

SAM HIRSCH
Acting Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

THE HONORABLE JEFFREY S. WHITE

SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief
ETHAN CARSON EDDY, Trial Attorney (Cal. Bar 237214)
Wildlife and Marine Resources Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0202 (phone)
(202) 305-0275 (fax)
ethan.eddy@usdoj.gov

JOHN THOMAS H. DO, Trial Attorney
Environmental Defense Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 514-2593 (Phone); (202) 514-8865 (Fax)
john.do@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH FOUNDATION and
ECOLOGICAL RIGHTS FOUNDATION,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Defendants.

)
) Case No. 3:13-cv-2857-JSW
)
) **STIPULATION TO VACATE**
) **HEARING AND REQUEST TO**
) **ENTER CONSENT DECREE;**
) **[PROPOSED] ORDER**
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1 Pursuant to Civil Local Rule 7-12, Plaintiffs Our Children’s Earth Foundation and
2 Ecological Rights Foundation (collectively, “Plaintiffs”) and Defendants U.S. Environmental
3 Protection Agency, Gina McCarthy, Administrator, and Jared Blumenfeld, Regional
4 Administrator of Region 9 (collectively, "EPA") hereby stipulate to vacate the scheduled motion
5 hearing on the United States’ partial motion to dismiss and request that Court enter the attached
6 Consent Decree. For the reasons stated below, the Consent Decree is fair, reasonable, and
7 consistent with the goals and requirements of the Clean Water Act (“CWA”), 33 U.S.C. §1251 et
8 seq.
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10 **Procedural Background**

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12 On June 20, 2013, Plaintiffs filed a complaint pursuant to Section 505(a)(2) of the CWA,
13 33 U.S.C. § 1365(a)(2); Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. §
14 1540(g)(1)(A); and Section 706(1) of the Administrative Procedure Act (“APA”), 5 U.S.C. §
15 706(1), against the U.S. Environmental Protection Agency (“EPA”), the U.S. Fish and Wildlife
16 Service and the National Marine Fisheries Service (together “the Services”), and certain federal
17 officials of all three agencies.

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19 The Complaint included six claims alleging that: [1] EPA failed to perform a non-
20 discretionary duty to promulgate certain water quality criteria for selenium and mercury for the
21 State of California as required by CWA Section 303(c)(4), 33 U.S.C. § 1313(c)(4); [2] EPA
22 violated ESA Section 9, 16 U.S.C. § 1538(a)(1)(B), by failing to adopt certain CWA Section
23 303(c) criteria for selenium, mercury, pentachlorophenol, cadmium and dissolved metals as
24 envisioned in a biological opinion issued by the Services on March 24, 2000; [3] EPA violated
25 ESA Sections 7(a)(1) and 7(a)(2), 16 U.S.C. § 1536(a)(1) and (2), by failing to carry out certain
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1 conservation programs and reasonable and prudent measures contained in an ESA biological
2 opinion; [4] EPA violated ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to reinitiate
3 ESA consultation; [5] the Services violated ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), by
4 failing to reinitiate ESA consultation; and [6] EPA violated the APA, 5 U.S.C. § 706(1), by
5 unreasonably delaying the promulgation of certain selenium and mercury water quality criteria.

6
7 On October 1, 2013, the United States moved to dismiss the First, Second, Fifth, and
8 Sixth Claims for failure to state a claim and/or lack of subject matter jurisdiction. To facilitate
9 settlement discussions, including court-mandated mediation, the motion to dismiss is currently
10 stayed. At present, the motion to dismiss is fully briefed and scheduled for hearing on
11 September 5, 2014.

12 The Fifth Claim against the Services was voluntarily dismissed by Plaintiffs on May 1,
13 2014, and Plaintiffs and EPA (the “Parties”) have now negotiated a proposed Consent Decree to
14 resolve the remaining claims.

15 16 **Statutory Background**

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18 As part of the CWA’s framework of cooperative federalism, States promulgate water
19 quality standards (“WQS”), which consist of “the designated uses of the navigable waters
20 involved and the water quality criteria for such waters based upon such uses.” 33 U.S.C. §
21 1313(c)(2)(A). Criteria are “elements of State water quality standards, expressed as constituent
22 concentrations, levels, or narrative statements, representing a quality of water that supports a
23 particular use.” 40 C.F.R. § 131.3(b).

24 Whenever a State adopts a new or revised WQS, it must submit the standard to EPA,
25 pursuant to CWA section 303(c)(2), for review and approval or disapproval. 33 U.S.C. §
26

1 1313(c)(2) and (c)(3). Once approved, the State’s standard becomes the applicable standard for
 2 purposes of the CWA. 40 C.F.R. § 131.21. EPA has separate, discretionary authority to set new
 3 or revised standards for a State *sua sponte*, independent of a State’s section 303(c)(2)
 4 submission. In order for EPA to exercise that authority, the EPA Administrator must first
 5 determine that a new or revised standard is necessary to meet the CWA’s requirements. 33
 6 U.S.C. § 1313(c)(4)(B); 40 C.F.R. §§ 131.22(b), 131.5(b). Upon such determination, EPA is to
 7 promptly propose standards and then promulgate final standards within 90 days of publication of
 8 a proposed standard. 33 U.S.C. § 1313(c)(4).
 9

10 Section 7 of the ESA directs each federal agency to ensure, in consultation with the
 11 Services, that “any action authorized, funded, or carried out by such agency . . . is not likely to
 12 jeopardize the continued existence of” any listed species or destroy or adversely modify
 13 designated critical habitat. 16 U.S.C. § 1536(a)(2). If the agency proposing the relevant action
 14 (“action agency”) determines that the action “may affect” ESA-listed species or critical habitat,
 15 the action agency must pursue either informal or formal consultation with the consulting agency.
 16 50 C.F.R. §§ 402.13-402.14.
 17
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19 **The Proposed Consent Decree**

20 The proposed Consent Decree would establish conditional requirements for EPA to
 21 propose certain selenium criteria for waters outside of the San Francisco Bay Delta¹ by
 22 November 30, 2016 and certain mercury criteria for waters not covered by prior site-specific
 23 criteria by June 30, 2017. Consent Decree ¶¶ 14 and 20. Under the Consent Decree, if EPA
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25 ¹ The San Francisco “Bay Delta” is defined in Paragraph 6 of the Consent Decree by reference to certain water
 26 bodies defined under the 1992 National Toxics Rule. 57 Fed. Reg. 60848, 60921, codified at 40 C.F.R. §
 131.36(b)(1)(ii).

1 proposes selenium criteria for the San Francisco Bay Delta, EPA's deadline to propose selenium
2 criteria for the rest of California would be extended to November 30, 2018. Consent Decree ¶¶
3 15. With respect to the proposed selenium criteria for waters outside of the San Francisco Bay
4 Delta and the proposed mercury criteria, the Consent Decree provides that EPA will request
5 initiation of any necessary ESA consultation within nine months of proposing criteria and that
6 EPA must promulgate final criteria within six months after the completion of any ESA
7 consultation. Consent Decree ¶¶ 16, 17, 21, and 22. In the event that EPA approves selenium
8 or mercury criteria submitted by the State of California for any water body, EPA's obligation to
9 propose or finalize criteria for those areas would be null and void. The Consent Decree does not
10 affect any person's opportunity to participate in the development of water quality criteria for
11 California waters or to challenge the substantive adequacy of any criteria promulgated by EPA.
12

13 With the Fifth Claim having been voluntarily dismissed, the Second, Third, Fourth and
14 Sixth Claims in the Complaint would be dismissed upon entry of the Consent Decree. Consent
15 Decree ¶ 28. Resolving all of Plaintiffs' claims in this matter, the First Claim will be dismissed
16 upon EPA meeting its obligations under the Consent Decree and termination of the Consent
17 Decree. Consent Decree ¶ 28. The Court would retain jurisdiction for the purposes of resolving
18 any disputes arising under the Consent Decree including the awarding of reasonable attorney
19 fees and costs. Consent Decree ¶¶ 24 and 36.
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22 **The Settlement is Fair and Reasonable**

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24 Approval of a proposed settlement is committed to the informed discretion of the district
25 court. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). Further, "public policy
26 generally supports "a presumption in favor of voluntary settlement" of litigation. *United States*
27 STIPULATION TO VACATE HEARING 4 Case No. 3:13-cv-2857-JSW
AND REQUEST TO ENTER CONSENT DECREE;
28 ~~PROPOSED~~ ORDER

1 *v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991). The Court should enter a
2 proposed consent judgment if it is fair, reasonable, and equitable, and does not violate the law or
3 public policy. *Sierra Club v. Elec. Controls Design*, 909 F.2d 1350, 1355 (9th Cir. 1990).

4 Where the United States is a party to the consent decree, a court “should pay deference to the
5 judgment of the government agency which has negotiated and submitted the proposed
6 judgment.” *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984). The relevant standard is “not
7 whether the settlement is one which the court itself might have fashioned, or considers as ideal,
8 but whether the proposed decree is fair, reasonable, and faithful to the objectives of the
9 governing statute.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

10 And, in no event may the Court rewrite or modify the parties’ proposed settlement. *See Officers*
11 *for Justice v. Civil Serv. Comm’n of City and County of San Francisco*, 688 F.2d 615, 630 (9th
12 Cir. 1982).

13
14 Under these governing legal standards, the Parties respectfully submit that the settlement
15 is fair, reasonable, in the public interest, and faithful to the CWA’s objectives. The Parties
16 engaged in arm’s-length negotiations through counsel for months, and reached a mutually
17 acceptable compromise. *See Oregon*, 913 F.2d at 581 (decrees resulting from good faith, arm’s-
18 length negotiations are “presumptively valid”). The proposed settlement avoids further costly
19 litigation while meeting the objectives of the Clean Water Act to “restore and maintain the
20 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

21 Specifically, the public benefits from EPA’s scheduled commitments to promulgate certain water
22 quality criteria that protect designated uses of California waters and reflect the most recent
23 scientific data. Further, the Consent Decree allows time for ESA consultation between EPA and
24 the Services to ensure that the actions proposed pursuant to the Consent Decree do not
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1 unlawfully jeopardize ESA-listed species or designated critical habitats. Finally, the Consent
2 Decree allows time for California to submit its own water quality criteria in lieu of EPA-imposed
3 criteria and in no way restricts the public's participation in the development of water quality
4 criteria.

5
6 **CONCLUSION**

7
8 WHEREFORE, the settlement is fair, reasonable, equitable, in the public interest, and
9 consistent with the purposes of the Clean Water Act, the Parties stipulate that the motion hearing
10 for the United States' motion to dismiss be vacated and request that the Court sign and date the
11 signature page of the Consent Decree (Attachment A) and enter it as an order of the Court.

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13 Respectfully submitted this 22nd day of August, 2014.

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15 **SAM HIRSCH**
16 Acting Assistant Attorney General
17 U.S. Department of Justice
18 Environment & Natural Resources Division

19 **SETH M. BARSKY**, Chief
20 **S. JAY GOVINDAN**, Assistant Chief
21 **ETHAN CARSON EDDY**, Trial Attorney
22 Wildlife and Marine Resources Section
23 P.O. Box 7611, Ben Franklin Station
24 Washington, D.C. 20044
25 (202) 305-0202 (Phone); (202) 305-0275 (Fax)
26 ethan.eddy@usdoj.gov

27 s/ John Thomas H. Do
28 **JOHN THOMAS H. DO**, Trial Attorney
Environmental Defense Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 514-2593 (Phone); (202) 514-8865 (Fax)
john.do@usdoj.gov

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Attorneys for Defendants

s/ Christopher A. Sproul (as authorized)

CHRISTOPHER A. SPROUL
JODENE ISAACS
Environmental Advocates
5135 Anza Street
San Francisco, California 94121
Telephone: (415) 533-3376
Facsimile: (415) 358-5695
Email: csproul@enviroadvocates.com

Attorneys for Plaintiffs

E-FILING ATTESTATION

Pursuant to Civil Local Rule 5.1(i)(3), I attest that counsel for Plaintiffs has concurred in the filing of this document.

s/ John Thomas H. Do
JOHN THOMAS H. DO
Counsel for Defendants


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~~PROPOSED~~ ORDER

Before the Court is the Parties' **STIPULATION TO VACATE HEARING AND REQUEST TO ENTER CONSENT DECREE**. Upon due consideration, and for good cause shown, the Consent Decree has been **ENTERED** as of this date. Further, the hearing on the **UNITED STATES' MOTION TO DIMISS** scheduled for September 5, 2014 is hereby **VACATED**.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: August 25, 2014



HON. JEFFREY S. WHITE
United States District Judge