

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

FOOD & WATER WATCH, INC., et al.,
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,
Defendants.

Case No. [17-cv-02162-EMC](#)

**ORDER DENYING DEFENDANTS’
ADMINISTRATIVE MOTION TO
GOVERN FUTURE PROCEEDINGS**

Docket No. 332

United States District Court
Northern District of California

Plaintiff Food & Water Watch, Inc. (“FWW”) sued Defendant Environmental Protection Agency (“EPA”) to request the initiation of rulemaking pursuant to the Toxic Substances Control Act, 15 U.S.C. §2620 (“TSCA”) to prohibit the addition of fluoridation chemicals to drinking water to protect the public from neurotoxic risks. After a 7-day bench trial, the Court stayed the case. Docket No. 262 (“Stay Order”). FWW filed a motion to lift the stay and take the case out of abeyance. Docket No. 306 (“MLS”). On October 28, 2022, the Court lifted the stay to allow FWW to take discovery on the draft NTP documents. Docket No. 319 (“MLS Order”).

On December 14, 2022, FWW filed a notice under seal, attaching a draft of the State of the Science Monograph, two drafts of the Meta-Analysis Manuscript, and five emails. Docket No. 329. EPA now requests that the Court wait an additional six months to schedule expert discovery deadlines or trial to allow NTP more time to complete its review process of the NTP draft reports. Docket No. 332 (“Admin. Motion”).

The Court finds that no additional factual developments warrant an additional six-month delay in what is essentially an elongation of the stay. The Court previously lifted the stay, considering evidence that final publication of the NTP report was no longer imminent. Because

1 “the NTP may never publish the final version,” a stay may thus be indefinite. MLS Order at 4. A
 2 determinate wait period of six months is unlikely to resolve the Court’s concern. Now, three
 3 months after the Court’s hearing on the motion to lift the stay, EPA still cannot offer a definite
 4 publication date or a definite decision to publish the final report. Although Dr. Woychik, Director
 5 of the NTP, submitted a new second declaration, EPA’s description of the publication timeline
 6 remains the same as described in the briefing on the previous motion to lift the stay:

7 In February 2022, Richard P. Woychik, Ph.D., the director of NTP,
 8 asked the NTP Board of Scientific Counselors (“BSC”) to evaluate
 9 (with the assistance of a working group) comments and concerns
 10 raised by agency subject-matter experts and NTP’s responses to
 11 those concerns regarding the Meta-Analysis Manuscript and, in June
 12 2022, expanded that request to include NTP’s response to the
 13 reviews of the State of the Science Monograph. 2d Woychik Decl.
 14 ¶¶ 17–20. As Dr. Woychik had anticipated, subject-matter experts
 15 have now been identified for the working group assisting the BSC
 16 after being screened to prevent conflicts of interest, and the working
 17 group began its evaluation in October 2022. *Id.* ¶ 21. Dr. Woychik
 18 currently expects that the working group will present its report at a
 19 BSC meeting in early 2023. *Id.* ¶ 22. The BSC meeting will be open
 20 to the public, and, following NTP’s standard process, the BSC could
 21 accept the working group report and convey it to Dr. Woychik as
 22 written, revise the report and convey the revised report, or offer
 23 other recommendations, which could include expanding the
 24 monograph and meta-analysis to add more studies published over
 25 the past year. *Id.* ¶¶ 22–24. Upon acceptance of the working group
 26 report, the BSC will make a recommendation to Dr. Woychik who
 27 will make a final decision whether to publish the State of the
 28 Science Monograph and whether to submit the Meta-Analysis
 Manuscript for publication. *Id.* ¶ 25. Dr. Woychik states that he will
 “make [his] decision as quickly as possible” but that his “obligation
 as director of NTP is to uphold the most rigorous scientific
 principles when providing scientific background that may inform the
 public health policies of the nation.” *Id.* ¶¶ 26–27.

Admin. Motion at 2. Again, EPA admits that NTP may decide that the final version should not be
 published at all: “Dr. Woychik who will make a final decision *whether* to publish the State of the
 Science Monograph and *whether* to submit the Meta-Analysis Manuscript for publication.”

Admin. Motion at 3 (emphases added). Furthermore, as to the Meta-Analysis Manuscript, EPA
 acknowledged at the hearing that even if it were to proceed to peer review, it would likely be more
 than a year before that process is completed. EPA’s arguments in its administrative motion here
 add no additional arguments or facts beyond what EPA argued in its briefing regarding the motion
 to lift the stay.

United States District Court
Northern District of California

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

Thus, EPA’s Administrative Motion to Govern Future Proceedings is **DENIED**.
Nonetheless, the Court is sensitive to EPA’s concerns as well as FWW’s concern about delay, and the Court has scheduled future proceedings to allow for an orderly process that may give gestation time for NTP to review their draft report while balancing considerations that this case has been pending for several years. In particular, the Court directed the parties to schedule adjudication of EPA’s assertion of privilege over the May 2022 draft of the NTP report and FWW’s entitlement to discovery into critiques of that draft. Upon that adjudication, the Court indicated it will consider setting an expedited trial date.

The Court sets a further status conference to discuss future scheduling for April 11, 2023, at 2:30 p.m. via Zoom. The parties shall file a joint status report by April 4, 2023.

This order disposes of Docket No. 332.

IT IS SO ORDERED.

Dated: January 20, 2023



EDWARD M. CHEN
United States District Judge