



1 Civ. P. 78; Local R. 7-15. Accordingly, the hearing set for March 12, 2007 on the  
2 present motion is removed from the Court's calendar. After considering the  
3 moving and opposing papers, the Court GRANTS in part and DENIES in part  
4 Plaintiff's Motion for Partial Judgment on the Pleadings.

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6 I. BACKGROUND

7 Plaintiff Natural Resources Defense Council ("Plaintiff" or "NRDC") is a  
8 non-profit environmental organization with more 530,000 members nationwide  
9 and more than 98,000 members in California. On August 3, 2006, NRDC filed a  
10 Complaint for declaratory and injunctive relief compelling Defendant Stephen L.  
11 Johnson, Administrator of the Environmental Protection Agency ("EPA") to  
12 comply with the mandatory provisions of the sections 104(v) and 304(a)(9) of the  
13 Clean Water Act ("CWA"), as amended by the Beaches Environmental  
14 Assessment and Coastal Health Care Act of 2000 ("BEACH Act") (33 U.S.C.  
15 1251, *et seq.*).

16 NRDC now moves for partial judgment on the pleadings and seeks a  
17 declaratory judgment that the EPA violated its nondiscretionary duty to publish  
18 new or revised water quality criteria by October 10, 2005, as required by 33  
19 U.S.C. § 1314(a)(9).

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21 II. LEGAL STANDARD

22 Under Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed but within  
23 such time as not to delay the trial, any party may move for judgment on the  
24 pleadings." "For purposes of the motion, the allegations of the non-moving party  
25 must be accepted as true, while the allegations of the moving party which have  
26 been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner*

1 *and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Judgment on the pleadings is  
2 proper when, taking all the allegations in the non-moving party's pleadings as true,  
3 the moving party establishes that there is no material issue of fact and it is entitled  
4 to judgment as a matter of law. *Torbet v. United Airlines, Inc.*, 298 F.3d 1087,  
5 1089 (9th Cir. 2002). However, judgment on the pleadings is improper when the  
6 court goes beyond the pleadings to resolve an issue; such a proceeding must be  
7 properly treated as a motion for summary judgment. Fed. R. Civ. P. 12(c); *Hal*  
8 *Roach Studios, Inc.*, 896 F.2d at 1550.

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10 III. DISCUSSION

11 NRDC contends that judgment on the pleadings as to Count Three is proper  
12 based on EPA's admissions in Paragraphs 6, 15, 16 and 29 of the Answer. Count  
13 Three states, in relevant part:

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15 38. 33 U.S.C. § 1314(a)(9) requires that EPA "shall publish" by October  
16 10, 2005, "new or revised water quality criteria for pathogens and  
17 pathogen indicators (including a revised list of testing methods, as  
18 appropriate), based on the results of the studies conducted under  
19 1254(v),<sup>1</sup> for the purpose of protecting human health in coastal  
20 recreation waters.

21 39. EPA failed to meet the October 10, 2005 deadline in violation of 33  
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24 <sup>1</sup>33 U.S.C. § 1254(v), entitled, "Studies concerning pathogen indicators in coastal  
25 recreation waters," provides that the Administrator of the EPA, in cooperation with appropriate  
26 Federal, State, tribal, and local officials (including local health officials), "shall initiate, and, not  
27 later than 3 years after October 10, 2000, shall complete" certain studies to provide additional  
28 information for use in developing, among other things, "(4) guidance for State application of the  
criteria for pathogens and pathogen indicators to be published under section 1314(a)(9) of this  
title to account for the diversity of geographic and aquatic conditions."

1 U.S.C. § 1314(a)(9), and failed to perform a nondiscretionary duty,  
2 id. § 1365 (a)(2).<sup>2</sup>

3 40. This violation has harmed and continues to harm plaintiff and  
4 plaintiff's members in the manner described in paragraphs 11-  
5 13 above. EPA should be compelled to comply with 33 U.S.C.  
6 § 1314(a)(9) without further delay.

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8 33 U.S.C. § 1314(a)(9) provides:

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10 (A) Not later than 5 years after October 10, 2000, after consultation and  
11 in cooperation with appropriate Federal, State, tribal, and local officials  
12 (including local health officials), the Administrator shall publish new or  
13 revised water quality criteria for pathogens and pathogen indicators  
14 (including a revised list of testing methods, as appropriate), based on the  
15 results of the studies conducted under section 1254(v) of this title, for  
16 the purpose of protecting human health in coastal recreation waters.

17 (B) Not later than the date that is 5 years after the date of publication of  
18 water quality criteria under this paragraph, and at least once every 5  
19 years thereafter, the Administrator shall review and, as necessary, revise  
20 the water quality criteria.

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25 <sup>2</sup>Section 1365(a)(2) provides that "...any citizen may commence a civil action on his own  
26 behalf ... against the Administrator where there is alleged a failure of the Administrator to  
27 perform any act or duty under this chapter which is not discretionary with the Administrator."  
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1 In its Answer, the EPA “denies part (i) of the first sentence of [Paragraph 6 of  
2 the Complaint] and admits part (ii) of the first sentence of this paragraph.”

3 Answer at ¶ 6.

4 Paragraph 6 of the Complaint states:

5 EPA has failed to (I) initiate and complete appropriate studies to  
6 assess the full human health risk from exposure to pathogens in  
7 coastal recreational waters and (ii) publish revised water quality  
8 criteria for pathogens and pathogen indicators (including a revised list  
9 of testing methods) based on those studies.”

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11 The EPA admits Paragraphs 15 and 16 of the Complaint, which state:

12 15. Defendant EPA, a federal agency of the United States, is charged  
13 with responsibility for implementation and administration of the  
14 relevant provisions of the BEACH Act.

15 16. Defendant Stephen L. Johnson is the Administrator of EPA. He  
16 is sued in his official capacity.

17 The EPA admits all but the first sentence of Paragraph 29 of the Complaint,  
18 which states:

19 29. Furthermore, EPA failed to meet the October 10, 2005 deadline  
20 to publish new or revised water quality criteria. EPA has not yet  
21 proposed, much less finalized, new or revised water quality  
22 criteria. Nor has the EPA published a revised list of testing  
23 methods. EPA has stated that it does not expect to publish  
24 revised water quality criteria until 2011.



1 *shall* publish new or revised water quality criteria for pathogens and pathogen  
2 indicators ...based on the results of the studies conducted under section 1254(v) of  
3 this title.” (Emphasis added). In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the  
4 Supreme Court addressed a similarly worded statute, § 1533 of the Endangered  
5 Species Act (“ESA”), and found its terms to be “plainly those of obligation rather  
6 than discretion.” Section 1533 provides: “The Secretary shall designate critical  
7 habitat, and make revisions thereto, ... on the basis of the best scientific data  
8 available...” According to the Supreme Court, the statute conferred a “categorical  
9 requirement that, in arriving at his decision, [the Secretary] ‘tak[e] into  
10 consideration the economic impact, and any other relevant impact,” and use “the  
11 best scientific data available.”” *Id.*

12 Like § 1533 of the ESA, § 1314(a)(9) of the BEACH Act imposes a  
13 categorical requirement that the Administrator “publish new or revised water  
14 quality criteria” by October 10, 2005. Both statutes unequivocally use the word  
15 “shall,” “plainly [indicating words] of obligation rather than discretion.” Hence,  
16 § 1314(a)(9) imposes a non-discretionary duty that the EPA was obligated, but  
17 failed, to abide by.

18 With respect to Paragraph 40 of Count Three, the EPA has not admitted that  
19 “[t]his violation has harmed and continues to harm plaintiff and plaintiff’s  
20 members in the manner described in paragraphs 11-13 above.” Thus, judgment on  
21 the pleadings as to Paragraph 40 is not proper.

#### 22 23 IV. CONCLUSION

24 Plaintiff’s Motion for Partial Judgment on the Pleadings is GRANTED with  
25 respect to Paragraphs 38 and 39 of Count Three. The Court finds the EPA has  
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1 violated the nondiscretionary duty imposed by 33 U.S.C. § 1314(a)(9). The  
2 Motion is DENIED with respect to Paragraph 40.

3 At the scheduling conference set for April 2, 2007, the parties are to be  
4 prepared to discuss the issue of the appropriate amount of time the EPA should  
5 have to complete publication of new or revised water quality criteria for pathogens  
6 and pathogen indicators.

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DATE: 3/21/07

  
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PHILIP S. GUTIERREZ  
United States District Judge