JEAN E. WILLIAMS
Acting Assistant Attorney General
MARK A. RIGAU (CA Bar Number 223610)
MARTHA C. MANN (FL Bar Number 155950)
Environmental Defense Section
United States Department of Justice
450 Golden Gate Avenue
Suite 07- 6714
San Francisco, California 94102
Tel: (415) 744-6487 (Rigau)
Fax: (415) 744-6476
E-mail: mark.rigau@usdoj.gov
martha.mann@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT/EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; COOK INLETKEEPER; CENTER FOR BIOLOGICAL DIVERSITY; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

v.

MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

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

EPA'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

REGULATIONS

INTRODUCTION

As set forth in EPA's cross-motion for summary judgment and below, Plaintiffs have not demonstrated that the National Contingency Plan ("NCP") is inefficient or ineffective, and the Court should grant summary judgment to EPA as to Plaintiffs' claim that EPA has violated any nondiscretionary duty to update the NCP. And because this Court has recognized that Plaintiffs may bring a citizen suit claim to compel EPA to update the NCP, their unreasonable delay claim brought under the Administrative Procedure Act ("APA") to require such rulemaking must be dismissed.

Nothing in Plaintiffs' reply/opposition refutes EPA's motion for summary judgment. Indeed, Plaintiffs' reply/opposition relies on conjecture and sweeping, unsupported statements to support claims that (1) any new information triggers a nondiscretionary duty to update the NCP, (2) EPA has granted their administrative petitions, and (3) this Court can direct the substance of an ongoing rulemaking as a remedy in a citizen suit or APA unreasonable delay claim. As well-intentioned as Plaintiffs may be, their claims are not sustainable on the facts or the law.

However, to the extent this Court concludes that EPA is required to update the NCP, EPA's proposed schedule for completing the ongoing rulemaking process should be adopted by the Court. Plaintiffs provide no rational reason for opposing EPA's intent to take final action in the near term on the monitoring provisions already proposed by the agency. And EPA's proposed time frame for taking action on the remaining provisions of the proposal would allow EPA the time it needs to complete the work necessary to take final action. In contrast, Plaintiffs ask this Court to direct not only the timing of EPA action, but the substance of such action as well. Plaintiffs have failed to provide a factual or legal basis for their proposed remedy.

ARGUMENT

I. Plaintiffs have failed to demonstrate that the NCP does not "provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges."

The Court previously held that Plaintiffs may bring a Clean Water Act ("CWA") 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 33 U.S.C. § 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; *see also id.* at 8 ("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."). Under the Court's prior ruling, any nondiscretionary duty to update the NCP would be triggered if Plaintiffs were to demonstrate that the NCP does not provide for "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges" including "containment, dispersal, and removal of oil." *Id.* at 7-8, citing 33 U.S.C. § 1321(d)(2).

In its cross motion for summary judgment, EPA explained that it has fulfilled any nondiscretionary duty to revise or amend the NCP to "achieve the purpose of the NCP." ECF 64-1 at 9-10. EPA has performed many activities to ensure the efficacy of the NCP and preserve its ability to provide for mitigation of pollutants. *Id.*; Declaration of Acting Office Director of EPA's Office of Emergency Management, Donna Kathleen Salyer ("Salyer Decl.") (ECF 64-4 ¶¶ 4, 6, 7, 9-58). EPA's facts are undisputed; Plaintiffs have failed to show the NCP is neither effective nor efficient.

Plaintiffs now concede that the Court's ruling on its jurisdiction to consider Plaintiffs' claim under the CWA citizen suit was not a ruling that EPA had violated its duty to maintain the NCP. ECF 66 at 3 n.2 ("Plfs' Reply/Opp'n"). As such, Plaintiffs failed to provide factual support for their CWA claim. In a belated attempt to overcome this failure, Plaintiffs' response to EPA's cross motion for summary judgment argues that EPA's citation to numerous amendments to the NCP is irrelevant and a "red herring,"[1] *id.* at 3, and that the "NCP's

---

[1] The issues raised by EPA are relevant as they demonstrate the incorrectness of Plaintiffs' allegations previously relied upon by the Court. In considering EPA's motion to dismiss the CWA citizen suit claim for lack of jurisdiction, the Court accepted all allegations in the Complaint as true and drew all reasonable inferences in favor of Plaintiffs. ECF 42; citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The Court therefore considered as true for purposes of the jurisdictional motion Plaintiffs' allegations that the current NCP is "obsolete and dangerous" (ECF 1 ¶¶ 1-2); that "EPA has not updated the NCP since October 17, 1994" (*id.* ¶¶

ineffectiveness is manifest in EPA's own documents," *id.* at 4-5. Plaintiffs' response further conflates this foundational issue as to whether the NCP is effective and efficient with the issue of whether "new information" triggers a nondiscretionary duty to update the NCP, which is addressed in Section II below.

A. The EPA Office of Inspector General Report did not find that the NCP was ineffective or inefficient.

Plaintiffs first rely on the EPA Office of Inspector General Report: *Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill* (Aug. 25, 2011) ("IG Rpt.") to claim that "NCP revisions were 'needed,' not optional." ECF 66 at 4. *See* Exhibit 1 to the Declaration of Mark A. Rigau (a copy of the IG Rpt. is included in the Administrative Record). The IG Report was prepared following two complaints regarding the use of dispersants in response to the Deepwater Horizon oil spill in the Gulf of Mexico. The IG Report did not make any finding that the NCP (or Subpart J) is ineffective or inefficient. The Report only made recommendations that, in part, helped form the basis of EPA's 2015 Proposed Rule. *See, e.g.,* ECF 64-4, Salyer Decl. ¶¶ 7-13; *see also* IG Report at 8 (noting that EPA was already working on potential revisions to the NCP at the time of the Deepwater Horizon spill). The IG Report therefore, does not support Plaintiffs' opposition to EPA's cross motion for summary judgment.

The NCP is a comprehensive, technical set of regulations governing oil and hazardous substance response. However, the purpose of the IG Report was relatively narrow: (1) to determine what steps EPA took to analyze the dispersant Corexit 9500A prior to listing it on the NCP Product Schedule, (2) to analyze EPA's role in the decision to use Corexit 9500A over

---

52, 2-3); that "overwhelming scientific evidence indicates that dispersants likely do more environmental harm than good, and generally exacerbate a [oil] spills ecological impact" (*id.* ¶ 2); that "[o]ver the past 30 years . . . federally sanctioned use of chemical dispersants in oil spill response has expanded rapidly," "are increasingly chosen over mechanical cleanup methods, and have become a virtually automatic spill response" (*id.* ¶ 59); and that "EPA failed to update the NCP since 1994, and has thereby failed to incorporate scientific and technological developments to assure that the NCP is 'effective' and can 'minimize damage'" (*id.* ¶ 127). As shown in EPA's cross motion for summary judgment and herein, Plaintiffs' allegations are unsupported and the undisputed material facts show that EPA is entitled to summary judgment.

other dispersants in the Deepwater Horizon oil spill, and (3) to review an allegation that EPA staff committed perjury. IG Rpt at 1. The IG did not find evidence supporting the perjury allegation. As discussed below, the IG Report in many respects recognizes the appropriateness of EPA's actions in responding to the Deepwater Horizon oil spill. In fact, the IG revised the report to clarify that the IG did not intend to imply that EPA actions were inadequate or that decisions were inappropriate or inconsistent with the NCP. *See id.* at 21, 35. The IG Report ultimately makes limited recommendations to EPA to revise the NCP, without finding or concluding that the NCP is not efficient and effective.

The IG Report first discusses responses to oil spills, the NCP, the Subpart J Product Schedule, and the Deepwater Horizon oil spill.[2] *Id.* at 1-5. The IG Report explains that '[d]ispersants are chemicals that accelerate the natural dispersion process created by energy, allowing oil to mix with water," that they "include surfactants that break down oil into smaller droplets that are more likely to dissolve into the water column," and that their use "involves trade-offs between decreasing risks to water surface and shoreline habitats, and increasing potential risks to organisms in the water column and on the sea floor." *Id.* at 3.

The IG Report includes a timeline and description of the responses to the catastrophic spill that demonstrate how EPA and the United States Coast Guard ("USCG") were transparent and monitored the use of dispersants continuously. IG Rpt. at 5, Table 1. The Report is focused on the response to the Deepwater Horizon oil spill and not the efficiency and effectiveness of the NCP. For example, the report notes that EPA and USCG issued multiple directives over the course of sixteen days to BP regarding dispersant use, including a directive to establish a goal to reduce dispersant application by 75 percent, limiting subsurface application to 15,000 gallons per day, and eliminating surface applications altogether, unless an exemption was approved. *Id.* EPA subsequently issued toxicity results on eight dispersants listed on the NCP Product Schedule and concluded that Corexit EC9500A was not significantly more toxic than other

---

[2] The Deepwater Horizon was an unprecedented disaster. The sheer volume of the oil released (134 million gallons) is magnitudes larger than any other spill in the United States. *See, e.g.,* Rigau Decl. Ex. 2, NOAA graphic "Largest Spills Affecting U.S. Waters from 1969 to [2017]."

dispersants tested. A second round of testing "confirmed that the dispersant used in response, Corexit EC9500A, is generally no more or less toxic than other available alternatives." *Id.* The IG Report's factual findings demonstrate EPA's continuous, directed, comprehensive, and successful efforts to ensure that the Deepwater Horizon response under the NCP was performed in a coordinated and appropriate manner.

The IG Report further recognizes EPA's appropriate actions during the Deepwater Horizon spill response, including: posting of health and environmental data on EPA's website throughout the spill response and recovery operation; monitoring air, water, sediment, and waste generated by the cleanup operations; monitoring and sampling activities to provide USCG and state and local governments with information on potential impacts of the oil to human health of residents and aquatic life along the shoreline; sampling along the shoreline and monitoring for chemicals related to oil and dispersants in air, water, and sediment; supporting and advising USCG efforts to clean the reclaimed oil and waste from the shoreline; and active involvement with new monitoring procedures for observing the effects of dispersants in the subsurface environment. IG Rpt. at 5-6. The IG Report further lauded EPA's "proactive efforts to improve emergency response plans." *Id.* at 6. Contrary to the assertions in Plaintiffs' complaint, the facts found in the IG Report demonstrate EPA's continuous, directed, comprehensive, and successful efforts to ensure that action under the NCP is efficient, coordinated, and effective.

Chapter 2 of the IG Report relates more specifically to Subpart J of the NCP, but does not support Plaintiffs' claim that the Report shows the NCP is not efficient or effective. In Chapter 2, the IG Report provides a review of EPA's testing protocol for listing a dispersant on the NCP Product Schedule. Subpart J of the NCP identifies the requirements that a manufacturer must meet for a dispersant product to be included on the Product Schedule. *Id*. at 8. Included among the 12 data and information requirements specific to dispersants is an efficacy test result using the Swirling Flask Test ("SFT"). The IG Report discusses how an EPA study had considered "revising Subpart J to include changing the efficacy testing procedure to the Baffled Flask Test ("BFT") – a more reproducible testing procedure." *Id*. The report notes EPA's comment that the "available record does not suggest the dispersant used [Corexit EC9500A] was ineffective, or

that it would not have also passed the BFT." *Id.* at 10. Indeed, the IG Report data review demonstrated that using the SFT test, the dispersant Corexit EC9500A was listed seventh on the efficacy ranking table (representing it as the least effective dispersant on the table) but under the BFT protocol Corexit EC9500A is the second most effective. *Id*. Table 2. Thus, the IG Report recognized that even under the BFT protocol "the dispersant used in Deepwater Horizon oil spill would likely not have changed." *Id.* at 11.

In sum, Plaintiffs' attempt to rely on the IG Report to demonstrate that the NCP is not efficient or effective is misplaced.

B. The 2015 Proposed Rule did not find that the current NCP is ineffective or inefficient.

Plaintiffs' reliance on the 2015 Proposed Rule to amend Subpart J of the NCP is equally unavailing. ECF 66 at 4. Plaintiffs argue that the preamble to the Proposed Rule constituted an "unambiguous Administrator affirmation that the existing plan is not adequate." *Id.* Plaintiffs' claim is factually deficient and illogical. The Proposed Rule does not refer to the current NCP as inadequate or ineffective, nor provide any findings on the part of the Administrator. Rather, the Proposed Rule is a means for EPA to gather public comments on whether and how to implement lessons learned from the Deepwater Horizon oil spill response and other information in an effort to improve what is and continues to be a functioning NCP.[3] Proposed revisions to make the NCP *more* effective or *more* efficient are not a de facto demonstration that the NCP is ineffective or inefficient. Proposals are not the Administrator's final word on a subject – but rather represent an initial approach that may be changed after notice and comment. Such is the case here. Under Plaintiffs' flawed logic, any time EPA publishes a proposed rule to amend the NCP, a person could simply file a 60-day notice under the CWA citizen suit provision and subsequently a citizen suit alleging that EPA's proposed rule constitutes an admission that the Administrator has failed to perform a nondiscretionary duty to amend the NCP.

---

[3] In a footnote, Plaintiffs characterize any proposed rulemaking to be a determination by the Administrator that the NCP is inadequate. ECF 66 at 4 n.4. That is incorrect.

C. Plaintiffs' petitions and declarations do not show the NCP is ineffective or inefficient.

Even though Plaintiffs assert that the NCP's ineffectiveness is "manifest" in EPA's own documents, ECF 66 at 4-5, they rely on the administrative petitions they submitted to EPA and the declarations[4] they filed with their opening brief in an effort to demonstrate the "NCP's inadequacy." *Id.* at 4. Notably, the purpose of the Plaintiffs' petitions and declarations is not to provide for "efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges" via "containment, dispersal, and removal of oil." 33 U.S.C. § 1321(d)(2). Rather, Plaintiffs' goal is the prohibition of the use of dispersants. *See, e.g.,* ECF 1 at 113 ("The [2012] petition implored EPA to issue a final rule that discontinues use of harmful chemical dispersants . . . ."); 2014 Supplement to Petition for Rulemaking to Amend NCP, Rigau Decl. Ex. 3 at 2 (seeking "a systematic revision of the NCP"); Miller Decl., ECF 63-1 ¶ 9 (opposing the production and use of dispersants); and Shavelson Decl., ECF 63-6 ¶¶ 15-17 (discussing general desire to ban the use of chemical dispersants in oil spill responses).[5]

---

[4] Plaintiffs' motion for summary judgment cited the declarations to support their standing to bring their claims, *see* ECF 63 at 8-11, and to argue for a fast-track rulemaking under an Administrative Procedure Act claim. ECF 66 at 17-18.

[5] Plaintiffs' allegations that "[o]ver the past 30 years . . . federally sanctioned use of chemical dispersants in oil spill response has expanded rapidly," "are increasingly chosen over mechanical cleanup methods, and have become a virtually automatic spill response," ECF 1 ¶ 59, are inaccurate and unsupported. To the contrary, Plaintiffs are well aware that mechanical containment or recovery is the primary line of defense against oil spills. *See* 33 C.F.R. § 153.305(a) ("Each person who removes or arranges for the removal of a discharge of oil from coastal waters shall (a) Use to the maximum extent possible mechanical methods and sorbents that (1) Most effectively expedite removal of the discharged oil; and (2) Minimize secondary pollution from the removal operations."); *see also* IG Rpt at 6 (noting that EPA had proactively directed its representatives to Regional Response Teams to work with their partners to develop a "hierarchy of preferred oil spill response measures" addressing mechanical recovery (such as skimming and booming and controlled burning) and dispersant use). Further, dispersants have been infrequently used in response to oil discharges. *See* Rigau Decl., Ex. 4, National Research Council. 2005. *Understanding Oil Spill Dispersants: Efficacy and Effects.* Washington, DC: The National Academies Press (https://www.nap.edu/catalog/11283/oil-spill-dispersants-efficacy-

By holding out their own petitions and declarations as a basis for finding the NCP "inadequate," Plaintiffs are asking this Court to stand in the shoes of EPA and grant their petitions.[6] That is not the purpose of a citizen suit to compel a nondiscretionary duty, or an unreasonable delay claim, and the Court lacks such authority. This action was brought to compel EPA to take action to complete the rulemaking it initiated in 2015, *see* ECF 1 ¶ 4, and the Proposed Rule does not include a proposal to prohibit the use of dispersants altogether. The Proposed Rule seeks to ensure, among other things, that chemical and biological agents used to address oil discharges, such as dispersants, have met applicable efficacy and toxicity requirements and that the response communities are equipped with the proper information to authorize and use products in a judicious and effective manner. More specifically, the proposed rule addressed three primary components: (1) establishing new monitoring requirements for certain atypical dispersant use situations; (2) revising the data and information requirements for chemical agent products to be listed on the Subpart J Product Schedule, and (3) revising the authorization of use of procedures for chemical agents in response to an oil discharge to waters of the United States. Thus, the petitions and declarations do not support a threshold finding that the NCP is inefficient or ineffective, which finding is necessary for the Court to conclude that EPA has failed to perform any nondiscretionary duty 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.

II. EPA acknowledges that there has been new information since it last updated the NCP.

In its cross motion, while respectfully disagreeing with the Court's ruling on EPA's motion to dismiss the citizen suit claim, EPA recognized that "[t]o the extent the Court has found that EPA is under a nondiscretionary duty under 33 U.S.C. § 1321 (d)(3) to revise or amend the

---

and-effects) at 67-69 (noting that dispersants had been used off the coast of Alaska in 1989 and seven times in the Gulf of Mexico between 1999 and 2004).

[6] Although Plaintiffs currently appear to suggest that EPA has in fact granted their petitions, they are mistaken. *See* Section III, *infra*.

NCP whenever there is 'new information," EPA's liability could not seriously be disputed because "new information" had become available since it last updated the NCP. ECF 64-1 at 11. In their reply/opposition, Plaintiffs argue that EPA has conceded its "liability under the CWA." ECF 66 at 2. Plaintiffs' statement is not entirely true. The term "new information" is not included in the CWA's provisions regarding the NCP. If the term "new information," as used in the Court's order, is intended to be interpreted in the broadest possible way (e.g., *any* new information), then EPA's liability cannot be in dispute, as new information has been received. However, in its analysis in the prior ruling, the Court determined that EPA's duty stemmed from the CWA's overall intent "to require a number of activities to ensure the efficacy of the NCP and the ability to safely provide for mitigation of any pollution." ECF 42 at 8. The Court found CWA "Subsection 1321(d)(2) particularly instructive as it provides for continuing operations and mandates an 'effective' and 'efficient' response to oil and hazardous substance pollution." *Id.* This is why EPA filed a cross motion for summary judgment on the first claim, as Plaintiffs have not shown that the NCP is not an effective and efficient. The undisputed facts demonstrate that EPA has taken numerous actions to ensure that the NCP is an effective and efficient response to oil and hazardous substance pollution. *See* Section I, *supra*.

However, if the term "new information" means any new information, then EPA's liability under the CWA citizen suit claim cannot be disputed. Since EPA last updated Subpart J of the NCP in 1994, it has received new information from many sources, including the Regional Response Teams, On Scene Coordinators, other federal partners, states, chemical manufacturers, and community groups, among others. *See* ECF 64-1 at 11. Indeed, the agency anticipates that it will always become aware of new information that may relate to the wide variety of actions EPA takes under the NCP to respond to releases or threatened releases of hazardous substances and oil. Should the Court find that EPA has a nondiscretionary duty to amend the NCP upon receipt of any new information, EPA has presented a remedy based on the undisputed facts contained in the declaration of Donna Kathleen Salyer. *See* ECF 64-4.

III. EPA is entitled to summary judgment on Plaintiffs' APA unreasonable delay claim.

In its cross motion, EPA explained that, as a matter of law, if Plaintiffs can bring a claim under the CWA citizen suit provision to update the NCP, then they cannot maintain an unreasonable delay claim under the APA to obtain the same relief. ECF 64-1 at 14-15. EPA also noted that Plaintiffs' Complaint alleges unreasonable delay in acting on their administrative petitions but seeks no relief with respect to action on their petitions. *See* ECF 64-1 at 14 n.7; ECF 1 at 29. Plaintiffs' motion for summary judgment likewise seeks no such relief, and presents no argument regarding reasonableness of any delay in acting on their petitions. *See* ECF 63 at 1, 24. Thus, Plaintiffs have abandoned any claim for relief as to their administrative petitions.

In response, Plaintiffs agree that they cannot maintain an APA claim where the remedy sought is the same or duplicative of their claim under the CWA citizen suit. ECF 66 at 5. However, in their opposition/reply Plaintiffs claim, for the first time, that their APA claim is separate and distinct from their CWA citizen suit claim. *Id.* Plaintiffs now assert that their APA claim arises not from failure to take final action on the Proposed Rule, but "from EPA's violation of the APA's *own* procedural guarantee of timely action on petitions." ECF 66 at 5. More specifically, Plaintiffs contend that EPA has "failed to *complete* action on Plaintiffs' petitions." *Id.* at 6 (emphasis added). Plaintiffs further contend that this case is "on all fours" with *In re A Community Voice v. U.S. EPA*, 878 F.3d 779 (9th Cir. 2017), a case in which EPA had granted an administrative petition for rulemaking under the Toxic Substances Control Act but had yet to initiate the rulemaking. *Id.* Thus, Plaintiffs now appear to argue that EPA has granted its rulemaking petitions, and that in addition to ordering EPA to update the NCP, that the Court should order EPA to initiate a rulemaking consistent with their administrative petitions. Notwithstanding the fact that Plaintiffs never raised this argument in their motion for summary judgment, or asserted such a claim in their Complaint, they are wrong.

Plaintiffs point to the Ninth Circuit's opinion in *A Community Voice* as holding that when "accepting a rulemaking petition, an agency assumes 'a duty to conclude a rulemaking

proceeding within a reasonable time.'" ECF 66 at 10 (citing 878 F.3d at 785). However, EPA had *granted* the administrative petition at issue in *A Community Voice*. 878 F.3d at 785.[7] *A Community Voice* is not "on all fours" with this case, in part because EPA has not granted the petitions submitted by Plaintiffs here.[8] Plaintiffs confuse the mere "acceptance" of an administrative petition with the granting of the petition. *See* ECF 66 at 11 (characterizing EPA's responses to their rulemaking petitions and asserting that "EPA thus appears to have accepted Plaintiffs' petitions, especially insofar as it did not timely deny them.").

There is no evidence in the administrative record that EPA has granted, in whole or part, Plaintiffs' administrative petitions. Indeed, EPA's responses to Plaintiffs show that at the time the petitions were submitted, EPA was already considering a proposal to update the NCP. ECF 64-2, EPA response to 2012 petition; ECF 64-3, EPA response to 2014 supplemental petition. EPA responded to acknowledge receipt of the petitions, and to encourage Plaintiffs to participate in EPA's independent rulemaking efforts. ECF 64-2, ECF 64-3. *See also* Complaint, ECF 1, ¶ 114, and Answer, ECF 43, ¶ 4. EPA further stated that it was "reviewing the details of the petition and supplement." ECF 64-3. Thus, EPA has not yet taken any action to grant or deny Plaintiffs' petitions. Plaintiffs' creative attempt to cast their petitions as somehow granted cannot be sustained on the facts. *Compare* EPA's responses to Plaintiffs' petitions, ECF 64-2 and 64-3, with EPA's grant of the petition at issue in *A Community Voice*, Rigau Decl. Ex. 5. Indeed, it is telling that nowhere in Plaintiffs' Complaint or briefing do they allege that the petitions were granted. To the contrary, Plaintiffs alleged in their Complaint that the agency has

---

[7] *See also* Rigau Decl. Ex. 5, EPA letter granting petition in *A Community Voice*.

[8] *A Community Voice* is distinguishable from this case on many grounds, but relevant to Plaintiffs' argument here is that EPA had granted the petition at issue in *A Community Voice*. Plaintiffs' reliance on *Nat. Res. Def. Council v. EPA*, 956 F.3d 1134 (9th Cir. 2020) ("*NRDC*"), is similarly misplaced. In that case, NRDC initially sought a writ of mandamus in the D.C. Circuit to compel the EPA to issue a response to an administrative petition. Several months after NRDC filed suit, EPA denied the administrative petition and the parties jointly dismissed the suit. NRDC then filed a suit seeking mandamus in the Ninth Circuit, challenging EPA's final action in denying its petition as unlawful. *Id.* at 1137-38.

failed to take final action on their petitions. ECF 1 ¶ 115 (alleging "inaction" on Plaintiffs' 2012 petition), ¶ 135 (alleging failure to "take final action" on petition).

Because EPA has yet to take action on their administrative petitions, and Plaintiffs seek no such relief, Plaintiffs have abandoned any claim to compel EPA action on the petitions in this case. While Ninth Circuit law generally provides that a plaintiff abandons their claims by not raising them in opposition to a defendant's motion for summary judgment, s*ee Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008), where, as here, the parties have stipulated that the motions for summary judgment would be dispositive of the case, ECF 30 at 4 (Case Management Report), not affirmatively moving for summary judgment on that claim further constitutes abandonment. Even if the Court were to find that Plaintiffs' filings somehow seek summary judgment on EPA's alleged failure to act on Plaintiffs' petitions, and that motion were granted, the appropriate remedy would be to direct EPA to either grant or deny the petition by a date certain. *Ctr for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 968 (N.D. Cal. 2013) ("The sole remedy available under § 706(1) is for the court to 'compel agency action,' such as by issuing an order requiring the agency to act, without directing the substantive content of the decision.").

EPA is entitled to summary judgment on Plaintiffs' APA claim of unreasonable delay, as Plaintiffs cannot rely on the APA if the CWA citizen suit can provide adequate relief. ECF 64-1 at 14-16. Should the Court recognize an unreasonable delay claim with respect to granting or denying Plaintiffs' petitions, that claim has been abandoned. And even if it were not, the only remedy is an order directing EPA to take action to grant or deny the petitions.

IV. In the event the Court finds that EPA has failed to perform a nondiscretionary duty to update the NCP, it should order EPA's proposed remedy.

In its cross motion, EPA presented factual support for its proposed remedy. ECF 64-1 at 16-24 and ECF 64-4, Salyer Decl. In response, Plaintiffs only assert that EPA's forthcoming final action to issue a final rule as to a discrete portion of the 2015 Proposed Rule is "illogical" and that EPA's proposed deadlines will take "too long." ECF 66 at 14-15. Plaintiffs have failed to present any facts to support their opposition to EPA's proposed remedy, or any factual support for the timing that they suggest in place of a different remedy.

A. EPA should not be prevented from taking final action on the monitoring provisions of the Proposed Rule.

In support of its cross motion, EPA presented a declaration from the Acting Office Director of EPA's Office of Emergency Management, Donna Kathleen Salyer. ECF 64-4. EPA explained why it moved forward with the monitoring provisions:

> EPA determined that it could move forward more expeditiously with taking final action on the monitoring provisions in the 2015 Proposed Rule, as the monitoring provisions are based on and share similar provisions with existing National Response Team interagency guidance and are not dependent upon the availability of reference oils. Additionally, EPA determined that prioritizing the monitoring provisions would address an area where, unlike listing and authorization of use requirements, there are currently no regulatory requirements (i.e., there are no requirements specifically targeted to monitoring certain dispersant use operations in the NCP).

Salyer Decl., ECF 64-4, ¶ 34. Accordingly, since 2019, months before Plaintiffs filed their Complaint in 2020, EPA has conducted activities to complete the monitoring provisions of the rule ("Part 1"). The Proposed Rule proposed new monitoring requirements for dispersant use in response to major oil discharges and/or certain dispersant use situations. If finalized as proposed, the monitoring provisions would integrate the National Response Team's interagency guidance into the NCP to develop a "process for longer-term responses and the need for monitoring information to reassess dispersant and chemical use." IG Rpt. at 6.

Having worked its way through the agency's rulemaking process, the draft final Part 1 rule was transmitted to the Office of Management and Budget ("OMB") for review on May 19, 2021. *See* Salyer Decl., ECF 64-4, ¶ 34. The timeframe for OMB review is established by Executive Order and EPA anticipates that final action on the Part 1 monitoring provisions will be completed by August 31, 2021. *Id.* ¶¶ 35-36. Without any analysis or justification, Plaintiffs have asked the court for an order that delays final action on the monitoring provisions in Part 1 until at least July 2022. *See* ECF 63-8 (Plaintiffs' proposed order requires a final rule update "within one year of date" of the order). Plaintiffs do not provide any rational explanation as to why they now want to further delay final action on the Part 1 monitoring provisions until July

2022, as the monitoring provisions are not dependent upon and have no bearing on the other portions of the Proposed Rule.

B. EPA's proposed remedy is expeditious and provides necessary time to complete final action on the other provisions in the Proposed Rule.

In any event, EPA has moved forward with the monitoring provisions in the Proposed Rule and anticipates that final action by August 31, 2021; a full year before Plaintiffs propose. With respect to Part 2 of the rulemaking, there are complicating factors that EPA has been diligently working to resolve and the agency has been following the Action Development Process framework which includes legally required interagency review periods. *See* ECF 64-1 at 16-25 and ECF 64-4, ¶¶ 14-58. It is more important that EPA take final action on a rule in a manner that is reasonable and legally defensible, rather than solely for expediency.

Plaintiffs' proposed remedy would require significant time far in excess of what Plaintiffs propose, as it "would require additional time beyond that time EPA has already spent on taking final action on the 2015 Proposed Rule." ECF 64-4, ¶ 58. Nowhere do Plaintiffs provide any factual basis for their proposed timeframe of one year to revise the proposed rule, publish a new proposal, allow time for additional comments, review the comments and draft responses to comments and a final rule, and complete interagency review before promulgating the rule. Because EPA has presented a remedy that it believes will allow it the necessary time to take final action on Part 2 of the Proposed Rule, in the event the court finds EPA has failed to perform a nondiscretionary duty, EPA's proposed remedy should be granted.

C. This Court lacks authority to direct the substance of EPA rulemaking in the context of this lawsuit.

Plaintiffs provide no response to EPA's argument that this Court lacks the authority to direct EPA as to the substance of its rulemaking by requiring EPA to issue a new proposed rule. *See* ECF 64-1 at 24. Nor do Plaintiffs provide any examples of comparable claims that were resolved by requiring an agency to revise and re-propose a proposed rule. Indeed, the Court has already determined that Plaintiffs' claims are procedural, not substantive. ECF 42 at 10 n.2 (acknowledging "the underlying fact that this lawsuit challenges the procedure and not the

substance of the NCP"). The Court agreed with Plaintiffs that "the allegations in the complaint only attack the procedure used by the EPA (e.g., the lack of timeliness in updating the regulations) and not the substance of the regulations." *Id.* at 10 (citing ECF 29).

Accordingly, should the Court find that EPA has failed to perform a nondiscretionary duty to update the NCP, it should grant EPA's motion with respect to the remedy.

CONCLUSION

For the reasons set forth above and in EPA's additional briefing on the cross-motions for summary judgment, this Court should grant EPA's motion and deny Plaintiffs' motion.

Dated: June 17, 2021

JEAN E. WILLIAMS
Acting Assistant Attorney General

Mark A. Rigau
MARK A. RIGAU (CA Bar No. 223610)
MARTHA C. MANN (FL Bar Number 155950)
Environmental Defense Section
United States Department of Justice
450 Golden Gate Avenue
Suite 07-6714
San Francisco, California 94102
Tel: (415) 744-6487 (Rigau)
Fax: (415) 744-6476
E-mail: mark.rigau@usdoj.gov
martha.mann@usdoj.gov