

1 CHRISTOPHER SPROUL (State Bar No. 126398)
2 RACHEL E. SHAPIRO (State Bar No. 211398)
3 Environmental Advocates
4 1004 O'Reilly Avenue
5 San Francisco, California 94129
6 Tel: (415) 561-2222, Fax: (415) 561-2223

7 MICHAEL W. GRAF (State Bar No. 136172)
8 Law Offices
9 227 Behrens Street
10 El Cerrito, California 94530
11 Tel: (510) 525-7222; Fax: (510) 525-1208

12 MICHAEL A. COSTA (State Bar No. 219416)
13 Our Children's Earth Foundation
14 100 First Street, Suite 100-367
15 San Francisco, CA 94105
16 Tel: (415) 608-2781; Fax: (650) 745-2894

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

20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 OUR CHILDREN'S EARTH FOUNDATION and)	Case No.
23 ECOLOGICAL RIGHTS FOUNDATION)	
)	
24 Plaintiffs,)	COMPLAINT FOR
)	DECLARATORY AND
25 v.)	INJUNCTIVE RELIEF
)	
26 UNITED STATES ENVIRONMENTAL)	CLEAN WATER ACT CASE
27 PROTECTION AGENCY and MICHAEL LEAVITT,)	
28 as Administrator of the United States Environmental)	
Protection Agency,)	
)	
29 Defendants.)	
)	
)	

1 Plaintiffs Our Children’s Earth Foundation (“OCE”) and Ecological Rights Foundation
2 (“ERF”) (collectively, “Plaintiffs”) allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs bring this action under section 505(a)(2) of the Clean Water Act (CWA), 33
5 U.S.C. § 1365(a)(2), which authorizes citizens to bring civil actions against the EPA
6 Administrator for failure to perform any non-discretionary CWA duty. Plaintiffs seek relief
7 from the failure of Defendants U.S. Environmental Protection Agency and Michael Leavitt,
8 Administrator of the U.S. Environmental Protection Agency (collectively, “EPA” or
9 “Defendants”) to conduct an annual review of Effluent Limitation Guidelines (“Effluent
10 Guidelines”) in accord with CWA sections 304(b) and 304(m)(1)(A); 33 U.S.C. §§ 1314(b),
11 (m)(1)(A). Plaintiffs further seek relief from Defendants’ failure to review Effluent Limitations
12 every five years as required by CWA section 301(d), 33 U.S.C. § 1311(d). Plaintiffs also seek
13 relief from Defendants’ failure to adopt Effluent Guidelines Plans governing their annual review
14 and promulgation of Effluent Guidelines in accord with the deadlines established by CWA
15 section 304(m).

16 2. CWA section 304(b), 33 U.S.C. § 1314(b), requires EPA to establish Effluent
17 Guidelines for all classes and categories of industries which discharge water pollutants. Effluent
18 Guidelines establish the level of water pollutant discharge reduction attainable by those
19 industries via the application of specified pollution reduction technologies. Effluent Guidelines
20 are used "for the purpose of adopting or revising [the technology-based] Effluent Limitations"
21 required by CWA section 301(b). Effluent Limitations required by CWA section 301(b), in turn,
22 are mandatory restrictions on the amount of pollution that any point source may discharge to
23 waters of the United States. The CWA ensures that Effluent Guidelines will be kept up to date
24 with current pollution control technology by requiring EPA to review all Effluent Guidelines
25 annually, and if appropriate, revise them. CWA §§ 304(b), (m)(1)(A); 33 U.S.C. §§ 1314(b),
26 (m)(1)(A). The CWA further requires EPA to review at least some of its Effluent Limitations at
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1 least every five years. CWA § 301(d); 33 U.S.C. § 1314(b). The CWA also requires EPA to
2 establish a schedule for the annual review of existing Effluent Guidelines and adoption of new
3 Effluent Guidelines in an Effluent Guidelines Plan that must be issued every two years. CWA §
4 304(m)(1)(A), 33 U.S.C. § 1314(m)(1)(A).

5 3. Effluent Guidelines and related technology-based Effluent Limitations are the
6 cornerstone of the Clean Water Act as comprehensively amended by Congress in 1972. The
7 1972 Amendments to the CWA require EPA to regulate point source pollution through a
8 national permit system that applies the best feasible and available technology to pollution
9 control, based on the recognition that the prior regulatory focus on health and environmental risk
10 assessment had been ineffective at controlling point source water pollution. As noted by Senator
11 Edmund Muskie, the chief author of the 1972 Amendments, technology-based Effluent
12 Limitations based on Effluent Guidelines were the “best available mechanism to control water
13 pollution” because it allowed EPA to regulate pollutants without having to “search for a precise
14 link between pollution and water quality.” *See* EPA’s Draft Strategy for National Clean Water
15 Industrial Regulations at 7.

16 4. EPA has established Effluent Guidelines for fifty-five categories and 450
17 subcategories of industry. CWA sections 304(b) and 304(m)(1)(A) mandate that EPA review *all*
18 of these Effluent Guidelines annually to determine whether technological advance or changed
19 economic circumstances warrants their revision. In 2003, however, EPA did not analyze nor
20 reach conclusions concerning whether technological improvements or change in the economic
21 feasibility of pollution control has occurred within *any* of the classes and categories of industries
22 addressed by existing Effluent Guidelines. Instead, in 2003, EPA conducted an ill-advised and
23 largely unsuccessful attempt to rank the relative environmental risks posed by the discharges
24 from different categories of industrial dischargers. EPA then used this environmental risk
25 ranking to select only two of the fifty-five categories of Effluent Guidelines for further review in
26 2004. While EPA has indicated that in 2004 it is attempting to discern whether technological

1 advance or change in economics of pollution control would warrant revision of these two
2 Effluent Guidelines, EPA has also made it clear that it is not conducting this sort of review in
3 2004 for any of the other fifty-five categories and 450 subcategories of existing Effluent
4 Guidelines.

5 5. EPA's review of Effluent Guidelines in 2003 plainly violated EPA's mandatory duties
6 under CWA sections 304(b) and 304(m)(1)(A) to evaluate whether technological advances or
7 changed economic circumstances have made it feasible to revise and make Effluent Guidelines
8 more stringent for any of the categories of industry covered by existing Effluent Guidelines.
9 EPA's review in 2003 unlawfully consisted only of a "screening effort" to determine a small
10 subset of Effluent Guidelines to review in more detail in 2004. This 2003 screening effort
11 violated EPA's mandatory duties to review Effluent Guidelines in at least six ways: (1) EPA did
12 not consider the two main factors that the CWA mandates EPA to consider in reviewing effluent
13 guidelines: technical feasibility of reducing pollutant discharge and economic feasibility of
14 reducing pollutant discharge, (2) EPA improperly determined that it could rule out review of the
15 technical and economic feasibility of pollutant reduction for categories of industry whose
16 discharges EPA deemed to pose relatively less health and environmental risks than other
17 categories, (3) EPA improperly determined that it could rule out review of Effluent Guidelines
18 based on findings that the water pollution problems potentially caused by an industry are being
19 dealt with more "efficiently" by other regulatory and non-regulatory means, including voluntary
20 efforts of industry, (4) EPA impermissibly declined to review any Effluent Guidelines
21 promulgated since 1996, (5) EPA impermissibly determined it could rule out review of Effluent
22 Guidelines based on a finding that there are only a few facilities in an industry discharging
23 pollutants or pollutants that pose risks to water quality, and (6) EPA impermissibly determined
24 that it could change the annual review specified by CWA sections 304(b) and 304(m)(1)(A) into
25 a two year, phased review.

26 6. EPA's unlawful methodology for review of Effluent Guidelines in 2003 has
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1 necessarily translated into on-going violation of EPA's mandatory statutory duty to review
2 Effluent Guidelines in 2004 given EPA's decision to make its 2004 review of Effluent
3 Guidelines the second half of a two-year review begun in 2003. EPA used the unlawful
4 screening of Effluent Guidelines it performed in 2003 to decide to review only two categories of
5 Effluent Guidelines in 2004 in the manner required by CWA sections 304(b) and 304(m)(1)(A):
6 the Effluent Guidelines for the Effluent Guidelines for the Organic Chemicals, Plastics and
7 Synthetic Fibers industrial category set forth at 40 C.F.R. part 414 and the Effluent Guidelines
8 for the Petroleum Refining category set forth at 40 C.F.R. part 419. This is unlawful as, one, the
9 CWA requires EPA to review *all* existing Effluent Guidelines annually and two, EPA employed
10 impermissible and arbitrary and capricious criteria in selecting these two categories for review.

11 7. The CWA also requires EPA to review and revise as appropriate Effluent Limitations
12 required by CWA section 301(b)(2) "at least every five years." CWA § 301(d), 33 U.S.C. §
13 1311(d). EPA's Effluent Guidelines regulations also establish Effluent Limitations within the
14 meaning of CWA section 301(b)(2). Thus, EPA necessarily employs the same methodology in
15 reviewing Effluent Limitations that it employs in reviewing its Effluent Guidelines.

16 Accordingly, EPA's review of Effluent Limitations has generally been unlawful for much the
17 same reasons its review of Effluent Guidelines has been unlawful. Most obviously, EPA's
18 determination not to review any Effluent Limitations regulations promulgated since 1996 is
19 directly contrary to CWA section 301(d)'s obligation to review Effluent Limitations required by
20 CWA section 301(b)(2) "at least every five years."

21 8. The CWA also requires EPA to publish a biennial Effluent Guidelines Plan ("EGP"),
22 after providing for public review of and comment on the proposed plan, which (1) establishes a
23 schedule for EPA's annual review of Effluent Guidelines, (2) identifies categories of industries
24 which are not subject to existing Effluent Guidelines and which discharge toxic or
25 nonconventional pollutants, and (3) sets a schedule for promulgation of new Effluent Guidelines
26 for newly identified categories of industry which are not subject to existing Effluent Guidelines.

1 CWA § 304(m), 33 U.S.C. § 1314(m). Though EPA is now five months into 2004, EPA still has
2 not published a final EGP for 2004/2005. Accordingly, EPA is in on-going violation of its
3 mandatory duty to have published a currently applicable final EGP. Moreover, over the last six
4 years, EPA has established a pattern and practice of finalizing its EGPs well after the
5 commencement of the time period ostensibly covered by the EGP. Thus, EPA has lacked final
6 EGPs in place that have been subjected to public review and comment during a substantial
7 portion of EPA's Effluent Guidelines review over the last six years.

8 9. Therefore, Plaintiffs seek declaratory relief establishing that EPA's practices in
9 reviewing Effluent Guidelines and Effluent Limitations and in publishing EGPs are unlawful.
10 Plaintiffs further seek injunctive relief compelling EPA to review Effluent Guidelines and
11 Effluent Limitations and to publish EGPs in accordance with the requirements of the CWA.

12 **JURISDICTION**

13 10. This Court has subject matter jurisdiction over the claims for violations of the CWA
14 set forth in this Complaint pursuant to CWA section 505(a)(1), 33 U.S.C. § 1365(a)(1), and 28
15 U.S.C. section 1331 (an action for declaratory, injunctive and other relief arising under the
16 Constitution and laws of the United States).

17 11. Plaintiffs and their members are aggrieved by the EPA's unlawful procedure in
18 failing to comply with its mandatory duties under CWA sections 301(d), 304(b) and
19 304(m)(1)(A). 33 U.S.C. §§ 1311(d), 1314(b), 1314(m)(1)(A). As a result of EPA's actions,
20 Plaintiffs are more likely to suffer injury due to EPA's failure to update Effluent Guidelines for
21 industrial categories of point source pollution.

22 12. This Court has personal jurisdiction over the U.S. Environmental Protection Agency,
23 and the Administrator of the U.S. Environmental Protection Agency. EPA is a federal agency
24 established by the government of the United States. The main EPA office for EPA Region 9,
25 which has jurisdiction over the states of California, Hawaii, Arizona, and Nevada and certain
26 federal territories, is located in the City and County of San Francisco.

1 **VENUE**

2 13. Venue in the United States District for the Northern District of California is proper
3 under 28 U.S.C. section 1391(e) because defendant EPA’s main office for EPA Region 9 is
4 located at 75 Hawthorne Street, San Francisco, California. In addition, EPA’s inaction or
5 misconduct in reviewing and updating Effluent Guidelines and Effluent Limitations has caused
6 injury to Plaintiffs by not properly regulating the pollutant discharge of various point sources of
7 pollution located within the Northern District of California.

8 **INTRADISTRICT ASSIGNMENT**

9 14. Intradistrict assignment of this matter to the San Francisco Division of the Court is
10 appropriate pursuant to Civil Local Rule 3-2(c) in that the sole California office of the agency
11 responsible for the events or omissions which give rise to Plaintiffs’ claims (EPA misconduct in
12 reviewing, revising and enacting Effluent Guidelines and Limitations) is located in San
13 Francisco County and Plaintiff OCE’s sole office is also located in San Francisco County.

14 **THE PARTIES**

15 15. Plaintiff Our Children’s Earth Foundation (“OCE”) is a non-profit public benefit
16 corporation with offices in San Francisco, California and members throughout the United States.
17 OCE is dedicated to protecting the public, especially children, from the health impacts of
18 pollution and other environmental hazards and to improving environmental quality for the public
19 benefit. Another aspect of OCE’s mission is to participate in environmental decisionmaking,
20 enforce environmental laws, both federal and state, to reduce pollution, and to educate the public
21 concerning those laws and their enforcement. OCE’s members use the Nation’s waters for
22 fishing, body contact water sports and other forms of recreation, wildlife observation, aesthetic
23 enjoyment, educational study, and spiritual contemplation. OCE members are concerned about
24 water quality and will be adversely affected by impacts resulting from EPA’s failure to review
25 and revise Effluent Guidelines and Effluent Limitations and timely publish Effluent Guideline
26 Plans as required by the CWA.

1 16. Plaintiff Ecological Rights Foundation (“ERF”) is a non-profit public interest
2 organization public benefit corporation with offices in Garberville, California and members
3 throughout California. Among other advocacy activities, ERF focuses on protecting surface
4 waters from pollution and degradation. ERF represents citizens who are striving to protect
5 waterways from pollution and secure the multitude of public and private benefits that follow
6 from clean, vibrant waters: safe drinking water, abundant and diverse wildlife populations,
7 healthy recreational opportunities, and economic prosperity from commercial fishing and other
8 commercial activities that depend on clean water. ERF's members use waters in California and
9 elsewhere in the United States for recreation, fishing, wildlife observation, aesthetic enjoyment,
10 educational study, and spiritual contemplation. ERF members are concerned about water quality
11 and will be adversely affected by impacts resulting from EPA’s failure to review and revise
12 Effluent Guidelines and Effluent Limitations and timely publish Effluent Guideline Plans as
13 required by the CWA.

14 17. Defendant EPA is a federal agency within the meaning of 16 U.S.C. section 1456.
15 EPA is the agency responsible for administering the requirements of the CWA. Defendant
16 Michael Leavitt is named here in his official capacity as Administrator of EPA. Each of the
17 Defendants named in this complaint is sued in the capacity of an agency of the United States
18 Government bearing responsibility, in whole or in part, for the acts complained of in this
19 Complaint.

20 **COMPLIANCE WITH NOTICE REQUIREMENTS**

21 18. As required by CWA section 505(b)(2), 33 U.S.C. § 1365(b)(2), and 40 C.F.R.
22 section 135.2, Plaintiffs sent a Notice of Intent to File Suit pursuant to CWA section 505(a)(2) to
23 EPA and the Attorney General of the United States, via certified mail return receipt requested
24 postmarked on March 26, 2004. This Notice notified Defendants of Plaintiffs’ intent to file all
25 claims set forth in this Complaint. More than sixty days have now passed since service of this
26 Notice, which was effective on the date the Notice was postmarked. Plaintiffs have thus

1 complied with the notice requirements established by CWA section 505(b)(2) and 40 C.F.R.
2 section 135.2.

3 **LEGAL AND FACTUAL BACKGROUND**

4 **A. EPA's Duty to Review CWA Effluent Guidelines and Effluent Limitations**

5 19. CWA section 304(b) requires EPA to adopt regulations setting out “Effluent
6 Guidelines,” which identify the degree of reduction of water pollutant discharge attainable by
7 specific categories of industries through the application of progressively more stringent levels of
8 pollution control: (1) best practicable control technology currently available (BPT), (2) best
9 conventional pollutant control technology (BCT), and (3) best available technology
10 economically achievable (BAT). CWA section 304(b) Effluent Guidelines are closely
11 interrelated with technology-based “Effluent Limitations” established under CWA section
12 301(b). CWA Effluent Limitations are enforceable limitations on the amount of pollutants that
13 any point source of pollution can discharge to regulated waters of the United States. The CWA
14 specifies that Effluent Limitations must be “determined in accordance with” Effluent
15 Guidelines. CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

16 20. The CWA required EPA to promulgate Effluent Limitations based on BPT by no
17 later than July 1, 1977, Effluent Limitations based on BCT by no later than March 31, 1989, and
18 Effluent Limitations based on BAT by no later than March 31, 1989. CWA §§ 301(b)(1)(A)
19 (BPT deadline), 301(b)(2)(F) (BCT deadline), 301(b)(2)(A), (C), (D) & (F) (BAT deadline); 33
20 U.S.C. § 1311(b)(1)(A), (b)(2). As Effluent Limitations must be set based on Effluent
21 Guidelines, EPA thus had a mandatory duty to have promulgated Effluent Guidelines by those
22 deadlines, as well.

23 21. While EPA perhaps could have elected to promulgate separate regulations
24 establishing Effluent Guidelines under CWA section 304(b) and Effluent Limitations under
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1 CWA section 301(b),¹ EPA has in fact promulgated only a single set of regulations setting forth
2 both Effluent Guidelines and Effluent Limitations combined. These regulations are codified at
3 40 C.F.R. chapter I, subchapter N (40 C.F.R. parts 405-71).

4 22. Effluent Guidelines and related technology-based Effluent Limitations represent the
5 first of Congress' basic two prong water pollution control strategy reflected in the CWA. First,
6 EPA is to set technology-based Effluent Guidelines and Effluent Limitations that generally
7 require uniform pollution reduction equal to what is technically and economically achievable by
8 the various classes and categories of industries nationwide. Such technology-based limits must
9 be set regardless of the water quality needs or benefits associated with this level of pollution
10 reduction. Second, EPA is to evaluate whether additional water quality problems or hazards
11 persist despite the application of such technology-based Effluent Limitations. EPA is then to set
12 additional water quality-based Effluent Limitations needed to eliminate any still persisting water
13 quality problems.

14 23. EPA has promulgated Effluent Guidelines and Effluent Limitations for fifty-five
15 classes and categories and over 450 subcategories of industrial water polluters, which represents
16 some, but not all of the classes and categories of industrial water polluters in the United States.

17 24. CWA section 304(b) requires EPA to revise Effluent Guidelines annually, if
18 appropriate. 33 U.S.C. § 1314(b). CWA section 304(m)(1)(A) further requires EPA to establish
19 a schedule for the annual review of existing Effluent Guidelines. 33 U.S.C § 1314(m)(1)(A).
20 Taken together, these provisions require EPA to review existing Effluent Guidelines annually to
21 determine whether they should be revised.

22 25. In setting Effluent Guidelines, EPA must assess specific factors related to the
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25 ¹ *But see* CWA § 301(b)(2)(C), (D), (E) (stating that the deadlines by which Effluent
26 Limitations shall be “achieved” are “no later than three years after the date *such limitations are*
27 *promulgated under section 1314(b) of this title* [CWA section 304(b)],” thus implying that
Effluent Guidelines regulations promulgated under CWA § 304(b) are necessarily also Effluent
Limitations under CWA § 301(b).

1 technical and economic feasibility of reducing pollutant discharges. In setting BPT-based
2 Effluent Guidelines, EPA has a mandatory statutory duty, *inter alia*, to consider “the total cost of
3 application of technology in relation to the effluent reduction benefits to be achieved from such
4 application. . . , the age of equipment and facilities involved, the process employed, the
5 engineering aspects of the application of various types of control techniques, [and] process
6 changes. . . .” CWA § 304(b)(1)(B); 33 U.S.C. § 1314(b)(1)(B). In setting BCT-based Effluent
7 Guidelines, EPA has a mandatory statutory duty, *inter alia*, to consider “the reasonableness of
8 the relationship between the costs of attaining a reduction in effluents and the effluent reduction
9 benefits derived, and the comparison of the cost and level of reduction of such pollutants from
10 the discharge from publicly owned treatment works to the cost and level of reduction of such
11 pollutants from a class or category of industrial sources . . . , the age of equipment and facilities
12 involved, the process employed, the engineering aspects of the application of various types of
13 control techniques, [and] process changes. . . .” CWA § 304(b)(4)(B); 33 U.S.C. §
14 1314(b)(4)(B). In setting BAT-based Effluent Guidelines, EPA has a mandatory statutory duty,
15 *inter alia*, to consider “the age of equipment and facilities involved, the process employed, the
16 engineering aspects of the application of various types of control techniques, process changes,
17 [and] the cost of achieving such effluent reduction. . . .” CWA § 304(b)(2)(B); 33 U.S.C. §
18 1314(b)(2)(B). As these are the factors that EPA must consider when setting Effluent
19 Guidelines, these are necessarily the factors that EPA must reasonably consider in evaluating
20 whether it is appropriate to revise existing Effluent Guidelines, as EPA itself has acknowledged.
21 68 Fed. Reg. at 75520.

22 26. In addition, CWA section 301(d) specifies that EPA must review all BAT-based and
23 BCT-based Effluent Limitations required by CWA section 301(b)(2) "at least every five years."
24 33 U.S.C. § 1311(d). EPA must also revise these Effluent Limitations "if appropriate."

25 **B. EPA's Inadequate Review of Effluent Guidelines in 2003**

26 27. The central Congressional purpose behind CWA sections 301(d), 304(b) and
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1 304(m)(1)(A) is for EPA to regularly review the technological and economic feasibility of
2 requiring the Nation's industries further to reduce their discharges of water pollutants. In 2003,
3 EPA thwarted this central purpose by conducting such a paltry examination of the pertinent
4 technological and economic issues that EPA could not, as it expressly admitted, come to any
5 conclusions, even preliminary, about whether it is technically and economically feasible for any
6 American industry to reduce its pollutant discharge below the levels specified by existing
7 Effluent Guidelines.

8 28. On December 31, 2003, EPA published in the Federal Register the results of its
9 annual review of Effluent Guideline regulations for calendar year 2003. *See* 68 Fed. Reg. 75515
10 ("EPA December 2003 Notice"). The EPA December 2003 Notice indicated that EPA had
11 adopted a biennial review process, under which EPA would review Effluent Guidelines in two
12 year increments, with a screening level analysis in the first year and a detailed analysis of two
13 selected Effluent Guidelines in the second year. The EPA December 2003 Notice summarized
14 EPA's screening level analysis for 2003, which constituted EPA's annual review of Effluent
15 Guidelines for 2003. EPA indicated that it would perform the second half of this review, the
16 more detailed analysis of two selected Effluent Guidelines, in 2004.

17 29. In 2003, as EPA explained in the EPA December 2003 Notice, EPA devised four
18 factors to employ in screening which of its fifty-five categories of Effluent Guidelines it would
19 review in more detail in 2004. EPA identified "Factor 1" as:

20 consideration of the extent to which the pollutants remaining in an industrial category's
21 discharge pose a hazard or risk to human health or the environment.

22 EPA identified "Factor 2" as:

23 identification of an applicable and demonstrated technology, process change, or pollution
24 prevention alternative that can effectively reduce the pollutants remaining in the
25 industrial category's wastewaters and thereby substantially reduce the hazard or risk to
26 human health or the environment associated with these pollutant discharges.

27 EPA identified "Factor 3" as:

28 the cost, performance, and affordability of the technology, process change, or pollution
prevention measures identified using the second factor.

1 EPA identified "Factor 4 as:

2 implementation and efficiency considerations and recommendations from stakeholders[,]
3 opportunities to eliminate inefficiencies or impediments to pollution prevention or
4 technological innovation, or opportunities to promote innovative approaches such as
5 water quality trading, including within-plant trading.

6 68 Fed. Reg. 75520-21.

7 30. EPA further indicated that its "Factor 4" included consideration of whether Effluent
8 Guideline revision is unwarranted because (1) a "pollutant source is already efficiently
9 addressed by another regulatory program or by non-regulatory programs" and (2) voluntary
10 pollution reduction efforts by an industry are sufficiently addressing environmental concerns. 68
11 Fed. Reg. at 75521-22.

12 31. EPA also indicated in the EPA December 2003 Notice that it had categorically ruled
13 out review in 2003 or in the more focused review to follow in 2004 of any Effluent Guidelines
14 that it had promulgated within the past seven years. 68 Fed. Reg. at 75521. EPA further
15 indicated that it had elected not to review certain Effluent Guidelines based on a finding that
16 there are only a few facilities in that industry discharging pollutants or pollutants that pose risks
17 to water quality.

18 32. In the EPA December 2003 Notice, EPA stated that EPA had found it difficult to
19 compile and/or analyze the information necessary to evaluate its Factors 2 and 3 in 2003 or to
20 use these Factors 2 and 3 as part of its rationale for screening which Effluent Guidelines EPA
21 would review in more detail in 2004. 68 Fed. Reg. 75521-22, 75528. As a result, EPA used only
22 its Factors 1 and 4 to reach conclusions as to which Effluent Guidelines merited further focused
23 analysis in 2004. Thus, EPA described its 2003 annual review of Effluent Guidelines as
24 consisting of "collecting and analyzing screening-level data to identify industrial categories
25 whose pollutant discharges potentially pose the greatest hazards or risks to human health and the
26 environment because of their toxicity" and an additionally vaguely described consideration of
27 "efficiency and implementation issues." 68 Fed. Reg. at 75521.

28 33. EPA employed two sources of information to perform its analysis in 2003 of its

1 Factor 1: EPA Toxics Release Inventory (TRI) Data and three year old OECA Permit
2 Compliance System (PCS) Data generated in 2000. EPA conceded, however, that both of these
3 data sources are incomplete and do not accurately characterize the range of health and
4 environmental risks posed by categories of industry discharging pollutants to surface waters.
5 *See, e.g.*, 68 Fed. Reg. 75525; *see also* EPA, Factor 1 Analysis: Human Health and
6 Environmental Impacts (“Factor 1 Report”) at 2-2 to 2-8; 3-2, 3-3; EPA, Description and Results
7 of EPA Methodology to Synthesize Screening Level Results for the Effluent Guidelines Program
8 Plan for 2004/2005 (“Methodology Memo”) at 15 (EPA stating that “reported discharges in PCS
9 and TRI do not represent a national estimate of pollutant discharges for a variety of reasons”).
10 Indeed, EPA encountered so many difficulties and imprecision with available data that EPA
11 could not reliably have used its 2003 Factor 1 analysis to reach meaningful conclusions about the
12 relative environmental and human health impacts of water pollutant discharges from specific
13 industries.

14 34. Employing Factors 1 and 4 as its 2003 screening methodology, EPA identified only
15 two industrial categories of Effluent Guidelines for any detailed further evaluation in 2004: the
16 Effluent Guidelines for the Organic Chemicals, Plastics and Synthetic Fibers industrial category
17 set forth at 40 C.F.R. part 414 and the Effluent Guidelines for the Petroleum Refining category
18 set forth at 40 C.F.R. part 419. *Id.* at 75522.

19 **C. EPA's Inadequate Review of Effluent Guidelines in 2004**

20 35. In 2004, EPA is continuing to thwart the central Congressional purpose behind CWA
21 sections 301(d), 304(b) and 304(m)(1)(A) of having EPA regularly and *systematically* review the
22 technological and economic feasibility of requiring the Nation’s industries further to reduce their
23 discharges of water pollutants. As noted *supra*, EPA stated in the EPA December 2003 Notice
24 that it is now implementing the annual review requirement of CWA section 304(b) in a two year,
25 phased review process. EPA’s effort in 2004 essentially is now and will continue to consist of
26 the second half of the two year review EPA began in 2003. In 2004, EPA is *only* looking at the
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1 technological and economic feasibility of more stringent treatment standards for just the two
2 industries identified in EPA's 2003 screening process: manufacture of Organic Chemicals,
3 Plastics and Synthetic Fibers and Petroleum Refining. 68 Fed. Reg. at 75522. EPA has stated
4 that it may conduct some additional limited review of the health and environmental risks posed
5 by discharges from other industries, but is not now and will not in 2004 study the technological
6 and economic feasibility of more stringent treatment standards for such other industries. 68 Fed.
7 Reg. at 75521.

8 **D. EPA's Inadequate Review of Effluent Limitations in 2003 and 2004**

9 36. The methodology that EPA has adopted for review of its Effluent Guideline
10 regulations is necessarily EPA's methodology for reviewing Effluent Limitations promulgated
11 under CWA section 301(b), given that EPA has but one set of regulations serving as both
12 Effluent Guidelines and Effluent Limitations--the EPA regulations set forth at 40 C.F.R. parts
13 405-71. Thus, when EPA decided in 2003 and 2004 not to review Effluent Guidelines
14 promulgated since 1996, EPA necessarily also determined not to review Effluent Limitations
15 promulgated since 1996. EPA further determined to review Effluent Limitations in all the same
16 manners that it reviewed Effluent Guidelines in 2003 and is currently reviewing Effluent
17 Guidelines in 2004. Thus, EPA in 2003 did not review and in 2004 is not reviewing the
18 technical and economic feasibility of requiring industries to meet revised BCT-based and BAT-
19 based Effluent Limitations that are five years old or older, as required by CWA section 301(d),
20 33 U.S.C. § 1311(d).

21 **E. EPA's Failure to Operate Under a Current Final Effluent Guidelines Plan for 2004**

22 37. CWA section 304(m) requires EPA to publish a biennial plan, after providing for
23 public review of and comment on a proposed plan, which (1) establishes a schedule for EPA's
24 annual review of Effluent Guidelines, (2) identifies categories of industries which are not subject
25 to existing Effluent Guidelines and which discharge toxic or nonconventional pollutants, and (3)
26 sets a schedule for promulgation of new Effluent Guidelines for newly identified categories of
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1 industry which are not subject to existing Effluent Guidelines. 33 U.S.C. § 1314(m). Though
2 EPA is now five months into 2004, EPA still has not published a final EGP for 2004/2005. EPA
3 published its last CWA section 304(m) EGP on August 27, 2002. 67 Fed. Reg. 55012. This last
4 EGP scheduled EPA's review and revision of Effluent Guidelines for calendar years 2002 and
5 2003. Accordingly, EPA does not currently have a EGP in place which schedules EPA's review
6 and revision of Effluent Guidelines for 2004 and 2005.

7 38. In the EPA December 2003 Notice, EPA published a Preliminary Effluent
8 Guidelines Plan ("Preliminary EGP"). As required by CWA section 304(m)(2), EPA set a public
9 review and comment period on this Preliminary EGP. EPA originally set the comment period to
10 last through February 17, 2004, which EPA subsequently extended until March 18, 2004. 69
11 Fed. Reg. 6984 (Feb. 12, 2004). Though more than two months has passed since the close of the
12 public comment period, EPA has not formally stated any further intentions to issue a Final
13 Effluent Guidelines Plan ("Final EGP") by any date certain.

14 39. EPA's lack of a current Final EGP is part of EPA's continuing pattern and practice
15 of finalizing the two year plans required under CWA section 304(m) long after the
16 commencement of the two year period covered by each individual plan. EPA published its three
17 previous EGPs about eight months into the planning periods ostensibly covered by those EGPs.
18 EPA published its EGPs for 2002/2003, 2000/2001, and 1998/1999, respectively, on August 27,
19 2003; August 31, 2001; and September 4, 1998, whereas all of those EGPs should have been
20 published by January 1 of 2003, 2001 and 1998, respectively.

21 **FIRST CLAIM FOR RELIEF**

22 Violation of the CWA
33 U.S.C. §§ 1314(b), 1314(m)(1)(A)

23 **Request for Declaratory Relief and Injunction to Compel EPA to Review Effluent Guidelines**
24 **Annually in Accordance with Sections 304(b) and 304(m) of the CWA**

25 40. Plaintiffs reassert and reallege paragraphs 1 through 39 above.

26 41. CWA section 304(b) requires EPA to revise Effluent Limitations annually, if
27 appropriate. 33 U.S.C. § 1314(b). CWA section 304(m)(1)(A) further requires EPA to establish

1 a schedule for the annual review of existing Effluent Guidelines in accordance with CWA
2 section 304(b). 33 U.S.C. § 1314(m)(1)(A). Pursuant to these provisions, EPA must review
3 each of its existing Effluent Guidelines set forth at 40 C.F.R. parts 405-71 annually to determine
4 whether it is appropriate to revise any of them.

5 42. In determining whether it is appropriate to revise Effluent Guidelines, EPA must
6 taken into account specified statutory factors related to the technical and economic feasibility of
7 reducing pollutant discharge. These specific statutory factors are listed *supra* in paragraph 25.

8 43. In 2003, EPA violated its mandatory duties to review Effluent Guidelines in at least
9 six ways: (1) EPA did not consider any of the factors listed in the preceding paragraph that the
10 CWA mandates EPA to consider in reviewing effluent guidelines, which essentially reduce
11 down to the technical feasibility of reducing pollutant discharge and economic feasibility of
12 reducing pollutant discharge, (2) EPA improperly determined that it could rule out review of the
13 technical and economic feasibility of pollutant reduction for categories of industry whose
14 discharges EPA deemed to pose relatively less health and environmental risks than other
15 categories, (3) EPA improperly determined that it could rule out review of Effluent Guidelines
16 based on findings that the water pollution problems potentially caused by an industry are being
17 dealt with more “efficiently” by other regulatory and non-regulatory means, including voluntary
18 efforts of industry, (4) EPA impermissibly declined to review any Effluent Guidelines
19 promulgated since 1996, (5) EPA impermissibly determined it could rule out review of Effluent
20 Guidelines based on a finding that there are only a few facilities in an industry discharging
21 pollutants or pollutants that pose risks to water quality, and (6) EPA impermissibly determined
22 that it could change the annual review specified by CWA sections 304(b) and 304(m)(1)(A) into
23 a two year, phased review. *See* 68 Fed. Reg. 75520-21.

24 44. In 2004, EPA is continuing to fail to comply with its CWA mandatory duties by
25 impermissibly limiting its 2004 review to the two categories of Effluent Guidelines that it
26 selected as priorities based on its improper review of Effluent Guidelines conducted in 2003.

1 Thus, EPA's on-going review in 2004 necessarily incorporates all the mistakes of law and
2 failures of duty committed in EPA's 2003 review of Effluent Guidelines. In addition, EPA's on-
3 going 2004 review is unlawful for expressly focusing review on only two of the fifty-five
4 categories of existing Effluent Guidelines, rather than including review of all fifty-five
5 categories of Effluent Guidelines as required by CWA sections 304(b) and 304(m)(1)(A).

6 45. EPA's failure to review all Effluent Guidelines annually according to the
7 requirements of CWA sections 304(b) and 304(m)(1)(A) frustrates Congress' intent that Effluent
8 Guidelines be continuously revised based on technological advances and changed economics.
9 EPA's conduct makes it less likely that pollutant discharges will be reduced as technological
10 advance and changed economic circumstance make such reductions attainable. Plaintiffs will
11 endure greater levels of pollution in the waters they use and seek to enjoy as a result. Plaintiffs
12 are therefore entitled to declaratory relief that EPA's 2003 and 2004 reviews of Effluent
13 Guidelines have been and continue to be unlawful under the CWA and injunctive relief pursuant
14 to CWA section 505(a), 33 U.S.C. § 1365(a), ordering EPA to commence review of Effluent
15 Guidelines in conformance with the CWA according to a schedule set by this Court.

16 **SECOND CLAIM FOR RELIEF**

17 Violation of the CWA
33 U.S.C. §§ 1251, et seq.

18 **Request for Declaratory Relief and Injunction to Compel EPA to Review BAT-Based and BCT-**
19 **Based Effluent Limitations Every 5 Years as Required by CWA Section 301(d.)**

20 46. Plaintiffs reassert and reallege paragraphs 1 through 45 above.

21 47. Clean Water Act section 301(d) specifies that EPA must review all BAT-based and
22 BCT-based Effluent Limitations required by CWA section 301(b)(2) "at least every five years."
23 33 U.S.C. § 1311(d). EPA's regulations set forth at 40 C.F.R. part 405-71 establish both Effluent
24 Guidelines and Effluent Limitations within the meaning of CWA section 301(b)(2). Thus, EPA
25 has a mandatory duty to review the BAT and BCT portions of these Effluent
26 Guideline/Limitation regulations at least every five years. EPA has not done so for most
27 categories of point source pollutants for over a decade. Moreover, EPA has expressly stated that

1 it declined in 2003 and intends to continue in 2004 to decline to review any Effluent
2 Guideline/Limitation regulation that was promulgated since 1996. This approach is, however,
3 unlawful under CWA section 301(d), 33 U.S.C. § 1311(d).

4 48. EPA's failure to review BAT-based and BCT-based Effluent Limitations required by
5 CWA section 301(b)(2) at least every five years frustrates Congress' intent that BAT-based and
6 BCT-based Effluent Limitations be continuously revised based on technological advances and
7 changed economics. EPA's conduct makes it less likely that pollutant discharges will be
8 reduced as technological advance and changed economic circumstance make such reductions
9 attainable. Plaintiffs will endure greater levels of pollution in the waters they use and seek to
10 enjoy as a result. Plaintiffs are therefore entitled to declaratory relief that EPA's 2003 and 2004
11 reviews of Effluent Limitations have been and continue to be unlawful under the CWA.
12 Plaintiffs are further entitled to injunctive relief pursuant to CWA section 505(a), 33 U.S.C. §
13 1365(a), ordering EPA to commence review of BAT-based and BCT-based Effluent Limitations
14 in conformance with existing law according to a schedule set by this Court.

15 **THIRD CLAIM FOR RELIEF**

16 Violation of the CWA
33 U.S.C. §§ 1251, *et seq.*

17 **Request for Declaratory Relief and Injunction to Compel EPA to Issue its Final 304(m) Effluent**
18 **Guidelines Plan in a Timely Manner**

19 49. Plaintiffs reassert and reallege paragraphs 1 through 48 above.

20 50. CWA section 304(m) requires EPA to publish a biennial plan which (1) establishes a
21 schedule for EPA's annual review of Effluent Guidelines, (2) identifies categories of industries
22 which are not subject to existing Effluent Guidelines and which discharge toxic or
23 nonconventional pollutants, and (3) sets a schedule for promulgation of new Effluent Guidelines
24 for newly identified categories of industry which are not subject to existing Effluent Guidelines.
25 CWA § 304(m); 33 U.S.C. § 1314(m). EPA published its last EGP on August 27, 2002. 67 Fed.
26 Reg. 55012. This last plan scheduled EPA's review and revision of Effluent Guidelines for
27 calendar years 2002 and 2003. EPA has yet to issue a Final Effluent Guidelines Plan for 2004.

1 Thus, EPA continues to lack an EGP to govern its on-going review and revision of Effluent
2 Guidelines in 2004.

3 51. EPA's lack of a current EGP is part of EPA's continuing pattern and practice of
4 finalizing the two year plans required under CWA section 304(m) long after the commencement
5 of the period covered by each individual plan. EPA published its three previous EGPs about
6 eight months into the planning period ostensibly covered by those EGPs. EPA published its
7 EGPs for 2002/2003, 2000/2001, and 1998/1999, respectively, on August 27, 2003, on August
8 31, 2001, and September 4, 1998 whereas all of those EGPs should have been published by
9 January 1 of 2003, 2001 and 1998, respectively.

10 52. EPA's failure to promulgate EGPs in a timely manner frustrates Congress' intent
11 under CWA section 304(m) that EPA prepare biennial plans, adopted only after taking and
12 considering public comment, that set forth EPA's proposed schedule for reviewing existing
13 Effluent Guidelines, that identify new categories of industry to be regulated under Effluent
14 Guidelines, and that set a schedule for EPA to promulgate new Effluent Guidelines. 33 U.S.C. §
15 1314(m). Plaintiffs are therefore entitled to declaratory relief that EPA's practice of not
16 adopting EGPs until well after the period they are meant to cover has commenced is unlawful
17 under the CWA. Plaintiffs are further entitled to injunctive relief pursuant to CWA section
18 505(a), 33 U.S.C. § 1365(a), ordering EPA to complete and issue a Final EGP for 2004
19 according to a schedule set by this Court and thereafter to issue final EGPs before the period
20 they cover has commenced.

21 **REMEDY**

22 53. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of law,
23 other than the relief sought in this Complaint, because there is no other mechanism for
24 compelling EPA to take the action necessary under the CWA in reviewing Effluent Guidelines
25 annually, review BAT-based and BCT-based Effluent Limitations at least every five years, and
26 to prepare Effluent Guidelines plans on a timely basis in conformance with the requirements of
27

1 CWA sections 301(d), 304(b) and 304(m)(1)(A), 33 U.S.C. §§1311(d), 1314(b), (m)(1)(A).

2 Without an order from this Court, EPA will not promptly act to comply with these mandatory
3 duties required by the CWA.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs seek the following relief:

6 54. An injunction pursuant to CWA section 505(a), 33 U.S.C. § 1365(a), ordering
7 Defendants to:

8 a. to commence review of Effluent Guidelines in conformance with the CWA
9 according to a schedule set by this Court;

10 b. to commence review of BAT-based and BCT-based Effluent Limitations in
11 conformance with the CWA according to a schedule set by this Court;

12 c. to prepare its EGPs pursuant to CWA section 304(m) in conformance with the
13 CWA.

14 55. A declaratory judgment pursuant to CWA section 505(a), 33 U.S.C. § 1365(a), and 5
15 U.S.C. section 2201 establishing that EPA's practices for reviewing Effluent Guidelines and
16 Effluent Limitations and adopting EGPs as described herein are unlawful;

17 56. An award of attorneys fees and costs to the Plaintiffs pursuant to the CWA section
18 505(d), 33 U.S.C. § 1365(d); and

19 57. Such other and further relief as this Court deems just and proper.

20 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

21 58. Based on Plaintiffs knowledge to date, pursuant to Civil Local Rule 3-16, the
22 undersigned certifies that, as of this date, other than the named parties, there is no such interest
23 to report.

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1 Respectfully submitted this 28th day of May 2004.

2
3 By: _____
4 Christopher Sproul
5 Attorney for Plaintiffs
6 Ecological Rights Foundation and
7 Our Children's Earth Foundation
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