Case No. 05-16214

IN 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 of the United States
Environmental Protection Agency, et al.,

Appellees.

INTERVENOR-APPELLEE, EFFLUENT GUIDELINES INDUSTRY COALITION'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Effluent Guidelines Industry Coalition ("EGIC") makes the following disclosure:

EGIC does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of EGIC's stock. EGIC states that its members are made up of numerous industrial entities and trade associations that own and operate (or have members that own and operate) regulated industrial facilities located in the United States.

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JURISDICTIONAL STATEMENT

The District Court lacked jurisdiction in this case to review EPA's exercise of its discretionary duties. If jurisdiction exists at all, this Court had original and exclusive jurisdiction over such claims brought by Our Children's Earth Foundation and Ecological Rights Foundation (hereinafter, these parties will be collectively referred to as "OCEF") under section 509(b)(1)(E) of the Clean Water Act. 33 U.S.C. § 1369(b)(1)(E). Specifically, section 509(b)(1)(E) provides that Circuit Courts have exclusive jurisdiction to review any EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the Clean Water Act]." *Id.* At issue in this case are EPA's actions in reviewing effluent limitations guidelines and effluent limitations and how it prepared its effluent guidelines plans. The EPA's actions at issue, to the extent that there is jurisdiction, fall under section 509(b)(1)(E), as actions "in approving or promulgating" effluent limitations and effluent limitation guidelines.

Because it has failed to comply with section 509(b), OCEF's challenge of EPA's discretionary actions to this Court is now untimely. Section 509(b) requires that a petition for review of EPA's action "shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial . . ." *Id.* The action at issue in this case is EPA's 2004 review of effluent limitations guidelines and effluent limitations, along with EPA's schedule for the 2005 review

and proposed changes to the effluent limitations guidelines, which EPA issued on September 2, 2004. 69 Fed. Reg. 53,705 (Sept. 2, 2004) (the "2004 EGP"). Accordingly, OCEF's right to review of EPA's issuance of the 2004 EGP, if any, expired on December 31, 2004. OCEF has not filed any petition for review with this Court, and only filed a notice of appeal on June 24, 2005. Accordingly, OCEF's appeal under section 509(b)(1)(E) of the Clean Water Act is untimely.

STANDARD OF REVIEW

Because section 509 of the Clean Water Act does not provide for the standard of review of EPA's actions in this case, the general standard of review for agency actions in the Administrative Procedure Act applies, namely, whether EPA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). Accordingly, "[e]ven when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 497 (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

STATEMENT OF ISSUES

1. Whether EPA complied with its mandatory duties under the Clean Water Act, sections 304(b), 301(d), and 304(m) (33 U.S.C. §§ 1314(b), 1311(d), and 1314(m)), in issuing the 2004 EGP, that included EPA's review of effluent limitations guidelines and effluent limitations, as well as EPA's 2005 schedule review and proposed changes to the effluent limitations guidelines. 69 Fed. Reg. 53,705 (Sept. 2, 2004).

2. Whether the Circuit Courts of Appeals have exclusive jurisdiction (if there is jurisdiction at all) over the review of whether EPA's promulgation of the 2004 EGP complied with EPA's discretionary obligations under the Clean Water Act, and, thus, OCEF's appeal is untimely.

STATEMENT OF THE CASE

Pursuant to its duties under sections 304(b), 301(d), and 304(m) of the Clean Water Act, on September 2, 2004, EPA issued the 2004 EGP. 69 Fed. Reg. 53,705 (Sept. 2, 2004). In this document, EPA, among other things, published and performed an annual review of effluent limitations guidelines, reviewed effluent limitations, published a plan establishing a schedule for the annual review of effluent limitations guidelines as required by section 304(b), and identified previously unregulated sources and established a schedule to promulgate effluent limitations guidelines for them.

Unsatisfied with this review, OCEF brought an action before the District Court for the Northern District of California. Although OCEF's action purported to seek review of EPA's non-discretionary duties under section 505(b) of the Clean Water Act (33 U.S.C. § 1365(b)), the allegations in OCEF's Complaint actually challenged the adequacy of how EPA performed its duties and the substantive contents of the 2004 EGP. The District Court, however, properly limited its review to EPA's non-discretionary duties, and found that because EPA had acted as the Clean Water Act requires, summary judgment was appropriate in favor of EPA and the Intervenor-Defendants. Further, the District Court ruled that it did not have jurisdiction over a substantive review of how EPA performed its duties,

as the Courts of Appeals have exclusive jurisdiction to review such claims under section 509(b) of the Clean Water Act. 33 U.S.C. § 1369(b).

STATEMENT OF FACTS

In the spirit of judicial economy, EGIC adopts EPA's statement of facts for the limited purpose of litigating this appeal, and, when appropriate, will reference the facts stated therein.

SUMMARY OF ARGUMENT

To the extent that it had jurisdiction to review EPA's evaluation of effluent limitations guidelines and effluent limitations in the 2004 EGP, the District Court properly found that EPA complied with its non-discretionary duties under sections 304(b), 301(d), and 304(m) of the Clean Water Act. Specifically, in the 2004 EGP, EPA reviewed all existing effluent limitations guidelines as required under sections 304(b) and 304(m), reviewed all effluent limitations as required by section 301(d), and published effluent guidelines plans under section 304(m). EPA's actions satisfied its obligations as mandated under the Clean Water Act.

With regard to OCEF's remaining claims that challenge EPA's discretionary duties in issuing the 2004 EGP, such claims properly lie (if there is jurisdiction at all) under section 509(b) of the Clean Water Act, which provides the Courts of Appeals with exclusive jurisdiction. Under section 509(b), OCEF was required to file a petition for review with this Court (or any Court of Appeals) in order to seek review of EPA's discretionary duties in complying with sections 304(b), 301(d), and 304(m). OCEF has not timely filed a petition for review or otherwise properly sought a review of EPA's discretionary duties in this case.

Accordingly, to the extent OCEF seeks a review of EPA's non-discretionary duties, the District Court's ruling entering judgment for EPA and Intervenor-Defendants should be affirmed. To the extent OCEF seeks a review of EPA's

discretionary duties, OCEF's claims should be dismissed as this Court lacks jurisdiction due to OCEF's failure to comply with section 509(b).

ARGUMENT

I. EPA complied with its non-discretionary duties under the Clean Water Act.

A. To the extent it has jurisdiction, the District Court properly ruled in EPA's and EGIC's favor on OCEF's claims.

The only issues that the District Court exercised jurisdiction over are whether EPA performed its non-discretionary duties pursuant to sections 304(b), 301(d), and 304(m) of the Clean Water Act. OCEF claims that EPA failed to annually review all existing effluent limitation guidelines as mandated in subsections 304(b) and (m), EPA did not conduct a mandatory five year review of all effluent limitations required by section 301(d), EPA failed to publish effluent guidelines plans in a timely manner under section 304(m), and EPA wholly failed to publish a proper effluent guidelines plan in accordance with section 304(m).

In order to properly assess whether EPA complied with its mandatory duties, it is critical to first define exactly what EPA duties are subject to review in this case. As an initial matter, OCEF brought its claims before the District Court under section 505(a)(2) of the Clean Water Act, which provides:

> . . . any citizen may commence a civil action on his own behalf -
>
> * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

> The district courts shall have jurisdiction . . . to order the Administrator to perform such act or duty, as the case may be . . . .

33 U.S.C. § 1365(a)(2). Accordingly, the District Court was limited to determining whether EPA performed its non-discretionary duties. *See Alaska Center for the Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994); *San Francisco Baykeeper, Inc. v. Browner*, 147 F. Supp. 2d 991, 996 (N.D. Cal. 2001). Once EPA actually takes action pursuant to the Clean Water Act, and satisfies its non-discretionary duties, only the Circuit Courts have jurisdiction to review the way in which EPA performs those duties, *i.e.*, whether EPA acted within its discretion. 33 U.S.C. § 1369(b)(1)(E); *City of Las Vegas v. Clark County*, 755 F.2d 697, 704 (9th Cir. 1985). Accordingly, at most, the only question before this Court is whether the District Court properly held that EPA acted under sections 304(b), 301(d), and 304(m), and fulfilled its mandatory, non-discretionary statutory obligations under the Clean Water Act.

The mandatory duties imposed on EPA under the Clean Water Act at issue provide that 1) EPA "revise, if appropriate," the effluent limitations guidelines currently set at least once a year (33 U.S.C. § 1314(b)); 2) EPA review at least every five years the limitations promulgated under section 304(b) and "if appropriate," revise them pursuant to the procedures in section 301(d) (33 U.S.C. §

1311(d)); and 3) EPA publish a plan every two years that establishes a schedule for the revision of currently existing guidelines, identifies categories of sources that do not yet exist, and establishes a schedule for the promulgation of guidelines for new categories of sources (33 U.S.C. § 1314(m)). EPA has satisfied these duties.

As to EPA's duty under section 304(b), that section provides that EPA shall:

> . . . publish . . . regulations providing guidelines for effluent limitations and at least annually thereafter, revise, if appropriate, such regulations. . . .

33 U.S.C. § 1314(b). As EPA thoroughly argues in its Brief, EPA did publish and perform an annual review of such guidelines to determine which, if any, should be revised if appropriate. 69 Fed. Reg. 53,705. EPA complied with its duty and annually considers which guidelines are appropriate for revision. *See* 69 Fed. Reg. 53,705, 53,708-709 (EPA's description of its annual review pursuant to section 304(b)).

With regard to EPA's duty under section 301(d), that section states:

> Any effluent limitation required by [section 304(b)(2)] shall be reviewed at least every five years and, if appropriate, revised. . .

33 U.S.C. § 1311(d). In EPA's notice of the 2004 EGP, EPA stated that:

> EPA identifies four industries for effluent guidelines rulemaking. . . . two industries - Vinyl Chloride Manufacturing, which is part of the Organic Chemicals, Plastics, and Synthetic Fibers point source category, and Chlor-Alkali manufacturing, which is part of the Inorganic Chemicals point source Category - are subject

> to existing effluent guidelines, which EPA is identifying for possible revision.

69 Fed. Reg. 53,705. Instead of waiting five years, EPA actually complies with this duty on an annual basis, as it conducts both its 304(b) and 301(d) reviews every year. *Id.* at 53,707. Because EPA develops regulations that satisfy the requirements under both sections 304(b) and 301(d) for an industrial category at the same time and considers similar factors when doing so, EPA decided that it is appropriate to conduct a single review of the combined sets of regulations and does so annually. *Id.*

Lastly, section 304(m) requires EPA to publish a plan in the Federal Register establishing a schedule for the annual review required by section 304(b) and to identify previously unregulated sources and establish a schedule to promulgate effluent limitations guidelines for them. 33 U.S.C. § 1314(m). EPA performed this duty. In the 2004 EGP, EPA identified Airport Deicing Operations and Drinking Water Supply and Treatment as not being subject to existing effluent guidelines and established the required schedules. *See* 69 Fed. Reg. 53,706, 53,718. The 2004 EGP also established a schedule for the annual review of effluent limitations guidelines for existing guidelines. 69 Fed. Reg. at 53,717. Accordingly, EPA complied with its duties under section 304(m).

OCEF wants the Court to rule not that EPA failed to review the effluent limitations guidelines or that EPA did not act under the Clean Water Act, but that it

failed to do so in a satisfactory way. This argument falls squarely into the issue of whether EPA properly exercised its discretion. The "if appropriate," language in sections 301(d) and 304(b), however, allows EPA to make judgments and exercise discretion about the appropriateness of revision in light of the statutory factors that it must apply. Further, Clean Water Act Section 505 does not authorize citizen suits over discretionary actions; its plain language demonstrates that it may only be used where EPA has not performed a mandatory duty. 33 U.S.C. § 1365(a)(2). *Abrhim & Sons Enters. v. Equilon Enters, LLC.*, 292 F.3d 958, 961 (9th Cir. 2002) ("If the words of the statute are clear and unambiguous, there is no need to resort to other indicia of legislative intent."). Because EPA has performed its mandatory duties, OCEF's claims should be denied.[1]

Moreover, OCEF's reliance on *Natural Resources Defense Council, Inc. v. Reilly*, No. 89-2980, 1991 U.S. Dist. LEXIS 5334 (D.D.C. April 23, 1991), is misplaced. Besides its non-precedential value, the *Natural Resources* case misinterpreted section 304(m) of the Clean Water Act, in that the court disregarded that section 304(b) is cross-referenced by section 304(m)(1)(A), and allows EPA discretion to promulgate effluent limitation guidelines "if appropriate." *Natural*

[1] In their brief, OCEF argues several times that EPA is compelled to regulate to a "zero discharge" standard. This is simply not the case. Eliminating discharges of pollutants is a goal of the Act, not an enforceable requirement. The legislative history indicates that Congress was well aware that "there are technical limits to what can be done to achieve the no-discharge objective." 117 Cong. Rec. 38899 (1971) (statement of Sen. Muskie).

Resources, 1991 U.S. Dist. LEXIS at *16-18. Instead, the court ruled that the "if appropriate" language did not give EPA discretion because of the history and policy of the enforcement of the Clean Water Act. *Id.* at *24-26. This analysis, however, ignored the plain language of section 304(b), which states that EPA "shall . . . 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." 33 U.S.C. § 1314(b) (emphasis added). Because the plain language of sections 304(b) and 304(m) provide EPA with discretionary power, the *Natural Resources* case was based on a misinterpretation of the Clean Water Act.

B. EPA's review of effluent limitations guidelines and effluent limitations satisfied EPA's obligations under the Clean Water Act.

OCEF's real issue in this case is that it is not happy with how EPA exercised its discretionary duties. OCEF argues that EPA only conducted a "harm based" review in its 2004 EGP, and that it was required to conduct a technology based review. This issue, however, is irrelevant for determining whether EPA complied with its mandatory duties, as OCEF's argument focuses on how EPA exercised its discretion in performing its duties. Again, as EPA argues at length in its brief, EPA has reviewed on an annual basis effluent limitations guidelines and effluent limitations under both sections 304(b) and 301(d). Because EPA develops

regulations that fulfill requirements under sections 304(b) and 301(d) for an industrial category at the same time and considers similar factors when doing so, EPA decided it is appropriate to conduct a single review of the combined sets of regulations and does so annually. 69 Fed. Reg. at 53,707. Further, EPA promulgated schedules and plans as required under section 304(m).

OCEF also argues that when conducting its review of effluent limitations guidelines and effluent limitations, EPA should consider all of the factors that EPA considers when promulgating regulations for effluent limitations guidelines. If EPA did this, however, the annual review would be identical to the extensive rulemaking proceeding that goes into promulgating an effluent limitation. Moreover, promulgating an effluent limitation is an enormous task that takes several years and considerable resources. Indeed, it appears that OCEF is seeking to compel EPA to conduct a detailed and extensive review every year of each effluent limitation guideline for all 56 industrial categories and 450 subcategories of sources using the factors EPA is to consider when developing regulations that establish the actual effluent limitations. This is wholly untenable and, at any rate, is not required by the Clean Water Act.

The factors used to determine the best available control technology are listed in section 304(b)(2)(B), which provides:

> Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

33 U.S.C. § 1314(b)(2)(B). These factors are considered when revising a guideline, but do not need to be considered annually in the review process. Presently, the effluent limitations, which are derived from effluent limitations guidelines comprise approximately 1,300 pages in the Code of Federal Regulations. *See* 40 C.F.R. §§ parts 400-471. Such an in-depth annual review of these regulations, however, is not required by the Clean Water Act, which gives EPA discretion to revise regulations, <u>if appropriate</u>. *See* 33 U.S.C. §§ 1314(b), and 1311(b)(2)(A). OCEF is seeking an extreme remedy that is not contemplated by the Clean Water Act and would create an extraordinary burden on EPA and regulated entities. EPA properly acknowledged this burden in the 2004 EGP:

> Because there are 56 point source categories (including over 450 subcategories) with existing effluent guidelines that must be reviewed annually, EPA believes it is important to prioritize its review so as to focus especially on industries where changes to the existing effluent guidelines are most likely to be needed.

69 Fed. Reg. 53,705, 53,711. In addition, in the preliminary plan for the 2004 EGP, EPA identified possible source subcategories for review of existing

limitations, and possible categories for development of new effluent limitations guidelines. *See* 68 Fed. Reg. 75515, 75527-31 (Dec. 31, 2003) (the "Preliminary Plan").

EPA's docket for the 2004 EGP contains more than 1,300 entries. *See* SER 1-169, Ex. 1.[2] These entries included at least 94 comments on the Preliminary Plan from OCEF, EGIC, various members of EGIC, other regulated entities, and members of the public. The docket contains comments from entities regulated under the categories and subcategories that EPA was considering for additional or revised rulemaking. From the nature of the comments that were submitted, it is clear that it would take an extraordinary amount of resources to perform the type of review that OCEF seeks. Indeed, the comments to the Preliminary Plan reflect the substantial burden that is imposed for the development of guidelines:

> Reopening the effluent guidelines for revision would be a costly and time-consuming process for both the petroleum industry and EPA, and so the decision to conduct the detailed investigation possibly leading to this decision should be based on an accurate screening assessment of the industry.

SER 171, Ex. 2; *Comments on Notice of the Preliminary Effluent Guidelines Program Plan for 2004/2005* (Correspondence dated February 24, 2004 from American Petroleum Institute, to EPA Water Docket).

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[2] Citations to EGIC's Supplemental Excerpts of the Record, filed concurrently herewith, shall be referenced as "SER [page number], Ex. _____."

> The existing effluent limitations guidelines and standards for petroleum refining are rigorous and require refineries to install and properly operate treatment systems that represent the best available technology economically achievable (BAT) for industrial wastewater treatment. . . . EPA has identified no new commercially available, cost-effective technologies that would warrant revising the guidelines. . . [R]eopening the effluent guidelines would be very costly and time-consuming to the petroleum industry.

Id. at 172.

> All [National Petrochemical & Refiners Association] petroleum refining and petrochemical members are affected by EPA's effluent limitation guidelines and pretreatment standards and therefore would be directly affected by any revisions to the effluent guidelines. NPRA believes that the current effluent guidelines and any pretreatment standards for petroleum refining and bulk storage terminals are protective of human health and the environment, and represent the best available technology (BAT) economically achievable for industrial wastewater treatment.

SER 202, Ex. 3; *Comments on Notice of the Preliminary Effluent Guidelines Program Plan for 2004/2005* (Correspondence dated March 15, 2004 from NPRA to EPA Water Docket).

> GE has been actively involved in effluent guideline rulemakings, and we have an ongoing interest in ensuring that this program addresses real environmental issues in a cost-effective manner. In previous effluent guideline rulemakings, GE sites have completed EPA surveys; hosted EPA's sampling episode reviews; submitted discharge monitoring reports (DRM) data; and provided testimony at EPA hearings.

SER 222, Ex. 4; *Comments on Notice of the Preliminary Effluent Guidelines Program Plan for 2004/2005* (comments from General Electric Company to EPA Water Docket).

> As demonstrated through many recent ELG rulemakings, such a process is an inefficient use of limited federal resources and imposes an unnecessary financial burden on the regulated community.

SER 236, Ex. 5; *Comments on EPA Docket ID Number OW-2003-0074: "Preliminary Effluent Guidelines Program Plan for 2004/2005"* (Correspondence dated March 18, 2004 from American Chemistry Council to EPA Water Docket).

> The data also demonstrate that further improvements in effluent quality, even if feasible through additional treatment technologies, could likely only be achieved at significant and unreasonable costs.

SER 257, Ex. 6; *Comments on Preliminary Effluent Guidelines Program Plan for 2004/2005* (Correspondence dated March 18, 2004 from American Petroleum Institute to EPA Water Docket).

> First, UWAG [Utilities Water Act Group] strongly supports EPA's decision not to review the Stream Electric Effluent Guidelines (Part 423) during 2004-05. While there are many changes occurring within the industry, discharge pollutants remain largely unchanged. Any new pollutants discharged by the industry are subject to water quality standards limits or best professional judgment limits, and properly regulated.

SER 268, Ex. 7; *Comments of the Utility Water Act Group on EPA's 2004-05 Effluent Guidelines Plan*. (Comments dated March 18, 2004).

Given the impossibility of an in depth review of all effluent guidelines each year and that the language of the Clean Water Act itself does not require such an extensive annual review, EPA's use of the factors set forth in its annual review to narrow down the guidelines that require a more extensive focus, is within its discretion.

C. EPA properly exercised its discretion in using a risk assessment approach in the 2004 EGP.

In its brief, OCEF repeatedly argues that EPA improperly used a risk assessment approach in its annual review of existing effluent limitations guidelines to screen which effluent limitations guidelines and regulations to review in more detail or to select for the development of more stringent effluent limitations guidelines. Section 304(b), however, clearly gives EPA discretion in how it conducts reviews of existing effluent guidelines and decides which regulations to revise, and states that EPA shall publish:

> Regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, **if appropriate**, such regulations. Such regulations shall -
>
> * * *
>
> (B) Specify Factors to be taken in to account in determining the best measures and practices available to comply . . . . Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality

> environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

33 U.S.C. § 1314(b)(2) (emphasis added). Thus, EPA, in the context of its annual review, has discretionary authority to determine whether revisions are appropriate, and if so, what those revisions might be, considering the risks and hazards involved so that EPA can develop and revise effluent limitations guidelines.

Moreover, EPA has discretion under Clean Water Act Section 301(d) to revise effluent limitations. 33 U.S.C. § 1311(d) ("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.") (emphasis added). Because it is given discretion to determine whether it is appropriate to revise effluent limitations, and because of the extensive resources that go into developing effluent limitations guidelines and pretreatment standards (both in terms of time and money, as well as the costs to install pollution control equipment), EPA is justified in setting priorities based on the risk or hazard

that a source may pose to human health and the environment.[3] Without being about to set priorities, EPA would be required to expend and potentially waste substantial resources needlessly looking at guidelines that do not pose a threat to the environment. Moreover, given its limited resources, EPA would also be forced not to spend sufficient time and resources pursuing guidelines that regulate pollutants that pose serious risks to the environment. It is within EPA's discretion to do such risk and hazard evaluation to prioritize industrial categories for developing effluent limitations guidelines. 33 U.S.C. §§ 1311(d), 1314(b).

In addition, OCEF's statements that EPA should not rely on other regulatory programs or non-regulatory voluntary control measures by industry when determining industrial categories for further control is without merit. OCEF completely ignores the fact that many industrial sources have voluntarily decided to control their discharges above and beyond what may be required by EPA. There are a variety of reasons for such voluntary efforts, including, but not limited to, the

[3] There is ample precedent for considering such factors in the effluent limitation guidelines program. For example, the 1976 consent decree that resulted in many of the current effluent limitations guidelines contained provisions under which EPA could exclude point source categories or subcategories, or individual pollutants, from further regulation, based on factors such as: (1) whether the pollutants are present in trace amounts not likely to cause toxic effects or only in the discharges of a small number of sources; (2) whether discharges are or will be adequately controlled under other standards; and (3) whether the pollutant is present in amounts too small to be effectively reduced by technologies known to EPA. *Natural Resources Defense Council v. Train*, No. 2153-73, 1976 U.S. Dist. LEXIS 14700 (D.D.C. June 9, 1976), amended by *Natural Resources Defense Council v. Costle,* 9 Envtl. L. Rep. 20176 (D.D.C. 1979), Consent Decree Paragraph 8(a).

fact that limiting discharge of pollutants may make good business sense. In some instances, pollution prevention measures can reduce the amount of raw materials a company needs to buy. Operating well below an effluent limit helps a facility assure continued compliance. Voluntary control measures may be implemented in the most cost-effective way for a particular company. Companies strive to reduce pollution to minimize potential future liabilities under other statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA" or "Superfund"). Companies also recognize that there may be a competitive advantage in manufacturing products in an environmentally-friendly manner. EPA has recognized and encouraged these voluntary efforts so that it may more cost-effectively focus its efforts on developing regulations for industries that have not been regulated or have not taken steps to voluntarily limit their discharges:

> EPA agrees that industrial categories demonstrating significant progress through voluntary efforts to reduce hazard or risk to human health and the environment associated with their effluent discharges would be comparatively lower priority for effluent guidelines revision, particularly where such reductions are achieved by a significant majority of individual facilities in the industry.

See 69 Fed. Reg. 53,705, 53,711. Encouraging voluntary control measures by deferring regulation of industries is a cost-effective means of reducing water pollution discharges and is within EPA's discretion.

D. EPA did not disregard technology in its screening analysis.

OCEF complains that EPA, during its annual review, did not evaluate whether new technologies might be available to further reduce pollutant discharges. OCEF is missing a fundamental distinction between not considering technology at all and not doing a full-blown analysis of all available control technology, of the sort EPA must do when it develops an effluent limitations guideline regulation. EPA must consider the listed factors when developing the regulations that establish best available technology economically achievable ("BAT"), best conventional pollutant control technology ("BCT"), and best practicable control technology currently available ("BPT"). 33 U.S.C. § 1314(b). In its decisions as to whether to revise those regulations, EPA does not, and need not, consider all of those factors, but it does perform a technology analysis. Specifically, in the 2004 EGP, as EPA "used pollutant loadings information and technological, economic, and other information in evaluating whether revising its promulgated effluent guidelines would be appropriate." 69 Fed. Reg. at 53,708. Further, EPA did consider technology where such information was available:

> EPA did consider information on the availability of treatment or process changes for some industries, where such information was provided by commenters on the preliminary Plan or otherwise identified by EPA.

Id. at 53,710, col. 3. The considerable amount of information on technologies that EPA considered during its review is presented in its 559-page Technical Support

Document for the 2004 EGP, which is provided in EPA's Excerpts of Record. EPA's approach meets the requirements of the Clean Water Act.

II. The Court of Appeals has exclusive jurisdiction, if any jurisdiction exists, over OCEF's discretionary duty claims, which are now untimely.

A. This Court has exclusive jurisdiction over OCEF's claims, if jurisdiction exists at all.

Although the District Court properly conducted a narrow review of EPA's mandatory duties, the Court of Appeals had exclusive jurisdiction over OCEF's desired review of the substance of the 2004 EGP (if, that is, there is jurisdiction over these EGP claims at all). Section 509(b) of the Clean Water Act provides that the Courts of Appeals have exclusive jurisdiction over EPA's actions:

> Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, 306, or 405 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

33 U.S.C. § 1369(b). Concurrently, section 505(b) provides that "any citizen may commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the Clean Water] Act which is not discretionary with the Administrator." 33 U.S.C. § 1365(b).

OCEF's claims mainly concern how EPA reviewed the effluent limitations guidelines and effluent limitations and how it prepared the effluent guidelines plan under sections 301 and 304 of the Clean Water Act. These issues do not involve whether EPA acted or not; they involve how EPA acted. These discretionary actions under sections 301 and 304 fall within section 509(b)(1)(E), and, in such circumstances, the Courts of Appeals have exclusive jurisdiction to review such claims (assuming that the EGP constitutes a "final action" that can be reviewed). *See E.I. du Pont de Nemours & Co. v. Train*, 403 U.S. 112, 136 (1977); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 511-524 (2d Cir. 2005).

OCEF argues that the District Court, and not this Court, had jurisdiction to review all of EPA's actions, discretionary acts included, and relies on *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992). This reliance, however, is misplaced. In *Longview*, the petitioners argued that this Court had jurisdiction over a review of EPA's issuance of Total Maximum Daily Loads ("TMDLs") pursuant to water quality standards, which were promulgated under section 303 of the Clean Water Act. *Id.* at 1310. The Court found that because section 303 of the Clean Water Act was not listed under section 509(b), and the TMDL was not "under section 1311," the Court lacked jurisdiction over the petitioner's claims. *Id.* at 1311. Unlike *Longview*, however, the case at bar involves a review of sections 301, which is expressly set forth in section 509(b),

and section 304, which the Supreme Court has held is covered by section 509(b) due to its intertwinement with section 301. *E.I. du Pont*, 430 U.S. 127-128, 137.

Specifically, the Supreme Court in *E.I. du Pont* initially found that although the Clean Water Act expressly provides the Courts of Appeals with review of effluent limitations under section 301, "the [Clean Water] Act does not provide for judicial review of § 304 guidelines." *Id.* at 124. Despite the omission of section 304 from the jurisdictional language of section 509(b), however, the Court held that because EPA can issue limitations under section 301 through regulations set forth in section 304, a review of alleged EPA violations of section 304 is properly before the Courts of Appeal. *Id.* at 136 ("More importantly, petitioners' construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions."); *see also, Waterkeeper Alliance*, 399 F.3d at 511-524 (The Second Circuit accepted a petition for review of effluent limitations guidelines passed under section 304 as part of EPA's Concentrated

Animal Feeding Operation rule).[4]

Because the Courts of Appeals have exclusive jurisdiction (if there is any jurisdiction) over OCEF's discretionary duty claims, OCEF was required to comply with the timing provision of section 509(b) in order to seek a review of its claims. Section 509(b) provides that "Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial . . ." 33 U.S.C. § 1369(b). The EPA actions at issue in this case are contained in the 2004 EGP, that was issued on September 2, 2004. 69 Fed. Reg. 53,705. Accordingly, in order to seek a proper review of their claims, OCEF's Petition for Review of the 2004 EGP was due on December 31, 2004. OCEF, however, has yet to file a Petition for Review with this Court. In fact, OCEF did not file its notice of appeal until June 24, 2005. Accordingly, even if OCEF's notice of appeal would otherwise be sufficient to invoke the Court's jurisdiction under section 509(b), OCEF's appeal is untimely.

[4] OCEF also makes the unavailing argument that the District Court had jurisdiction under the APA and 28 U.S.C. § 1331. Again, because OCEF's claims are covered by section 509(b), the Court of Appeals has *exclusive* jurisdiction of its claims. *See Central Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 555 (2d Cir. 1978); *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124 (D.C.Cir.1976); *American Petroleum Inst. v. Train*, 526 F.2d 1343, 1345-46 (10th Cir. 1975). Because this Court had exclusive jurisdiction under section 509(b), OCEF cannot invoke the District Court's jurisdiction under the more general jurisdictional provisions under the APA and 28 U.S.C. § 1331.

B. The District Court's denial of OCEF's Motion to Transfer was proper.

OCEF also argues both that the District Court erred in denying its motion to transfer its claims that are covered by section 509(b), and that, in any case, this Court should on its own authority transfer all claims covered by section 509(b). OCEF's attempt to transfer its 509(b) claims, however, should be denied, as OCEF is trying to do indirectly what it cannot do directly. If OCEF wanted to pursue a substantive review of EPA's issuance of the 2004 EGP, it should have filed a direct petition with a Court of Appeals within the 120-day limitation. OCEF failed to do this. Instead, OCEF filed its Complaint for review of EPA's actions with the District Court on May 28, 2004, and chose not to file a direct petition with this Court. Pursuant to section 509(b), the District Court properly declined a substantive review of the 2004 EGP as it only has jurisdiction to review whether EPA complied with its non-discretionary duties. Unsatisfied with the District Court's narrow review, OCEF is now attempting to backdoor new substantive claims involving EPA's discretionary actions through a Petition for Review veiled as a Motion to Transfer. This strategy must be rejected. *See NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982) (In interpreting section 509(b)(1) prior to its 1987 amendment,[5] the Court held that "one who wishes to challenge an action of the

[5] The 1987 Amendment to the Clean Water Act amended the time limit under section 509(b)(1) from 90 days to 120 days.

Administrator must, if the action is held to be within the categories of section 509(b)(1), do so within ninety days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties." *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 292 (2d Cir. 1976).

In *Sun Enterprises*, the Court rejected a similar strategy that OCEF is attempting to employ in the case at bar. There, the plaintiffs filed an action against EPA in district court alleging that EPA violated its own regulations in issuing a NPDES permit. *Id.* at 284. The district court dismissed the case, finding that the plaintiffs' claims were only reviewable in the Court of Appeals pursuant to section 509(b)(1). *Id.* at 286. The plaintiffs then appealed the order of dismissal, claiming that the district court had jurisdiction to rule on whether EPA failed to perform its non-discretionary duties under section 505 of the Clean Water Act. *Id.* at 287. Also after the dismissal, and a little over one year after the permit was issued, the plaintiffs filed a direct petition for review in the Court of Appeals related to the substantive issues of the permit's issuance. *Id.* On appeal, the Court first found that EPA complied with its non-discretionary duties by complying with the effluent limitations in question. *Id.* at 287-88. As to the issue of EPA's promulgation of effluent limitations, the Court ruled that the plaintiffs were required to pursue such substantive review in the Court of Appeals through a direct petition. *Id.* Because the plaintiffs waited over a year after EPA's action to file their direct petition under

section 509, the Court found that the plaintiffs' direct petition was time-barred. *Id.* at 291. In the case at bar, OCEF is attempting this same strategy, albeit through a Motion to Transfer rather than actually filing a petition for review. Like the plaintiffs' direct petition in *Sun Enterprises*, OCEF's motion to transfer should be denied.[6]

In addition, the cases cited by OCEF to support its requested transfer are not applicable to this case. In all of the cases cited by OCEF, the plaintiffs filed their claims in courts that wholly lacked jurisdiction, while other courts clearly would have had jurisdiction. *See McCauley v. McCauley*, 814 F.2d 1350, 1351 (9th Cir. 1987) (District Court lacked jurisdiction over bankruptcy appeal, and claim should have been appealed to the Ninth Circuit Court); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (in appeal of writ of habeas corpus, the Court found that case should have been transferred to the district court in the jurisdiction of the plaintiff's "regular place of incarceration"); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004) (Court of Appeals lacked jurisdiction over original writ of habeas corpus, which should have been filed in district court). In the case at bar, however,

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[6] In addition, OCEF's motion to transfer was properly denied by the District Court because OCEF's notice of appeal had divested the District Court of jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)("The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *NRDC v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).

OCEF had a choice at the time it brought its claims: either file a complaint in the District Court to review whether EPA complied with its mandatory duties pursuant to section 505(b), or file a petition for review to challenge EPA's discretionary actions in the Courts of Appeals under section 509(b). OCEF elected the first option, and the District Court properly reviewed whether EPA had complied with its mandatory duties. OCEF made a decision not to seek review of EPA's discretionary duties in the Court of Appeals, and cannot now use 28 U.S.C. § 1631 to undo its election to first proceed in the District Court, thereby limiting its case to a review of EPA's mandatory duties.

In addition, the case of *Trustees for Alaska v. DOI*, 919 F.2d 119 (9th Cir. 1990) is distinguishable from the case at bar, as the Court found that "because a court had never interpreted [the Outer Continental Shelf Lands Act]'s jurisdictional provisions, confusion was possible." *Id.* at 123. The same cannot be said of the Clean Water Act's jurisdictional provisions, which have been litigated in hundreds of cases in front of numerous Courts of Appeals. It is disingenuous for OCEF to argue that it was confused as to which court has jurisdiction over its claims, as the statute and case law make clear that District Courts have jurisdiction over mandatory duty claims under section 505(b) and Courts of Appeals have jurisdiction over discretionary duty claims under section 509(b). OCEF's attempt

to transfer this case via 28 U.S.C. § 1631 should be denied, and the Court's review should be limited to assessing whether EPA complied with its mandatory duties.

CONCLUSION

The District Court properly found that EPA's actions in issuing the 2004 EGP were sufficient to comply with EPA's non-discretionary duties under sections 304(b), 301(d), and 304(m) of the Clean Water Act. In the 2004 EGP, EPA published and performed an annual review of effluent limitations guidelines, reviewed effluent limitations, published a plan establishing a schedule for the annual review as required by section 304(b), and identified previously unregulated sources and established a schedule to promulgate effluent limitations guidelines for them. EPA's actions were adequate to pass under a section 505(b) review.

Further, OCEF has not properly pursued a review of EPA's discretionary duties in this case. As the Supreme Court held in the *E.I. du Pont* case, EPA's discretionary actions in complying (or failing to comply) with sections 301 and 304 of the Clean Water Act are exclusively reviewed in the Courts of Appeals pursuant to section 509(b). Accordingly, if OCEF desired a review of EPA's discretionary duties, it needed to file a petition for review by December 31, 2004, 120 days after EPA's issuance of the 2004 EGP. OCEF has not filed a petition for review with this Court, and only filed a notice of appeal on June 24, 2005. Because OCEF's appeal is both untimely and procedurally improper, a review of how EPA performed its discretionary duties should be denied.

Accordingly, the Court should affirm the District Court's May 20, 2005 Order, dismiss all aspects of OCEF's case that involve a review of EPA's discretionary duties, and deny OCEF's motion to transfer its claims to this Court.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 31-1, I certify that Intervenor-Appellee's Answering Brief is proportionally spaced, has a 14-point typeface, and contains 7,216 words.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, I hereby certify that Intervenor-Appellee is unaware of any related cases currently pending in this Court.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing, Intervenor-Appellee, Effluent Guidelines Industry Coalition's Answering Brief, has been served by first class Unites States Mail, postage prepaid, on this 1st day of December, 2005, on the following counsel of record:

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