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

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

20 Plaintiffs,

21 vs.

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

27 Defendants.
28

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

**EPA'S REPLY BRIEF IN SUPPORT
OF MOTION TO DISMISS THE FIRST
CAUSE OF ACTION**

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

**Location: Courtroom 2 – 17th 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.**

1 Defendants the United States Environmental Protection Agency and its Administrator
 2 (collectively, “EPA”) respectfully submit this reply in support of their Motion to Dismiss
 3 Plaintiffs’ First Cause of Action. As explained in that Motion, the First Cause of Action should
 4 be dismissed for lack of subject matter jurisdiction or, in the alternative, for failure to state a
 5 claim. Plaintiffs’ opposition (“Opp’n”) is notable for its failure to address the primary rationale
 6 for dismissal presented in EPA’s motion – that Plaintiffs cannot establish federal subject matter
 7 jurisdiction to support its citizen suit claim under the Clean Water Act (“CWA”). Rather than
 8 articulate a basis for jurisdiction, Plaintiffs spend much of their opposition discussing alleged
 9 facts and arguments relating to their Second Claim for Relief, an Administrative Procedure Act
 10 (“APA”) claim of unreasonable delay.¹ EPA reserves its right to address the merits of the
 11 Second Claim for Relief at the appropriate time. This reply is directed to EPA’s motion to
 12 dismiss Plaintiffs’ CWA citizen suit claim.

13 **I. THE COURT SHOULD RESOLVE THE ISSUE RAISED IN EPA’S MOTION**
 14 **TO DISMISS**

15 As an initial matter, Plaintiffs contend that the Court cannot dismiss the claim under
 16 Rule 12(b)(1) unless the allegations in the complaint are “frivolous” or “immaterial.” ECF No.
 17 26, Opp’n 8:19-21. Plaintiffs misstate the basis for EPA’s motion; the agency is not
 18 challenging “federal question jurisdiction” under 28 U.S.C. 1331. *See* ECF No. 26, Opp’n 8:8-
 19 9. Rather, EPA moves to dismiss because there is no waiver of sovereign immunity, and thus
 20 no subject matter jurisdiction, where Plaintiffs cannot identify a nondiscretionary duty that
 21 forms the basis for its Clean Water Act citizen suit.

22
 23
 24 ¹ In their summary, Plaintiffs fail to inform the Court that in November 2019 – over two months
 25 before Plaintiffs filed their complaint – notice of a proposed final action was published. *See*
 26 [https://www.epa.gov/newsreleases/epa-fall-2019-unified-agenda-and-regulatory-plan-](https://www.epa.gov/newsreleases/epa-fall-2019-unified-agenda-and-regulatory-plan-underscores-commitment-strong)
 27 [underscores-commitment-strong](https://www.epa.gov/newsreleases/epa-fall-2019-unified-agenda-and-regulatory-plan-underscores-commitment-strong) (notice) and
 28 https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201910&showStage=longterm&agencyCd=2000&csrf_token=B317D67E55A2C88D471AF343F1F7A87D103E316472F673F68830CE34B6FB61D8BDD65F8CAC61DC562AF51AE3753F0A07A785 (*See* RIN 2050-AE87)(both last visited April 21, 2020).

1 Plaintiffs further argue that the First Cause of Action cannot be dismissed for lack of
 2 subject matter jurisdiction under Rule 12(b)(1) because the motion “attacks the merits of
 3 Plaintiffs’ claim rather than its jurisdictional basis.” ECF No. 26, Opp’n 7:20-21. Indeed,
 4 Plaintiffs’ opposition seeks to prevent the Court from considering the very statutory provision
 5 upon which Plaintiffs rely upon to invoke federal subject matter jurisdiction. However, courts
 6 in the Ninth Circuit routinely consider whether a plaintiff has identified a nondiscretionary duty
 7 – and thus met their burden to establish subject-matter jurisdiction – in the context of motion to
 8 dismiss. *See, e.g., WildEarth Guardians v. McCarthy*, 772 F.3d 1179 (9th Cir. 2014)
 9 (upholding district court’s dismissal for failure to identify a nondiscretionary duty on the part of
 10 agency); *Martin v. Olson*, 749 F. App’x 638 (9th Cir. 2019) (same); *Friends of the Wild Swan*
 11 *v. Director of U.S. Fish & Wildlife Service*, 745 F. App’x 718 (9th Cir. 2018) (same). Plaintiffs
 12 have not – and cannot – provide a reasoned basis for delaying a decision on the discrete legal
 13 issue raised in EPA’s motion, *i.e.*, whether the “duty” Plaintiffs cite in their Complaint is a
 14 nondiscretionary action compelled by the CWA.²

15 Plaintiffs’ reliance on *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d
 16 138, 140 (9th Cir. 1983), is misplaced. In *Sun Valley*, the district court had made a finding on a
 17 disputed factual issue – whether the parties were in a “franchise relationship” in deciding a
 18 motion to dismiss. *Id.* at 139. In reversing the district court, the Ninth Circuit stated
 19 “[j]urisdictional findings of genuinely disputed *facts* is inappropriate when ‘the jurisdictional
 20 issue and substantive issues are so intertwined that the question of jurisdiction is dependent on
 21 the resolution of factual issues going to the merits’ of an action.” *Id.* (emphasis added, internal
 22 citations omitted). Here, the Court’s evaluation of whether there is jurisdiction under the
 23 CWA is a matter of law and does not involve factual findings.

24
 25 ² It is true that, if the Court were to find that Plaintiffs have identified a nondiscretionary duty,
 26 EPA’s liability would be clear since there is no dispute that EPA has not yet finalized a
 27 rulemaking process to amend the NCP. But that is no reason for the Court to withhold ruling
 28 on EPA’s motion to dismiss.

1 Similarly, *Bell v. Hood*, 327 U.S. 678 (1946) offers no support to Plaintiffs’
2 interpretation of the CWA. In *Bell*, the Supreme Court considered whether a complaint
3 asserting common law trespass under state law could derive federal jurisdiction out of claims
4 under the Constitution. *Id.* The Court explained that jurisdiction is not defeated “by the
5 possibility that the averments might fail to state a cause of action on which petitioners could
6 actually recover,” *id.* at 682, and concluded that the court must first exercise jurisdiction in
7 order to determine whether the allegations in the complaint state a ground for relief. *Id.* In that
8 event, the court determined dismissal of the case for failure to state a claim would be on the
9 merits, not for want of jurisdiction. *Id.* Here, EPA’s motion presents the alternative argument
10 for dismissal for failure to state a claim under Rule 12(b)(6).

11 Neither *Sun Valley* nor *Bell* involved a motion to dismiss for failure to identify a
12 nondiscretionary duty on the part of a governmental entity. And, as the case law in this Circuit
13 makes abundantly clear, the Court can and should decide the issue in the context of a motion to
14 dismiss.

15 **II. THE FIRST CAUSE OF ACTION MUST BE DISMISSED UNDER RULE** 16 **12(b)(1)**

17 In cases brought against the United States, one condition on a federal court’s exercise of
18 subject matter jurisdiction is the existence of an applicable waiver of sovereign immunity.
19 Without such a waiver, the United States, together with its agencies and its employees, may not
20 be sued. *FDIC v. Meyer*, 510 U.S. 471-475 (1994). “Sovereign immunity is jurisdictional in
21 nature.” *Id.* at 475; *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014) (“Suits against the
22 government are barred for lack of subject matter jurisdiction unless the government expressly
23 and unequivocally waives its sovereign immunity”). Waivers of sovereign immunity must be
24 strictly construed in the government’s favor and must be unequivocally expressed in the
25 statutory text. *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *Dep’t of the Army v. Blue*
26 *Fox, Inc.*, 525 U.S. 255, 261 (1999). Because only Congress can waive the government’s
27 sovereign immunity, a suit against the United States or its agencies or employees acting in their
28 official capacity may proceed only in accordance with an applicable statutory waiver, including

1 such conditions on the waiver as Congress may impose. *United States v. Testan*, 424 U.S. 392,
2 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586-88 (1941). Plaintiffs bear the
3 burden of establishing federal jurisdiction. *Acres Bonusing, Inc, et al. v. Lester Marston, et al.*,
4 2020 WL 1877711, No. 19-cv-05418-WHO at *4 (N.D. Cal. April 15, 2020), citing *Kokkonen*
5 *v. Guardian Life Ins. Of Am.*, 511 U.S. 375, 377 (1994). The issue of whether the CWA
6 imposes a mandatory duty on EPA to revise or amend the NCP is critical to Plaintiffs' claim to
7 federal court jurisdiction.

8 In the First Cause of Action, Plaintiffs allege that the CWA citizen suit provision
9 provides a statutory basis to invoke federal jurisdiction. See ECF No. 1, Compl. ¶¶ 129-131;
10 33 U.S.C. § 1365(a)(2) (authorizing suit “against the Administrator where there is an alleged a
11 failure of the Administrator to perform any act or duty under this Act which is not discretionary
12 with the Administrator”). Thus, the relevant CWA waiver of sovereign immunity is limited to
13 claims where a plaintiff identifies a nondiscretionary duty on the part of the Administrator and
14 alleges that the Administrator has failed to perform that duty. Plaintiffs allege that EPA has a
15 nondiscretionary duty to amend the NCP under CWA section 311(d)(3), see ECF No. 1,
16 Compl. ¶ 129 (alleging failure to update the NCP, as required under 33 U.S.C. § 1321(d)(3),
17 constitutes a failure to perform a non-discretionary duty). However, Plaintiffs have failed to
18 identify a clear-cut, readily ascertainable duty in the CWA. See *WildEarth Guardians*, 772
19 F.2d at 1182, citing *Our Children’s Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008).

20 Plaintiffs acknowledge that the CWA states, in relevant part: “[t]he President, *may*,
21 *from time to time, as the President deems advisable*, revise or otherwise amend the [NCP].” 33
22 U.S.C. § 1321(d)(3) (emphasis added); see ECF No. 26, Opp’n at 12:17-20. The provision is
23 replete with discretionary directives. The words “may,” “from time to time,” and “as the
24 [Administrator] deems advisable” all demonstrate Congressional intent to provide EPA with
25 discretion in determining whether and when to revised or amend the NCP. See, e.g., *Fleetwood*
26 *Enterprises, Inc. v. U.S. Dept. of Housing and Urban Dev.*, 818 F.2d 1188, 1194 (5th Cir.
27 1987) (holding that the term “deems advisable” in the National Manufactured Housing
28

1 Construction and Safety Standards Act of 1974 provides the Secretary of HUD discretion in
2 how to conduct hearings).

3 Although Plaintiffs cite CWA Section 311(d)(3) as the source of the nondiscretionary
4 duty for their citizen suit, in their opposition they attempt to cobble together separate provisions
5 of the CWA in their attempt to establish a mandatory duty to amend the NCP. ECF No. 26,
6 Opp'n 10:18-22 (arguing that inclusion of the term "shall" in 33 U.S.C. § 1321(d)(2) pertains to
7 subsection (d)(3)). As the Ninth Circuit has made clear, the agency's duty cannot exist "only
8 [as] the product of a set of inferences based on the overall statutory scheme." *Our Children's*
9 *Earth Found.*, 527 F.3d 842, 851 (9th Cir. 2008) (quoting *Sierra Club v. Thomas*, 828 F.2d
10 783, 791 (D.C. Cir. 1987)). Moreover, Plaintiffs' analysis is incorrect. CWA Section 311(d),
11 captioned "National Contingency Plan," has many discrete provisions. For example, in Section
12 311(d)(1), Congress instructed that [EPA] "*shall* prepare and publish a [NCP]" and Section
13 311(d)(2) describes in detail the contents that the NCP "*shall*" include. 33 U.S.C. § 1321(d)(1),
14 (2). Section 311(d)(3), in contrast, expressly provides that EPA "*may, from time to time, as the*
15 *[Administrator] deems advisable*" revise or amend the NCP. 33 U.S.C. § 1321(d)(3) (emphasis
16 added). Because Congress unambiguously provided EPA discretion under Section 311(d)(3),
17 the Court must give effect to that express intent. *See Ochoa-Amaya v. Gonzales*, 479 F.3d 989,
18 992 (9th Cir. 2007).

19 To the extent the Court concludes that there is any ambiguity as to whether there is a
20 nondiscretionary duty on the part of EPA – which EPA submits there is not – the Court's
21 inquiry ends and the First Cause of Action must be dismissed. As the Ninth Circuit has
22 repeatedly made clear, when a plaintiff sues the EPA Administrator for failure to perform a
23 nondiscretionary act or duty set forth in a statute, "the nondiscretionary nature of the duty must
24 be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty."
25 *WildEarth Guardians*, 772 F.2d at 1182. This Court "must be able to identify a 'specific,
26 unequivocal command' from the text of the statute." *Id.* (internal citations omitted). And
27 Plaintiffs cannot be allowed to extrapolate a nondiscretionary duty based on an "amalgamation
28 of disputed statutory provisions." *Our Children's Earth*, 527 F.3d at 851. Where a court finds

1 ambiguity in a provision that is asserted as setting forth a nondiscretionary duty, the Court must
2 dismiss for lack of subject-matter jurisdiction. *WildEarth Guardians*, 772 F.2d at 1182.

3 Plaintiffs chide EPA for “neglecting” to cite *In re A Community Voice*, 878 F.3d 779
4 (9th Cir. 2017), in the agency’s motion to dismiss. *See, e.g.*, ECF No. 26, Opp’n 11:4-5.
5 Contrary to Plaintiffs’ assertions, *Community Voice* has no bearing on the Court’s analysis of
6 EPA’s motion to dismiss. That matter was before the Ninth Circuit on an appeal of the denial
7 of an action seeking a writ of mandamus and involved a provision of the Toxic Substances
8 Control Act (“TSCA”), not the CWA. In determining federal jurisdiction, the Ninth Circuit
9 analyzed TSCA to determine whether the statute imposed a nondiscretionary duty on EPA to
10 promulgate rules relating to lead-based paint. The court found that TSCA contained an
11 “ongoing duty, authorizing EPA to amend any regulations when necessary,” including
12 amending the lead-based paint standards authorized by Congress.³ *Id.* at 784. Central to the
13 court’s determination was the specific text of the statute that provided “[t]he regulations may be
14 amended from time to time *as necessary*.” *Id.*, citing 15 U.S.C. § 2683 (emphasis added).
15 Here, the text of the CWA section at issue does not include the term “as necessary” and the
16 statute is significantly and materially different than TSCA. Section 311(d)(3) expressly states
17 that EPA “may, from time to time, as the [Administrator] deems advisable” revise or amend the
18 NCP. 33 U.S.C. § 1321(d)(3).

19 Under the CWA, Congress specifically used the term “shall” in directing the EPA to
20 promulgate the NCP and as to the specific contents that were required, but used the terms
21 “may” and “deems advisable” when specifying how and when amendments and revisions to the
22 NCP should take place. *See supra*, 4:16-5:13 (discussing CWA sections 311(d)(1)-(3)); *see*
23 *also Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (stating that the court
24 “must interpret statutes as a whole, giving effect to each word and making every effort not to
25 interpret a provision in a manner that renders other provisions of the same statute inconsistent,
26

27 ³ Although EPA believes *Community Voice* was wrongly decided on several grounds, including
28 for example, the reasons set forth in Judge Smith’s dissent, *see* 878 F.3d at 788-793, the agency
recognizes that it is binding Ninth Circuit law.

1 meaningless or superfluous”). Because Congress expressly provided EPA discretion to amend
 2 or revise the NCP under the CWA how and when the agency deems advisable, Plaintiffs’
 3 assertion of a nondiscretionary duty fails.

4 Plaintiffs have failed to establish federal subject matter jurisdiction for the First Cause
 5 of Action under the CWA and that count should be dismissed under Rule 12(b)(1).

6 **II. ALTERNATIVELY, THE FIRST CAUSE OF ACTION SHOULD BE**
 7 **DISMISSED UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM**

8 For the same reasons set forth above, Plaintiffs have failed to state a claim for relief
 9 under the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2), because section 311(d)(3), 33
 10 U.S.C. § 1321(d)(3), does not impose a “nondiscretionary duty.” Plaintiffs ignore the plain text
 11 of the statute and attempt to import other statutory provisions and alleged facts to avoid the
 12 dismissal for failure to state a claim. The Court should grant EPA’s motion under Rule
 13 12(b)(6) because a plain textual reading of Section 311(d)(3) does not impose a
 14 nondiscretionary duty on EPA. *See supra*. Plaintiffs have not and cannot allege facts that
 15 defeat the specific statutory directive provided by Congress. Accordingly, Plaintiffs cannot
 16 state a claim upon which relief can be granted and the First Cause of Action should be
 17 dismissed under Rule 12(b)(6).

18 **CONCLUSION**

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

22 Respectfully submitted this 21st day of April, 2020.

23
 24 By: /s/ Mark Albert Rigau
 25 MARK ALBERT RIGAU
 26 Senior Trial Counsel
 27 Environmental Defense Section
 28 United States Department of Justice
Counsel for Defendants

CERTIFICATE OF SERVICE

On April 21, 2020, the undersigned electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court for the Northern District of California, using the electronic case filing system of the Court. The undersigned hereby certifies that all counsel of record have been electronically served in accordance with Federal Rule of Civil Procedure 5(b)(2).

/s/ Mark Albert Rigau