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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 BIOLOGICAL
18 DIVERSITY; ROSEMARY
19 AHTUANGARUAK; AND KINDRA 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.

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

**EPA'S NOTICE OF MOTION AND
MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION
OF ORDER DENYING EPA'S
MOTION TO DISMISS FIRST CAUSE
OF ACTION AND [PROPOSED]
ORDER**

Action Filed: January 30, 2020

Re: Local Rule 7-9

1 EPA respectfully submits that reconsideration is warranted, as there was “a manifest
2 failure by the Court to consider . . . dispositive legal arguments which were presented to the
3 Court before [the Court’s June 2, 2020 Order]. L.R. 7-9(b)(3).

4 **BACKGROUND AND PROCEDURAL HISTORY**

5 Plaintiffs have asserted two claims in this case. In the First Cause of Action (Compl. ¶¶
6 126-32), Plaintiffs allege that EPA has failed to perform a mandatory duty to update the NCP
7 under 33 U.S.C. § 1321(d)(3). Plaintiffs cite the Clean Water Act’s citizen suit provision, 33
8 U.S.C. § 1365(a)(2), which authorizes judicial actions to compel EPA to perform
9 nondiscretionary duties imposed by the Act. *See* Compl. ¶¶ 129-130. In the Second Cause of
10 Action (Compl. ¶¶ 133-136), Plaintiffs allege that EPA’s failure to issue a final rule or take
11 final action on a 2015 petition to amend Subpart J violates 5 U.S.C. § 555(b) and that EPA
12 actions “constitutes an agency action ‘unlawfully withheld or unreasonably delayed.’” Compl.
13 ¶ 135, citing 5 U.S.C. § 706(1).

14 EPA moved to dismiss the First Cause of Action because Plaintiffs have failed to
15 identify a discrete, nondiscretionary duty on the part of EPA. Dkt. No. 16. As EPA explained:

16 Plaintiffs’ allegation that EPA has a nondiscretionary duty to amend the
17 [National Contingency Plan] is refuted by the plain language of the Act. The
18 CWA provides that EPA “*may*, from time to time, *as the [Administrator] deems*
19 *advisable*, revise or otherwise amend the [NCP].” 33 U.S.C. § 1321(d)(3)
20 (emphasis added). Thus, the statute specifically provides that revisions and
21 amendments to the NCP are initiated at the discretion of the agency.
22 *Id.* at 5 (emphasis in motion). With respect to the text of Section 1321(d)(3), EPA focused on
23 the terms “*may*,” “*from time to time*,” and “*as the Administrator deems advisable*.” *Id.* at 5-6.
24 In light of these express statutory terms, EPA argued that the plain text of section 311(d)(3)
25 leaves the appropriateness and the timing of any such regulatory amendments or revisions to
26 the Agency’s discretion. *Id.* at 6.

27 In opposing EPA’s motion, Plaintiffs devoted the majority of their argument to their
28 position that the term “*may*” in Section 1321(d)(3) should be interpreted to mean “*shall*.” *See*

1 Opp'n. Dkt. No. 26 at 2:12-3:2, 10:21-11:3, 14:11-16:11. Plaintiffs also argued that the lack of
2 a specific date or time in Section 1321(d) was not dispositive. *See id.* at 16:12-17:6. With
3 respect to EPA's assertion that the language of the statute expressly confers discretion to
4 EPA's Administrator, "as the Administrator deems advisable," Plaintiffs did not dispute that
5 the statute confers discretion to the Administrator. Rather, Plaintiffs avoided the argument,
6 and wrongly asserted that "EPA's Administrator" had in fact made a determination that the
7 NCP should be amended based on recommendations in an EPA Inspector General report. *See*
8 *id.* at 13:16-21.

9 In EPA's reply, the agency noted in part that, in contrast to the other subsections of
10 Section 1321 that contained mandatory requirements, Section 1321(d)(3) specifically provides
11 that EPA "may, from time to time, as the [Administrator] deems advisable" revise or amend
12 the NCP. Dkt. No. 28 at 5:14-16 (citing 33 U.S.C. § 1321(d)(3) (emphasis added)). EPA
13 further asserted that "[b]ecause Congress unambiguously provided EPA discretion under
14 Section 311(d)(3), the Court must give effect to that express intent." *Id.* at 5:16-18 (citing
15 *Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 992 (9th Cir. 2007)). EPA also explained that *In re A*
16 *Community Voice*, 878 F.3d 779 (9th Cir. 2017), a case Plaintiffs contend is "controlling"
17 because it purportedly addressed "statutory text nearly identical to the case at bar," was easily
18 distinguishable. *Id.* at 6:3-18; Opp'n., Dkt. No. 26 at 11:5-6. EPA pointed out that, unlike the
19 Toxic Substances Control Act provision at issue *A Community Voice*, CWA Section 1321(d)(3)
20 includes language identifying the Administrator as having discretion to determine the timing
21 and substance of revisions or amendments to the NCP. Dkt. No. 28 at 6:15-18 (citing 33 U.S.C.
22 § 1321(d)(3) (providing that EPA "may, from time to time, as the [Administrator] deems
23 advisable" revise or amend the NCP).

24 In the Order denying EPA's Motion to Dismiss, the Court acknowledged the text of
25 Section 1321(d)(3) and stated that, based on the text of subsection (d)(3), the Court "would
26 agree that this language suggests discretionary, not mandatory, authority." Dkt. No. 42 at
27 7:12-14. The Court then proceeded to consider some of the language of subsection (d)(3),
28 including the terms "may," "from time to time," and "as advisable." *Id.* at 7-8; *see also* 9:21-

1 10:3 (discussing lack of date-certain deadline). However, the Court did not specifically
 2 address the portion of Section 1321(d)(3) that places authority in the President (which has been
 3 delegated to the Administrator of EPA) to determine when it is advisable to amend or revise
 4 the NCP. 33 U.S.C. § 1321(d)(3).

5 Rather, the Court looked to Section 1321(d)'s "overall intent," which the Court found
 6 "contemplates an ongoing duty that in turn strongly suggests that the duty to update and revise
 7 the NCP 'as advisable' is not discretionary, but required." Dkt. No. 42 at 8:15-16. The Court
 8 also pointed to "[t]he facts alleged," the "purpose of the NCP," and the "intent of Congress in
 9 enacting the CWA" in finding that "Section 1321(d)(3) is properly interpreted to create a
 10 nondiscretionary obligation for the Administrator to revise or amend the NCP." *Id.* at 8, 9:6-7.

11 ARGUMENT

12 EPA respectfully submits that the Court erred in failing to address the agency's
 13 arguments that the plain language of Section 1321(d)(3) expressly confers discretion on the
 14 Administrator to make a determination as to the advisability and timing of amendments to the
 15 NCP.

16 I. EPA presented a dispositive legal argument – that action taken under Section 17 1321(d)(3) is at the discretion of the EPA Administrator.

18 The issue presented by EPA's motion is whether Clean Water Act Section 1321(d)(3)
 19 contains a discrete, nondiscretionary duty that is subject to a CWA citizen suit to compel
 20 performance of the alleged duty. *See* Order, Dkt. No. 42 at 1 ("At issue is whether, as a matter
 21 of law, the CWA imposes a nondiscretionary duty on the EPA to update or amend the National
 22 Contingency Plan"). As the parties and Court agree, the presence of a nondiscretionary duty is
 23 a prerequisite to bringing a CWA citizen suit. *See* Motion, Dkt. No. 16 at 4:20-28; Opp'n, Dkt.
 24 No. 26 at 9:19-20; Reply, Dkt. No. 28 at 4:5-7; Order, Dkt. No. 42 at 1 ("if so, [Plaintiffs are]
 25 allowed to bring a cause of action pursuant to the CWA's citizen-suit provision"). Without
 26 such prerequisite, Plaintiffs' First Cause of Action must be dismissed.

27 II. The argument that action taken under Section 1321(d)(3) is discretionary was 28 presented to the Court in EPA's briefing on the motion to dismiss.

1 There can also be no dispute that EPA clearly asserted that the express language of
 2 Section 1321(d)(3) confers discretion *to the Administrator* to determine whether it is advisable
 3 to amend or revise the NCP and, if so, when to promulgate an amendment or revision of the
 4 NCP. *See* Dkt. No. 16 at 5:1-5; Dkt. No. 28 at 4:20-27. Indeed, the Court recognized that EPA
 5 “focuses on the plain language” of Section 1321(d)(3), and noted EPA’s arguments regarding
 6 the terms “may,” “from time to time,” and “as the Administrator deems advisable.” Dkt No.
 7 42 at 7:7-12. Thus, EPA’s briefing addressed both the timing of any action to revise or amend
 8 the NCP, and the Administrator’s discretionary authority to determine whether and when to do
 9 so.

10 EPA’s briefing also included discussion of Supreme Court caselaw explaining the
 11 difference between discretionary versus nondiscretionary duties. Dkt. No. 16 at 5-6

12 EPA further explained that the statutory provision at issue in *A Community Voice*, the
 13 case upon which Plaintiffs and the Court cite in concluding that Section 1321(d)(3) contains a
 14 nondiscretionary duty, was substantively different from CWA Section 1321(d)(3). EPA
 15 explained:

16 Here, the text of the CWA section at issue does not include the term “as
 17 necessary” and the statu[t]e is significantly and materially different than TSCA.

18 Section 311(d)(3) expressly states that EPA “may, from time to time, *as the*
 19 *[Administrator] deems advisable*” revise or amend the NCP.

20 Dkt. No. 28 at 6:15-18 (citing 33 U.S.C. § 1321(d)(3)) (emphasis added).

21 **III. There was a failure on the part of the Court to consider EPA’s argument that the**
 22 **express language of Section 1321(d)(3) confers discretion on the Administrator to**
 23 **determine how and when to revise the NCP, and that the Ninth Circuit’s decision**
 24 **in *A Community Voice* addressed a statutory provision that did not include such**
 25 **language.**

26 In the Court’s parsing of the terms contained in Section 1321(d)(3), the Court did not
 27 address the statutory terms referencing the discretionary authority of the President of the
 28 United States, which has been delegated to EPA’s Administrator. The Court’s decision is
 notable for its ample analysis of *some* of the terms of Section 1321(d)(3), such as the word
 “may” and “advisable,” and complete absence of analysis of the statute’s language regarding

1 the Administrator as a decisionmaker. It is well-established that courts “must interpret statutes
 2 as a whole, giving effect to each word and making every effort not to interpret a provision in a
 3 manner that renders other provisions of the same statu[t]e inconsistent, meaningless, or
 4 superfluous.” *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). *See also*
 5 *J.C. by & through W.P v. Cambrian Sch. Dist.*, No. 12-CV-03513-WHO, 2014 WL 229892, at
 6 *7 (N.D. Cal. Jan. 21, 2014) (Orrick, J.) (stating same), *aff’d sub nom. J.C. ex rel. W.P. v.*
 7 *Cambrian Sch. Dist.*, 648 F. App’x 652 (9th Cir. 2016).

8 EPA respectfully contends that the Court’s failure led to an erroneous decision that is in
 9 conflict with other decisions of this District Court and other courts in the Ninth Circuit. *See,*
 10 *e.g., Citizens for a Better Env’t v. EPA*, No. C-90-1124-JPV, 1990 WL 269123 (N.D. Cal. Nov.
 11 6, 1990) (finding CWA Section 1313(c)(4)(B), which provides that EPA’s Administrator shall
 12 promptly publish proposed water quality standards “in any case where the Administrator
 13 determines that a revised or new standard is necessary to meet the requirements of [the
 14 CWA],” to be discretionary); *Nw. Envtl. Advocates v. U.S. E.P.A.*, 268 F. Supp. 2d 1255, 1261
 15 (D. Or. 2003) (finding same); *Puget Soundkeeper All. v. EPA*, No. C13-1839-JCC, 2014 WL
 16 4674393, at *2 (W.D. Wash. Sept. 18, 2014) (finding same).

17 Relatedly, the Court neither recognized nor addressed EPA’s argument as to the textual
 18 distinction between the Toxic Substances Control Act (“TSCA”) provision at issue in *A*
 19 *Community Voice* and CWA Section 1321(d)(3). Rather, the Court found the language of
 20 Section 1321(d)(3) “similar in wording” to a TSCA provision that made no reference to any
 21 decisionmaker. Dkt. No. 42 at 9:14. In addition, the Court discounted any difference between
 22 “as necessary” and “as advisable,” Dkt. No. 42 at 7:18-19, but did not seem to recognize that
 23 Section 1321(d)(3) does not contain the term “as advisable.”¹ Rather, as EPA pointed out

24
 25
 26 ¹ The Court stated that “EPA suggests that the difference between ‘as necessary’ and ‘as
 27 advisable’ is significant.” Dkt. No. 42 at 7:17-19. What EPA actually stated was that “the text
 28 of the CWA section at issue does not include the term ‘as necessary’ and the statu[t]e is
 significantly and materially different than TSCA. *Section 311(d)(3) expressly states that EPA
 ‘may, from time to time, as the [Administrator] deems advisable’ revise or amend the
 NCP.”* Dkt. No. 28 at 6:15-18 (citing 33 U.S.C. § 1321(d)(3)).

1 numerous times in its briefing, it is “as [*the Administrator*] deems advisable.” See Dkt. No. 16
2 at 3:12-16, 5:2-4, 6:22-25; Dkt. No. 28 at 4:20-25, 5:14-16, 6:16-18.

3 **CONCLUSION**

4 EPA respectfully submits that had the Court considered EPA’s dispositive legal argument
5 that the plain language of CWA Section 1321(d)(3) regarding the discretionary authority of the
6 Administrator, it would have found in favor of EPA and dismissed the First Cause of Action.
7 Because there was a failure on the part of the Court to address the arguments made by EPA in its
8 briefing, the Court should grant EPA leave to file a motion for reconsideration of the Court’s
9 Order.

10 Respectfully submitted this 22st day of July 2020.

11
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CERTIFICATE OF SERVICE

I certify that on July 22, 2020, I electronically filed the foregoing Notice of Motion and Motion for Leave to File Motion for Reconsideration with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel and parties of record.

Dated: July 22, 2020

By: /s/Mark Rigau
Mark Rigau

