

1 Squire, Sanders & Dempsey L.L.P.
David G. Fromm (CA Bar # 214391)
2 555 South Flower Street, 31st Floor
Los Angeles, CA 90071-2300
3 Telephone: +1.213.624.2500
Facsimile: +1.213.623.4581
4 dfromm@ssd.com

5 David W. Burchmore (OH Bar # 0034490)
Pro hac vice admission pending
6 Squire, Sanders & Dempsey L.L.P.
4900 Key Tower, 127 Public Square
7 Cleveland, OH 44114
+1.216.479.8779
8 Fax: +1.216.479.8780
dburchmore@ssd.com

9 Alexandra Dapolito Dunn (DC Bar # 428526)
10 *Pro hac vice* admission pending
General Counsel
11 National Association of Clean Water Agencies
1816 Jefferson Place, N.W.
12 Washington, D.C. 20036-2505
Telephone: +1.202.533.1803
13 Facsimile: +1.202.833.4657

14 Attorneys for Intervenor-Plaintiff
National Association of Clean Water Agencies

15
16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18
19 NATURAL RESOURCES DEFENSE
COUNCIL

20 Plaintiff,

21 vs.

22 STEPHEN L. JOHNSON,
ADMINISTRATOR, UNITED STATES
23 ENVIRONMENTAL PROTECTION
AGENCY, and UNITED
24 STATES ENVIRONMENTAL
PROTECTION AGENCY

25 Defendant.
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Case No. 2:06-cv-04843-GAF-(JTL Y)

COMPLAINT IN
INTERVENTION FOR
DECLARATORY AND
INJUNCTIVE RELIEF

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NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Intervenor-Plaintiff, vs. STEPHEN L. JOHNSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendant.	
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1 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

2 **INTRODUCTION**

3 1. Plaintiff the National Association of Clean Water Agencies
4 (“NACWA”) seeks declaratory and injunctive relief against defendants, the U.S.
5 Environmental Protection Agency and Stephen L. Johnson, Administrator of the
6 U.S. Environmental Protection Agency (collectively “EPA”), for failing to comply
7 with statutory obligations under the Beaches Environmental Assessment and
8 Coastal Health Act of 2000 (“BEACH Act”), Pub. L. 106–284, Oct. 10, 2000
9 (amending the Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C.
10 §§ 1251 *et seq.*), to protect the public from the adverse health effects caused by
11 contact with contaminated beachwater.

12 2. In October 2000, Congress enacted the BEACH Act to address the
13 significant health concerns posed by contaminated water and to improve water
14 quality protections for the Great Lakes and other coastal recreational waters.
15 Congress enacted the BEACH Act “to give the public confidence in the quality of
16 the nation’s coastal water” and to protect “the tourism and recreation industries that
17 rely on safe and swimmable coastal waters.” H.R. Rep. No. 106-98, at 5 (2000).
18 Congress further explained that “EPA’s 1986 criteria need to be updated to improve
19 the scientific basis for identifying pathogens in coastal recreation waters.” *Id.* at 6.

20 3. The BEACH Act requires EPA, by fixed statutory deadlines, to
21 conduct studies on the health effects of pathogens in coastal recreational waters and
22 to protect beachgoers against illnesses caused by these pathogens.

23 4. EPA has failed to comply with the BEACH Act’s requirements to (i)
24 initiate and complete appropriate studies to provide additional information for use
25 in developing an assessment of potential human health risks resulting from
26 exposure to pathogens in coastal recreational waters and (ii) publish revised water
27 quality criteria for pathogens and pathogen indicators (including a revised list of
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1 appropriate testing methods) based on those studies. These failures violate express
2 statutory deadlines contained in the BEACH Act.

3 JURISDICTION AND VENUE

4 5. Subject matter jurisdiction is proper in this court pursuant to federal
5 question jurisdiction, 28 u.s.c. § 1331, and the citizen suit provision of the Clean
6 Water Act, 33 U.S.C. § 1365(a), because plaintiff NACWA asserts claims against
7 defendants under the BEACH Act and the Administrative Procedure Act (“APA”),
8 5 U.S.C. §§ 551 et seq.

9 6. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e)(3),
10 because the original plaintiff in this action resides in this judicial district.

11 THE PARTIES

12 7. Plaintiff NACWA is a national, non-profit trade association, acting on
13 behalf of its members, which own and operate publicly owned treatment works
14 (“POTWs”), municipal separate storm sewer systems, and combined sewer
15 treatment facilities throughout the United States. NACWA’s member agencies hold
16 National Pollutant Discharge Elimination System (“NPDES”) permits pursuant to
17 CWA § 402(a), 33 U.S.C. § 1342(a), authorizing the discharge of municipal
18 wastewater, combined sewer overflows and stormwater to the waters of the United
19 States, including the Great Lakes and other coastal recreation waters.

20 8. Plaintiff NACWA brings this action on its own behalf and on behalf of
21 its members. NACWA, which has represented the interests of the nation’s POTWs
22 and municipal wastewater treatment agencies since 1970, is comprised of nearly
23 300 POTW members who collectively serve the majority of this country’s sewered
24 population and treat over 18 billion gallons of wastewater each day. NACWA
25 strives to maintain a leadership role in the development and implementation of
26 scientifically-based, technically-sound, and cost-effective environmental programs
27 for protecting public and ecosystem health. NACWA’s members operate municipal
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1 wastewater treatment plants under federal and state laws and regulations in cities
2 and towns across the United States, including 32 California agencies.

3 9. NACWA and its members are harmed by EPA's failure to comply
4 with its nondiscretionary duties under the BEACH Act to perform appropriate
5 studies to provide additional information for use in developing an assessment of
6 potential human health risks resulting from exposure to pathogens in coastal
7 recreational waters; appropriate and effective indicators for improving detection in
8 a timely manner; appropriate, expeditious and cost-effective test methods; and
9 guidance for state application of the criteria for pathogens and pathogen indicators
10 published by the EPA. EPA's failure to comply with the BEACH Act has an
11 immediate and substantial impact on NACWA's member agencies.

12 10. Because of EPA's failure to act, NACWA's member agencies are
13 deprived of information they need to make appropriate planning and budgeting
14 decisions about future wastewater and stormwater infrastructure investments, and
15 they are currently subject to effluent discharge limitations for pathogens and
16 pathogen indicators that have not been sufficiently proven and may not be
17 appropriate for all coastal environments.

18 11. Most existing POTWs and combined sewer treatment facilities have
19 been designed and constructed to demonstrate disinfection effectiveness using a
20 fecal coliform standard, while EPA's failure to perform the studies and to publish
21 the new or revised criteria required by the BEACH Act has resulted in the
22 imposition of new requirements to comply with outdated and unreliable standards
23 for E. coli and enterococci that may not be appropriate or suitable for use as
24 indicator mechanisms and may be difficult for many facilities to achieve. See
25 EPA's *Water Quality Standards for Coastal and Great Lakes Waters*, 69 Fed. Reg.
26 67218 (November 16, 2004).

27 12. EPA's current *Ambient Water Quality Criteria for Bacteria* were
28 developed 20 years ago, in 1986, and were based upon a limited set of coastal sites

1 as well as highly subjective and potentially biased data. NACWA has long
2 advocated that EPA must conduct additional research using up-to-date methods and
3 experience on the suitability of the indicator organisms selected for EPA's existing
4 criteria, in compliance with the requirements explicitly enumerated in the BEACH
5 Act.

6 13. The requested declaratory and injunctive relief mandating that EPA
7 comply with its statutory obligations will redress these harms.

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

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

13 **RELEVANT STATUTORY PROVISIONS**

14 **A. REQUIRED HEALTH PROTECTION STUDIES**

15 16. The BEACH Act requires EPA, "after consultation and in cooperation
16 with appropriate Federal, State, Tribal and local officials (including local health
17 officials)," to conduct studies on the health effects of pathogens in coastal
18 recreational waters to form the basis for updating public health standards and
19 methods for detecting pathogens.

20 17. Specifically, the BEACH Act requires EPA perform studies to provide
21 additional information for use in developing "an assessment of potential human
22 health risks resulting from exposure to pathogens in coastal recreation waters,
23 including non-gastrointestinal effects." 33 U.S.C. § 1254(v)(1).

24 18. Congress also mandated that EPA perform studies to provide
25 additional information for use in developing "appropriate and effective indicators
26 for improving detection in a timely manner in coastal recreation waters of the
27 presence of pathogens that are harmful to human health." *Id.* § 1254(v)(2).

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1 19. Congress also mandated that EPA perform studies to provide
2 additional information for use in developing “appropriate, accurate, expeditious,
3 and cost-effective methods (including predictive models) for detecting in a timely
4 manner in coastal recreation waters the presence of pathogens that are harmful to
5 human health.” Id. § 1254(v)(3).

6 20. Finally, Congress mandated that EPA perform studies to provide
7 additional information for use in developing “guidance for State application of the
8 criteria for pathogens and pathogen indicators to be published under section
9 304(a)(9) to account for the diversity of geographic and aquatic conditions.” Id. §
10 1254 (v)(4).

11 B. DEADLINES

12 21. The BEACH Act requires that EPA “shall initiate” the required studies
13 not later than 18 months after the date of enactment of the BEACH Act (i.e., by
14 April 2002) and “shall complete” these studies not later than 3 years after the date
15 of enactment of the BEACH Act (i.e., by October 2003). Id. § 1254.

16 22. The BEACH Act further requires EPA to develop new or revised water
17 quality criteria for pathogens and pathogen indicators for use in recreational waters,
18 based on the studies outlined above. Specifically, the law requires that EPA “shall
19 publish,” not later than 5 years after the date of enactment of BEACH Act (i.e., by
20 October 10, 2005), “new or revised water quality criteria for pathogens and
21 pathogen indicators (including a revised list of testing methods, as appropriate),
22 based on the results of the studies conducted under section 104(a), for the purpose
23 of protecting human health in coastal recreation waters.” Id. § 1314(a)(9)(A).

24 23. The BEACH Act requires that, not later than 36 months after the date
25 of publication by the Administrator of new or revised water quality criteria under
26 section 309(a)(9), each state having coastal recreation waters shall adopt and submit
27 to the Administrator new or revised water quality standards for all pathogens and
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1 pathogen indicators to which the new or revised water quality criteria are
2 applicable. Id. § 1313(i)(1)(B).

3 **THE CHALLENGED AGENCY FAILURE TO ACT**

4 24. The BEACH Act requires EPA to conduct studies to provide
5 additional information for use in developing an assessment of potential human
6 health risks, appropriate and effective indicators, appropriate, expeditious and cost-
7 effective methods, and guidance for state application of criteria for pathogens and
8 pathogen indicators. The BEACH Act requires that EPA “shall initiate” the
9 required studies by April 2002, and “shall complete” these studies by October 2003.
10 The BEACH Act further requires EPA to publish new or revised water quality
11 criteria based on those studies by October 10, 2005.

12 25. EPA has not initiated or completed studies that satisfy the criteria of
13 the BEACH Act, and has failed to meet the October 10, 2005 deadline to publish
14 new or revised water quality criteria.

15 26. By failing to initiate and complete the required studies and to publish
16 new or revised water quality criteria, EPA is in violation of its statutory mandate.

17 **CLAIMS FOR RELIEF**

18 FIRST CLAIM FOR RELIEF

19 27. Plaintiff incorporates by reference all preceding paragraphs as if fully
20 set forth herein.

21 28. The BEACH Act requires EPA to initiate water quality studies by
22 April 2002 and complete these studies by October 2003. 33 U.S.C. § 1254(v).

23 29. In failing to initiate studies that satisfy the criteria of the BEACH Act
24 by April 2002 and complete these studies by October 2003, EPA violated 33 U.S.C.
25 § 1254(v) and failed to perform a nondiscretionary duty. 33 U.S.C. § 1365(a)(2).

26 30. This violation has harmed and continues to harm plaintiff and
27 plaintiff’s members in the manner described in paragraphs 9-12 above. EPA should
28 be compelled to comply with 33 U.S.C. § 1254(v) without further delay.

1 SECOND CLAIM FOR RELIEF

2 31. Plaintiff incorporates by reference all preceding paragraphs as if fully
3 set forth herein.

4 32. EPA's failure to initiate water quality studies by April 2002 and
5 complete these studies by October constitutes agency action unlawfully withheld in
6 violation of the APA, 5 U.S.C. § 706(1), and is arbitrary, capricious, an abuse of
7 discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

8 33. This violation has harmed and continues to harm plaintiff and
9 plaintiff's members in the manner described in paragraphs 9-12 above.

10 THIRD CLAIM FOR RELIEF

11 34. Plaintiff incorporates by reference all preceding paragraphs as if fully
12 set forth herein.

13 35. 33 U.S.C. § 1314(a)(9) requires that EPA "shall publish," by October
14 10, 2005, "new or revised water quality criteria for pathogens and pathogen
15 indicators (including a revised list of testing methods, as appropriate), based on the
16 results of the studies conducted under section 1254(v), for the purpose of protecting
17 human health in coastal recreation waters."

18 36. EPA failed to meet the October 10, 2005 deadline in violation of 33
19 U.S.C. § 1314(a)(9), and failed to perform a nondiscretionary duty. 33 U.S.C. §
20 1365(a)(2).

21 37. This violation has harmed and continues to harm plaintiff and
22 plaintiff's members in the manner described in paragraphs 9-12 above. EPA should
23 be compelled to comply with 33 U.S.C. § 1314(a)(9) without further delay.

24 FOURTH CLAIM FOR RELIEF

25 38. Plaintiff incorporates by reference all preceding paragraphs as if fully
26 set forth herein.

27 39. EPA's failure to meet the October 10, 2005 deadline to publish new or
28 revised water quality criteria for pathogens and pathogen indicators (including a

1 revised list of testing methods) constitutes agency action unlawfully withheld in
2 violation of the APA, 5 U.S.C. § 706(1), and is arbitrary, capricious, an abuse of
3 discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

4 40. This violation has harmed and continues to harm plaintiff and
5 plaintiff's members in the manner described in paragraphs 9-12 above.

6 **REQUEST FOR RELIEF**

7 WHEREFORE, the plaintiff respectfully requests that judgment be entered
8 against EPA as follows:

9 (1) Declaring that EPA has unlawfully failed to meet statutory deadlines
10 to initiate and complete appropriate water quality studies and to publish revised
11 water quality criteria;

12 (2) Compelling EPA to initiate and complete, by a court-ordered deadline,
13 appropriate studies to provide additional information for use in developing an
14 assessment of potential human health risks resulting from exposure to pathogens in
15 coastal recreational waters; appropriate and effective indicators for improving
16 detection in a timely manner of the presence of pathogens that are harmful to
17 human health; appropriate, accurate, expeditious and cost-effective methods for
18 detection in a timely manner of the presence of pathogens that are harmful to
19 human health; and guidance for state application of the criteria for pathogens and
20 pathogen indicators to account for the diversity of geographic and aquatic
21 conditions;

22 (3) Compelling EPA to publish revised water quality criteria (including a
23 revised list of testing methods, as appropriate) for pathogens and pathogen
24 indicators for use in coastal recreational waters by a court-ordered deadline;

25 (4) Awarding plaintiff its costs and attorneys' fees; and
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1 (5) Granting such other and further relief as the Court deems just and
2 proper.

3 Dated: December 13, 2006 Respectfully submitted,



David G. Fromm (CA Bar # 214391)
Squire, Sanders & Dempsey L.L.P.
555 South Flower Street, 31st Floor
Los Angeles, CA 90071-2300
+1.213.689.5128
Fax: +1.213.623.4581
dfromm@ssd.com

David W. Burchmore (OH Bar # 0034490)
Pro hac vice admission pending
Squire, Sanders & Dempsey L.L.P.
4900 Key Tower, 127 Public Square
Cleveland, OH 44114
+1.216.479.8779
Fax: +1.216.479.8780
dburchmore@ssd.com

Alexandra Dapolito Dunn (DC Bar # 428526)
Pro hac vice admission pending
General Counsel
National Association of Clean Water Agencies
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505
Telephone: +1.202.533.1803
Facsimile: +1.202.833.4657

Attorneys for Intervenor-Plaintiff
National Association of Clean Water Agencies

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1 **PROOF OF SERVICE**

2 The undersigned certifies and declares as follows:

3 I am a resident of the State of California and over 18 years of age and am not
4 a party to this action. My business address is 555 South Flower Street, Suite 3100
5 Los Angeles, California 90071-2300, which is located in the county where any
non-personal service described below took place.

6 On December 13, 2006, I served a copy of the following document(s):

7 **COMPLAINT IN INTERVENTION FOR DECLARATORY AND
8 INJUNCTIVE RELIEF**

9 on the persons identified on the attached service list:

10 Service was accomplished as follows.

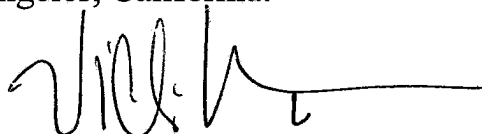
11 **By U.S. Mail, According to Normal Business Practice.** On this date,
12 I sealed the above document(s) in an envelope addressed to the above, and I placed
13 that sealed envelope for collection and mailing following ordinary business
14 practices, for deposit with the U.S. Postal Service. I am readily familiar with the
business practice at my place of business for the collection and processing of
correspondence for mailing with the U.S. Postal Service. Correspondence so
collected and processed is deposited the U.S. Postal Service the same day in the
ordinary course of business, postage fully prepaid.

15 **By Facsimile.** On this date, I transmitted the above-mentioned
16 document(s) by facsimile transmission machine to the parties and facsimile number
set forth above.

17 **By Federal Express Service Carrier.** On this date, I sealed the above
18 document(s) in an envelope or package designated by Federal Express, an express
19 service carrier, addressed to the above, and I deposited that sealed envelope or
20 package in a box or other facility regularly maintained by the express service
21 carrier, or delivered that envelope to an authorized courier or driver authorized by
the express service carrier to receive documents, located in Los Angeles, California
with delivery fees paid or otherwise provided for.

22 **By Electronic Mail Transmission With Attachment.** On this date, I
23 transmitted the above-mentioned document(s) by electronic mail transmission with
24 attachment to the parties at the electronic mail transmission number set forth below.

25 I declare under penalty of perjury under the laws of the United States of
26 America that the foregoing is true and correct, and that I am employed in the office
27 of a member of the bar of this court at whose direction the service was made.
28 Executed on December 13, 2006, at Los Angeles, California.



Vicki Scott

Service List

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David S. Beckman
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300
dbeckman@nrdc.org

Lily N. Chinn, Esq.
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0135
lily.chinn@usdoj.gov

Aaron Colangelo
Natural Resources Defense Council
1200 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 289-2376