CHRISTOPHER A. SPROUL (State Bar No. 126398)
RACHEL E. SHAPIRO (State Bar No. 211398)
Environmental Advocates
1004 O'Reilly Avenue
San Francisco, California 94129
Tel: (415) 561-2222, Fax: (415) 561-2223

MICHAEL W. GRAF (State Bar No. 136172)
Law Offices
227 Behrens Street
El Cerrito, California 94530
Tel: (510) 525-7222; Fax: (510) 525-1208

MICHAEL A. COSTA (State Bar No. 219416)
Our Children's Earth Foundation
100 First Street, Suite 100-367
San Francisco, CA 94105
Tel: (415) 608-2781; Fax: (650) 745-2894

Attorneys for Plaintiffs
ECOLOGICAL RIGHTS FOUNDATION
and OUR CHILDREN'S EARTH FOUNDATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON, as Acting Administrator of the United States Environmental Protection Agency, Defendants.	Case No. C 04-2132 PJH PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS Hearing Date: May 11, 2005 Hearing Time: 9:00 a.m. Courtroom 3, 17th Floor CLEAN WATER ACT AND ADMINISTRATIVE PROCEDURE ACT CASE

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INTRODUCTION

Plaintiffs hereby oppose the Motion for Judgment on the Pleadings ("EPA Motion") brought by Defendants U.S. Environmental Protection Agency and Acting Administrator Stephen L. Johnson (collectively, "EPA"). The EPA Motion contests this Court's jurisdiction to hear Plaintiffs' First, Second, and Fourth Claims.[1] EPA's Motion should be denied as this Court properly has jurisdiction over these claims.

Plaintiffs are simultaneously filing a Motion for Summary Judgment ("Plaintiffs' MSJ"), which explains the Clean Water Act (CWA) statutory framework relevant to this CWA case concerning EPA's breach of CWA duties. In brief, Plaintiffs' First Claim alleges EPA's failure to review CWA effluent limitation guidelines ("effluent guidelines") annually as required under CWA §§ 304(b) and 304(m)(1)(A), 33 U.S.C. §§ 1314(b), (m)(1)(A). Plaintiffs' Second Claim alleges EPA's failure to review CWA effluent limitations every five years as required by CWA § 301(d), 33 U.S.C. § 1311(d). Plaintiffs' Fourth Claim alleges EPA's failure to prepare legally adequate effluent guidelines plans ("EGPs") under CWA § 304(m).

As set forth in Plaintiffs' MSJ, CWA § 304(b) requires EPA to promulgate effluent guidelines imposing a uniform national floor of technologically and economically feasible water pollution control. Plts. MSJ at 9, 23-24, 32. Effluent guidelines are not directly enforceable, but EPA must set effluent limitations under CWA § 301(b) based on effluent guidelines. Effluent limitations under CWA § 301(b) are enforceable limitations on the discharge of water pollutants. CWA § 304(m) requires EPA to prepare EGPs which schedule the annual review of all existing effluent guidelines, identify new categories of industry discharging toxic and nonconventional pollutants which are not covered by existing effluent guidelines, and schedule the promulgation

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[1] EPA further argues that the Court should dismiss Plaintiffs' Third Claim because the Court granted summary judgment on that claim on August 11, 2004. EPA Mot'n at 8; *see Order Granting Defendants' Motion for Summary Judgment* ("*Summary Judgment Order*"). Plaintiffs are not seeking reconsideration of this decision, however, obviating any reason for a redundant order "dismissing" a claim on which judgment has already been entered.

within three years of new effluent guidelines for these industries.

EPA's EGP for 2004 and 2005 ("the 2004 EGP") sets forth the "results" of EPA's "review" of effluent guidelines and limitations in 2004. Plts. MSJ at 16-19. The 2004 EGP indicates EPA has and will continue to "review" existing effluent guidelines and limitations by first identifying those categories of industry that EPA concludes pose the greatest relative risk of environmental harm. EPA will then narrow its review of technologically and economically feasible treatment methods to a small subset of industries that EPA believes pose the greatest relative risks of harming receiving waters. EPA is similarly declining to identify new industries not regulated by existing effluent guidelines and schedule the promulgation of new effluent guidelines for these industries in part based on EPA conclusions that it need not adopt new effluent guidelines absent showing of environmental harm to receiving waters. EPA further has concluded it need not set uniform national standards for industries not currently regulated by effluent guidelines when such industries are "subcategories" related to industries that are regulated or when such industries have few facilities. Finally, EPA has indicated that it need not set a schedule for completing effluent guidelines for newly identified industries, only a schedule for commencing guideline promulgation, while reserving the option of terminating this promulgation short of completion. 69 Fed. Reg. 53705, 53717-20 (Sept. 2, 2004).

As pointed out in Plaintiffs' MSJ, this "review" of effluent guidelines and limitations and scheduling of new effluent guidelines promulgation flatly contradicts Congress' intent that EPA not get bogged down in assessing environmental impacts to receiving waters, but instead set effluent guidelines and limitations to require the level of pollution reduction technologically and economically feasible nationwide. Plts. MSJ at 20-27. As discussed in Plaintiffs' MSJ, Congress had several important policy goals in mind in requiring this technology-based pollution control strategy. *Id.* EPA has thus not scheduled or conducted effluent guidelines and limitation reviews nor scheduled promulgation of new effluent guidelines in breach of mandatory CWA duties. This Court has jurisdiction under the CWA and/or the Administrative Procedure Act

(APA) to compel EPA to perform mandatory CWA duties and/or to set aside agency action that is contrary to law, arbitrary, capricious, or an abuse of discretion.

ARGUMENT

I. *Plaintiffs' Claims Are Properly within District Court Jurisdiction.*

EPA erroneously contends that any jurisdiction over Plaintiffs' claims resides exclusively in the courts of appeals. EPA Mot'n at 11-16. District court jurisdiction over Plaintiffs' claims is proper under CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), and/or the APA.

A. *CWA § 505(a)(2) Grants District Court Jurisdiction over Plaintiffs' Claims.*

CWA § 505(a)(2) grants district courts exclusive jurisdiction to hear claims that EPA has failed to implement mandatory CWA duties. *See*, *e.g.*, *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). Plaintiffs' claims concern EPA failure's to implement mandatory CWA duties to review effluent guidelines and limitations and to prepare a legally adequate EGP. Accordingly, CWA § 505(a)(2) grants district court jurisdiction here.

1. *EPA Has Mandatory CWA Duties To Review and Determine Whether To Revise Effluent Guidelines and Limitations.*

CWA § 304(b) specifies that EPA "shall" revise effluent guidelines annually, "if appropriate." CWA § 304(m) specifies that EPA "shall" publish a plan which "shall" include a schedule for "the annual review and revision of effluent guidelines in accordance" with CWA § 304(b). CWA § 301(d) specifies that BAT and BCT effluent limitations[2] "*shall* be reviewed at least every five years." Read together, these provisions impose mandatory CWA duties on EPA to review *all* effluent guidelines annually and review *all* BAT and BCT effluent limitations every five years after their adoption. *See NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-19 (D.D.C. Apr. 23, 1991) (CWA §§ 304(b) and (m)(1)(A) together require EPA to review *all* effluent limitations annually); *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812

[2] As pointed out in Plaintiffs' MSJ, "BAT effluent limitations" are those based on application of best available technology economically achievable and "BCT effluent limitations" are those based on best conventional pollutant control technology. CWA § 301(b)(2); Plts. MSJ at 9-10.

(9th Cir. 1980) (CWA § 301(d) "requires review of [effluent limitation] regulations every five years after their promulgation"); *American Frozen Food Institute v. Train*, 539 F.2d 107, 116 (D.C. Cir. 1978) (CWA § 301(d) requires "continuing periodic review [of effluent limitations], presumably until all discharges are terminated."); *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976) ("[CWA] §§ 304(b) and 301(d) place a duty upon the Administrator to review and revise these regulations."); *Tanners' Council, Inc. v. Train*, 540 F.2d 1188, 1195-96 (4th Cir. 1978) ("[CWA s]ection 304(b) provides that § 304 guidelines be revised, if appropriate, at least annually, and § 301(d) has a similar requirement for § 301 limitations at five-year time intervals."); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3rd Cir. 1975), *mandate partially recalled on other grounds*, 560 F.2d 589 (1977), *cert. denied*, 435 U.S. 914 (1978); ("[§ 301(d) of] the [Clean Water] Act contemplates that the § 301 limitations be reviewed 'at least every five years'"); *see also, e.g., Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991) (Congress is presumed to create mandatory duties when it specifies an agency "shall" act); *Northwest Environmental Advocates v. EPA*, 268 F. Supp. 2d 1255, 1260-61 (D. Ore. 2003) (same).

While CWA §§ 304(b), 304(m) and 301(d) grant EPA discretion whether to revise effluent guidelines and limitations, EPA nonetheless has a judicially reviewable mandatory duty both to review effluent guidelines and limitations and to decide from these reviews whether to revise effluent guidelines and limitations. In an analogous setting, the Second Circuit found EPA had a mandatory duty to review and decide whether to revise EPA regulations:

> Although the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion. . . . 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 892, 900 (2d Cir. 1989), *cert. denied*,

Alabama Power Co. v. Environmental Defense Fund, 493 U.S. 991. A district court similarly recently held that an EPA regulation mandating that EPA "shall" propose certain rules as the EPA "determines are appropriate:"

> imposes a nondiscretionary duty on the Administrator to either affirmatively act or decide that no action was needed. . . . [E]ven though the agency has discretion to promulgate "any" regulation it deems appropriate, "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."

Sierra Club v. Leavitt, 2005 U.S. Dist. LEXIS 1771 at *17 (D.D.C. 2005) (Feb. 9, 2005).[3]

2. *To Complete its Duty to Review Effluent Guidelines and Limitations, EPA Must Consider CWA Section 304(b)'s Criteria for Setting Effluent Guidelines.*

EPA contends that it has complied with its mandatory CWA duties to review effluent guidelines and limitations, defeating CWA section 505(a)(2) jurisdiction. EPA apparently contends that such jurisdiction is limited to reviewing whether EPA has acted at all in the face of a mandatory duty, not whether the agency has acted to fulfill all aspects of the mandatory duty.

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[3] Arguably, mandatory duties only exist where Congress has further provided deadlines for the agency actions at issue. *Sierra Club v. Thomas*, 828 F.2d 783, 790-91 (D.C. Cir. 1987), *but see Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 568 (N.D. Tx 1997) and cases cited therein. Congress has mandated reviews of effluent guidelines and limitations by date-certain deadlines. Mandatory deadlines are inferred whenever a Congressional deadline "is readily-ascertainable by reference to some other fixed date or event." *Sierra Club v. Thomas*, 828 F.2d at 790-91. EPA follows a calendar year in its ostensible "reviews" of effluent guidelines. *See* 68 Fed. Reg. 75515; 69 Fed. Reg. 53705. Thus, the end of every calendar year is the deadline for completion of EPA's annual review of effluent guidelines. *See In re Center for Auto Safety*, 793 F.2d 1346, 1348-49 (D.C. Cir. 1986) (agency convention establishes the reference date for inferred Congressional deadline). Alternatively, EPA's completion of any annual review of effluent guidelines is the "fixed date or event" for setting the deadline for completion of the ensuing annual review. Once EPA completes an annual review, it must complete the ensuing annual review within a year. *See Summary Judgment Order* at 2. (EPA has a mandatory duty to issue EGPs every two years, no later than two years since the date of the previous EGP); *Environmental Defense Fund*, 870 F.2d 892 (requirement to review regulations every five years creates a mandatory duty). Similarly, EPA must complete each of its perpetual five-year reviews of effluent limitations within five-years of completing its previous review of any given effluent limitations. *See id.* at 2; *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 266 (5th Cir. 1989) (challenge to EPA failure to update effluent limitations properly resides in district court, not court of appeals).

EPA Mot'n at 11. EPA mischaracterizes the governing law. CWA § 505(a)(2), like the APA, 5 U.S.C. § 706(a)(1), codifies traditional mandamus principles under which the sole question is whether an agency has performed a mandatory duty *in total and in the manner required. See e.g.*, *Florida PIRG v. EPA*, 386 F.3d 1070, 1088 (11th Cir. 2004); *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378-80 (2004). As *Florida PIRG* pointed out in an analogous context:

> [T]he 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.

386 F.3d at 1087-88 (in determining whether to approve CWA water quality standards, EPA has mandatory duty reviewable in district court to consider statutory criteria for such approval); *see also Pennsylvania Dep't of Environmental Resources v. EPA*, 618 F.2d 991, 994-97 (3rd Cir. 1980) (finding district court § 505(a)(2) jurisdiction to compel EPA to complete promulgation of regulations when EPA had promulgated part, but not all, of required regulations); *In re Bluewater Network*, 234 F.3d 1305, 1308, 1315-16 (D.C. Cir. 2000) (ordering agency to complete promulgation of incompleted rulemaking); *Cobell v. Norton*, 240 F.3d 1081, 1107 (D.C. Cir. 2001) (ordering agency to comply with fiduciary mandates left only partly filled); 5 U.S.C. § 551(13) (defining "agency action" to include"the whole or a part of a[] . . . failure to act").

The cases cited by EPA do not support the proposition that EPA defeats CWA § 505(a)(2) jurisdiction simply by taking some action, regardless of whether such action complies with mandatory requirements, nor undermine that CWA § 505(a)(2) jurisdiction exists to compel EPA to consider criteria the CWA directs it to consider when acting. In these cases, the courts dismissed jurisdiction CWA § 505(a)(2) jurisdiction because the plaintiffs in each case had failed to identify a mandatory duty that EPA has failed to take, and were instead challenging EPA's exercise of discretion. *City of Las Vegas v. Clark County,* 755 F.2d 697, 704 (9th Cir.

1985); *Scott v. City of Hammond,* 741 F.2d 992 (7th Cir. 1984).[4]

The CWA requires EPA to consider the criteria set forth in CWA §§ 304(b)(1)(B), (b)(2)(B), and (b)(4)(B) for setting effluent guidelines ("the 304(b) Guidelines Criteria") in reviewing and determining whether to revise effluent guidelines and limitations. *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *19 ("Understanding [CWA § 304(m)(1)(A) as a Congressional command to review and revise guidelines in conformity with the parameters set out at length in [CWA] § 304(b) makes logical sense. . . ."); *accord* 68 Fed. Reg. 75515, 75520 (Dec. 31, 2003); *Pacific Fisheries*, 615 F.2d at 812 (in its five year review of effluent limitations, EPA will be required to 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); CWA § 301(d)[5]; *see American Frozen Food*, 539 F.2d at 120 (EPA must consider the 304(b) Guidelines Criteria in promulgating effluent guidelines); *see also Florida PIRG*, 386 F.3d at 1087; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971) (in reviewing agency action "the court must consider whether the decision was based on a consideration of the relevant factors.").

EPA must be held to have a mandatory duty to consider the 304(b) Guidelines Criteria EPA when reviewing whether it is appropriate to revise effluent guidelines and limitations to

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[4] Two other cases cited by EPA are also not on point. In both cases, the courts dismissed district court jurisdiction because the CWA and CAA, respectively, expressly assigned judicial review over the EPA actions in issue to the courts of appeals. *See Sun Enterprises, Ltd. v. Train,* 532 F.2d 280, 288 (2d Cir. 1976); *Sierra Club v. Browner,* 130 F. Supp. 2d 78, 82 (D.D.C. 2001), *aff'd,* 285 F.3d 63 (D.C. Cir. 2002).

[5] CWA § 301(d) provides that BAT and BCT effluent limitations "shall be reviewed at least every five years and, if appropriate, *revised pursuant to the procedure established under* [CWA § 301(b)(2)]." CWA § 301(b)(2), in turn, requires EPA to base effluent limitations on the effluent guidelines, thus mandating that in deciding whether to revise effluent limitations, EPA must consider effluent guidelines. In this fashion, EPA's consideration of effluent limitations necessarily should reflect EPA's due consideration of the 304(b) Guidelines Criteria EPA must use to set effluent guidelines.

give effect to Congress' intent in providing for effluent guidelines and limitations. *See Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1426 (W.D. Wash. 1991); *aff'd*, *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. Wash. 1994) ("In interpreting statutes, a court's function is to construe the language so as to give effect to the intent of Congress."). In *Alaska Ctr.*, the court found that EPA has a mandatory CWA duty to adopt specified plans when states have failed to submit proposed plans required by CWA § 303, 33 U.S.C. § 1313, reasoning that otherwise, "an important aspect of the federal scheme of water pollution control could be frustrated by the refusal of states to act." *Id.* at 1427. Similarly, a fundamental aspect of Congress' CWA design will be thwarted if EPA is deemed not to have a mandatory duty to consider the 304(b) Guidelines Criteria when reviewing effluent guidelines and limitations. As noted, the 304(b) Guidelines Criteria require EPA to set effluent guidelines at the level of pollution reduction technically and economically feasible as intrinsic to a strategy of achieving a nationally uniform floor of pollutant reduction. *See*, *e.g.*, *American Frozen Food Institute v. Train*, 539 F.2d 107, 118-20 (D.C. Cir. 1978) (noting that CWA legislative history repeatedly emphasizes "the critical importance of 'nationally uniform [technology-based] effluent limitations'"); Plts. MSJ at 3-8. For EPA to achieve Congress' intent, EPA must review whether effluent guidelines and limitations are still in keeping with the 304(b) Guidelines Criteria.

Plaintiffs' MSJ establishes that EPA has *not* considered all the 304(b) Guidelines Criteria in its reviews of effluent guidelines and limitations and has further indicated it intends to continue to "review" effluent guidelines and limitations without fully considering these criteria. Plts. MSJ at 16-18, 20-24. Departing fundamentally from the 304(b) Guidelines Criteria, which directs EPA to analyze what level of pollution reduction is technically and economically feasible, EPA is focusing on a poorly designed and executed risk assessment that seeks to rank the relative risk to receiving waters posed by various industries. EPA is using this risk assessment to rule out effluent guidelines and limitations revision for all but a few subcategories of industry that EPA has deemed to pose the greatest relative risk of environmental harm. CWA

§ 505(a)(2) jurisdiction exists to compel EPA to cease its practice of ignoring the 304(b) Guidelines Criteria in its effluent guidelines and limitations reviews.

3. *EPA Has a Mandatory CWA Duty To Publish Effluent Guidelines Plans with Specified Elements Every Two Years.*

As noted CWA § 304(m) specifies that EPA "shall" publish EGPs which "shall" (1), schedule the annual review of all existing effluent guidelines, (2) identify new categories of industry discharging toxic and nonconventional pollutants which are not covered by existing effluent guidelines, and (3) schedule the promulgation within three years of new effluent guidelines for these latter industries. CWA § 304(m) thus establishes mandatory CWA duties, reviewable in district court, for EPA to promulgate EGPs that contain all three elements. *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26 (district court asserting jurisdiction to compel EPA to prepare EGP containing these three elements); *see also, e.g., Idaho Conservation League*, 946 F.2d at 720.

EPA contends that it complied with this mandatory duty by publishing the 2004 EGP, defeating CWA § 505(a)(2) jurisdiction. EPA again argues that because Plaintiffs are complaining only about the manner in which EPA has complied with CWA § 304(m), not whether EPA has complied at all, CWA § 505(a)(2) provides no jurisdiction. EPA Mot'n at 11. EPA ignores, however, that its mandatory duty is not merely to publish EGPs, but to publish EGPs that contain the three elements outlined above. As argued in the preceding section, CWA § 505(a)(2) jurisdiction extends to compel performance of mandatory duties *in total and in the manner required*. *E.g.*, *Florida PIRG*, 386 F.3d at 1088; *Pennsylvania Dep't of Environmental Resources*, 618 F.2d at 994-97.

EPA must be held to a mandatory duty to include the three elements specified in CWA § 304(m) in EGPs to achieve Congress' intent in amending the CWA to require EGPs. *See Alaska Ctr. for the Env't*, 762 F. Supp. at 1426. Congress enacted CWA § 304(m) because "the slow pace in which these [EPA effluent guideline and limitations] regulations are promulgated

continues to be frustrating" and "to assure that these guidelines and standards will be promptly developed and implemented." *See* Plts. MSJ Ex. 7 at 1424; *see also* 55 Fed. Reg. 80, 82 (Jan. 2, 1990) (EPA acknowledging Congressional frustration at EPA's slow pace in promulgation of effluent guidelines); *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26 ("Despite high hopes that the 1977 amendments [to the CWA] would goad EPA to take prompt regulatory action, continued agency inertia [in promulgating effluent guidelines] forced Congress to amend the Act yet again in 1987 [to add CWA § 304(m)].").

As shown in Plaintiffs' MSJ, EPA has not complied with CWA § 304(m)'s mandate to adopt EGPs that contain all three elements discussed above. Plts. MSJ at 33-35. The 2004 EGP does not schedule the legally mandated review required to determine whether existing effluent guidelines reflect technologically and economically feasible levels of pollution control. The EGP further fails to identify many industries discharging toxic and nonconventional pollutants that are not covered by existing effluent guidelines and thus fails to set a schedule for promulgation of new effluent guidelines for such industries. Accordingly, EPA has breached a mandatory CWA duty in not publishing an EGP that includes the express elements required by CWA § 304(m), providing this Court with jurisdiction under CWA § 505(a)(2).[6]

B. ***Alternatively, District Court Jurisdiction Is Proper under the APA.***

Assuming *arguendo* that Plaintiffs' claims only challenge discretionary EPA action in reviewing effluent guidelines and limitations and adopting the 2004 EPG, district court jurisdiction over Plaintiffs' claims would still be proper under the APA. District courts have jurisdiction under the APA to review EPA's discretionary CWA actions other than the narrow class of actions made reviewable only in the courts of appeals. *See City of Las Vegas,* 755 F.2d

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[6] As pointed out in footnote 3, *supra*, mandatory duties arguably only exist where Congress has further provided deadlines for the agency actions at issue. Congress has mandated preparation of EGPs by date-certain deadlines. *See Summary Judgment Order* (EPA has a mandatory duty to issue EGPs every two years, no later than two years since the date of the previous EGP); *Environmental Defense Fund*, 870 F.2d 892; *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 (EPA has mandatory duty to issue EGPs with specified elements).

at 704; *Scott*, 741 F.2d at 995. As argued below, the EPA actions at issue are not within this narrow class.

C. *CWA § 509(b)(1) Does not Assign Jurisdiction over Plaintiffs' Claims to the Courts of Appeals.*

EPA erroneously contends that CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1), assigns any jurisdiction to hear Plaintiffs' claims exclusively to the courts of appeals. EPA Mot'n at 11-16. While CWA § 509(b)(1) assigns the courts of appeals exclusive jurisdiction to review certain specified EPA actions, these actions do not include review and promulgation of effluent guidelines under CWA § 304(b), promulgation of EGPs under CWA § 304(m), nor review of effluent limitations under § 301(d). EPA argues, however, that these actions should nonetheless be reviewable only in the courts of appeals because they are related to adoption of effluent limitations under CWA § 301, and the latter is reviewable in the courts of appeals under CWA § 509(b)(1)(E). EPA Mot'n at 12-14.

EPA's argument is contrary to controlling Ninth Circuit precedent.[7] *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992). In *Longview Fibre*, the Ninth Circuit expressly rejected (at EPA's urging) that courts of appeals have jurisdiction to review EPA actions not expressly listed in CWA § 509(b)(1) when such actions are "functionally similar or closely related to" actions that are listed in CWA § 509(b)(1). *Id*. at 1314. Applying the maxim *expressio unius est exclusio alterius*, the Ninth Circuit deemed CWA § 509(b)(1)'s detailed listing of EPA actions reviewable by the courts of appeals excludes court of appeals review of any other EPA actions under the CWA:

> No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated.

Id. at 1313; *accord Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431-32 (9th Cir. 1991); *Envt'l Protection Info. Ctr. v. Pacific Lumber*, 266 F. Supp. 2d 1101, 1113-14 (N.D. Cal. 2003); *Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003).

None of the cases cited in the EPA Motion dictate a contrary rule. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), for example, supports the *Longview Fibre* rule. In *du Pont*, the Court deemed that EPA regulations had to be effluent limitations under CWA § 301 rather than effluent guidelines under CWA § 304 to be reviewable in the courts of appeals:

> [CWA] § 509(b)(1) . . . provides that "[r]eview of the Administrator's action... (E) in approving or promulgating any effluent limitation... under § 301" may be had in the courts of appeals. On the other hand, [§ 509(b)(1) of] the Act does not provide for judicial review of § 304 guidelines. If EPA is correct that its regulations are "effluent limitation[s] under § 301," the regulations are directly reviewable in the Court of Appeals. *If industry is correct that the regulations can only be considered § 304 guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere*.

430 U.S. at 124-25 (emphasis added).[7] Thus *du Pont* supports that court of appeals jurisdiction extends *only* over those EPA actions expressly enumerated in CWA § 509(b)(1), and not to any other actions, no matter how closely related to EPA actions listed in CWA § 509(b)(1).

The additional cases cited by EPA found exclusive court of appeals jurisdiction not because EPA's challenged actions were closely related to EPA actions listed under CWA § 509(b)(1), but because those actions *were deemed to be actions listed under CWA § 509(b)(1)*. *National Wildlife Federation v. EPA*, 286 F.3d 554 (D.C. Cir. 2002) (asserting court of appeals jurisdiction to review EPA promulgation of CWA § 301 Effluent Limitation, an action listed in CWA § 509(b)(1)(E)); *NRDC v. EPA*, 673 F.2d 400, 405 n.15, 407 (D.C. Cir. 1982) (court of appeals jurisdiction exists because EPA's NPDES permitting regulations are an effluent

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[7] In a footnote, the Supreme Court further observed that the Eighth Circuit had held that promulgation of effluent guidelines is reviewable in district court rather than the courts of appeals, *CPC Int'l, Inc. v. Train*, 515 F. 2d 1032, 1038 (1975). 430 U.S. at 125 n.14. The Court added, "It has been suggested, however, that even if the EPA regulations are considered to be only § 304 guidelines, the Court of Appeals might still have ancillary jurisdiction to review them because of their close relationship with the § 301 effluent limitations . . . which are directly reviewable in the Court of Appeals." *Id*. The Court, however, did not endorse this theory and instead held that it had to find that the EPA regulations in issue were effluent limitations under CWA § 301 rather than only effluent guidelines under CWA § 304 to be reviewable in the courts of appeals.

limitation or other limitation under § 509(b)(1)(E)); *NRDC v. EPA*, 656 F.2d 768, 775-76 (D.C. Cir. 1981) (same); *Maier v. EPA*, 114 F.3d 1032, 1038-39 (10th Cir. 1997) (finding court of appeals jurisdiction to review EPA failure to promulgate effluent limitations required under CWA § 301(b)(1)(B), in part because EPA has no mandatory duty reviewable under CWA § 505(a)(2) to revise this type of effluent limitation)[8]; *Virginia Elec. and Power Co. v. Costle,* 566 F. 2d 446 (4th Cir. 1977) (EPA regulations constitute "other limitations" listed in CWA § 509(b)(1)(E)).[9]

Thus, court of appeals jurisdiction over Plaintiffs' claims is proper only if the EPA actions at issue can reasonably be characterized as being functionally equivalent to an action listed in CWA § 509(b)(1). The only nexus offered by EPA between the challenged EPA conduct at issue in this case and actions listed in CWA § 509(b)(1)(E) is that the challenged

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[8] The holding in *Maier* that EPA has no mandatory duty to revise secondary treatment-based effluent limitations for municipal sewage plants required by CWA § 301(b)(1)(B) is not relevant in this case, as none of Plaintiffs' claims concern such effluent limitations. CWA § 301(d) *does not address such effluent limitations*. Furthermore, CWA § 304(b) does not require EPA to promulgate effluent guidelines for municipal sewage plants and CWA § 304(m) omits any requirements concerning effluent limitations for sewage plants under CWA § 301(b)(1)(B). CWA § 304(d), a provision of the CWA not at issue here, imposes requirements that relate to setting such effluent limitations, but EPA grants EPA much more latitude than CWA §§ 304(b), (m) and 301(d).

[9] 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. *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 832, 843, 874-76 (9th Cir. 2003); *rehrg denied, rehrg en banc denied*, 344 F.3d 832, *cert. denied*, *Tex. Cities Coalition on Stormwater v. EPA*, 124 S. Ct. 2811 (2004). Court of appeals jurisdiction was not contested in any of these cases, however, and the court provided no analysis of the bases for jurisdiction in any of these cases. For example, in *Environmental Defense Ctr.*, the court's sole discussion of jurisdiction consisted of the single conclusory sentence: "We have jurisdiction pursuant to § 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1) (assigning review of EPA effluent and permitting regulations to the Federal Courts of Appeals)." To square these cases with *Longview Fibre*, the court must be deemed to have found EPA adoption of these permitting regulations to be tantamount to one of the actions expressly made reviewable by CWA § 509(b)(1), and not merely closely related to such actions.

actions have a "close relationship to" promulgation of Effluent Limitations. EPA Mot'n at 12. EPA does not and cannot, however, argue that the three challenged actions at issue here are functionally the *same action* as promulgation of effluent limitations.

One, under CWA § 304(m), EGPs *do not govern EPA's five-year review of effluent limitations and do not govern EPA's promulgation of effluent limitations under CWA § 301.* EGPs solely relate to CWA § 304 effluent guidelines. Effluent guidelines under CWA § 304 *are not* the same as effluent limitations under CWA § 301, as the Supreme Court expressly recognized in *du Ponte* in noting that CWA § 509 makes the latter, but not the former, reviewable in the courts of appeals. 430 U.S. at 124-25. Accordingly, a plan governing the review and adoption of CWA § 304 effluent guidelines cannot reasonably be deemed to be tantamount to the promulgation of effluent limitations under CWA § 301, nor even closely related to such action.

Two, an annual review of existing effluent guidelines pursuant to CWA § 304(b) also cannot reasonably be deemed to be tantamount to promulgation of effluent limitations under CWA § 301. One, this would again contradict *du Ponte*'s holding that effluent guidelines and effluent limitations are not the same. 430 U.S. at 124-25. Two, a *review* of regulations is not the same action as *promulgation* of regulations, a point EPA attempts (though erroneously) to press to its advantage elsewhere in its Motion. EPA Mot'n at 18-19.

Three, a five-year review of effluent limitations cannot reasonably be deemed to be tantamount to promulgation of effluent limitations under CWA § 301. Again, this would contradict the point urged by EPA itself that a *review* of regulations is not the same action as *promulgation* of regulations. *Id.*; *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).

In sum, the EPA actions at issue here are *not* the functional equivalent of promulgation of effluent limitations, leaving no basis for court of appeals jurisdiction.

D. *Court of Appeals' All Writs Act Jurisdiction Is Irrelevant in this Case.*

The courts of appeals generally have original and exclusive jurisdiction under the All Writs Act to compel agencies to end unreasonable delay whenever courts of appeals have original jurisdiction ultimately to review the delayed agency action. Such jurisdiction is typically seen as necessary to protect the court of appeals' future jurisdiction. *See e.g.*, *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"). EPA erroneously argues that the *TRAC* rule further defeats district court jurisdiction over Plaintiffs' claims. EPA Mot'n at 15.

The *TRAC* rule is inapplicable because none of Plaintiffs' claims concern delayed EPA action that would ultimately be reviewable in the courts of appeals once finally taken. Plaintiffs complain that EPA has impermissibly delayed reviewing effluent guidelines and limitations, but neither action, once final, would be reviewable in the court of appeals. As discussed above, CWA § 509(b)(1) gives the courts of appeals jurisdiction only to review EPA's promulgation of effluent limitations under CWA § 301, not EPA's *review* of effluent limitations. Moreover, under CWA § 509(b)(1), the courts of appeals lack jurisdiction to review EPA promulgation *or* review of effluent guidelines. *du Ponte*, 430 U.S. at 124-25; *see NRDC v. Train*, 510 F.2d at 704 (district courts have jurisdiction to compel end to EPA delay in promulgating effluent guidelines).

Plaintiffs further complain that EPA's 2004 EGP is legally deficient. As discussed above, promulgation of EGPs is also not reviewable in the courts of appeals, thus precluding court of appeals review under the *TRAC* rule of agency delay in promulgating EGPs.[10]

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[10] Notably, on August 11, 2004, this Court granted EPA summary judgment on the merits of Plaintiffs' Third Claim, holding that EPA had not violated the deadline for publishing its 2004 EGP. *Summary Judgment Order*. EPA's motion for summary judgment on Plaintiffs' Third Claim did not contend that the Court lacks jurisdiction to determine whether EPA has published an EGP. The Court could have only properly granted EPA summary judgment on the merits of Plaintiffs' Third Claim if EPA is presently wrong concerning this Court's jurisdiction.

II. *Plaintiffs Need Not Establish "Final Agency Action" within the Meaning of the APA for CWA Citizen Suit Claims.*

EPA contends Plaintiffs' claims should be dismissed because the EPA actions at issue are not discrete, final agency action under the APA. EPA Mot'n at 16-22. EPA ignores, however, that Plaintiffs' claims are brought under CWA § 505(a)(2) to compel performance of CWA mandatory duties. While the APA, 5 U.S.C. § 704, limits judicial review *under the APA* to "final agency action for which there is no adequate remedy in court," this section is necessarily limited to APA claims and thus is irrelevant to claims under CWA § 505(a)(2). CWA § 505(a)(2) does not limit judicial review to final agency action, but instead provides jurisdiction to compel any CWA mandatory duty which EPA has not performed. *E.g.*, *Trustees for Alaska*, 749 F.2d at 558; *Pennsylvania Dep't of Environmental Resources*, 618 F.2d at 994-95 (final agency action not required for CWA § 505(a)(2) review).

Plaintiffs have asserted the APA as an alternative basis for their claims, but only if the Court finds that Plaintiffs' claims are not under CWA § 505(a)(2). Claims can be made under the APA only when there is no other statutory remedy available. *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001); *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 851 (9th Cir. 1987). As argued in section I.A.1, *supra*, CWA § 505(a)(2) provides an appropriate basis for Plaintiffs' claims, necessarily precluding application of the APA and the APA's limitations to Plaintiffs' claims.

III. *Alternatively, EPA's Effluent Guidelines Reviews and Adoption of the 2004 Effluent Guidelines Plan Are Reviewable Agency Actions under the APA.*

Assuming *arguendo* that Plaintiffs' claims cannot be brought under CWA § 505(a)(2) but are instead under the APA, EPA's actions at issue constitute final agency actions reviewable under the APA.

A. *EPA's Reviews of Effluent Guidelines and Limitations Constitute Final Agency Action*.

EPA erroneously contends that reviews of effluent guidelines and limitations are not

final agency actions subject to APA review. EPA Mot'n at 18-19; *see Norton*, 124 S. Ct. at 2378-79 (when no other legal remedy is available, the APA authorizes challenges to final agency action). As discussed in section I.A., *supra*, Plaintiffs' claims concern EPA's procedural duties to review and decide whether to revise effluent guidelines and limitations, not EPA's substantive revision of effluent guidelines and limitations. *E.g.*, *Environmental Defense Fund*, 870 F.2d at 900. What constitutes reviewable final agency action under the APA is different in such a procedural rights setting. Whenever a statute:

> simply guarantees a particular procedure, not a particular result . . . . a person with standing who is injured by a failure to comply with the . . . procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1089 (9th Cir. 2003).

Whenever a required agency environmental review will "have an impact on," "will influence subsequent . . . specific actions," or "pre-determines the future" by narrowing an agency's future decision options, failure to comply with the review requirements constitutes reviewable final agency action. *Laub*, 342 F.3d at 1089-91. This is true for environmental reviews of broad programs, when the review will impact future specific decisions. *Id*. As noted, EPA's reviews of effluent guidelines and limitations must end with a determination whether to revise effluent guidelines and limitations. *See*, *e.g.*, *Environmental Defense Fund*, 870 F.2d at 900; 69 Fed. Reg. 53705 (Sept. 2, 2004). EPA's reviews thus have real and highly consequential impacts as they necessarily narrow and eliminate EPA's options for toughening CWA water pollution discharge limitations for the nation's industrial polluters. Accordingly, EPA's reviews are reviewable agency action under the APA.

The cases EPA claims defeat APA jurisdiction are not on point as both cases addressed only challenges to substantive agency decisions, and thus did not address what constitutes reviewable final agency action ripe when procedural rights are at stake. *Norton*, 124 S. Ct. 2373; *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990).

Norton has two holdings, neither of which involved environmental review procedures

One, *Norton* held that a clause in a Wilderness Study Area (WSA) land use plan prepared by the Bureau of Land Management (BLM) under the Federal Land Policy and Management Act (FLPMA) imposed only discretionary, not mandatory duties on BLM. This holding is limited to the specific facts and regulatory setting of the BLM plan and thus provides no guidance here. 124 S. Ct. at 2380-81. Two, *Norton* held that BLM action to implement FLPMA's mandate to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness," was action too diffuse and general to constitute "discrete" agency action subject to APA review. *Id*. This second holding in *Norton* relied on *Lujan*, in which the Court held that a series of BLM land use classification decisions under FLPMA that plaintiffs characterized as BLM's "land withdrawal review program" was not a discrete agency action. The Court explained its *Lujan* holding thusly:

> The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action" -- much less a "final agency action" -- than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration.

497 U.S. at 890. The second holding in *Norton* and the holding in *Lujan* are also irrelevant here, as they simply does not address whether procedural environmental reviews, as opposed to substantive decisions, must be "discrete" to be reviewable. As noted, *Laub* indicates that this is not the case: so long as environmental reviews foreclose options on future specific action, such reviews themselves are reviewable final agency action even if they are broadly scoped.

Even if, however, EPA's reviews of effluent guidelines and limitations must be "discrete" actions to be subject to APA review, they would qualify. BLM's perpetual efforts at issue in *Norton* and *Lujan* to implement FLPMA's broad mandates to manage vast tracts of federal land consistent with vaguely framed overall goals of balancing wilderness preservation against competing concerns is not analogous to EPA's CWA duties to review effluent guidelines

and limitations. Whereas BLM's amorphous actions at issue in *Norton* and *Lujan* had no set end, the CWA gives EPA specific recurring deadlines (every year and every five years, respectively) to perform a single focused task: review all its effluent guidelines and effluent limitations regulations. Whereas the statutory duties at issue in *Norton* and *Lujan* involved multiple, loosely related decisions, CWA section 304(m) requires EPA to make a single decision to adopt a single plan for annual effluent guidelines review and adoption. Whereas the FLPMA provisions in *Norton* and *Lujan* were too vague for judicial oversight, Congress has provided a clear basis for judicial oversight in mandating that EPA consider specific criteria in reviewing EPA's discrete set of effluent guidelines regulations. *See*, *e.g.*, *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *19; *Environmental Defense Fund*, 870 F.2d at 900. Finally, whereas the FLPMA provisions at issue in *Norton* and *Lujan* required a highly discretionary balancing of widely varying concerns, Congress enacted CWA section 304(m) with one focused goal: to hasten what Congress saw as EPA's frustratingly slow pace in adopting nationally uniform effluent guidelines and limitations. Plts. MSJ Ex. 7 at 1424; *see NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26. To give effect to Congress' intent behind CWA § 304(m), EPA must be compelled to review effluent guidelines and limitations, the indispensable first step for keeping effluent guidelines and limitations updated. *See Alaska Ctr. for the Env't*, 762 F. Supp. at 1426.

EPA further argues that effluent guideline and limitation reviews are not final agency action because they are only intermediate steps rather than the ultimate consummation of the effluent guideline and limitation promulgation process. EPA Mot'n at 18-19. The reviews need not end effluent guideline and limitation promulgation to be final agency action, however. Environmental reviews are judicially reviewable final agency action, even though only prelude to subsequent substantive agency decision, whenever the reviews have legal consequence. *Laub*, 342 F.3d at 1089-91; *Center for Sierra Nevada Conservation v. Berry*, No. S-02-325, slip op. at 25-28 (Plts. MSJ Ex. 12) (Feb. 15, 2005) (decision constituting intermediate step to deciding

whether to do an environmental impact statement (EIS) is final agency action, as decision will narrow when EISs are prepared). Agency actions are final for APA purposes when they represent the consummation of "*a*" decisionmaking process "by which rights or obligations have been determined or from which legal consequences will flow," even if such decisions are only the intermediate steps to final regulatory action. *E.g., Center for Sierra Nevada Conservation,* slip op. at 27-28; *see Bennett v. Spear,* 520 U.S. 154, 177-78 (1997). Effluent guideline and limitations reviews end with EPA determining whether it is appropriate to revise effluent guidelines and limitations, making these reviews consequential.

EPA further overlooks that, apart from complaining of procedural review violation, Plaintiffs complain that EPA *has not acted* to review effluent guidelines and limitations as required. Thus, to the extent this action is under the APA, it is an action under APA § 706(1) to compel agency action unlawfully withheld. EPA's failure to take action required by statute *per se meets the final agency action requirement*. A contrary rule would allow EPA to nullify APA § 706(1) and block judicial review by simply never acting. *See Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 861-66 (4th Cir. 1961) ("When a party suffers a legal wrong from continuing agency delay and . . . there is no other adequate administrative or judicial remedy, *the delay is final agency action*" subject to APA review) (emphasis added); *accord Cobell*, 240 F.3d at 1095-97; *Center for Sierra Nevada Conservation* (agency failure to complete required programmatic environmental review constitutes failure to act that may be compelled under APA § 706(1)).

B. *EPA's Promulgation of the 2004 EGP Constitutes Reviewable Agency Action*.

Erroneously relying on *Norton*, EPA contends that EGPs adoption is not a "discrete action" subject to APA review. As noted, *Norton* had two holdings, neither of which aids EPA here. As noted, *Norton*'s first holding was that a particular clause in a BLM land use plan did not impose mandatory duties on BLM. Again, this holding is irrelevant as Plaintiffs are not seeking to enforce EGPs, but instead to challenge EPA failure to include certain mandatory

elements in EGPs. Whether a clause in a BLM land use plan imposes a mandatory duty on BLM is irrelevant for whether EPA adoption of CWA EGPs is a "discrete" action.

Norton's second holding was that BLM action to implement FLPMA's mandate for managing WSAs was action too diffuse and general to constitute "discrete" agency action subject to APA review. As noted, *Norton* here relied on *Lujan*, in which the Court held that a series of BLM land use classification decisions under FLPMA for which plaintiffs coined the term BLM's "land withdrawal review program" was not a discrete agency action. These holdings are similarly irrelevant here. FLPMA's broad mandate to manage vast tracts of federal land consistent with a vaguely framed overall goal is not analogous to CWA § 304(m)'s very specific directive to prepare a single document which, (1), schedules the annual review of all existing effluent guidelines, (2) identifies new categories of industry discharging toxic and nonconventional pollutants not covered by existing effluent guidelines, and (3) schedules the promulgation within three years of new effluent guidelines for these industries. *See NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26 (EPA has a mandatory duty to prepare EGPs with these specific elements). Unlike the litigants in *Lujan*, Plaintiffs have not made up the concept of an effluent guidelines "plan," which is clearly identified in CWA § 304(m) as a discrete planning document that EPA must prepare. Whereas, in *Norton* and *Lujan*, BLM faced perpetual and vaguely framed land management duties, under CWA § 304(m), EPA has specific recurring deadlines every two years to make a single decision on a single EGP document with a prescribed focus: scheduling EPA's mandatory review of existing effluent guidelines and promulgation of certain new effluent guidelines. Whereas the FLPMA provisions at issue in *Norton* and *Lujan* provided no meaningful standard for judicial review, CWA § 304(m) mandates that EPA adopt a plan with three specific elements, providing clear basis for judicial review as to whether EPA's EGPs do in fact contain these three elements. *See NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26 (holding that EPA's EGP lacked the three elements required by CWA § 304(m)).

EPA further contends that its adoption of EGPs does not meet the APA's finality requirement. EPA Mot'n at 20-22. As noted, agency actions are final for APA purposes when they result in decisions from which "legal consequences will flow." *E.g., Bennett,* 520 U.S. at 177-78. EGPs meet this requirement as EPA cannot act at odds with its EGPs, which, properly framed, impose mandatory duties on EPA to review *all* effluent guidelines annually, list *all* industries discharging toxic or nonconventional pollutants not yet regulated by effluent guidelines, and adopt new effluent guidelines for such newly identified industries within three years. *See NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-26. To the extent that *Norton* is relevant, it supports finding EGPs to be final agency action. While *Norton* declined to compel BLM to enforce one particular discretionary aspect of a BLM land use plan, *Norton* noted that BLM could not violate clear directives of the plan and could be compelled to take actions that the plans clearly made mandatory. 124 S. Ct. at 2382, 2384. Under *Norton*, then, BLM land use plans are "final" for final agency action purposes because they have legal consequences. Under *Reilly*, CWA EGPs similarly have legal consequences. *Norton* suggests that EGPs are thus also final agency actions.[11]

IV. *Plaintiffs' Claims Are Not Moot.*

EPA erroneously contends that Plaintiffs' claims should be dismissed as moot. EPA Mot'n at 8-10. Defendants claiming mootness must satisfy a "heavy burden of persuasion." *San Francisco Baykeeper, Inc., v. Tosco Corp*., 309 F.3d 1153, 1159 (9th Cir. 2002), *cert. dismissed*, *Tosco Corp. v. San Francisco Baykeeper, Inc*., 539 U.S. 924 (2003). EPA has not met this heavy burden. Whether EPA has complied with its CWA duties to review effluent guidelines and limitations and prepare EGPs constitutes a live, redressable controversy, precluding EPA's mootness defense. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189-94 (2000); *San Francisco Baykeeper,* 309 F.3d at 1159; *Florida PIRG*, 386 F.3d at 1086-88.

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[11] As noted in footnote 10, *supra*, this Court's Summary Judgment Order of August 11, 2004, to have been correctly entered, had to implicitly assume that EPA's present arguments concerning jurisdiction to review whether EPA has complied with CWA § 304(m) are wrong.

EPA asserts that it has complied with its CWA duties to review guidelines and imitations and prepare its 2004 EGP, mooting Plaintiffs' claims. EPA Mot'n at 9-10. The Court cannot find Plaintiffs' claims moot, however, without finding that Plaintiffs are wrong on the merits--which the Court cannot do based on EPA's Motion. EPA's Motion does not even argue the merits of Plaintiffs' claims.

A. *Plaintiffs' First and Second Claims for EPA's Failure To Review Effluent Guidelines Is Not Moot.*

EPA asserts that it reviewed effluent guidelines and limitations in 2003 and 2004 as required by the CWA, mooting Plaintiffs' First and Second Claims. EPA Mot'n at 9-10. What EPA calls its "review" is not the reviews mandated by the CWA, however. As shown by Plaintiffs' MSJ, EPA failed in 2003 and 2004 to review *all* effluent guidelines to determine whether they require the level of pollutant reduction that is technically and economically feasible for industry to achieve, as required by CWA §§ 304(b) and 304(m). Plts. MSJ at 16-18, 20-24. EPA further failed to review effluent limitations as required by CWA § 301(d). *Id*. Plaintiffs' challenge to EPA's improper review of effluent guidelines and limitations in 2003 and 2004 is not moot because EPA's mandatory one year annual review of effluent guidelines and five year review of effluent limitations is "capable of repetition, yet evading review." Claims are not moot whenever "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173-74 (9th Cir. 2002). Federal agency actions that are required by law to be repeated every year are *per se* within this capable of repetition, yet evading review exception. *Id*.[12]

Moreover, as pointed out in Plaintiffs' MSJ, EPA is not only capable of repeating its

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[12] EPA promulgated its effluent limitations in many different years, rather than all at once in the same year. Thus, more or less, every year one or more of its EPA's 56 categories and 450 plus subcategories of effluent limitations will come due for the five year review specified by CWA § 301(d). As pointed out in Plaintiffs' MSJ, it has been more than five years since EPA reviewed many categories of effluent limitations. Plts. MSJ at Plts. MSJ at 31, n. 34.

unlawful effluent guideline and limitations review methodology, it is doing so in 2005 and has stated in the Federal Register its intention to continue to do so in the future. Plts. MSJ at 22.[13] Plaintiffs are seeking relief to stop EPA's unlawful practice and to prevent EPA from employing the same unlawful methodology when EPA reviews effluent guidelines and limitations in 2006 and beyond. Accordingly, there is a live, redressable controversy. *See*, *e.g.*, *Florida PIRG*, 386 F.3d at 1086-88.

Even if EPA presently halted its flawed effluent guideline and limitation review methodology, Plaintiffs' claims would still not be moot. If it remains possible for a defendant to repeat past violations, a claim related to these past violations is not moot. *Laidlaw*, 528 U.S. at 174, 189-90 ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."); *Tosco Corp*., 309 F.3d at 1159-60.

B. *Plaintiffs' Fourth Claim Concerning EPA's Failure To Complete a Legally Adequate Effluent Guidelines Plan Is Not Moot*

EPA asserts that because it has now adopted the 2004 EGP, Plaintiffs' Fourth Claim alleging that EPA has failed to publish a legally adequate EGP is necessarily moot. As discussed in section I.A.3. *supra*, EPA overlooks that its mandatory duty is not merely to publish an EGP, but to publish an EGP which meets CWA § 304(m)'s express requirements. As shown by Plaintiffs' MSJ, the 2004 EGP fails to include the three elements EGPs must include. Plts. MSJ at 32-35. Plaintiffs are contesting the legal adequacy of the 2004 EGP on this basis and seeking

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[13] As pointed out in Plaintiffs' MSJ, in November 2002, EPA issued a draft National Strategy for Clean Water Regulations (the "Draft Strategy") that proposed new EPA policy on reviewing and promulgating effluent guidelines and limitations and complying with CWA § 304(m)'s requirement to prepare EGPs. MSJ Ex. 11 at 2, 12; *see also* 67 Fed. Reg. 71165 (Nov. 29, 2002). This Draft Strategy outlined the risk assessment approach that EPA is instituting in place of the across the board assessment of technological and economic feasibility of more stringent technology-based effluent limitation specified by the Guidelines Criteria. The 2004 EGP states that EPA plans to finalize its "Draft Strategy" in 2006 as part of the issuance of its 2006 EGP. 69 Fed. Reg. 53705, 53709 (Sept. 2, 2004).

judicial relief requiring EPA to revise the 2004 EGP. Thus, there is a live controversy between the parties over the currently governing EGP. Moreover, even after the 2004 EGP expires on December 31, 2005, Plaintiffs' Fourth Claim will not be moot. EPA promulgates EGPs under CWA § 304(m) every two years, making this action *per se* within the capable of repetition yet evading review exception to mootness. *Biodiversity Legal Foundation*, 309 F.3d at 1173-74. Plaintiffs' challenge to the methodology reflected in EPA's 2004 EGP will remain a live controversy because EPA possibly may employ this methodology again. *Laidlaw*, 528 U.S. at 174, 189-90; *Tosco Corp*., 309 F.3d at 1159-60. Indeed, as pointed out in Plaintiffs' MSJ, EPA intends to continue this legally erroneous methodology in future EGPs. Plts. MSJ at 22. Plaintiffs seek relief to preclude this.

CONCLUSION

The Court properly has jurisdiction over Plaintiffs' claims. Accordingly, EPA's Motion should be denied.

Respectfully Submitted,

Dated: February 28, 2005

Christopher A. Sproul
Attorney for Plaintiffs