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8  
9 **IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 OUR CHILDREN'S EARTH FOUNDATION )  
and ECOLOGICAL RIGHTS FOUNDATION, )

11 Plaintiffs, )

12 v. )

13 UNITED STATES ENVIRONMENTAL )  
14 PROTECTION AGENCY and MICHAEL )  
O. LEAVITT, as Administrator of the United )  
15 States Environmental Protection Agency, )

16 Defendants. )

Civil Action No.  
04-2132 (PJH)

HEARING DATE:  
August 11, 2004  
9:00 am

17  
18 **DEFENDANTS' CROSS-MOTION FOR SUMMARY  
JUDGMENT ON PLAINTIFFS' THIRD CLAIM FOR RELIEF AND  
19 OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

20 Defendants give notice that, in response to plaintiffs' motion for summary judgment,  
21 defendants are requesting summary judgment on the Third Claim for Relief in the Complaint.  
22 The Cross-motion is noticed for August 11, 2004, at 9:00 am, which is the hearing date set for  
23 Plaintiffs' pending Motion for Summary Judgment.

24 Defendants ask the Court to enter judgment in their favor pursuant to Fed. R. Civ. P.  
25 56(c) and to deny the summary judgment motion filed by plaintiffs. The reasons in support of  
26 this motion are set forth in the accompanying memorandum of points and authorities.  
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16 Defendants. )

Civil Action No.  
04-2132 (PJH)

HEARING DATE:  
August 11, 2004

17  
18 **MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANTS’ CROSS-MOTION  
19 FOR SUMMARY JUDGMENT THIRD CLAIM FOR RELIEF  
AND IN OPPOSITION TO  
20 PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

21 On May 28, 2004, Plaintiffs (jointly referred to as “the Foundations”) filed their  
22 complaint against Defendants United States Environmental Protection Agency and Michael O.  
23 Leavitt, Administrator, (jointly referred to as “EPA”) alleging that EPA has failed to perform  
24 various duties the Foundations claim are mandated by the Clean Water Act (“CWA”). The  
25 Foundations have moved for summary judgment on their Third Claim for Relief, which alleges  
26 that EPA has failed to perform a mandatory duty to publish the biennial plan required by CWA  
27 section 304(m)(1) no later than December 31, 2003. Complaint (“Compl.”) ¶¶ 49-52.

28 EPA agrees that section 304(m) mandates biennial publication of the plans described

1 therein, but the statute does *not* designate December 31 as the deadline for this action. Between  
2 January 31, 1992, and December 31, 2003, EPA published the 304(m) plans in accordance with  
3 the schedule established in a consent decree entered by the United States District Court for the  
4 District of Columbia. See *supra* 5-7. EPA has published six plans pursuant to the Consent  
5 Decree; the most recent plan was published on August 27, 2002.<sup>1/</sup> 67 Fed. Reg. 55,012. EPA  
6 expects to sign the next 304(m) plan by August 26, 2004. See Declaration of Benjamin H.  
7 Grumbles, Acting Assistant Administrator for the Office of Water, U.S. Environmental  
8 Protection Agency ¶ 8 (July 21, 2004) (“Grumbles Decl.”) (Exh. 1). The signed document will  
9 be promptly transmitted to the Office of the Federal Register for publication, *id.* ¶ 9, thereby  
10 fulfilling the statutory mandate for biennial publication.

11 For the reasons set forth below, EPA is entitled to judgment as a matter of law pursuant  
12 to Fed. R. Civ. P. 56(c). The Foundations’ claim that EPA was required to publish the next  
13 304(m) plan by December 31, 2003, is not supported by the statutory language. Under section  
14 304(m), the earliest date by which EPA could be required to publish the next plan is August 27,  
15 2004, two years to the day after publication of the prior plan. Because EPA has not missed this  
16 deadline, the Court should grant EPA’s cross-motion for summary judgment and deny the  
17 motion for summary judgment filed by the Foundations.

## 18 STATEMENT OF ISSUES

19 1. Whether the statutory requirement that EPA publish the section 304(m) plan  
20 biennially can be construed as requiring publication by December 31.

21 2. Whether injunctive relief is warranted, even assuming the Court accepts the  
22 Foundations’ interpretation of section 304(m), given that EPA expects to sign the next 304(m)  
23 plan by August 26, 2004.

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24  
25 <sup>1/</sup> The Consent Decree has been referenced in every Federal Register notice for a proposed  
26 or final plan under section 304(m) since the Decree was entered. The Foundations do not  
27 mention the Consent Decree in their complaint or in the memorandum of points and authorities  
in support of their motion for summary judgment (hereinafter referred to as “Pltf. Memo”).

1 **BACKGROUND**

2 **I. STATUTORY BACKGROUND**

3 The CWA, enacted in 1972, establishes a comprehensive program “to restore and  
4 maintain the chemical, physical, and biological integrity of the Nation's waters” through the  
5 reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C.  
6 § 1251(a). The CWA seeks to control water pollution by controlling the sources of pollutant  
7 discharges. *See generally EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S.  
8 200, 204-05 (1976).

9 **A. Effluent Limitations**

10 One of the strategies employed by the CWA to protect the Nation’s waters is to limit the  
11 discharge of pollutants based upon the capabilities of the equipment or “control technologies”  
12 available to control those discharges, rather than upon the impact of the discharge on the  
13 receiving waters.<sup>2</sup> For existing sources that discharge directly to receiving waters, these  
14 limitations are often based on the “best available technology economically achievable” (“BAT”)  
15 for a category or class of point sources. 33 U.S.C. §§ 1311(b)(2)(A), (C), (D) & (F); *id.* §  
16 1314(b)(2).<sup>3</sup> For direct discharging new sources, the limitations are based on the best available  
17 demonstrated control technology (“BADT”) and are known as “new source performance  
18 standards.” *Id.* § 1316(b)(1)(B).<sup>4</sup>

19 \_\_\_\_\_  
20 <sup>2</sup> This discussion is limited to the CWA sections specifically at issue in the Foundations’  
21 Third Claim for Relief, which is the subject of the pending motion for summary judgment.

22 <sup>3</sup> BAT limitations control toxic and so-called “non-conventional” pollutants. *See* 33  
23 U.S.C. § 1311(b)(2)(C), (D) & (F). Limitations on “conventional” pollutants are based on the  
24 “best conventional pollutant control technology” for the particular industrial category. *See id.* §  
25 1311(b)(2)(E). EPA can also promulgate effluent limitations guidelines for all pollutants based  
26 on the “best practicable control technology currently available.” *See id.* § 1311(b)(1)(A).

27 <sup>4</sup> Direct dischargers are distinguished from facilities that introduce pollutants to publicly  
28 owned treatment works; those facilities are called indirect dischargers. Indirect dischargers are  
subject to pretreatment standards promulgated by EPA, as well as local limits imposed by the

(continued...)

1 EPA establishes technology-based effluent limitations for industrial categories through  
2 national regulations known as effluent limitations guidelines and standards.<sup>57</sup> These regulations  
3 implement not only section 301(b), but also 304(b), which requires EPA to “provide guidelines  
4 for effluent limitations.” 33 U.S.C. § 1314(b). *See E.I. du Pont de Nemours & Co. v. Train*, 430  
5 U.S. 112, 130-34 (1977). In setting these limitations, EPA identifies the waste streams to be  
6 regulated in a particular category or subcategory, as well as a technology that represents the  
7 statutorily prescribed level of control (*e.g.*, BAT or BACT) for each wastestream. The Agency  
8 then identifies the discharge limitations that correspond to the application of the identified  
9 technology, *see generally id.* at 130-31, but does not require dischargers to install that  
10 technology.

11 Permits issued to direct dischargers under the National Pollutant Discharge Elimination  
12 System (“NPDES”) program under section 402 transform the generally applicable technology-  
13 based regulations and state water quality standards into specific effluent limitations applicable to  
14 the individual discharger. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S.  
15 at 205. An NPDES permit is issued either by EPA or an authorized state. 33 U.S.C. § 1342. In  
16 the absence of national categorical effluent limitations guidelines and standards, permit writers  
17 establish BAT and other technology-based limitations on a case-by-case, best professional  
18 judgment basis. 40 C.F.R. § 125.3. Pretreatment standards are directly enforceable against  
19 indirect dischargers, *see* 33 U.S.C. § 1317(d), although local limits, when justified on a site-  
20 specific basis, are imposed through pretreatment control mechanisms. *See* 40 C.F.R. § 403.5.

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21  
22  
23 <sup>47</sup>(...continued)  
pretreatment control authority. 33 U.S.C. § 1317(b) & (c); 40 C.F.R. § 403.5.

24  
25 <sup>57</sup> CWA section 502(11) defines “effluent limitation” as “any restriction established by a  
26 State or the Administrator on quantities, rates, and concentrations of chemical, physical,  
27 biological, and other constituents which are discharged from point sources into navigable waters,  
the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C.  
§ 1362 (11).



1 Section 304(b) required EPA to publish regulations providing “guidelines for effluent  
2 limitations” by October 18, 1973, and requires that EPA “at least annually thereafter, revise, if  
3 appropriate, such regulations.” 33 U.S.C. § 1314(b). Section 304(m)(1) provides:

4 Within 12 months after February 4, 1987, and biennially thereafter, [EPA] shall  
5 publish in the Federal Register a plan which shall –

6 (A) establish a schedule for the annual review and revision of promulgated  
7 effluent guidelines, in accordance with subsection (b) of this section;

8 (B) identify categories of sources discharging toxic or nonconventional  
9 pollutants for which guidelines under subsection (b)(2) of this section and section  
10 1316 of this title have not previously been published; and

11 (C) establish a schedule for promulgation of effluent guidelines for  
12 categories identified in subparagraph (B), under which promulgation of such  
13 guidelines shall be no later than 4 years after February 4, 1987, for categories  
14 identified in the first published plan or 3 years after the publication of the plan for  
15 categories identified in later published plans.

16 33 U.S.C. § 1314(m). Section 304(m)(2) provides that EPA must allow for public comment on  
17 the plan (hereinafter referred to as the “Effluent Guidelines Program Plan”) prior to final  
18 publication.

## 19 **B. Judicial Review**

20 CWA section 505(a)(2) authorizes actions against EPA in the federal district courts  
21 where plaintiff alleges that EPA has failed to perform a duty that is made nondiscretionary by the  
22 CWA. 33 U.S.C. § 1365(a)(2). The statute permits only one judicial remedy: an order requiring  
23 EPA “to perform [such nondiscretionary] act or duty.” *Id.*

## 24 **II. PRIOR LITIGATION AND CONSENT DECREE**

25 EPA did not publish the plan required under section 304(m) by the original statutory  
26 deadline of February 4, 1988. The Natural Resources Defense Council and Public Citizen, Inc.,  
27 filed an action in the United States District Court for the District of Columbia that, in relevant  
28 part, challenged EPA’s actions in implementing section 304. *NRDC v. Reilly*, Civ. No. 89-2980  
(D.D.C., filed Oct. 30, 1989) (“*NRDC*”). EPA thereafter published its first Effluent Guidelines  
Program Plan on January 2, 1990, at 55 Fed. Reg. 80. NRDC alleged that the 1990 Plan did not

1 satisfy EPA's duties under section 304(m). In an order dated April 23, 1991, the District Court  
2 agreed. The remedy was spelled out in a Consent Decree entered by the Court on January 31,  
3 1992.<sup>6</sup> Exh. 2.

4 The Consent Decree addressed both the promulgation of effluent guidelines pursuant to  
5 section 304(b) and the publication of the Effluent Guidelines Program Plans pursuant to section  
6 304(m). The Consent Decree, ¶ 3, required EPA to complete studies of eleven point source  
7 categories between 1993 and 1997. Paragraphs 2, 4, and 5 of the Consent Decree required EPA  
8 to act on nineteen point source categories between 1993 and 2003. For each category, these  
9 Paragraphs identified the year for starting the action, proposing the guideline, and taking final  
10 action. Paragraph 2 identified specific dates, but paragraphs 4 and 5 set only the year for action,  
11 which was construed as the calendar year (January 1 to December 31).

12 The schedule for publishing the Effluent Guidelines Program Plans was established in  
13 paragraph 7(a) of the Consent Decree. EPA was required to propose a Plan within 90 days of  
14 entry of the Consent Decree and to publish final notice of the Plan within 210 days of entry of  
15 the Consent Decree. *Id.* ¶ 7(a). The Consent Decree did not specify particular dates for  
16 subsequent plans, but provided that

17 EPA will publish final notices of subsequent 304(m) Plans every second year  
18 after final notice of the [preceding] Plan; proposed notices will be published  
within the year preceding publication of the corresponding final notice.

19 *Id.* Paragraph 7(b) of the Decree states:

20 304(m) Plans issued subsequent to this decree that are consistent with its terms  
21 shall satisfy EPA's obligations under Section 304(m) with respect to the  
22 publication of such plans. The foregoing sentence shall [] not apply with respect  
to any obligations that may arise after December 31, 2003.

23 *Id.* The Consent Decree required that each Plan must include the schedules for proposing and  
24 taking final action on effluent guidelines for the point source categories identified under the

---

25  
26 <sup>6</sup> EPA has completed its obligations under the Consent Decree and anticipates moving for  
27 termination.

1 Decree's other provisions. *Id.* ¶¶ 2-6.<sup>7</sup>

2 Because the Consent Decree was entered on January 31, 1992, the deadline for action on  
3 publishing the first Effluent Guidelines Program Plan under the Decree was August 28, 1992.  
4 This plan was signed on that date and appeared in the Federal Register on September 8, 1992.  
5 57 Fed. Reg. 41,000. EPA has published five subsequent Effluent Guidelines Program Plans.  
6 *See* Pltf. Memo at 3 (listing relevant Federal Register citations). These plans were published  
7 every second year after 1992. The Plans typically appeared in the Federal Register in late  
8 August or early September of each even-numbered year (and once in October). The most recent  
9 Plan, the 2002-2003 Effluent Guidelines Program Plan, which sets forth a schedule for final  
10 actions to be taken between December 31, 2002, and September 4, 2004, was published on  
11 August 27, 2002. 67 Fed. Reg. 55,012.

12 EPA signed the proposed Effluent Guidelines Program Plan for 2004-2005 on December  
13 23, 2003. 68 Fed. Reg. 75,515 (Dec. 31, 2003). As explained in the Grumbles Declaration, ¶ 8,  
14 the Agency expects to sign the final Effluent Guidelines Program Plan by August 26, 2004, and  
15 will then transmit the notice to the Office of the Federal Register for publication.

### 16 **III. CURRENT LITIGATION**

17 The Foundations' complaint alleges that EPA has failed to perform three  
18 nondiscretionary duties under the CWA. First, the Foundations claim that EPA has failed to  
19 perform an annual review of effluent limitations guidelines and to revise such guidelines as  
20 appropriate. Compl. ¶¶ 40-45 (citing 33 U.S.C. § 1314(b) and (m)(1)(A)). Second, the  
21 Foundations assert that EPA has failed to review the BAT-based and BCT-based effluent  
22 limitations every five years. Compl. ¶¶ 46-48 (citing 33 U.S.C. § 1311(d)). Finally, the  
23 Foundations allege that EPA has failed to publish the Effluent Guidelines Program Plan. 33  
24 U.S.C. § 1314(m). Compl. ¶¶ 49-52.

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25  
26 <sup>7</sup> Paragraph 6 of the Consent Decree addressed the procedure to be followed if EPA were  
27 to decide not to proceed with an effluent guideline for a particular category.

1 The Foundations’ motion for summary judgment is limited to the Third Claim for Relief:  
2 publication of the Effluent Guidelines Program Plan. EPA has also limited its cross-motion to  
3 this same claim.

#### 4 STANDARD OF REVIEW

5 Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment  
6 “shall be rendered forthwith if the pleadings, . . . together with the affidavits, if any, show that  
7 there is no genuine issue as to any material fact and that the moving party is entitled to a  
8 judgment as a matter of law.” *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 n.4 (1986) (citing  
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

#### 10 ARGUMENT

##### 11 **I. THE FOUNDATIONS’ CLAIM THAT EPA HAD A MANDATORY DUTY TO** 12 **PUBLISH THE 2004-2005 PLAN BY DECEMBER 31, 2003, IS CONTRARY TO** 13 **THE STATUTORY LANGUAGE**

14 The Foundations’ claim is based on section 505(a)(2), which authorizes only claims  
15 alleging that EPA has failed to perform a duty that is made nondiscretionary by the CWA. 33  
16 U.S.C. § 1365(a)(2). *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 881 (9th Cir. 2002).  
17 Thus, in order to proceed under the citizen suit provision, the Foundations must establish: (1) the  
18 duty alleged is mandatory; and (2) EPA has breached that duty. As explained below, under  
19 section 304(m), the earliest date by which EPA could be required to act is August 27, 2004, the  
20 second anniversary of publication of the prior plan. Accordingly, as a matter of law, EPA, not  
21 the Foundations, is entitled to summary judgment.

##### 22 **A. EPA Has Not Missed the Deadline for Publishing Its Biennial Plan**

23 Section 304(m)(1) requires that the Effluent Guidelines Program Plan be published  
24 “biennially,” which means “happening every two years.” Random House Dictionary of the  
25 English Language (2d ed. 1987). The term on its face does not require that the event happen on  
26 the same exact date every other year. The statute, however, cannot be construed as requiring  
27 EPA to act less than twenty-four months after publication of the most recent Plan, which  
28

1 occurred on August 27, 2002, consistent with the Consent Decree deadlines.<sup>87</sup> Therefore, the  
2 earliest mandatory deadline that could be justified under the plain language of section 304(m)  
3 would be August 27, 2004.

4 Section 304(m)(1) provides that the first Effluent Guidelines Program Plan was to be  
5 published “[w]ithin 12 months after February 4, 1987, and biennially thereafter.” After EPA  
6 failed to meet the initial deadline, the Consent Decree required that the 1992 Effluent Guidelines  
7 Program Plan be completed by August 28, 1992. Once the 1992 Plan was published, that  
8 publication date became the starting point for establishing the biennial cycle under the statute  
9 and the Consent Decree.

10 A similar situation was addressed in *Nichols v. Whitman*, Civ. No. 02-1495 (D.D.C. Apr.  
11 4, 2004). Exh. 3. *Nichols* addressed a claim that EPA had failed to comply with its mandatory  
12 duty under section 121(c) of the Comprehensive Environmental Response, Compensation, and  
13 Liability Act (“CERCLA”), to review certain Superfund sites “no less often than each five years  
14 after the initiation of the remedial action.” 42 U.S.C. § 9621(c). Plaintiff alleged that EPA  
15 should have performed such reviews in 1991 and 1996. The court dismissed the claim as moot  
16 after finding that the Agency had completed a review in 2001, shortly before the complaint was  
17 filed. The court explained that once the Agency completed that review, even if it was late, the  
18 Agency could not be required to take any further action until 2006. Thus, the court focused on  
19 maintaining the interval between reviews, rather than reinstating the original starting point for  
20 calculating the deadlines for the reviews, the date the remedial action began. Slip op. at 4-5.

21 In the instant case as well, the most important element of the statutory requirement is the  
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23  
24

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25 <sup>87</sup> The question of whether the 2002 publication was timely is not before the Court.  
26 *American Littoral Soc’y v. EPA*, 199 F. Supp. 2d 217, 228 (D.N.J. 2002) (the district court’s  
27 only power is to require EPA to conform its present conduct to the law. Any past  
28 noncompliance is irrelevant to the question of an agency's present compliance).

1 interval between plans, rather than the particular date used to start the two-year period.<sup>9/</sup> Because  
2 the prior plan was published less than two years ago, EPA is not in breach of its obligations  
3 under the statute.<sup>10/</sup>

4 **B. The Statutory Language Does Not Support the Foundations' Claim That**  
5 **EPA Was Required to Publish the 2004-2005 Plan by December 31, 2003**

6 The date of December 31 does not appear at all in section 304. The Foundations do not  
7 rely on explicit statutory language to support their claim that EPA was required to act on the  
8 2004-05 plan by December 31, 2003, but instead allege that Congress "implicitly created" a  
9 deadline requiring EPA to act by that date. The Foundations do not cite any case law to support  
10 their claim that a mandatory deadline can be identified by implication.<sup>11/</sup> Essentially, their  
11 arguments boil down to the claim that EPA's actions under 304(m) and 304(b) would be  
12 coordinated more effectively if EPA published the Effluent Guidelines Program Plan by the end  
13 of the year preceding the first calendar year included in the Plan.<sup>12/</sup> "The question, however, is

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14  
15 <sup>9/</sup> The two-year interval makes particular sense in view of the fact that the 304(m) plan  
16 must "establish a schedule for the annual review and revision" of effluent guidelines in  
17 accordance with section 304(b). 33 U.S.C. § 1314(m)(1)(A). Adjusting the deadline to  
December 31, as proposed by the Foundation, would inappropriately shorten the schedule for the  
upcoming annual review.

18 <sup>10/</sup> Even if EPA were to publish the 2004-05 Effluent Guidelines Program Plan later than  
19 August 28, 2004, the Foundations' May 2004 complaint would still be defective under section  
20 505(a)(2), because no complaint may be filed under that section prior to sixty days after a  
21 plaintiff has given notice of such action to the Administrator. 33 U.S.C. § 1365(a)(2). In order  
to bring a claim that EPA had failed to take an action in August, 2004, the Foundations would  
have to provide the requisite sixty days notice before seeking judicial intervention.

22 <sup>11/</sup> Moreover, their argument is inherently contrary to the cases which have rejected claims  
23 that a deadline is mandatory unless the statute states a date-certain or such a deadline is readily-  
24 ascertainable by reference to some fixed date or event. *See Sierra Club v. Thomas*, 828 F.2d  
25 783, 790-91, & n.58 (D.C. Cir. 1987); *Defenders of Wildlife v. Browner*, 888 F. Supp. 1005,  
1008 (D. Ariz.1995).

26 <sup>12/</sup> In the proposal for the 2004-2005 Effluent Guidelines Program Plan, EPA proposed that  
27 the section 304(b) annual review and section 304(m) biennial planning obligations can be most

(continued...)

1 not what a court thinks is generally appropriate to the regulatory process, it is what Congress  
2 intended for these regulations.” *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. at 138.

3 The Foundations’ argument simply does not match the actual language of the statute. As  
4 explained above, there are two elements in section 304(m)(1) that are relevant to a deadline: (1)  
5 the designation of February 4, 1988, as the deadline for the first plan; and (2) the requirement  
6 that the plans be published “biennially.” To be consistent with the Foundations’ claim, the  
7 statute would have to be construed as requiring publication of the first plan by February 4, 1988;  
8 the second plan by December 31, 1989; and subsequent plans biennially thereafter. To reach the  
9 result the Foundations desire, the Court would have to rewrite, rather than interpret, the plain  
10 language of section 304(m).

11 Moreover, the Foundations’ argument by implication assumes that both section 304(m)  
12 and section 304(b)<sup>13/</sup> require EPA to act based on a calendar year basis. Pltf. Memo at 4. Neither  
13 part of section 304, however, refers to December 31 or the calendar year. Again, the  
14 Foundations are seeking to change the statute, rather than to apply it as written.

15 In sum, the Foundations have failed to show that EPA was required to act on the up-  
16 coming Effluent Guidelines Program Plan by December 5, 2003. Thus, their Third Claim for  
17 Relief fails as a matter of law.

18 **II. EVEN IF THE THIRD CLAIM FOR RELIEF WAS SUPPORTED BY THE**  
19 **STATUTE, INJUNCTIVE RELIEF IS NOT APPROPRIATE**

20 The Foundations have failed to demonstrate that they are entitled to the injunctive relief  
21 they request. Therefore, even if the Court were to accept the Foundations’ claim that EPA was  
22 required to publish the 2004-2005 Effluent Guidelines Program Plan no later than December 31,

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23 <sup>12/</sup>(...continued)

24 effectively coordinated by publishing the results of the annual review as part of the proposed or  
25 final biennial plan. The Agency requested public comment on this aspect of the proposal. 68  
Fed. Reg. at 75,519.

26 <sup>13/</sup> Section 304(b) states that EPA must promulgate effluent limitation guidelines by  
27 October 18, 1973, and “at least annually thereafter, revise, if appropriate, such regulations.”

1 2003, the Foundations' request for injunctive relief should be denied.

2 **A. An Injunction Requiring EPA to Publish the Next Plan by September 10,**  
3 **2004, Is Unnecessary**

4 The proposed order submitted by the Foundations requires EPA to publish the 2004-2005  
5 Effluent Guidelines Program Plan in the Federal Register no later than September 10, 2004,  
6 which is less than a month after the hearing date on the instant motion.<sup>14</sup> EPA has stated that it  
7 expects to sign this Plan by August 26, 2004. Grumbles Decl. ¶ 8. Under these circumstances,  
8 the complex questions that the Foundations raise regarding the issuance of injunctions in  
9 mandatory duty cases need not be addressed. The Foundations have simply failed to show that  
10 the relief they request will have any practical effect.

11 The function of an injunction in a citizen suit is to compel compliance with the statutory  
12 requirements. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002)  
13 (“[A] review of Supreme Court precedent reveals that, when federal statutes are violated, the test  
14 for determining if equitable relief is appropriate is whether an injunction is necessary to  
15 effectuate the congressional purpose behind the statute.”). The injunction requested by the  
16 Foundations is not necessary to ensure that EPA acts promptly on the 2004-2005 Plan.  
17 Moreover, the Foundations fail to show any threat of injury if the Court withholds injunctive  
18 relief requiring the Agency to take action where the Agency has already stated its intent to do  
19 so.

20 **B. There is No Basis for an Injunction Applicable to EPA's Actions with**  
21 **Respect to Future Plans**

22 The Foundations request an injunction requiring EPA to act on all future plans by  
23 December 31 of the year before the first of the two years to be covered by the plan. Even

---

24 <sup>14</sup> The proposed order illustrates the Foundations' tendency to expand, rather than to apply,  
25 section 304(m). Although the statute says only that EPA must publish these plans in the Federal  
26 Register, the proposed order requires that the plans also be posted on EPA's internet site. It is  
27 well-established, however, that the federal courts cannot establish procedural requirements, but  
28 can only enforce the requirements established by Congress. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).



1 assuming that the Foundations could establish that EPA was required to act by that date, the  
2 Foundations do not provide any support for the claim that the Court can issue an injunction that  
3 would apply to Effluent Guidelines Program Plans to be published after 2004. Section 505(a)(2)  
4 authorizes an injunction requiring EPA to perform a nondiscretionary that EPA has failed to  
5 perform. 33 U.S.C. § 1365(a)(2).<sup>15/</sup> The statute does not authorize a mandatory injunction  
6 applicable to the Agency’s performance of duties not yet required. Because the Foundations  
7 have failed to cite a waiver of sovereign immunity that would permit the relief they request, this  
8 portion of their request for relief must be denied.<sup>16/</sup> See *United States v. Mitchell*, 445 U.S. 535,  
9 538 (1980).

10 Moreover, even if such an injunction were authorized by the statute, the facts of this case  
11 make such relief inappropriate here. The Ninth Circuit has recognized that “[i]njunctive relief  
12 may be inappropriate where it requires constant supervision.” *Natural Resources Defense*  
13 *Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (petition for review of EPA  
14 regulations extending deadlines for certain NPDES permits pursuant to CWA section 509(b)).  
15 The Foundations’ requested injunction would require this Court to supervise EPA’s publication  
16 of the Effluent Guidelines Program Plans for an indefinite time period. This represents both an  
17 undue burden on the Court and an excessive intrusion into the Agency’s internal operations.  
18 EPA has issued the Plans biennially since 1992. There is no reason to think that the Agency  
19 would fail to continue to perform this obligation. See *NRDC*, 966 F.2d at 1300 (recognizing  
20 presumption that EPA will act in accord with statute as construed by court).

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21  
22 <sup>15/</sup> The *NRDC* Consent Decree provided broader relief than allowed by the citizen suit. It is  
23 well-established that a federal court can enter a consent decree that provides broader relief than  
24 the district court could have provided in a contested decision. See e.g. *Local No. 93, Int’l Ass’n*  
*of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

25 <sup>16/</sup> The Foundations suggest that their request is supported by *Biodiversity Legal Foundation*  
26 *v. Badgley*, 309 F.3d 1166 (9th Cir. 2002), but their reliance is misplaced. The relief at issue in  
27 that case was an order requiring defendant to act on specific pending determinations identified in  
the complaint and a declaratory judgment deciding the proper interpretation of the statute at  
issue. *Id.* at 1173 n.7.

1 **CONCLUSION**

2 For these reasons, the Court should deny the Foundations' motion for summary judgment  
3 on the Third Claim for Relief and instead grant the cross-motion for summary judgment filed by  
4 EPA.

5 Respectfully submitted,

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# EPA EXHIBIT 1

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

---

OUR CHILDREN'S EARTH FOUNDATION, and )  
ECOLOGICAL RIGHTS FOUNDATION )

Plaintiffs, )

-v.- )

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

Defendants. )

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Case No. C 04-2132 PJH

DECLARATION OF BENJAMIN H. GRUMBLES  
IN RESPONSE TO PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR  
PARTIAL SUMMARY JUDGMENT, DECLARATORY RELIEF AND INJUNCTION

I, Benjamin H. Grumbles, hereby declare the following:

1. I am Benjamin H. Grumbles, Acting Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency (EPA). I have been the Acting Assistant Administrator for Water since December 2003. I have been briefed by my staff regarding EPA's efforts to issue a final effluent guidelines plan for 2004/2005, as required by section 304(m) of the Clean Water Act.

2. The Office of Science and Technology (OST) within the Office of Water reports to me and is assigned to work on the 304(m) effluent guidelines planning process. OST

generally is responsible for developing scientific standards, criteria, advisories, guidelines, limitations and analytical methods under the Clean Water Act and the Safe Drinking Water Act. The office within OST that is directly responsible for completing work on the 2004/2005 effluent guidelines plan is the Engineering and Analysis Division (EAD). Among other things, EAD develops effluent limitations guidelines, new source performance standards, pretreatment standards, regulations for cooling water intake structures, and analytical methods, and is responsible for numerous Clean Water Act rules and regulations.

3. Until recently, EPA's rulemaking agenda in the effluent guidelines program has been largely set by three consecutive consent decrees, beginning in 1976. The most recent consent decree was entered into with the Natural Resources Defense Council (NRDC) and Public Citizen, Inc., in 1992. This consent decree dictated both the content and timing of the biennial effluent guidelines program plan required under section 304(m) of the Clean Water Act. Under the consent decree, EPA's 304(m) plan was due on August 28<sup>th</sup> of every even year. See NRDC Consent Decree at ¶ 7(a). EPA has met its final obligation under this consent decree and is in the process of terminating the decree.

4. I am aware that the NRDC consent decree does not govern the content or timing of the 2004/2005 effluent guidelines plan. NRDC Consent Decree at ¶ 7(b). Accordingly, EPA has been conducting an intensive effluent guidelines planning endeavor for the first time independently of a consent decree. In doing so, EPA recognized that it would need to develop complex new analytical tools and implement time-consuming methodologies to collect and verify data on pollutant discharges from more than 55 industrial categories. EPA decided to develop and distribute a "Draft Strategy" in order to solicit public input on its proposed effluent

guidelines planning process. Developing and implementing the "Draft Strategy" was more complicated and time-consuming than expected, particularly in light of the numerous comments received. In addition, during the same time period, EAD was engaged in other rulemakings subject to consent decree deadlines, including rulemakings relating to Clean Water Act section 316(b) Phase II cooling water intake structures, Meat Products, Construction & Development, and Aquatic Animal Production.

5. I am aware that the plaintiffs, Our Children's Earth Foundation and the Ecological Rights Foundation, have asked this Court to order that EPA complete its 2004/2005 effluent guidelines plan by September 10, 2004.

6. EPA is nearing completion of the 2004/2005 effluent guidelines plan required under the Clean Water Act section 304(m). EPA expects to issue this plan on or before August 26, 2004. EPA has methodically taken the necessary steps towards completing the 2004/2005 effluent guidelines plan, including the following:

a. In November 2002, EPA published a "Draft Strategy" in the Federal Register describing, and seeking public comment on, a process that EPA was considering using to identify industries for which effluent guidelines would be revised or developed. 67 Fed. Reg. 71165 (Nov. 29, 2002). During the comment period, EPA held a public meeting and met with numerous stakeholders, including the Association of State and Interstate Water Pollution Control Administrators, the Natural Resources Defense Council, and potentially affected businesses and trade associations. EPA solicited their comments on how the Agency should conduct its planning for the effluent guidelines program. After the comment period on the "Draft Strategy"

closed on February 27, 2003, EPA carefully considered the public comments in determining how to conduct our annual review of effluent guidelines.

b. Based on the "Draft Strategy" and public comments, EPA conducted its 2003 annual review of effluent guidelines. EPA engaged in extensive outreach and data-gathering in conducting its annual review. EPA first focused its efforts on identifying industry categories with the greatest potential effects on human health and the environment and, potentially, the greatest opportunity to achieve pollutant reductions using effluent guidelines. EPA examined all possible sources of data on industrial pollutant discharges and determined that only two databases contained sufficient data to systematically review and compare industries on a national basis with relatively complete and comparable data (the Toxic Release Inventory and the Permit Compliance System database, which contains facility identification and discharge monitoring data reported by facilities regulated by National Pollutant Discharge Elimination System permits). My staff acquired and analyzed the most recent data from these databases in order to complete a screening-level examination of all industries regulated by effluent guidelines and those industries not regulated by effluent guidelines. My staff also developed and implemented a new, computer-assisted methodology to analyze the extent to which particular industry categories discharge pollutants of concern to waterbodies listed by States or EPA as impaired due to discharges of those pollutants. EPA then identified industry categories for additional collection and verification of data regarding pollutant discharges and discharge trends and also for a qualitative assessment of treatment technologies in place, the cost and availability of better performing technologies, and macroeconomic industry trends. To assist in this assessment, EPA

co-sponsored, with Vanderbilt University, a conference in February 2003 on industrial wastewater and best available treatment technologies.

c. EPA published a notice in the Federal Register on December 31, 2003, see 68 Fed. Reg. 75515 (Dec. 31, 2003), that provided the results of its 2003 annual review, proposed its preliminary 304(m) effluent guidelines plan for 2004/2005, and solicited public comment on the process for conducting its annual review and for developing the preliminary plan. Prior to that date, my staff had developed the supporting materials and assembled a docket of more than 600 relevant documents for public inspection and comment. EPA conducted a public meeting in January 2004 to discuss the preliminary effluent guidelines plan for 2004/2005.

d. The public comment period on the preliminary 304(m) plan was scheduled to close on February 17, 2004. EPA received numerous requests to extend the public comment period further. By notice published on February 12, 2004, see 69 Fed. Reg. 6984-6985 (Feb. 12, 2004), EPA extended the comment period for 30 days to March 18, 2004.

e. Since the close of the public comment period, EPA has reviewed the comments and accompanying materials and is drafting responses to comments. EPA received a total of 61 comments, both in support of and in opposition to, EPA's preliminary plan. In order to address these comments, EPA conducted additional data gathering and analysis. For example, NRDC's comments identified 13 additional industries for effluent guidelines development. EPA conducted both scientific and legal analyses to determine whether these industrial activities should be identified as candidates for effluent guidelines rulemaking in the 304(m) plan. Similarly, in response to petroleum industry comments that EPA's data overestimated discharges of the most toxic compounds, EPA engaged in an extensive plant-by-plant verification of data in



order to ensure that the Agency had the best information available to support its review. EPA made similar efforts to gather additional data and verify pollutant discharges from key facilities in the organic chemicals, synthetic fibers and plastics industries and, in this case, exercised its information gathering authority pursuant to section 308 of the Clean Water Act to request that certain companies provide detailed data on their discharges of dioxin and their technologies and other approaches for reducing these discharges. During this time, EPA also met with numerous stakeholders, including those industries potentially targeted for further regulation and NRDC.

f. EPA has drafted a Federal Register notice presenting the final 304(m) plan for 2004/2005, and has circulated this draft notice for internal agency review. EPA has also drafted significant portions of the supporting materials.

7. In order to complete our work and issue a final 304(m) plan for 2004/2005, EPA will need to take the following steps:

a. EPA will need to consider and, as appropriate, incorporate final comments on the draft plan from agency reviewers in several offices within EPA.

b. To complete the supporting documentation, EPA will need to conduct additional legal and scientific analyses and draft the remaining portions of the supporting documentation.

c. Throughout this period, OST will continue to draft responses to public comments.

d. While OST is drafting responses to the comments, EPA will also need to coordinate with any interested federal agencies.

8. For all of the reasons described above, it is my judgment and the judgment of my staff that EPA will be able to complete the final effluent guidelines plan for 2004/2005, including supporting documentation, by August 26, 2004. We believe this estimate represents an ambitious but reasonable schedule for EPA to complete each of the steps described in paragraph 7, in order to produce a sound and well-reasoned final effluent guidelines plan that fully considers all available information, including public input.

9. EPA will promptly transmit the signed plan to the Office of Federal Register for publication.

I declare in accordance with 28 U.S.C. § 1746, under penalty of perjury, that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the United States Environmental Protection Agency under my supervision.

Executed in Washington, D.C. on July 20, 2004.



Benjamin H. Grumbles  
Acting Assistant Administrator for Water  
U.S. Environmental Protection Agency

# EPA EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 31 1992

Clerk, U.S. District Court  
District of Columbia

NATURAL RESOURCES DEFENSE COUNCIL,  
INC.; PUBLIC CITIZEN, INC.,

Plaintiffs,

v.

WILLIAM K. REILLY, ADMINISTRATOR,  
U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant,

and

AMERICAN PAPER INSTITUTE; NATIONAL  
FOREST PRODUCTS ASSOCIATION; et al.,

Intervenor-Defendants,

Civ. No. 89-2980  
(RCL)  
(Lamberth, J.)

CONSENT DECREE

WHEREAS, plaintiffs Natural Resources Defense Council, Inc., and Public Citizen, Inc. (collectively, "plaintiffs"), filed this action on October 30, 1989, against defendant William K. Reilly, Administrator, U.S. Environmental Protection Agency ("EPA" or "Agency");

WHEREAS, this action involves plaintiffs' allegations concerning (a) EPA's obligations under section 304(m) of the Clean Water Act, as amended, 33 U.S.C. § 1314(m) (the "First Claim for Relief"), and (b) EPA's obligations under section

3018(b) of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6939(b) (the "Second Claim for Relief");

WHEREAS, plaintiffs and EPA agree that this Court has jurisdiction over the First Claim for Relief;

WHEREAS, by Order filed April 23, 1991, this Court granted plaintiffs' motion for partial summary judgment as to the First Claim for Relief, and declared that EPA is in violation its statutory responsibilities under 33 U.S.C. § 1314(m);

WHEREAS, the parties enter into this Consent Decree in settlement of the First Claim for Relief;

WHEREAS, by Order filed April 23, 1991, this Court held that plaintiffs had filed the Second Claim for Relief in a court that lacked subject matter jurisdiction to hear the claim, and accordingly dismissed the Second Claim for Relief;

WHEREAS, plaintiffs have agreed not to appeal this Court's dismissal of the Second Claim for Relief, if this Consent Decree is entered by the Court;

WHEREAS, as of the date hereof, plaintiffs have agreed to seek the dismissal of their petitions for review in NRDC v. Reilly, No. 90-1228 (D.C. Cir.), and NRDC v. Reilly, No. 90-1497 (D.C. Cir.), if this Consent Decree is entered by the Court;

WHEREAS, EPA wishes to take advantage of the best opportunities for reducing risks to human health and the environment across all environmental media;

WHEREAS, the parties agree that recommendations from a special task force may be helpful to EPA in developing and revising effluent guidelines on a more expedited basis;

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the remaining issues in this action without protracted litigation;

WHEREAS, plaintiffs and EPA have agreed to a settlement of this action, without any admission or adjudication of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action;

WHEREAS, the Court finds and determines that the settlement represents a just, fair, adequate and equitable resolution of the claims raised in this action; and

WHEREAS, by entering into this Consent Decree, plaintiffs and EPA do not waive any claim or defense, on any grounds, related to any final agency action taken pursuant to this Decree.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

Definition of Terms

1. As used in this Consent Decree, the following terms shall have the following meanings:

(a) "Administrator" shall mean the Administrator of EPA (or the Administrator's authorized representative).

(b) "Effluent guidelines" shall mean, as appropriate for the point source category at issue: (i) for existing direct dischargers, the guidelines described in section 304(b) of the Clean Water Act, 33 U.S.C. § 1314(b), (ii) for new direct dischargers, the standards described in section 306 of the Clean Water Act, 33 U.S.C. § 1316, and (iii) for new and existing indirect dischargers, the pretreatment standards described in section 307 of the Clean Water Act, 33 U.S.C. § 1317.

(c) "Propose" shall mean signature by the Administrator of a proposed effluent guideline. EPA shall promptly submit each effluent guideline proposed under this Decree to the Federal Register and make a copy available to plaintiffs.

(d) "Take final action" shall mean a final decision by the Administrator on the issuance of an effluent guideline. As required by the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, EPA will fully consider and respond to public comments before making a final decision on the scope and substance of any final effluent guideline.

(e) "Section 304(m)" shall mean section 304(m) of the Clean Water Act, as amended, 33 U.S.C. § 1314(m); and

(f) "304(m) Plan" shall mean the biennial plan described in Section 304(m).

Effluent Guidelines Currently Under Development

2. (a) EPA shall propose and take final action with respect to effluent guidelines for the following point source categories according to the following schedules:

<u>Point Source Category</u>	<u>Proposal</u>	<u>Final Action</u>
1. Pesticide Manufacturing	March, 1992	July, 1993
2. Pesticide Formulating and Packaging	January, 1994	August, 1995
3. Centralized Waste Treatment-Phase I	April, 1994	January, 1996
4. Machinery Manufacturing and Rebuilding - Phase I	November, 1994	May, 1996
5. Pharmaceutical Manufacturing	August, 1994	February, 1996
6. Organic Chemicals, Plastics & Synthetic Fibers - Response to Remand in <u>CMA v. EPA</u> , 870 F.2d 177, rehearing granted in part, 885 F.2d 253 (5th Cir. 1989)	(published December, 1991)	May, 1993
7. Coastal Oil and Gas	January, 1995	July, 1996

(b) Revision of effluent guidelines for the Pulp, Paper and Paperboard point source category is the subject of litigation in EDF v. Thomas, Civ. No. 85-0973 (D.D.C.). Revision of effluent guidelines for the Offshore Oil and Gas point source category is the subject of litigation in NRDC v. EPA, Civ. No. 79-3442 (D.D.C.). The schedules for proposal and final action for those guidelines are the subject of those proceedings, and are not the subject of this Decree.



Studies

3. (a) EPA shall conduct studies according to the following schedules, which shall be reflected in the next 304(m) Plan:

<u>Point Source Category</u>	<u>Start</u>	<u>Complete</u>
1. Petroleum Refining	1992	1993
2. Metal Finishing	1992	1993
3. Iron and Steel	1993	1994
4. Inorganic Chemicals	1993	1994
5. Leather Tanning	1994	1995
6. Coal Mining	1994	1995
7. Onshore/Stripper Oil & Gas	1995	1996
8. Textiles	1995	1996
9. Study Category #9	1996	1997
10. Study Category #10	1996	1997
11. Study Category #11	1996	1997

(b) Notwithstanding the provisions of Paragraph 3(a), EPA may replace any or all of the eight (8) point source categories specifically identified in Paragraph 3(a) with other point source categories, provided EPA notifies plaintiffs within thirty (30) days following a decision to make such a replacement. EPA shall determine which point source categories shall be the subject of study categories Nos. 9 - 11 referenced in Paragraph 3(a).

Additional Effluent Guidelines

4. (a) EPA shall comply with the following schedules, which shall be reflected in the next 304(m) Plan:

<u>Point Source Category</u>	<u>Start</u>	<u>Proposal</u>	<u>Final Action</u>
Centralized Waste Treatment - Phase II (landfills and incinerators)	1993	1995	1997
Industrial Laundries	1993	1996	1998
Transportation Equipment Cleaning	1993	1996	1998
Machinery Manufacturing and Rebuilding- Phase II	1995	1997	1999

(b) Notwithstanding the provisions of Paragraph 4(a), EPA may replace any or all of the four (4) point source categories identified in Paragraph 4(a) with other point source categories, provided EPA notifies plaintiffs within thirty (30) days following a decision to make such a replacement.

5. (a) In addition, EPA shall comply with the following schedules, which shall be published in the next 304(m) Plan:

<u>Point Source Category</u>	<u>Start Action</u>	<u>Proposal</u>	<u>Final Action</u>
New or Revised Rule #5	1996	1998	2000
New or Revised Rule #6	1996	1998	2000
New or Revised Rule #7	1997	1999	2001
New or Revised Rule #8	1997	1999	2001
New or Revised Rule #9	1998	2000	2002

<u>Point Source Category</u>	<u>Start Action</u>	<u>Proposal</u>	<u>Final Action</u>
New or Revised Rule #10	1998	2000	2002
New or Revised Rule #11	1999	2001	2003
New or Revised Rule #12	1999	2001	2003

(b) EPA will determine which point source categories will be the subject of effluent guidelines described in Paragraph 5(a). These point source categories will be selected on the basis of the studies already completed or in progress as of the date of this Decree, the additional studies described in Paragraph 3, and such other information as may be available.

6.(a) The parties disagree with respect to what discretion, if any, EPA has under applicable law to decide not to proceed with an effluent guideline. Accordingly, the Court has determined that the following provisions shall govern in the event that EPA decides not to proceed with an effluent guideline for a particular point source category. For such purposes, "decide not to proceed with an effluent guideline" shall mean to make a final, affirmative decision prior to proposal that an effluent guideline is not appropriate for the point source category under consideration, and shall not include making a decision to defer development of such guideline.

(1) Notwithstanding the provisions of Paragraphs 4 and 5, EPA reserves the discretion to decide not to proceed with any one or more effluent guidelines where the Administrator determines,

pursuant to any discretion the Administrator has under the Clean Water Act, 33 U.S.C. §§ 1251-1387, or any other legal authority, that an effluent guideline is not appropriate for the point source category under consideration. In EPA's view, such discretion includes the discretion not to proceed with an effluent guideline where the Administrator determines (taking into account the range of environmental issues confronting the Agency) that promulgating the guideline would not have the potential to significantly reduce risk to human health or the environment, or that another approach would accomplish a comparable reduction in risk. In EPA's view, such discretion also includes the discretion not to proceed with an effluent guideline on the basis of cost considerations.

(2) Plaintiffs do not necessarily agree that EPA has the discretion, under the Clean Water Act or any other legal authority, to decide not to proceed with an effluent guideline as described in Paragraph 6(a)(1), and thus reserve the right to contest any determination made pursuant to such paragraph.

(3) In the event EPA decides not to proceed with an effluent guideline with respect to any point source category described in Paragraphs 4(a) or 5(a), EPA shall notify plaintiffs within thirty (30) days of the date such discretion is exercised. Plaintiffs shall have sixty (60) days from receipt of such notice to provide EPA with a written statement of plaintiffs' intent to challenge such decision, and one hundred eighty (180) days from

receipt of such notice to file any and all motions contesting such decision with the Court.

(4) In the event EPA decides not to proceed with an effluent guideline with respect to any point source category described in Paragraphs 4(a) or 5(a), and either (i) plaintiffs do not challenge such decision pursuant to the procedures and within the time frames described in Paragraph 6(a)(3) above, or (ii) the Court holds that, in making such decision, EPA properly exercised its discretion under applicable law, then such decision shall satisfy any and all obligations of EPA under this Decree with respect to such point source category.

(b) Any decision by the Administrator not to proceed with an effluent guideline pursuant to Paragraph 6(a)(1) above shall be included in the first 304(m) Plan proposed following such determination.

(c) (1) Notwithstanding the provisions of Paragraph 6(a), EPA will take final action with respect to twelve (12) effluent guidelines (in addition to those listed in Paragraph 2) before December 31, 2003 unless, after analysis of the eleven (11) studies undertaken pursuant to Paragraph 3 and the seven (7) studies already completed, the Administrator determines, pursuant to any discretion the Administrator has under the Clean Water Act, 33 U.S.C. §§ 1251 - 1387, or any other legal authority, that fewer than twelve (12) of the eighteen (18) total point source categories studied merit proposal of effluent guidelines pursuant to the standards set forth in Paragraph 6(a)(1). In such case,

EPA will undertake studies of additional categories of point sources to determine whether the promulgation of additional effluent guidelines is appropriate. EPA will state its intention to conduct any such additional studies in 304(m) Plans.

(2) EPA will notify plaintiffs within thirty (30) days after any decision pursuant to Paragraph 6(c)(1) not to take final action with respect to twelve (12) effluent guidelines (in addition to those effluent guidelines listed in Paragraph 2) before December 31, 2003. Plaintiffs may challenge such decision by following the procedures set forth in Paragraph 6(a)(3) above. In the event the Court holds that EPA lacks the authority to make such a decision, the Court will establish a new schedule for taking final action on the remaining effluent guidelines.

#### 304(m) Plans

7. (a) EPA will propose the next 304(m) Plan no later than ninety (90) days after entry of this Consent Decree by the Court. EPA will publish final notice of the next 304(m) Plan no later than two hundred ten (210) days after entry of this Consent Decree by the Court. EPA will publish final notices of subsequent 304(m) Plans every second year after final notice of the next 304(m) Plan; proposed notices will be published within the year preceding publication of the corresponding final notice.

(b) 304(m) Plans issued subsequent to this Decree that are consistent with its terms shall satisfy EPA's obligations under Section 304(m) with respect to the publication of such plans.

The foregoing sentence shall (i) not apply with respect to any obligations that may arise after December 31, 2003, and (ii) not be construed to affect plaintiffs' right to seek modification of this Decree for good cause pursuant to Paragraph 9(a).

#### Special Task Force

8. No later than six (6) months from the entry of this Decree by this Court, EPA shall establish a special task force to assist the Agency in discharging its responsibility to implement the Clean Water Act. This task force shall be established, if possible, under the auspices of an existing advisory group established under the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1-15. EPA shall seek representatives to serve on the task force from EPA Regions, State and local government (including publicly owned treatment works), industry, citizen groups, and the scientific community. EPA shall specifically request that the task force (i) provide recommendations with respect to a process for expediting the promulgation of effluent guidelines by a date no later than twelve (12) months from the date the task force is formally established, and (ii) in doing so, consider, among other pertinent matters, EPA's experience in issuing regulations under the Clean Air Act and any other regulations subject to expedited promulgation procedures. EPA will request that the task force provide supplemental recommendations regarding a process for expediting the promulgation of effluent guidelines at least annually during the

period the task force remains in existence. In addition, EPA shall request recommendations from the task force with respect to:

(a) a process for deciding which additional point source categories to regulate by means of effluent guidelines, based on potential for risk reduction, the utility of regulation and the schedule for promulgation of such rules;

(b) a process and schedule for reviewing and determining whether to revise additional existing effluent guidelines;

(c) new technologies and control methods, including methods to achieve zero discharge;

(d) the minimum components of new and revised effluent guidelines to ensure that they are adequate in scope and coverage;

(e) minimum requirements for surveys under section 308 of the Clean Water Act, 33 U.S.C. § 1318; and

(f) a process for promoting effective co-regulation of point source categories to eliminate or minimize cross-media transfer of pollution.

#### Modification of this Decree

9. (a) The provisions of this Decree shall be modified for good cause shown.

(b) The provisions relating to dates established by this Decree shall be modified according to the procedures set forth in Paragraph 10. All other provisions of this Decree may be \*



modified by written consent of plaintiffs and EPA, or by the Court upon request of either party.

(c) In EPA's view, the schedules for effluent guidelines and studies incorporated into this Decree assume the following: (i) that Congress will appropriate funds for the effluent guideline program at the levels requested by the Administration, (ii) that sufficient qualified personnel will be available to staff the effluent guidelines program, (iii) that no rule subject to the schedules set forth in this Decree will require either (A) more than one Notice of Proposed Rulemaking, or (B) a Notice of Data Availability subsequent to publication of a Notice of Proposed Rulemaking. In EPA's view, the failure of any one of these assumptions to be true with respect to an effluent guideline or study which is the subject of this Decree would constitute "good cause" for modification of the schedule with respect to such effluent guideline or study. Plaintiffs do not necessarily agree that the above factors constitute good cause to modify the Decree.

10. Modification of the dates set forth in this Decree shall be by written consent of plaintiffs and EPA, or in accordance with the procedures specified below.

(a) If a party files a motion requesting modification of a date or dates established by this Decree and provides notice to the other party at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of

such motion shall, upon request, stay the date for which modification is sought. Such stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, (ii) the date sought in the modification, or (iii) the date which is one hundred eighty (180) days after the date such motion is filed. Only one such automatic stay shall be permitted for each deadline for which modification is sought.

(b) If a party files a motion requesting modification of a date or dates established by this Decree totalling thirty (30) days or less and provides notice to the other party at least thirty (30) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, stay the date for which modification is sought. Such stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this court on such motion, or (ii) the date sought in the modification. Only one such automatic stay shall be permitted for each deadline for which modification is sought.

(c) If a party seeking modification does not provide notice pursuant to subparagraphs (a) or (b) above, that party may move the Court for a stay of the date for which modification is sought. The party seeking modification under this subparagraph (c) shall give notice to the other party as soon as possible of its intent to seek a modification and/or stay of the date sought to be modified. The notice provided under this Paragraph 10(c)

and any motion for stay shall demonstrate why the party could not have utilized the notification procedures set forth in subparagraphs (a) and (b) above.

(d) If the Court denies a motion by EPA to modify a date established by this Decree, then the date for which modification had been requested shall be such date as the Court may specify.

(e) Any motion to modify the schedule established in this Decree shall be accompanied by a motion for expedited consideration. All parties to this Decree shall join in any such motion for expedited consideration.

11. Nothing in this Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party.

#### Termination of this Decree

12. The Court shall retain jurisdiction to determine and effectuate compliance with this Decree. When EPA's obligations under this Decree have been completed, this case shall be dismissed.

#### Savings provisions

13. Nothing in the terms of this Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by the Administrator

pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree.

14. Nothing in this Decree shall be construed to limit or modify EPA's discretion to alter, amend, or revise the regulations promulgated pursuant to this Decree, from time to time, or to promulgate superseding regulations.

15. Except as expressly provided herein, nothing in this Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act, 33 U.S.C. §§ 1251-1387, or by general principles of administrative law in taking the actions which are the subject of this Decree.

16. Nothing in this Decree relieves EPA of the obligation to act in a manner consistent with other applicable law, including the notice and comment and other provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706; Section 304(m)(2) of the Clean Water Act, 33 U.S.C. § 1314(m)(2), the Anti-Deficiency Act, 5 U.S.C. § 1341, and other applicable appropriations law. Provided, that if EPA believes that compliance with any applicable law may lead to noncompliance with the terms of this Decree, EPA shall utilize the above-specified procedures for modification of this Decree.

17. EPA agrees that plaintiffs are entitled to reasonable attorneys' fees and costs accrued as of the date of this Decree on at least some of their claims. The parties will attempt to reach agreement as to the appropriate amount of the recovery. If

they are unable to do so, plaintiffs will file an application with the Court for the recovery of fees and costs.

Signature of the Parties

18. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

Done this 31st day of January, 1992.

BY THE COURT:

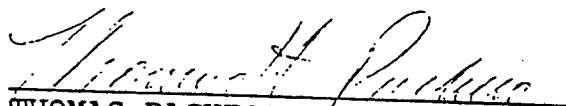
Roger C. Lombardi  
District Judge

Approved by Counsel for the Parties:

WILLIAM K. REILLY, ADMINISTRATOR,  
U.S. ENVIRONMENTAL PROTECTION AGENCY

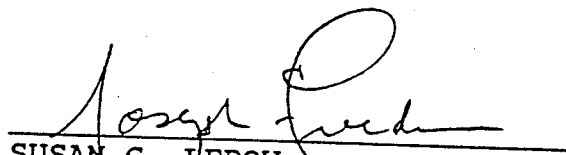
BARRY M. HARTMAN  
Acting Assistant Attorney General  
Environment & Natural Resources  
Division

Date: 1-30-92



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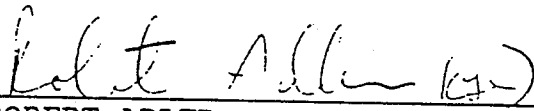
NATURAL RESOURCES DEFENSE COUNCIL, INC.  
PUBLIC CITIZEN

Date: 1/30/92



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Spielberg  
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Date: 1/30/92



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# EPA EXHIBIT 3

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

EULA NICHOLS,

Plaintiff,

v.

CHRISTINE TODD WHITMAN,  
*Administrator, United States Environmental  
Protection Agency*

Defendant.

Civil Action No.02-1495(CKK)

MEMORANDUM OPINION

(April 9, 2004)

Pending before the Court are Defendant United States Environmental Protection Agency's ("EPA") Motion to Dismiss [4], Defendant's Motion to Stay Further Proceedings [9] pending resolution of Defendant's Motion to Dismiss, and Plaintiff Eula Nichols' Motion for Leave to Conduct Discovery [10]. Each of these motions is opposed. Upon consideration of the parties' motions, their briefing, and the relevant law, the Court shall grant Defendant's Motion to Dismiss, deny as moot Plaintiff's Motion for Leave to Conduct Discovery, and deny as moot Defendant's Motion to Stay Further Proceedings.

**I. Background**

Plaintiff filed this suit on July 29, 2002, seeking a court order requiring Christine Todd Whitman, in her role as Administrator of the EPA,<sup>1</sup> to conduct a five-year review of the Midlands

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<sup>1</sup>The Court notes that Christine Todd Whitman no longer serves as the Administrator of the EPA, although neither party has filed a notice with the Court substituting the proper new party for Ms. Whitman.

Products Superfund Site (“Midlands Site” or “Site”) in Yell County, Arkansas. Pl.’s Compl. (“Compl.”) ¶ 1. The EPA implemented remedial environmental cleanup measures at the Midlands Site under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-75, and Plaintiff now contends that Defendant has a nondiscretionary statutory duty under section 121(c) of CERCLA, 42 U.S.C. § 9621(c), to conduct a five-year review of the Site. Compl. ¶ 1.

Plaintiff is a private individual who visits a local wildlife management area to “enjoy the wildlife and natural beauty,” and is concerned about the impact any Midland Site groundwater contamination could have on the area if the Midlands Site cleanup remedy does not adequately protect human health and the environment. Compl. ¶ 4. Plaintiff claims that CERCLA § 121(c) requires a five-year review of the Site, and that she is entitled to sue for such a review under CERCLA’s citizen suit provision, 42 U.S.C. § 9659.<sup>2</sup> Compl. ¶¶ 5, 8.

Defendant has filed its Motion to Dismiss on the grounds that the Court lacks jurisdiction over Plaintiff’s Complaint. Defendant contends that Plaintiff’s claim falls outside the scope of the Court’s jurisdiction under CERCLA’s citizen suit provision, and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). Mem. in Support of Def.’s Mot. to Dismiss (“Def.’s Mot. to Dismiss”) at 1. Defendant further argues that Plaintiff’s claim is moot, because a review was conducted on the Midland Site in March 2001. *Id.* at 9-11. Defendant has also filed their Motion to Stay Further Proceedings, including discovery, pending the Court’s

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<sup>2</sup>Plaintiff also cites the Administrative Procedure Act, 5 U.S.C. §§ 702-706, as a jurisdictional basis for her claim. Compl. ¶ 2. Defendant also disputes this basis for jurisdiction. See Mem. in Support of Def.’s Mot. to Dismiss (“Def.’s Mot. to Dismiss”) at 1.

resolution of the Motion to Dismiss. Def.'s Mot. to Stay Further Proceedings ("Def.'s Mot. to Stay") at 1.

Plaintiff has requested leave to conduct discovery, stating that such discovery is necessary to establish jurisdiction over Plaintiff's claims. Pl.'s Brief in Opp. to Def.'s Mot. to Stay Further Proceedings and in Support of Pl.'s Mot. to Conduct Disc. ("Pl.'s Brief") at 5-6.

## II. Discussion

"Where an action has no continuing adverse impact and there is no effective relief that a court may grant, any request for judicial review of the action is moot." *Southwestern Bell Tele. Co. v. F.C.C.*, 168 F.3d 1344, 1350 (D.C. Cir. 1999) (citing *O'Shea v Littleton*, 414 U.S. 488, 496 (1974)). See also *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982) (finding moot a claim that agency had failed to comply with the APA in promulgating a rule when agency complied with APA in promulgating a subsequent rule). Defendant argues that a five-year review was conducted at the Midland Site in March 2001, and that this renders Plaintiff's request for a five-year review moot. The Court agrees.

The March 2001, review is documented by a memorandum from the EPA Region Six in which the EPA approves of the review done by Arkansas Department of Environmental Quality ("ADEQ") in 1999. See Def.'s Mot. at 4-5, Ex. 4 ("Knudson Memorandum"). In the Knudson Memorandum, the EPA determined that the remedy for the Midland Site is "protective of human health and the environment." Knudson Memorandum.

The CERCLA citizens suit provision provides that the remedy available to a plaintiff bringing suit in this Court is an order requiring "such action as may be necessary to correct the

violation.” 42 U.S.C. § 9659(c).<sup>3</sup> Accordingly, were the Court to find Plaintiff’s claims meritorious, the Court would be limited to an order requiring a five-year review of the Midland Site. Defendant takes the position that any failure on the EPA’s part to conduct a review in either 1991 or 1996 is irrelevant to the Court’s consideration of this suit because “the [D]istrict [C]ourt’s only power is to require the EPA to conform its present conduct to the law.” Def.’s Mot. at 10-11 n. 7. Defendant argues that “the only question before the Court would be whether EPA is currently in default on a statutory obligation . . . . Thus, even if EPA was required to perform five-year reviews, the fact that one was issued in 2001 cures any default by the Agency.” *Id.*

Plaintiff disputes Defendant’s contention that the March 2001 review satisfies the EPA’s current obligations, and argues that a second five-year review should have been done in May 2001. Pl.’s Opp. at 14-16. Plaintiff contends that first review was due in May 1996, five years after “mobilization for on-site construction of the first EPA-selected CERCLA remedial actions at the Midland Site.” *Id.* at 15. By Plaintiff’s calculation, this would in turn require a second five-year review in May 2001, and a third in May 2006. *Id.* Accordingly, Plaintiff argues that the March 2001, review satisfies the May 1996, review requirement, and that the subsequent deadlines should remain in place. *Id.* at 15-16.

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<sup>3</sup>42 U.S.C § 9659(c) states:

The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) of this section to order the President or other officer to perform the act or duty concerned.

The Court finds that it is quite obviously unreasonable to require a second five-year review a mere two months after the completion of the March 2001, review. CERCLA requires that “the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented.” 42 U.S.C. § 9621. This language makes it clear that, after a remedial action has been taken, reviews are due at five year intervals.<sup>4</sup> The March 2001, review may have been late, but that does not modify the underlying statutory requirement that the next review take place five years after the previous review.

Plaintiff’s claim is moot because the EPA has conducted a five-year review. Based on the date of the last review, the next five-year review is due in March 2006. If the EPA does not undertake a review at that time, Plaintiff will be free to bring a suit and raise the issues in this suit again. Furthermore, if the EPA determines that the remedy for the Midland Site is complete, and Plaintiff considers the remedy inadequate, Plaintiff will be free to bring a suit raising that concern. However, at the present time, Plaintiff does not have a live case or controversy before this Court. Accordingly, Defendant’s Motion to Dismiss shall be granted.

\_\_\_\_\_  
/s/  
COLLEEN KOLLAR-KOTELLY  
United States District Judge

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<sup>4</sup>Plaintiff reads the statutory language differently, taking it to mean that reviews must take place at five year intervals “from” the initiation of the EPA’s remedial action. However, the statute plainly requires the reviews take place at five year intervals “after” implementation of the remedial action. Although the distinction may be small, the Court is not persuaded by Plaintiff’s interpretation.

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**IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

OUR CHILDREN’S EARTH FOUNDATION  
 and ECOLOGICAL RIGHTS FOUNDATION,

Plaintiffs,

v.

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

Defendants.

Civil Action No.  
 04-2132 (PJH)

HEARING DATE:  
 August 11, 2004  
 9:30 a.m.

**DEFENDANTS’ PROPOSED ORDER**

Upon consideration of the motion and cross-motion for summary judgment on plaintiffs’ Third Claim for Relief, it is hereby ordered that plaintiffs’ motion is denied and the cross-motion filed by defendants is granted. Judgment shall be entered in favor of defendants on the Third Claim for Relief.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

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 HON. PHYLLIS J. HAMILTON  
 UNITED STATES DISTRICT COURT JUDGE