No. 05-16214

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION
and ECOLOGICAL RIGHTS FOUNDATION
Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and
MICHAEL LEAVITT, as Administrator ,
Appellees.

On Appeal from the U.S. District Court for the Northern District of California

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APPELLANTS' REPLY BRIEF

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I. INTRODUCTION AND SUMMARY

In this proceeding, Plaintiffs OCE *et al.* challenge EPA's failure to adhere to a technology-based approach in reviewing existing effluent guidelines and limitations and promulgating new effluent guidelines and limitations. Such an approach is mandated by Congress' sweeping 1972 Clean Water Act (CWA) amendments, which require EPA to set and then update uniform national effluent guidelines and limitations based on the best available technology for pollution reduction or elimination. Returning to the pre-1972 approach, EPA has unlawfully determined that it will only revise or adopt new effluent guidelines for any given industry if EPA finds that industry's discharges pose *significant environmental risk.* By pre-screening industrial categories according to risk assessment criteria, EPA limits its actual "review" of effluent guidelines and limitations to two to three industries whose discharges EPA deems pose the greatest relative risk to the environment. Even for these few industries, EPA is declining to review existing or propose new effluent guidelines for some industries in favor of instead setting possibly varying effluent limitations facility by facility–thus ignoring Congress' mandate to set uniform national effluent limitations.

EPA is thus considering revising effluent guidelines and limitations for *only* industries that EPA ranks, by a system so flawed as to be little better than guess work,

as one of the two or three industries posing the greatest water quality risks. EPA is therefore granting all other industries, including those demonstrating promising technology advances in reducing or eliminating pollutants, *de facto* permanent exemption from more stringent technology-based regulation. Further, EPA's facility by facility effluent limitation approach risks return to the "race to the bottom" phenomena that undermined clean water regulation prior to 1972, when the lack of uniform national standards and parochial economic interest prompted local regulators to compete in making their regulations industry attractive.

EPA and Intervenors contend that OCE's challenge to EPA's effluent guideline and limitation review conducted under CWA §§ 304(b) and 301(d) and Effluent Guideline Plan ("EGP") prepared under CWA § 304(m) is not reviewable by this Court. As argued in Section II.D below, however, OCE's action is properly reviewed here on appeal under the CWA's citizen suit provision, CWA § 505(a)(2), because EPA has failed to comply with its non-discretionary duty to consider technology and cost feasibility factors when it determines whether it is "appropriate" to revise effluent guidelines and limitations under CWA §§ 304(b) and 301(d), and because EPA has failed to comply with mandatory duties set forth in CWA § 304(m).

EPA's jurisdictional arguments are contrary to case law, s*ee e.g., Environmental Defense Fund v. Thomas*, 870 F.2d 892, 898-900 (2d Cir. 1989), as

well as CWA § 304(m), which Congress enacted in 1987 out of "frustration with the slow pace" at which EPA was proceeding in reviewing and promulgating effluent guidelines. R. Ex. 12 at 0168. *NRDC v. Reilly*, R. Ex. 10 at 0149-0151. EPA's argument also conflicts with *Bennett v. Spear*, 520 U.S. 154, 172 (1997), which in addressing a citizen suit provision identical to that of CWA § 505(a)(2) held that "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision *does not confer discretion to ignore the required procedures* of decisionmaking." (emphasis added); *see also Florida PIRG v. EPA*, 386 F.3d 1070, 1087-88 (11th Cir. 2004).

Because EPA has failed to comply with nondiscretionary duties, OCE's actions were properly brought in the District Court, which has *exclusive* jurisdiction over CWA § 505(a)(2) claims. *See e.g., Trustees of Alaska v. EPA*, 749 F.2d 549, 559 (9th Cir.1984). Were this Court to assume jurisdiction over OCE's claims under CWA § 509 or the APA, EPA still failed to proceed according to law. *NRDC v. EPA* 966 F.2d 1292, 1297 (9th Cir. 1992).[1]

II. ARGUMENT

A. EPA'S RISK ASSESSMENT APPROACH TO REVIEW AND

[1]Even under CWA § 509, the Court must assume jurisdiction over OCE's case. *See* 28 U.S.C. § 1631; *McCauley v. McCauley*, 814 F.2d 1350, 1351-1352 (9th Cir. 1987); OCE's Opening Brief at 52-55; Section II.D.5, *infra.*

PROMULGATION OF EFFLUENT GUIDELINES AND LIMITATIONS IS CONTRARY TO THE CWA.

In its review of existing effluent guidelines and limitations and identification of industry targets for new effluent guidelines and limitations, EPA employs a risk-based analysis to screen out nearly all industries from additional effluent guidelines and limitations regulation. EPA employs this risk-based screen without reviewing whether current technology innovations could reduce or eliminate pollutants in these industries. EPA contends that it need not review or promulgate effluent guidelines for industries that EPA believes "are likely to pose an insignificant risk to human health or the environment." R. Ex. 7 at 0103.[2] EPA's risk-based approach to effluent guidelines and limitations review and promulgation contradicts CWA mandates.

1. Risk Assessment is Contrary to Technology-based Regulation.

The CWA is predicated on technological advance, driven by EPA regulation,

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[2] EPA's 2004 Effluent Guidelines Plan presents repeated examples of how "risk" has become the driving factor in EPA's effluent guideline review, revision and identification process. R. Ex. 7 at 0092 (EPA's annual review " represents a considerable effort by the Agency to consider the *hazards or risks* to human health and the environment from industrial point source categories."); at 0093 ("The first factor considers ... the extent to which these pollutants pose a hazard or risk to human health or the environment."); at 0094("EPA identified potentially *high risks or hazards* associated with discharges from two other industrial categories."); at 0094 ("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.") (emphases added.)

reducing and eventually eliminating *all* discharges of pollutants. *See* CWA § 101(a). Thus, the CWA requires EPA to set effluent guidelines and limitations requiring the level of effluent reduction "achievable" using the best available technologies, including zero discharge when achievable. CWA §§ 304(b)(2)(A), 304(b)(3), 301(b)(2)(A).

EPA's risk-based approach to reviewing existing and identifying potential new effluent guidelines and limitations ignores and subverts this central CWA regulatory scheme. Risk assessment does not seek to eliminate pollutants, but rather to *manage* their risk to human health or the environment. Congress determined in 1972, however, that regulation based exclusively on discerning and managing the hazards to water bodies posed by pollutant discharges had failed. Congress expressly mandated that this approach be abandoned in favor of requiring all industries to limit their discharges to that achievable with available technology as the first and fundamental step toward curtailing water pollution. *See Crown Simpson Pulp Company v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981) ("fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent."). The 1972 CWA Amendments provided that EPA could and should tackle water quality problems persisting despite application of BAT and BCT-based effluent limitations, under separate statutory

provisions not at issue here set forth in CWA § 303, but the CWA's secondary focus on assessing and tackling water quality problems *does not* authorize EPA to skip the Act's first focus on technology-based control. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976); *NRDC v. EPA,* 822 F.2d 104, 109-110 (D.C. Cir. 1988).

Implemented properly, the CWA's technology and water quality-based regulatory approaches are complementary. Meeting water quality standards may require industries to meet tougher limits than what are achievable by technology currently defined as BAT or BCT.[3] Meeting such limits necessarily forces technology forward, and the resulting technological innovations may form the basis for a review and revision of an effluent guideline for that industry.

Departing from the CWA's complementary design, EPA's effluent guideline review employs a crude, risk-based methodology not consistent with either technology or water quality based regulation. EPA is spending considerable resources on its risk-based toxic weighting system which informs EPA neither on pollution control technology innovations that EPA could define as BAT or BCT nor on how to restore water quality to specific water bodies pursuant to CWA § 303.

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[3]*See* CWA § 302(a). *See also* CWA § 302(c) (establishment of water quality based effluent limitations "shall not operate to delay" the identification and implementation of technology-based effluent limitations under CWA § 301.)

EPA's risk assessment methodology also only ranks the relative hazards posed by "toxic" and "nonconventional" pollutants,[4] thus necessarily ignoring risks posed by discharges of "conventional pollutants."[5] Given that EPA's methodology first requires EPA to determine that an industry's discharges are relatively more risky before EPA will even consider assessing whether the industry could employ better technology for pollutant reduction, EPA has effectively, and impermissibly, ruled out the possibility of updating its effluent guidelines and limitations for "best conventional pollution control technology" ("BCT") required by CWA §§ 304(b)(4) and 301(b)(2)(E).

2. The Record Reflects How EPA's Risk Based Approach Will Frustrate Technology-based Regulation.

In its effluent guidelines and limitations' reviews, EPA has improperly spent its resources attempting to rank the environmental risks posed by industries' discharges instead of, as the CWA requires, collecting and reviewing information on the availability of pollution control technologies capable of reducing or eliminating

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[4]*See* R. Ex. 7 at 0094 ("In particular, EPA ranked point source categories according to their discharges of *toxic* and *non-conventional* pollutants.") (emphases added). *See also* R. Ex. 15 at 0192-95 (explaining EPA's toxic weighting factors system used for this ranking).

[5] Conventional pollutants are defined by CWA § 304(a)(4) and EPA regulations set forth at 40 C.F.R. § 401.16.

pollutant discharge, including information on the innovative technologies already employed by "exemplary" facilities. *See* R. Ex. 7 at 0096-0100; *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. 64, 76 n.15 (1980). EPA's toxics risk screening level review methodology has effectively limited EPA's actual review of available technologies for reducing or eliminating pollutant discharge to one or two industrial categories per year. For the remaining 95% of effluent guideline and limitation categories,[6] EPA is simply no longer conducting technology-based review.[7] EPA did not review information in its possession on promising pollution control technology advances in many industries due to EPA's inability to identify the precise hazard or risk posed by that industry.[8] Even for industrial categories posing significant risk, EPA did not assess available technology advances where EPA was still reviewing the industries' toxicity data. *See* R. Ex. 8 at 0119. ("EPA ...identified significant data gaps or issues

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[6] EPA's current effluent guidelines regulations list 56 categories and about 450 subcategories of industrial point source dischargers.

[7] "EPA was unable to gather the data needed to perform a comprehensive screening-level analysis of the availability of treatment or process technologies to reduce hazard or risk beyond the performance of technologies already in place for the 56 industrial categories." R. Ex. 7 at 0094.

[8] EPA identified nine industrial point source categories as "potential candidates for effluent guideline revision based on potential opportunities to improve efficient implementation of the national water quality program" but "did not identify hazard or risks that appear to warrant effluent guideline revision." R. Ex. 8 at 0013-0014.

affecting the Agency's estimates of these hazards or risks.")[9] EPA's deferring review of effluent guidelines and limitations due to its uncertainty about environmental risks posed by the industries involved contradicts the CWA's requirement that EPA assess technology capable of reducing or eliminating pollutants.

EPA's risk focus also suffers the same shortcomings as those identified by Congress in 1972 when abandoning a "harm-based" regulatory approach.[10] EPA concedes the multiple flaws of its reliance on TRI and PCS data to assess environmental risks and its resulting inability to determine which industries are actually degrading water quality.[11]

3. EPA's May Not Exempt Industries from Effluent Guidelines and Limitations Where EPA Finds That a Few Facilities Pose the Most Significant Risk.

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[9] In its "review" of the Petroleum Refining Category, one of only two out of 56 effluent categories examined in 2004, EPA commented on information obtained from the Washington State Department of Ecology suggesting technology advancements but determined that it had no "present plans to revise the effluent guidelines." *See* R. Ex. 7 at 0098. Instead "permit writers can include limitations for these pollutants on a case-by-case, best professional judgment ("BPJ") basis under 40 CFR 125.3." *See* Section II.A.3 *infra*, (BPJ does not serve as substitute for national effluent limitations.)

[10] *See* Section II.B.2.d. *infra,* for a discussion of relevant CWA legislative history.

[11] *See* OCE's Opening Brief at 13-15. EPA has recently proposed regulations that would further *limit* the comprehensiveness of TRI data by eliminating many reporting requirements. *See* EPA's Proposed Rule: Toxics Release Inventory Burden Reduction, 70 FR 57822, October 4, 2005 (rule intended to"reduce reporting burden associated with the TRI reporting requirements.")

EPA proposes to exempt existing effluent guidelines from review and to not identify industries as targets for new effluent guidelines where EPA finds that the greatest risk to water quality is being caused by a few facilities within an industrial sector.[12] This approach directly contradicts the CWA requirement for uniform national effluent guidelines and limitations setting a technology-based, regulatory floor for allowable pollutant discharge:

> [T]his legislation would clearly establish that no one has the right to pollute - that pollution continues because of technological limits, not because of any inherent right to use the Nation's waterways for [discharge].

R. Ex. 11 at 0161.

CWA § 301(a) prohibits discharge except as in compliance with CWA §§ 301 and 402. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 133 (1977). CWA §§ 301 and 402, in turn, mandate a uniform technological floor of pollutant discharge limitation except in narrowly prescribed circumstances. EPA's risk-based approach impermissibly expands the limited circumstances under which

[12] *See* R. Ex. 7 at 0100-0101 (Table V-1) and R. Ex. 8 at 0114-0115 (Table VI-1), 0116-0117 (Tables VI-2, VI-3), & 0121(Table VIII-1) (proposing to exempt review of existing effluent guidelines). *See also* R. Ex. 7 at 0094 (no effluent guidelines for the newly identified industrial sectors in Petroleum Bulk Stations and Terminals and Chemical Formulating and Packaging based on EPA's risk-based findings that "individual facility permit support, rather than a national effluent guidelines rulemaking, may be the most appropriate course of action."); at 0099 (no national standards for the Petroleum Refining category discharge of dioxin and polycyclic aromatic compounds (PACs)).

an individual discharger may avoid uniform national effluent limitations.

One narrow exception to the nationally uniform effluent limitation requirement recognized by Congress was for the interim period it would take EPA to promulgate regulations setting nationally uniform effluent guidelines and limitations. Only during this interim period, EPA may set effluent limitations facility-by-facility in individual NPDES permits using best professional judgment or "BPJ." CWA § 402(a)(1)(B). *See, e.g., NRDC v. EPA*, 863 F.2d 1420, 1424 (EPA may use BPJ where "industry-wide guidelines have not yet been promulgated."). EPA is now proposing, however, to rely on BPJ-based ad hoc limits as its permanent approach to regulating whole industry sectors, thus employing what Congress meant to be a temporary, interim regulatory approach as the means permanently to sidestep setting uniform effluent guidelines for these sectors.[13] As one court pointed out, permanent reliance on BPJ permitting contradicts the CWA by "result[ing] in disparities in standards among states, causing industry to forum shop for the states with the most lenient water pollution control standards." *NRDC v. Reilly*, R. Ex. 10 at 0150.

CWA § 301(n) provides a second limited exception to nationally uniform

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[13] *See e.g.,* R. Ex. 7 at 0100 ("Given these toxic discharge distributions, EPA concluded that individual facility permit support, rather than a national effluent guidelines rulemaking, may be the most appropriate course of action"); at 0099 (EPA notes that "permit writers can include limitations for these pollutants on a case-by-case, best professional judgment basis.")

effluent limitations "in rare cases, based on the discharger's demonstration that it is 'fundamentally different' from other dischargers in the category or subcategory." *Texas Oil & Gas Association v. EPA,* 161 F.3d 923, 928 (5th Cir. 1998). EPA's approach contradicts the fundamentally different factors (FDF) test, which is limited to the specific criteria set forth under CWA § 301(n) and which dictates *no* consideration of the relative "risk" to water quality posed by the discharger. *Crown Simpson Pulp Company v. Costle*, 642 F.2d at 327(State Board erred in proposing a FDF variance for reasons relating to water quality); *Chemical Mfrs. Ass'n v. NRDC,* 470 U.S. 116, 132 (1985).[14]

B. EPA'S FAILURE TO CONSIDER TECHNOLOGY-BASED CRITERIA IN REVIEWING EFFLUENT GUIDELINES AND LIMITATIONS IS CONTRARY TO LAW.

OCE challenges EPA's failure to perform its nondiscretionary duty to consider

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[14] Further, the FDF test requires a showing that the specific characteristics of a facility were not considered in the rulemaking for the industrial category to which that facility belongs. *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. at 77-78. This test is inapplicable to industrial sectors presently unregulated by national standards.

The CWA allows a few additional potential limited exemptions from nationally uniform limitations, but these do not apply to toxic pollutants. *See* CWA §§ 301(c), (g), (l). Further, these exemptions assume that EPA has promulgated nationally uniform effluent limitations corresponding to up to date BPT, BAT and BCT.

technology and cost feasibility criteria in determining whether revision of effluent guidelines and limitations is "appropriate." EPA's failure thwarts the CWA's reliance on increasingly advanced pollution control technology to achieve the fundamental goal of eliminating pollutants from our Nation's waters.

As discussed in Section II.D *infra,* EPA's failure to comply with nondiscretionary duties is actionable under CWA § 505(a)(2)'s citizen suit provision. Whether the Court reviews EPA's actions under § 505(a)(2), the APA, or this Court's original jurisdiction under CWA § 509, EPA's actions are contrary to the CWA and thus unlawful.[15]

1. This Court May Find a Mandatory Duty Using Basic Tools of Statutory Interpretation.

To determine the existence of a mandatory statutory duty a court must be "careful to ascertain as precisely as possible the exact contours of congressional intent and of congressional delegation." *American Cetacean Society v. Baldrige*, 768 F.2d 426, 434 (D.C. Cir. 1985), *rev'd on other grounds*, *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221(1986). EPA argues that for a duty to be "clear cut," it must be readily apparent in the plain language of the statutory text. *See* EPA Brief at 26. However, *Farmers Union Cent. Exch., Inc. v. Thomas,* 881 F.2d 757, 760 (9th Cir. 1989), at most, requires a plaintiff to "point to a statute or

[15] *See* Discussion, Section II.E.1-2, *infra.*

regulation" to establish the duty.

The CWA, read as a whole, obligates EPA to review effluent guidelines and limitations according to technology-based criteria, and to issue an EGP that identifies unregulated industries discharging pollutants as targets for effluent guideline promulgation. *See* CWA §§ 301(d), 304(b) & 304(m); *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278, n. 6 (4th Cir. 1992) ("[T]he existence of a nondiscretionary duty could be recognized through application of Chevron's rule of construction"); *NRDC v. Train,* 510 F.2d 692, 706-707 (D.C. Cir. 1975) ("[T]he Act and its legislative history rein in the Administrator's discretion.").

2. EPA's Interpretation that it Can Ignore Technology and Cost Feasibility Criteria in Reviewing Effluent Guidelines and Limitations is Contrary to the CWA.

EPA erroneously argues that it need not consider the technology-based factors set forth in CWA §§ 304(b) and 301(b) in its reviews required under CWA §§ 304(b) and 301(d).[16] Under the first step of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837

[16] In the alternative, EPA contends "if the matter proceeded to a merits review, EPA believes it could show its approach reasonably accounted for technology through the assessment of hazard." EPA Brief at 31-32, n. 13. However, EPA has not made this argument, which is at any rate contrary to the technology-based approach since it is based on risk and not on the capacity to reduce pollutant discharge. *See also* R. Ex. 18 at 0214:1-3 ("The parties agree that the 2004 EGP moves away from the technology-based plans previously promulgated under a consent decree and this year, is based instead on a risk/hazard assessment methodology.").

(1984), the Court must determine whether Congress clearly intended EPA to consider CWA §§ 304(b) and 301(b) technology-based criteria in reviewing effluent guidelines and limitations. If so, that intent must be given effect. *Id.* at 842-843 & n. 9. If the Court finds that the CWA is ambiguous on the question, *Chevron*'s second step mandates asking whether EPA's interpretation is based on a permissible construction of the statute. *Id.* As discussed below, under either prong of *Chevron*, EPA's interpretation is erroneous.

a. EPA's Interpretation is Contrary to the Overall Purpose of Effluent Guideline and Limitation Review in Continually Updating Technology-Based Regulation.

To determine the plain meaning and purpose of relevant statutory provisions, the Court must examine "not only the specific provisions at issue, but also the structure of the law as a whole including its object and policy." *Almero v. I.N.S.*, 18 F.3d 757, 760 (9th Cir. 1993); *Katie John v. United States*, 247 F.3d at 1038-1042; at 1039 ("statutory terms must not be interpreted in isolation.")

EPA and Intervenors focus narrowly on CWA statutory provisions in isolation in arguing that the CWA does not require EPA to consider technology-based factors in its effluent guidelines and limitations review. EPA and Intervenors ignore the context of these provisions, which establishes that the function of effluent guideline and limitation review is to advance the statutory goal of eliminating pollutants from our Nations' waters via ever more stringent technology-based control.

CWA § 304(b) requires EPA to review and, if appropriate, revise effluent guidelines annually "[f]or the purpose of adopting or revising effluent limitations." To ensure that revisions to effluent guidelines lead to revisions in effluent limitations, CWA § 301(d) requires that any "effluent limitation" established under 301(b)(2) "be reviewed at least every five years and, if appropriate, revised" pursuant to that section. Accordingly, effluent limitations under § 301(b) must correspond to the control technologies identified as BAT and BCT under § 304(b). *See* CWA § 301(b)(2). In sum, Congress intended that EPA annually review available control technologies for possible revision of effluent guidelines under § 304(b) and incorporate any revisions into effluent limitations at least every five years pursuant to § 301(d).[17] *See NRDC v. EPA,* 822 F.2d at 110 ("[T]echnology-based effluent limitations...derive from standards formulated with reference to pollution control technology.").

The CWA requires effluent guidelines and limitations to require the maximum

[17] *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. at 124 ("The § 304(b) guidelines, according to EPA, were intended to guide it in later establishing § 301 effluent-limitation regulations.") *NRDC v. Train*, 510 F.2d at 707 ("The achievement of these limitations depends on coordination of the different roles played by sections 301(b), 304(b), and 402....") In implementing the 301(b) and 304(b) requirements through the promulgation of a single set of "effluent limitation guidelines," EPA fails to acknowledge the intended CWA structure that effluent limitations be brought up to date every five years pursuant to Section 301(d) with effluent guidelines subject to *annual* review under Section 304(b).

levels of pollutant reduction *achievable* by the best *available* technologies. *See* CWA §§ 304(b)(2); 301(b)(2). However, EPA's current risk-based review does not ask which technologies are *available* nor the level of pollution control *achievable* by such technologies. Accordingly, EPA does not know whether existing guidelines for numerous categories that have not been revised for 10 to 20 years[18] still reflect the "best available" technology for reduction or elimination of pollutants. Whereas CWA §§ 304(b)(2)(A) requires EPA to keep its regulations matched to currently available "treatment techniques, process and procedure innovations, operating methods, and other alternatives" for classes and categories of point sources, EPA is failing to consider the information in its reviews needed to so keep its regulations current.[19]

The CWA intends that EPA apply the best "available" technology that will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.[20] CWA § 301(b)(2)(A) states that "effluent limitations

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[18] *See* Amicus Brief of Natural Resources Defense Council and Waterkeeper Alliance dated October 17, 2005 (hereinafter "Amicus Brief") at 11-15 (providing detail on current outdated state of current effluent guidelines).

[19] In *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. at 76 n.15, the Supreme Court acknowledged EPA's definition of BPT as "based upon performance levels achieved by exemplary plants." Here, EPA has no information about the performance levels of *exemplary* plants that are redefining the level of control that is *achievable.*

[20] The CWA also requires reviews of effluent standards for toxic pollutants every three years, CWA § 307(a)(3), and of new source performance standards from "time to time." CWA § 306(b)(1)(B.)

shall require the elimination of discharges of all pollutants if the Administrator finds, on the *basis of information available to him*...that such elimination is technologically and economically achievable for a category or class of point sources." (emphases added).[21] Such information is also critical for EPA to establish federal standards of performance for new sources of industrial point source dischargers, including "where practicable, a standard permitting no discharge of pollutants." CWA § 306(a)(1).

These statutory provisions require EPA to review annually and every five years whether such new technologies have been developed that are capable of *eliminating* point source pollutant discharge[22] and to consider information on technology changes or innovations in updating new source performance standards.[23]

In contrast, EPA is not reviewing whether new technology is available and capable of reducing pollutant discharge, and thus is overlooking information about new innovative processes for pollution control or how exemplary plants are achieving higher levels of pollution control. Instead, EPA's current review is focused on the availability of toxic release information.

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[21] CWA § 304(b)(3) requires EPA to identify available control measures and practices that can "eliminate the discharge of pollutants."

[22] *See also* Legislative History in support at R. Ex. 11 at 0154, 0161; Discussion Section II.B.2.e, *infra.*

[23] EPA shall update its new source performance standards from time to time "as technology and alternatives *change*." CWA § 306(b)(1)(B). (emphasis added.)

EPA justifies this approach by arguing that the "review" requirements under §§ 304(b) and 301(d) are unrelated to the criteria for determining "appropriate" effluent guidelines and limitations. EPA even argues that EPA's effluent limitation review under CWA § 301(d) only requires reference to CWA § 301(b)(2) *if* EPA first determines revision is appropriate. EPA Brief at 29. Absent such a determination, EPA contends it has no obligation to consider available information showing that elimination of pollutant discharge is "technologically and economically achievable for a category or class of point sources." *See* CWA § 301(b)(2).

This exact argument was soundly rejected in *NRDC v. Reilly,* which found that Congress had commanded EPA to "review and revise guidelines in conformity with the parameters set out at length in § 304(b)." R. Ex. 10 at 0149.[24] Here, EPA's approach of focusing on toxic release data at the expense of information about the availability of new innovative pollution control technology ensures that EPA will not have the necessary information "available" to determine whether the elimination of pollutants is technologically and economically achievable.[25] *See NRDC v. EPA,* 822

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[24] EPA argues that *NRDC v. Reilly* is simply a district court decision, which is not binding on the 9th Circuit. While not binding, this decision is well-reasoned and thus persuasive. Further, this decision led to the Consent Decree that has controlled EPA's effluent guideline review process for the last decade.

[25] The Factor 2 Report indicates that EPA gathered secondary source (though no primary source) data on emerging treatment and process technologies for *only five industries*. R. Ex. 14 at 0188-0190.

F.2d at 124 ("As technology advances, EPA is instructed to revise its regulations at least annually, if necessary, and to revise effluent limitations every five years to reflect progress toward the goal of eliminating pollution."); *American Frozen Food Institute v. Train*, 539 F.2d 107, 116 (D.C. Cir. 1978) (§ 301(d) requires "continuing periodic review...until all discharges are terminated").[26]

EPA's approach also contradicts cases describing EPA's review in terms of reviewing the same data initially used to establish BPT, BAT and BCT. *Association of Pacific Fisheries v. Environmental Protection Agency,* 615 F.2d 794, 812 (9th Cir. 1980) held that EPA's review under CWA § 301(d) must revisit the same technological and economic analysis issues germane to setting effluent limitations to determine whether "*more extensive data* developed since the regulations were first promulgated" warrants revision of effluent limitations. *See also American Iron & Steel Institute v. EPA*, 526 F.2d at 1062 (CWA § 301(d) contemplates that "the accuracy of the [EPA's] evaluations and projections can be reviewed in the light of

[26] EPA is also not keeping up with alternative production processes or even new plant designs for new source standards, which are supposed to include "where practicable, a standard permitting no discharge of pollutants." CWA § 306(b)(1)(B); *NRDC v. EPA,* 822 F.2d at 123 ("In setting new source standards, EPA is statutorily required to give serious consideration to a standard permitting no discharge of pollutants"); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1058 (3rd Cir. 1975), cert. denied, 435 U.S. 914 (1978) (the "most effective and least expensive approach to water pollution" is to require "maximum feasible control of new sources, *at the time of their construction*.") (emphasis added).

actual experience.”).

The purpose of revisiting prior determinations regarding which technology based controls are appropriate is to force technology forward, leading to the eventual elimination of pollutants. As stated by this Court in *NRDC v. EPA,* 863 F.2d 1420 (9th Cir. 1988), EPA’s failure to review “pollutant limitations as BAT *when these limitations are technologically available*” would “frustrate congressional intent *to stimulate the use of innovative technology to reduce water pollution.*” *Id.* at 1427-1428 (emphases added). Similarly, the D.C. Court of Appeals states:

> [T]he regulatory scheme is structured around a series of *increasingly stringent* technology-based standards...the most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is *technology-forcing...*The essential purpose of this series of ...technology-based standards was *...to press development of new, more efficient and effective technologies*. This policy is expressed as a *statutory mandate*, not simply as a goal.

NRDC v. EPA, 822 at 123 (emphases added).

b. EPA’s Prior Interpretation is Contrary to its Position in Litigation

Prior to this litigation, EPA opined in the Federal Register that “review” of effluent guidelines and limitations should employ the same factors used to identify and revise such regulations. *See* R. Ex. 8 at 0111 (“EPA interprets the statute to authorize EPA to employ the same factors for its annual review that it would consider in selecting BAT in a rulemaking context.); R. Ex. 7 at 0091 (“304(b) also specifies

factors that EPA must consider when deciding whether revising an effluent guideline is appropriate.")

EPA never made a determination, prior to litigation, that it need not consider technology and cost feasibility factors in reviewing effluent guidelines and limitations. Instead, EPA created a four factor test, then simply dispensed with a review of the second, third and fourth factors based on EPA's realization that it lacked information as to available technologies to reduce or eliminate pollutant discharge.[27] EPA's change of position on this issue in this proceeding means that its interpretation is entitled to no deference. *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992); *Katie John v. United States*, 247 F.3d at 1038.

c. EPA Does Not Have Discretion to Ignore the Factors Required to Establish Effluent Guidelines in Its Effluent Guidelines Review.

EPA also argues that even if it is required to review effluent guidelines according to "factors" set forth in CWA § 304(b), this legislative delegation is "broad and flexible" because it allows EPA to "consider such other factors as the Administrator deems appropriate." *See* EPA Brief at 30.

CWA § 304(b)(2) states that EPA "*shall take into account* the age of equipment

[27] *See* R. Ex. 7 at 0094 ("EPA was unable to gather the data needed to perform a comprehensive screening-level analysis of the availability of treatment or process technologies to reduce hazard or risk beyond the performance of technologies already in place.")

and facilities involved, the process employed, potential process changes, the cost of achieving such effluent reductions, non-water quality environmental impacts, including energy requirements, *and* other *such* factors as the EPA Administrator deems appropriate."(emphases added). EPA may not avoid the statutory directive to "take into account" factors relating to the technological feasibility of more advanced pollution control technology.[28] *See Texas Oil & Gas Association,* 161 F.3d at 934 ("EPA...is not free to ignore any individual factor entirely.").

EPA's interpretation would negate the CWA mandate that EPA continually update its effluent guideline definitions of BAT and BCT until all pollutant discharge is eventually eliminated.[29] To determine whether it is "appropriate" to revise effluent guidelines, EPA must *first* identify whether there are available technologies capable of more effective pollution reduction.[30] Without this first step, EPA has no basis to assess technical feasibility, costs versus benefits of pollution reduction, or any other

[28] The interpretive doctrine of *ejusdem generis* requires that any "such" additional factors the EPA considers be consistent with the technology-based approach in establishing BAT or BCT. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003).

[29] EPA also ignores CWA § 304(b)(3) requiring EPA to "identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources." *See also* CWA § 301(b)(2).

[30] Among the four factors EPA originally intended to use for effluent guideline and limitation review, factors two, three and four all require EPA *first* to identify a potentially innovative treatment technology to begin the review process. *See* R. Ex. 7 at 0093.

factor relevant to determining whether its BAT or BCT definitions remain current.[31]

d. Were this Court to Consider Congress' Intent Ambiguous, EPA's Interpretation is Contrary to Legislative History.

The CWA unambiguously reveals Congress' intent that EPA conduct its effluent guideline review based on the same technology and cost feasibility criteria that are used to identify such guidelines in the first instance. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context ...."); *Katie John v. United States*, 247 F.3d at 1039.[32]

If the CWA were seen as ambiguous, however, CWA legislative history makes plain that Congress intended EPA's effluent guidelines review to focus on technology-based criteria rather than a risk-based assessment. EPA's contention that legislative history is irrelevant, EPA Brief at 31, contradicts 9th Circuit precedent. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d at 1453 ("It is naive, or disingenuous, to suggest that courts should not consider legislative history when attempting to determine the meaning of statutes"); *Almero v. I.N.S.*, 18 F.3d at 760 (Court "may

[31] EPA also argues that its obligation to consider technology-based factors in rulemaking means EPA need not consider such factors in its review of effluent guidelines and limitations. *See* EPA Brief at 29-30. This argument ignores the purpose of effluent guideline and limitation review to identify innovative technologies on which new, updated regulatory standards may be based.

[32] Whether a statute is ambiguous is a pure question of law to be determined by the court, not by the parties or by an administrative agency. *Id.* at 1041-1042.

make use of legislative history to illuminate the intent and meaning of a provision.”)[33]

Congress’ turned to a technology-based regulatory approach because it concluded that the prior approach based on risk to water quality “has been inadequate in every vital aspect." *EPA v. California,* 426 U.S. at 204. Technology-based controls make it “unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. “ *Id*. Instead, “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 other polluters must collectively conform.” *Id.* at 204-205. *See* R. Ex. 11 at 0164-0165 (“Administrator should 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.”).

Congress envisioned that EPA would press for more effective technology to eliminate pollution discharges:

> [T]his section requires increasingly tougher controls on industry; [I]ndustry will be required *every five years* to re-evaluate its control efforts and to apply the best technology then available; [I]ndustries will have to show *every five years* that no-discharge is not attainable.

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[33] Numerous case decisions have consulted CWA legislative history to gain more thorough understanding behind Congressional intent. *See e.g., NRDC v. EPA,* 863 F.2d at 1426-1427.

R. Ex. 11 at 0161(emphasis added). *See also id.* at 0164. This language illustrates that in enacting CWA § 301(d), Congress intended EPA to determine whether effluent limitation revision is "appropriate" every five years based on "research and development of *new* processes" and other such "*improvements in technology.*" *Id*. at 0161.

The 1987 CWA Amendments legislative history corroborates these points, stating that:

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

R. Ex. 12 at 0168 (emphases added). The 1987 Amendments added CWA § 304(m) to ensure public and judicial oversight over what Congress found to be the frustratingly "slow pace" of EPA's implementation of its obligations to establish and review effluent guidelines for *technology-based* point source discharges. R. Ex. 12 at 0168. CWA § 304(m)'s requirement that EPA establish a publicly reviewed schedule for effluent guideline revision demonstrates that Congress did not intend EPA to abandon technology-based controls.

Congress enacted the technology-based approach because prior attempts to control discharges based on estimated risk to water quality had proven unworkable.

See R. Ex. 11 at 0158 ("The Committee adopted this substantial change because of the *great difficulty* associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality") (emphasis added); at 0158 ("With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality"); *EPA v. California*, 426 U.S. at 203-204; *see also* 1987 Amendments, Ex. 12 at 0168 (water quality-based approach has been historically ineffective); at 0173 (EPA need not "make any determination of environmental harm.").

C. EPA'S EFFLUENT GUIDELINES PLAN DOES NOT COMPLY WITH THE REQUIREMENTS OF CWA § 304(M)

1. Congress Intended EPA's Compliance with CWA § 304(m) to be Reviewable.

EPA argues that this Court may not review whether EPA's Effluent Guideline Plan complies with the requirements of CWA § 304(m). This exact claim was soundly rejected by the D.C. District Court in *NRDC v Reilly,* R. Ex. 10 at 0148-0150, and should be rejected by this Court as well. *See* Discussion, Section II.D.3.b. *infra*.

2. The EGP is Contrary to Law Because it Establishes a Schedule that is Based on EPA's Violations of the CWA.

EPA's 2004 EGP schedule for review established under CWA § 304(m)(1)(A) is based on an unlawful risk based screening process which does not consider technology based factors and thus is not "in accordance with" CWA § 304(b).

Instead, EPA's "schedule" for review is limited to those one or two industries out of hundreds that EPA prioritizes as posing the greatest "risk." Further, EPA's data review, limited to toxic and non-conventional pollutants, by definition does not consider the potential for innovative technologies to address conventional pollutants.

EPA's schedule for "revision" is also contrary to the CWA, both because it does not consider technology-based factors and because it allows certain industrial sectors to avoid revised effluent guideline limitations altogether, in favor of a facility by facility approach contrary to the CWA. In sum, because EPA's schedule is the product of a flawed methodology inconsistent with the technology-based approach to establish uniform national effluent standards, it is contrary to CWA § 304(m).

3. The EGP Fails to Identify and Promulgate Effluent Guidelines for Industries Discharging Pollutants into our Nations' Waters.

a. The Plan Incorporates EPA's Unlawful Risk-Based Exemptions for Effluent Guideline Promulgation.

The 2004 EGP states that "the universe of industrial categories potentially subject to § 304(m)(1)(B) is limited." R. Ex. 7 at 0102. The 2004 EGP does not schedule the promulgation of revised or new effluent guidelines for industries discharging toxic and non-conventional pollutants where EPA lacks sufficient information to determine significant risk or where EPA decides to regulate on a

facility by facility basis.[34] This approach contradicts the CWA's requirement that polluting industries be subject to uniform national effluent limitations after the interim period needed to develop effluent guidelines and limitations regulations (except for rare facilities qualifying for FDF exemptions). *See* Section II.A.3. *supra* re how EPA's risk based exemptions do not meet these criteria.[35]

b. EPA Cannot Avoid Promulgating Effluent Guidelines by Characterizing an Industrial Sector as a "Subcategory."

The 2004 EGP attempts to avoid the three year deadline for promulgating effluent guidelines under CWA § 304(m)(1)(C) by characterizing industries discharging pollutants as "subcategories," which, according to EPA, do not require identification under CWA § 304(m)(1)(B). EPA then determines that no effluent

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[34] EPA's proposed EGP proposes not to promulgate effluent guidelines for several industries currently not regulated by effluent guidelines. *See* R. Ex. 8 at 0121 (Table VIII-1). EPA declines to promulgate effluent guidelines for industries lacking national standards, including Petroleum Bulk Refining and Chemical Formulating and Repackaging, R. Ex. 7 at 0097, 0100, and for dioxin in Petroleum refining output despite EPA's concession that "dioxins," one of the most potent of all toxic chemicals, is "occasionally discharged." *See* R. Ex. 7 at 0099.

[35] Even where EPA has itself identified a "category" under CWA § 304(m)(1)(B), EPA has impermissibly declined to promulgate effluent guidelines. In 2004, EPA withdrew the newly identified construction industry from further rulemaking based on EPA's decision that the sediment and associated toxic runoff pollution from this industry could be best addressed without the need for national effluent standards. *See* R. Ex 7 at 0099. *See e.g.,* 69 Fed Reg. 22472 (April 26, 2004) ("EPA determined that uniform national technology-based standards are not the most effective way to address storm water discharges from construction sites at this time.").

guidelines are necessary because discharge from the majority of facilities in these industrial sectors do not pose "significant risk." *See, e.g.,* R. Ex. 7 at 0097 (no uniform standards for Chemical Formulating, Packaging, and Repackaging industries); at 0099-0100 (no standards for Petroleum Bulk Stations and Terminal industries).

As discussed, this result contradicts the CWA, which requires industrial pollutants to be regulated according to national uniform standards established under CWA § 301(b) in accordance with the technology-based approach set forth in CWA § 304(b). While EPA has discretion to determining how to group and regulate industrial sectors, it may not avoid national standards for new industrial sources of pollutant discharge by simply characterizing them as part of a larger existing category.

Given the CWA purpose to regulate, with limited exceptions, all pollutant discharge according to uniform standards, the term "categories of sources" set forth in CWA § 304(m)(1)(B) must be interpreted to mean "similar point sources with similar characteristics" which must "meet similar effluent limitations." *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. at 130.[36]

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[36] In *Chemical Mfrs. Ass'n v. NRDC,* the Supreme Court appeared to condone an approach in which FDF variances could be used as effluent standards applicable to identified industry subcategories. 470 U.S. at 131 & n. 22. However, in contrast to EPA's approach, the Court assumed all facilities within such a grouping would be

Even if the Court were to find ambiguity, a review of the applicable legislative history shows that Congress intended that "any non-trivial discharges from *sources in a category* must lead to effluent guidelines." (emphasis added). R. Ex. 12 at 0172-0173. Congress did not intend that "sources in a category" be exempted from effluent guidelines simply because effluent guidelines already exist for the category as a whole. The only court to have addressed this issue, *NRDC v. Reilly,* interpreted § 304(m)(1)(B) to require all new industrial sources of point source pollution be identified in a 304(m) plan:

> Surely the Congress which passed § 304(m) out of frustration with the agency's sluggishness did not intend to confer upon the agency discretion to limit the scope and set the pace of effluent guidelines preparation simply by refraining from "identifying" known polluters.

R. Ex. 10 at 0150. The court noted that 304(m) imposed on EPA a "duty to continue collecting the technical data necessary" to list industries in need of effluent guidelines in future § 304(m) plans. *Id.* This was critical to maintain uniform national regulation to avoid "extremely expensive and time-consuming, permit-by-permit development of effluent standards," which cause "industry to forum shop for ...most lenient water

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regulated under uniform limitations. *Id.* at 130 ("similar point sources" must "meet similar effluent limitations.") The Court also noted that Congress did not intend that subcategories would be inconsistent with the "goal of uniform effluent limitations" but instead would simply require that EPA "establish subcategories to reflect ... differences in the effluent limitations and standards that are promulgated." *Id.*

pollution control standards.*"* *Id.*

c. EPA Cannot Avoid its Obligation Under CWA § 304(m)(1)(C) to Promulgate Effluent Guidelines for Categories Identified under CWA § 304(m)(1)(B).

Intervenors claim that EPA has the authority *not* to promulgate effluent guidelines for industrial categories that EPA has identified under CWA § 304(m)(1)(B). As discussed, however, EPA may not use "risk" as a basis for *not* promulgating effluent guidelines. Thus, EPA may not withdraw from the effluent guideline promulgation process industries identified under CWA § 304(m)(1)(B).[37]

4. EPA Did Not Approve the EGP in the Lawfully Required Manner under CWA § 304(m).

CWA § 304(m)(2) requires that the EGP be circulated for public review and comment *prior to* plan publication. Petitioner's Opening Brief argues that EPA must therefore consider public comments prior to commencing its effluent guideline review and promulgation process for the biennial EGP under § 304(m)(1).

EPA argues that there is no requirement the review process be based on the

[37]This issue is squarely presented in a case currently pending in the U.S. Central District of California, *NRDC, et al., v. EPA, et al.*, CV 04-8307 and potentially presented by a case pending in this Court, *NRDC v. EPA, et al.*, Case No. 04-74479. In this case, plaintiffs challenge EPA's failure to promulgate effluent guidelines for the construction industry despite having identified the construction industry pursuant to CWA § 304(m)(1)(B) as a discharger of toxic and non-conventional pollutants that lacks effluent guidelines. Since this issue is more fully briefed in the district court proceedings, which is likely to end up before this Court, it may be appropriate to defer decision on this issue and/or to consolidate consideration of the *NRDC v. EPA* case with consideration of this issue.

calendar year. Even if this were true, EPA must still have an accountable mechanism whereby public comment on a proposed plan is received, responded to and addressed when EPA issues its final EGP setting forth the regulatory determinations and resulting schedule that will drive EPA's agenda for the following two year period.

EPA, however, treats its draft and final plans as a continuing process in which the public may provide ongoing comments, which EPA need not review or consider prior to implementing its CWA § 304(m) duties. EPA's approach allows EPA to implement CWA § 304(m)(1) activities prior to having reviewed public comments and issued the final EGP. Here, EPA considered public comments at the same time it implemented the proposed EGP during the course of 2004. EPA treats its draft and final EGPs as simply ongoing progress reports which do not set a two year program for EPA, but instead merely keep the public informed, *after the fact*, of what EPA is doing. This violates § 304(m)(2), which requires public comment "prior to final publication" in order to ensure public review and input for EPA to incorporate into its final EGP schedule for the two year period covered by the plan.

D. OCE'S CLAIMS ARE REVIEWABLE BY THIS COURT.

EPA and Intervenors contend this Court lacks jurisdiction to reach the merits of OCE's claims. These jurisdictional arguments are entitled to no deference[38] and

[38] *Fox Television Stations, Inc. v. F.C. C.*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002) (no deference is owed to agency interpretations of a statute's of subject matter jurisdiction).

contradict applicable law.

CWA § 505(a)(2) grants district court jurisdiction over OCE's claims for EPA's failure to comply with mandatory CWA duties to perform a technology-based review of existing effluent guidelines and limitations and to adopt lawful EGPs. This Court thus has appellate jurisdiction over OCE's CWA § 505(a)(2) claims.[39] Alternatively, EPA's challenged actions may still be reviewed in District Court under the APA as a failure to act, or as agency conduct involving abuse of discretion or not in accordance with law. *See* 5 U.S.C. §§ 706(1)-(2). Finally, if original jurisdiction should lie under CWA § 509(b)(1), this Court should hear these claims via transfer ordered pursuant to 28 U.S.C. § 1631.

1. CWA § 505(a)(2) Grants District Court Jurisdiction Over *All* OCE's Claims Concerning EPA's Review of Existing Effluent Guidelines and Limitations.

As discussed above in Section II.B*,* EPA has a non-discretionary duty to consider technology and cost feasibility criteria in determining whether revision of effluent guidelines and limitations is "appropriate." *See* CWA §§ 301(b), 301(d), 304(b) & 304(m)(1). CWA § 505(a)(2) grants district court jurisdiction to hear OCE's claims that EPA failed to perform these non-discretionary duties.

CWA §§ 304 and 301(d) impose mandatory duties on EPA to review effluent

[39]EPA's position would lead to the elimination of citizen suit jurisdiction over a number of legal obligations placed in the Statute by Congress to ensure the CWA policy to *eliminate* pollutant discharge would be achieved.

guidelines and limitations not in the abstract, but to a focused purpose, to determine whether it is "appropriate" to revise them. Identical language in the federal Clean Air Act imposes a mandatory statutory duty both to review and decide whether to revise EPA regulations:

> [T]he words [revise EPA regulations] "as may be appropriate" clearly suggest that the Administrator *must* exercise judgment. . . . The district court thus does have jurisdiction to compel the Administrator to make some formal decision as to whether or not to revise the [regulations].

Environmental Defense Fund v. Thomas, 870 F.2d at 898-900. *See also Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 550-551 (D.D.C. 2005).

As discussed, the CWA read as a whole directs EPA, in determining whether to revise effluent guidelines and limitations, to consider the same criteria that EPA considered when it originally adopted those effluent guidelines and limitations. *E.g.*, R. Ex. 10 at 0149; *Pacific Fisheries*, 615 F.2d at 812.

EPA contends that CWA § 505(a)(2) mandatory duty jurisdiction extends only to adjudication of whether EPA has taken some kind of action to review effluent guidelines and limitations, regardless of how such review was conducted. *See* EPA Brief at 21. An agency's mandatory duties include consideration of the statutory criteria an agency must consider in making its decision, however. As the Supreme Court noted in interpreting identical citizen suit language:

> [T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his

> decision, he "take into consideration the economic impact, and any other relevant impact," and use "the best scientific data available." *Ibid*. It is rudimentary administrative law that discretion as to the substance of the ultimate decision *does not confer discretion to ignore the required procedures* of decisionmaking.

Bennett v. Spear, 520 U.S. at 172 (emphasis added).[40]

In *Florida PIRG v. EPA*, the Eleventh Circuit applied the same principle to a CWA § 505(a)(2) claim that EPA had not complied with all the steps required under CWA § 303(c) in reviewing a state water quality plan. 386 F.3d at 1087. Specifically rejecting EPA's argument that it had fulfilled its "mandatory duty" by simply conducting a cursory review, *Florida PIRG* held that "the only way in which the EPA can satisfy a mandatory duty is by actually discharging that obligation in the manner specifically required by the statute." *Id*. at 1087-88.

In EPA's cited case *City of Las Vegas v. Clark County*, 755 F.2d 697 (9th Cir. 1985), citizens challenged the substantive outcome of a discretionary EPA decision whether to approve a State water quality standard. *Id*. at 704. Here, in contrast, OCE is *not* challenging EPA's determination whether, for any particular guideline or limitation, revision is "appropriate" but instead EPA's failure to consider the CWA's mandatory criteria under CWA § 304(b) for deciding whether it is appropriate to

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[40] *See also Sierra Club v. Leavitt*, 355 F. Supp. 2d at 550; *Federation of Fly Fishers v. Daley*, 200 F. Supp. 2d 1181, 1186 (N.D. Cal. 2002).

revise effluent guidelines and limitations.[41]

2. CWA § 505(a)(2) Grants District Court Jurisdiction Over *All* OCE's Claims Concerning EPA's EGP.

As discussed above in Section II.C*,* EPA has a non-discretionary duty to publish timely EGPs that (1) include all three of the CWA § 304(m)(1) elements and (2) reflect decisionmaking methodology required by CWA § 304(m)(1). *See e.g.*, *Bennett v. Spear*, 520 U.S. at 172; *Florida PIRG*, 386 F.3d at 1088; R. Ex. 10 at 0148-0150.[42] CWA § 505(a)(2) grants district court jurisdiction to hear OCE's claims that EPA failed to perform these non-discretionary duties. *See, e.g.*, *Trustees for Alaska*, 749 F.2d at 558.

OCE is not challenging EPA's substantive discretionary decision in the EGP, such as whether a given industry meets the three criteria in § 304(m)(1)(B), but instead the methodology and criteria employed by EPA in making its determination. Thus, OCE's claims are for breach of a mandatory duty and reviewable in district

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[41] EPA also cites to *Kennecott Copper Corp., Nevada Mines Div., McGill, Nev. v. Costle*, 572 F.2d 1349 (9th Cir. 1978), but that case only holds that EPA "does not have a mandatory duty to approve either the revision or the variance." *Id.* at 1354. Here, OCE is *not* challenging EPA's substantive decisions as to which effluent guidelines to revise, only EPA's improper process in arriving at those decisions.

[42] OCE also submits with this Reply a copy of the C.D. California District Court's recent decision in the *NRDC C.D. Cal Case* that district court jurisdiction exists to review whether EPA has a mandatory duty under CWA § 301(m)(1)(C) to complete promulgation of new effluent guidelines within three years. *See* Appendix 1.

court.

3. The *Norton* Decision Precludes Neither CWA Nor, In the Alternative, APA Jurisdiction over OCE's Claims.

a. Norton's Holding Concerning APA Final Agency Action Is Inapplicable in this CWA Case.

EPA's contention that *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) precludes CWA jurisdiction over OCE's claims, *see* EPA Brief at 22-23, is erroneous, since *Norton* is limited to interpreting the "final agency action" requirement for judicial review imposed by APA § 706, a requirement absent from CWA § 505(a)(2). R. Ex. 18 at 0209-210 (District Court's decision finds *Norton* does not apply); *Trustees for Alaska*, 749 F.2d at 558; *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 851 (9th Cir. 1987) (APA review is not appropriate when CWA citizen suit provision provides remedy).[43]

b. *Norton* Does Not Address an Agency's to Follow Mandatory Procedures in Taking Required Actions.

As discussed, OCE's claims challenge EPA's failure to implement mandatory CWA procedural duties. CWA § 505(a)(2), or in the alternative, the APA, 5 U.S.C. § 706, codify traditional mandamus principles under which courts review whether an agency has performed a mandatory duty *in total and in the manner required*,

[43] EPA contends that the APA and CWA can concurrently provide jurisdiction. EPA Brief at 42-43. This is incorrect since CWA and APA jurisdiction are mutually exclusive. NACWA Brief at 8; EGIC Brief at 29, n.4; *ONRC*, 834 F.2d at 851.

including considering any factors an agency *must* consider in reaching decision. *See Bennett v. Spear*, 520 U.S. at 172; *Florida PIRG*, 386 F.3d at 1088; *Barron v. Reich* 13 F.3d at 1376 ("[M]andamus will lie when the standards have been ignored or violated.").[44]

Plaintiffs' CWA and APA claims challenge EPA's failure to conduct review and identify effluent guidelines and limitations as required by the CWA.[45] Under *Norton,* these claims are reviewable. 124 S. Ct. at 2379 ("[O]nly agency action that can be compelled ...is action legally required.").[46]

The procedural nature of Plaintiffs' claims are demonstratively different from the substantive challenge raised in *Norton* that BLM was impairing the suitability of Wilderness Study Areas for preservation as wilderness. Here, the CWA gives EPA specific recurring deadlines under CWA §§ 304(b) and 301(d) to perform a discrete task, to review all effluent guidelines annually and effluent limitations every five

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[44]A claim seeking mandamus is essentially one for relief under APA § 706. *See Japan Whaling Ass'n,* 478 U.S. at 230 n.4.

[45]*See* Plaintiffs' 1st Amended Complaint, ¶ 82.

[46]OCE complaint alleges that EPA *has not acted* to review effluent guidelines and limitations and adopt EGPs as required. Thus, to the extent this action is under the APA, it may be considered as an action under APA § 706(1) to compel agency action unlawfully withheld as well as an agency failure to proceed according to law. EPA's failure to take action required by statute meets the final agency action requirement since a contrary rule would allow EPA to nullify APA § 706(1) and block judicial review by simply never taking action, thereby frustrating Congress' intent in requiring these review procedures and in enacting CWA § 304(m).

years. In contrast to the general directives of the land use management plan in *Norton,* CWA § 304(m) requires EPA biennially to issue an EFG requiring EPA to identify and promulgate effluent guidelines for new industries discharging point source pollution. Ninth Circuit law states that whenever a required agency procedures will "will influence subsequent . . . specific actions," or "pre-determine" an agency's future decision options, the failure to follow such procedures constitutes reviewable final agency action. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1089-1091 (9th Cir. 2003). For that reason, cases such as *Environmental Defense Fund v. Thomas*, 870 F.2d at 898-899, and *NRDC v. Reilly*, R. Ex. 10 at 0148-0150, hold that the statutory requirements for effluent guidelines and limitations in CWA §§ 301(d), 304(b) and 304(m) are reviewable.

Here, EPA's effluent guideline and limitation reviews and EGPs have real consequence as they necessarily narrow and eliminate EPA's options for toughening CWA limitations for the Nation's industrial polluters. R. Ex. 7 at 0091. Accordingly, EPA's reviews are reviewable agency action, under either the CWA or APA.

Were EPA's approach to be adopted, *no court* would have jurisdiction or oversee any part of this process. Here, EPA claims unreviewable discretion to abandon the technology-based approach at the heart of the CWA in favor of an EPA-created risk-based approach that brings the updating of effluent guidelines to reflect new technologies to a halt. *See* Sections II.A-B, *supra*. Surely, Congress in enacting

304(m) to hasten what Congress saw as EPA's frustratingly slow pace in adopting and reviewing nationally uniform effluent guidelines and limitations, did not intend for EPA to have nonreviewable discretion to thwart Congress' mandate to update technology-based regulation. *See* R. Ex. 12 at 0168; *NRDC v. Reilly*, R. 10 at 1048-1050.

4. CWA § 509 Does Not Grant Court of Appeals Jurisdiction over OCE's Claims.

EPA inconsistently contends that CWA § 509 provides for exclusive Court of Appeals' jurisdiction in this case while also arguing that the District Court had enough jurisdiction under CWA § 505(a)(2) to rule in its favor. Apart from being internally inconsistent, EPA's argument contradicts both EPA's arguments in and the holding of the leading Ninth Circuit case on CWA § 509(b)(1) jurisdiction, *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1314 (9th Cir. 1992).[47]

CWA § 509(b)(1)(E) provides for exclusive court of appeals jurisdiction over "the [EPA] administrator's *action* . . . in *approving or promulgating*" CWA § 301 effluent limitations (emphasis added). EPA argues that CWA § 509(b)(1)(E)

[47] EPA contends that CWA § 505(a)(2) provides limited district court jurisdiction to review only whether EPA has done some form of review of effluent guidelines and limitations, but not jurisdiction to adjudicate whether EPA's reviews were conducted in the manner that the CWA requires. EPA Brief at 23-31. This argument would lead to a bifurcation of review over EPA's CWA duties, in which litigants would necessarily have to file separate actions in district court and the Court of Appeals to challenge EPA's conduct as contrary to the CWA.

jurisdiction includes all actions closely related to the actions literally listed in that section. EPA Brief at 50-54. This same argument was expressly rejected in *Longview Fibre*, 980 F.2d at 1314, which noted that the "narrowly and precisely" drafted provisions of § 509 must not be read "to imply a more general and broad coverage than the statutes designated."

OCE challenges EPA's failure to review effluent guidelines under CWA § 304(b) and effluent limitations under § 301(d) according to the required procedures. EPA's failure to *review* effluent guidelines and limitations is not functionally the same action as promulgation of CWA § 301 effluent limitations. Neither of these reviews constitute EPA "action" in "*approving or promulgating*" CWA § 301 "effluent limitations." OCE is not challenging the promulgation, or even the failure to promulgate, a specific limitation or guideline, but rather EPA's overall procedure in conducting its effluent guidelines and limitations reviews. In contrast, in *Maier v. EPA*, 114 F.3d 1032, 1038-39 (10th Cir. 1997), a case cited by EPA, the court found 509 jurisdiction by treating a challenge to EPA's refusal to revise a rule in the face of new information as "akin to a challenge to the existing rule."

Further, in challenging EPA's failure to take required action on effluent guidelines and limitations, OCE's claims are outside § 509 jurisdiction. *See Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 266 (5th Cir. 1989) (CWA § 509(b)(1)(E) assigns jurisdiction to court of appeals to review *only* EPA promulgation of effluent

limitations, not EPA delay in revising effluent limitations); *see also* R. Ex. 10 (D.C. District Court decision finding CWA § 505(a)(2) jurisdiction to review EPA failure to adopt proper EGPs); Reply Appendix 1 (*NRDC v. EPA*, slip op. at 1-5, C.D. Cal Aug. 29, 2005, finding that CWA § 509(b)(1)(E) does not apply to EPA's decision *not to* promulgate effluent guidelines or limitations).[48]

The cases EPA cites (EPA Brief at 51) for a contrary result actually do not contradict *Longview Fibre*. These cases find § 509 jurisdiction because the actions were deemed to be, or akin to, actions listed under CWA § 509(b)(1). *See National Wildlife Federation v. EPA*, 286 F.3d 554 (D.C. Cir. 2002); *NRDC v. EPA*, 673 F.2d 400, 405 n.15, 407 (D.C. Cir. 1982); *NRDC v. EPA*, 656 F.2d 768, 775-76 (D.C. Cir. 1981); *Virginia Elec. and Power Co. v. Costle,* 566 F. 2d 446 (4th Cir. 1977).[49]

Intervenor NACWA also argues that the public law which enacted the CWA

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[48] Similarly, EPA's adoption of EGPs that must under CWA § 304(m) set forth a schedule for review of existing effluent guidelines and identification of new industries for new guidelines is not reviewable under CWA § 509(b)(1) since it is not the functional equivalent of the actual promulgation of effluent limitations.

[49] EPA further relies on three Ninth Circuit decisions holding that the courts of appeals have exclusive jurisdiction to review EPA adoption of certain regulations governing the issuance and terms of NPDES permits. *See American Mining Congress v. EPA,* 965 F.2d 759, 763 (9th Cir. 1992); *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992); *Environmental Defense Ctr. v. EPA*, 344 F.3d at 874-76. Section 509 jurisdiction was not contested in these cases, however, and the courts provided no analysis of the bases for jurisdiction. To square with *Longview Fibre*, these decisions must be deemed to have found EPA adoption of these regulations tantamount to one of the actions expressly reviewable under CWA § 509(b)(1) and not merely closely related.

amendments of 1977 included an ultimately uncodified section providing that EPA's effluent guidelines review would be subject to Court of Appeals original jurisdiction. NACWA Answering Brief at 17-18. NACWA overlooks that this section applies only to EPA's one-time 1977 review of a subset of BCT effluent guidelines promulgated prior to 1977 and an additional one-time pre-1980 review of the remainder of EPA's BCT effluent guidelines promulgated prior to 1980.[50] This section does not apply to EPA's general mandatory obligations under CWA §§ 301(d), 304(b) and § 304(m).

5. If OCE's Claims Are Within CWA § 509(b)(1) Jurisdiction, They Should Be Transferred To This Court.

Assuming *arguendo* that CWA § 509(b)(1) provides for exclusive original court of appeals' jurisdiction over OCE's claims, the claims should be transferred to this Court pursuant to 28 U.S.C. § 1631. *See* OCE's Opening Brief at 52-55. 28 U.S.C. § 1631 provides for transfer "in the interest of justice" whenever a litigant 1) files timely claims in the wrong federal court, 2) was justifiably uncertain as to which federal court had jurisdiction, and 3) is precluded by a statute of limitations from refiling the claims in the proper court. *See McCauley v. McCauley*, 814 F.2d at 1351-52; *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). OCE meets these

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[50] Section 73 of Pub. L. 95-217 is actually consistent with OCE's arguments in this case since it required EPA to consider the same factors it had to consider when it first promulgated these effluent guidelines in determining whether to *revise* such guidelines. *See* Discussion, Section II.B *infra.*

requirements.

One, as detailed in OCE's Opening Brief at 54-55, OCE timely filed its claims in district court within the 120 day statute of limitations. Two, the case law cited by OCE, at the least, establishes justifiable reason for OCE to conclude its claims belonged in the court of appeals rather than district court. *See Longview Fibre*, 980 F.2d at 1313-14 (CWA § 509(b) creates a "complex and difficult" jurisdictional scheme). Third, it would now be beyond the statute of limitations to file an original action in this Court.

Finally, it is in the interests of justice for EPA's present actions to be reviewed. EPA's new risk assessment methodology for reviewing effluent guidelines and limitations and scheduling promulgation of new effluent guidelines undermines the technology-based approach to water pollution regulation established by the 1972 CWA Amendments. If EPA's actions are found unreviewable, EPA will be given unchecked latitude to follow a policy approach at odds with that dictated by Congress.

EPA and Intervenor EGIC contend that filing in the right court is a prerequisite for invoking § 1631 transfer authority. *See* EPA Brief at 41-42. In support, EGIC cites several cases decided *prior to* 28 U.S.C. § 1631's enactment on April 2, 1982. As shown by applicable legislative history, Congress enacted 28 U.S.C. § 1631 expressly to *reverse* the approach followed in such cases. *See e.g.*, *Rodriguez-Roman*

v. INS, 98 F.3d 416, 422 (9th Cir. 1996) (a "case mistakenly filed in the wrong court [should] be transferred as though it had been filed in the transferee court.")

EPA also argues that its review of effluent guidelines and limitations and adoption of EGPs is not judicially reviewable because these actions are not "final agency actions" within the meaning of the *Norton* decision. EPA Brief at 42-50.[51] But EPA also argues that CWA § 509(b)(1) precludes District Court CWA § 505(a)(2) jurisdiction. EPA Brief at 50-51. EPA cannot have it both ways, using CWA § 509 jurisdiction as a sword to preclude CWA § 505(a)(2) jurisdiction over OCE's claims while at the same time arguing that there is no CWA § 509(b)(1) jurisdiction over these claims. In sum, if this Court finds that the District Court lacked jurisdiction over some or all OCE's claims, this Court should address the merits of those claims pursuant to CWA § 509(b)(1) and 28 U.S.C. § 1631.[52]

III. CONCLUSION

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[51] As discussed in Section II.E.3 *supra,* this argument is flawed.

[52] EPA argues that this Court should not in any case hear OCE's claims until EPA has compiled the administrative record. EPA Brief at 42, n.15. However, EPA has already provided the relevant administrative record by creating a docket for its approval of the 2004 EGP, which was lodged with the District Court in December 2004. Further, in the District Court below, EPA moved for summary judgment on the merits, providing all documents from the administrative record relevant for decision. Ninth Circuit Rule 30-1 obligates EPA to provide "those parts of the record necessary to permit an informed analysis of [its] position." Here, the parties do not dispute the relevant facts and thus the issues are purely legal in nature. *See* R. Ex. 18 at 0213-0215.

As set forth in OCE's Opening Brief pp. 56-58, and for the reasons stated above, this Court should reverse the District Court's grant of judgment on the pleadings and summary judgment for EPA and remand with instructions to enter summary judgment granting OCE declaratory relief and for any such additional proceedings to determine the appropriate scope of injunctive relief.

Respectfully submitted this 21st day of February 2006,

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-16214

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply brief is proportionately spaced, has a typeface of 14 points or more and contains 11,835 words. Appellants have filed a motion to file an oversized brief in conjunction with this filing.

Dated: February 21, 2006

By:

____
Michael W. Graf
Counsel for Appellants

APPENDIX 1

***Natural Resources Defense Council et. al. v. U.S.E.P.A., et al.,* United States District Court, Central District of California, Case No CV-04-8307-GHK(RCx);**

Court Ruling on Motion to Dismiss dated August 29, 2005