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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency,

Defendant.

Case No. C 04-2132 PJH

INTERVENOR AMSA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 11, 2005
Time: 9:00 a.m.
Judge: Honorable Phyllis J. Hamilton
Courtroom 3, 17th Floor

CLEAN WATER ACT CASE

[E-FILING]

MOTION

Intervenor Association of Metropolitan Sewerage Agencies ("AMSA") gives notice that, in response to Plaintiffs' Motion for Partial Summary Judgment, AMSA is requesting summary judgment on Claims One, Two, and Four of Plaintiffs' First Amended Complaint. This Cross-Motion is noticed for May 11, 2005 at 9:00 a.m., which is the hearing date and time set for Plaintiffs' pending Motion for Partial Summary Judgment.

REQUESTED RELIEF

AMSA asks the Court to enter judgment in favor of Defendants and Intervenor pursuant to Fed. R. Civ. Pro. 56(c) and to deny the partial summary judgment motion filed by Plaintiffs. The reasons for this motion are set forth in the accompanying memorandum of points and authorities.

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MEMORANDUM IN SUPPORT OF INTERVENOR AMSA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Intervenor AMSA submits this memorandum in opposition to the Plaintiffs' Motion for Partial Summary Judgment on Claims One, Two and Four of the Plaintiffs' First Amended Complaint,[1] and support of AMSA's Cross-Motion for Summary Judgment. Assuming that this Court has jurisdiction to entertain the Plaintiffs' Motion (which Defendant and Intervenors have contested in their pending Motions for Judgment on the Pleadings), the Plaintiffs' motion should be denied because Defendant EPA has not violated its nondiscretionary duties to review effluent guidelines annually (Count I); to review effluent limitations every five years (Count II); and to publish a biennial effluent guidelines plan in accordance with the requirements of CWA § 304(m) (Count IV). Instead, pursuant to AMSA's accompanying Cross-Motion for Summary Judgment, this Court should grant summary judgment to the Defendant on each of those same Counts, on the grounds that EPA has fulfilled the relevant Clean Water Act requirements and there is no further relief that could be granted to the Plaintiffs by this Court.

ARGUMENT

It is undisputed that EPA has, in fact, published in the Federal Register its annual reviews of the effluent limitations guidelines (ELGs) for 2003 and 2004. 69 Fed. Reg. 53705 (Sept. 2, 2004) and 68 Fed. Reg. 75520 (Dec. 31, 2003). Pursuant to the rulemaking procedure endorsed by the Supreme Court in *E.I. du Pont de Nemours v. Train*, 430 U.S. 113 (1977), these actions encompassed the agency's review of both the § 301(d) effluent "limitations" and the § 304(b) effluent "guidelines." It is also undisputed that EPA has published its biennial effluent guidelines plan for 2004 and 2005. 69 Fed. Reg. 53705 (Sept. 2, 2004). The essence of the Plaintiffs' argument in its Motion for Partial Summary Judgment, therefore, is that the manner in which EPA has performed the requirements of CWA §§ 301(d), 304(b) and 304(m) is "inadequate." However, the Plaintiffs' expansive interpretation of the statute is contradicted by the plain

[1] Plaintiffs do not dispute that the Court has already entered judgment on Claim Three. Plaintiffs' Memorandum in Support at 1, n. 1.

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language of those sections, and Plaintiffs' argument in support of the relief sought in this proceeding is undermined by the case law cited by the Plaintiffs themselves.

I. THE CLEAN WATER ACT DOES NOT REQUIRE A SPECIFIC PROCEDURE FOR THE PERIODIC REVIEW OF EFFLUENT LIMITATIONS UNDER § 301(D) OR EFFLUENT GUIDELINES UNDER § 304(B)

Section 301(d) of the CWA states that:

> Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

Contrary to the Plaintiffs' interpretation of the statute, the only nondiscretionary duty imposed upon EPA in this section is that effluent limitations shall be "reviewed" every five years. The duty to "revise" such limitations arises only if EPA determines that revision is "appropriate," which is a determination placed squarely within the administrative discretion of the agency. More importantly, there are no specific procedures specified for the process of review. The phrase "pursuant to the procedure established under such paragraph" clearly modifies the word "revised," and not the word "reviewed" (which is modified only by the phrase "at least every five years").

Section 304(b) states that:

> For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations.

Once again, the only nondiscretionary duty imposed by this section is to publish guidelines for effluent limitations.[2] The duty to revise such guidelines annually thereafter arises only if EPA determines that revision is "appropriate."

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[2] The remainder of § 304(b) dictates that "such regulations" shall "identify" certain control measures and the degree of effluent reduction attainable through the application of different levels of technology (§§ 301(b)(1)(A), (2)(A), (3) and (4)(A)) and "specify factors" to be taken into account in the application of those technologies (§§ 301(b)(1)(B), (2)(B) and (4)(B)).

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The requirement for annual "review" of effluent limitations established under § 304(b) arises (if at all) only from the additional provisions added to § 304(m) by the 1987 CWA amendments. That section provides, in relevant part, that:

> (1) PUBLICATION. Within 12 months after the date of the enactment of the Water Quality Act of 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall--
>
> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section . . . .

Here again, the only clearly nondiscretionary duty imposed by this section is to "publish . . .a plan" which shall "establish a schedule." Whether or not this section creates a duty to conduct the "annual review and revision" of the 304(b) guidelines separate and apart from the duty already imposed in § 304(b) itself is open to debate. Plaintiffs contend that it does, and that the phrase "in accordance with subsection (b)" means that all of the factors enumerated in §§ 304(b)(1)(A) through 304(b)(4)(B) must be applied to both the process of "review" and the process of "revision." However, as noted above, § 304(b) clearly states that those factors shall be addressed in the "regulations" containing the effluent guidelines, and that such regulations shall be revised "if appropriate." There is absolutely nothing in either § 304(b) or § 304(m) that establishes any specific procedure that EPA must follow in making the initial determination whether to revise or not revise its existing guidelines.

EPA has concluded that §§ 304(b) and 304(m) require it to perform an annual review of existing effluent guideline regulations, but that such review shall be conducted in accordance with the screening procedures which it has outlined in its most recent biennial plan. 69 Fed. Reg. 53705, 53708-10 (Sept. 2, 2004). EPA's interpretation of §§ 301(d), 304(b) and 304(m) is reasonable and is consistent with the plain language of the statute.

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II. PLAINTIFFS' INTERPRETATION OF THE STATUTE AND THE SCOPE OF RELIEF AVAILABLE IN THIS COURT IS NOT SUPPORTED BY THE APPLICABLE CASE LAW

Plaintiffs rely heavily on the unpublished, interlocutory Memorandum Order issued by the D.C. District Court in *NRDC v. Reilly*, 1991 U.S. Dist. LEXIS 5334 [Exhibit 5 to Plaintiffs' Memorandum in Support]. This opinion is neither precedential nor persuasive, since it focused primarily on whether 304(m) did or did not impose certain mandatory *deadlines* (for promulgating guidelines, conducting an annual review and issuing a biennial plan), and not on the substantive procedures that must be followed in the process of reviewing existing guidelines. *Id.* at *14-*26. Plaintiffs read too much into the court's statement that the cross-reference to § 304(b) should be understood as a Congressional command to review and revise guidelines "in conformity with the parameters set out at length in § 304(b)," because the substance of the agency's review process was not even at issue before the court. Plaintiffs' Memorandum in Support at 34; Plaintiffs' Memorandum in Opposition at 7. Moreover, as explained above, the plain language of the statute does not support the notion that all of the detailed parameters in §§ 304(b)(1)(A) through 304(b)(4)(B) should be applied to the process of "review" as opposed to the process of "revision."

Plaintiffs' argument also mischaracterizes the governing law when it claims that the Court's authority to compel the performance of a nondiscretionary duty under CWA § 505(a)(2) 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*." Plaintiffs' Memorandum in Opposition, at 6 (emphasis in original). The actual holding of the decision to which Plaintiffs refer, *Florida PIRG v. EPA*, 386 F.3d 1070, 1088 (11th Cir. 2004), was that EPA can only satisfy a mandatory duty by actually discharging that obligation "in the manner *specifically* required by the statute" (emphasis added). Plaintiffs' omission of the word "specifically" is telling, because in this case the Clean Water Act does not establish any specific requirements governing EPA's review of existing ELGs or its determination whether or not to revise those ELGs.

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Plaintiffs' citation to the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) in this context is even more misleading, because what *Norton* actually said is that the traditional practice of judicial review achieved through the so-called prerogative writs – primarily writs of mandamus – "was normally limited to enforcement of a '*specific, unequivocal command*.'" *Id.* at 2379 (citation omitted). Construing the courts' analogous authority under APA § 706(1), the Supreme Court found that it empowers a court only "to take action upon a matter, without directing *how* it shall act." *Id.* (citation omitted) (emphasis in original). According to the Supreme Court, this limitation "precludes the kind of broad, programmatic attack we rejected" in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1971). *Id.* at 2379-80. In *Lujan*, the Court had rejected a challenge to the Bureau of Land Management's land withdrawal review program, stating that "respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." 479 U.S. at 891, *quoted in Norton*, 124 S. Ct. at 2380 (emphasis in original). Similarly, in *Norton*, the Supreme Court concluded that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, *but has no power to specify what the action must be*." 124 S. Ct. at 2380 (emphasis added).

The Supreme Court's decision in *Norton* thus prohibits exactly the type of relief that is sought by the Plaintiffs in this case. Plaintiffs' First Amended Complaint seeks to have this Court compel EPA to "*systematically* review" existing effluent limitation guidelines under CWA §§ 304(b) and 304(m). Complaint at ¶ 36 (emphasis in original). Plaintiffs further allege that EPA must take into account all of the statutory factors relating to the technical and economic feasibility of reducing pollutant discharge in determining whether it is appropriate to revise existing guidelines under § 304(b). Complaint at ¶ 66. Finally, Plaintiffs seek injunctive relief ordering EPA to cease and desist in the future from issuing ELG plans which reflect the "improper methodology for review" of effluent guidelines. Complaint at ¶ 80.

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As the Supreme Court observed in *Norton*, the failure to revise plans "in the proper fashion," is not a failure to act which can be addressed by this Court pursuant to either CWA § 505 or APA § 706. 124 S. Ct. 2372, 2380 (quoting *Lujan*, 497 U.S. at 891). What the Plaintiffs seek in their Complaint is precisely the kind of relief which they cannot obtain. The bulk of the factual allegations therein relate to the allegedly "inadequate review" of effluent guidelines in 2003 and 2004, ¶¶ 28-42; the "inadequate review" of effluent limitations in 2003 and 2004, ¶ 43; and the "inadequate and unlawful" effluent guidelines plan for 2004/2005, ¶¶ 44-60. The majority of the factual and legal background described in Plaintiffs' Memorandum in Support, and most of the voluminous Exhibits attached thereto, are similarly focused on alleged deficiencies in the *manner* in which EPA's review and planning process was conducted. The fact that the annual reviews and the biennial plans were actually performed by EPA and were published in the Federal Register is not in dispute. Plaintiffs' Motion for Partial Summary Judgment should therefore be denied, and the Defendants' and Intervenors' Cross-Motions for Summary Judgment should be granted.

III. PRACTICAL AND POLICY CONSIDERATIONS DICTATE AGAINST THE PLAINTIFFS' INTERPRETATION OF THE CLEAN WATER ACT'S REQUIREMENTS

Plaintiffs' claim that the Clean Water Act requires EPA to consider all of the technical and economic factors enumerated in §§ 304(b)(1)(A) through 304(b)(4)(B) in its annual review of existing effluent limitation guidelines essentially means that the agency would have to repeat the entire process of guideline development on an annual basis. The sheer impossibility of such an undertaking militates against the Plaintiffs' interpretation of the Act's requirements.

On highly respected commentator has aptly described the process of ELG development as follows:

> The development of technology standards was the most Herculean task ever imposed on an environmental agency. EPA had literally to master the economics, engineering, and technology of every industrial process in the most industrialized and fastest-growing economy in world history. It had to learn state-of-the-art and potential alternative technologies for each process. It had to be able to defend its technology-forcing conclusions against the most experienced engineers, economists, and lawyers money could buy.

> Every draft standard EPA proposed was subject to intense scrutiny, lobbying, and opposition from the affected industry and, within the limits of its resources, at least one organization.

Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ENVTL L. REP. 10528, 10537 (Sept. 1991). It has also been estimated that, from start to finish, the process of developing a single ELG typically takes five years or more. P. Evans, *The Clean Water Act Handbook*, 22 (1994). The ELGs for the pulp and paper industry challenged in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), for example, were the result of a rulemaking process that developed over six years, illustrating what the court described as "the overwhelming technical and litigative burden shouldered by the Agency under the Act." *Id*. at 1021 n. 3

Plaintiffs are correct in observing that Congress was frustrated in 1987 with the slow pace at which effluent guidelines had been promulgated. Plaintiffs' Memorandum in Support at 12. Indeed, of the 29 industrial categories established in 1977 for which guidelines were required to be promulgated, 5 still remained to be completed in 1987. S. Rep. 99-50, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* (Committee Print for the Senate Committee on Environment and Public Works) 1424 (1988). But if the purpose of Congress in passing the amendments that added § 304(m) to the CWA in 1987 was to speed up the process of guideline development, it would not have imposed a new burden on EPA to go back and completely revise the guidelines that had already been developed – a process that would unquestionably have the effect of slowing down, rather than accelerating, the ELG program. Indeed, since it was well known that the process of developing a single effluent limitation guideline consumed as much as five years, such a requirement would have brought the entire ELG program to a grinding halt. Such could not have been the intent of Congress.

Instead, EPA's interpretation of § 304(m), as reflected in the program for screening level review set forth in the agency's 2004/2005 effluent guidelines plan, represents a reasoned and practical interpretation of that provision. This view of the agency charged with administering the statute is entitled to considerable deference; the court need not find that it is the only permissible construction that EPA might have adopted, but only that EPA's understanding of this very

'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. *Chemical Mfrs. Ass'n v. NRDC,* 470 U.S. 116, 125 (citing *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975) and *Chevron U. S. A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

CONCLUSION

EPA has already performed each of the nondiscretionary duties referred to in Claims One, Two and Four of the First Amended Complaint, and there is no further relief that could be granted by this Court even if such duties were not performed in a manner that the Plaintiffs would characterize as adequate or complete. *Norton, supra,* 124 S. Ct. at 2380. Plaintiffs' Motion for Partial Summary Judgment should therefore be denied, and Defendants' and Intervenors' Cross-Motions for Summary Judgment should be granted.

Dated: April 1, 2005

Respectfully submitted,

/s/ David W. Burchmore

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PROOF OF SERVICE

I, JOHNNY R. AGUILAR, am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Maritime Plaza, Third Floor, San Francisco, California 94111-3492.

On April 1, 2005, I caused to be served the following documents described as:

INTERVENOR AMSA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the interested parties in this action as set forth below:

Served On:	***Represented Party:***
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Service was accomplished as follows:

☒ **By U.S. Mail, According to Normal Business Practices.** On the above date, at my place of business at the above address, I sealed the above document(s) in an envelope addressed to the above, and I placed that sealed envelope for collection and mailing following ordinary business practices, for deposit with the U.S. Postal Service. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for mailing with the U.S. Postal Service. Correspondence so collected and processed is deposited the U.S. Postal Service the same day in the ordinary course of business, postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 1, 2005, at San Francisco, California.

/s/John R. Aguilar
JOHN R. AGUILAR