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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No.: CV 04-8307-GHK(RCx) **Date:** August 29, 2005

Title: **Natural Res. Defense Council, et al. v. U.S. Envtl. Prot. Agency, et al.**

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DOCKET ENTRY

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PRESENT: **Hon. George H. King, United States District Judge**

Beatrice Herrera	None
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: **Defendants' Motion to Dismiss**

This matter is before the Court on the above-entitled motion brought by defendants U.S. Envtl. Prot. Agency ("EPA"), and Stephen L. Johnson, and intervenor-defendants Nat'l Ass'n of Home Builders, and Associated Gen. Contractors of Am. (collectively "Defendants") against plaintiffs Natural Res. Defense Council ("NRDC"), and Waterkeeper Alliance and intervenor-plaintiffs state of New York, New York State Dep't of Envtl. Conservation, and state of Connecticut (collectively "Plaintiffs"). This matter is appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. After considering all the papers filed, we rule as follows:

I. Background

The parties are familiar with the facts in the current action. Consequently, we will not repeat any facts except as necessary.

II. Discussion

Plaintiffs bring suit to compel EPA to promulgate effluent limitation guidelines ("ELGs") and new source performance standards ("NSPSs") for stormwater pollution discharges from construction and development sites. Defendants contend that dismissal of Plaintiffs' Clean Water Act ("CWA") and Administrative Procedure Act claims is appropriate since the courts of appeals have exclusive jurisdiction pursuant to section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E). Under section 509(b)(1)(E) the courts of appeals have exclusive jurisdiction to review the Administrator's action [illegible] or

promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 . . . ." 33 U.S.C. § 1369(b)(1)(E).

Plaintiffs, however, argue that section 509(b)(1)(E) is inapplicable since EPA has not approved or promulgated any ELGs or NSPSs. Defendants respond by arguing that section 509(b)(1)(E) encompasses any final action by EPA, regardless of whether the end result is an ELG or NSPS, or a decision not to issue an ELG or NSPS.

Despite Defendants' contentions, section 509(b)(1)(E) is inapplicable. First, as recognized in Trustees for Alaska v. EPA, 749 F.2d 549, 559 (9th Cir. 1984), allegations that EPA failed to approve or promulgate ELGs or NSPSs are outside the scope of section 509(b)(1)(E). See also Maier, P.E. v. EPA, 114 F.3d 1032, 1037 (10th Cir. 1997) (stating that section 509(b)(1)(E) "arguably does not apply to the Administrator's refusal to promulgate a rule in the first instance"); Armco, Inc. v. EPA, 869 F.2d 975, 981-82 (6th Cir. 1989) (finding that direct review before appeals court of EPA's failure to promulgate regulations was improper as no action by EPA had taken place); Envtl. Def. Fund v. EPA, 598 F.2d 62, 90-91 (D.C. Cir. 1978) (finding no appeals court jurisdiction to hear direct challenge to EPA's failure to promulgate regulations). The Trustees for Alaska court clearly stated that where a petitioner's "argument is framed in terms of EPA's failure to comply with a nondiscretionary duty to promulgate industry-wide rules[,]" the petitioner is required to bring the action in district court pursuant to section 505(a)(2), 33 U.S.C. § 1365. Trustees for Alaska, 749 F.2d at 558-59. Defendants' argument that Trustees for Alaska is distinguishable since, here, EPA "proposed [ELGs], accepted public comment, compiled a voluminous administrative record, and made an affirmative decision . . . not to promulgate [ELGs]" is unavailing. See Joint Br. at A-16:2-6. Nothing in Trustees for Alaska suggests that its holding is conditioned on the lack of a record, public comment, or any other similar conduct.

Second, Penn. Dept. of Envtl. Res. v. EPA, 618 F.2d 991, 995-96 (3d Cir. 1980), a case relied upon by the court in Trustees for Alaska, recognized that EPA inaction is outside of the scope of section 509(b)(1)(E) even where EPA's failure to approve or promulgate was a deliberate decision based on a record. The court rejected the petitioner's argument that since the issue of post-mining discharges "was raised" during EPA's rulemaking proceedings EPA had not failed to act, i.e. that "as long as the subject matter of the deferred regulations [were] included in the scope of the administrative proceedings, there is a sufficient record for [the] court to review." Id. at 995. The court reasoned that "deferral [was] no more nor less a failure to act . . . ." Id.

Third, the statutory language itself suggests that EPA's decision not to issue ELGs or NSPSs does not constitute an approval or promulgation within the meaning of section 509(b)(1)(E). The plain language of section 509(b)(1)(E) is limited to actions

"approving or promulgating" ELGs or NSPSs. Defendants' contention that Congress settled on the phrase "approving or promulgating" rather than "regarding 'approving or promulgating'" "because that is often the agency action" engaged in by EPA, Joint Br. at A-11:11-13, is hardly convincing.

Also, the specificity of section 509, in "distinguish[ing] between EPA approvals, determinations and promulgations . . . . demonstrates that Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the [CWA]." Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431-32 (9th Cir. 1991); see also Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992); League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002); Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992); Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 517 (2d Cir. 1976).

Moreover, if Congress intended section 509(b)(1)(E) to include any action "regarding 'approving or promulgating,'" it could have used the phrase "any determination" as it did in subsections B and D. See 33 U.S.C. § 1369(b)(1)(B), (D); Boise Cascade Corp., 942 F.2d at 1432 (recognizing that the use of different words in the same sentence of a statute signals that Congress intended to distinguish between them); Lake Cumberland Trust, Inc., 954 F.2d at 1222 (same); Longview Fibre Co., 980 F.2d at 1314 ("Had Congress intended a more general meaning, it would have used more general words.").

Fourth, courts have interpreted the term "promulgate" in a manner inconsistent with Defendants' interpretation. In Am. Paper Inst., Inc. v. EPA, 882 F.2d 287, 288 (7th Cir. 1989), the plaintiff sought direct review of an EPA Region V policy statement concerning discharges of dioxin from paper mills. The court held that section 509(b)(1)(E) was inapplicable since, inter alia,

> neither Region V nor the Administrator had "promulgated" anything. Promulgation means issuing a document with legal effect. Region V's policy statement has none: it does not appear in the Federal Register and will not be codified in the Code of Federal Regulations.

Id. at 288-89. The court found that policy statements without independent legal effect do not establish rules that render discharges unlawful, and, that, to constitute a limitation under section 509(b)(1)(E), the regulation "must have bite - it must at least control the states or the permit holders, rather than serve as advice about how the EPA will look at things when the time comes." Id. at 289. In other words, "[u]ntil . . . EPA puts polluters under the gun, compelling them to do something they would rather not, the 'final' agency action lies ahead," and therefore review under section 509(b)(1)(E) is not appropriate. Id.; see also S. Holland Metal Finishing Co. v. Browner, 97 F.3d 932, 936 (7th Cir. 1996).

Fifth, policy reasons favoring appeals court jurisdiction are insufficient and are counterbalanced by policy reasons favoring district court jurisdiction. Without doubt, courts hold that the presence of an administrative record militates in favor of jurisdiction before appeals courts. See, e.g., Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). However, Florida Power & Light Co. also recognized that such policy reasons cannot override the clear intent of Congress. Id. at 745. As discussed above, the plain language of section 509(b)(1)(E) suggests that approving and promulgating is not the same as "any determination." Moreover, although the presence of a record diminishes the significance of our factfinding abilities, "the district court is[,] [nevertheless,] the proper court to consider whether mandamus or other extraordinary relief is appropriate and under what circumstances or conditions mandamus would be made available." Armco, Inc., 869 F.2d at 982.

In addition, Defendants' argument that denying direct review under these circumstances will lead to irrational bifurcation, and delay are overstated. Irrational bifurcation occurs where appeals courts and district courts are placed in the position of reviewing the same action, Forelaws on Bd. v. Johnson, 709 F.2d 1310, 1313 (9th Cir. 1983), or are prevented from addressing the root cause of various complaints, such as where the appeals court reviews the issuance or denial of permits while the district court reviews the underlying regulations governing the issuance or denial of permits, see NRDC v. EPA, 673 F.2d 400, 405-06 (D.C. Cir. 1982). Here, however, a finding of no direct review does not give rise to such a "perverse situation": there is no equivalent underlying regulation, and the appeals court and district court would not review the same agency decision since in one case an ELG or NSPS would have been promulgated while in another there would be no such promulgation.

Moreover, policy reasons support a narrow reading of section 509(b)(1)(E). See Penn. Dept. of Envtl. Res., 618 F.2d at 997 (finding no appeals court jurisdiction over EPA deferral of regulations since, otherwise, "[courts of appeals would be open] to unlimited interlocutory review of all sorts of procedural steps taken in EPA rulemaking proceedings"); Longview Fibre Co., 980 F.2d at 1313; Am. Paper Inst., Inc., 882 F.2d at 289.

Also, district court jurisdiction is supported by pragmatic reasons. See Penn. Dept. of Envtl. Res., 618 F.2d at 997 (recognizing that construing section 509(b)(1)(E) as permitting the same type of relief available under section 505 would deprive EPA of the protection of the requirement that the plaintiff give EPA sixty days' notice before a court may order performance of a mandatory duty). Additionally, denying appeals court review under such circumstances does not deprive the parties of relief: relief is available before the district court under section 505(a)(2). Id.

Finally, none of Defendants' cases dictate a contrary result. Many of the cases do not address section 509(b)(1)(E). See Ctr. for Auto Safety v. Natl. Highway Traffic Safety Admin., 710 F.2d 842, 845-46 (D.C. Cir. 1983) (interpreting phrase "any rule" in the Motor

Vehicle Information and Cost Savings Act); Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196-97 (1980) (applying section 509(b)(1)(F)); Am. Mining Congress v. EPA, 965 F.2d 759, 763 (9th Cir. 1992) (same); Envtl. Defense Ctr., Inc. v. EPA, 344 F.3d 832, 860-61 (9th Cir. 2003) (same). Others did not seek to compel EPA promulgation of new rules, but rather challenged the content of existing regulations. See Envtl. Defense Ctr., Inc., 344 F.3d at 860-62; Maier, P.E., 114 F.3d at 1038;[1] Las Vegas v. Clark County, 755 F.2d 697, 704 (9th Cir. 1985); Scott v. Hammond, 741 F.2d 992, 995-96 (7th Cir. 1984); Florida Power & Light Co., 470 U.S. at 731, 746. And lastly, NRDC v. EPA did not address the scope of "approving or promulgating," but instead addressed a challenge to EPA's issuance of NPDES-related regulations. See NRDC v. EPA, 673 F.2d at 401-02.

Thus, despite the fact that EPA generated a full administrative record before deciding not to approve or promulgate ELGs or NSPSs for stormwater pollution discharges from construction and development sites, EPA's failure to promulgate ELGs or NSPSs forecloses review pursuant to section 509(b)(1)(E).[2]

III. Conclusion

In light of the foregoing, Defendants' motion to dismiss Plaintiffs' complaint is **DENIED**.

IT IS SO ORDERED.

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[1] As discussed above, Maier, P.E., also recognized that section 509(b)(1)(E) "arguably does not apply to the Administrator's refusal to promulgate a rule in the first instance." Maier, P.E., 114 F.3d at 1037-38.

[2] We also reject Defendants' contention that we must examine whether a nondiscretionary duty exists before finding that we have jurisdiction. Plaintiffs' allegation that EPA violated mandatory duties raises a substantial question sufficient to trigger jurisdiction before this Court at this time. See 33 U.S.C. § 1365(a)(2) ("[A]ny citizen may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any" mandatory duty); Trustees for Alaska, 749 F.2d at 558-59 (holding that where a petitioner's "argument is framed in terms of . . . EPA's failure to comply with a nondiscretionary duty to promulgate industry-wide rules[,]" the petitioner is required to bring the action in district court); Cronin v. Browner, 898 F. Supp. 1052, 1057 (S.D.N.Y. 1995) (stating that section 505(a)(2) jurisdiction is proper if "the claims alleged in the complaint are more than 'wholly insubstantial and frivolous'").

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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I. INTRODUCTION AND SUMMARY

Plaintiffs OCE *et al.* submit this revised Reply Brief to meet page limitations.[1]

OCE challenges EPA's failure to adhere to a technology-based approach in reviewing existing effluent guidelines and limitations and promulgating new effluent guidelines and limitations. Technology-based regulation requires EPA to set and then update uniform national effluent guidelines and limitations according to the best available technology for pollution reduction or elimination.

In contrast, EPA proposes not to review or adopt new 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 approach returns CWA point source regulation to the failed, pre-1972 method based on water quality risk.

By pre-screening industrial categories based on risk, EPA no longer reviews whether current technology innovations could reduce or eliminate pollutants for the vast majority of industries. Instead, EPA limits its actual "review" to two to three industries

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[1]The Court denied Plaintiffs' motion to file a brief consisting of 11,835 words, in response to three separate opposition briefs. This revision includes eliminating prior section II.A showing how EPA's risk assessment approach is contrary to the CWA.

[2] EPA's Brief (*see e.g.,* p. 14) refers to its risk analysis as a "hazard" assessment. EPA's 2004 Effluent Guidelines Plan demonstrates that EPA was conducting *risk* assessment to determine which few industrial categories to review. *See e.g.,* R. Ex. 7 at 0092-0094.

whose discharges EPA deems pose the greatest relative risk. Even for these few industries, EPA declines to review existing or proposed new effluent guidelines in favor of varying effluent limitations on a facility by facility basis – thus ignoring Congress' mandate to set uniform national effluent standards. EPA thereby grants to all other industries, including those demonstrating promising technology advances in reducing or eliminating pollutants, *de facto* exemption from the CWA requirement that EPA periodically review whether there is more stringent technologies that could reduce or eliminate pollution discharge. Meanwhile, new facilities are constructed based on outdated effluent guideline standards and without information regarding the possibility of further reduction or elimination of pollution discharge.

While EPA concedes its "risk" analysis based on incomplete data, its facility by facility regulatory approach suggests the "race to the bottom" phenomena that undermined clean water regulation prior to 1972. EPA's data review, limited to toxic and non-conventional pollutants,[3] also by definition does not consider the potential for innovative technologies to update BCT standards as required by CWA §§ 304(b)(4) and 301(b)(2)(E).

EPA's and Intervenors's Opposition Briefs largely avoid addressing EPA's

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[3]R. Ex. 7 at 0094 ("In particular, EPA ranked point source categories according to their discharges *of toxic and non-conventional* pollutants."); R. Ex. 15 at 0192-95.

abandonment of technology based regulation and instead argue that OCE's challenges are not reviewable by this Court. However, OCE's legal claims are properly reviewed under CWA § 505(a)(2) because EPA has failed to comply with its non-discretionary procedural duties under CWA §§ 304(b), 301(d) and § 304(m). *See e.g., Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("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."); *NRDC v. Reilly*, R. Ex. 10 at 0149-0151; R. Ex. 12 at 0168 (Congress enacted 304(m) in 1987 out of "frustration with the slow pace" at which EPA was proceeding); Section II.C.1-2, *infra.*

The District Court 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).[4]

II. ARGUMENT

A. 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

[4]Even under CWA § 509, the Court should assume jurisdiction over OCE's case. *See* OCE's Opening Brief at 52-55; Section II.C.5, *infra.*

technology and cost feasibility criteria in determining whether revision of effluent guidelines and limitations is "appropriate." *See Environmental Defense Fund v. Thomas*, 870 F.2d 892, 898-900 (2d Cir. 1989); District Court Ruling, R. Ex. 18 at 0214:8-10 ("EPA also admits that it did not conduct a technology review of the 450 categories and subcategories at issue.")[5]

EPA's use of risk assessment as an alternative "screening tool" to conduct effluent guideline review thwarts the intent of the 1972 CWA Amendments to rely on the availability of technological advances as the primary means to eliminate pollutants from our Nation's waters. EPA's reliance instead on "risk" and relative hazard marks a return to the pre-1972 days prior to technology based regulation which Congress previously found to be "ineffective" at regulating discharge. R. Ex. 12 at 0168.[6]

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[5]As discussed in Section II.C.1-2, *infra,* EPA's failure to comply with nondiscretionary duties is actionable under CWA § 505(a)(2)'s citizen suit provision. Further, even if this Court were to review EPA's actions the APA or under its original jurisdiction in CWA § 509, EPA's actions are contrary to the CWA and thus unlawful. *See* Discussion, Section II.C.3-5, *infra.*

[6]Risk assessment does not seek to eliminate pollutants, but rather to *manage* their risk to human health or the environment. In contrast, the technology based approach requires 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) (purpose was to shift "from a focus on receiving water quality to a focus on the technological control of effluent.") EPA must tackle water quality problems persisting despite application of BAT pursuant to CWA § 303, which does not, however, authorize EPA to skip the Act's first focus on technology-based control.

1. EPA Cannot Ignore Technology and Feasibility Criteria in Reviewing Effluent Guidelines and Limitations

EPA 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).[7] Under the first step of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (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 CWA is ambiguous on the question, *Chevron*'s second step asks whether EPA's interpretation is based on a permissible construction of the statute. *Id*. Under either *Chevron* prong, EPA's interpretation is erroneous.

a. EPA's Interpretation is Contrary to the Purpose of Effluent Guideline and Limitation Review.

To determine the plain meaning and purpose of relevant statutory provisions, the

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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)

[7] EPA alternatively 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's post hoc argument is rate contrary to the technology-based approach since it is based on risk and not on the capacity to reduce pollutant discharge. *See also* District Court's Ruling, R. Ex. 18 at 0214:1-3 ("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.")

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).

EPA and Intervenors focus on isolated CWA statutory provisions in arguing that the CWA does not require EPA to consider technology-based factors in its effluent guidelines and limitations review. EPA's Brief (p. 26) cites *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989) that for a duty to be "clear cut," it must be readily apparent in the plain language of the statutory text. However, *Farmers Union* at most requires a plaintiff to "point to a statute or regulation" to establish the duty. In *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278, n. 6 (4th Cir. 1992), the court noted that "the existence of a nondiscretionary duty could be recognized through application of Chevron's rule of construction." This includes considering the statute as a whole, *see Katie John v. United States*, 247 F.3d 1032, 1039 (9th Cir. 2001), and consulting legislative history where appropriate. *See NRDC v. Train*, 510 F.2d 692, 706-707 (D.C. Cir. 1975). Here the interrelated CWA §§ 301(b), 301(d), 304(b), 304(m) and 306 establish that effluent guideline and limitation review is intended to advance the statutory goal of eliminating pollutants from our Nations' waters via ever more stringent technology-based controls.

CWA § 304(b) requires EPA to review 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 ...be reviewed at least every five years and, if appropriate, revised" pursuant to CWA § 301(b)(2). Effluent limitations under § 301(b)(2) must correspond to BAT and BCT set under § 304(b). Read together, these provisions require EPA to review annually available control technologies for possible revision of effluent guidelines and incorporate any revisions into effluent limitations at least every five years.[8] *See NRDC v. EPA,* 822 F.2d 104, 110 (D.C. Cir. 1988). ("[T]echnology-based effluent limitations...derive from standards formulated with reference to pollution control technology.")

EPA's current risk-based review does not ask which technologies are *available* nor the level of pollution control *achievable* by the best available technologies as required by CWA §§ 304(b)(2) & 301(b)(2). As a result, EPA does not know whether existing guidelines for numerous categories that have not been revised for 10 to 20

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[8] *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 124 (1977) ("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).

years[9] still reflect BAT for reduction or elimination of pollutants. Thus, EPA is failing to consider the information necessary to ensure that its regulations are up to date with currently available "treatment techniques, process and procedure innovations, operating methods, and other alternatives" for point sources. CWA §§ 304(b)(2)(A).[10]

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.[11] CWA § 301(b)(2)(A) implements this provision by requiring EPA to assess whether the elimination of pollutants "is technologically and economically achievable for a category or class of point sources."[12] These statutory mandates are not based on risk, but rather on technological capability. Further, such information is critical for EPA to establish federal standards of performance for new sources of

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[9] *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).

[10] In *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. 64, 76 n.15 (1980), the Supreme Court reiterated the 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 may be redefining the level of control that is *achievable*.

[11] 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.)

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

industrial point source dischargers, including "where practicable, a standard permitting no discharge of pollutants." CWA § 306(a)(1). *See also* CWA § 306(b)(1)(B). (EPA shall update its new source standards "as technology and alternatives change.")[13]

By not reviewing whether new technology is available and capable of reducing pollutant discharge, EPA is overlooking information about new innovative processes for pollution control or how exemplary plants are achieving higher levels of pollution control. Indeed, for over 95% of effluent guideline and limitation categories, EPA is simply not conducting technology-based review.[14] 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.[15] 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 affecting the

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[13] *See also* Legislative History in support at R. Ex. 11 at 0154, 0161; Section II.A.1.d, *infra.*

[14] "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.

[15] 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.

Agency's estimates of these hazards or risks.")[16]

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's Brief (p.29) 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 and that EPA otherwise has no obligation to review whether pollutant elimination is "technologically and economically achievable for a category or class of point sources." *See* CWA § 301(b)(2).

EPA's approach allows it to ignore the availability of new innovative advancements in water pollution control until EPA determines that a significant "risk" exists. *NRDC v. Reilly* rejected a similar argument in finding that the CWA required EPA to "review and revise guidelines in conformity with the parameters set out at length in § 304(b)." R. Ex. 10 at 0149.[17] Here, EPA's approach ensures that EPA will

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[16] 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." *See* Note 28, *infra*, discussing how BPJ can not serve as substitute for national effluent limitations.

[17] EPA argues that *NRDC v. Reilly* is a non-binding district court decision. However this decision is well-reasoned and thus persuasive. Further, this decision led to the Consent Decree that has controlled EPA's effluent guideline review

not have the necessary information "available" to determine whether the elimination of pollutants is technologically and economically achievable.[18] *See NRDC v. EPA,* 822 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).[19]

EPA's approach is also contrary to cases describing EPA's review obligations in terms of reassessing the same data initially used to establish BPT, BAT and BCT. *See Association of Pacific Fisheries v. Environmental Protection Agency,* 615 F.2d 794, 812 (9th Cir. 1980) (EPA's review under CWA § 301(d) must determine whether "*more extensive data* developed since the regulations were first promulgated" warrants

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process for the last decade.

[18] The Record 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.

[19] 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).

revision of effluent limitations"); *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 actual experience.").

The purpose of revisiting prior determinations regarding BAT and BCT is to force technology forward, leading to the eventual elimination of pollutants. *See NRDC v. EPA,* 863 F.2d 1420, 1427-1428. (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.) *NRDC v. EPA,* 822 F.2d at 123 ([T]he regulatory scheme is structured around a series of *increasingly stringent* technology-based standards...to press development of new, more efficient and effective technologies. This policy is expressed as a *statutory mandate*, not simply as a goal.") (emphases added).

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

EPA has already stated 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...")

Prior to litigation, 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.[20] 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's Brief (p. 30) argues that even if it is required to review effluent guidelines according CWA § 304(b), this legislative delegation is "broad and flexible" because it allows EPA to "consider such other factors as the Administrator deems appropriate."

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

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[20] *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.")

into account" factors relating to the technological feasibility of more advanced pollution control technology.[21] *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.[22] To conduct a meaningful review, EPA must *first* identify whether there are available technologies capable of more effective pollution reduction.[23] Without this critical first step, EPA has no basis to assess technical feasibility, weigh costs and benefits of pollution reduction, or consider any other factor relevant to determining whether its BAT or BCT definitions remain current.[24]

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[21] 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).

[22] 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).

[23] Among the four factors EPA originally intended to use for 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.

[24] EPA's Brief (pp. 29-30) also argues that its obligation to consider technology-based factors in rulemaking means EPA need not consider such factors in its review. This ignores the purpose of review to identify innovative technologies on which new, updated regulatory standards may be based.

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

Read as a whole, the CWA requires 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.[25]

Even if the CWA were seen as ambiguous, 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 Brief's (p. 31) contention that legislative history is irrelevant 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. Here, numerous case decisions have regularly consulted the legislative history of the CWA. *See e.g., EPA v. California,* 426 U.S. at 204; *NRDC v. EPA,* 863 F.2d at 1426-1427; *Association of Pacific Fisheries,* 615 F.2d at 805.

Due to space limits,[26] OCE cites to the following pages of legislative history to

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[25] 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. *Katie John v. United States*, 247 F.3d at 1041-1042.

[26]This revised Reply eliminates the quoted sections from the prior Legislative History Section II.B.2.d.

support the conclusions that:

- 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; *EPA v. California*, 426 U.S. at 203-204; Ex. 12 at 0168, 0173.

- EPA was to review the effectiveness of all "available" pollution control technologies for different industries, *see* R. Ex. 11 at 0164-0165;

- CWA Section 301(d) was intended to push increasingly tougher controls on industry to show "*every five years* that no-discharge is not attainable," R. Ex. 11 at 0161(emphasis added).

- Technology based regulation was reaffirmed as the central basis of point source regulation in the 1987 CWA Amendments R. Ex. 12 at 0168.

B. 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* Section II.C.2, *infra.*

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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." EPA's schedule for "revision" is thus contrary to the CWA because it does not consider technology-based factors

EPA's schedule for "revision" is also contrary to the CWA because it ratifies EPA's approach of using informal risk assessment to exempt certain industrial sectors from uniform national limitations in favor of facility by facility regulation.[27] The CWA allows for narrow exceptions to the nationally uniform effluent limitation requirement for the interim period it would take EPA to promulgate regulations setting nationally uniform effluent guidelines and limitations[28] and where a discharger can demonstrate

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[27] *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.")

[28]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 at 1424. 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

'fundamentally different' from other dischargers in a particular category or subcategory. *See* CWA § 301(n); *Texas Oil & Gas Association v. EPA,* 161 F.3d 923, 928 (5th Cir. 1998).[29] In sum, EPA's schedule is based on a methodology inconsistent with the technology-based approach needed to establish uniform national standards.

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

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temporary, interim regulatory approach as the means permanently to sidestep setting uniform effluent guidelines for these sectors. As noted in *NRDC v. Reilly*, R. Ex. 10 at 0150, reliance on BPJ permitting undermines the CWA's requirement of national standards, resulting "in disparities in standards among states, causing industry to forum shop for the states with the most lenient water pollution control standards."

[29]EPA's approach contradicts the fundamentally different factors 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). 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.

information to determine significant risk or where EPA decides to regulate on a facility by facility basis.[30] 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).[31]

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 guidelines are

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[30] 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.

[31] 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.").

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).

The CWA 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. *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. at 130 ("categories of sources" mean "similar point sources with similar characteristics" which must "meet similar effluent limitations.")[32]

EPA's current approach allows EPA, once again, to hide behind "risk assessment" to avoid the need for identification of the best available pollution control technologies for similar industries across the Nation.

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[32] 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 regulated under uniform limitations. *Id.* at 130 ("similar point sources" must "meet similar effluent limitations.")

Were the Court to find ambiguity on this issue, 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 by identification as "subcategories" nor that EPA could dispense with uniform standards based on an informal risk assessment process. *See NRDC v. Reilly,* R. Ex. 10 at 0150 ("Congress ...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.")[33]

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

[33]*NRDC v. Reilly* found Section 304(m) imposed on EPA a "duty to continue collecting the technical data necessary" to list industries in need of effluent guidelines, which was critical to avoid "extremely expensive and time-consuming, permit-by-permit development of effluent standards," which cause "industry to forum shop for ...most lenient water pollution control standards." *Id*.

promulgation process industries identified under CWA § 304(m)(1)(B).[34]

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.

EPA argues that there is no requirement the review process be based on the calendar year. That is not the point. Whenever it conducts its review, 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. Here, EPA 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. This approach establishes 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

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[34]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. This issue is more fully briefed in the district court proceedings, which are awaiting a ruling on the merits from the district court judge. This Court may thus wish to wait in ruling on this specific issue until the CV 04-8307 case is presented on appeal.

EPA is doing.

This result is contrary to Congressional intent in passing CWA § 304(m) in the 1987 Amendments, which was to allow the public to provide input into EPA's proposed decisions regarding effluent guideline review for the coming year. Section 304(m)(2) 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.

C. 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[35] and 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.[36] Alternatively, EPA's challenged actions may still be reviewed in District Court under the APA as a

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[35] *Fox Television Stations, Inc. v. F.C. C.*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002)

[36] 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.

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. *See* Section II.C.5, *infra*.

1. CWA § 505(a)(2) Grants District Court Jurisdiction Over EPA's Failure to Follow Required Procedures in 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 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). Here, as discussed, EPA must consider the same criteria that EPA considered when it originally adopted those effluent guidelines and limitations. *See e.g.*, R. Ex. 10 at 0149; *Pacific Fisheries*, 615 F.2d at 812.

EPA's Brief (p. 21) contends that CWA § 505(a)(2)'s mandatory duty jurisdiction extends only to whether EPA has taken some kind of action to review effluent guidelines and limitations, regardless of how such "review" was conducted. The Supreme Court rejected this type of argument when it interpreted identical citizen suit language under the Federal Endangered Species Act:

> [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).[37]

Similarly, *Florida PIRG v. EPA*, 386 F.3d 1070, 1087 (11th Cir. 2004) applied the same principle to a CWA § 505(a)(2) claim, finding that EPA had not complied with all the required steps under CWA § 303(c) in reviewing a state water quality plan.

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[37] *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).

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. Here, EPA's decision not to assess the availability of pollution control advancements for industries discharging pollutants as part of its review process does not "discharge" its CWA obligations.

EPA cites *City of Las Vegas v. Clark County*, 755 F.2d 697 (9th Cir. 1985) but this case concerned a challenge to the substantive outcome of a discretionary EPA decision whether to approve a State water quality standard. *Id*. at 704. Here, OCE is *not* challenging EPA's determination whether a revision is "appropriate" but instead EPA's overall failure to consider the CWA's mandatory criteria under CWA § 304(b) for deciding whether it is appropriate to revise effluent guidelines and limitations.[38] Without this information, EPA as a matter of law cannot be conducting an adequate review under CWA §§ 304(b) and 301(d).

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

As discussed (Section II.B), 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

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[38] EPA's other case, *Kennecott Copper Corp., Nevada Mines Div., McGill, Nev. v. Costle*, 572 F.2d 1349 (9th Cir. 1978), holds only that EPA "does not have a mandatory duty to approve either the revision or the variance." *Id*. at 1354. Here, OCE is challenging only EPA's improper procedure in making its determination.

decisionmaking methodology required by CWA § 304(m)(1). R. Ex. 10 at 0148-0150.[39] 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.

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

EPA's Brief (22-23) contends *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) precludes CWA jurisdiction over OCE's claims. However, *Norton* is limited to interpreting the "final agency action" requirement for judicial review imposed by APA § 706. As discussed, this case is properly under CWA Section 505(a)(2), which addresses EPA failure to comply with its mandatory duties required by its review and plan issuance obligations. CWA §§ 301(d), 304b), 304(m.) Thus the APA requirements do not apply since the claims are mutually exclusive. *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 851 (9th Cir. 1987; *Trustees for Alaska*, 749 F.2d at 558; R. Ex. 18 at 0209-210 (District Court's decision finds *Norton* does not apply).[40]

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[39] 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.

[40] 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

Even if this were to proceed as an APA or Section 1369 action, Ninth Circuit law finds that whenever a required agency procedures will "influence" subsequent actions," or "pre-determine" an agency's future decision options, the failure to follow such procedures is reviewable as final agency action. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1089-1091 (9th Cir. 2003). *See also Environmental Defense Fund v. Thomas*, 870 F.2d at 898-899; *NRDC v. Reilly*, R. Ex. 10 at 0148-0150.[41]

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 years and to issue an EFG every two years requiring EPA to identify and promulgate effluent guidelines for new industries discharging point source pollution. 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

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exclusive. NACWA Brief at 8; EGIC Brief at 29, n.4; *ONRC*, 834 F.2d at 851.

[41]OCE complaint alleges that EPA *has not acted* to review effluent guidelines and limitations and adopt EGPs as required by 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).

oversee any part of this process. In enacting 304(m), Congress 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's Brief (p. 50) argues that CWA § 509(b)(1)(E) jurisdiction includes all actions closely related to the actions literally listed in that section.[42] 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's argument was rejected in *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1314 (9th Cir. 1992), 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

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[42] EPA's Brief (pp. 23-31) alternatively 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. This argument would lead to a bifurcation of review over EPA's CWA duties with accompanying burdensome demands on the federal court system and litigants.

action as the discretionary 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. EPA cites *Maier v. EPA*, 114 F.3d 1032, 1038-39 (10th Cir. 1997), but this case found 509 jurisdiction by treating a challenge to EPA's refusal to revise a rule as "akin to a challenge to the existing rule." *See also Chemical Mfrs. Ass'n v. EPA*, 870 F.2d at 266 (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).[43]

None of the cases cited by EPA's Brief (p. 51) contradict *Longview Fibre,* but instead find § 509 jurisdiction because the actions were deemed to be, or akin to, actions listed under CWA § 509(b)(1). *See e.g., National Wildlife Federation v. EPA*,

[43] EPA's adoption of EGPs under CWA § 304(m) is not reviewable under CWA § 509(b)(1) since it is not the promulgation of effluent limitations.

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).

Intervenor NACWA also argues that the public law which enacted the CWA 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.[44]

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

If CWA § 509(b)(1) provides for 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. Here, OCE timely filed its claims in the district court. This filing was, at the least, justifiable given the arguably unsettled law on jurisdiction in the 9th Circuit. *See Longview Fibre*, 980 F.2d at 1313-14 (CWA § 509(b) creates a "complex and difficult" jurisdictional scheme).

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[44] Section 73 of Pub. L. 95-217 also required EPA to consider the Section 304(b) factors in determining whether to *revise* such guidelines. *See* Section II.A *infra.*

EPA's Brief (pp. 41-42) contends that filing in the right court is a prerequisite for invoking § 1631 transfer authority, but relies on cases decided *prior to* 28 U.S.C. § 1631's enactment on April 2, 1982. However, Congress enacted 28 U.S.C. § 1631 expressly to *reverse* the approach followed in such cases. *See 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.")

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.[45]

III. CONCLUSION

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 to determine the proper injunctive relief.

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[45] EPA's Brief (p. 42, n.15) argues that this Court should not in any case hear OCE's claims until EPA has compiled the administrative record. However, EPA has already provided the relevant administrative record by creating a docket for its 2004 EGP approval, which was lodged with the District Court in December 2004. Further, there is no dispute about the relevant facts and the issues are purely legal in nature. *See* R. Ex. 18 at 0213-0215.

Respectfully submitted this 1st day of May 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 8,377 words. This complies with the Court's most recent order limiting Plaintiffs' Reply Brief to not more than 8,400 words.

Dated: May 1, 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