

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL RESOURCES DEFENSE
COUNCIL, et al.,
Plaintiffs,
v.
SCOTT PRUITT, et al.,
Defendants.

Case No. 16-cv-02184-JST

**ORDER GRANTING DEFENDANTS'
AND DEFENDANT-INTERVENORS'
MOTIONS FOR SUMMARY
JUDGMENT, DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING CASE
FOR LACK OF JURISDICTION**

Re: ECF Nos. 102, 103, 104, 105

Before the Court are the parties' and intervenors' cross-motions for summary judgment. ECF No. 102, 103, 104, 105. The Court will dismiss the case for lack of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Water Quality Control Plans for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan”) and the Sacramento River Basin and San Joaquin River Basin, 4th Edition (“Central Valley Plan”) implement water quality standards issued by the State Water Resources Control Board (“SWRCB”) and approved by the United States Environmental Protection Agency (“EPA”). California Water Code Section 13247 requires state agencies to comply with water quality control plans approved by the SWRCB.

On January 17, 2014, Governor Edmund G. Brown, Jr. issued a “Proclamation of a State of Emergency” throughout California due to severe drought conditions. ECF No. 14-1 at 2-5. The proclamation suspended operation of Section 13247 and directed the SWRCB to “consider modifying requirements for reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan.” *Id.* at 3.

Between 2014 and 2016, the SWRCB issued several orders granting temporary urgency change petitions (“TUCPs”) by various water users. E.g., ECF Nos. 105-16 to 105-25, 105-27.

1 Plaintiffs – three environmental organizations: the Natural Resources Defense Council, Bay.org
2 d/b/a The Bay Institute, and Defenders of Wildlife – contend that these orders had the effect of
3 revising the water standards contained in the Bay-Delta Plan and Central Valley Plan.¹ They
4 further assert that Defendants Scott Pruitt and Alexis Strauss had a nondiscretionary duty to
5 review these revised water standards under the Clean Water Act (“CWA”), 33 U.S.C.
6 §§ 1313(c)(2)(A), (c)(3)-(4).²

7 Defendants moved to dismiss Plaintiffs’ complaint for lack of subject matter jurisdiction
8 pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to
9 Rule 12(b)(6). ECF No. 38. The Court denied the motion on February 7, 2017. ECF No. 73.

10 On April 7, 2017, the Governor issued Executive Order B-40-17, which terminated the
11 January 17, 2014 emergency drought proclamation except as to four counties and rescinded related
12 orders, including the suspension of Section 13247. ECF No. 104-8 at 3.

13 On May 25, 2017, the EPA filed its agency determination that “none of the TUCP Orders
14 issued by the Water Board in 2014-2016 are new or revised [water quality standards].” ECF No.
15 96-1 at 5.

16 All parties, as well as Defendant-Intervenors San Joaquin Tributaries Authority, San Luis
17 & Delta-Mendota Water Authority, and Westlands Water District, now move for summary
18 judgment. ECF Nos. 102-105.

19 **II. REQUESTS FOR JUDICIAL NOTICE**

20 The parties and intervenors make several requests for judicial notice. Pursuant to Federal
21 Rule of Evidence 201(b), “[t]he court may judicially notice a fact that is not subject to reasonable
22

23 ¹ In briefing on Defendants’ motion to dismiss, the parties disputed “whether or not Plaintiffs
24 [had] adequately pleaded that the temporary orders issued by the State throughout 2014-2016
25 qualified as ‘revisions’ to the water quality standards in the EPA-approved 1995 Bay-Delta Plan.”
26 ECF No. 73 at 9. The Court concluded that they had. Id. at 13. As the Court noted in its order
denying Defendants’ motion, the question presented there was “whether Defendants [had]
demonstrated as a matter of law that the TUCP orders do not revise California’s water quality
standards.” Id. (emphasis added). In light of the Court’s conclusion below that the parties’
dispute is now moot, it does not address this question further.

27 ² Pruitt, Administrator of the EPA, and Strauss, Acting Regional Administrator for EPA Region
28 IX, are substituted for their respective predecessors in office, Gina McCarthy and Jared
Blumenfeld. See Fed. R. Civ. P. 25(d).

1 dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can
2 be accurately and readily determined from sources whose accuracy cannot reasonably be
3 questioned.” A court “must take judicial notice if a party requests it and the court is supplied with
4 the necessary information.” Fed. R. Evid. 201(c)(2).

5 The Court may take judicial notice of public records, Santa Monica Food Not Bombs v.
6 City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006), and facts within public records
7 that are not subject to reasonable dispute, Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir.
8 2001). This includes “public record[s] downloaded from a public agency’s official website.”
9 Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency, 812 F. Supp. 2d 1089, 1093
10 (E.D. Cal. 2011). The Court grants the parties’ and intervenors’ requests for judicial notice of the
11 following public records: the 1995 Bay-Delta Plan, see ECF Nos. 103-2, 104-1; the public records
12 submitted by the San Luis & Delta-Mendota Water Authority and Westlands Water District, see
13 ECF Nos. 13, 14, 104-1; Plaintiffs’ Exhibits B-Z, 1-3, and AA-BB, see ECF Nos. 105-1, 106,
14 110-5, 117; and San Joaquin Tributaries Authority’s Exhibits A and B, see ECF No. 108-2.

15 The remainder of the parties’ requests for judicial notice are denied as moot because they
16 are either duplicative or “this order need not rely on [the] documents” presented. Asarco LLC v.
17 Shore Terminals LLC, No. C 11-01384 WHA, 2011 WL 6182123, at *3 (N.D. Cal. Dec. 13,
18 2011).

19 **III. LEGAL STANDARD**

20 Summary judgment is proper when a “movant shows that there is no genuine dispute as to
21 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
22 A dispute is genuine only if there is sufficient evidence “such that a reasonable jury could return a
23 verdict for the nonmoving party,” and a fact is material only if it might affect the outcome of the
24 case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for
25 summary judgment, the court must draw “all justifiable inferences” in the nonmoving party’s
26 favor and may not weigh evidence or make credibility determinations. Id. at 255.

27 Where the party moving for summary judgment would bear the burden of proof at trial,
28 that party “has the initial burden of establishing the absence of a genuine issue of fact on each

1 issue material to its case.” C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474,
2 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of
3 proof at trial, that party “must either produce evidence negating an essential element of the
4 nonmoving party’s claim or defense or show that the nonmoving party does not have enough
5 evidence of an essential element to carry its ultimate burden of persuasion at trial.” Nissan Fire &
6 Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies
7 its initial burden of production, the nonmoving party must produce admissible evidence to show
8 that a genuine issue of material fact exists. Id. at 1102-03. If the nonmoving party fails to make
9 this showing, the moving party is entitled to summary judgment. Celotex Corp. v. Catrett, 477
10 U.S. 317, 322-23 (1986).

11 **IV. DISCUSSION**

12 **A. Mootness and Standing**

13 The Court previously denied Defendants’ motion to dismiss this case as moot. ECF No. 73
14 at 6-8. At that time, the TUCP orders had already expired and there were no pending petitions for
15 additional TUCP orders, but the EPA had yet to perform any review of those orders and the
16 Governor’s suspension of Section 13247 remained in effect. ECF No. 73 at 6-7. The Court held
17 that “[u]nder this constellation of facts, Plaintiffs and the Court [could] reasonably expect that the
18 challenged harms [would] recur.” Id. at 7.

19 The facts have now changed. On April 7, 2017, the Governor rescinded the suspension of
20 Section 13247, so state agencies must again comply with water quality control plans. ECF No.
21 104-8 at 3. Moreover, on May 25, 2017, the EPA completed its review of the TUCP orders at
22 issue and determined that the orders do not constitute new or revised water quality standards. ECF
23 No. 96-1 at 5. The Court must consider whether these changed circumstances render the case
24 moot or deprive Plaintiffs of standing

25 “A moot action is one where the issues presented are no longer ‘live’ or the parties lack a
26 legally cognizable interest in the outcome. [The Court] cannot take jurisdiction over a claim to
27 which no effective relief can be granted.” Headwaters, Inc. v. Bureau of Land Management, 893
28 F.2d 1012, 1015 (9th Cir. 1990) (citations and internal quotation marks omitted). Defendants’

“burden of demonstrating . . . mootness . . . is a heavy one.” Greenpeace Action v. Franklin, 14 F.3d 1324, 1329 (9th Cir. 1992). If injunctive relief is unavailable, the Court may still grant declaratory relief if the dispute is “capable of repetition, yet evading review.” Davis v. Fed. Election Comm’n, 554 U.S. 724, 735 (2008). A case qualifies for this exception “if (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.” Greenpeace Action, 14 F.3d at 1329.

Plaintiffs rely on Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006 (9th Cir. 2012), to support their argument that this case falls within the “capable of repetition, yet evading review” exception, but that case is distinguishable. The Karuk plaintiffs challenged four notices of intent (“NOIs”) allowing certain mining activities, and the Ninth Circuit held that the case was not moot even though the NOIs had expired. Id. at 1017-18. As in Karuk, the TUCP orders at issue in this case remain “too short in duration for a plaintiff to complete litigation before” their expiration. Id. at 1018. But, unlike in Karuk, Plaintiffs have not shown “a reasonable expectation that [Defendants] will engage in the challenged conduct again.” Id. (citation and quotation marks omitted). The claims in Karuk satisfied this standard because the Forest Service “continued to approve NOIs” while the case was pending, and the plaintiffs “demonstrated a commitment to challenging these approvals.” Id. Here, by contrast – as Plaintiffs’ own motion observes – “Section 13247 prohibits ‘de facto amendments’ to water quality objectives,” and “[t]he SWRCB acknowledged . . . in every TUCP order it issued . . . that it could not have approved an order relaxing the permits’ objectives if Section 13247 (which prevents state agencies from contravening water quality standards) had been in force.” ECF No. 105 at 30 (citing Jan. 31, 2014 TUCP Order at 7-8; Feb. 3, 2015 TUCP Order at 13; SWRCB Cases, 136 Cal. App. 4th 674, 726-33 (2006)). Now that the suspension of Section 13247 has been rescinded, the SWRCB no longer has authority to issue TUCP orders, such as the ones in dispute here, that are inconsistent with the State’s water quality standards. Consequently, there is no reasonable expectation that the challenged conduct will recur.

Moreover, the EPA has now performed the review that Plaintiffs prayed for in their

1 complaint. See ECF Nos. 1 at 29-30 (complaint), 96-1 (EPA agency determination). While
2 Plaintiffs may be correct that the EPA used its determination as an opportunity to support its
3 litigation position, see, e.g., Vietnam Veterans of Am. v. CIA, 811 F.3d 1068, 1078 (9th Cir.
4 2016) (declining to afford deference to regulatory interpretation that was merely a “convenient
5 litigating position”), the fact remains that the EPA has performed a review. As in Miccosukee
6 Tribes of Indians of Florida v. United States, No. 95-0533-CIV-DAVIS, 1998 WL 1805539 (S.D.
7 Fla. Sept. 14, 1998), that renders this case moot. In that case:

8 Following remand, the EPA undertook the very review of the
9 [Everglades Forever Act (“EFA”)] the Tribe sought to compel. The
10 agency concluded in January of this year that the EFA does not
11 change the state’s water quality standards. . . . The EPA found that
12 because the EFA does not change Florida’s water quality standards,
13 it is consistent with the CWA. Therefore, the EPA concluded there
14 was no need to exercise its discretionary duty to promulgate new
15 water quality standards for Florida. . . .

16 The mandate [from the Eleventh Circuit] required the Court to make
17 factual findings because the EPA had not reviewed the Act. Only
18 now the EPA has reviewed the Act. Under those circumstances, the
19 Court need no longer make its own factual findings, and cannot
20 proceed under the citizen suit provision of the CWA.

21 The Tribe’s allegation that the EPA ignored its mandatory duty to
22 review the EFA is moot.

23 Id. at *8, *12-13 (citations omitted). Like the Miccosukee Tribe, Plaintiffs here are left “in the
24 position of challenging the sufficiency of the review and the substance of the EPA’s findings, not
25 whether the EPA fulfilled any mandatory duty. The EPA has no mandatory duty to reach a
26 particular conclusion after reviewing state standards; it has discretion to approve or disapprove
27 them.” Id. at *13 (citing Nat’l Wildlife Fed’n v. Browner, 127 F.3d 1126, 128-30 (D.C. Cir.
28 1997); City of Las Vegas v. Clark Cty., 755 F.2d 697, 704 (9th Cir. 1985)). “The CWA’s citizen
suit provision is only available to force the EPA to perform a mandatory duty, not to challenge the
substance of an EPA decision. The only way to challenge a decision involving the EPA’s
discretion is through the APA [Administrative Procedure Act].”³ Id. (citing City of Las Vegas,
755 F.2d at 704; Scott v. City of Hammond, 741 F.2d 992, 995 (7th Cir. 1994); United States Steel

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
5530
5531
5532
5533
5534
5535
5536
5537
5538
5539
5540
5541
5542
5543
5544
5545
5546
5547
5548
5549
5550
5551
5552
5553
5554
5555
5556
5557
5558
5559
55510
55511
55512
55513
55514
55515
55516
55517
55518
55519
55520
55521
55522
55523
55524
55525
55526
55527
55528
55529
55530
55531
55532
55533
55534
55535
55536
55537
55538
55539
55540
55541
55542
55543
55544
55545
55546
55547
55548
55549
55550
55551
55552
55553
55554
55555
55556
55557
55558
55559
555510
555511
555512
555513
555514
555515
555516
555517
555518
555519
555520
555521
555522
555523
555524
555525
555526
555527
555528
555529
555530
555531
555532
555533
555534
555535
555536
555537
555538
555539
555540
555541
555542
555543
555544
555545
555546
555547
555548
555549
555550
555551
555552
555553
555554
555555
555556
555557
555558
555559
5555510
5555511
5555512
5555513
5555514
5555515
5555516
5555517
5555518
5555519
5555520
5555521
5555522
5555523
5555524
5555525
5555526
5555527
5555528
5555529
5555530
5555531
5555532
5555533
5555534
5555535
5555536
5555537
5555538
5555539
5555540
5555541
5555542
5555543
5555544
5555545
5555546
5555547
5555548
5555549
5555550
5555551
5555552
5555553
5555554
5555555
5555556
5555557
5555558
5555559
55555510
55555511
55555512
55555513
55555514
55555515
55555516
55555517
55555518
55555519
55555520
55555521
55555522
55555523
55555524
55555525
55555526
55555527
55555528
55555529
55555530
55555531
55555532
55555533
55555534
55555535
55555536
55555537
55555538
55555539
55555540
55555541
55555542
55555543
55555544
55555545
55555546
55555547
55555548
55555549
55555550
55555551
55555552
55555553
55555554
55555555
55555556
55555557
55555558
55555559
555555510
555555511
555555512
555555513
555555514
555555515
555555516
555555517
555555518
555555519
555555520
555555521
555555522
555555523
555555524
555555525
555555526
555555527
555555528
555555529
555555530
555555531
555555532
555555533
555555534
555555535
555555536
555555537
555555538
555555539
555555540
555555541
555555542
555555543
555555544
555555545
555555546
555555547
555555548
555555549
555555550
555555551
555555552
555555553
555555554
555555555
555555556
555555557
555555558
555555559
5555555510
5555555511
5555555512
5555555513
5555555514
5555555515
5555555516
5555555517
5555555518
5555555519
5555555520
5555555521
5555555522
5555555523
5555555524
5555555525
5555555526
5555555527
5555555528
5555555529
5555555530
5555555531
5555555532
5555555533
5555555534
5555555535
5555555536
5555555537
5555555538
5555555539
5555555540
5555555541
5555555542
5555555543
5555555544
5555555545
5555555546
5555555547
5555555548
5555555549
5555555550
5555555551
5555555552
5555555553
5555555554
5555555555
5555555556
5555555557
5555555558
5555555559
55555555510
55555555511
55555555512
55555555513
55555555514
55555555515
55555555516
55555555517
55555555518
55555555519
55555555520
55555555521
55555555522
55555555523
55555555524
55555555525
55555555526
55555555527
55555555528
55555555529
55555555530
55555555531
55555555532
55555555533
55555555534
55555555535
55555555536
55555555537
55555555538
55555555539
55555555540
55555555541
55555555542
55555555543
55555555544
55555555545
55555555546
55555555547
55555555548
55555555549
55555555550
55555555551
55555555552
55555555553
55555555554
55555555555
55555555556
55555555557
55555555558
55555555559
555555555510
555555555511
555555555512
555555555513
555555555514
555555555515
555555555516
555555555517
555555555518
555555555519
555555555520
555555555521
555555555522
555555555523
555555555524
555555555525
555555555526
555555555527
555555555528
555555555529
555555555530
555555555531
555555555532
555555555533
555555555534
555555555535
555555555536
555555555537
555555555538
555555555539
555555555540
555555555541
555555555542
555555555543
555555555544
555555555545
555555555546
555555555547
555555555548
555555555549
555555555550
555555555551
555555555552
555555555553
555555555554
555555555555
555555555556
555555555557
555555555558
555555555559
5555555555510
5555555555511
5555555555512
5555555555513
5555555555514
5555555555515
5555555555516
5555555555517
5555555555518
5555555555519
5555555555520
5555555555521
5555555555522
5555555555523
5555555555524
5555555555525
5555555555526
5555555555527
5555555555528
5555555555529
5555555555530
5555555555531
5555555555532
5555555555533
5555555555534
5555555555535
5555555555536
5555555555537
5555555555538
5555555555539
5555555555540
5555555555541
5555555555542
5555555555543
5555555555544
5555555555545
5555555555546
5555555555547
5555555555548
5555555555549
5555555555550
5555555555551
5555555555552
5555555555553
5555555555554
5555555555555
5555555555556
5555555555557
5555555555558
5555555555559
55555555555510
55555555555511
55555555555512
55555555555513
55555555555514
55555555555515
55555555555516
55555555555517
55555555555518
55555555555519
55555555555520
55555555555521
55555555555522
55555555555523
55555555555524
55555555555525
55555555555526
55555555555527
55555555555528
55555555555529
55555555555530
55555555555531
55555555555532
55555555555533
55555555555534
55555555555535
55555555555536
55555555555537
55555555555538
55555555555539
55555555555540
55555555555541
55555555555542
55555555555543
55555555555544
55555555555545
55555555555546
55555555555547
55555555555548
55555555555549
55555555555550
55555555555551
55555555555552
55555555555553
55555555555554
55555555555555
55555555555556
55555555555557
55555555555558
55555555555559
555555555555510
555555555555511
555555555555512
555555555555513
555555555555514
555555555555515
555555555555516
555555555555517
555555555555518
555555555555519
555555555555520
555555555555521
555555555555522
555555555555523
555555555555524
555555555555525
555555555555526
555555555555527
555555555555528
555555555555529
555555555555530
555555555555531
555555555555532
555555555555533
555555555555534
555555555555535
555555555555536
555555555555537
555555555555538
555555555555539
555555555555540
555555555555541
555555555555542
555555555555543
555555555555544
555555555555545
555555555555546
555555555555547
555555555555548
555555555555549
555555555555550
555555555555551
555555555555552
555555555555553
555555555555554
555555555555555
555555555555556
555555555555557
555555555555558
555555555555559
5555555555555510
5555555555555511
5555555555555512
5555555555555513
5555555555555514
5555555555555515
5555555555555516
5555555555555517
5555555555555518
5555555555555519
5555555555555520
5555555555555521
5555555555555522
5555555555555523
5555555555555524
5555555555555525
5555555555555526
5555555555555527
5555555555555528
5555555555555529
5555555555555530
5555555555555531
5555555555555532
5555555555555533
5555555555555534
5555555555555535
5555555555555536
5555555555555537
5555555555555538
5555555555555539
5555555555555540
5555555555555541
5555555555555542
5555555555555543
5555555555555544
5555555555555545
5555555555555546
5555555555555547
5555555555555548
5555555555555549
5555555555555550
5555555555555551
5555555555555552
5555555555555553
5555555555555554

1 Corp. v. Train, 556 F.2d 822, 836 (7th Cir. 1977)). The EPA’s conclusions might be subject to
2 attack in another setting, but the Court cannot, under the citizen suit provision of the CWA,
3 require the EPA to come to any particular outcome.

4 In addition, while California will certainly experience drought sometime in the future, see
5 ECF No. 73 at 7 & n.6, the Governor’s and SWRCB’s responses to such a drought are uncertain.
6 That fact is also fatal to Plaintiffs’ theory of standing, which requires an “injury in fact” that is
7 both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”
8 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted).
9 “[T]hreatened injury must be certainly impending to constitute injury in fact.” Clapper v.
10 Amnesty Int’l USA, 568 U.S. 398, 410 (2013) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158
11 (1990)). Plaintiffs’ argument now rests on their fear that: (1) California will experience another
12 drought; (2) the Governor will again respond by issuing an emergency proclamation suspending
13 state law enforcing water quality standards; (3) the SWRCB will again issue TUCP orders that are
14 inconsistent with the State’s water quality standards; and (4) the EPA will again fail to review the
15 TUCP orders as revisions to water quality standards. Plaintiffs have “no actual knowledge” of
16 how the Governor, SWRCB, or EPA will respond in the event of renewed drought conditions. Id.
17 at 411. Instead, their argument is based on “a highly attenuated chain of possibilities,” not any
18 “certainly impending” threatened injury. Id. at 410. The Court is “reluctan[t] to endorse standing
19 theories that rest on speculation about the decisions of independent actors,” and cannot conclude
20 that Plaintiffs face an imminent prospect of future injury that warrants declaratory relief. Id. at
21 414; see also Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (courts cannot issue advisory opinions
22 on “what the law would be upon a hypothetical state of facts” (citation and internal quotation
23 marks omitted)).

24 For the foregoing reasons, the Court finds that this case is now moot and that Plaintiffs
25 lack standing. The Court no longer has jurisdiction to consider this case.

26 **B. Plaintiffs’ Request for Leave to Amend**

27 Plaintiffs argue that the case is not moot, even though the EPA has determined that the
28 TUCP orders did not revise water quality standards, because that determination “is arbitrary and

1 capricious . . . and therefore (to the extent necessary) should be held unlawful and set aside under
2 the APA.” ECF No. 105 at 32. Plaintiffs request leave to amend their complaint pursuant to Rule
3 15 of the Federal Rules of Civil Procedure to state an APA claim. Id.; ECF No. 110 at 28.

4 It is proper for the Court to consider Plaintiffs’ request:

5 Where plaintiffs fail to raise a claim properly in their pleadings, if
6 they raised it in their motion for summary judgment, they should be
7 allowed to incorporate it by amendment under Fed. R. Civ. P. 15(b).
8 And when issues are raised in opposition to a motion to summary
9 judgment that are outside the scope of the complaint, the district
court should have construed the matter raised as a request pursuant
to rule 15(b) of the Federal Rules of Civil Procedure to amend the
pleadings out of time.

10 Desertrain v. City of Los Angeles, 754 F.3d 1147, 1154 (9th Cir. 2014) (citations, internal
11 quotation marks, and alterations omitted). Although the Ninth Circuit referenced Rule 15(b), it
12 also cited the standard for granting leave to amend under Rule 15(a): “[L]eave to amend ‘shall be
13 freely given when justice so requires,’ Fed. R. Civ. P. 15(a), and this policy is to be applied with
14 extreme liberality.”⁴ Id. (citation omitted). “Five factors are taken into account to assess the
15 propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party,
16 futility of amendment, and whether the plaintiff has previously amended the complaint.” Id.
17 (quoting Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004)).

18 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend,”

19
20 ⁴ The court quoted from cases decided prior to the 2007 amendments to Rule 15. Desertrain, 754
21 F.3d at 1154 (quoting Jackson v. Hayakawa, 605 F.2d 1121, 1129 (9th Cir. 1979), and Apache
22 Survival Coal. v. United States, 21 F.3d 895, 910 (9th Cir. 1994) (quoting Johnson v. Mateer, 625
23 F.2d 240, 242 (9th Cir. 1980))). At the time of those cases, Rule 15(b) was entitled,
24 “Amendments to Conform to the Evidence” and Rule 15(a) was simply “Amendments.” E.g.,
25 Fed. R. Civ. P. 15(a), (b) (2006). The rules are now delineated as “Amendments Before Trial,”
26 Fed. R. Civ. P. 15(a), and “Amendments During and After Trial,” Fed. R. Civ. P. 15(b). A motion
for leave to amend at summary judgment might now be more correctly characterized as falling
under Rule 15(a) because it occurs before trial. However, this distinction is not material, as the
standards under both rules are substantially similar. Under Rule 15(b), a “court should freely
permit an amendment when doing so will aid in presenting the merits and the objecting party fails
to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.”
Fed. R. Civ. P. 15(b). Likewise, under Rule 15(a), “[t]he court should freely give leave when
justice so requires.” Fed. R. Civ. P. 15(a)(2). “Rule 15(a) is very liberal,” AmerisourceBergen
Corporation v. Dialysis W., Inc., 465 F.3d 946, 951 (9th Cir. 2006), and Rule 15(b) also “embodies a
liberal policy in favor of allowing pleading amendments at any time during and even after trial.”
United States v. Gila Valley Irrigation Dist., 859 F.3d 789, 804 (9th Cir. 2017) (quoting Consol.
Data Terminals v. Applied Digital Data Sys., Inc., 708 F.2d 385, 396 (9th Cir. 1983)).

1 Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995), and this factor is dispositive here. Even if
2 the Court were to allow amendment, and even if the Court were then to set aside the EPA’s
3 determination and require the EPA to perform a new, additional review of the TUCP orders, and
4 even if the EPA (or the Court) were then to determine both that the TUCP orders revised state
5 water quality standards and that such standards did not meet the requirements of the CWA, the
6 next step – as Plaintiffs acknowledge in their complaint – would be for the EPA to give the State
7 an opportunity to amend the TUCPs to meet the CWA’s requirements. 33 U.S.C. § 1313(c)(3);
8 ECF No. 1 ¶2 (“If EPA does not approve the new or revised standard, EPA must give the state an
9 opportunity to cure any defect. If the state fails to do so, then the EPA must promulgate federal
10 water quality standards.”). But the TUCPs are no longer in effect, so there would be nothing for
11 the State to amend even if Plaintiffs’ prevailed at every step of the litigation. The Court is
12 incapable of giving Plaintiffs meaningful relief, and any amendment would therefore be futile.
13 Plaintiffs’ motion for leave to amend is denied.

CONCLUSION

This case is dismissed for lack of jurisdiction. Defendants' and Defendant-Intervenors' motions for summary judgment are granted, and Plaintiffs' motion is denied. Leave to amend the complaint is also denied. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: November 30, 2017


JON S. TIGAR
United States District Judge