establishes no start-dates, deadlines,  
 12 or any other time-related instructions").

13  
 14 The Supreme Court's decision in *National Association of Home Builders v. Defenders of*  
 15 *Wildlife*, 551 U.S. 644 (2007), clarified what types of agency actions are discretionary. In *Home*  
 16 *Builders*, the Court considered whether EPA had discretion in the decision to transfer permitting  
 17 authority to state officials pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b). *Id.* at 661-69.  
 18 The Court stated that "Section 402(b) of the CWA provides, without qualification, that the EPA  
 19 'shall approve' a transfer application unless it determines that the State lacks adequate authority  
 20 to perform the nine functions specified in the section." *Id.* at 661. The Court added that, "[b]y  
 21 its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria  
 22 are satisfied, the EPA does not have the discretion to deny a transfer application." *Id.*

23 In *Home Builders*, the Supreme Court stated that "[a]gency discretion presumes that an  
 24 agency can exercise 'judgment' in connection with a particular action." *Id.* at 668 (citing  
 25 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)). The Court  
 26 looked to the definition of "discretion" as "the power or right to decide or act according to one's  
 27 own judgment; freedom of judgment or choice." *Id.* (citing Random House Dictionary of the  
 28 English Language 411 (unabridged ed. 1967)). As *Home Builders* makes clear, actions that

1 involve an agency's exercise of judgment, such as whether it is "advisable" to revise or amend  
2 the NCP, are necessarily discretionary.

3 Plaintiffs fail to allege a statutorily mandated, nondiscretionary duty imposed on EPA to  
4 amend the NCP, and thus their first claim must be dismissed for lack of subject matter  
5 jurisdiction.

6 **II. ALTERNATIVELY, PLAINTIFFS' FIRST CAUSE OF ACTION FAILS TO**  
7 **STATE A CLAIM FOR RELIEF UNDER THE CWA'S CITIZEN SUIT**  
8 **PROVISION BECAUSE PLAINTIFFS HAVE NOT IDENTIFIED A DISCRETE**  
9 **MANDATORY DUTY THAT EPA HAS FAILED TO PERFORM.**

10 Plaintiffs allege that EPA has failed to perform a nondiscretionary duty to amend Subpart  
11 J of the NCP. *See*, Compl. ¶¶ 126-132. For the same reasons set forth above, Plaintiffs have  
12 failed to state a claim for relief under the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2),  
13 because section 311(d)(3), 33 U.S.C. § 1321(d)(3), does not impose a "nondiscretionary duty" as  
14 that term has been construed by the courts. In *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir.  
15 1987), the court, in considering a claim under the similar language of the citizen suit provision of  
16 the Clean Air Act explained:

17 In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness  
18 must categorically mandate that all specified action be taken by a date-certain deadline.  
19 In such circumstances, the only question for the district court to answer is whether the  
20 agency failed to comply with that deadline.

21 *Id.* at 791 (internal quotation omitted) (emphasis in original). *See also American Lung Ass'n v.*  
22 *Reilly*, 962 F.2d 258, 263 (2d Cir. 1992); *Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989).

23 Section 311(d)(3) does not establish a deadline for EPA to promulgate or revise the NCP.  
24 Section 311(d)(1) says that EPA must "prepare and publish" the NCP, which it has done. In  
25 addition, section 311(d)(3) provides that EPA "may, from time to time, as [EPA] deems  
26 advisable, revise or otherwise amend the [NCP]." The plain text of section 311(d)(3) expressly  
27 leaves the appropriateness and the timing of any such regulatory amendments or revisions to the  
28 Agency's discretion. Accordingly, because Plaintiffs cannot state a claim that EPA has a  
nondiscretionary duty to take the actions Plaintiffs seek to compel through their First Cause of

1 Action, that claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Sierra Club v.*  
2 *Jackson*, 648 F.3d at 853.

3 **CONCLUSION**

4 The First Cause of Action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for  
5 lack of subject matter jurisdiction or, alternatively, under Fed. R. Civ. P. 12(b)(6) for failure to  
6 state a claim upon which relief can be granted.

7  
8 Respectfully submitted this 31<sup>st</sup> day of March 2020.

9  
10 By: /s/ Mark Albert Rigau  
11 MARK ALBERT RIGAU  
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13 Environmental Defense Section  
14 Environment and Natural Resources Division  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2020, the foregoing pleading was filed via the U.S. District Court's CM/ECF electronic filing system and a copy thereof was served upon:

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