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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
 INLETKEEPER; CENTER FOR
 17 BIOLOGICAL DIVERSITY; ROSEMARY
 AHTUANGARUAK; AND KINDRA
 18 ARNESEN,

19 Plaintiffs,

20 v.

21 Michael S. Regan,¹ in his official capacity
 as Acting Administrator of the United States
 22 Environmental Protection Agency; and the
 23 UNITED STATES ENVIRONMENTAL
 PROTECTION AGENCY,

24 Defendants.
 25
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 27
 28

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

**EPA’S MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 OPPOSITION TO PLAINTIFFS’
 MOTION FOR SUMMARY
 JUDGMENT AND IN SUPPORT OF
 CROSS MOTION FOR SUMMARY
 JUDGMENT**

Hearing date: July 7, 2021
 Time : 2:00 PM
 Dept : Courtroom 2, 17th Floor
Via Zoom unless otherwise indicated.
 Judge : Hon. William H. Orrick

¹ Administrator Michael S. Regan is substituted for his predecessor, Acting Administrator Jane Nishida, pursuant to Federal Rule of Civil Procedure 25(d).

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INTRODUCTION

1
2 Under the Clean Water Act (“CWA”), Congress directed EPA to “prepare and publish a
3 National Contingency Plan (“NCP”) for removal of oil and hazardous substances pursuant to
4 this section.” 33 U.S.C. § 1321(d)(1). “It is undisputed that the EPA has discharged that
5 duty.” ECF 42, Order at 7. It is equally undisputed that as part of the last major overhaul of
6 the NCP in 1994, EPA updated Subpart J, the portion of the NCP that Plaintiffs focus on in this
7 litigation. As promulgated, the 1994 amendments, including Subpart J, “provide[d] for
8 efficient, coordinated, and effective action to minimize damage from oil and hazardous
9 substance discharges, including containment, dispersal, and removal of oil and hazardous
10 substances.” 33 U.S.C. § 1321(d)(2). The NCP has been revised multiple times.

11 On January 30, 2020, Plaintiffs filed this suit in an effort to compel EPA to complete a
12 rulemaking on proposed amendments to Subpart J of the NCP. The complaint asserts claims
13 under the CWA citizen suit provision, 33 U.S.C. § 1365(a), and under the Administrative
14 Procedure Act (APA”), 5 U.S.C. § 704, alleging that EPA has unreasonably delayed issuing a
15 final rule and taking final action on their administrative petitions. ECF 1 at 27-28.

16 EPA moved to dismiss Plaintiffs’ CWA citizen suit claim for lack of jurisdiction. ECF
17 16. The Court denied EPA’s motion, determining that CWA section 1321(d)(3), which states
18 “[t]he [EPA] may, from time to time, as the [EPA] deems advisable, revise or otherwise amend
19 the [NCP],” imposes a nondiscretionary duty on EPA to amend the NCP “in light of new
20 information.” ECF 42, Order at 10. As a result, the Court found it has jurisdiction to hear
21 Plaintiffs’ claim brought under the CWA citizen suit provision, which authorizes a citizen to
22 bring a civil action “against the Administrator where there is alleged a failure of the
23 Administrator to perform any act or duty under this Act which is not discretionary with the
24 Administrator.” 33 U.S.C. § 1365(a)(2). EPA moved for leave to file a motion for
25 reconsideration, ECF 47, but that motion was denied, ECF 53.

26 In their motion for summary judgment, Plaintiffs move for summary judgment under
27 both their citizen suit claim and their APA unreasonable delay claim. However, the APA does
28 not provide a waiver of sovereign immunity or a cause of action where a plaintiff seeks similar

1 relief under the APA as it seeks in a citizen suit to compel agency action. Plaintiffs cannot
2 have it both ways. Where the Court has found it has jurisdiction to hear Plaintiffs' citizen suit
3 claim, their APA claim must be dismissed.

4 The Court should also reject Plaintiffs' requested relief, which Plaintiffs claim is based
5 on the Administrative Procedure Act and the All Writs Act. Plaintiffs' request for relief has
6 evolved from the Complaint, which seeks an order requiring EPA to "issue a final rule to
7 update the NCP on an expeditious schedule to be established by this Court," to a much broader
8 demand regarding the substance of EPA's rulemaking, in which Plaintiffs seek to discard the
9 prior proposal by requesting an order requiring EPA to draft a new proposed rule and complete
10 action on that new proposal in one year. Compare Complaint [ECF 1] at 27-28 with Plaintiffs'
11 Proposed Order [ECF 63-8]; see also, Order [ECF 42] at 10 ("plaintiffs challenge the agency's
12 procedure and not its substantive decision").

13 As explained below, EPA has acted reasonably in connection with the proposed rule to
14 amend or revise Subpart J of the NCP. The facts associated with the time it has taken EPA to
15 move various portions of the proposed rule through the rulemaking process are undisputed. In
16 the event the Court finds EPA to be liable under either the citizen suit claim or the APA claim,
17 the length of time necessary for EPA to take final action on its proposed rule, which is
18 described in the attached declaration, is reasonable under the circumstances.

19 STATEMENT OF ISSUES

20 The issues to be resolved through summary judgment are: (1) whether EPA is liable
21 with respect to Plaintiffs' first claim, which asserts a failure on the part of EPA to perform a
22 nondiscretionary duty under the Clean Water Act, i.e., "to update the NCP, as required by 33
23 U.S.C. § 1321(d)(3)" (ECF 1 ¶ 129); (2) whether EPA is liable with respect to Plaintiffs'
24 second claim, which asserts unreasonable delay on the part of EPA to complete a rulemaking
25 to update the NCP; and (3) if the Court finds in favor of Plaintiffs as to either claim, the
26 appropriate remedy.

BACKGROUND

I. Legal Background

A. The National Contingency Plan

The National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”) is a nationwide plan that provides “organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.” 40 C.F.R. § 300.1. Congress directed that “[t]he President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.” 33 U.S.C. § 1321(d)(1). The NCP is required by section 311(d) of the Clean Water Act, 33 U.S.C. § 1321(d), and by section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9605. Section 311 of the CWA, as amended by the Oil Pollution Act of 1990, focuses on the prevention of and response to oil discharges and CWA listed hazardous substances. *See* 33 U.S.C. § 1321. Section 105 of CERCLA directed the President to “revise and republish the [NCP] for the removal of oil and hazardous substances, originally prepared and published pursuant to [CWA section 311]” to also provide procedures and standards for response actions undertaken pursuant to CERCLA. 42 U.S.C. § 9605(a); *see* NCP, 55 Fed. Reg. 8666 (Mar. 8, 1990).

The purpose of the NCP is to “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.” 33 U.S.C. § 1321(d)(2). The NCP applies to discharges of oil into or on the navigable waters of the United States and releases of hazardous substances into the environment. 40 C.F.R. § 300.3(a). The NCP is comprised of twelve subparts, some of which have general applicability (e.g., Subpart A (Introduction, which includes Definitions), Subpart B (Responsibility and Organization for Response), and Subpart C (Planning and Preparedness)), and some of which are specific to either discharges of oil or releases of hazardous substances. *See id.* Part 300.

Plaintiffs’ Complaint focuses on Subpart J, which sets forth “[p]rocedures and techniques to be employed in identifying, containing, dispersing, and removing oil and

1 hazardous substances” and a schedule for identifying and evaluating dispersants, other
2 chemicals, and other spill mitigating devices and substances” which may be used in response to
3 oil discharges. 33 U.S.C. § 1321(d)(2)(F), (G). *See* 40 C.F.R. §§ 300.900-920 (“Use of
4 Dispersants and Other Chemicals”). The Subpart J regulations implement 33 U.S.C.
5 § 1321(d)(2)(G), and set forth the procedure for adding chemical agents, including dispersants,
6 to the NCP Product Schedule and for authorizing their use. *See id.* §§ 300.900(a), 300.910,
7 300.920. For a product to be added to the schedule, the manufacturer of the product must
8 submit technical product data specified in 40 C.F.R. § 300.915 to EPA. *Id.* § 300.920.

9 Among other things, Subpart J set a threshold for effectiveness that must be met for a
10 dispersant to be included on the NCP Product Schedule and requires the manufacturer to
11 provide the results of effectiveness and toxicity testing using defined procedures, as well as
12 other specific information. 40 C.F.R. § 300.915. EPA makes this information available to
13 planning entities, including the Regional Response Teams and Area Committees. *See id.* §§
14 300.115, 300.205. Regional Response Teams and Area Committees are required to address, as
15 part of their planning activities, the desirability of using appropriate dispersants and other
16 chemical agents to address oil discharges. *Id.* § 300.910(a). They **may** develop
17 **“preauthorization plans”** which address the specific context in which products may be
18 authorized for use by the On-Scene Coordinators and used under their oversight or direction.
19 These plans should address the specific contexts in which such products should and should not
20 be used. “In meeting the provisions of this paragraph, preauthorization plans may address
21 factors such as the potential sources and types of oil that might be spilled, the existence and
22 location of environmentally sensitive resources that might be impacted by spilled oil, available
23 product and storage locations, available equipment and adequately trained operators, and the
24 available means to monitor product application and effectiveness.” *Id.*

25 **Preauthorization plans** are approved, disapproved, or approved with modifications by
26 representatives from EPA, the Department of Interior, the Department of Commerce, and the
27 state(s) with jurisdiction over the water to the area which they apply. *Id.* When a
28 preauthorization plan approves in advance the use of certain products under specified

1 circumstances, the On-Scene Coordinator may authorize the use of the products listed on the
2 Schedule in response to a spill without further NCP Subpart J consultation or concurrence,
3 subject to any limitations within the applicable preauthorization plan and any other applicable
4 legal requirements. *Id.* For specific discharge situations not covered by preauthorization
5 plans, the On-Scene Coordinator may authorize the use the products listed on the NCP Product
6 Schedule with the appropriate consultations and concurrences. *Id.* § 300.910(b). An exception
7 is provided where the On-Scene Coordinator may authorize the use of any product, whether or
8 not it is listed on the Schedule and without obtaining any concurrences, if it is the judgment of
9 the On-Scene Coordinator that the use of the product is necessary to prevent or substantially
10 reduce a hazard to human life. *Id.* § 300.910(d).

11 EPA has promulgated the schedule of dispersants and other chemical or bioremediation
12 products that may be authorized for use on oil discharges as required by section 311(d)(2)(G),
13 known as the NCP Product Schedule, *see* 40 C.F.R. § 300.905. *Ala. Cmt’y Action on Toxics v.*
14 *EPA*, 943 F. Supp. 2d 96, 98 (D.D.C. 2013) (describing the NCP Product Schedule). The NCP
15 Product Schedule works in conjunction with the Subpart J testing requirements and
16 authorization of use procedures to address the types of waters and the quantities of listed agents
17 that may be used in response to oil discharges.

18 “The President may, from time to time, as the President deems advisable, revise or
19 otherwise amend the National Contingency Plan.” 33 U.S.C. § 1321(d)(3). The President’s
20 authority under section 311(d) has been delegated to the Administrator of EPA. *See* Executive
21 Order 12,777, 56 Fed. Reg. 54,757, 54,758 (Oct. 22, 1991).

22 B. The CWA Citizen Suit Provision

23 The Clean Water Act provides a limited waiver of sovereign immunity for any person to
24 bring a citizen suit against the Administrator “where there is alleged a failure of the
25 Administrator to perform any act or duty under [the CWA] which is not discretionary.” 33
26 U.S.C. § 1365(a)(2).

27 C. The Administrative Procedure Act

28 The Administrative Procedure Act (“APA”) provides a right of review for a “person

1 suffering legal wrong because of agency action, or adversely affected or aggrieved by agency
2 action within the meaning of a relevant statute.” 5 U.S.C. § 702. Judicial review is limited to
3 “[a]gency action made reviewable by statute and final agency action for which there is no other
4 adequate remedy in a court.” *Id.* § 704. The APA identifies the specific forms of relief
5 available. *Id.* § 706. At issue here is section 706(1), which provides that “[t]he reviewing
6 court shall . . . compel agency action unlawfully withheld or unreasonably delayed.” The
7 Court may only review and compel agency action that is discrete and required. *Norton v. S.*
8 *Utah Wilderness All.*, 542 U.S. 55, 63 n.1, 64 (2004).

9 **II. Factual Background and Procedural History**

10 **A. EPA’s Proposed Rule to Revise the NCP Subpart J**

11 In the aftermath of the Deepwater Horizon Oil Spill in 2010, EPA began reevaluating
12 the role of dispersants in oil spill response to mitigate the environmental impacts of oil
13 discharges. Although Plaintiffs now contend in the Complaint that the Clean Water Act placed
14 a mandatory duty on EPA to update the NCP, in November 2012 several of the Plaintiffs
15 submitted a petition requesting that EPA exercise its authority under the CWA and amend the
16 NCP. ECF 1 ¶ 113. In January 2013, EPA responded, informing the petitioners that it was
17 already working on a proposed rule and encouraged petitioners to participate in the public
18 comment process. *See* Ex. 1, EPA Letter, Jan. 3, 2013. In June 2014, Plaintiff ALERT filed a
19 supplemental petition and sought a “complete overhaul of the NCP.” ECF 1 ¶ 115. EPA
20 responded, informing ALERT of the status of the proposed rule and seeking appropriately
21 formatted copies of the 2012 petition and 2014 supplemental petition for use in the rulemaking
22 docket. *See* Ex. 2, EPA Letter, July 23, 2014.

23 In 2015, EPA proposed amendments to Subpart J. NCP Proposed Rule, 80 Fed. Reg.
24 3380 (Jan. 22, 2015). EPA’s proposed rule seeks to ensure, among other things, that chemical
25 and biological agents used to address oil discharges, such as dispersants, have met applicable
26 efficacy and toxicity requirements and that the response communities are equipped with the
27 proper information to authorize and use products in a judicious and effective manner. More
28 specifically, the proposed rule addressed three primary components: (1) establishing new

1 monitoring requirements for certain atypical dispersant use situations; (2) revising the data and
2 information requirements for chemical agent products to be listed on the Subpart J Product
3 Schedule, and (3) revising the authorization of use of procedures for chemical agents in
4 response to an oil discharge to waters of the United States. Comments to the proposed rule
5 closed on April 22, 2015. *Id.* at 3381.

6 EPA received 81,973 comments on the proposed rule during the public comment
7 period. The comments included submissions from industry, academia, state and local
8 governments, environmental groups, and individuals. The comments provided a wide range of
9 both support for, and opposition to, the provisions of the proposed rule. EPA received
10 comments on all three major components of the proposed action: the authorization of use
11 requirements for chemical agents, the toxicity and efficacy testing protocols and data
12 requirements for listing products on the NCP Product Schedule, and the new monitoring
13 requirements for atypical dispersant use situations. In addition to the broad range of comments
14 offered on the policy approach for the proposed action, many of the comments are highly
15 technical in nature.

16 As explained in detail below, since 2015 EPA has continued to conduct the steps
17 necessary to conclude the rule but the process has been delayed for different reasons.

18 B. Procedural History

19 In January 2020, Plaintiffs filed a Complaint asserting two causes of action. ECF 1.
20 The First Cause of Action asserted under the CWA's citizen suit provision, alleges that EPA's
21 Administrator has failed to perform a nondiscretionary duty to update the NCP. *Id.* ¶ 129.
22 Plaintiffs cite as the basis for the duty 33 U.S.C. § 1321(d)(3), which provides that "[t]he
23 President may, from time to time, as the President deems advisable, revise or otherwise amend
24 the National Contingency Plan." *Id.* The Second Cause of Action asserted under the APA,
25 asserts that EPA has unreasonably delayed taking final action on the 2015 proposed rule and
26 Plaintiffs' petitions for rulemaking. *Id.* ¶¶ 134-35.

27 EPA moved to dismiss Plaintiffs' citizen suit claim under Rule 12(b)(1) and (6) for
28 failure to identify a discrete, nondiscretionary duty on the part of EPA's Administrator as the

1 basis for the claim. ECF 16. Because of section 1321(d)(3)'s clear and unequivocal language,
2 EPA has never viewed section 1321(d)(3) as imposing a nondiscretionary duty on EPA's
3 Administrator.² The Court denied EPA's motion and found that Plaintiffs "may bring a CWA
4 claim" to compel agency action because EPA's Administrator is under a nondiscretionary duty
5 pursuant to section 1321(d)(3) "in order to achieve the purpose of the CWA and the purpose of
6 the NCP" and "to revise or amend the NCP in light of new information." ECF 42 at 4, 9, 10.
7 EPA moved for leave to seek reconsideration of the Court's Order on the grounds that the
8 Court did not address EPA's arguments on the express language of the statute pertaining to the
9 Administrator as a decision-maker. ECF 47 at 1. The Court denied the motion, finding that
10 "EPA's arguments amount to an improper repetition of the arguments that it made in its motion
11 to dismiss, which I rejected." ECF 53 at 2.

12 STANDARD OF REVIEW

13 A motion for summary judgment will be granted "if the movant shows that there is no
14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
15 law." Fed. R. Civ. P. 56(a). Summary judgment is appropriate if the non-moving party "fails
16 to make a showing sufficient to establish the existence of an element essential to that party's
17 case," on which the party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 322-23 (1986). In evaluating a motion for summary judgment, the court must draw all
19 reasonable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S.
20 242, 257 (1986). "However, conclusory and speculative testimony does not raise genuine
21 issues of fact and is insufficient to defeat summary judgment." *Simpson Strong-Tie Company,*
22 *Inc. v. Oz-Post International, LLC*, 411 F. Supp. 3d 975, 980 (N.D. Cal. 2019), citing *Thornhill*
23 *Publ'g Co., Inc. v. GT&E Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

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27 ² Indeed, Plaintiffs have called the Court's ruling on this issue a "game-changer." See
28 https://www.nola.com/news/environment/article_eb652ad6-a5d5-11ea-a678-cfba9addc42d.html
(quoting Plaintiffs' counsel). EPA agrees.

ARGUMENT

I. EPA has fulfilled any nondiscretionary duty to revise or amend the NCP to “achieve the purpose of the NCP.”

Count I of the Complaint alleges a CWA citizen suit claim and seeks to compel EPA’s Administrator to perform a nondiscretionary duty alleged under 33 U.S.C. § 1321(d)(3), which provides that “[t]he President may, from time to time, as the President deems advisable, revise or otherwise amend the National Contingency Plan.” ECF 1 at ¶ 129. As noted above, the Court previously found that Plaintiffs may bring a citizen suit under 33 U.S.C. § 1365(a)(2) based on the Court’s finding that EPA’s Administrator is under a nondiscretionary duty pursuant to section 1321(d)(3) to revise or amend the NCP “in order to achieve the purpose of the CWA and the purpose of the NCP.” ECF 42 at 9.

Plaintiffs incorrectly assert in their motion that “[t]his Court has already determined that EPA has violated the Clean Water Act.” ECF 63 at 11. While EPA respectfully disagrees with the Court’s ruling on whether EPA has a nondiscretionary duty to amend the NCP, the Court found only that it has jurisdiction to hear Plaintiffs’ citizen suit claim. The Court made no finding as to EPA’s failure to perform any duty. The Court noted in its Order that “[o]verall, Section 1321(d) contemplates an ongoing duty that in turn strongly suggests that the duty to update and revise the NCP ‘as advisable’ is not discretionary, but required.” ECF 42 at 8. Further, the Court observed that the “requirement of Subsection (d)(2) is particularly instructive as it provides for continuing operations and mandates an ‘effective’ and [‘]efficient’ response to oil and hazardous substance pollution.” *Id.* Based on their apparent assumption that the Court’s finding that there is a nondiscretionary duty means that EPA has failed to meet that duty, Plaintiffs make no attempt to demonstrate that the NCP is not effective and efficient.

The NCP is a complex set of regulations that provides the blueprint for oil and hazardous substance response. The scope of the NCP is governed by both the CWA and CERCLA and, as a whole, the NCP must provide for the “efficient, coordinated, and effective response to discharges of oil and releases of hazardous substances, pollutants, and contaminants in accordance with the authorities of CERCLA and the CWA.” 40 C.F.R. § 300.3(b). Initially, the CWA required EPA to

1 “prepare and publish a National Contingency Plan for removal of oil and hazardous substances
 2 pursuant to this section,” 33 U.S.C. § 1321(d)(1), and then CERCLA required EPA to “revise and
 3 republish the national contingency plan for the removal of oil and hazardous substances, originally
 4 prepared and published pursuant to section 311.” 42 U.S.C. § 9605(a). EPA amended the NCP
 5 pursuant to the requirement in CERCLA in 1990, and since then, has further amended the
 6 NCP. Since the last major overhaul in 1994, EPA has amended the NCP several times.³

7 Thus, to the extent EPA is under a general nondiscretionary duty to revise or amend the
 8 NCP “from time to time” to achieve the purpose of the NCP, Plaintiffs have not shown that
 9 EPA has failed to perform that duty.

10 **II. If EPA is under a nondiscretionary duty under 33 U.S.C. § 1321(d)(3) to revise or**
 11 **amend the NCP whenever there is “new information,” EPA acknowledges that**
 12 **there has been new information since it last updated the NCP.**

13 In their motion, Plaintiffs request an order declaring that EPA’s Administrator has
 14 failed to perform the nondiscretionary duty to update the NCP “to reflect improvements in
 15 scientific and technological knowledge.” ECF 63 at 1. As noted above, the Court previously
 16 held that Plaintiffs may bring a citizen suit under 33 U.S.C. § 1365(a)(2), finding that EPA’s
 17 Administrator is under a nondiscretionary duty pursuant to section 1321(d)(3) “to revise or
 18

19 ³ See, e.g., 60 Fed. Reg. 16,053, 16,054 (Mar. 29, 1995) (revised definitions and text associated
 20 with remedial site evaluation); 62 Fed. Reg. 34,602 (June 26, 1997) (revised Federal Facilities
 21 Subpart L – NCP; involuntary acquisition of property by the government); 65 Fed. Reg. 47,323,
 22 47,325, (Aug. 2, 2000) (technical amendments); 72 Fed. Reg. 31,752, 31,753 (June 8, 2007)
 23 (amended 40 C.F.R. § 300.105); 78 Fed. Reg. 16,612 (Mar. 18, 2013) (amended 40 C.F.R. §
 24 300.805 – location of administrative record file); 79 Fed. Reg. 36,429 (June 27, 2014) (revised
 25 Subpart G, 40 C.F.R. § 300.600 – designation of federal trustees); 79 Fed. Reg. 65,589, 65,592
 26 (Nov. 5, 2014) (amended 40 C.F.R. § 300.4, 300.5, and 300.420 – remedial site evaluations); 80
 27 Fed. Reg. 17,703, 17,706 (Apr. 2, 2015) (amended public notification provisions for Superfund
 28 activities in 40 C.F.R. § 300.415 removal actions, § 300.425 remedial priorities, § 300.815
 administrative record for remedial action); 80 Fed. Reg. 37,054, 37,119 (June 29, 2015)
 (amended definitions – 40 C.F.R. § 300.5); 37,121-23 (amended Appendix E – navigable
 waters); 83 Fed. Reg. 5209 (Feb. 6, 2018) (amended Appendix B National Priorities List); 84
 Fed. Reg. 56,626, 56,670 (Oct. 22, 2019) (amended definitions and Appendix E); and 85 Fed.
 Reg. 22,250, 22,341 (Apr. 21, 2020) (amended definitions – 40 C.F.R. § 300.5 and Appendix E).

1 amend the NCP in light of new information.” ECF 42 at 4, 10. As noted above, EPA
 2 respectfully disagrees with the Court’s ruling on whether EPA has a nondiscretionary duty to
 3 revise or amend the NCP, but that ruling is the law of the case.⁴

4 To the extent the Court has found that EPA is under a nondiscretionary duty under 33
 5 U.S.C. § 1321(d)(3) to revise or amend the NCP whenever there is “new information,” ECF 42
 6 at 10, EPA respectfully disagrees with the Court’s ruling, but acknowledges that there has been
 7 “new information” since it last updated the NCP. Thus, EPA’s liability cannot be seriously
 8 disputed under the Court’s prior ruling, as it is clear that “new information” has become
 9 available to EPA, including new information since EPA last updated Subpart J. Indeed, EPA
 10 proposed amendments to Subpart J partly on that basis.

11 In an effort to bolster the “correctness” of the Court’s prior ruling, Plaintiffs revisit the
 12 Court’s analysis of EPA’s motion to dismiss in their motion for summary judgment and present
 13 new arguments. ECF 63 at 12. The case law, statutory text, and factual assertions upon which
 14 Plaintiffs rely, *see id.* at 12-13, were all in existence at the time the Court decided EPA’s
 15 motion to dismiss (and EPA’s motion for leave to seek reconsideration).⁵ Thus, Plaintiffs’
 16 motion provides supplemental arguments, which could have been provided at the time the
 17 Court decided EPA’s motion, on a decided issue. Based on the doctrine of the law of the case,
 18 and the Court’s rejection of EPA’s request to seek reconsideration of this issue, Plaintiffs’

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 20 ⁴ The “law of the case” rule generally precludes a court from re-examining an issue previously
 21 decided by that court in the same case. *Pit River Home & Agric. Coop. Ass’n v. United States*, 30
 22 F.3d 1088, 1096 (9th Cir. 1994) (citing *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833
 23 (9th Cir. 1982)). Under the rule, a decision on a factual or legal issue “must be followed in all
 24 subsequent proceedings in the same case in the trial court or on a later appeal in the appellate
 25 court, unless the evidence on a subsequent trial was substantially different, controlling authority
 26 has since made a contrary decision of the law applicable to such issues, or the decision was
 27 clearly erroneous and would work a manifest injustice.” *Moore*, 682 F.2d at 834 (internal
 28 quotation and citation omitted); *see also Plantronics, Inc. v. Am. Home Assur. Co.*, Case No.
 5:07-cv-06038, 2014 WL 2452577 *3, (N.D. Cal. May 30, 2014) (internal citations omitted).

⁵ Plaintiffs incorrectly state that *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462
 (2020) was decided after the Court ruled on EPA’s motion to dismiss. ECF No. 63 at 12. The
 Supreme Court’s opinion was issued on April 23, 2020, at least five weeks before this Court
 ruled on EPA’s motion on June 2, 2020.

1 attempt to revisit the basis for the Court’s earlier ruling is wholly improper. If the Court
2 believes it necessary to reconsider whether there is a nondiscretionary duty on the part of the
3 Administrator to update the NCP under 33 U.S.C. § 1321(d)(3), then the Court should allow
4 further briefing from all parties as to the “correctness” of the Court’s earlier ruling.

5 In any event, Plaintiffs’ reliance on *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct.
6 1462 (2020), is misplaced. *County of Maui* does not inform the question of whether there is a
7 nondiscretionary duty on the part of the Administrator to update the NCP. In that case, the
8 Supreme Court addressed a different question of statutory interpretation, *i.e.*, whether the
9 CWA “requires a permit when pollutants originate from a point source but are conveyed to
10 navigable waters by a nonpoint source.” *Id.* at 1468. In addition to the statutory text, the Court
11 looked to the overall purpose of the CWA, the legislative history, and regulatory practice in
12 deciding the meaning of the statutory provision at issue there. Such an analysis has no place in
13 deciding whether a statute imposes a nondiscretionary duty on the Administrator, a prerequisite
14 to finding a clear and unequivocal waiver of sovereign immunity. Rather, in the Ninth Circuit,
15 a “clear statement rule” applies to citizen suits brought against the EPA Administrator.
16 *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). That clear-statement
17 rule recognizes a duty as non-discretionary only when the duty takes the form of a “‘specific,
18 unequivocal command’ from the text of the statute at issue using traditional tools of statutory
19 interpretation.” *Id.* Courts may not interpret statutes as imposing mandatory duties on
20 agencies unless the mandate is clear and unequivocal.

21 In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. at 55, the Supreme Court
22 reviewed a claim under the APA, specifically 5 U.S.C. § 706(1), which is analogous to the
23 CWA’s citizen suit provision in that it allows a person to challenge an agency’s failure to
24 perform an action unreasonably delayed or unlawfully withheld. In *Norton*, the plaintiffs
25 asserted that the Bureau of Land Management failed to perform a nondiscretionary duty under
26 the Federal Land Policy and Management Act to manage wilderness study areas “in a manner
27 so as not to impair the suitability of such areas for preservation as wilderness.” 542 U.S. at 65
28 (citing 43 U.S.C. § 1782(c)).

1 The Supreme Court affirmed the dismissal of the plaintiffs' claim, finding that the
2 purpose of section 706(1) of the APA is to order agencies to act only where the agency fails to
3 carry out a discrete nondiscretionary duty. *Id.* at 62-64. The Court further recognized that the
4 purpose of this limitation in failure to act claims is to "protect agencies from undue judicial
5 interference with their lawful discretion, and to avoid judicial entanglement in abstract policy
6 disagreements which courts lack both expertise and information to resolve." *Id.* at 66. As
7 stated by the Supreme Court:

8 If courts were empowered to enter general orders compelling compliance with
9 broad statutory mandates, they would necessarily be empowered, as well, to
10 determine whether compliance was achieved--which would mean that it would
11 ultimately become the task of the supervising court, rather than the agency, to
work out compliance with the broad statutory mandate, injecting the judge into
day-to-day agency management.

12 *Id.* at 66-67. Thus, a plaintiff cannot rely on broad statutory mandates – as Plaintiffs attempt to
13 do here in citing *County of Maui* – as the basis for a waiver of sovereign immunity to bring a
14 citizen suit against the Administrator. *Cf. Citizens for Pa's Future v. Wheeler*, 469 F. Supp. 3d
15 920, 932 (N.D. Cal. 2020) (finding that citizen suit provisions operate in the context of federal
16 sovereign immunity), citing *Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (waivers of
17 sovereign immunity must be strictly construed in favor of the sovereign).

18 Plaintiffs appear to assert that *County of Maui* supports jurisdiction over their citizen
19 suit claim because the Supreme Court disagreed with EPA's interpretation of an ambiguous
20 statutory term that would be inconsistent with the purpose of a statutory provision. ECF 63 at
21 12. Notably, the majority in *County of Maui* recognized that the courts "often pay particular
22 attention to an agency's view in light of the agency's expertise in a given area, its knowledge
23 gained through practical experience, and its familiarity with the interpretive demands of
24 administrative need." *Id.* at 1474 (Breyer, J.). However, the Court rejected EPA's
25 interpretation of the statutory provision at issue, which was contained in EPA's amicus brief,
26 because it was "new" and could not be reconciled with other provisions in the statute or EPA's
27 own prior interpretation of the statute. 140 S. Ct. at 1473-1475. Here, EPA has never viewed
28 the language in 33 U.S.C. § 1321(d)(3) as non-discretionary. *See* Ex. 3, Declaration of Donna

1 Salyer (“Salyer Decl.”) at ¶ 22.

2 Plaintiffs’ belated attempts to provide supplemental briefing regarding
3 recommendations by EPA’s Office of Inspector General and responses from those within the
4 agency are also unavailing, as none of those documents constitutes a determination by the
5 Administrator as to when it is advisable to promulgate revisions or amendments to the NCP.⁶
6 *See* ECF 63 at 13 (claiming that “the agency” has twice agreed that it is advisable to update
7 Subpart J). Where the Administrator has not delegated their authority, *see, e.g.*, 40 C.F.R.
8 131.22(b)(1), decisions by others within the agency are not determinations by “the
9 Administrator” as to when it is advisable to promulgate a final rule to update the NCP.

10 **In sum**, unless the Court wishes to allow further briefing on the issue of whether 33
11 U.S.C. § 1321(d)(3) imposes a mandatory duty on the Administrator, **under the law of the case**
12 **EPA acknowledges that it has received “new information” since the last update of the NCP.**

13 **III. Plaintiffs’ APA Claim Must Be Dismissed.**

14 Count II of the Complaint, asserted under the Administrative Procedure Act, asserts
15 that EPA has unreasonably delayed taking final action on the 2015 proposed rule and
16 Plaintiffs’ petitions for rulemaking. ECF 1 ¶¶ 134-35. **Based on the Court’s Order that there is**
17 **a nondiscretionary duty to update the NCP, Plaintiffs cannot maintain a separate claim to**
18 **compel EPA to update the NCP under the APA.**⁷

19
20
21 ⁶ With respect to EPA’s assertion that the language of the statute expressly confers discretion to
22 EPA’s Administrator, “as the Administrator deems advisable,” Plaintiffs did not dispute that the
23 statute confers discretion to the Administrator. Rather, Plaintiffs avoided the argument, and
24 **wrongly asserted that “EPA’s Administrator” had in fact made a determination that the NCP**
should be amended based on recommendations in an EPA Inspector General report. *See* Plfs’
Opp’n to Motion to Dismiss, ECF 26 at 13.

25 ⁷ Although their Complaint alleges unreasonable delay in acting on their administrative
26 petitions, Plaintiffs’ Complaint seeks no relief with respect to action on their petitions. ECF 1 at
27 29. Plaintiffs’ motion for summary judgment likewise seeks no such relief, and presents no
28 argument regarding reasonableness of any delay in acting on their petitions. ECF 63 at 1; *id.* at
24 (describing “the precise relief that Plaintiffs seek: **an order to EPA to update and reissue its**
proposed rule for public comment before finalizing the rule”). **Thus, Plaintiffs have abandoned**
any claim for relief as to their administrative petitions.

1 A claim to compel action asserted to be unlawfully withheld or unreasonably delayed
2 under APA section 706(1) may not be brought where there is an alternative adequate remedy,
3 such as under a citizen suit. The APA states that only “[a]gency action made reviewable by
4 statute and final agency action for which there is no other adequate remedy in a court are
5 subject to judicial review.” 5 U.S.C. § 704. Thus, the APA “premises jurisdiction on the
6 absence of an adequate alternative remedy in court.” *Garcia v. McCarthy*, No. 13–cv–03939–
7 WHO, 2014 WL 187386, at *11 (N.D. Cal., Jan. 16, 2014) (citing 5 U.S.C. §§ 702, 704). If
8 Plaintiffs have a cognizable claim against EPA under the CWA citizen suit provision for the
9 failure to update Subpart J of the NCP, that precludes an additional claim under the APA that
10 seeks similar relief. *See Bowen v. Mass.*, 487 U.S. 879, 903 (1988); *Coos Cnty. Bd. of Cnty.*
11 *Comm’rs v. Kempthorne*, 531 F.3d 792, 810 (9th Cir. 2008). *Cf. Sierra Club v. McCarthy*, No.
12 C 08-01409 WHA, 2008 WL 3820385, at *2, (N.D. Cal. Aug. 8, 2008) (holding that “the
13 ‘unlawfully withheld’ portion of plaintiffs’ APA claim is duplicative of their CERCLA citizen
14 suit and must be dismissed without prejudice”) (citing *Coos Cnty.*, 531 F.3d at 810 and *Brem-*
15 *Air Disposal v. Cohen*, 156 F.3d 1002, 1005 (9th Cir. 1998)).

16 Moreover, “the alternative remedy need not provide relief identical to relief under the
17 APA, so long as it offers relief of the ‘same genre.’” *Garcia*, 2014 WL 187386, at *11 (citing
18 *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009)). Plaintiffs do not seek an order
19 compelling EPA to simply take final action on the 2015 proposal to update Subpart J of the
20 NCP. *See* ECF 63 at 1; *id.* at 24 (seeking “an order to EPA to update and reissue its proposed
21 rule for public comment before finalizing the rule”). But even if they did, that would be relief
22 “of the same genre” as that sought under the Complaint and in Plaintiffs’ motion for summary
23 judgment.

24 Here, the Court found that Plaintiffs may bring a citizen suit to compel EPA to
25 promulgate a rule to revise the NCP. ECF 42 at 4, 9, 10. That is an adequate remedy at law
26 with respect to the claim of unreasonable delay in completing the rulemaking. Because there is
27 an adequate remedy provided by this Court’s ruling that Plaintiffs may bring a CWA citizen
28 suit claim, Plaintiffs’ APA claim must be dismissed and summary judgment be granted in favor

1 of EPA as to Count II of the Complaint.

2 **IV. Plaintiffs' Belated Attempt to Assert a Mandamus Claim Should Also Be Rejected.**

3 Plaintiffs assert for the first time in their motion for summary judgment that this Court
4 "has broad discretion . . . under the All Writs Act to fashion equitable relief that redresses
5 Plaintiffs' substantive and procedural injuries." ECF 63 at 22, 23-24. Plaintiffs' Complaint
6 does not assert a mandamus claim or cite the All Writs Act as a basis for this Court's
7 jurisdiction. There should be no dispute that this Court lacks jurisdiction to consider a claim
8 for a writ of mandamus in this matter.

9 Under the All Writs Act, the district courts have jurisdiction "to compel an officer or
10 employee of the United States or any agency thereof to perform a duty owed to the plaintiff"—
11 that is, to issue a writ of mandamus. 28 U.S.C. § 1361. For a court to entertain a petition for a
12 writ of mandamus, among other things the plaintiff must have "no other adequate means to
13 attain the relief" sought. *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403
14 (1976); see also *In re Bozic*, 888 F.3d 1048, 1052 (9th Cir. 2018). Plaintiffs do not explain
15 how in light of the Court's ruling the CWA's citizen suit provision (or the APA) does not
16 provide an adequate remedy. The All Writs Act cannot serve as a basis for this Court's
17 jurisdiction, nor could it provide the basis for any appropriate remedy in this case.

18 **V. In the Event the Court Finds EPA Has Failed to Perform a Mandatory Duty to**
19 **Update the NCP, EPA's Proposed Remedy Represents the Most Expeditious**
20 **Schedule that the Agency Can Reasonably Meet.**

21 Contrary to Plaintiffs' motion, ECF 63 at 22-23, the appropriate remedy where there is
22 a finding of a failure on the part of the Administrator to perform a nondiscretionary duty under
23 the Clean Water Act is not found in the APA or the All Writs Act. Instead, the remedy is
24 expressly provided for in the CWA's citizen suit provision: a court is authorized "to order the
25 Administrator to perform [a nondiscretionary] act or duty under the Act." 33 U.S.C. § 1365(a).
26 In a suit alleging violation of a congressionally mandated duty, the district court exercises its
27 discretion to fashion a remedy by considering whether "the official involved . . . has in good
28 faith employed the utmost diligence in discharging his statutory responsibilities." *NRDC v.*

1 *Train*, 510 F.2d 692, 713 (D.C. Cir. 1974). “The sound discretion of [a] court does not
2 embrace enforcement . . . of a party’s duty to comply with an order that calls [on] him ‘to do an
3 impossibility.’” *Id.* Indeed, “it would be inappropriate to set an infeasible schedule in order to
4 punish a delinquent agency.” *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987).

5 In *Train*, the leading case on the subject of an agency’s failure to meet statutory
6 deadlines, the D.C. Circuit recognized two types of circumstances that might necessarily delay
7 agency action and make it infeasible to comply with a particular deadline: (1) budgetary and
8 manpower constraints, and (2) the need for an agency to have more time to sufficiently
9 evaluate complex technical issues. 510 F.2d at 712-13. With respect to the latter, “[t]he public
10 has a significant interest in ensuring that the government does not [act] via a process that
11 emphasizes expediency over quality and accuracy.” *Cronin v. Browner*, 90 F. Supp. 2d 364,
12 373 (S.D.N.Y. 2000). In setting deadlines for agency action, courts have considered the
13 agency’s need for time to act in a manner that would withstand the scrutiny of subsequent
14 challenge. *See Sierra Club v. Thomas*, 828 F.2d 783, 798-99 (D.C. Cir. 1987); *United*
15 *Steelworkers of Am. v. Rubber Mfrs. Ass’n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (holding
16 judicial imposition of an overly hasty timetable on agency would ill serve the public interest);
17 *Me. Ass’n of Handicapped Persons v. Dole*, 623 F. Supp. 920, 926 (D. Me. 1985) (recognizing
18 “the need to implement clear and effective regulations capable of withstanding the scrutiny of
19 challenges following enactment.”). In short, when an agency has failed to complete a non-
20 discretionary duty, a court should examine the relevant facts and circumstances and evaluate
21 the time needed by the agency to make well-reasoned, scientifically supportable, and
22 defensible decisions.

23 The Court has found that the Administrator is under a nondiscretionary duty pursuant to
24 33 U.S.C. § 1321(d)(3) “to revise or amend the NCP in light of new information.” ECF 42 at
25 4, 10. EPA does not dispute that there is new information, which was the basis for its 2015
26 proposed rule. 80 Fed. Reg. at 3381. Therefore, the remedy determination for the court is the
27 amount of time EPA needs to take final action on the 2015 Proposed Rule.
28

1 A. EPA's Actions Have Been Reasonable.

2 Contrary to Plaintiffs' claims, EPA has acted reasonably in the proposed Subpart J rule
3 process. EPA has never interpreted 33 U.S.C. § 1321(d)(3) to impose a mandatory duty on the
4 part of the Administrator. Salyer Decl. ¶¶ 4, 22. Regardless, EPA has diligently continued to
5 work on the rulemaking while balancing changing and competing priorities within the agency
6 and working to resolve technical issues that have delayed EPA's efforts. *Id.* ¶¶ 14-34.

7 For example, EPA has faced competing priorities since the comment period on the
8 proposed rule closed in 2015. *Id.* ¶¶ 14-17, 20. In 2017, EPA re-prioritized its rulemaking
9 actions relative to other EPA Office of Land and Emergency Management ("OLEM") actions
10 under the belief that the 2015 Proposed Rule was a discretionary rulemaking in keeping with
11 the clear language of section 1321(d)(3). *Id.* ¶¶ 22-23. During this time, EPA prioritized the
12 Risk Management Program ("RMP") Rule, which addresses the development of risk
13 management plans at facilities that use extremely hazardous substances, by proposing and
14 finalizing a reconsideration of the RMP Rule (83 Fed. Reg. 24,850 (May 30, 2018); 84 Fed.
15 Reg. 69,834 (Dec. 19, 2019)). *Id.* ¶¶ 14-15, 23. OLEM also developed EPA's proposed and
16 final actions regarding Clean Water Act Hazardous Substances Spill Prevention, including a
17 Notification of Data Availability, as per the terms of a Consent Decree resolving litigation in
18 that matter (83 Fed. Reg. 29,499 (June 25, 2018); 84 Fed. Reg. 4,741 (Feb. 19, 2019); 84 Fed.
19 Reg. 46,100 (Sept. 3, 2019)), and developed EPA's proposed and final action on the EPCRA
20 and CERCLA animal waste rule in response to the Fair Agricultural Reporting Method Act
21 (FARM Act) (83 Fed. Reg. 37,444 (Aug. 1, 2018); 83 Fed. Reg. 56,791 (Nov. 14, 2018); 84
22 Fed. Reg. 27,533 (June 13, 2019)). *See* Salyer Decl. ¶¶ 16, 17.

23 In addition, technical issues have delayed EPA in completing the work necessary to
24 take final action on the 2015 proposal. For example, reference oils are necessary for a product
25 manufacturer to conduct the product effectiveness and toxicity testing prescribed in Appendix
26 C of Subpart J that must be submitted, along with the technical product data specified in 40
27 C.F.R. § 300.915, to EPA for listing on the NCP Product Schedule. *Id.* ¶ 25-34. Once listed,
28 the products are available to be authorized for use following the procedures under 40 C.F.R.

TRUMP

1 § 300.910. Reference oils provide a standard reference point for comparison of efficacy and
2 toxicity requirements between products where required for product listing. This relative
3 comparison between products, as well as the product technical data, provide the On-Scene
4 Coordinator with information when evaluating whether to authorize the use of a product in
5 response to a discharge or threatened discharge under the CWA. Multiple reference oils allows
6 for products to be tested on oils with differing characteristics, providing the On-Scene
7 Coordinator more detailed information when determining which available product or products
8 may be appropriate for use in a response, as well as what limitations to place on any such
9 authorization for use. EPA took numerous steps to identify possible reference oils, but faced
10 challenges along the way that have significantly impacted its ability to take final action on the
11 proposed rule. The Proposed Rule included amendments to product testing protocols and
12 listing requirements, but EPA's ability to take final action on those amendments is contingent
13 upon its ability to test the proposed protocols on reference oils and its ability to maintain a
14 supply of reference oil to distribute for testing purposes if the new oils are included in the final
15 action.

16 EPA has faced obstacles obtaining reference oils needed in order to conduct necessary
17 testing. *Id.* ¶¶ 27-30. While developing the 2015 proposal, EPA identified certain prospective
18 reference oils in the possession of a sister federal agency that could be made available to EPA,
19 appeared to meet the technical needs for use as reference oils, and appeared to serve the
20 purposes identified for use for such reference oils within the 2015 proposal. *Id.* While EPA
21 had tested those reference oils as part of its quality control process, the oil supply was
22 compromised when the facility in which they were stored was damaged during Hurricane
23 Sandy. *Id.* EPA moved forward with the 2015 proposal while at the same time working to
24 secure similarly suitable reference oils on a parallel track to rule development.

25 Since Hurricane Sandy, EPA has contacted numerous potential sources in an effort to
26 address the need for new reference oils, discussing options with various oil companies, non-
27 governmental organizations, foreign countries, and sister federal agencies, again to no avail.

28 *Id.* ¶¶ 31-32. In August 2016, EPA put out an initial public notice for a proposal ("Request for

OBAMA

1 Quotation”) for interested parties to sell EPA similarly suitable reference oils via the federal
 2 government acquisition and grants internet portal. In September 2016, after receiving no
 3 proposals in response to the first public notice, EPA reissued the Request for Quotation, again
 4 receiving no proposals in response. *Id.* ¶ 30.

5 In 2021, Congress promulgated the National Defense Authorization Act of 2021 and TRUMP
 6 amended the Oil Pollution Act of 1990, which itself had amended the Federal Water Protection
 7 Act, in a manner to provide certain gift receipt authority to EPA to allow EPA to receive
 8 donations of oil for research and other purposes, addressing potential augmentation issues that
 9 could have arisen had EPA taken such donations absent that authority. *Id.* ¶ 32. However, the
 10 Act did not grant any enforcement authority requiring the production of such oils. *Id.*

11 Since the loss of the original potential reference oils, EPA has continued outreach and,
 12 in November of 2020, tentatively identified a potential source for one potential reference oil, TRUMP
 13 subject to agreement and a determination by EPA that the oil is of sufficient type and quality to
 14 serve as reference oil for purposes of the 2015 proposal. *Id.* In April 2015, EPA secured a OBAMA
 15 contract to store any reference oils once acquired. *Id.* ¶ 33. EPA renewed the oil storage
 16 contract in April 2020. *Id.* EPA is currently considering its options to address the potential TRUMP/
 17 lack of availability of reference oils in relation to the 2015 Proposed Rule. *Id.* ¶ 32. BIDEN

18 Notwithstanding the issues it encountered, EPA continued to work towards final action
 19 on the 2015 Proposed Rule. *Id.* ¶¶ 32-56.

20 B. EPA’s Proposed Schedule is the Most Appropriate Remedy.

21 For the reasons set forth below, EPA proposes a schedule that would provide it
 22 adequate time to take final action on the 2015 Proposed Rule. There are three main
 23 components of the 2015 proposal: (1) monitoring certain dispersant use; (2) authorization of
 24 chemical agent use in response to oil discharges; and (3) listing provisions for chemical agent
 25 products on the NCP Product Schedule. *Id.* ¶ 24. In 2020, EPA proceeded with drafting the TRUMP
 26 final monitoring-related provisions. The draft final rule for those provisions has been
 27 submitted to the Office of Management and Budget for interagency review, and EPA
 28 anticipates taking final action on the proposed monitoring rule in August 2021. The

1 authorization and listing provisions to the proposed rule require further work on the part of
2 agency staff. Accordingly, EPA proposes the following schedule:

- 3 • *Proposed Date for EPA to take final action on Part 1 of the 2015 Proposed Rule*
4 *(Monitoring Provisions): August 31, 2021.*
- 5 • *Proposed Date for EPA to take final action on Part 2 of the 2015 Proposed Rule*
6 *(Listing and Authorization of Use Provisions): May 31, 2023.*

7 1. Final Action on the Monitoring Provisions

8 As explained in the declaration, EPA has advanced its efforts to take final action on
9 part of the 2015 proposal. In 2019, EPA reviewed the 2015 Proposed Rule to determine what
10 portions, if any, could move forward. *Id.* ¶ 34. EPA determined that it could move forward
11 more expeditiously by taking final action on the monitoring provisions in the 2015 Proposed
12 Rule, as these are based on and share similar provisions with existing National Response Team
13 interagency guidance. *Id.* Additionally, EPA determined that prioritizing taking final action
14 on the monitoring provisions would address an area where, unlike listing and authorization of
15 use requirements, there are currently no regulatory requirements specifically targeted to certain
16 dispersant use operations in the NCP to address monitoring. *Id.* EPA therefore took action to
17 split the rulemaking into two parts for separate final actions, with the first part addressing the
18 dispersant monitoring provisions in the proposal, and the other part addressing the remaining
19 provisions, including proposed authorization and listing requirements. *Id.*

20 EPA has completed the majority of steps necessary to take final action on the
21 monitoring provisions of the proposal. Interagency review must be finalized to ensure
22 comments from the Office of Management and Budget (“OMB”) and sister federal agencies,
23 including but not limited to the United States Coast Guard, are addressed and resolved
24 appropriately. *Id.* ¶¶ 36, 40, 52. EPA estimates that it will take until August 31, 2021 to take
25 final action on the monitoring portion of the rule. *Id.* ¶ 35. Final actions revising the NCP are
26 published in the Federal Register and become effective after an additional time period.

27 2. Final Action on the Listing and Authorization of Use Provisions

28 The remaining portions of the 2015 Proposed Rule address authorization of chemical

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guides!

legalize it

1 agent use in response to oil discharges and listing provisions for chemical agent products on
2 the NCP Product Schedule. *Id.* ¶¶ 34-35. EPA has further work to do to take final action on
3 these portions of the rulemaking. As with the monitoring provisions of the proposed rule, EPA
4 is following its established Action Development Process (“ADP”) and Executive Orders
5 12,777 and 12,866 for the Listing and Authorization of Use phase of the rulemaking. *Id.* ¶ 36,
6 38-39. The ADP brings together a group with broad perspectives and expertise from
7 programmatic areas across EPA. *Id.* ¶ 38. Consistent with the ADP, the following steps must
8 be completed to take final action on the Listing and Authorization of Use provisions of the
9 Proposed Rule.

10 (a) Programmatic Analysis: OEM conducted a preliminary review of the public
11 comments received in order to organize them into topic areas. In preparation for Early
12 Guidance and Workgroup Engagement, OEM further summarized the comments and identified
13 issue areas and new relevant information for consideration. *Id.* ¶ 44. EPA believes that the
14 currently ongoing programmatic analysis has generally been completed, and notes that it has
15 cumulatively spent approximately twelve months on these underlying actions to advance
16 towards final action on the entirety of the 2015 Proposed Rule. *Id.*

17 (b) Early Guidance: EPA anticipates addressing Early Guidance concurrently within
18 the Workgroup Engagement process described below. *Id.* ¶ 45.

19 (c) Workgroup Engagement and Options Development: The Workgroup Engagement
20 reviews and considers the comments, along with other relevant new information received
21 during the comment period. The Workgroup consults internally and develops
22 recommendations on how to proceed, including whether to reconsider the options published in
23 the proposed rule, or analyze new options based on its assessment of the comments and other
24 information not previously available to the Agency. *Id.* ¶ 46. This phase of the rulemaking
25 schedule provides for the Workgroup to reconvene and meet weekly to review and consider
26 comments on the individual topics outlined in the proposed rule. EPA initiated this process in
27 March 2021 and anticipates that, given the breadth and depth of the issues, completing the
28 analysis and consultation will extend through the end of November, 2021. *Id.* ¶ 47.

not 2015?

1 (d) Options Selection: The Workgroup presents option recommendations to senior
2 leadership for option selection. EPA anticipates it will take a month for preparation,
3 distribution and consideration of the option selection materials, and a final senior leadership
4 decision. EPA expects to finalize options selection in approximately January 2022. *Id.* ¶ 48.

5 (e) Rule Drafting and Workgroup Review: Based on option selection, the lead office
6 (OEM) prepares Responses to Comments (“RtC”) for Workgroup member input and review. did for
7 The RtC document is expected to go through several review cycles to incorporate Workgroup atypical
8 input. Following the review cycle, the Workgroup expects to require at least three weeks to
9 review and comment on drafts of the RtC document(s). OEM reviews and incorporates
10 Workgroup comments into a revised RtC document(s). *Id.* ¶ 49.

11 OEM also develops any Federal Register notice and drafts the final Regulatory Impact
12 Analysis document (“RIA”) for Workgroup member input and review. These documents are
13 sent out for Workgroup review following an iterative process similar to the RtC review cycle.
14 *Id.* ¶ 50. EPA is scheduled to begin this process in January 2022 and anticipates that the who
15 analysis and consultation will conclude by approximately November 2022. This timeframe reviews
16 accounts for the complexity of the rulemaking, the wide perspective of views in the comments,
17 and that other federal agencies have equities and interests in their application. *Id.* ¶ 42.

18 (f) Final Agency Review (“FAR”): An FAR meeting is scheduled at the conclusion of
19 the Rule Drafting and Workgroup Review. Any final action package is prepared and
20 distributed to Workgroup member program offices for a minimum a three-week period prior to
21 the FAR meeting. This allows Workgroup members to brief Senior Leadership on the
22 proposed rule. Any final action package that revises an existing regulation includes the Federal
23 Register preamble and regulatory text for the Listing and Authorization of Use provisions, the
24 associated Summary & Response to Comment document, Regulatory Impact Analysis,
25 Information Collection Request, Communications Materials, and Agency Action Memo. *Id.* ¶
26 51. EPA expects FAR meeting to conclude by January 2023. *Id.*

27 (g) Office of Management and Budget Interagency Review: This proposed action has
28 been determined to be significant per Executive Order 12,866, 58 Fed. Reg. 51,735 (Sep. 30,

1 1993). OEM incorporates any comments received from the FAR meeting and submits any
 2 final Listing and Authorization of Use rule package to EPA Office of Policy for transmittal to
 3 OMB. The Agency estimates that the Office of Policy would submit any final action to OMB
 4 for interagency review by approximately February 2023. *Id.* ¶ 52. Given the OMB standard
 5 review timeframe of 90 days, EPA expects conclusion of any federal interagency review by
 6 May 2023. *Id.*

7 (h) Administrator Review and Final Action: Following OMB review, the rule package
 8 is returned to EPA for the Administrator’s review and approval, as appropriate. EPA
 9 anticipates the Administrator taking final action on the final rule by May 31, 2023. *Id.* ¶ 53.

10 (i) Federal Register Publication: Final Rules are sent to the Office of Federal Register
 11 for publication in the Federal Register. EPA does not control this process.

12 In sum, the timeline and steps are necessary to take final action on the 2015 Proposed
 13 Rule are reasonable in order for EPA to promulgate defensible final rules. Accordingly,
 14 summary judgment on EPA’s proposed remedy should be granted.

15 C. Plaintiffs Have Provided No Support for their Proposed Remedy.

16 Plaintiffs request that this Court order EPA to “(1) issue a new proposed rule to amend
 17 the NCP within 90 days of the Court’s decision; (2) issue a final rule within one year of the
 18 Court’s decision; and (3) provide the Court with a status report 180 days from the date of the
 19 Court’s decision.” ECF No. 63 at 1. Although Plaintiffs baldly claim that this Court has the
 20 authority to require EPA to issue a new proposed rule, and that it would “serve judicial
 21 economy” to do so, *id.* at 24, Plaintiffs provide no support for their position. EPA is not aware
 22 of any instance in which an agency initiated rulemaking was found to be a nondiscretionary
 23 action and a court required the agency to revise and re-propose the proposed rule. Plaintiffs’
 24 reliance on *Center for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1134 (N.D. Cal.
 25 2007), is misplaced, as that case involved a requirement that federal officials produce an
 26 “updated” National Global Research Plan at least every three years. *Id.* at 1131.

27 Plaintiffs also do not explain how taking final action on the proposed rule would not
 28 comply with the nondiscretionary duty recognized by the Court – to amend the NCP “in light

2+ yr
process

wah!

1 of new information.” ECF 42, Order at 10. Plaintiffs provide no details as to how the
2 proposed rule is insufficient.⁸ Nor do Plaintiffs identify any specific information made
3 available since the proposal that would trigger anew EPA’s mandatory duty to update the NCP
4 under section 1321(d)(3). Ordering EPA to propose a new rule would put Plaintiffs in the role
5 of the Administrator because it would allow Plaintiffs, with nothing more than their subjective
6 assertion, to decide when and how it is advisable to propose amendments to the NCP.

7 Even if the Court found that it has authority to order EPA to revise and re-propose an
8 update to Subpart J of the NCP, it is unreasonable to expect the agency to be in a position to do
9 so in 90 days. As noted above, EPA’s delegated authority to revise the NCP is subject to
10 OMB’s review of any proposed revisions to the NCP. Similarly, it would be unreasonable to
11 expect the agency to be in a position to take final action on a new proposal, which would
12 trigger a new comment period that would likely leave the agency with less than six months to
13 take final action on the new proposal. *See, e.g.*, Salyer Decl. ¶ 58.

14 CONCLUSION

15 With respect to Plaintiffs’ citizen suit claim, EPA has fulfilled any nondiscretionary
16 duty to revise or amend the NCP to achieve the purpose of the NCP. However, there is no
17 dispute that there is “new information” since EPA last updated Subpart J of the NCP. With
18 respect to Plaintiffs’ APA claim, because the Court has held that Plaintiffs may bring a citizen
19 suit, the Court must dismiss Plaintiffs’ APA claim which seeks similar relief as Plaintiffs’
20 citizen suit claim. In the event the Court finds EPA liable, the Court should provide EPA until
21 August 31, 2021 to take final action on the monitoring provisions of the 2015 Proposed Rule,
22 and until May 31, 2023 to take final action on the remaining provisions of the 2015 Proposed
23 Rule.

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27 ⁸ For example, it is unclear why EPA should not be allowed to take final actions on the
28 monitoring provisions of the proposal, which are currently in the final stages of the rulemaking
process.

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Dated: May 20, 2021

Respectfully submitted,

By: /s/ Mark A. Rigau
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