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

OUR CHILDREN'S EARTH FOUNDATION and  
ECOLOGICAL RIGHTS FOUNDATION

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and STEPHEN L.  
JOHNSON, as Acting Administrator of the United  
States Environmental Protection Agency,

Defendants.

) Case No. C 04-2132 PJH  
)  
) **PLAINTIFFS' MEMORANDUM OF**  
) **LAW IN SUPPORT OF MOTION**  
) **FOR PARTIAL SUMMARY**  
) **JUDGMENT**  
)  
) Hearing Date: May 11, 2005  
) Hearing Time: 9:00 a.m.  
) Courtroom 3, 17<sup>th</sup> Floor  
)  
) **CLEAN WATER ACT AND**  
) **ADMINISTRATIVE PROCEDURE**  
) **ACT CASE**  
)

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## I. INTRODUCTION

This brief is filed in support of Plaintiffs' Motion for Partial Summary Judgment on Claims One, Two and Four of their First Amended Complaint.<sup>1</sup> Plaintiffs seek a ruling on their First and Second Claims that defendant Environmental Protection Agency ("EPA") has violated its nondiscretionary duty under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("CWA") to assess whether current technology is available that could reduce or eliminate pollutant discharges as part of its review of effluent limitation guidelines ("effluent guidelines") and effluent limitations. 33 U.S.C. §§ 1311(d), 1314(b.) Plaintiffs also seek a ruling on their Fourth Claim that the EPA has violated its non-discretionary duty to issue an effluent guidelines plan that sets forth a schedule to review all effluent guidelines in accordance with the factors set forth in CWA Section 304(b), and which identifies currently unregulated industries for effluent guideline promulgation within three years. *See* 33 U.S.C. § 1314(m)(1)(A)-(C.)

The purpose of the CWA is to restore and maintain the chemical and biological integrity of the Nation's waters and to achieve Congress' declared "national goal that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1); *Chemical Manufacturers Ass'n v. EPA*, 870 F.2d 177, 195 (5<sup>th</sup> Cir. 1989.) To accomplish this objective, in 1972 Congress adopted a new and different method of pollution control. Instead of having EPA focus on the relative risk caused by pollutant discharge, Congress required EPA to identify the best technology "available" to control and eventually eliminate pollution discharge. *See* Section II.A, *infra*. Under this innovative approach, EPA was required to establish effluent guidelines and effluent limitations that set restrictions on point source discharge corresponding to the pollution reduction attainable by the newly identified technology. Dischargers could meet the limits any way they wished, but the standards themselves were set according to the availability and performance of the technology rather than on EPA's assessment of which amounts of discharge were harmful to water quality.

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<sup>1</sup>Plaintiffs' seek partial summary judgment on liability for these Claims. In addition, the Court has already ruled on Plaintiffs' Third Claim.



1 To ensure reasonable further progress towards eliminating pollutant discharge in our Nation's  
2 waters, Congress required EPA to review effluent guidelines on an annual basis and revise such  
3 guidelines if appropriate based on the availability and feasibility of increasingly effective pollution  
4 control technology. 33 U.S.C. § 1314(b.) The purpose of this annual review was to provide  
5 information for EPA to upgrade the requirements of effluent limitations, which, unlike effluent  
6 guidelines, are binding on individual dischargers. 33 U.S.C. § 1311(a)-(b.) The CWA history and  
7 language show that Congress intended that EPA demonstrate, at a minimum once every 5 years, that  
8 point source dischargers are applying the best available technology to control point source pollution.  
9 *See* Section II.A.2, *infra*; 33 U.S.C. § 1311(d.) Indeed, the legislative history and statutory language  
10 show that Congress intended EPA to demonstrate that elimination of point source discharge pollution  
11 was not possible at regular five year intervals. *Id.*; 33 U.S.C. § 1311(b)(2)(A.)

12 The technology-based approach to cleaning up pollutant discharge has been remarkably  
13 successful, but there is still more progress to be made. Yet at this crucial juncture, as EPA embarks  
14 upon a new “Draft Strategy” for future effluent guideline review, EPA has turned its back on  
15 technology based regulation and instead gone back to the risk assessment approach, the failure of  
16 which was the basis for the 1972 CWA Amendments in the first place.

17 In September 2004, EPA published its final effluent guidelines plan (“2004 EFG”), which sets  
18 forth how EPA “reviewed” existing effluent guidelines for 2003 and 2004, and how EPA intends to  
19 do so in the future. (*See* 69 Fed. Reg. 53705, attached hereto as Exhibit 1 to Declaration of Michael  
20 W. Graf in Support of Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary  
21 Judgment (“Graf Decl.”)) As discussed below, EPA’s approach consists of a first tier, “screening  
22 level” process based that eliminates all but a handful of effluent guideline categories from review  
23 based on EPA’s determination of which categories pose the most significant “risk” to our Nation’s  
24 waters. Not only is this risk approach contrary to the framework of technology-based regulation,  
25 EPA concedes that it lacks data for many categories EPA believes are discharging harmful pollutants.

26 The striking feature of the 2004 EFG is the absence of meaningful discussion regarding the  
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1 availability and feasibility of more effective pollution control technology, including design and process  
2 changes that have the potential to eliminate pollutant discharge altogether. This approach violates  
3 the legislative history, language and purpose of the CWA. EPA must be directed, in keeping with  
4 its mandatory CWA duties, to abandon this approach and return to assessing the technological and  
5 economic feasibility of revised effluent guidelines and limitations.

## 6 II. LEGAL BACKGROUND

### 7 A. CONGRESS' TECHNOLOGY-BASED APPROACH IN 1972 AMENDMENTS TO 8 THE FEDERAL CLEAN WATER ACT

9 The purpose of the 1972 Amendments to the Clean Water Act was to replace the old,  
10 ineffective system of water quality regulation based on health and environmental risk assessment with  
11 technology-based regulation of point source pollution. As noted by Senator Muskie:<sup>2</sup>

12 The Legislation recommended by the Committee proposes a major change in the enforcement  
13 mechanism of the Federal Water pollution control program from water quality standards to  
14 effluent limits. ...The Committee adopted this substantial change because of the great  
15 difficulty associated with establishing reliable and enforceable precise effluent limitations on  
16 the basis of a given stream quality...Under this Act, the basis of pollution prevention and  
17 elimination will be the application of effluent limitations. Water quality will be a measure of  
18 program effectiveness and performance, not a means of elimination and enforcement.

19 (See Graf Decl., Ex. 6, Senate Report No. 92-414 (October 28, 1971) ("1971 Senate Report"), pp.  
20 7-8, reprinted in Congressional Research Service, A Legislative History of the Water Pollution  
21 Control Act Amendments of 1972 ("1972 Legislative History"), p. 1425-1426. (emphasis added.))  
22 In *EPA v. California Ex Rel. State Water Resources Control Bd.*, 426 U.S. 200, 203-204 (1976.),  
23 the U.S. Supreme Court described the impetus for switching to a technology-based approach:

24 In 1972, prompted by the conclusion of the Senate Committee on Public Works that "the  
25 Federal water pollution control program... has been inadequate in every vital aspect,"  
26 Congress enacted the Amendments, declaring "the national goal that the discharge of  
27 pollutants into the navigable waters be eliminated by 1985....[Technology-based effluent ]  
28 restrictions on discharges facilitate enforcement by making it unnecessary to work backward  
from an overpolluted body of water to determine which point sources are responsible and  
which must be abated. In addition, a discharger's performance is now measured against strict  
technology-based effluent limitations - specified levels of treatment - to which it must  
conform, rather than against limitations derived from water quality standards to which it and

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26 <sup>2</sup>See *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1243 (D.C. Cir. 1980)  
27 (Senator Muskie's views are "entitled to significant weight in fathoming congressional intent.")

1 other polluters must collectively conform.

2 426 U.S. at 204-205. (emphasis added.)

3 The CWA's reliance on technology based controls was reaffirmed by Congress when it  
4 considered and passed the 1987 CWA Amendments, which established Section 304(m) requiring EPA  
5 to publish effluent guideline plans with schedules of annual review of existing effluent guidelines:

6 The technology based approach to water pollution control was adopted in 1972 because of  
7 the historical ineffectiveness of the previous water-quality-based approach. This approach  
8 failed because of uncertainties about the relationship between water quality and health and  
9 environmental effects. There are still significant gaps in knowledge of these relationships.  
10 Consequently the reported bill reaffirms the technologically-based approach established in  
11 1972 as an immediate and effective method of achieving the goals of the Act.

12 *See Graf Decl., Ex. 7 (S. Rep. No. 50, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1985) (hereafter "Senate Report,"),*  
13 *pp. 3-4, reprinted in Congressional Research Service, A Legislative History of the Water Quality Act*  
14 *of 1987, 1424 (1988) ("1987 Legislative History," pp. 1424-1425.)*

15 The new technology-based permitting approach had several important aspects. First, EPA  
16 was required to identify and apply pollution control technologies to point source discharge in a  
17 phased process. Second, EPA was required to constantly review and upgrade technology  
18 requirements to ensure reasonable further progress toward's the CWA's goal of eliminating the  
19 discharge of point source pollutants. Third, EPA was required to identify, apply and revise these  
20 technology-based controls to reduce pollutant loading without undergoing risk assessment regarding  
21 the impacts of such pollutants on water quality.

22 **1. The CWA Requires EPA to Identify Available Pollution Control Technologies**  
23 **as a Means of Controlling Point Source Discharge of Pollutants**

24 The 1972 CWA amendments represented a fundamental decision by Congress to require EPA  
25 to identify and apply increasingly refined technological advances to pollution control in order to meet  
26 the CWA's objective of eliminating all pollutant discharges. The 1972 Amendments established a two  
27 phase process for all non-conventional pollutants, applying "best practicable technology" (BPT) by  
28

1 1977, and “best available technology” (BAT) by 1983.<sup>3</sup>

2 In order to carry out the objective of this legislation, a two phase program for applying  
3 effluent limits is created: the first based on best practicable technology, the second based on  
4 best available technology. In Phase I,...all industrial pollution sources must apply the best  
practicable technology...In Phase II...communities and industries will be required to apply,  
where the goal of no-discharge cannot be attained, the best available technology.

5 (Graf Decl., Ex. 6 (1971 Senate Report, p. 8; 1972 Legislative History, p. 1426.))

6 For BAT, the CWA required a stricter standard, designed to identify all available pollution  
7 control technologies, including those still not widely practiced in the industry:

8 The Conference agreement applies a different test to the Administrator’s determination of  
9 [BAT.] ....the Administrator may consider a broader range of technological alternatives and  
should, at a minimum, review capabilities which exist in operation or which can be applied as  
10 a result of public and private research efforts..[R]ather than establishing the range of levels  
in reference to the average of the best performers in an industrial category, the range should,  
at a minimum, be established with reference to the best performer in any industrial category.

11 (Graf Decl., Ex. 6 (1972 Legislative History at 170)<sup>4</sup> The Senate Report notes that:

12 [T]he concept “best available technology” is intended to mean that the Administrator should  
13 examine the degree of effluent control that has been or can be achieved through the  
application of technology which is available or normally can be made available. This does not  
14 mean the technology must be in actual routine use somewhere. It does mean that the  
technology must be available at a cost and at a time which the Administrator determines to  
15 be reasonable, and the technology has been adequately demonstrated if not routinely applied.

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18 <sup>3</sup>*EPA v. California Ex Rel. State Water Resources Control Bd.*, *supra*, 426 U.S. at 204,  
19 n. 11 Congress subsequently extended the deadline for meeting BAT to 1989. *See* 33 U.S.C. §  
20 1311(b)(2)(A.) For conventional pollutants, the CWA requires the achievement of best  
practicable control technology (“BCT”), also by 1989. 33 U.S.C. § 1311(b)(2)(D.)

21 <sup>4</sup> In identifying BPT, EPA was required to conduct some balancing between total cost and  
22 effluent reduction benefits, but that such balancing should only “limit the application of  
technology only where the additional degree of effluent reduction is wholly out of proportion to  
23 the costs of achieving such marginal level of reduction for any class or category of sources.” *See*  
Senate Consideration of the Report of the Conference Committee, October 4, 1972 (“Senate  
24 Committee Report”), reprinted in 1972 Legislative History”) p. 170. (emphasis added.) *See also*  
*EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64, 76 n.15 (1980) (EPA defines BPT as “the  
25 average of the best existing performance by plants of various sizes, ages and unit processes within  
each industrial category or subcategory. This average is not based upon a broad range of plants  
26 within an industrial category or subcategory, but is based upon performance levels achieved by  
exemplary plants.”)

1 (*Id.*, (Senate Report, pp 51-52; 1972 Legislative History, p. 1469-1470.))<sup>5</sup>

2 **2. The CWA Requires EPA to Review and Revise Technology Standards on a**  
3 **Constant Basis in Order to Eliminate Point Source Discharge of Pollutants**

4 Congress envisioned that EPA would take the lead and pressing for more effective technology  
5 to eliminate pollution discharges. The Senate Report states:

6 The Administrator will have the capability and the mandate to press technology and  
7 economics to achieve those levels of effluent reduction which he believes to be practicable in  
8 the first instance and attainable in the second. [T]he program established by this section  
9 requires increasingly tougher controls on industry; [I]ndustry will be required every five years  
10 to re-evaluate its control efforts and to apply the best technology then available; [I]ndustries  
11 will have to show every five years that no-discharge is not attainable.

12 (Graf Decl., Ex. 6 (Senate Report, p. 42; 1972 Legislative History, p. 1460) (emphasis added.)) The  
13 technology forcing component of the CWA assumed that incremental improvements would continue  
14 to occur as the EPA worked to identify feasible pollution control technologies in the future:

15 The distinction between “best practicable” and “best available” is intended to reflect the need  
16 to press toward increasingly higher levels of control, applied over five year periods. Through  
17 research and development of new processes, modifications, replacement of obsolete plans and  
18 processes, and other improvements in technology, the Committee anticipates that it should  
19 be possible, taking into account the cost of controls, to achieve ...levels of control  
20 approaching 95-99% reduction of pollutants discharged in most cases and complete recycling  
21 in the remainder.

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18 <sup>5</sup>Congress intended the BAT standard to push industry towards achieving the CWA goal  
19 of no net discharge of pollutants without an explicit cost-benefit balancing:

20 “[W]hile cost should be a factor in the Administrator’s judgment, no balancing test will be  
21 required. The Administrator will be bound by a test of reasonableness. In this case, the  
22 reasonableness of what is “economically achievable” should reflect an evaluation of what  
23 needs to be done to move toward the elimination of the discharge of pollutants and what is  
24 achievable through the application of available technology – without regard to cost

25 *Id.*; *Natural Resources Defense Council v. EPA*, 863 F.2d 1420, 1426 (9<sup>th</sup> Cir. 1988) (the “  
26 consideration of cost in determining BAT requires only ‘economic viability at the level sufficient  
27 to reasonably justify the making of investments in such new facilities’”); *Kennecott v. EPA*, 780  
28 F.2d 445, 448 (4<sup>th</sup> Cir. 1985), *cert. denied*, 479 U.S. 814 (1986) (“We proceed, however, on the  
understanding that Best Available Technology was the means chosen by Congress to achieve ‘the  
national goal that the discharge of pollutants into the navigable waters be eliminated by 1985..., a  
goal that implies some urgency to the environmental task that Congress set.”)

1 (Graf Decl., Ex. 6 (Senate Report, pp 50-51; 1972 Legislative History, p. 1468-1469.))<sup>6</sup>

2 As discussed below, the CWA implements this Congressional intent by requiring EPA to  
3 annually review and, if appropriate, revise effluent guidelines, and to review effluent limitations every  
4 five years, 33 U.S.C. 1311(d), and effluent standards for toxic pollutants every three years. 33 U.S.C.  
5 § 1317(a)(3).<sup>7</sup> Finally, frustrated with the slow pace of EPA’s identification, review and revision of  
6 applicable control technologies, Congress in the 1987 CWA amendments added a new section  
7 requiring EPA to publish a schedule for its review of effluent guidelines in a biennial plan that is  
8 subject to public notice and comment. *See* 33 U.S.C. § 1314(m.)

9 **3. Congress Intentionally Limited EPA’s Ability to Consider Impacts to Water**  
10 **Quality in Setting Effluent Guidelines**

11 The CWA drafters intended EPA to identify and apply technology controls to reduce pollutant  
12 loading without undergoing risk assessment regarding the impacts of such pollutants on water quality:

13 The Committee recommends the change to effluent limits as the best available mechanism to  
14 control water pollution. With effluent limits, the Administrator can require the best control  
technology; he need not search for a precise link between pollution and water quality.

15 (Graf Decl., Ex. 6 (1971 Senate Report, p. 7; 1972 Legislative History, p. 1425.) (emphasis added.))

16 The purpose of this approach was to make progress on eliminating point source pollutant discharge  
17 despite the lack of full information on water quality risk assessment and the difficulties in  
18 implementing a water quality based approach as the primary criteria for issuing point source discharge  
19 permits. (*See id.* (1972 Legislative History, p. 1426 (“ The Committee adopted this substantial change  
20 because of the great difficulty associated with establishing reliable and enforceable precise effluent  
21

22 \_\_\_\_\_  
23 <sup>6</sup>The CWA sets even stricter standards for new sources of pollutant discharge, requiring  
24 them to meet New Source Performance Standards (“NSPS”) equivalent to the “greatest degree of  
25 effluent reduction ...achievable through application of the best available demonstrated control  
26 technology, processes, operating methods, or other alternatives, including, where practicable, a  
27 standard permitting no discharge of pollutants.” 33 U.S.C. § 1316(a)(1.) (emphasis added.)

28 <sup>7</sup>For newly constructed point sources, EPA must revise NSPSs “from time to time, as  
technology and alternatives change.” 33 U.S.C. 1316(b)(1)(B.) (emphasis added.)

1 limitations on the basis of a given stream quality.”))<sup>8</sup>

2 In passing the 1987 CWA Amendments, Congress also reiterated its commitment to a  
3 technology-based approach based on “the uncertainties about the relationship between water quality  
4 and health and environmental effects” and the “still significant gaps in knowledge of these  
5 relationships.” (Senate Report, pp. 3-4, reprinted in 1987 Legislative History, pp. 1424-1425.)  
6 Congress also emphasized that the EPA was specifically not required to “make any determination of  
7 environmental harm” in determining effluent guidelines for industrial point source discharges.  
8 Instead, “any non-trivial discharges from sources in a category must lead to effluent guidelines.” (Graf  
9 Decl., Ex. 7 (Senate Report at p. 25; 1987 Legislative History at p. 1446.))<sup>9</sup>

10 **B. CWA’S TECHNOLOGY FORCING APPROACH IS BASED ON THE**  
11 **ESTABLISHMENT, REVIEW AND REVISION OF EFFLUENT GUIDELINES AND**  
12 **LIMITATIONS**

13 **1. Relationship of Effluent Guidelines to Effluent Limitations**

14 Under the CWA, Effluent guidelines are to be used “for the purpose of adopting or revising  
15 [the technology-based] effluent limitations” required by CWA section 301(b), 33 U.S.C. § 1311(b),  
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17  
18 <sup>8</sup>Congress retained the water quality approach under section 303 of the Act. which  
19 requires EPA and the states to evaluate whether additional water quality problems or hazards  
20 persist despite the application of such technology-based effluent limitations. *See* 33 U.S.C. §  
21 1313. Such water quality measures, which Congress recognized as a more difficult approach to  
22 pollution control, would only be required, however, where up-to-date technolgy controls based  
23 on BCT, BAT and NSPS were insufficient to achieve desired water quality. *See e.g.*, Graf Decl.,  
24 Ex. 7 (Senate Report, p. 3-4, 1987 Legislative History, p. 1425 (“Although technology-based  
25 BAT controls are the primary driving force behind the Act’s cleanup requirements, water quality  
26 standards are expected to play a key supplementary role in assuring clean water and, where  
27 necessary, in developing additional control requirements.”))

28 <sup>9</sup>Numerous case decisions have reiterated that EPA’s effluent guidelines and limitations  
must be based not on the relative harm caused by discharged pollution, but rather on the  
technology available to reduce and if possible eliminate, point source pollutants. *See Association*  
*of Pacific Fisheries v. Environmental Protection Agency*, 615 F.2d 794, 805-806 (9<sup>th</sup> Cir. 1980);  
*See also EPA v. Nat’l Crushed Stone Ass’n*, *supra*, 449 U.S. at 75-77 (1980); *E.I. du Pont de*  
*Nemours & Co. v. Train*, 430 U.S. 112, 130 (1977.)

1 which are then applied to NPDES permits for point source discharges. *See* 33 U.S.C. § 1342(a.)<sup>10</sup>

2 In *NRDC v. Train*, 510 F.2d 692, 707 (D.C. Cir. 1975), the D.C. Circuit summarized the  
3 interrelationship between the adoption of effluent guidelines under CWA Section 304(b), 33 U.S.C.  
4 1314(b), and the establishment and implementation of effluent limitations in individual NPDES  
5 permits as a means to control point source pollution:

6 The Act relies on effluent limitations on individual point sources as the "basis of pollution  
7 prevention and elimination." The achievement of these limitations depends on coordination  
8 of the different roles played by sections 301(b), 304(b), and 402 in the formulation and  
9 implementation of the effluent limitations. Section 301(b) contains a broad description of the  
10 phase one and phase two effluent limitations, to be achieved by July 1, 1977, and July 1,  
11 1983, respectively. The limitations established under section 301(b) are to be imposed upon  
12 individual point sources through permits issued under the National Pollutant Discharge  
13 Elimination System (NPDES) established by section 402.... Section 304(b) calls for the  
14 publication of regulations containing guidelines for effluent limitations for classes and  
15 categories of point sources. These guidelines are intended to assist in the establishment of  
16 section 301(b) limitations that will provide uniformity in the permit conditions imposed on  
17 similar sources within the same category by diverse state and federal permit authorities.

18 *NRDC v. Train, supra*, emphasized the primary importance of up-to date effluent guidelines  
19 as a trigger to ensure that effluent limitations under CWA Section 301(b) would be required to  
20 comply with a uniform national standard and thereby avoid the industry "race to the bottom"  
21 characteristic of state by state regulation of water point source discharges in the 1960s:

22 The effluent limitation guidelines contained in section 304(b) and the corresponding effluent  
23 limitations to be promulgated under section 301(b) were intended to safeguard against  
24 industrial pressures by establishing a uniform "minimal level of control imposed on all sources  
25 within a category or class." Senator Muskie emphasized the function of the guidelines in  
26 promoting uniformity...."the Administrator is expected to be precise in his guidelines so as to  
27 assure that similar point sources with similar characteristics, regardless of their location or the  
28 nature of the water into which the discharge is made, will meet similar effluent limitations."

510 F.2d at 709-710. (emphasis added.)

## 2. Establishment of Effluent Guidelines under CWA Section 304(b.)

Under the CWA, effluent guidelines are required to identify the level of pollutant reduction  
through the application of available technological controls corresponding to BPT, BAT, BCT and

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<sup>10</sup>In practice, EPA has promulgates a single set of regulations that incorporate both the  
effluent guidelines under 304(b) and effluent limitations under section 301(b.) *See* Graf Decl., Ex.  
153707; *E.I. du Pont de Nemours & Co. v. Train, supra*, 430 U.S. 113. *See* Discussion, *infra*.



1 any controls available to eliminate pollutant discharge altogether. 33 U.S.C. § 1311(b)(1)-(4.) 33  
2 U.S.C. § 1314(b).<sup>11</sup> In identifying BAT effluent guidelines, EPA must consider “the age of equipment  
3 and facilities involved, the process employed, the engineering aspects of the application of various  
4 types of control techniques, process changes, [and] the cost of achieving such effluent reduction,  
5 non-water quality environmental impacts (including energy requirements), and such other factors as  
6 the Administrator deems appropriate.” 33 U.S.C. § 1314(b)(2)(B).<sup>12</sup>

7 In addition to BPT, BCT and BAT, the CWA also requires EPA, as part of its establishment  
8 of effluent guidelines, to “identify control measures and practices available to eliminate the discharge  
9 of pollutants from categories and classes of point sources, taking into account the cost of achieving  
10 such elimination of th discharge of pollutants.” 33 U.S.C. § 1314(b)(3.)

### 11 **3. CWA Requires Review and Revision of Effluent Guidelines and Limitations**

12 The CWA requires EPA to review and if appropriate revise applicable technology standards  
13 to ensure that such technology is up to date and is making “reasonable further progress” towards the  
14 Nation’s goal of eliminating the discharge of point source pollution. 33 U.S.C. § 1311(b)(2)(A.)

15 The primary mechanism for ensuring technology requirements for point source discharge are  
16 up to date and current is CWA Section 304(b), which requires EPA to review and, if appropriate,  
17 revise effluent guidelines annually “[f]or the purpose of adopting or revising effluent limitations.” 33  
18 U.S.C. § 1314(b.) Accordingly, the CWA requires EPA to set effluent limitations under Section  
19 301(b) which correspond to BAT and BCT as set forth in effluent guidelines established under  
20 304(b.) 33 U.S.C. § 1311(b)(2)(A.) In addition, under Section 301(b)(2)(A), “effluent limitations

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21  
22 <sup>11</sup>The CWA required EPA to promulgate Effluent Limitations based on BPT by no later  
23 than July 1, 1977, and Effluent Limitations based on BAT and BCT by no later than March 31,  
24 1989. 33 U.S.C. § 1311(b)(1)(A), (b)(2.) Congress originally envisioned that point source  
25 dischargers would meet the stricter BAT and BCT standards by 1983. *See e.g., EPA v. California*  
*Ex Rel. State Water Resources Control Bd., supra*, 426 U.S. at 204, n. 11. As a result of  
26 continued delay, Congress subsequently extended the 1983 deadline to 1984 and then 1989 for  
27 existing point source dischargers. *See* 33 U.S.C. § 1311(b)(2)(A)-(F.)

28 <sup>12</sup>*See also* 33 U.S.C. § 1314(b)(1)(B) (standards for BPT); 33 U.S.C. § 1314(b)(4)(B)  
(standards for BCT.)

1 shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of  
2 information available to him ...that such elimination is technologically and economically achievable  
3 for a category or class of point sources” as determined by effluent guidelines established under  
4 Section 304(b.) 33 U.S.C. § 1311(b)(2)(A.) This requirement is consistent with EPA’s obligation  
5 under Section 304(b)(3) to identify available control measures and practices that can “eliminate the  
6 discharge of pollutants.” 33 U.S.C. § 1314(b)(3.)

7 To insure that revisions to effluent guidelines lead to revisions in effluent limitations, CWA  
8 Section 301(d) requires that any “effluent limitation” established under 301(b)(2) “be reviewed at  
9 least every five years and, if appropriate, revised pursuant to the *procedure* established under such  
10 paragraph.” (emphasis added.) Such “procedure,” as set forth in Section 301(b)(2), is to require  
11 effluent limitations to correspond to the applicable BAT, BCT and “no- net discharge” technologies  
12 identified in the annually reviewed effluent guidelines. *See* 33 U.S.C. §§ 1311(b)(2), 1314(b)(2)-(4.)

13 These CWA provisions indicate that Congress intended that EPA review available pollution  
14 control technologies for point source discharge categories on an annual basis for possible revision of  
15 effluent guidelines, and that EPA would incorporate any revisions into effluent limitations at least  
16 every 5 years. These provisions are consistent with legislative history, which indicates that Congress  
17 intended the CWA to apply “increasingly tougher controls” by requiring industry “every five years  
18 to re-evaluate its control efforts and to apply the best technology then available.” (Graf Decl., Ex. 7  
19 (Senate Report, p. 42; 1972 Legislative History, p. 1460.)) Indeed, Congress noted that “industries  
20 will have to show every five years that no-discharge is not attainable.” (*Id.*) (emphasis added.) This  
21 latter requirement is embodied in the language of Sections 301(b)(2)(A) and 304(b)(3), which confirm  
22 the overriding objective of the CWA technology based approach to eliminate all point source  
23 pollution from the Nation’s waters. *See* 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(3.)

24 As a practical matter, the EPA has implemented the 301(b) and 304(b) requirements together  
25 through the promulgation of a single set of effluent guidelines. *See* Graf Decl., Ex. 153707. As a  
26 result, EPA claims that when it conducts a “review of effluent limitations guidelines under section  
27

1 304(b), EPA is also reviewing the effluent limitations they contain, thereby fulfilling its obligations  
2 under section 301(d) and 304(b) simultaneously.” *Id.* Notwithstanding that EPA has decided not to  
3 distinguish between effluent guidelines and effluent limitations in drafting regulations, however, the  
4 CWA’s original legislative scheme in requiring EPA to review available technology on an annual basis  
5 under Section 304(b), and every five years under Section 301(d), is still highly relevant in this Court’s  
6 determination of whether EPA is today complying with its legal obligations.

### 7 **C. PASSAGE OF 1987 CLEAN WATER ACT AMENDMENTS**

8 In 1985, Congress noted that EPA had failed to identify effluent guidelines setting forth BPT  
9 and BAT limitations for a number of point source categories and indicated that “the slow pace at  
10 which [effluent guideline] regulations are promulgated continues to be frustrating.” *See Graf Decl.*,  
11 Ex. 7 (Senate Report, p. 3, 1987 Legislative History, p. 1424.) To ensure that EPA would meet its  
12 statutory obligations to promulgate and revise if appropriate applicable effluent guidelines for  
13 industrial categories, Congress amended the CWA in 1987 to add section 304(m.) 33 U.S.C. §  
14 1314(m.) As noted by the Senate Report:

15 New Section [304(m)] requires the Administrator to publish within 12 months a plan (1)  
16 establishing a schedule for the annual review and revision of effluent guidelines already  
17 promulgated; (2) identifying categories of sources of toxic or non-conventional pollutants for  
18 which guidelines have not been promulgated; and (3) establishing a schedule for promulgation  
19 of those guidelines, no later than 3 years after identification of the categories....

18 [Effluent] Guidelines are required for any category of sources discharging significant amounts  
19 of toxic pollutants. In this case, “significant amounts” does not require the Administrator to  
20 make any determination of environmental harm; any non-trivial discharges from sources in  
21 a category must lead to effluent guidelines.(emphasis added.)

22 (Graf Decl., Ex. 7 (Senate Report, pp. 24-25, 1987 Legislative History, pp. 1445-1446.))

23 As enacted, CWA section 304(m)(1)(A) provides that by February 4, 1988, and biennially  
24 thereafter, EPA must publish in the Federal Register a plan which shall “establish a schedule for the  
25 *annual review* and revision of promulgated effluent guidelines, in accordance with” CWA section  
26 304(b) (emphasis added).<sup>13</sup> CWA section 304(m)(1)(B) requires EPA to identify categories of

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26 <sup>13</sup>As discussed, Section 304(b) of the Clean Water Act requires EPA to review and, if  
27 appropriate, revise effluent limitations on an annual basis. *See* 33 U.S.C. § 1314(b.)

1 industries discharging toxic or nonconventional pollutants for which effluent guidelines have not  
2 previously been published. 33 U.S.C. § 1314(m)(1)(B). CWA section 304(m)(1)(C) requires EPA  
3 to establish a schedule for promulgation of effluent guidelines for new categories of industry (for  
4 which no effluent guidelines have been issued) within three years after their identification by EPA in  
5 an effluent guidelines plan. 33 U.S.C. § 1314(m)(1)(C).

### 6 III. FACTUAL BACKGROUND

#### 7 A. EPA'S FAILURE TO COMPLY WITH ITS OBLIGATIONS TO IDENTIFY AND 8 REVIEW EFFLUENT GUIDELINES

9 The history of EPA's implementation of the CWA's requirements to identify and review  
10 effluent guideline categories has been one of woeful non-compliance. From the outset, EPA failed  
11 to identify effluent guidelines for industrial categories in a timely manner as required by CWA Section  
12 306, 33 U.S.C. § 1316, and failed to identify and establish effluent guidelines and limitations for toxic  
13 pollutants are required under by CWA Section 307, 33 U.S.C. § 1317. Each of these failures were  
14 successfully challenged in court, resulting in a Consent Decree under which EPA listed effluent  
15 guidelines though the remainder of the 1970s and most of the 1980s. *See* 55 Fed. Reg. 80 (January  
16 2, 1990) ("For the past 12 years, a consent decree settling litigation ...has largely set the Agency's  
17 agenda for the development of effluent guidelines.")<sup>14</sup>

#### 18 B. EPA'S IDENTIFICATION AND REVISION OF EFFLUENT GUIDELINES AND 19 EFFLUENT LIMITATIONS SINCE THE 1987 CWA AMENDMENTS

##### 20 1. EPA's 1990 Effluent Guidelines Plan is Held to Violate the CWA

21 In response to the 1987 CWA Amendments, EPA issued its first effluent guidelines plan  
22 ("EFG") in January 2, 1990, almost two years after the deadline set by Congress. *See* 33 U.S.C. §  
23 1314(m)(1.) EPA's 1990 Plan relied on prioritization, according to which EPA claimed it had

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25 <sup>14</sup> *See Chemical Manufacturers Ass'n v. EPA, supra*, 870 F.2d at 195, n. 9; *NRDC v.*  
26 *Train, supra*, 510 F.2d at 710-712; *NRDC v. Costle*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C.  
27 1976), modified sub. nom; *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C.1976),  
modified sub. nom; *NRDC v. Gorsuch*, 17 Env't. Rep. Cas. (BNA) 2013, 12 Env'tl. L. Rep. 20570  
(D.D.C.1982), modified sub. nom; *NRDC v. Ruckelshaus*, No. 73-2153 (D.D.C. Aug. 2, 1983)

1 discretion to determine when effluent guidelines needed to be identified for unregulated industries:

2 The statutory requirement for biennial identification of sources, coupled with the three-year  
3 statutory schedule for the issuance of new guidelines for identified sources, indicates that  
4 Congress did not intend to require the Agency to identify all categories of sources discharging  
5 toxic or nonconventional pollutants in the first plan. ... Had Congress intended such a  
6 dramatic increase in the pace of the guidelines program, it is reasonable to expect that this  
7 would have been made clear on the face of the statute and in the legislative history.

8 55 Fed. Reg. at 81-82. EPA's Plan thus identified industries without effluent guideline regulations,  
9 but proposed to prioritize the promulgation of regulations for such industries based on the relative  
10 risk posed over a time period the EPA claimed was within its discretion.

11 To implement this interpretation, EPA has developed a set of criteria to set priorities in  
12 identifying industries for development of new or revised effluent limitations guidelines and  
13 standards. The criteria emphasize the presence and quantity of toxic and nonconventional  
14 pollutants in the discharges to waters of the United States, and the potential impact of those  
15 discharges on the environment.

16 *See id.* at 82 (emphasis added.)

17 In *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 (D.D.C. Apr. 23, 1991), the D.C. district  
18 court rejected this position. (*See Graf Decl., Ex. 5.*) The court noted that the "Congressional  
19 command to review and revise guidelines in conformity with the parameters set out at length in §  
20 304(b) makes logical sense and allows this court to interpret § 304(m)(1)(A) in a way which does not  
21 render the words of the statute superfluous." (*Graf Decl., Ex. 5, p. 7.*) The district court held that  
22 Section 304(m) was consistent with the legislative purposes of the Clean Water Act in two ways:

23 First, advances in pollution detection technology may allow EPA to uncover industries not  
24 currently known to be dischargers of dangerous chemicals. The biennial update requirement  
25 imposes on EPA the duty to continue collecting the technical data necessary to identify  
26 polluters in need of effluent guidelines and to list them in future § 304(m) plans. Second, the  
27 continuing obligation to prepare biennial plans provides a way for Congress and the public  
28 to monitor the vigilance of EPA over the Nation's water quality. In short...the biennial plan  
29 requirement furthers the Clean Water Act's goal of creating and maintaining up to date  
30 standards.

31 (*Graf Decl., Ex. 5, p. 16:1-12.*) (emphasis added.) The district court concluded by noting that "in  
32 light of the compelling need for federal effluent guidelines, the well documented history of agency  
33 inertia, and the general structure of the Act," EPA's intent to "prioritize" its statutory obligations was  
34 "inadequate and not in conformity with the mandate" of the CWA. (*Graf Decl., Ex. 5, p. 9.*)

1           **2.     EPA Enters into and Implements a Consent Decree that Directs EPA’s**  
2           **Identification and Revision of Effluent Guidelines and Issuance of Effluent in**  
3           **the 1990s**

4           As a result of the district court’s decision in *NRDC v. Reilly*, the EPA entered into a consent  
5           decree (“1992 Consent Decree”) under which EPA identified additional effluent guidelines for  
6           industrial categories between 1993 and 2004. *See NRDC, et al. v. Reilly*, No. 89-2980 (RCL)  
7           (D.D.C. Jan. 31, 1992).<sup>15</sup>

8           During this time period, EPA published six effluent guideline plans under CWA Section  
9           304(m).<sup>16</sup> In each of these plans, EPA complied with the 1992 Consent Decree obligations by  
10          identifying new industrial categories for promulgation of effluent guidelines, discussing ongoing  
11          regulations being promulgated, and announcing regulations that have been issued. In all, EPA  
12          established new effluent guidelines for 18 industries during this period pursuant to the terms of the  
13          Consent Decree. *See Graf Decl.*, Ex. 1 at 53708. In addition, EPA completed studies for 11  
14          industrial categories pursuant to the 1992 Consent Decree. *Id.*; 63 Fed. Reg. 47285, 47288 (Sept.  
15          4, 1998); 61 Fed. Reg. 52582, 52585 (Oct. 7, 1996). In sum, pursuant to the 1992 Consent Decree,  
16          EPA focused its energies over the last decade on specifically designated industrial point source  
17          categories, rather than conducting the annual review of effluent guidelines, or 5 year review of  
18          effluent limitations, as required by the CWA. *See* 33 U.S.C. § 1311(d); 1314(b.)

19           **3.     EPA’s Draft National Strategy for Clean Water Regulations in 2002**

20          In November 2002, EPA issued its draft National Strategy for Clean Water Regulations  
21          (“Draft Strategy”) to assess how EPA would implement its obligations to promulgate and revise  
22          effluent guidelines for industry in the years ahead. (*Graf Decl.*, Ex. 11, p. 2; at p. 12 (“ The Agency

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23           <sup>15</sup>The Court terminated this consent decree on August 9, 2004. *See NRDC v. Leavitt*, No.  
24           89-2980 (RCL), slip op. at 1 (D.D.C. Aug. 9, 2004). *See Graf Decl.*, Ex. 1 at 53708.

25           <sup>16</sup>These biennial plans were published on September 8, 1992 (57 Fed. Reg. 41000),  
26           August 26, 1994 (59 Fed. Reg. 44234), October 7, 1996 (61 Fed. Reg. 52581), September 4,  
27           1998 (63 Fed. Reg. 47285), August 31, 2000 (65 Fed. Reg. 53008) and August 27, 2002 (67  
28           Fed. Reg. 55012.) EPA’s most recent plan dated September 2, 2004 (69 Fed. Reg. 53705) is the  
29           first effluent guideline plan published since the completion of EPA’s Consent Decree obligations.

1 is now considering how it will comply with the 304(m) planning requirements in the future.”) *See also*  
2 67 Fed. Reg. 71165 (Nov. 29, 2002.)

3 The Draft Strategy describes the genesis of the effluent guideline program as a desire by  
4 Congress to require available technology to clean up pollutant discharges without requiring EPA to  
5 make determinations regarding the environmental impacts of such discharge on receiving waters. (*See*  
6 Graf Decl., Ex. 11, pp. 5-8, at p. 6 (“[T]he Committee bill makes a sharp break with present practice  
7 – for the beginning point is not the degree of pollution considered tolerable, but the elimination of  
8 polluting discharges to the extent that available technology allows.”) Contrary to this legislative  
9 intent, the Draft Strategy charts out a different course for EPA’s effluent guideline and limitation  
10 review, one based on risk assessment prioritization:

11 EPA is proposing a process to establish priorities that is predicated on selecting opportunities  
12 for the greatest risk reduction using the best programs and tools available. EPA intends to  
13 characterize and compare risks based on sound, reliable data and sound analysis. Further,  
14 EPA intends to establish priorities and to make choices in consultation with the public and  
15 regulated communities based on the potential to cost-effectively reduce levels of risk to public  
16 health and the environment.

17 (*See* Graf Decl., Ex. 11, p. 11.) Thus, under the Draft Strategy, EPA proposes to “shift its focus to  
18 addressing remaining risks” rather than focus on the availability of technology to reduce further  
19 pollutant discharge. (*Id.*, p. 14) (emphasis added.) EPA plans to finalize its “Draft Strategy” in 2006  
20 as part of the issuance of its 2006 effluent guidelines plan. *See* Graf Decl., Ex. 1 at 53709.

#### 21 **4. EPA's 2003 and 2004 Review of Effluent Guidelines and Limitations and** 22 **Issuance of 2004 Effluent Guidelines Program Plan**

23 On September 2, 2004, EPA issued its final Effluent Guideline Plan for 2004 (“2004 EFG”)  
24 pursuant to CWA Section 304(m).<sup>17</sup> The 2004 EFG describes EPA’s review of Effluent Guidelines  
25 in 2003 and 2004 and how EPA proposes to conduct review in 2005 and 2006.

##### 26 **a. EPA’s Screening Level Review Process**

27 EPA’s “review” of effluent guidelines for 2003 and 2004 applied a “screening level” risk  
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26 <sup>17</sup>EPA published its preliminary plan on December 31, 2003. *See* 68 Fed. Reg. 75515  
27 (Dec. 31, 2003). (*See* Graf Decl., Ex. 2.)

1 assessment process to determine which of the 56 industrial categories for effluent guidelines and  
2 effluent limitations it would subject to a detailed investigation. EPA describes its 2003 review:

3 In its 2003 annual review, EPA focused its efforts on collecting and analyzing screening-level  
4 data to identify industrial categories whose pollutant discharges potentially pose the greatest  
5 hazard or risk to human health because of their magnitude and toxicity (i.e., highest estimates  
6 of toxic-weighted pollutant discharges). In particular, EPA ranked point source categories  
according to their discharges of toxic and non-conventional pollutants (reported in units of  
toxic-weighted pound equivalent or TWPE), based primarily on data from the Toxics Release  
Inventory (TRI) and the Permit Compliance System (PCS).

7 69 Fed. Reg. at 53710. EPA's applied the same risk assessment approach in 2004:

8 The first component of EPA's 2004 annual review consisted of a screening-level review of all  
9 promulgated effluent guidelines. As a starting point for this review, EPA examined  
10 screening-level data from its 2003 annual review. ...In its 2004 annual review, EPA  
11 re-examined the categories listed in the 2003 screening review, with particular emphasis on  
12 those for which EPA had reason to believe the Factor 1<sup>18</sup> risk or hazard assessment had  
changed. For example, when stakeholders identified existing effluent guidelines for revision  
in their comments on the 2003 review and the preliminary Plan, EPA re-considered the extent  
to which the pollutants in the industrial category's wastewater discharge posed a hazard or  
risk to human health or the environment.

13 *Id.* The 2004 EFG states that the screening level review did not involve an evaluation of whether  
14 there were more current technologies available to reduce pollutant loading:

15 EPA did not, however, conduct a comprehensive screening-level review of the availability of  
16 treatment or process technologies that might reduce hazard or risk. As was the case in the  
17 2003 annual review, EPA was unable to gather the data needed to perform a comprehensive  
18 screening-level analysis of the availability of treatment or process technologies to reduce  
19 hazard or risk beyond the performance of technologies already in place for the 56 industrial  
20 categories. EPA did consider information on the availability of treatment or process changes  
for some industries, where such information was provided by commenters on the preliminary  
Plan or otherwise identified by EPA. Similarly, EPA could not identify a suitable  
screening-level tool for comprehensively evaluating the economic affordability of treatment  
or process technologies because the universe of facilities is too broad and complex.

21 *Id.* at 53710.<sup>19</sup> The 2004 EFG then goes on to state that EPA intends to continue its risk assessment

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22 <sup>18</sup>EPA's Draft Strategy and 2003 Preliminary EGP set forth four "factors" to determine  
23 which categories of effluent guidelines it would evaluate for potential revision. "Factor 1" related  
24 to extent to which the discharged pollutants pose a hazard or risk to human health or the  
environment. *See* Graf Decl., Ex. 1 at 53709; Graf Decl., Ex. 275520-21.

25 <sup>19</sup>In the Preliminary EGP, EPA indicated that its "review" of effluent guidelines for 2003  
26 had consisted of "collecting and analyzing screening-level data to identify industrial categories  
27 whose pollutant discharges potentially pose the greatest hazards or risks to human health and the  
environment because of their toxicity." Graf Decl., Ex. 2 at 75521. (emphasis added.)



1 approach to “screen” which effluent guideline and effluent limitation categories should be reviewed  
2 in 2005 and 2006. *See id.* at 53717 (In 2005, EPA intends to conduct a screening-level analysis...  
3 EPA will conduct more detailed analyses of those industries that rank high in terms of toxic and  
4 non-conventional discharges among all point source categories.”)

5 EPA’s 2003 and 2004 review further refined the screening level review process by eliminating  
6 from review industrial effluent guideline categories based on EPA’s determination that 1) there is a  
7 lack of available risk assessment data;<sup>20</sup> 2) the water pollution problems caused by that industry are  
8 being dealt with more “efficiently” by other regulatory and non-regulatory means; 3) regulation is  
9 more appropriately conducted on a facility by facility basis or 4) that an effluent guideline has been  
10 promulgated within the past seven years. *Id.* at 53711.

11 **b. EPA’s 2004 Review of Two Industrial Categories**

12 As a result of its risk assessment screening approach used in 2003, EPA identified only two  
13 industrial categories for evaluation in 2004: Organic Chemicals, Plastics, and Synthetic Fibers  
14 (“OCPSF”); and Petroleum Refining. *Id.* at 53711. The 2004 EFG states that EPA considered  
15 technology factors in its review of these two industries. However, the description of EPA’s review  
16 indicates that EPA eliminated all but two industrial subcategories<sup>21</sup> from further analysis based on  
17 EPA’s conclusion that pollutant discharges were not causing water quality impairment or could be  
18 addressed by other regulatory mechanisms. *Id.* at 53713-53716.<sup>22</sup>

19 In sum, even for the two (out of 56) industrial categories for which EPA purported to conduct

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20  
21 <sup>20</sup>Based on the lack of comprehensive data, EPA did not take any action with respect to  
22 nine industrial effluent guideline categories that EPA found to have significant discharges of toxic  
and non-conventional pollutants. *See* Graf Decl., Ex. 153710, 53711; Graf Decl., Ex. 2 at 75522.

23 <sup>21</sup>The subcategories are the vinyl chloride manufacturing segment of the organic chemicals  
24 industry and the chlor-alkali segment of the inorganic chemicals industry. Graf Decl., Ex. 1 at  
59714.

25 <sup>22</sup>*See id.* at 59713 (“EPA estimated that the discharge of phosphorus from OCPSF  
26 facilities would not cause in-stream phosphorus concentrations to exceed the levels generally  
27 expected to be found in the least impacted 25% of freshwater rivers and streams nationally.”)

1 a “detailed” review process according to the factors of CWA Section 304(b), EPA provides no  
2 information whether there are available technologies that can further reduce or eliminate pollutant  
3 discharges from these industries beyond the levels required by existing effluent guidelines.

4 **c. EPA’s Identification of New Effluent Guideline Categories**

5 The 2004 EFG identifies two industries that are not regulated by existing Effluent Guidelines  
6 for potential promulgation of new effluent guidelines : 1) Airport Deicing Operations and 2) Drinking  
7 Water Supply and Treatment. *Id.* at 53719-53720. However, even for these new categories, EPA  
8 did not commit to enacting effluent guidelines within three years. *See* 33 U.S.C. § 304(m)(1)(C.)

9 Further, EPA determined that it was under no obligation to identify for effluent guideline  
10 promulgation industries lacking effluent guidelines if EPA characterized such industries as  
11 “subcategories” of existing guideline categories. *Id.* at 53718. Thus, EPA identified two  
12 “subcategories” of existing categories that lack effluent guidelines: (1) Petroleum Bulk Stations and  
13 Terminals, (part of the Petroleum Refining category; and (2) Chemical Formulating, Packaging, and  
14 Repackaging operations, part of the OCPSF category. *Id.* For each of these “subcategories,”  
15 however, EPA determined that no action was necessary despite the fact that no effluent guidelines  
16 currently address the discharges from these industrial pollutant discharges. *Id.* at 53713, 53715.

17 **IV. ARGUMENT**

18 **A. SUMMARY JUDGMENT STANDARD OF REVIEW**

19 Pursuant to Federal Rule of Civil Procedure 56(c), the Court should grant summary judgment  
20 “if the pleadings...together with affidavits, if any, show that there is no genuine issue as to any  
21 material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. Proc.  
22 56(c). Entry of summary judgment is appropriate when the non-moving party has failed to produce  
23 evidence “sufficient to establish the existence of an element essential to the party’s case, and on which  
24 that party will bear the burden at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

25 The moving party bears the initial burden of demonstrating that no genuine issue of material  
26 fact remains to be decided at trial. *Celotex, supra*, 477 U.S. at 323. Once this burden has been met,  
27

1 the burden shifts to the non-moving party to demonstrate that, in fact, a genuine issue of material fact  
2 does exist. *Id.* at 324. “[T]he mere existence of some alleged factual dispute between the parties will  
3 not defeat an otherwise properly supported motion for summary judgment; the requirement is that  
4 there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
5 (1986); *Celotex, supra*, 477 U.S. at 323-24. A fact is not material unless it is identified by the  
6 controlling substantive law as an essential element that will affect the outcome of the suit. *Id.*;  
7 *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). An issue of  
8 material fact is not genuine if the issue is unsupported by the evidence, or if the issue is created by  
9 evidence that is “merely colorable” or “not significantly probative.” *Anderson*, 477 U.S. at 250.

10 **B. EPA HAS NOT FULFILLED ITS MANDATORY DUTY TO CONSIDER THE**  
11 **AVAILABILITY OF IMPROVED POLLUTION CONTROL TECHNOLOGY IN**  
12 **REVIEWING EFFLUENT GUIDELINES AND EFFLUENT LIMITATIONS**

13 As set forth in its Draft Strategy and 2004 EFG, EPA has decided to base its current and  
14 future review of effluent guidelines and limitations on a risk assessment approach that screens review  
15 of effluent guidelines according to the relative harm – as determined by EPA – of point source  
16 pollutant discharges. As a result, for the vast majority of effluent guideline categories, EPA does not  
17 review the current or potential future availability of technology advances that can reduce or even  
18 eliminate pollutant discharges. This approach violates the CWA and must be set aside by this Court.

19 EPA’s screening level approach does not review the vast majority of the 56 effluent guidelines  
20 and limitations categories on an annual basis, as required by CWA Section 304(b), nor does EPA  
21 demonstrate every five years that national effluent limitations meet the “best available technology”  
22 required for toxic or non-conventional pollutants nor whether such pollutant discharges are capable  
23 of being eliminated, as required by CWA Sections 301(d) and 301(b)(2)(A.) Instead, EPA’s  
24 screening level review eliminates the majority of effluent guideline categories from review based on  
25 a risk assessment analysis that EPA admits is incomplete and or likely inaccurate. In sum, what EPA  
26 characterizes as a “review” falls far short of the statutory requirements in several ways.

27 First, in both 2003 and 2004, EPA eliminated all but two effluent guideline categories from  
28

1 review based on EPA's internal assessment of the health and environmental risks posed by different  
2 industrial point source categories. As discussed below, this approach is contrary to the CWA, its  
3 legislative history and the plain language of Section 304(b) and must be rejected.

4 Second, even for industries for which EPA has sufficient information to demonstrate likely  
5 harm from point source discharges, EPA still did not examine the availability of technology to reduce  
6 or eliminate such discharges based on EPA's determination that 1) there is lack of adequate  
7 information to identify the degree of adverse environmental impacts that are occurring; 2) the water  
8 pollution problems potentially caused by that industry could be addressed more "efficiently" by other  
9 regulatory and non-regulatory means; or 3) regulation of individual facilities based on best  
10 professional judgment is preferable to the establishment of uniform minimum performance standards  
11 based on available technology.

12 As discussed, EPA treats effluent guidelines under Section 304(b) and effluent limitations  
13 under Section 301(b) as one in the same. Thus, EPA's failure to conduct a review of available  
14 technology to reduce or even eliminate pollutant discharges violates both Section 304(b)'s annual  
15 review requirement for effluent guidelines and Section 303(d)'s five year requirement for effluent  
16 limitations. Thus, Plaintiffs must prevail on their First and Second Claims.

17 **1. EPA's Risk Assessment Approach is Contrary to Congress' Intent in the CWA**  
18 **to Apply Technology-Based Controls to Eliminate the Discharge of Pollutants.**

19 For its 2003 and 2004 review of existing effluent guidelines, EPA did not follow the  
20 congressional mandate to review and identify potentially available pollution control technologies that  
21 could meet applicable BAT criteria, as set forth in section 304(b). Instead, EPA's annual review was  
22 limited to an internal risk assessment of the threats posed by industrial point source categories on  
23 water quality, precisely the criteria that Congress intended to move away from in originally passing  
24 the CWA Amendments and establishing the NPDES permit system in 1972. *See Chevron U.S.A., Inc.*  
25 *v. NRDC* 467 U.S. 837, 842-844 (1984) ("If the intent of Congress is clear, that is the end of the  
26 matter; for the court...must give effect to the unambiguously expressed intent of Congress.")

27 Rather than focusing its review process on identifying and assessing available pollution control

1 technologies not yet incorporated within existing effluent guidelines, EPA states that its “annual  
2 review of existing effluent guidelines under section 304(b) represents a considerable effort by the  
3 Agency to consider the hazards or risks to human health and the environment from industrial point  
4 source categories.” Graf Decl., Ex. 1 at 53708. EPA’s 2004 EFG thus states that EPA intends to  
5 continue its risk assessment approach to “screen” which effluent guideline and effluent limitation  
6 categories should be reviewed in 2005 and 2006:

7 EPA's 2003 review and public comments received on the preliminary Plan helped the Agency  
8 prioritize its analysis of existing categories during the 2004 review. The information gathered  
9 during the 2004 annual review, including the identification of data gaps in the analysis of  
10 certain existing industry categories, in turn provides a starting point for EPA's 2005 annual  
11 review. ... In 2005, EPA intends to conduct a screening-level analysis of all 56 industry  
categories and compare the results against those from previous years. Based on these results  
and other information gathered during previous years, EPA will conduct more detailed  
analyses of those industries that rank high in terms of toxic and non-conventional discharges  
among all point source categories

12 *Id.* at 53717. EPA’s approach follows from its 2003 decision to rely on Factor 1 regarding the risk  
13 posed to human health or the environment. EPA explains its methodology as follows:

14 For a number of the industries that appeared to offer the greatest potential for reducing  
15 hazard or risk to human health or the environment, EPA attempted to gather and analyze  
16 additional data prior to commencing detailed and costly economic and technology studies.  
17 EPA examined: (1) The pollutants driving the hazard or risk estimates; (2) the geographic  
distribution of facilities in the industry; (3) any discharge trends within the industry; and (4)  
possible links between industrial point source discharges and impaired waterbodies identified  
by EPA, States, and Tribal governments under CWA section 303(d.)

18 Graf Decl., Ex. 2 at 75521.

19 EPA’s review process is unlawful because it did not assess feasible pollution control  
20 technology in industrial point source categories and instead assessed the relative risks of current  
21 effluent discharges on water quality, including “possible links between point source discharges and  
22 impaired water bodies” identified pursuant to Section 303(d) of the CWA. Graf Decl., Ex. 2 at  
23 75521. *See also* Graf Decl., Ex. 1 at 53710 (screening-level review includes EPA’s analysis of  
24 “available data linking water quality impairments with point source discharges.”)

25 EPA even rejected further review of industries with promising pollution control technology  
26 advances due to EPA’s inability to identify, based on existing data, hazard or risks that appear to  
27

1 warrant effluent guideline revision. For example, EPA's 2003 review states:

2 EPA's Regional Offices and stakeholders identified nine other industrial point source  
3 categories as potential candidates for effluent guideline revision based on potential  
4 opportunities to improve efficient implementation of the national water quality program or  
5 because their discharges may contribute to water quality problems. EPA evaluated these  
6 industrial point source categories and, based on available data, did not identify hazard or risks  
7 that appear to warrant effluent guideline revision

8 Graf Decl., Ex. 2 at 75522-75523. In 2004, EPA determined that no further review of the Petroleum  
9 Refining Category -- one of only two categories examined by EPA -- was unwarranted despite  
10 information in EPA's possession suggesting more advanced pollution control technologies:

11 EPA has received information on pollution prevention opportunities currently employed at  
12 refineries. In particular, the Washington State Department of Ecology published a document  
13 entitled "Water Pollution Prevention Opportunities in Petroleum Refineries," which describes  
14 opportunities in the area of general operating and maintenance practices and procedures, and  
15 design revisions and modifications to various refining processes.

16 Graf Decl., Ex. 1 at 53715. This type of incomplete assessment is exactly the type of analysis that  
17 Congress sought to avoid when it adopted the Amendments to the CWA in 1972, which replaced the  
18 prior emphasis on water quality assessment with a uniform effluent limitations based on available  
19 pollution control technology. (*See e.g.*, Graf Decl., Ex. 6 (1971 Senate Report, p. 7; 1972 Legislative  
20 History, p. 1425 ("With effluent limits, the Administrator can require the best control technology; he  
21 need not search for a precise link between pollution and water quality."))

22 EPA's review of effluent guidelines in 2003 and 2004 fails to provide a single piece of  
23 information regarding the availability of more effective pollution control technologies for existing  
24 point source categories. Instead, "EPA found that it was much more difficult than anticipated to  
25 gather the data needed to perform a meaningful screening-level analysis of the availability of treatment  
26 or process technologies that might reduce hazard or risk beyond the performance of technologies in  
27 place at facilities in 55 industrial categories." (*See* Graf Decl., Ex. 2 at 75521. *See also* Ex. 9, p. 3.)  
28 Rather than obtaining this data, or setting in motion procedures to focus its review process on  
collecting and reviewing this information so vitally necessary to the effluent guideline review process,  
EPA simply adopted a different criteria -- health and environmental risk assessment -- that Congress  
purposely meant to de-emphasize in requiring EPA to "press toward increasingly higher levels of

1 control, applied over five year periods.” (Graf Decl., Ex. 6, Senate Report, pp 50-51; 1972  
2 Legislative History, p. 1468-1469.) (emphasis added.)

3 EPA’s failure to identify or review feasible technological advances within existing effluent  
4 guideline categories is particularly problematic given Congress’s commitment to use the effluent  
5 guideline setting process as a means to establish ever-more effective pollution control technology with  
6 the purpose of eliminating pollutant discharges. (See Graf Decl., Ex. 6 (Senate Report, p. 42; 1972  
7 Legislative History, p. 1460 (“[T]he program established by this section requires increasingly tougher  
8 controls on industry; [I] ndustry will be required every five years to re-evaluate its control efforts and  
9 to apply the best technology then available.”) at 1469-70 (effluent limitations may be based on  
10 technology not in actual or routine use, so long as such technology will be available at a reasonable  
11 time and cost)); 33 U.S.C. § 1311(b)(2)(A)(i) (BAT should "result in reasonable further progress  
12 toward the national goal of eliminating the discharge of all pollutants.")<sup>23</sup>

13 In passing the CWA, Congress envisioned that EPA would take the lead on developing an  
14 informational database and pushing for the adoption of more effective pollution control technologies.

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16 <sup>23</sup>Numerous case decisions have reiterated that EPA’s effluent guidelines and limitations  
17 must be based not on the relative harm caused by discharged pollution, but rather on the  
18 technology available to reduce and if possible eliminate, point source pollutants. See *Association*  
19 *of Pacific Fisheries v. Environmental Protection Agency*, *supra*, 615 F.2d at 805-806 (“Congress  
20 intended BPT standards to be based primarily on employment of available technology for reducing  
21 effluent discharge, and not primarily on demonstrated changes in water quality.”) See also *EPA v.*  
22 *Nat'l Crushed Stone Ass'n*, *supra*, 449 U.S. at 75-77; *E.I. du Pont de Nemours & Co. v. Train*,  
23 *supra*, 430 U.S. at 130 (Supreme Court notes legislative history showing that EPA Administrator  
24 is not required to ascertain water quality impact of effluent controls in setting effluent guidelines);  
25 *Texas Oil & Gas Association v. Environmental Protection Agency*, 161 F.3d 923, 928 (5th Cir.  
26 1998) (“These limitations are technology-based rather than harm-based; that is, they reflect the  
27 capabilities of available pollution control technologies to prevent or limit different discharges  
rather than the impact that those discharges have on the waters”); *Natural Resources Defense*  
*Council v. EPA*, 822 F.2d 104, 125 (D.C. Cir. 1988) (“treatment technology” is “the basis for  
effluent guidelines); *NRDC v. Train*, *supra*, 510 F.2d at 709-710 (“Senator Muskie emphasized  
the function of the guidelines in promoting uniformity. He stated that "the Administrator is  
expected to be precise in his guidelines so as to assure that similar point sources with similar  
characteristics, regardless of their location or the nature of the water into which the discharge is  
made, will meet similar effluent limitations.") (emphasis added.)

1 Congress intended that EPA “press toward increasingly higher levels of controls...[t]hrough research  
2 and development of new processes, modifications, replacement of obsolete plans and processes, and  
3 other improvements in technology. (Graf Decl., Ex. 6 (Senate Report, pp 50-51; 1972 Legislative  
4 History, p. 1468-1469.)) Congress intended that EPA “should examine the degree of effluent control  
5 that has been or can be achieved through the application of technology which is available or normally  
6 can be made available.” The EPA’s review is not limited to technology “in actual routine use” but  
7 must include any technology that has been “adequately demonstrated if not routinely applied.” (Graf  
8 Decl., Ex. 6 (Senate Report, pp 51-52; 1972 Legislative History, p. 1469-1470.))<sup>24</sup>

9 **2. EPA’s Approach Illustrates Why Congress Intended That EPA Not Rely on**  
10 **Risk Assessment to Regulate Point Source Pollutant Discharge**

11 EPA’s risk assessment repeats the same type of incomplete and largely ineffective analysis that  
12 convinced Congress to move towards a technology based approach when it passed the CWA  
13 Amendments in 1972. EPA’s Factor 1 Report, which forms the basis for EPA’s evaluation of existing  
14 effluent guidelines in 2003, acknowledges that after thirty years of CWA implementation, EPA and  
15 the States still have not assessed the water quality of *the majority* of U.S. waters.<sup>25</sup> Indeed, EPA  
16 itself acknowledges that its risk assessment process lacks adequate data and is incomplete.<sup>26</sup> EPA’s

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17  
18 <sup>24</sup>The Factor 2 Report indicates that the EPA division responsible for reviewing effluent  
19 guidelines, the Engineering and Analysis Division (EAD) gathered secondary source (though no  
20 primary source) data on emerging treatment and process technologies for only five industries.  
21 Graf Decl., Ex. 9, p. 2-1 to 2-3, ES-2, 3-1.

22 <sup>25</sup>The causes and sources of impairment for many of the waterbodies that have been  
23 assessed are still unknown. States have assessed the water quality of only 19 percent of the  
24 Nation’s total river and stream miles, 43 percent of its lake, pond, and reservoir acres, and 36  
25 percent of its estuarine square miles. Graf Decl., Ex. 8, p. 12-1.

26 <sup>26</sup> EPA itself has conceded that its level of analysis in its Factor 1 assessment did “not  
27 approach the level of detail required by a formal risk assessment” as “the questions about the fate  
28 and transport modeling and exposure pathways used to estimate risk were too involved and  
unworkable for the current preliminary Plan.” Graf Decl., Ex. 8, p. 1-1; Ex. 10, p. 4. Indeed,  
EPA encountered so many difficulties and imprecision with available data that its 2003 Factor 1  
analysis was little better than complete speculation about the relative environmental and human  
health impacts of water pollutant discharges from specific industries.



1 Factor 1 analysis relies on two sources of information, EPA Toxics Release Inventory (TRI) Data and  
2 OECA Permit Compliance System (PCS) Data, both of which have substantial limitations as data  
3 sources. Indeed, EPA concedes that “reported discharges in PCS and TRI do not represent a national  
4 estimate of pollutant discharges for a variety of reasons.” Graf Decl., Ex. 10, 15.<sup>27</sup> EPA has further  
5 acknowledged it could not “place a great deal of weight in its screening analyses on the exact rank  
6 of an industrial category in terms of pollutant discharges reported to TRI or PCS,” pointing out  
7 problems such as:

8 EPA’s effort to estimate the hazard posed by discharges from industry categories was limited  
9 by the lack of TWFs for certain chemicals; EPA’s effort to match facility discharges to  
10 impaired waters was limited by data gaps in industry monitoring/reporting of discharges and  
11 in the ambient monitoring used by States to develop their lists of impaired waters.

12 *Id.* at 16-17. The limitations of risk assessment are brought home most directly in EPA’s own  
13 determination not to review available technology for a number of industries that EPA acknowledges  
14 are likely having significant discharges on EPA’s lack of full information regarding the degree of  
15 adverse impacts that are occurring:

16 EPA identified seven other industrial point source categories with relatively high estimates  
17 of potential hazard or risk .....EPA also identified numerous data gaps and issues that may  
18 affect the Agency’s estimate of the risk or hazard posed by discharges from these industrial  
19 point source categories. ... At the present time, the Agency does not have enough information  
20 to determine whether the hazard or risk that appears to be posed by these categories warrants  
21 revision of the applicable effluent guidelines

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22 <sup>27</sup>As stated in the Factor 1 Report, TRI Data has severe limitations undermining its  
23 usefulness for EPA’s attempted analysis. These include the failure to track releases of many  
24 chemicals, TRI reporting only for manufacturing sector industries, admittedly “a small fraction of  
25 the number of facilities that generate wastewater,” (Graf Decl., Ex. 8, p. 2-2), a high threshold of  
26 chemical release for reporting that does not account for companies releasing less than 25,000  
27 pounds of discharge, (*id.* at 2-2 to 2-3) leading to a total universe of TRI reporting facilities of  
28 only 7,814 facilities, a small fraction of the total discharging facilities. *Id.* at 2-8. Further TRI  
releases are not counted when concentrations are below a certain percent of mass of  
wastestreams. *Id.* at 2-7. In addition, EPA’s RSEI model used to estimate chronic human health  
risk-related impacts does not address potential acute human health risks or risks to aquatic life,  
nor account for multiple chemical exposures, severity of effects, multiple health effects, or human  
dermal absorption. *Id.* at 2-4. PCS Data also has severe limitations undermining its reliability for  
EPA’s attempted analysis. *See id.* at 3-2 to 3-3, 12-14; at 3-3.

1 See Graf Decl., Ex. 2 at 75522. See also Graf Decl., Ex. 153710, 53711.<sup>28</sup> In sum, even for industries  
2 with identified risk, the lack of complete, comprehensive risk information is, according to EPA,  
3 sufficient basis not to examine whether there is available technology to reduce or eliminate pollutant  
4 discharges.

5 EPA's inability to rank accurately the pollutant risk posed by different industrial sectors  
6 illustrates precisely the problem the drafters of the 1972 CWA amendments wished to avoid as they  
7 considered how to expedite the cleanup of pollutant discharge in the face of ineffective regulation  
8 based on water quality. (See Graf Decl., Ex. 6 (1971 Senate Report, p. 8, 1972 Legislative History,  
9 p. 1426 ("The Committee adopted this substantial change because of the great difficulty associated  
10 with establishing reliable and enforceable precise effluent limitations on the basis of a given stream  
11 quality") (emphasis added)); *EPA v. California ex rel. State Water Resources Control Bd.*, *supra*,  
12 426 U.S. at 203-204. In 1987, Congress reiterated this point, noting that the water-quality-based  
13 approach had been historically ineffective due to uncertainties about the relationship between water  
14 quality and health and environmental effects and observing that "there are still significant gaps in  
15 knowledge of these relationships." (Graf Decl., Ex. 7 (Senate Report, p. 3, 1987 Legislative History,  
16 p. 1424.)) For this reason Congress in 1972, and again in 1987, emphasized that the CWA's basis  
17 approach to water pollution control would be to apply known and measurable pollution control  
18 technologies, without having to establish a precise link between effluent discharge and water quality.<sup>29</sup>

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20 <sup>28</sup>EPA forwent further review of industrial categories with significant discharges based on  
21 lack of comprehensive data for a total of nine industries. Graf Decl., Ex. 2 at 75522.

22 <sup>29</sup>See e.g., Graf Decl., Ex. 6 (1971 Senate Report, p. 7; 1972 Legislative History, p. 1425  
23 ("With effluent limits, the Administrator can require the best control technology; he need not  
24 search for a precise link between pollution and water quality"); at p. 1426 ("The Committee  
25 adopted this substantial change because of the great difficulty associated with establishing reliable  
26 and enforceable precise effluent limitations on the basis of a given stream quality")); Ex. 7 (Senate  
27 Report, p. 3, 1987 Legislative History, p. 1424 ("bill reaffirms the technologically-based approach  
established in 1972 as an immediate and effective method of achieving the goals of the Act"); *id.*  
at 25, at 1446 (adoption of effluent guidelines "does not require the Administrator to make any  
determination of environmental harm.") (emphasis added.))

1           **3.       EPA’s Risk Assessment Review is Contrary to the Language of Section 304(b.)**

2           The Clean Water Act requires EPA to review and revise, if appropriate, effluent guidelines  
3 according to the factors set forth in Section 304(b.) *See* 33 U.S.C. § 1314(b); 1314(m)(1)(A); Graf  
4 Decl., Ex. 2 at 75518 (“Section 304(b) specifies factors that EPA must consider when deciding  
5 whether to establish or revise effluent guidelines for existing direct dischargers and requires EPA to  
6 revise such regulations as appropriate.”) (emphasis added.); at 75520.<sup>30</sup>

7           Section 301(b)(2) requires that all point source discharges transition from BPT to BAT and  
8 BCT technologies by 1989 at the latest. *See* 33 U.S.C. § 1311(b)(2.) Thus, for all non-conventional  
9 pollutants, the relevant standard under Section 304(b) are those applicable to BAT and EPA’s  
10 requirement to identify technologies that can eliminate pollutants under Section 304(b)(3.) EPA  
11 agrees with this conclusion, stating that the “starting point of EPA's analysis is CWA section  
12 301(b)(2)(A), which requires dischargers to achieve effluent limitations that reflect the ‘best available  
13 technology economically achievable’ (BAT).” (Graf Decl., Ex. 2 at 75520.)<sup>31</sup>

14           The starting point for reviewing an existing effluent guideline for BAT according to the  
15 Section 304(b) factors is the determination of whether there are any available pollution control  
16 technologies not yet incorporated into the existing effluent guideline, which offer the potential for  
17 more effective reduction of pollutant discharge. *See E.I. du Pont de Nemours & Co. v. Train, supra*,  
18 430 U.S. at 131 (“As we read it, § 304 requires that the guidelines survey the practicable or available  
19 pollution-control technology for an industry and assess its effectiveness.) Without identifying,

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21           <sup>30</sup>As discussed, Section 304(b) requires EPA to identify the degree of effluent reduction  
22 attainable through the application of pollution control technologies applicable to the BPT, BAT  
23 and BCT standards. *See* 33 U.S.C. § 1314(b)(1),(2), & (4.) Section 304(b)(3) also requires EPA  
24 to identify control measures and practices available to eliminate pollutants from point source  
discharges. *See* 33 U.S.C. § 1314(b)(3.)

25           <sup>31</sup>The factors considered in assessing BAT include the cost of achieving BAT effluent  
26 reductions, the age of equipment and facilities involved, the process employed, potential process  
27 changes, non-water quality environmental impacts, including energy requirements, and other such  
factors as the EPA Administrator deems appropriate. *See* 33 U.S.C. § 1314(b)(2.) Factors for  
BCT are set forth in Section 304(b)(4)(B.)

1 reviewing, or presenting for public review potential pollution control technologies, EPA has no ability  
2 to complete the required analysis under Section 304(b)(2)(B.) EPA cannot, for example, estimate  
3 the costs and feasibility of such technology, nor whether such technology offers the potential for  
4 eliminating pollutant discharges in the future. Without this information, EPA’s 2003 “review” was  
5 left without its primary piece of required information for conducting the limited cost-benefit analysis  
6 allowed under the BAT standard.<sup>32</sup>

7 Without identifying any potential pollution control technologies, it is hardly surprising that  
8 EPA “could not identify a suitable screening-level tool for evaluating the economic affordability of  
9 treatment or process technologies.”<sup>33</sup> Without any identified technology, EPA had no information  
10 to assess cost feasibility. *Compare Natural Resources Defense Council v. EPA, supra*, 863 F.2d at  
11 1426-1427 (court reviews EPA’s BAT analysis of identified control technologies with the potential  
12 for reducing pollutant discharge); By instead focusing on its admittedly incomplete data sets  
13 regarding the health and environmental risk posed by point source discharge categories, EPA turns  
14 the required analysis under Section 304(b) on its head, thereby completely avoiding any assessment  
15 of technological feasibility or the extent to which technological advances could eliminate pollution  
16 discharges. *See* 33 U.S.C. § 1314(b)(2) & (3.)

#### 17 **4. EPA’s Risk Assessment Review is Likely to Lead to Continued Delay in** 18 **Updating Existing Effluent Guidelines**

19 EPA’s annual review for 2003 and 2004 is not likely to “press toward increasingly higher  
20 levels” of pollution control technology forward towards the statutory goal of eliminating the

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22 <sup>32</sup>*Kennecott v. EPA, supra*, 780 F.2d at 448 (“In setting BAT, EPA uses not the average  
23 plant, but the optimally operating plant, the pilot plant which acts as a beacon to show what is  
24 possible.”) (emphasis added.) *NRDC v. Train, supra*, 510 F.2d at 706 (“[T]he Administrator, by  
25 regulations, is to identify the degree of effluent reduction attainable by the application of the best  
26 practicable control technology currently available for classes and categories of point sources.”)  
27 (emphasis added.)

28 <sup>33</sup>EPA also states that EPA “could not produce an economic analysis of all industry  
categories with existing effluent guidelines with the resources and time available as this universe  
of facilities is too numerous, broad, and complex.” *See* Graf Ex. 10, p. 3.

1 discharge of pollutants, as envisioned by Congress in passing the CWA Amendments in 1972. (Graf  
2 Decl., Ex. 6 (Senate Report, pp 50-51; 1972 Legislative History, p. 1468-1469.)) Indeed, the slow  
3 pace of EPA's actions of setting and revising applicable effluent guidelines prompted Congress to add  
4 the Section 304(m) requirement that EPA establish a plan, subject to review, setting forth a schedule  
5 for the annual review of existing EFGs and the identification of new discharge categories:

6       Although EPA continues to move forward with developing guidelines for the installation of  
7       cleanup technology for both direct and indirect dischargers, the slow pace in which these  
8       regulations are promulgated continues to be frustrating.

9 (Graf Decl., Ex. 6 (Senate Report, p. 3, 1987 Legislative History, p. 1424.))

10       Instead of pushing the effluent guideline revision process forward, the EPA has adopted a  
11       review strategy based on risk assessment which is designed to delay the revision of existing guidelines  
12       for decades to come. First, EPA's screening process based on risk assessment eliminates most effluent  
13       categories from any review of BAT or technology capable of reducing pollutant discharge altogether.  
14       *See* Graf Decl., Ex. 1 at 53717 ("EPA will conduct more detailed analyses of those industries that  
15       rank high in terms of toxic and non-conventional discharges among all point source categories.")  
16       In 2003 and 2004, EPA used this process to limit its technology review to only two industrial  
17       categories. *See* Graf Decl. Ex. 2 at 75522. Yet even for these categories, EPA applied risk  
18       assessment to eliminate all but two "subcategories" of concern. Even for these "subcategories" EPA  
19       promises to conduct risk assessment to determine whether effluent guideline revisions are warranted.  
20       The same is true for the two new industrial categories identified by EPA. Even if EPA identifies a  
21       category for possible revision, EPA emphasizes that such a decision "does not in any way constitute  
22       a final decision to revise the guideline or guidelines." Graf Decl., Ex. 1 at 53718.

23       Second, EPA asserts its right to delay review of technology advances based on EPA's lack  
24       of information regarding the respective risks posed by effluent guideline categories to water quality.  
25       *See e.g.*, Graf Decl., Ex. 2, at 75522. ("EPA identified seven other industrial point source categories  
26       with relatively high estimates of potential hazard or risk, but also identified significant data gaps or  
27       issues affecting the Agency's estimates of these hazards or risks.")

1 This approach violates the statutory requirement that EPA review existing effluent guidelines  
2 on “annual” basis according to the technology factors set forth for BAT in Section 304(b)(2)(B) of  
3 the CWA, or review effluent limitations for BAT every 5 years. *See* 33 U.S.C. § 1311(d); 1314(b.)  
4 Here, under EPA’s approach the vast majority of effluent guideline categories will never undergo  
5 technology based review, while EPA meanwhile continues to conduct risk assessment based on  
6 incomplete data to determine whether to conduct a “detailed investigation.” This result is directly  
7 at odds with Congress’ technology based approach to regulation of point source discharges. (*See*  
8 Graf Decl., Ex. 6 (Senate Report, p. 42; 1972 Legislative History, p. 1460) (“ [I] ndustry will be  
9 required every five years to re-evaluate its control efforts and to apply the best technology then  
10 available; [I]ndustries will have to show every five years that no-discharge is not attainable.”))

11 Further, delay based on data gaps regarding the precise link between discharge and water  
12 quality was precisely the type of risk assessment analysis that Congress intended to avoid in passing  
13 the 1972 CWA amendments, which the Senate Report referred to as a “substantial change” required  
14 due to “the great difficulty associated with establishing reliable and enforceable precise effluent  
15 limitations on the basis of a given stream quality.” (Graf Decl., Ex. 6 (1971 Senate Report, pp. 7-8;  
16 1972 Legislative History, p. 1425-1426.)) In 1987, Congress reaffirmed the technology based  
17 approach due in part to the “significant gaps in knowledge” regarding the link between water quality  
18 and effluent discharge.” (Graf Decl., Ex. 7 (Senate Report, p. 3, 1987 Legislative History, p. 1424.))

19 Court decisions have uniformly held that the lack of comprehensive data is no excuse to avoid  
20 the adoption of effluent guidelines where advances in pollution control technology have been  
21 demonstrated. *See NRDC v. EPA, supra*, 863 F.2d at 1426 (“ The legislative history of the Act  
22 supports our conclusion that EPA should not delay requiring technologically feasible limitations as  
23 BAT in order to wait for precise cost figures.”) Here, EPA’s delay is due to data gaps regarding  
24 water quality impacts, not an enumerated factor in establishing BAT under Section 304(b)(2)(B).<sup>34</sup>

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26 <sup>34</sup> EPA has not reviewed effluent guidelines for many categories for over twenty years. *See*  
27 Graf Decl. Ex. 11 Appendix 1 (EPA has not reviewed BAT for (1) Electroplating since 1981, (2)  
28 Ore Mining since 1988, (3) Battery Manufacturing since 1986, (4) Plastic Manufacturing (5)

1           **5.     EPA May Not Exempt from Review Effluent Guideline Categories for Industries**  
2           **Discharging Pollutants from a Point Source**

3           Even for industries that make it through EPA’s ‘screening’ level process for effluent  
4 guidelines review, EPA still claims discretion not to examine whether available and feasible  
5 technology exists to reduce or eliminate pollution discharges based on factors not listed in CWA  
6 Section 304(b) that are at odds with Congress’ intent to establish uniform technology-based controls  
7 that set a minimum national standard for point source pollution control.

8           First, as discussed, EPA chose not to consider available technology for industries with  
9 significant discharges due to data gaps in EPA’s risk assessment. (*See* Graf Decl., Ex. 2, at 75522.)

10          Second, EPA eliminated industries from review based on its conclusion that pollutant  
11 discharges were not causing water quality impairment. (*See* Graf Decl., Ex. 1 at 53713-53716.)

12          Third, EPA eliminated industries from review based on its conclusion that there are only a few  
13 discharging facilities in that industry that pose risks to water quality. (*Id.* at 53713, 53715.)

14          Fourth, EPA eliminated industries from review based on its conclusion that the water  
15 pollution problems associated with that industry are being “efficiently” addressed by other regulatory  
16 or non-regulatory programs. (Graf Decl., Ex. 1, 53713-53716, Ex. 2 at 75522.)

17          These “exemptions” from the requirements of CWA Sections 304(b) and 301(d) are unlawful  
18 for several reasons. First, as discussed, they ignore the legally relevant question of whether feasible  
19 technology is available to reduce discharges.

20          Second, the exemptions ignore the role of effluent guidelines in establishing a minimum floor  
21 below which pollution discharge may not go. EPA’s assumption that industries are in some cases  
22 better left unregulated ignores the fundamental purpose of the 1972 CWA Amendments, which was  
23 to safeguard against industrial pressures by establishing “uniformity within a ...category of point  
24 sources ..and to avoid imposing ...any requirement to consider the location of sources...to ascertain

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26 Metal Molding since 1986, (6) Coil Coating since 1985, (7) Porcelain Enameling since 1985, (8)  
27 Aluminum Forming since 1988, (8) Copper Forming since 1986, (9) Electrical and Electronic  
28 Components since 1985, and (10) Nonferrous Metals Forming and Metal Powders since 1989.)

1 water quality impact of effluent controls or to determine the economic impact of controls on any  
2 individual plant in a single community.” (Graf Decl., Ex. 6, (1972 Legislative History at 170.)

3 EPA’s approach ignores the specific statutory provisions of the CWA that allow individual  
4 facilities to obtain “variances” from effluent requirements based on the “fundamentally different  
5 factors” applicable to their operations. *See* 33 U.S.C. 1311(n.) This section would be superfluous  
6 if EPA were able to simply dispense with the otherwise mandatory application of effluent guidelines  
7 and limitations to point source discharges. *See* 33 U.S.C. 1311(a)-(b).<sup>35</sup> In short, EPA’s resources  
8 are not better used on a facility by facility analysis, where a promptly enacted effluent guideline would  
9 allow for streamlined permitting to occur in the future.

10 In sum, EPA’s various attempts to rationalize why no effluent guidelines are required for  
11 polluting industries runs directly counter to Congress’ intent in adopting uniform, technology-based  
12 standards to control point source pollutant discharge. Indeed, EPA’s argument for regulatory  
13 “flexibility” ignores the fact that effluent guidelines and limitations do not require polluting industries  
14 to adopt a specific technology. Instead, dischargers may reduce or eliminate their pollutant discharge  
15 any way they wish. If an industry can do so through voluntary measures that do not involve BAT,  
16 BCT or NSPS, it is free to do so and still will be in compliance with the CWA. In the meantime,  
17 however, the CWA does not allow EPA to avoid establishing or revising effluent guidelines while it  
18 attempts to determine the relative harm caused by individual discharging facilities.

19 **C. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FOURTH  
20 CLAIM FOR RELIEF SINCE THE 2004 EGP IS CONTRARY TO LAW**

21 **1. The 2004 EGP Fails to Establish a Schedule for Review of Effluent Guidelines  
22 in Accordance with CWA Section 304(b.) (§ 304(m)(1)(A))**

23 The 2004 EGP purports to comply with the CWA Section 304(m)(1)(A) requirement to

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24 <sup>35</sup>In practice, “best professional judgment” permit issuance has been less than successful,  
25 and is typically plagued by exactly the problems that led Congress to adopt uniform national  
26 technology based standards in 1972. *See NRDC v. Reilly, supra*, 1991 U.S. District LEXIS 5334,  
27 \* p. 25 (“In addition to being extremely expensive and time-consuming, permit-by-permit  
28 development of effluent standards results in disparities in standards among states, causing industry  
to forum shop for the states with the most lenient water pollution control standards.”)



1 establish a schedule for the annual review and revision of promulgated effluent guidelines in  
2 accordance with CWA Section 304(b):

3 The schedule is as follows: to coordinate its annual review of existing effluent guidelines  
4 under section 304(b) with its publication of preliminary and final Effluent Guidelines Program  
Plan under CWA section 304(m).

5 (*See Graf Decl., Ex, 1 at 53716.*) As discussed above, EPA’s purported “annual review” applies a  
6 screening process that does not consider the CWA Section 304(b) factors for availability and  
7 feasibility of improved pollution control technology for nearly all the 56 effluent guideline categories.  
8 Since this procedure is not “in accordance with” CWA Section 304(b), the 2004 EGP schedule  
9 incorporating this procedure must also be illegal. This conclusion is supported by *NRDC v. Reilly,*  
10 *supra*, 1991 U.S. District LEXIS 5334, \* pp. 17-19, which held that CWA Section 304(m)(1)(A)  
11 imposed a duty on EPA to set forth a schedule for review in accordance with Section 304(b):

12 The court must assume that in passing § 304(m)(1)(A), Congress had a purpose in mind.  
13 Reading the whole of § 304(b), rather than focusing solely on the two words "if appropriate"  
14 allows the court to arrive at an interpretation of the § 304(m)(1)(A) which gives import to  
15 all the words of the statute and credits Congress with passing legislation which is not merely  
16 redundant. ...Understanding the section (b) reference as a Congressional command to review  
and revise guidelines in conformity with the parameters set out at length in § 304(b) makes  
logical sense and allows this court to interpret § 304(m)(1)(A) in a way which does not render  
the words of the statute superfluous.

17 Since EPA’s schedule of review intends a risk assessment “screening” process inconsistent with CWA  
18 Section 304(b), the 2004 EGP fails as a matter of law. Further, this persuasive reasoning rejects  
19 EPA’s belief that Section 304(m) “scheduling” requirement is simply a mechanism through which  
20 “EPA’s priority-setting processes would be available for public viewing.” (*Graf Decl. Ex. 1 at 53719.*)

21 **2. The 2004 EGP Fails to Identify Categories of Industries Not Subject to Existing**  
22 **Effluent Guidelines that Discharge Non-Trivial Amounts of Pollutants (§**  
**304(m)(1)(B))**

23 The 2004 EGP states that the “universe of industrial categories potentially subject to section  
24 304(m)(1)(B) is limited” and does not apply to industrial subcategories discharging significant  
25 amounts of toxic or conventional pollutants. (*Id.*, p. 53718.) EPA’s background technical documents  
26 list eight industries that currently lack effluent guidelines, *see* EPA DCN 01200, pp. 8-9, but do not  
27 identify any for effluent guideline promulgation based on EPA’s finding that they are “subcategories”

1 of existing categories.<sup>36</sup> The CWA legislative history indicates that Congress intended EPA to  
2 regulate all “non-trivial” discharges through the effluent guidelines process under CWA Section  
3 304(b.) Thus, EPA’s determination that it need not identify and regulate industries discharging non-  
4 trivial amounts pursuant to CWA Section 304(m)(1)(B) is contrary to law.

5 EPA also argues that industrial categories that pose an “insignificant risk to human health or  
6 the environment” need not be identified under CWA Section 304(m)(1)(B) since such discharges  
7 should be considered “trivial.” (Graf Decl. Ex. 1 at 53719.) EPA misstates the applicable legislative  
8 history. The Senate Report notes that the determination of which discharges should be subject to  
9 effluent guidelines “does not require the Administrator to make any determination of environmental  
10 harm; any non-trivial discharges from sources in a category must lead to effluent guidelines.(emphasis  
11 added.) (Graf Decl., Ex. 7 (Senate Report, pp. 24-25, 1987 Legislative History, pp. 1445-1446.))  
12 This legislative history is consistent with the purpose and structure of the CWA, which does not  
13 authorize EPA to waive technology based regulatory requirements for point source dischargers based  
14 on EPA’s own determination regarding relative harm. Thus, EPA’s interpretation is contrary to law.

15 **3. The 2004 EGP Fails to Schedule Promulgation of Effluent Guidelines for Newly**  
16 **Identified Categories of Industry Point Source Pollution (§ 304(m)(1)(C))**

17 The 2004 EFG identifies two currently unregulated industries for potential promulgation of  
18 new effluent guidelines, airport deicing operations and drinking water supply and treatment. (Graf  
19 Decl. Ex. 1 at 53719-53720.) However, even for these new categories, EPA did not commit to  
20 enacting effluent guidelines within three years. *See e.g., id.* at 53719 (“[A]nnouncing a rulemaking  
21 schedule for these point source categories does not constitute a final decision that effluent guidelines  
22 in fact are appropriate for the identified point source categories.”) Since this posture does not comply  
23 with CWA Section 304(m)(1)(C), it is contrary to law. *See* 33 U.S.C. § 304(m)(1)(C.)

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26 <sup>36</sup>EPA did examine two of these industries, Petroleum Bulk Stations and Terminals, and  
27 Chemical Formulating, Packaging, and Repackaging operations, but determined that no action  
28 was necessary despite the fact that no effluent guidelines currently address the discharges from  
these industrial pollutant discharges. Graf Decl., Ex. 1 at 53713, 53715

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**V. CONCLUSION**

For the reasons stated above, the Court should grant Plaintiffs' Motion for Summary Judgment on its First, Second and Third Causes of Action.

Dated: February 28, 2005

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s/Michael Graf/  
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