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4 **IN THE UNITED STATES DISTRICT COURT**
5 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

6 ALERT PROJECT, EARTH ISLAND
7 INSTITUTE; ALASKA COMMUNITY
8 ACTION ON TOXICS; COOK
9 INLETKEEPER; CENTER FOR
10 BIOLOGICAL DIVERSITY; ROSEMARY
AHTUANGARUAK; AND KINDRA
ARNESEN,

11 Plaintiffs,

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13 vs.

14 ANDREW WHEELER, in his official capacity
15 as Administrator of the United States
16 Environmental Protection Agency; and the
17 UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

18 Defendants.

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

**[PROPOSED] ORDER DENYING
DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' FIRST CAUSE OF ACTION**

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20 Before the Court is Defendants' Motion to Dismiss First Cause of Action, filed March 31,
21 2020, ECF No. 16. Plaintiffs filed an Opposition to Defendants' Motion to Dismiss First Cause
22 of Action on April 14, 2020, ECF No. 26.

23 Having read and considered the papers filed in support of and in opposition to the motion,
24 the Court finds that dismissal of Plaintiffs' First Cause of Action is inappropriate. First,
25 Plaintiffs' claims are neither "immaterial and made solely for the purpose of obtaining
26 jurisdiction," nor "wholly insubstantial and frivolous." *See Bell v. Hood*, 327 U.S. 678, 682-83
27 (1946). Thus, dismissal under Fed. Rule Civ. Pro. 12(b)(1) is not appropriate. Second, the Clean
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1 Water Act creates a nondiscretionary duty for Defendants to update the National Oil and
2 Hazardous Substances Pollution Contingency Plan. *See In re A Community Voice*, 878 F.3d 779,
3 784 (9th Cir. 2017). Thus, Plaintiffs' First Cause of Action states a claim upon which the Court
4 can grant relief, and dismissal under Fed. Rule Civ. Pro. 12(b)(6) is inappropriate.

5 Accordingly, the Motion to Dismiss is hereby DENIED.

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7 **IT IS SO ORDERED.**

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9 DATED: _____

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11 HON. WILLIAM H. ORRICK
12 United States District Judge
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