UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA ALLIANCE OF POTWS, et al.,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendant.

No. 2:14-cv-01513-MCE-DAD

MEMORANDUM AND ORDER

On June 25, 2014, Plaintiffs Southern California Alliance of POTWs ("SCAP") and Central Valley Clean Water Association ("CVCWA") (collectively "Plaintiffs") filed this action alleging that Defendants United States Environmental Protection Agency (the "EPA") and Jared Blumenfeld as the Regional Administrator of EPA Region IX (collectively "Defendants") violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-559, and regulations implementing the Federal Water Pollution Control Act (the "Clean Water Act" or the "Act"), 33 U.S.C. §§ 1251-1376. Compl., June 25, 2014, ECF No. 1. Specifically, Plaintiffs allege that Defendants illegally and improperly approved the California State Water Resources Control Board's ("State Water Board") request to use a newly formulated methodology for conducting chronic whole effluent toxicity ("WET") tests, known as the two-concentration Test of Significant Toxicity ("TST"), as an

Alternate Test Procedure ("ATP"). Id. Presently before the Court is Plaintiffs' Motion for a Temporary Restraining Order ("TRO") filed on June 26, 2014. Mot., June 26, 2014, ECF No. 4. Plaintiffs ask that this Court enjoin Defendants from "giving any force and effect" to its approval of the two-concentration TST and from "requiring or mandating the use . . . [of] analytical results obtained through the two-concentration TST method." ECF No. 4-7 at 2 (proposed order granting TRO). Defendants filed an Opposition, to which Plaintiffs responded. Opp'n, June 30, 2014, ECF No. 9; Reply, June 30, 2014, ECF No. 10. The Court held a hearing on the Motion on June 30, 2014. Upon consideration of the parties' filings and after hearing argument, the Motion was DENIED; this written order follows.[1]

BACKGROUND[2]

The Clean Water Act is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the discharge of a pollutant from a point source into waters of the United States, except as in compliance with specific provisions in the statute, including provisions regarding permits issued under the National Pollutant Discharge Elimination System ("NPDES") program. The Clean Water Act gives states "the primary responsibilit[y] and right[] . . . to prevent, reduce, and eliminate pollution" and encourages states to "assume the major role in the operation of the NPDES program." 33 U.S.C. § 1251(b); Boise Cascade Corp. v. U.S. E.P.A., 942 F.2d 1427, 1430 (9th Cir. 1991) (citing Shell Oil Co. v. Train, 585 F.2d 408, 410 (9th Cir. 1978)). "California [is one of the states] that ha[s] been granted authority to administer NPDES programs [itself]." Boise Cascade Corp., 942 F.2d at 1430 (citing 39 Fed. Reg. 26,061 (1973)). "The California State Water

[1] The Court denied Plaintiffs' Motion on the record. To the extent that this order materially differs from the Court's ruling on June 30, 2014, the terms of this order control.

[2] Unless otherwise indicated, the facts are taken, often verbatim, from Plaintiff's TRO Motion. See ECF No. 4.

Resources Control Board . . . and its various Regional Water Quality Control Boards are responsible for the enforcement of the Act in California and for issuing NPDES permits." Id. However, EPA itself "promulgate[s] guidelines establishing test procedures for the analysis of pollutants," which are used for certification and permit applications. 33 U.S.C. § 1314(h).

Plaintiff SCAP is a trade association that represents its agency members, who treat and recycle municipal and industrial wastewater in Southern California. Plaintiff CVCWA is a non-profit industry trade association that represents municipalities and other public entities located within the Central Valley region of California who provide wastewater collection, treatment, and water recycling services. The discharges to surface waters from Plaintiffs' member agencies are regulated through NPDES permits issued by the California Regional Water Quality Control Boards, the State Water Resources Control Board, and sometimes the EPA. However, as explained above, it is the EPA that promulgates formal methods for determining whether discharged water is deemed "toxic" or not.

Effluent limitations serve as the primary mechanism in NPDES permits for controlling discharges of pollutants from point sources to receiving waters. Water quality standards are used as the basis for deriving the specific effluent limitations in NPDES permits. According to Plaintiffs, for the last decade or so, SCAP and CVCWA members have been conducting WET testing of their discharges to make certain that the water discharged meets the relevant environmental standards. WET tests are designed to replicate the total effect and environmental exposure of aquatic life to toxic pollutants in a discharge without initially requiring the identification of the specific pollutants.

Under limited circumstances and subject to specific regulatory requirements, a person may request to use an Alternative Test Procedure ("ATP") to measure the toxicity of the effluent not previously approved and formally promulgated by the EPA. See 40 C.F.R. §§ 136.4, 136.5. "To be approved on a nationwide basis, an alternate test must go through rulemaking . . . and the regulations must be amended to add this

alternate test." Opp'n at 9 (citing 40 C.F.R. § 136.4(c)). Alternatively, a different process is used for limited use requests. See 40 C.F.R. § 136.5. "Instead, the applicant submits its request to the EPA's Regional Alternate Test Procedure Coordinator." Opp'n at 9 (citing 40 C.F.R. § 136.5). "The Regional Alternate Test Procedure Coordinator has the discretion to restrict the use of the alternate test procedure to a specific facility, or 'to all discharger[s] or facilities (and their associated laboratories) specified in the approval for the Region.'" Id. (citing 40 C.F.R. § 136.5).

On February 12, 2014, the State Water Board requested Regional EPA approval of "the statewide Alternate Test Procedure use of a two-concentration test design when using the Test of Significant Toxicity (TST) hypothesis testing approach." Compl. at 18. On March 17, 2014, EPA Region IX "determined that the State Water Board's proposed use of the two-concentration toxicity test evaluated using the Test of Significant Toxicity (TST) is an acceptable equivalent under the ATP process . . ." Id. at 24. However, Plaintiffs allege that SCAP's members did not learn of the new ATP until May 8, 2014, when the NPDES permits for three of SCAP's members were reissued by the Regional Water Quality Control Board for the Los Angeles Region. According to Plaintiffs, these new permits, and others, include numeric effluent limitations for chronic toxicity, and require WET testing to determine compliance with these limitations using the improperly adopted two-concentration TST.

Plaintiffs maintain that the EPA violated the APA and regulations implementing the Clean Water Act when it approved the State Water Board's requested use of the two-concentration toxicity test.[3] As a result and due to alleged flaws with this new method, Plaintiffs contend that their members will "suffer harm through the increased risk of non-

[3] Plaintiffs maintain that "there is a much larger story to tell than is possible in the short turnaround time for a TRO, but [that] the approval of the ATP was done because [the EPA] was unable to get internal approval from headquarters to allow use of the two-concentration TST. As will be demonstrated in this case, the [EPA] came up with the idea to have the State request an ATP to avoid the need for rulemaking, provided extensive funding to the [EPA] for toxicity testing related activity, and [EPA] employees even edited the letter sent requesting ATP approval. Review of the letters alone does not tell the whole story and what might appear to be lawful when viewed in isolation may be unlawful when the entire story is told." Reply at 6.

compliance, and the need to run additional tests to be able to statistically demonstrate compliance." Mot. at 10. Specifically, Plaintiffs contend that "[w]ithout injunctive relief, Plaintiffs' members whose permits currently or will soon contain requirements based on the two-concentration TST will be subject to enforcement and potentially liable for civil and criminal penalties and citizen suits for failure to consistently comply with the new final effluent limits and for undertaking more costly toxicity testing requirements based on the two-concentration TST." Id. Plaintiffs allege that the first permits incorporating and adopting the new test go into effect on July 1, 2014. Plaintiffs explain that such an outcome will result in "economic loss in the form of additional testing required to try to ensure compliance, and damage in the form of penalties and reputational injury for noncompliance with permit requirements." Id. In addition, Plaintiffs also allege that the State Water Board may be adopting the same mandate on July 2, 2014, and that without a TRO "there is no way to influence the State Water Board to adopt anything different than what the [EPA] has mandated." Id. at 11. Accordingly, Plaintiffs initiated this action on June 25 and filed a Motion for TRO the following day.

STANDARD

The purpose of a temporary restraining order is to preserve the status quo pending the complete briefing and thorough consideration contemplated by full proceedings pursuant to a preliminary injunction. See Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974) (temporary restraining orders "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer"); see also Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006); Dunn v. Cate, No. CIV 08-873-NVW, 2010 WL 1558562, at *1 (E.D. Cal. April 19, 2010).

Issuance of a temporary restraining order, as a form of preliminary injunctive relief, is an extraordinary remedy, and Plaintiffs have the burden of proving the propriety

of such a remedy. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). In general, the showing required for a temporary restraining order and a preliminary injunction are the same. Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

The party requesting preliminary injunctive relief must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20 (2008); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Winter). The propriety of a TRO hinges on a significant threat of irreparable injury that must be imminent in nature. Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988).

Alternatively, under the so-called sliding scale approach, as long as the Plaintiffs demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiffs' favor. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011) (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after Winter).

ANALYSIS

"Plaintiffs bear the burden of showing that, among other things, they are likely to suffer irreparable injury and the injury must be imminent in nature." Caribbean Marine, 844 F.2d at 674. Reflecting this requirement, Local Rule 231(b), which governs the timing of motions for TROs, states in full:

> In considering a motion for a temporary restraining order, the Court will consider whether the applicant could have sought relief by motion for preliminary injunction at an earlier date

> without the necessity for seeking last-minute relief by motion for temporary restraining order. Should the Court find that the applicant unduly delayed in seeking injunctive relief, the Court may conclude that the delay constitutes laches or contradicts the applicant's allegations of irreparable injury and may deny the motion solely on either ground.

As alleged, Plaintiffs have been on notice of the EPA's approval of the two-concentration TST since at least May 8, 2014. See Mot. at 8 (explaining that "SCAP's members first learned of this ATP on May 8, 2014, when the NPDES permits for three (3) of SCAP's members were reissued by the Regional Water Quality Control Board for the Los Angeles Region").[4] Defendants therefore contend that Plaintiffs' "long delay in seeking injunctive relief establishes 'a lack of urgency and irreparable harm.'" Opp'n at 16 (citing Oakland Tribune, Inc. v. Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985)). Defendants' argument is well taken.

Plaintiffs offer two justifications for their delay in seeking relief in this Court. First, Plaintiffs state that "[o]ne of the Plaintiffs did not even receive approval to join the litigation until its Board of Directors meeting held on [June 25, 2014]." Reply at 6. Next, Plaintiffs contend that before filing suit, "research had to be done to determine the issues to be raised in the case, including the sending of a Public Record Act request and a Freedom of Information Act . . . request." Id.

Given that a TRO is considered to be an extraordinary remedy and Plaintiffs have the burden of establishing its propriety, Plaintiffs' explanation of the reasons for their delay in filing their Motion is inadequate. Despite becoming aware of the EPA's approval of the two-concentration TST on May 8, 2014, Plaintiffs took no action in this Court for approximately seven weeks. Plaintiffs could have sought a preliminary injunction, without resorting to the extraordinary form of relief that is a TRO, in the interim period between May 8, 2014, and June 26, 2014. Instead, Plaintiffs waited until June 25, 2014,

[4] Defendants contend that Plaintiffs "actually learned of the Regional EPA's approval of the alternate test procedure by May 1, 2014 when the Los Angeles Regional Water Board responded in writing to comments to its draft permit for the Camarillo Sanitation District, a member of Plaintiff SCAP." Opp'n at 10.

to file a Complaint and until June 26, 2014, to file the instant motion -- just two business days prior to the onset of alleged irreparable harm. Stated another way, the Court is of the view that the seven-week delay between Plaintiffs' discovery of the EPA's approval of the two-concentration TST and the filing of this Motion contradicts Plaintiffs' claims of irreparable injury. Under the circumstances here, seven weeks constitutes an "undue delay" under Local Rule 231(b). See Caribbean Marine, 844 F.2d at 674.[5]

The Court finds that Plaintiffs have not made a compelling argument to explain why they could not "have sought relief by motion for preliminary injunction at an earlier date without the necessity for seeking last-minute relief by motion for temporary restraining order." E.D. Cal. Local R. 231(b); see, e.g., Occupy Sacramento v. City of Sacramento, 2:11–CV–02873–MCE, 2011 WL 5374748 (E.D. Cal. Nov. 4, 2011) (denying application for TRO for twenty-five day delay). Accordingly, the Court denies Plaintiffs' Motion on procedural grounds alone, and it is therefore unnecessary to address the substantive issues of Plaintiffs' Motion at this time.

CONCLUSION

For the reasons just stated, Plaintiffs' Motion for Temporary Restraining Order, ECF No. 4, is DENIED without prejudice. As explained on the record, Plaintiffs may seek a preliminary injunction through a properly noticed motion. See E.D. Cal. Local R. 230; 231(d).

IT IS SO ORDERED.

Dated: July 2, 2014

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[5] Despite Plaintiffs' failure to take any action in this Court prior to June 25, 2014, on June 6, 2014, the Camarillo Sanitary District, a member of Plaintiff SCAP, filed a petition challenging its permit before the California State Water Resources Control Board. See Opp'n at 13; Request for Judicial Notice, June 30, 2014, ECF No. 9-2. As Defendants point out, the Camarillo Sanitary District is represented by the same counsel as Plaintiffs in this action. See Opp'n at 13.