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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Plaintiffs,

v.

GINA MCCARTHY, et al.,

Defendants.

Case No. 16-cv-02184-JST

ORDER DENYING MOTION TO STAY

Re: ECF No. 87

Before the Court is Defendants United States Environmental Protection Agency Administrator, Scott Pruitt, and Acting Region 9 Administrator, Alexis Strauss's (collectively, "EPA") Motion for Referral and Stay. ECF No. 87. The Court will deny the motion.¹

I. PROCEDURAL HISTORY

Plaintiffs sent a 60-day Notice of Intent to Sue to the Defendants on October 29, 2015. See 33 U.S.C. § 1365(a); 40 C.F.R. § 135.2(c). ECF No. 1-1. Plaintiffs then filed their Complaint on April 22, 2016. ECF No. 1. On July 18, 2016, Defendants filed a motion to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6), which the Court denied. ECF Nos. 38, 73. The Court held that Plaintiffs' claims were not moot and that Plaintiffs had plausibly alleged a non-discretionary duty by the EPA to review the SWRCB orders at issue. ECF No. 73 at 13. On March 24, 2017, Defendants filed a motion to stay the case and refer it to the EPA to allow it to complete its consideration of whether certain orders issued by the SWRCB constitute revised water quality standards. ECF No. 87 at 1-2.

¹ The Court assumes the parties' familiarity with the facts of the case and omits any discussion of them here.

1 The EPA requests 75 days from the date of the filing of the motion, or until June 7, 2017,
2 to complete its review of the orders, after which it will “report its findings to this Court and all
3 parties.” ECF No. 87 at 2. Defendants argue that a referral of this matter to the EPA is
4 “consistent with the prudential doctrine of primary jurisdiction,” that it “would promote the
5 efficient disposition of this matter,” and that Plaintiffs would not be harmed by a referral and stay.
6 ECF No. 87 at 2. Plaintiffs oppose the motion, arguing that the doctrine of primary jurisdiction
7 does not apply, that referring the claims would not serve the purposes of primary jurisdiction, that
8 the referral would not promote efficiency, and that Plaintiffs would be prejudiced. ECF No. 90.

9 **II. LEGAL STANDARD**

10 “[T]he power to stay proceedings is incidental to the power inherent in every court to
11 control the disposition of the causes on its docket with economy of time and effort for itself, for
12 counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). The court must use
13 sound discretion when deciding whether to grant a stay, and consider such factors as “the possible
14 damage which may result from the granting of a stay, the hardship or inequity which a party may
15 suffer in being required to go forward, and the orderly course of justice measured in terms of the
16 simplifying or complicating of issues, proof, and questions of law which could be expected to
17 result from a stay.” CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1965) (citing Landis, 299
18 U.S. at 254-55). “A stay should not be granted unless it appears likely the other proceedings will
19 be concluded within a reasonable time in relation to the urgency of the claims presented to the
20 court.” Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 864 (9th Cir. 1979). The moving
21 party has the burden to show that a stay is appropriate. See Clinton v. Jones, 520 U.S. 681, 708
22 (1997).

23 **III. DISCUSSION**

24 Defendants argue that the case should be referred to the EPA under the doctrine of primary
25 jurisdiction, which “permits courts to determine ‘that an otherwise cognizable claim implicates
26 technical and policy questions that should be addressed in the first instance by the agency with
27 regulatory authority over the relevant industry rather than by the judicial branch.’” Astiana v.
28 Hain Celestial Grp., Inc., 783 F.3d 753, 760 (9th Cir. 2015) (quoting Clark v. Time Warner Cable,

1 523 F.3d 1110, 1114 (9th Cir. 2008)). “The rule in this Circuit is that where a court suspends
2 proceedings in order to give preliminary deference to an independent adjudicating body . . .
3 jurisdiction should be retained by a stay of proceedings.” Hawai’i Wildlife Fund v. Cty. of Maui,
4 24 F.Supp. 3d 980, 990 (D. Hawai’i, May 30, 2014) (quoting United States v. Henri, 828 F.2d
5 526, 528 (9th Cir. 1987)).

6 “In evaluating primary jurisdiction, we consider (1) the need to resolve an issue that (2) has
7 been placed by Congress within the jurisdiction of an administrative body having regulatory
8 authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive
9 regulatory authority that (4) requires expertise or uniformity in administration.” Id. (internal
10 quotations omitted). However, “[n]ot every case that implicates the expertise of federal agencies
11 warrants invocation of primary jurisdiction. Rather, the doctrine is reserved for a ‘limited set of
12 circumstances’ that requires resolution of an issue of first impression, or of a particularly
13 complicated issue that Congress has committed to a regulatory agency.” Id. (quoting Clark, 523
14 F.3d at 1114). The Court must also consider “whether invoking primary jurisdiction would
15 needlessly delay the resolution of claims.” Id. (citing Reid v. Johnson & Johnson, 780 F.3d 952,
16 967-68 (9th Cir. 2015)).

17 The decision of whether the TUCP orders constitute revisions to the state’s water quality
18 standards is certainly within the jurisdiction and competence of the EPA. The Court stated in its
19 order denying Defendants’ motion to dismiss that the EPA has not reached “a considered decision
20 . . . not to apply the effects test to the TUCP [orders],” and that both parties acknowledged, to
21 some extent, “that the Court should defer to [the] EPA’s interpretation of what constitutes a
22 revision.” ECF No. 73 at 9. Yet “while competence of an agency to pass on an issue is a
23 necessary condition to the application of the [primary jurisdiction] doctrine, competence alone is
24 not sufficient.” Hawai’i Wildlife Fund, 24 F.Supp. 3d at 990 (quoting United States v. Culliton,
25 328 F.3d 1074, 1082 (9th Cir. 2003)). There is a “virtually unflagging obligation of the federal
26 courts to exercise the jurisdiction given them,” id. (quoting Colorado River Water Conservation
27 Dist. v. United States, 424 U.S. 800, 817-18 (1976)), and thus the primary jurisdiction doctrine
28 should only be invoked where “it would be inconsistent with the statutory scheme to deny the

1 agency’s power to resolve the issues in question,” id. (quoting Culliton, 328 F.3d at 1082).

2 It would not be inconsistent with the Clean Water Act’s legislative scheme for this Court to
3 decide the question of whether the TUCP orders constitute revisions, as “[t]he citizen suit
4 provision in the Clean Water Act was specifically designed to allow courts to ensure direct
5 compliance with the Act’s requirements.” Id. The CWA contains no express limitations
6 applicable to this citizen suit. See id.; see also ECF No. 90 at 14 (citing 33 U.S.C. § 1365(b)).
7 “The absence of any textual limitation on citizen suits initiated during agency review is a strong
8 indication that Congress intended such suits to proceed.” Hawai’i Wildlife Fund, 24 F.Supp. 3d at
9 990.

10 Courts are clearly competent to address the type of issue raised by this citizen suit, such as
11 whether the TUCP orders constitute revisions to the state’s water quality standards. In fact, the
12 parties have acknowledged that they believe no discovery is necessary in this case and that it “is
13 appropriate for disposition on the basis of undisputed or easily proven and judicially noticeable
14 facts.” ECF No. 70. This case is therefore distinguishable from Miccosukee Tribe of Indians of
15 Florida v. EPA, 105 F.3d 599, 602 (11th Cir. 1997), in which the court referred the case for
16 “factual findings” that are unnecessary here, ECF No. 87-1, Ex. 1 (Miccosukee Tribe of Indians of
17 Fla. v. EPA, Case No. 95-0533-CIV-DAVIS, ECF No. 41 (S.D. Fla. Nov. 3, 1997)) at 2), and
18 Florida Public Interest Research Grp. Citizen Lobby v. EPA, 386 F.3d 1070 (11th Cir. 2004), in
19 which the state’s actions were significantly more complicated than here and required the EPA to
20 review “numerous complex provisions” of the state law, implicating the EPA’s “expertise in
21 statistics and science,” see Poole Dec. Ex. H (FPIRG v. EPA, Case No. 4:02 CV 408-WS, ECF
22 No. 82-2 (EPA’s motion to stay)) at 7. This Court is asked only to determine whether the
23 temporary permits issued by the State of California revised the State’s water quality standards,
24 triggering the EPA’s duty to review them. “Such a judgment is within the conventional expertise
25 of courts and does not require the type of complex [factual or] technical judgment at issue” in
26 Miccosukee and FPIRG. Hawai’i Wildlife Fund, 24 F.Supp. 3d at 991.

27 The Court also sees no discernible harm in parallel proceedings. See id. Plaintiffs aptly
28 point out that the EPA has had “more than three years” to consider the question at issue here, and

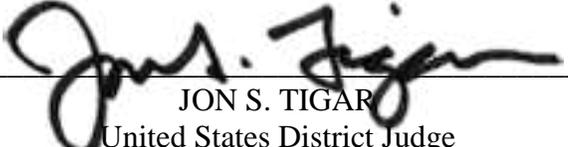
1 that the CWA’s 60-day notice requirement for citizen suits clearly put the EPA on notice of this
2 action. ECF No. 90 at 12 (citing Ctr. For Biological Diversity v. Marina Point Dev. Co., 566 F.3d
3 794, 800 (9th Cir. 2009) (“[T]he purpose of notice to the alleged violator is to give it an
4 opportunity to bring itself into complete compliance.” (internal quotations omitted))). Moreover,
5 the EPA’s review is presumably already underway,² and this Court’s denial of a stay will not
6 preclude it from completing that task. ECF No. 87 at 2 (“EPA requests 75 days from the date of
7 this filing.”). The danger of inconsistent rulings is minimal, especially considering that the EPA
8 plans to complete its review before this Court hears the parties’ motions for summary judgment.
9 ECF No. 87 at 7. The Court will therefore have the benefit of the EPA’s analysis as to whether
10 the TUCP orders triggered the CWA’s nondiscretionary duty of review. “The proponent of a stay
11 bears the burden of establishing its need.” Clinton v. Jones, 520 U.S. 681, 708 (1997). The EPA
12 has not met that burden.

13 **CONCLUSION**

14 For the foregoing reasons, the EPA’s motion for referral and stay is denied.

15 IT IS SO ORDERED.

16 Dated: July 26, 2017

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19 JON S. TIGAR
20 United States District Judge

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² Indeed, given the pace at which the Court has resolved this motion, the EPA’s review should
already have been completed.