UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, et al.,
Plaintiffs,
v.
MICHAEL S. REGAN, et al.,
Defendants.

Case No. 20-cv-00670-WHO

ORDER GRANTING EARTH ISLAND'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 63

Plaintiffs (collectively, "Earth Island") seek a declaratory judgment that defendants Michael S. Regan as Administrator[1] and the U.S. Environmental Protection Agency (collectively, "EPA") failed to perform a nondiscretionary duty to issue a final rule to update Subpart J of the National Contingency Plan ("NCP") as required by the Clean Water Act ("CWA") regarding, among other things, the removal of oil and hazardous substances after oil spills, and violated the Administrative Procedure Act ("APA") because of its unreasonable delay. Earth Island seeks injunctive relief to require the EPA to remediate these failures expeditiously.

In cross-motions for summary judgment, the parties contest whether the EPA violated the CWA and the APA. I previously denied the EPA's motion to dismiss premised on the lack of a nondiscretionary duty under the CWA. Order Re: Motion To Dismiss ("Order"), Dkt. No. 42. Now, for the reasons explained below, I find that the EPA breached its nondiscretionary duty to issue the final rule, delayed unreasonably in the process, and will be required to take final action on the listing and authorization of use provisions by May 31, 2023. I GRANT Earth Island's motion for summary judgment and DENY the EPA's cross-motion for summary judgment.

United States District Court
Northern District of California

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BACKGROUND

I. LEGAL AND FACTUAL BACKGROUND

Under the CWA, Congress directed the EPA to "prepare and publish a National Contingency Plan (NCP) for removal of oil and hazardous substances pursuant to this section." 33 U.S.C. § 1321(d)(1). The EPA has discharged that duty. Order at 7. 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). It has been revised multiple times. Dkt. No. 64 ("EPA Opp.") at 3.

Earth Island's complaint focuses on Subpart J, which sets forth "[p]rocedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances" and a schedule for identifying and evaluating "dispersants, other chemicals, and other spill mitigating devices and substances" which may be used in response to oil discharges. 33 U.S.C. § 1321(d)(2)(F), (G). To add a product to the schedule, the manufacturer of the product must submit technical product data specified in 40 C.F.R. § 300.915 to the EPA. 40 C.F.R. § 300.920. "Among other things, Subpart J set a threshold for effectiveness that must be met for a dispersant to be included on the NCP Product Schedule and requires the manufacturer to provide the results of effectiveness and toxicity testing using defined procedures, as well as other specific information." EPA Opp. at 4 (citing 40 C.F.R. § 300.915). The EPA has not updated Subpart J, the portion of the NCP at issue, since 1994. *Id.*

After the BP Deepwater Horizon Oil Spill in 2010, the EPA began reevaluating the role of dispersants in oil spill response to mitigate the environmental impacts of oil discharges. In 2011, the EPA's Office of the Inspector General ("OIG") issued a report about the NCP's approach to efficacy and toxicity review of dispersants. Dkt. No. 68 at 97–138 ("2011 EPA-OIG Report"). The report specifically found that the "EPA has not updated the NCP since 1994 to include the most appropriate efficacy testing protocol," and noted that if the NCP had reflected up-to-date testing procedures for dispersant efficacy, "more reliable efficacy data" would have been available at the time of the BP Deepwater Horizon Oil Spill. *Id.* at 8.

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1 In November 2012, several of the plaintiffs submitted a petition requesting that the EPA
2 exercise its authority under the CWA and amend the NCP. Compl. ¶ 113; *see also* Dkt. No. 68 at
3 41–96 ("EII 2012 Petition"). In January 2013, EPA responded, informing the petitioners that it
4 was already working on a proposed rule and encouraged the petitioners to participate in the public
5 comment process. *See* Dkt. No. 64-2 ("EPA Letter, Jan. 3, 2013"). In June 2014, plaintiff
6 ALERT filed a supplemental petition and sought a "complete overhaul of the NCP." Compl.
7 ¶ 115; *see also* Dkt. No. 68 at 4–40 ("EII 2014 Petition"). EPA informed ALERT of the status of
8 the proposed rule and sought copies of the 2012 petition and 2014 supplemental petition for use in
9 the rulemaking docket. *See* Dkt. No. 64-3 ("EPA Letter, July 23, 2014").
10 In 2015, the EPA proposed amendments to Subpart J (the "Proposed Rule"). Dkt. No. 68
11 at 765–832 ("80 Fed. Reg. 3380 (Jan. 22, 2015)"). The EPA's Proposed Rule was "anticipated to
12 encourage the development of safer and more effective spill mitigating products, and would better
13 target the use of these products to reduce the risks to human health and the environment." *Id.* at
14 3380. The Proposed Rule addressed three primary components: (1) establishing new monitoring
15 requirements for certain atypical dispersant use situations; (2) revising the data and information
16 requirements for chemical agent products to be listed on the Subpart J Product Schedule, and (3)
17 revising the authorization of use of procedures for chemical agents in response to an oil discharge
18 to waters of the United States. *Id.* Comments to the Proposed Rule closed on April 22, 2015. *Id.*
19 at 3381. The EPA received 81,973 comments on the Proposed Rule during the public comment
20 period.
21 On July 6, 2021, the EPA submitted a portion of the final rule to the Federal Register on
22 the first component: monitoring requirements for dispersant use in atypical situations. *See* Dkt.
23 No. 70. To this date, nearly six years since the public comment period on the Proposed Rule
24 closed, the EPA has not issued a final rule on the other two components of the Proposed Rule.

25 **II. PROCEDURAL BACKGROUND**

26 Earth Island filed this action on January 30, 2020, alleging two causes of action under the
27 CWA and the APA. Dkt. No. 1 ("Compl."). Under its first cause of action, Earth Island alleged that

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technological developments to assure that the NCP is "effective" and can "minimize damage" as required by the CWA. Compl. ¶¶ 126–32. Under the second cause of action, Earth Island alleged that the EPA violated Section 555(b) of the APA because it failed to conclude the rulemaking process more than four (now more than five) years since the comment period on the Proposed Rule closed, more than five (now six) years since it accepted ALERT's supplemental petition for rulemaking, and more than seven (now eight) years since ALERT's and other plaintiffs' initial petition for rulemaking. Compl. ¶¶ 133–36.

In April 2021, Earth Island filed the present motion for summary judgment. In May 2021, the EPA filed its opposition and cross-motion for summary judgment. Dkt. Nos. 63 ("EII Mot."); EPA Opp.

LEGAL STANDARD

A party is entitled to summary judgment where it "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine if it could reasonably be resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material where it could affect the outcome of the case. *Id.*

The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Once the movant has made this showing, the burden shifts to the nonmoving party to identify specific evidence showing that a material factual issue remains for trial. *Id.* The nonmoving party may not rest on mere allegations or denials from its pleadings but must "cit[e] to particular parts of materials in the record" demonstrating the presence of a material factual dispute. FED. R. CIV. P. 56(c)(1)(A); *see also Liberty Lobby*, 477 U.S. at 248. The nonmoving party need not show that the issue will be conclusively resolved in its favor. *Id.* at 248–49. All that is required is the identification of sufficient evidence to create a genuine dispute of material fact, thereby "requir[ing] a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* (internal quotation marks

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to . . . judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Celotex*, 477 U.S. at 323.

On summary judgment, the court draws all reasonable factual inferences in favor of the nonmoving party. *Liberty Lobby*, 477 U.S. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise a genuine factual dispute and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738–39 (9th Cir. 1979).

DISCUSSION

I. WHETHER THE EPA VIOLATED THE CLEAN WATER ACT

The parties dispute (1) whether the NCP is ineffective or inefficient, thereby triggering the EPA's nondiscretionary duty to revise and amend the NCP; and (2) if so, whether the EPA fulfilled its nondiscretionary duty. EII Reply at 2; EPA Reply at 2. In my prior Order, I found that the EPA's duty in this case "is quite clear: to revise or amend the NCP in light of new information."[2] Order at 10. The EPA contends that if "new information" 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." EPA Reply at 9 (emphasis in original).

This is a poor argument. I explained that the EPA has a nondiscretionary obligation to revise or amend the NCP "in order to achieve the purpose of the CWA and the purpose of the NCP." Order at 9. I relied on *In re A Community Voice*, 878 F.3d 779, 785 (9th Cir. 2017), where the Ninth Circuit held that the EPA must "amend initial rules and standards in light of new information," and explained that the "new information" was clear in the record: "the current standards for [hazardous substances were] insufficient to accomplish Congress' goal, thereby

[2] Earth Island asserts that a recent Supreme Court case, decided after the EPA's prior motion to dismiss was briefed, "confirms the correctness" of my conclusion in the prior Order. EII Mot. at 12 (discussing *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020)). The EPA contends that *County of Maui* is distinguishable and that Earth Island's attempt to revisit the basis for my prior earlier ruling is wholly improper, especially in light of my rejection of EPA's request to seek reconsideration of this issue. EPA Opp. at 11–12; *see* Dkt. No. 53. I do not find it necessary to reconsider whether the Administrator has a nondiscretionary duty to update the NCP

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