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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

16 _____)
17 SAN FRANCISCO CHAPTER OF THE A.)
18 PHILIP RANDOLPH INSTITUTE,)
19 CALIFORNIANS FOR RENEWABLE)
ENERGY, LYNNE BROWN, REGINA)
HOLLINS,)

20 Plaintiffs,

21 v.

22 U.S. ENVIRONMENTAL PROTECTION)
AGENCY, STEPHEN L. JOHNSON, BAY)
23 AREA AIR QUALITY MANAGEMENT)
DISTRICT, AND CITY AND COUNTY OF)
SAN FRANCISCO,)

24 Defendants.
25 _____)

Case No. 3:07-cv-4936 CRB

MEMORANDUM IN SUPPORT OF
EPA'S MOTION TO DISMISS

Date: Friday, March 21, 2008
Time: 10:00 a.m.
Place: 450 Golden Gate Avenue
Courtroom 8, 19th floor
San Francisco, California

26 Defendants United States Environmental Protection Agency and Stephen L. Johnson,
27 Administrator (collectively "EPA") move to dismiss, for lack of jurisdiction and failure to state a
28

1 claim upon which relief may be granted, the claims in Plaintiffs' First Amended Complaint that
2 are directed against EPA, i.e., the first claim for relief under the federal mandamus statute, 33
3 U.S.C. § 1361, and the second claim for relief under the Administrative Procedure Act ("APA"),
4 5 U.S.C. § 706. In this memorandum, EPA explains that Plaintiffs lack a cognizable claim for
5 relief. Moreover, Congress has provided, through the citizen's suit provision of the Clean Air
6 Act, 42 U.S.C. § 7604, a remedy for the allegation that EPA has unlawfully withheld or
7 unreasonably delayed action that is not discretionary with the Administrator. Accordingly,
8 jurisdiction under the federal mandamus statute and the APA is precluded by congressional
9 design.

10 BACKGROUND

11 In a case that Plaintiffs themselves describe as challenging two power plants to be built
12 near San Francisco, see First Am. Compl. ¶ 1, they seek breathtakingly broad relief affecting
13 multiple Clean Air Act programs -- first an order requiring EPA to act on a petition regarding
14 regulation of motor vehicle emissions of greenhouse gases pursuant to a judgment in a case to
15 which they are not a party, and then a declaratory judgment that an endangerment finding that
16 EPA might make pursuant to the judgment in that other case would, if made, be applicable across
17 a broad range of Clean Air Act programs, including motor vehicle emission limits, new source
18 performance standards for stationary sources, national ambient air quality standards, and state
19 implementation plans. See First Am. Compl., prayer for relief, ¶¶ 1 and 2. Moreover, Plaintiffs
20 presume that the implications of an endangerment finding by EPA would lead to a series of state,
21 and local administrative actions that, in Plaintiffs' view, may ultimately prevent the construction
22 of two power plants in Plaintiffs' communities. First Am. Compl. ¶¶ 1, 13-23. Plaintiffs regard
23 the Supreme Court's decision in Massachusetts v. EPA, 127 S. Ct. 1438 (2007), as the catalyst
24 for this chain of events. First Am. Compl. ¶ 13. At issue in Massachusetts v. EPA was EPA's
25 2003 denial of a rulemaking petition filed by a group of private organizations that sought
26 regulation of greenhouse gas emissions from new motor vehicles and engines under section 202
27 of the Clean Air Act, 42 U.S.C. § 7521. On the merits, the Supreme Court first found that EPA
28 has the statutory authority under the Clean Air Act to regulate greenhouse gas emissions to

1 address climate change. Massachusetts v. EPA, 127 S. Ct. at 1462. The Court further found that
2 EPA’s denial of the section 202 rulemaking petition was arbitrary and capricious because its
3 stated reasons were not sufficiently tied to the factors specified in the statute. Id. at 1462-63.
4 The Court explained that in responding to the section 202 rulemaking petition on remand, the
5 Agency must decide one way or the other whether greenhouse gas emissions from new motor
6 vehicles and engines cause or contribute to air pollution which may reasonably be anticipated to
7 endanger public health or welfare, or “provide[] some reasonable explanation as to why it cannot
8 or will not exercise its discretion to determine whether they do.” Id. at 1462. The Court declined
9 to impose constraints on EPA’s decision-making authority, however, and noted that “[w]e need
10 not and do not reach the question whether on remand EPA must make an endangerment finding,
11 or whether policy concerns can inform EPA’s actions in the event it makes such a finding.” Id. at
12 1463.

13 After receiving the case back from the Supreme Court, on September 14, 2007, the D.C.
14 Circuit remanded the matter to EPA. Massachusetts v. EPA, Nos. 03-1361 to 03-1368, 2007 WL
15 2935594 (D.C. Cir. Sept. 14, 2007). A mere ten days later, on September 24, 2007, Plaintiffs
16 filed their complaint alleging unreasonable delay on the part of EPA in responding to the remand.
17 See Compl. ¶ 60 (“The EPA’s failure to respond to the demand of the United States Supreme
18 Court to ‘ground its reasons for action or inaction in the statute’ (Massachusetts v. EPA, 127 S.
19 Ct. at 1463) constitutes agency action unlawfully withheld as well as unreasonably delayed in
20 violation of the Administrative Procedure Act, 5 U.S.C. § 706(1).”). Plaintiffs filed an amended
21 complaint on December 14, 2007, alleging additional state law causes of action against the non-
22 federal defendants. See First Am. Compl. ¶¶ 109-44. Although EPA believes that Plaintiffs’
23 claims against the Agency – set forth in the First Amended Complaint as the first and second
24 claims for relief – are frivolous and based on erroneous presumptions,^{1/} the Court need not reach

26 ^{1/} For example, any duty arising from the D.C. Circuit’s remand is not owed to these
27 Plaintiffs; any such duty is owed only to the plaintiffs in the Massachusetts v. EPA case, and only
28 they have the right to seek to enforce the judgment in that case. Moreover, the District Court for
(continued...)

1 the merits of those claims because it lacks subject matter jurisdiction under the APA and the
2 federal mandamus statute.

3 STANDARD OF REVIEW

4 “Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause
5 lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the
6 party asserting jurisdiction.” Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377
7 (1994). Plaintiffs have the burden of pleading the requisite jurisdictional facts. Gibbs v. Buck,
8 307 U.S. 66, 72 (1939); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.
9 1989). An issue of subject matter jurisdiction is properly decided under Rule 12(b)(1) of the
10 Federal Rules of Civil Procedure. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000);
11 Association of Am. Med. Colleges v. United States, 217 F.3d 770, 778 (9th Cir. 2000). Under
12 Rule 12(b)(1), “[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence
13 of disputed material facts will not preclude the trial court from evaluating for itself the merits of
14 jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does
15 in fact exist.” Thornhill Publ’g Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir.
16 1979) (citation omitted). “[A] Rule 12(b)(1) motion can attack the substance of a complaint’s
17 jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any
18 other evidence properly before the court.” Dreier v. United States, 106 F.3d 844, 847 (9th Cir.
19 1997) (quoting St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

20 In addition, a court must dismiss a complaint for failure to state a claim pursuant to Fed.
21 R. Civ. P. Rule 12(b)(6) when “it appears beyond doubt that the plaintiff can prove no set of facts
22 in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46
23 (1957). See also Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989); Haddock v.
24 Board of Dental Exam’rs, 777 F.2d 462, 464 (9th Cir. 1985). In other words, a Rule 12(b)(6)
25 dismissal is proper where there is either a “lack of a cognizable legal theory” or “the absence of
26 _____

27 ^{1/} (...continued)

28 the Northern District of California is not the appropriate forum in which to bring such an
enforcement action.

1 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t., 901
2 F.2d 696, 699 (9th Cir. 1990).

3 In deciding a motion to dismiss for failure to state a claim, the court’s review is limited to
4 the contents of the complaint. See Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996);
5 Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995).

6 The court must accept all factual allegations in the complaint as true, and must construe them and
7 draw all reasonable inferences from them in favor of the nonmoving party. See Cahill v. Liberty
8 Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Mier v. Owens, 57 F.3d 747, 750 (9th Cir.
9 1995) (citing Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)). It need not,
10 however, accept as true unreasonable inferences or conclusory legal allegations cast in the form
11 of factual allegations. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

12 ARGUMENT

13 **I. Plaintiffs’ Allegation that EPA Failed to Comply With a Supreme Court Decision 14 Does Not Support a Cognizable Claim.**

15 Plaintiffs do not and cannot identify any statutory basis for their claim of unreasonable
16 delay. Instead Plaintiffs assert, incorrectly, that their cause of action arises under the Supreme
17 Court’s ruling in Massachusetts v. EPA:

18 To date, the EPA defendants have not performed a duty owed to plaintiffs: to
19 comply with the order of the Supreme Court in order to slow global warming and
to promulgate rules that will lessen the environmental and health impacts of fossil
fuel-burning power plants such as CCSF’s CT plants.

20 First Am. Compl. ¶ 92. Plaintiffs’ legal theory is flawed. Under the APA, “for a claim of
21 unreasonable delay to survive, the agency must have a statutory duty in the first place.” San
22 Francisco BayKeeper v. Whitman, 297 F.3d 877, 885 (9th Cir. 2002). Here, Plaintiffs allege no
23 statutory duty to support an unreasonable delay claim against EPA.

24 The absence of an alleged statutory duty also means that the Court lacks subject matter
25 jurisdiction over Plaintiffs’ related claim that EPA has unlawfully withheld action. Although
26 Plaintiffs assert subject matter jurisdiction under the federal question statute, see First Am.
27 Compl. ¶ 34, that statute provides: “The district courts shall have original jurisdiction of all civil
28 actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331

1 (emphasis added). A challenge based on a Supreme Court decision is not a “civil action[] arising
 2 under the Constitution, laws, or treaties of the United States.” Id. Accord Madison-Hughes v.
 3 Shalala, 80 F.3d 1121, 1124-25 (6th Cir. 1996) (dismissing complaint under Fed. R. Civ. P.
 4 12(b)(1) for lack of subject matter jurisdiction “because jurisdiction depends upon the alleged
 5 existence of a mandatory legal requirement . . . when, in fact, . . . no such legal requirement
 6 exists”).

7 **II. Even if a Nondiscretionary Statutory Duty Existed, Plaintiffs’ APA Claim Would**
 8 **Fail for Lack of Subject Matter Jurisdiction.**

9 Assuming, for the sake of argument, that Plaintiffs could identify a statutory
 10 nondiscretionary duty, their APA claim of agency action unlawfully withheld or unreasonably
 11 delayed, see First Am. Compl. ¶¶ 101-108, should be dismissed because the Court lacks subject
 12 matter jurisdiction over this claim in the absence of an applicable waiver of sovereign immunity.
 13 Orff v. United States, 358 F.3d 1137, 1142 (9th Cir. 2004) (“Any claim for which sovereign
 14 immunity has not been waived must be dismissed for lack of jurisdiction.”), aff’d, 545 U.S. 596
 15 (2005). The APA contains a limited waiver of sovereign immunity for challenges to agency
 16 actions in district court under 28 U.S.C. § 1331. See 5 U.S.C. § 702; Gallo Cattle Co. v. United
 17 States Dep’t of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998) (“while the APA does not confer a
 18 district court with jurisdiction, it does provide a waiver of sovereign immunity in suits seeking
 19 judicial review of a federal action under [28 U.S.C.] § 1331”). Specifically, the APA prescribes
 20 standards for judicial review of “[a]gency action made reviewable by statute and final agency
 21 action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704 (emphasis added).
 22 Section 704 of the APA expressly “excludes from the APA’s sovereign immunity waiver those
 23 claims for which adequate remedies are elsewhere available.” Consol. Edison Co. v. United
 24 States Dep’t of Energy, 247 F.3d 1378, 1383 (Fed. Cir. 2001) (citing 5 U.S.C. § 704); see also
 25 Gallo Cattle, 159 F.3d at 1198.

26 Here, the Clean Air Act (“CAA”) governs the substance of Plaintiffs’ claims. Thus, if
 27 Plaintiffs had any cause of action, it would necessarily arise under the CAA, not the APA.
 28 Specifically, an allegation that EPA has unlawfully withheld or unreasonably delayed action must

1 be brought under the citizen suit provision of the CAA, 42 U.S.C. § 7604(a), which authorizes
2 any person to sue the EPA Administrator “where there is alleged a failure of the Administrator to
3 perform any act or duty under this chapter which is not discretionary with the Administrator.” 42
4 U.S.C. § 7604(a)(2). The CAA expressly provides remedies for these types of claims: “The
5 district courts of the United States shall have jurisdiction . . . to order the Administrator to
6 perform such act or duty.” 42 U.S.C. § 7604(a). The statute further provides: “The district
7 courts of the United States shall have jurisdiction to compel . . . agency action unreasonably
8 delayed. . . .” 42 U.S.C. § 7604(a). Because the CAA provides an adequate remedy for claims of
9 unreasonable delay in performing a nondiscretionary duty, judicial review under the APA is
10 barred. Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 547 (D.D.C. 2005) (if the Clean Air Act
11 vests subject matter jurisdiction in the court, “an assessment of the Court's jurisdiction pursuant
12 to the APA is unnecessary as subject matter jurisdiction under the APA only lies when ‘there is
13 no other adequate remedy in a court.’ 5 U.S.C. § 704.”). Accordingly, Plaintiffs’ second cause
14 of action must be dismissed as to defendant EPA for lack of subject matter jurisdiction.

15 Plaintiffs may not simply amend their complaint by replacing the existing APA claim
16 with a citizen suit claim under the CAA for two reasons. First, the citizen suit provision
17 explicitly directs that suits alleging unreasonable delay “may only be filed in a United States
18 District Court within the circuit in which such action would be reviewable under section 7607(b)
19 of this title.” 42 U.S.C. § 7604(a). In this case, the action that Plaintiffs seek to compel would
20 involve nationally applicable regulations concerning emissions of greenhouse gases from new
21 motor vehicles and engines. Pursuant to 42 U.S.C. § 7607(b), judicial review of that action
22 would occur in the United States Court of Appeals for the District of Columbia. See 42 U.S.C. §
23 7607(b) (a petition for review of “any standard under [section 202]. . . and any other nationally
24 applicable regulations promulgated . . . by the Administrator under this chapter may be filed only
25 in the United States Court of Appeals for the District of Columbia.”). Thus, venue for any
26 citizen suit alleging unreasonable delay under the CAA for failure to respond to the remand in
27 Massachusetts v. EPA would lie only in the District Court for the District of Columbia.

28 Second, prior to initiating a CAA citizen suit in the proper venue on the ground that the

1 Administrator has unlawfully withheld or unreasonably delayed action, Plaintiffs must comply
2 with the statutory notice requirements of CAA section 304(a), 42 U.S.C. § 7604(a). Specifically,
3 Plaintiffs must give EPA written notice of their intent to sue for unreasonable delay at least 180
4 days before filing suit. See 42 U.S.C. § 7604(a) (“In any . . . action for unreasonable delay,
5 notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days
6 before commencing such action.”). A claim that EPA has unlawfully withheld action that is not
7 discretionary must be preceded by 60 days’ notice. 42 U.S.C. § 7604(b)(2). Plaintiffs have not
8 given EPA the requisite notice of intent to sue. Because the CAA’s notice requirement is
9 jurisdictional, failure to comply cannot be cured by amendment of the complaint and must result
10 in dismissal of EPA from this lawsuit. Hallstrom v. Tillamook County, 493 U.S. 20, 31-33
11 (1989); Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515,
12 520 (9th Cir. 1998).

13 **III. This Court Lacks Jurisdiction Over Plaintiffs’ Claim Against EPA Under the**
14 **Federal Mandamus Statute, 28 U.S.C. § 1361.**

15 Plaintiffs’ attempt to invoke federal mandamus jurisdiction pursuant to 28 U.S.C. § 1361
16 must fail for reasons that are analogous to those set forth above with respect to the APA claim.
17 See First Am. Compl. ¶¶ 90-100 (first claim for relief). First, mandamus jurisdiction does not
18 exist without a nondiscretionary duty. Stang v. IRS, 788 F.2d 564, 565 (9th Cir. 1986). Johnson
19 v. Shalala, 2 F.3d 918, 924 (9th Cir. 1993) (“mandamus would be appropriate only when a party
20 demonstrated that the Secretary ‘owed him a clear nondiscretionary duty.’”). Here, Plaintiffs
21 have grounded their complaint on an alleged failure to comply with a Supreme Court remand,
22 and not on any statutory duty that is not discretionary with the EPA Administrator.

23 Further, even assuming that a nondiscretionary duty existed here, mandamus is not
24 available when an alternative adequate remedy exists. See Ex parte Republic of Peru, 318 U.S.
25 578, 584 (1943); Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983) (“The
26 availability of an adequate alternative remedy will . . . preclude mandamus review.”). As
27 explained above, if EPA has a present nondiscretionary duty to respond to the section 202
28 petition, Plaintiffs have an alternative adequate remedy under the citizen suit provision of the

1 Clean Air Act. Such an action, if successful, would result in an order requiring that EPA perform
2 the very action that Plaintiffs seek to compel through their mandamus claim. Where Congress
3 establishes a statutory method for reviewing administrative action or inaction, as here, an
4 aggrieved party cannot circumvent the prescribed statutory process by bringing a mandamus
5 action. See Wilmot v. Doyle, 403 F.2d 811, 816 (9th Cir. 1968) (“Since there is available a
6 statutory remedy and method of review, . . . mandamus is not available.”).^{2/}

7 **CONCLUSION**

8 For the foregoing reasons, the Court lacks subject matter jurisdiction over the first and
9 second claims for relief in Plaintiffs’ First Amended Complaint. Accordingly, EPA should be
10 dismissed as a defendant in this action.

11 Respectfully submitted,

12 Dated: February 15, 2008

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23 ^{2/} Even if Plaintiffs could properly assert a cause of action for unreasonable delay, they are
24 unlikely to prevail on the merits of such a claim. Plaintiffs filed this action alleging that EPA
25 unreasonably delayed responding to the Supreme Court’s decision in Massachusetts v. EPA only
26 ten days after the matter was remanded to the Agency by the D.C. Circuit. It appears that
27 Plaintiffs have rushed to court for an order compelling EPA to act before affording EPA a
28 reasonable opportunity to do so. Further, to the extent that Plaintiffs seek an order compelling
EPA to promulgate emission standards for greenhouse gases, see First Am. Compl. ¶ 32, their
claim is unripe. The CAA requires an affirmative finding of endangerment as a precondition to
the establishment of such emission limits. See, e.g., 42 U.S.C. §§ 7411(b)(1), 7521(a)(1).

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CERTIFICATE OF SERVICE

On February 15, 2008, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF EPA'S MOTION TO DISMISS was served electronically via the Court's e-filing system to Counsel of Record.

/s/ Pamela S. Tonglao
Pamela S. Tonglao

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