No. 05-16214

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION Appellants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL LEAVITT, as Administrator of the United States Environmental Protection Agency, et al. Appellees.	) Appeal))) Appellant and Petitioner's) Opening Brief)))))))))

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STATEMENT OF JURISDICTION

The District Court in this case had jurisdiction over the claims in this action pursuant to Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1), and 28 U.S.C. § 1331. The District Court further had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the claims arise under the laws of the United States, specifically 5 U.S.C. § 702 and 5 U.S.C. § 706.

The District Court issued three orders which together constitute a final judgment appealable to the Court of Appeals. On August 11, 2004, the District Court granted Defendant U.S. Environmental Protection Agency ("EPA")'s cross-motion for partial summary judgment dismissing the third claim for relief. On May 20, 2005, the District Court issued a final judgment for EPA and Intervenor-Defendants on all remaining claims. On August 15, 2005, the District Court denied Appellants' motion to transfer the claims to this Court that the District Court found to be within this Court's exclusive jurisdiction. Appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B) because Appellants filed a Notice of Appeal within sixty days of a final judgment in this matter, the deadline for appeal when the United States is a party.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The following issues are presented for review:

(1) Has EPA breached mandatory duties created by CWA §§ 304(b), (m) and 301(d) to review existing effluent guidelines and limitations in accord with the statutory criteria set forth in CWA §§ 304(b)(2)(B) and (b)(4)(B) and thus determine whether existing effluent guidelines and limitations should be made more stringent to reflect currently available, economically achievable pollution control technology?

(2) Has EPA breached mandatory duties under CWA § 304(m) to publish effluent guidelines plans which identify new categories of industry discharging toxic and nonconventional pollutants which are not covered by existing effluent guidelines and which then schedule the promulgation within three years of new effluent guidelines for these latter industries when EPA determines it will not identify currently unregulated industries: (a) whose discharges are not found by EPA to pose significant environmental risk, (b) which consist of only a few facilities, and (c) which EPA deems to be "subcategories" of categories of industry regulated by existing effluent guidelines (even

though the subcategories are not themselves covered by the existing effluent guidelines)?

(3) Has EPA breached mandatory duties under CWA § 304(m)(1)(C) to promulgate new effluent guidelines according to a three year schedule when EPA expressly reserves the possibility of not promulgating effluent guidelines for new categories of industries identified under CWA § 304(m)(1)(B)?

(4) Does EPA's practice of publishing its effluent guidelines plans required by CWA § 304(m) well into the planning period the plans cover violate EPA mandatory duties under CWA section 304(m) to adopt plans to schedule its review of EPA effluent guidelines?

(5) Does CWA § 509(b) vest exclusive jurisdiction in the courts of appeals over the claims in this action to the extent those claims involve challenge to the substance of EPA decisions?

(6) Do the Administrative Procedure Act (APA) and 28 U.S.C. § 1331 provide an alternative basis for district court jurisdiction?

(7) If the District Court properly declined to exercise jurisdiction over the claims in this case, should these claims be deemed transferred to this Court pursuant to 28 U.S.C. § 1631?

All issues are purely questions of law/statutory construction for which this Court has *de novo* review. *E.g.*, *Arnold v. Arrow Transp. Co.*, 926 F.2d 782, 785 (9th Cir. 1991).

STATEMENT OF THE CASE

This case concerns EPA's abandonment of technology- based regulation for point source industrial polluters under the CWA. Technology-based regulation, instituted by Congress as part of the CWA's 1972 Amendments, has been the primary reason for the enormous success of the CWA in cleaning up our Nation's waters. However, the primary CWA goal, to eliminate pollutant discharges, has still not been attained. This action thus represents a critical opportunity for the Ninth Circuit to review the legality of EPA's new "harm-based" regulation under the CWA.

Citizen groups Our Children's Earth Foundation and Ecological Rights Foundation (collectively, "OCE") seek to compel the EPA to review EPA effluent guidelines and effluent limitations and adopt effluent guidelines plans as required by CWA §§ 304(b), (m) and 301(d), 33 U.S.C. § 1314(b), (m), 1311(d).[1] The

[1] Case law and EPA documents often cite the statutes at large section numbers of the CWA rather than the CWA's United States Code codification. All initial citations to the CWA herein include both; thereafter citations are only to the statutes at-large sections.

CWA requires EPA to promulgate effluent guidelines and effluent limitations establishing technology-based pollution discharge standards. CWA §§ 304(b), 301(b). To ensure that effluent guidelines and effluent limitations are updated to reflect current pollution control technology, Congress required EPA to review all effluent guidelines annually and all effluent limitations every five years, and if appropriate, revise them. CWA §§ 304(b), (m)(1)(A), 301(d). Congress also mandated EPA to publish effluent guidelines plans every two years, after public review and comment upon EPA's proposed plans, which schedule EPA's review and adoption of effluent guidelines. CWA § 304(m).

EPA has not reviewed existing effluent guidelines and limitations and determined whether it is appropriate to revise them in the manner required by the CWA. EPA is further failing to adopt timely effluent guidelines plans ("EGPs").

The District Court granted judgment to EPA on all OCE's claims.

STATUTORY BACKGROUND

Prior to 1972, federal law required the government to establish that water pollution discharges were environmentally harmful before they could be restricted. In 1972, recognizing that this approach had proven cumbersome and ineffective, Congress enacted sweeping change to federal water pollution law. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204

(1976). The major shift of the CWA Amendments of 1972 was to require industries to meet discharge limitations based on application of the best available water pollution control technology economically achievable. *See generally id. at* 202-05; R. Ex. 11 at 0158.[2] As noted by the chief Senate author of the 1972 CWA Amendments, a technology-based regulatory approach was the "best available mechanism to control water pollution" because it avoided "the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality. . . ." R. Ex. 11 at 0158; R. Ex. 16 at 0198.[3]

Congress further intended its new technology-based approach to institute *uniform* national standards of pollutant control, thus eliminating competitive advantages to industrial sources regulated more leniently by local authorities than comparative sources elsewhere in the country. *See NRDC v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1975).

In adopting CWA amendments in 1987, Congress reaffirmed its 1972 technology-based approach:

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[2] EPA could still, as a secondary tool, impose additional pollution discharge restrictions where it could show such to be needed to curtail demonstrated environmental harm. *Id.*; R. Ex. 11 at 0161.

[3] All references "R. Ex. x at page x" are to the bates stamp pagination of the Appellants' Excerpts of Record Exhibits.

> The technology based approach to water pollution control was adopted in 1972 because of the historical ineffectiveness of the previous water-quality-based approach. This approach failed because of uncertainties about the relationship between water quality and health and environmental effects. There are still significant gaps in knowledge of these relationships. Consequently the reported bill reaffirms the technologically-based approach established in 1972 as an immediate and effective method of achieving the goals of the Act.

R. Ex. 12 at 0168.

Congress' technology-based regulatory scheme is reflected in CWA §§ 304(b), (m), and 301. CWA § 304(b) requires EPA to promulgate effluent guidelines establishing the water pollutant discharge reduction that industries can attain via the application of "best practicable technology" (BPT), "best available technology" (BAT) for toxic and non-conventional pollutants and "best conventional pollutant control technology" (BCT) for conventional pollutants.[4] EPA must promulgate effluent guidelines for all categories of industries which discharge pollutants to the nation's waters. CWA § 304(b). The CWA specifies that EPA and state agencies must use effluent guidelines in setting effluent limitations required by CWA section 301(b). Such effluent limitations are mandatory restrictions on the amount of pollution that any point source may

[4] Toxic pollutants consist of 65 classes and categories of substances listed by EPA at 40 C.F.R. part 423, appendix A pursuant to CWA § 307(a). CWA § 304(a)(4) defines conventional pollutants. Non-conventional pollutants are all other pollutants.

discharge to waters of the United States. *See generally*, *California ex rel.*, 426 U.S. at 204.

Congress envisioned that EPA would over time tighten technology-based regulatory restrictions on pollutant discharge. *E.g.*, R. Ex. 11 at 0158, 0164. The CWA requires EPA to have mandated BPT-based limits by 1977 and BAT and BCT-based limits by 1989. CWA § 301(b). Whereas Congress envisioned that EPA could set BPT as equal to "the average of the best performers in an industrial category," EPA would "consider a broader range of technological alternatives" in setting BAT equal to "the best performer in any industrial category." R. Ex. 11 at 0154. Moreover, Congress envisioned that EPA would periodically revise its definitions of BPT, BAT and BCT to press industry to adopt more advanced pollutant reducing technologies over time, eventually leading to the elimination of water pollutant discharges altogether:

> The [EPA] Administrator will have the capability and the mandate to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second. [T]he program established by this section requires increasingly tougher controls on industry; [I]ndustry will be required every five years to re-evaluate its control efforts and to apply the best technology then available; [I]ndustries will have to show every five years that no-discharge is not attainable. . . . Through research and development of new processes, modifications, replacement of obsolete plans and processes, and other improvements in technology, the Committee anticipates that it should be possible, taking into account the cost of controls, to achieve . . . levels of

> control approaching 95-99 % reduction of pollutants discharged in most cases and complete recycling in the remainder.

R. Ex. 11 at 0154, 0161; *see* CWA § 301(b)(2) (mandating, *inter alia*, that EPA set effluent limitations that "require the elimination of discharges of all pollutants" if EPA finds "such elimination is technically and economically achievable."); *see also* CWA § 304(b)(3).

To ensure that effluent guidelines are updated to reflect current pollution control technology, Congress required EPA to review all effluent guidelines annually, and if appropriate, revise them. CWA §§ 304(b), (m)(1)(A). To ensure that revisions to effluent guidelines lead to revisions in enforceable effluent limitations, Congress further required EPA to review all BAT-based effluent limitations at least every five years and, if appropriate, revise them "pursuant to the procedure established under CWA § 301(b)(2)" for setting BAT limitations.[5]

Finding that "the slow pace at which [effluent guideline] regulations are promulgated continues to be frustrating," Congress amended the CWA in 1987 to require EPA to publish biennial effluent guidelines plans which (1), schedule the annual review of all existing effluent guidelines, (2) identify new categories of

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[5] EPA has implemented CWA §§ 301(b) and 304(b) through a single set of regulations that constitute both effluent guidelines and effluent limitations. R. Ex. 7 at 0091.

industry discharging toxic and nonconventional pollutants currently unregulated by existing effluent guidelines, and (3) schedule the promulgation within three years of new effluent guidelines for these latter industries. CWA § 304(m)(1); R. Ex. 12 at 0168. Congress further required EPA to provide for public review and comment before publishing these plans. CWA § 304(m)(2).

STATEMENT OF FACTS

I. *Prior Relevant Litigation*

EPA has been persistently dilatory in adopting and revising effluent guidelines and limitations as required by the CWA, leading to multiple citizen suits and court orders forcing EPA to act.[6] EPA did not issue its first EGP until 1990, nearly two years past CWA § 304(m)'s 1988 deadline for this plan. In this 1990 Plan, EPA contended it did not have to identify and schedule promulgations of new effluent guidelines for all categories of industries not currently regulated by effluent guidelines that discharge toxic or nonconventional pollutants. EPA contended it could limit its efforts to industries posing the greatest relative risk of

[6] *See Chemical Manufacturers Ass'n v. EPA,* 870 F.2d 177, 195, n.9 (5th Cir. 1989); *NRDC v. Train, supra,* 510 F.2d at 710-712; *NRDC v. Costle*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified sub. nom*, *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C.1976), *modified sub. nom*, *NRDC v. Gorsuch*, 17 Env't. Rep. Cas. (BNA) 2013, 12 Envtl. L. Rep. 20570 (D.D.C.1982), *modified sub. nom*; *NRDC v. Ruckelshaus*, No. 73-2153 (D.D.C. Aug. 2, 1983); R. Ex. 8 at 0110.

environmental harm, effectively deferring effluent guideline development for unregulated categories of industry deemed by EPA to be relatively less risky. 55 Fed. Reg. 80, 81-82 (Jan. 2, 1990).

EPA's 1990 Plan was found unlawful in *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 (D.D.C. Apr. 23, 1991). The court found that "in light of the compelling need for federal effluent guidelines, the well documented history of agency inertia, and the general structure of the Act," EPA's intent to "prioritize" its promulgation of new effluent guidelines by relative ranking of risk was "inadequate and not in conformity with the mandate" of the CWA. *Id.* at *25-26 (R. Ex. 10 at 0151). EPA subsequently entered into a consent decree, which lasted until 2004, that required EPA to schedule promulgation of a specified number of new or revised effluent guidelines. R. Ex. 7 at 0092.

II. *EPA's Return to Risk-Based Analysis and EPA's 2003 Review of Effluent Guidelines and Limitations*

In November 2002, EPA published a draft National Strategy for Clean Water Regulations ("Draft Strategy") outlining the approach to effluent guidelines review and promulgation that EPA planned to take after termination of the *NRDC v. Reilly* consent decree. R. Ex. 16 at 0199-201. The Draft Strategy proposed a return to the risk-based prioritization approach rejected by the court in *NRDC v.*

Reilly. Specifically, EPA would identify industries posing the greatest relative risk of water pollution impacts and target these industries for revision of existing effluent guidelines where such industries were already covered by effluent guidelines or adoption of new effluent guidelines where such industries were not yet regulated. *Id.*; R. Ex. 8 at 0110.

A. *EPA's 2003 Review of Existing Effluent Guidelines*

On December 31, 2003, EPA published its proposed effluent guidelines plan to govern EPA's first post-*Reilly* effluent guidelines review, to be conducted in 2004 and 2005. R. Ex. 8 ("Proposed 2004 EGP"). The Proposed 2004 EGP also described EPA's 2003 effluent guidelines review. The Proposed 2004 EGP proposed a two-year EPA review involving a screening level analysis in the first year and a more-detailed analysis of two of EPA's 56 effluent guidelines in the second year. *Id.* at 0113.

Employing the risk assessment methodology proposed in the Draft Strategy, EPA limited its 2003 review of effluent guidelines to attempted identification of a small subset of categories of industry posing the greatest relative hazard to water quality. *Id.* at 0112. EPA did not evaluate whether economically achievable technology was available that would warrant more stringent effluent guidelines for *any* categories of industries and thus reached no conclusions in this respect:

> For a number of the industries that appeared to offer the greatest potential for reducing hazard or risk to human health or the environment, EPA attempted to gather and analyze additional data *prior to commencing detailed and costly economic and technology studies*. EPA examined: (1) The pollutants driving the hazard or risk estimates; (2) the geographic distribution of facilities in the industry; (3) any discharge trends within the industry; and (4) possible links between industrial point source discharges and impaired waterbodies identified by EPA, States, and Tribal governments under CWA section 303(d).

Id. at 0113 (emphasis added).[7]

EPA acknowledged that its risk assessment methodology involved severe limitations and did "not approach the level of detail required by a formal risk assessment" as "the questions about the fate and transport modeling and exposure pathways used to estimate risk were too involved and unworkable. . . ." R. Ex. 13 at 0175; R. Ex. 15 at 0193. EPA replied upon two EPA databases of pollutant release or discharge, EPA's Toxics Release Inventory (TRI) and Permit Compliance System (PCS) databases, to calculate rough estimates of pollutant discharges by categories of industry. EPA expressly conceded that "reported discharges in PCS and TRI do not represent a national estimate of pollutant discharges for a variety of reasons." R. Ex. 15 at 0194. EPA further acknowledged it could not "place a great deal of weight in its screening analyses

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[7] EPA explained that it had found it too difficult to compile and/or analyze technological or economic feasibility factors to screen existing effluent guidelines. *Id.* at 0112-13; R. Ex. 14 at 0187.

on the exact rank of an industrial category in terms of pollutant discharges reported to TRI or PCS," due to severe limits in the data.

As EPA acknowledged, its TRI database was flawed because: (1), the list of chemicals industries report to the TRI database has changed over time, making it difficult to track levels of releases for at least certain chemicals, (2), only a small fraction of the point source dischargers of water pollutants are required to report to the TRI database, and (3), TRI data is imprecise as EPA allows facilities to report an estimated range of chemical amounts released and further allows a *"de minimus*" exception to reporting when concentrations are below a certain percent of mass of wastestreams. R. Ex. 13 at 0176-80. Similarly, as EPA acknowledged, its PCS database was flawed because: (1) many pollutant dischargers are not covered by the data base, (2) data entered into PCS undergo limited quality screening prior to their addition, (3) PCS data is entered manually and therefore subject to data entry error, (4) EPA and the States have failed to enter the Standard Industrial Classification (SIC) codes for one-fourth of the facilities in the database, making it impossible to tell what industry these facilities are in, (5), PCS reports the primary SIC code that represents the principal activity causing a facility's discharge, meaning other activities may be ongoing at any given facility that would not be reflected in PCS, and (6) PCS contains no data for pollutant

discharges that a facility is not required by its NPDES permit to monitor or report. R. Ex. 13 at 0181-82, 0185. Compounding these problems, EPA used TRI and PCS data from the year 2000, hence several years out of date. *Id.* at 0183.

The model EPA employed to evaluate risks reflected in its pollutant release data was also highly limited and flawed. As EPA acknowledged, the model does not address potential acute human health risks or risks to aquatic life. Nor did the model allow EPA to account for multiple chemical exposures, severity of effects, or multiple health effects. *Id.* at 0178.

In 2003, EPA further eliminated from review categories of effluent guidelines when EPA found that: (1) there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility-by-facility basis because an industry had only a few facilities or (4) EPA had promulgated an effluent guideline for the industry within the last seven years. R. Ex. 8 at 0112, 0114; R. Ex. 7 at 0095, 0100-01.

Employing its "screening" methodology, EPA identified only two existing

effluent guidelines for detailed evaluation in 2004.[8] R. Ex. 8 at 0113-14. EPA thus effectively ignored considerable information it had received, though not analyzed, on advances in water pollution abatement technology in a wide variety of industries. R. Ex. 14 at 0186-90; R. Ex. 8 at 0113-14. For example, EPA acknowledged that it: (1) had "Sector Notebooks" compiling pollution control technology information on 23 industry sectors, (2), had recently co-sponsored a conference devoted to identifying new water pollution abatement technologies, (3), was aware of extensive information on such technologies documented in industry trade association publications, and (4) had gathered detailed information on the pollution abatement technologies available in five industry sectors and was gathering such additional information on 15 more industry sectors. R. Ex. 14 at 0187, 0189-90. EPA did not analyze this information, however, to reach any conclusions whether technological advances documented in such information sources might constitute basis for new definition of BPT, BAT or BCT. *Id.* at 0187; R. Ex. 8 at 0112.

[8] These were the Effluent Guidelines for the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) industrial category set forth at 40 C.F.R. part 414 and the Effluent Guidelines for the Petroleum Refining category set forth at 40 C.F.R. part 419.

B. *EPA's 2003 Identification of Potential New Effluent Guidelines Candidates*

EPA further concluded in its 2003 review that because it could not identify any industries discharging toxic or non-conventional pollutants not already covered by existing effluent guidelines, it would not schedule any new effluent guidelines promulgations in its 2004 EGP. R. Ex. 8 at 0120. EPA acknowledged that commentors on EPA's Draft Strategy had suggested thirteen potential new categories of industries not currently regulated as targets for new effluent guidelines. *Id.* at 75530. EPA further acknowledged that EPA itself had identified two industries not currently regulated by effluent guidelines.[9] *Id.* at 0118-20. EPA decided not to identify these industries and schedule new effluent guidelines promulgation for them under CWA § 304(m)(1)(B) and (C), however. *Id.* at 0120. EPA decided it need schedule new effluent guidelines only if: (1) discharges from unregulated industries pose a significant environmental risk , (2) the industries have more than a few facilities, and (3) the industries are not "subcategories" of industries regulated by existing effluent guidelines. *Id.*

III. *EPA's 2004 Review of Effluent Guidelines and Limitations*

On September 2, 2004 EPA issued its EGP for 2004 and 2005 ("2004

[9] These were chemical formulating, packaging, and repackaging operations and petroleum bulk stations and terminals.

EGP"). R. Ex. 7. Though the 2004 EGP Plan ostensibly "scheduled" EPA's 2004 review, EPA in fact issued the plan *after completing its 2004 review*. R. Ex. 7 at 0089, 0101. The 2004 EGP further announced that EPA intended to continue in the future to publish EGPs *after* completing the first year of review to be governed by the two-year plans. *Id.*

A. *EPA's 2004 Review of Existing Effluent Guidelines*

The 2004 EGP indicated that EPA repeated the same water quality risk-based screening level approach from 2003 to identify a small subset of industries whose effluent guidelines EPA would consider revising in 2005. R. Ex. 7 at 0094. EPA's 2004 review did not examine whether economically achievable improved technologies existed for any industries besides the small subset EPA targeted in 2003 for more focused review. *Id*. The 2004 EGP stated EPA's intent to continue its risk assessment approach to "screen" which effluent guideline and effluent limitation categories should be reviewed in 2005 and 2006. *See id.* at 0101.

In 2004, EPA further copied its 2003 approach to eliminate effluent guidelines from review when EPA determined that: (1), there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately

conducted on a facility-by-facility basis because there were only a few facilities in the industry or (4) EPA had promulgated an effluent guideline for the industry within the past seven years. *Id*. at 0100-01.

Employing its screening methodology, EPA only considered in 2004 whether revisions were appropriate for the two effluent guidelines EPA had determined warranted more study in 2003, plus two additional subcategories of effluent guidelines.[10] EPA determined that two subcategories of these industries warranted further study in years ahead "for possible effluent guidelines revision." R. Ex. 7 at 0096.[11] EPA ruled out revision of the effluent guidelines for most of these industries targeted for focused review not because EPA determined that there were no new economically achievable technologies for these industries, but because (1) the industries' discharges did not, in EPA's estimation, pose the environmental risk EPA saw as potentially possible based on its screening analysis or (2) the industries consisted of only a few facilities. *Id.* at 0096-0100. EPA

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[10] The two categories of industry were the OCPSF industry and petroleum refining. The two subcategories were chlor-alkali manufacturing, a subcategory of the inorganic chemicals industry, and the subcategory of the oil and gas extraction industry consisting of oil and gas production and exploration facilities in Cook Inlet, Alaska.

[11] The two subcategories were: the vinyl chloride manufacturing subcategory of the OCPSF category and chlor-alkali manufacturing.

concluded whether more effective economically achievable pollutant reduction technology is available for only one subcategory of the 450 subcategories of industry covered by EPA effluent guidelines (which EPA concluded there was not). *Id.* at 0096. Thus, EPA ended its 2004 review certain only that of the 450 subcategories of existing effluent guidelines, only one (guidelines for oil and gas facilities located in Cook Inlet, Alaska) still appropriately defines BPT, BAT, and BCT.

As in 2003, EPA thus effectively ignored considerable information it had on advances in pollution abatement technology for various industries. R. Ex. 14 at 0186-90; R. Ex. 7 at 0098-0099; R. Ex. 17 at 0202-0205; R. Ex. 8 at 0113-14. For example, EPA had a state agency study on advances in pollution abatement technology in the petroleum industry. EPA declined to analyze or reach conclusions, however, whether the technologies documented in that study warranted new definitions of BPT, BAT or BCT because EPA found it had insufficient evidence that the petroleum industry's current discharges pose risk of environmental harm. R. Ex. 14 at 0186-90; R. Ex. 7 at 0098-0099; R. Ex. 17 at 0202-0205; R. Ex. 8 at 0113-14.

B. *EPA's 2004 Identification of Potential New Effluent Guidelines Candidates*

EPA identified in its 2004 EGP two industries not yet regulated by existing effluent guidelines, hence candidates for new effluent guidelines.[12] *Id.* at 0103-04. Even for these new categories, however, EPA did not set a schedule for enacting new effluent guidelines within three years as specified by CWA § 304(m)(1)(C). EPA indicated it would commence rulemaking proceedings for new effluent guidelines for these industries, but EPA expressly reserved the possibility of not completing the rulemaking. *Id.* at 0103. EPA further reiterated its view that it had discretion not to schedule promulgation of new effluent guidelines for industries currently lacking effluent guidelines that discharge toxic and nonconventional pollutants under CWA § 304(m)(1)(B) and (C). *Id.* at 0102-03.

IV. *EPA's 2005 Review of Effluent Guidelines and Limitations*

EPA's 2005 review of existing effluent guidelines copied the same risk-based screening methodology EPA employed in 2003 and 2004. EPA again ruled out revision of effluent guidelines based on EPA's finding that an industry posed relatively less risk of receiving water harm than the couple industries EPA deemed posed the most risk. R. Ex. 21 at 0230-33. EPA ran into the same risk assessment

[12] The industries were airport deicing operations and drinking water supply and treatment.

problems it had in 2003 and 2004, often conceding that data available to it was inconclusive on whether an industry is actually posing receiving water risks. *Id.* at 0235. EPA again conceded it mostly had failed to examine whether technologies currently serving as the basis for BAT and BCT in existing effluent guidelines had been superseded by more modern pollutant reduction technologies. EPA did *start* such a technology-based analysis for two categories of industry, but EPA was unable to even complete those two analyses. *Id.* at 0232. Thus, EPA reached no conclusions after its 2005 review whether *any* of its effluent guidelines still appropriately define BPT, BAT and BCT and did not commence any new effluent guidelines promulgation based on its 2005 review.

EPA's 2005 review of industry candidates for new effluent guidelines similarly copied EPA's approach in 2003 and 2004. EPA again deemed it could decline to schedule new effluent guideline promulgation for currently unregulated industries if: (1) EPA has not found these industries' discharges not to pose substantial risk of receiving water harm, (2) the industry consists of only a few facilities, or (3) the industries are within "subcategories" of existing effluent guidelines. On these bases, EPA did not schedule any new effluent guidelines promulgation. *Id.* at 0239-40.

SUMMARY OF THE ARGUMENT

This case requires the Court to determine whether the EPA may dispense with the technology-based regulatory approach central to the 1972 CWA Amendments for a risk-based approach that Congress previously found unsuccessful at substantially reducing pollutant discharges into our nation's waters.

In enacting the 1972 CWA Amendments, Congress required EPA to adopt effluent guidelines and limitations setting a nationally uniform floor of available and economically achievable technology-based controls limiting water pollution discharges to that attainable through BPT, BAT and BCT. Congress mandated that EPA consider specific criteria in setting BPT, BCT, and BAT. CWA § 304(b). These criteria direct EPA not to base its BPT, BCT and BAT determinations on the level of pollutant reduction needed to prevent water quality risks or harm. Instead, EPA must determine what technologies are technically and economically possible for industries to implement and require industry to meet the pollution limits attainable by such technologies. Congress' technology-forcing approach requires EPA to mandate technologies that are available even if not yet widely used, with the eventual aim of bringing industries to develop technologies to curtail all water pollutant discharges.

CWA §§ 304(b), (m) and 301(d) requires EPA to review effluent guidelines and limitations and determine whether it is appropriate to revise them. CWA §§ 304(m)(1)(B) and (C) further require EPA to identify industries discharging pollutants but yet unregulated by effluent guidelines and limitation--and within three years promulgate new effluent guidelines to regulate such industries. To give effect to Congress' core intent to reduce and eventually *eliminate* pollutant discharges by applying advances in pollution control technology, EPA must determine in its reviews of existing effluent guidelines and limitations whether the latter still appropriately define BPT, BAT and BCT. *See* CWA §§ 101(a)(1); 301(b)(2)(A) and 304(b)(3). As CWA § 304(b) sets criteria that are the basis for BPT, BAT, and BCT determinations, EPA must accordingly evaluate these criteria in performing its mandatory reviews of existing effluent guidelines and limitations. In identifying industries as targets for new effluent guidelines, EPA must simply determine whether the industries discharge any measurable quantity of toxic and non-conventional pollutants.

Instead of following its statutory mandate, EPA adopted a new policy in 2002 that rejects the technology-based regulatory approach mandated by the 1972 CWA Amendments for an approach that limits EPA's review of existing effluent guidelines and limitations and evaluation of target industries for new effluent

guidelines to those industries that EPA believes present the greatest risk of harm to water quality--even though EPA lacks reasonable data to make such risk determinations. EPA has determined that it will not seek to revise BPT, BAT or BCT definitions in existing effluent guidelines and limitations, nor adopt new effluent guidelines for polluting industries not covered by EPA effluent guidelines, unless it finds that the industries in issue pose a substantial risk of water pollution harm. As a result, EPA is targeting for review only a very small subset of the industries covered by EPA's 56 existing effluent guidelines and a small subset of unregulated industries as candidates for new effluent guidelines that EPA deems pose the greatest relative risk of water quality harm.

Under its risk-based screening approach, EPA is effectively ignoring considerable information it has received, though not analyzed, on advances in water pollution abatement technology for various industries. EPA is failing to consider whether the information at its disposal shows that advances in pollution control technologies now warrant revised definitions of BPT, BAT and BCT in EPA effluent guidelines and limitations. In the last three years, EPA has been able to conclude for certain whether only one of the 450 subcategories of existing effluent guidelines still accurately sets BPT, BAT and BCT--a subcategory of effluent guidelines that applies only to a few facilities in Cook Inlet, Alaska. This

is not what Congress, which has expressed frustration at EPA's "slow pace" in setting appropriate effluent guidelines, envisioned in requiring EPA to review and update effluent guidelines and limitations.

EPA is now several years into its risk-based strategy announced in 2002. Just as Congress found such an approach prior to 1972 to be ineffective, EPA's approach has been similarly problematic and has brought advances in implementing new technologies for curtailing pollutant discharges and cleaning up the nation's waters to a virtual standstill. Predictably, EPA has been unable to identify with any precision those industries posing identifiable risks of environmental harm and has made essentially no progress in identifying industries that could reduce or eliminate their pollutant discharges through the application of existing and feasible advances in pollution control technology.

Respecting Congress' intent, the Court should require EPA: (1), conduct a proper technology-based review of existing effluent guidelines and limitations (2), determine whether to revise existing effluent guidelines and limitations based on the 304(b) technology-based criteria, and (3) target for new effluent guidelines all industries that discharge toxic and non-conventional pollutants but are not yet regulated by effluent guidelines.

ARGUMENT

I. *EPA Has Breached Mandatory CWA Duties To Review Effluent Guidelines and Limitations.*

A. *EPA Has a Mandatory CWA Duty To Perform a Technology-Based Review of Effluent Guidelines and Limitations.*

The CWA's text and applicable legislative history repeatedly emphasize that EPA must: (1), require industries to implement the best available technology economically achievable in tackling water pollution,[13] (2), continually revise effluent guidelines and limitations to make the nationally uniform floor of technology-based control more stringent as advances in technology and changes in economic circumstance permit,[14] and (3) use its rulemaking authority to force the development and implementation of technologies not yet widely used, with the ultimate aim of fostering technological change that would eliminate all water

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[13] *E.g.*, CWA §§ 301(b), 304(b); R. Ex. 11 at 0158, 0161.

[14] *E.g.*, CWA §§ 301(b), 304(b); R. Ex. 11 at 0161 (EPA "will have the capability and *mandate to press technology and economics* to achieve" the effluent reduction goals of the CWA) (emphasis added); *id.* at 0164; R. Ex. 12 at 0168 (CWA as amended reflects Congress' "commitment to *uniform* installation of the best available technology economically achievable by *all dischargers*") (emphasis added).

pollutant discharges.[15]

To secure these ends, CWA § 304(b) requires EPA to review and revise effluent guidelines annually, if appropriate. CWA § 301(d) and § 301(b)(2)(A) further specifies that EPA shall review BAT and BCT effluent limitations every five years, and then find whether current technology exists to reduce or eliminate pollutant discharge in any industry. Frustrated with EPA's slow pace in reviewing and making revisions to effluent guidelines where appropriate, Congress in 1987 enacted CWA § 304(m), which requires EPA to publish a plan which schedules "the annual review and revision of effluent guidelines in accordance" with CWA § 304(b).

Read in context, these provisions impose mandatory CWA duties on EPA to review *all* existing effluent guidelines annually and *all* BAT and BCT effluent limitations every five years and decide, based on the criteria set forth in CWA §§ 304(b), 301(d) and 301(b), whether advances in pollution control technologies and economic change make revisions to effluent guidelines and limitations appropriate. *See NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 at *13-19 (D.D.C. Apr. 23, 1991); R. Ex. 15 at 0192 (EPA acknowledgment that CWA

[15] *E.g.*, CWA §§ 301(b), 304(b), 101(a)(1); R. Ex. 8 at 0154, 0162.

requires EPA to review all effluent guidelines annually);[16] *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 900 (2d Cir. 1989), *cert. denied*, *Alabama Power Co. v. Environmental Defense Fund*, 493 U.S. 991;[17] *Sierra Club v. Leavitt*, 2005

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[16] *See also Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812 (9th Cir. 1980) (CWA § 301(d) "requires review of [effluent limitation] regulations every five years after their promulgation"); *American Frozen Food Institute v. Train*, 539 F.2d 107, 116 (D.C. Cir. 1978) (CWA § 301(d) requires "continuing periodic review [of effluent limitations], presumably until all discharges are terminated."); *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976) ("[CWA] §§ 304(b) and 301(d) place a duty upon the Administrator to review and revise these regulations."); *Tanners' Council, Inc. v. Train*, 540 F.2d 1188, 1195-96 (4th Cir. 1978) ("[CWA s]ection 304(b) provides that § 304 guidelines be revised, if appropriate, at least annually, and § 301(d) has a similar requirement for § 301 limitations at five-year time intervals."); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3rd Cir. 1975), *mandate partially recalled on other grounds*, 560 F.2d 589 (1977), *cert. denied*, 435 U.S. 914 (1978) ("[§ 301(d) of] the [Clean Water] Act contemplates that the § 301 limitations be reviewed 'at least every five years'").

[17] The court in *Environmental Defense Fund* expressly rejected EPA's contentions in circumstances where EPA has ultimate discretion as to the decision it will make, there is no mandatory EPA duty reviewable in court to make a decision. The court that "leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion. . . ." 870 F.2d at 900. Similarly, the court in *Sierra Club* held that when EPA must propose rules as the EPA "determines are appropriate," EPA has a mandatory duty to "affirmatively act or decide that no action was needed." The court noted, "even though the agency has discretion to promulgate 'any' regulation it deems appropriate, 'it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.'" 2005 U.S. Dist. LEXIS 1771 at *17(quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997)).

U.S. Dist. LEXIS 1771 at *17 (D.D.C. 2005) (Feb. 9, 2005).

As noted, Congress intended the CWA to prompt technological advances that would reduce and eventual eliminate all water pollutant discharges. *See* CWA § 301(b)(2)(A), 304(b)(3), 101(a)(1); *American Frozen Food*, 539 F.2d at 118-20. To accord with this statutory purpose, EPA's effluent guidelines and limitations reviews must allow EPA to determine whether effluent guidelines and limitations still appropriately define BPT, BAT and BCT–or have become obsolete because technological advances and/or changes in economic feasibility could achieve greater reduction of pollutant discharge than EPA's effluent guidelines and limitations currently require. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) ("in expounding a statute, we . . . look to the provisions of the whole law, and to its object and policy."); *Beno v. Shalala*, 30 F.3d 1057, 1068 (9th Cir. 1994) ("A statute is to be read as a whole. The meaning of statutory language, plain or not, depends on context."); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1426 (W.D. Wash. 1991), *aff'd, Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. Wash. 1994) ("In interpreting statutes, a court's function is to construe the language so as to give effect to the intent of Congress.").

Congress has required EPA to determine what is BPT, BAT or BCT based

upon the criteria in CWA §§ 304(b)(1)(B), (b)(2)(B) and (b)(4)(B) ("the 304(b) Guidelines Criteria"). These criteria require EPA to set BPT, BAT or BCT from assessments of technological and economic possibility. In reviewing and deciding whether to revise effluent guidelines, EPA must necessarily consider the 304(b) Guidelines Criteria to determine whether existing effluent guidelines still adequately define BPT, BAT and BCT–and EPA therefore must conduct a technology-based review. The sole court to face this precise question prior to this case so held:

> Understanding [CWA] § 304(m)(1)(A) as a Congressional command to review and revise guidelines in conformity with the parameters set out at length in [CWA] § 304(b) makes logical sense. . . .[18]

NRDC v. Reilly, 1991 U.S. District LEXIS 5334 at *19 (R. Ex. 10 at 0149); *see Pacific Fisheries*, 615 F.2d at 812 (in its five year review of effluent limitations,

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[18] Ironically, EPA itself seemed to embrace, though not ultimately follow, this same logic, stating in the Federal Register that:

> Because CWA section 304(m)(1)(A) requires EPA to review promulgated effluent guidelines in accordance with CWA section 304(b) EPA interprets the statute to authorize EPA to employ the same factors for its annual review that it would consider in selecting BAT in a rulemaking context. EPA believes this is a reasonable approach because the outcome of EPA's annual review is a decision. . . identifying those effluent guidelines for possible revision.

R. Ex. 8 at 0111; *see also* R. Ex. 16 at 2101c.

EPA will be required to revisit the same technological and economic analysis issues germane to setting effluent limitations to determine whether "more extensive data developed since the regulations were first promulgated" warrants revision of effluent limitations).

If EPA is not required to consider whether its existing effluent guidelines set BPT, BAT and BCT as stringently as they should now be set, which can only be determined by considering the 304(b) Guidelines Criteria, these intentions of Congress will be thwarted. EPA would be allowed to let stand effluent guidelines with obsolete definitions of BPT, BAT and BCT, and Congress' desire that EPA direct by regulation rapid technological advance leading to the ultimate elimination of water pollutant discharge would be shunted aside. *See American Frozen Food*, 539 F.2d at 120 (EPA must consider the 304(b) Guidelines Criteria in promulgating effluent guidelines); *see also Florida PIRG v. EPA*, 386 F.3d 1070, 1087-88 (11th Cir. 2004) (EPA has mandatory duty to consider statutory criteria for decisions as "the only way in which the EPA can satisfy a mandatory duty is by actually discharging that obligation in the manner specifically required by the statute."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971) (in reviewing agency action "the court must consider whether the decision was based on a consideration of the relevant factors."); 5 U.S.C. §

551(13) (defining "agency action" to include "the whole or a part of a[] . . . failure to act").

EPA's review obligation under § 304(b) is complemented by CWA § 301(d) and 301(b)(2)(A), which require EPA to determine every five years in EPA's reviews of effluent limitations whether current technology could achieve the greater reduction or *elimination* of pollution discharges. CWA § 301(d) provides that BAT and BCT effluent limitations "shall be reviewed at least every five years and, if appropriate, revised *pursuant to the procedure established under* [CWA § 301(b)(2)]" (emphasis added). CWA § 301(b)(2), in turn, directs EPA to require "application of the best available technology economically achievable. . .which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." CWA § 301(b)(2) further requires EPA to require "the elimination of discharges of all pollutants if the [EPA] Administrator finds . . . that such elimination is technologically and economically achievable" for any industry. Thus, to review effluent limitations pursuant to CWA § 301(b)(2)'s "procedure" is for EPA to analyze whether the reduction *or elimination* of pollutant discharge is technologically and economically achieveable. *See, e.g., Beno*, 30 F.3d at 1068; R. Ex. 11 at 0161 (applicable legislative history indicating Congress intended "increasingly tougher controls" and EPA evaluation every five

years whether elimination of discharge is attainable).

B. *EPA Has Not Considered the 304(b) Guidelines Criteria in Its Reviews of Effluent Guidelines and Limitations*.

EPA concedes that it did not consider the 304(b) Guidelines Criteria relating to technological and economic feasibility in its effluent guideline review for 2004. The District Court so found: "EPA also admits that it did not conduct a technology review of the 450 categories and subcategories at issue." R. Ex. 18 at 0213-15. Instead, EPA conducted a "harm-based" review according to factors that are nowhere set forth in the CWA. R. Ex. 7 at 0092.

As discussed in the Statement of Facts, since 2002 EPA has used a poorly designed and executed risk assessment that tries to rank the relative pollutant risk to receiving waters posed by various industries as EPA's primary means to rule out scheduling effluent guidelines revision. EPA further has ruled out such revision when if finds that: (1), risk assessment data for the industries involved was unavailable, (2), the water pollution problems caused by an industry are being dealt with more "efficiently" by other regulatory and non-regulatory means, including voluntary industry compliance, (3), there are only a few facilities in the industry, or (4), effluent guidelines for the industry had been promulgated within the past seven years. EPA has relied on these factors to rule out--without any

review of available technology–revision to nearly all existing effluent guidelines.

None of the 304(b) Guidelines Criteria directs EPA to consider the hazards or risks posed by industrial dischargers in setting effluent guidelines and limitations, however, and nothing in these criteria can remotely be read as authorizing EPA to set or then leave BPT, BAT and BCT at the level that EPA determines not to pose environmental hazard. Such a methodology is a return to the pre-1972 approach Congress deemed, for good reason, to be unworkable. *See e.g.,* R. Ex. 11 at 0158; R. Ex. 16 at 0198.

EPA's approach contradicts a vast body of case law reiterating that in setting effluent guidelines, EPA must "survey the practicable or available pollution-control technology for an industry and assess its effectiveness." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. at 13; *see also Pacific Fisheries*, 615 F.2d at 805-806 ("Congress intended BPT standards to be based primarily on employment of available technology for reducing effluent discharge, and not primarily on demonstrated changes in water quality."); *EPA v. Nat'l Crushed Stone Ass'n,* 449 U.S. 64, 75-77 (1980); *Texas Oil & Gas Association v. Environmental Protection Agency,* 161 F.3d 923, 928 (5th Cir. 1998) ("These limitations are technology-based rather than harm-based; that is, they reflect the capabilities of available pollution control technologies to prevent or limit different discharges

rather than the impact that those discharges have on the waters"); *Natural Resources Defense Council v. EPA,* 822 F.2d 104, 125 (D.C. Cir. 1988) (same); *Pacific Fisheries*, 615 F.2d at 805-806 (same).

EPA's approach is predictably encountering the same problems that prompted Congress in 1972 to abandon a showing of water-quality harm as the predicate for regulation. EPA acknowledges that after thirty years of CWA implementation, EPA and the States still have not assessed the quality of the majority of U.S. waters and do not know the causes of impairment for many of the waters that have been assessed. R. Ex. 13 at 0184. Compounding this, as discussed in the Statement of Facts, EPA lacks reliable data on pollutants discharged by industries and knows even less about linking the quantities of pollutants discharged with the occurrence of water quality problems. *Id.* at 0175, 0181-82, 0184-85; R. Ex. 15 at 0194-96. With such information gaps, EPA cannot reliably determine which industries pose the greatest water quality threats.

None of EPA's other criteria for ruling out revising most effluent guidelines are permissible under the 304(b) Guidelines Criteria. One, for EPA to rule out revising effluent guidelines because risk assessment data for an industry is unavailable is simply another way EPA declines to revise effluent guidelines unless an industry's discharges pose demonstrated environmental risk. Two, for

EPA to rule out revising effluent guidelines because the water pollution problems caused by an industry are more "efficiently" addressed by other regulatory and non-regulatory means is for EPA impermissibly to write § 304(b) out of the CWA for these industries. *E.g.*, *Dole*, 494 U.S. at 35, 42-43. Three, for EPA to rule out revising effluent guidelines because it finds an industry has only a few facilities is contrary to Congress' direction that EPA adopt *nationally uniform* effluent guidelines for all industries. *E.g., American Frozen Food*, 539 F.2d at 118-20. Four, for EPA to rule out revising effluent guidelines because an industry's effluent guidelines has been promulgated within the past seven years is for EPA to re-write Congress' requirement to review effluent guidelines *annually* and effluent limitations *every five years*. *See* CWA § 304(b), (m), 301(d).

In employing its risk-based screening methodology, EPA is impermissibly failing to consider ample information in EPA's possession that would allow EPA to perform its statutory duty for a technology-based review of effluent guidelines and limitations. As noted, EPA has, though has not analyzed, considerable information on advances in pollution abatement technology that should perhaps now be considered to be BPT, BAT or BCT. R. Ex. 14 at 0186-90; R. Ex. 7 at 0099; R. Ex. 17 at 0202-0205; R. Ex. 8 at 0113-14.

C. *EPA Is Failing To Schedule the Adoption of New Effluent Guidelines as Required by CWA § 304(m)(1)(B) and (C).*

CWA § 304(m)(1)(B) requires EPA's EGPs to identify new categories of industry discharging toxic and nonconventional pollutants which are not covered by existing effluent guidelines. CWA § 304(m)(1)(C) then requires EPA's EGPs to schedule promulgating new effluent guidelines for these latter industries within three years. EPA's 2004 EGP fails to comply with these mandatory duties.

Following its 2003 effluent guidelines review, EPA proposed not to schedule any new effluent guidelines promulgations. R. Ex. 8 at 0120. EPA did so not because it found there are no identifiable industries discharging pollutants currently unregulated by existing effluent guidelines, the only legally permissible basis for EPA's decision.

1. *EPA Impermissibly Ruled Out New Effluent Guidelines Based on Risk Assessment.*

In 2003, public commentors pointed out several industries discharging pollutants but not currently regulated by effluent guidelines, and even EPA acknowledged awareness of at least two such industries.[19] R. Ex. 8 at 0120. EPA

[19] The two unregulated industries recognized by EPA were chemical formulating, packaging, and repackaging operations and petroleum bulk stations and terminals.

did not schedule new effluent guidelines promulgations for these industries for much the same reasons EPA ruled out revision of most existing effluent guidelines. *Id.* *Inter alia*, EPA decided it need identify industries as targets for new effluent guidelines only when their discharges pose a significant risk to human health or the environment. *Id.* In 2004, EPA identified two industries unregulated by existing effluent guidelines, but still insisted it could rule out identifying new categories of industry for the same reasons as in 2003. R. Ex. 7 at 0102-04.

CWA § 304(m)(1)(B) requires EPA to identify *all* categories and classes of industries that discharge toxic or non-conventional pollutants but are not yet regulated by effluent guidelines. *See Reilly*, 1991 U.S. District LEXIS 5334 at 19-26 (R. Ex. 0149-0151). EPA's determination that it may avoid identifying such industries for new effluent guidelines if their discharges pose an "insignificant risk to human health or the environment" must be reversed as flatly contrary to the statute's purpose, discerned from the text read in context. *Id*; *see Dole*, 494 U.S. at 35, 42-43. The CWA requires EPA to regulate all water pollutant discharges, precluding exemption for discharges EPA considers not to be harmful or too burdensome to regulate. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); *League of Wilderness Defenders/Blue Mts.*

Biodiversity Project v. Forsgren, 309 F.3d 1181, 1190 (9th Cir. 2002); *American Mining Congress v. EPA*, 965 F.2d 759, 772 (9th Cir. 1992); *see Connecticut Fund for the Environment v. Upjohn Co.*, 660 F. Supp. 1397, 1416 (D. Conn. 1987) (rejecting contention that *de minimis* water pollutant discharges are not regulated).

EPA contends that applicable legislative history signals that EPA may exempt discharges it considers to pose insignificant risk to the environment. R. Ex. 8 at 0120. EPA misreads this legislative history, which in full reads that the determination of which discharges should be subject to effluent guidelines "*does not require the Administrator to make any determination of environmental harm*; any non-trivial discharges from sources in a category must lead to effluent guidelines." R. Ex. 12 at 0172-73 (emphasis added). Thus, Congress intended new effluent guidelines for all unregulated industries that discharge any cognizable quantity of water pollutants, irrespective of whether EPA could show these industries cause risk of environmental harm. Congress did so due to express recognition, stated repeatedly in the legislative history, that correlating pollutant discharges with actual environmental harm was such a difficult task that predicating regulation on such correlations was a recipe for inaction and failure. *E.g.*, R. Ex. 11 at 0158; R. Ex. 12 at 0168; *see* R. Ex. 16 at 0198; *California ex*

rel., 426 U.S. at 204.

2. *EPA Impermissibly Ruled Out New Effluent Guidelines for "Subcategories."*

EPA also did not identify under CWA § 301(m)(1)(B) the two industries it recognized in 2004 were not yet regulated by effluent guidelines because EPA deemed these to be only "subcategories" of industries regulated by existing effluent guidelines. R. Ex. 7 at 0102-04; R. Ex. 8 at 0120. This approach is impermissible. The term "subcategories" does not appear anywhere in the CWA, providing no statutory support for EPA's contention that it can treat industries it groups into "subcategories" differently from how CWA § 304(m)(1)(B) and (C) mandate EPA to address "categories." What EPA has denominated industrial "subcategories" are functionally the same as "categories," i.e., like-grouped industrial facilities with similar products, production methods, pollutant discharges, treatment options, and financial feasibility circumstances. *See*, *e.g.*, R. Ex. 7 at 0102. EPA's "subcategories" typically have distinct SIC codes and are thus recognized by the federal government as a common class of industry.[20] *See*

[20] SIC codes were established by the SIC Codes Interdepartmental Committee on Industrial Statistics, established by the Central Statistical Board of the United States "to develop a plan of classification of various types of statistical data by industries and to promote the general adoption of such classification as the standard classification of the Federal Government." See http://www.census.gov/epcd/www/naicsdev.htm.

R. Ex. 8 at 0119-21, R. Ex. 7 at 0102 (noting that EPA generally uses SIC codes to group industries for effluent guidelines purposes and noting that EPA-identified subcategories share a common SIC code). Thus, EPA's "subcategories" are indistinguishable from "categories" as the latter term is used in CWA section 304(m)(1)(B).

3. *EPA Impermissibly Has Failed To Set a Schedule for Completing Promulgation of New Effluent Guidelines.*

As noted, in 2004 EPA identified pursuant to CWA § 304(m)(1)(B) two industries unregulated by existing effluent guidelines. EPA failed to set a schedule for enacting new effluent guidelines for these categories within three years as specified by CWA § 304(m)(1)(C), however. EPA merely indicated it would commence rulemaking proceedings for new effluent guidelines for these industries and expressly reserved the possibility that it would ultimately decide not to complete the rulemaking. R. Ex. 7 at 0103-04. This contradicts CWA § 304(m)(1)(C)'s mandate to set a schedule "*for the promulgation of [new] effluent guidelines . . . no later than . . . three years after the publication of [effluent guideline] plans*" which identify the industries (emphasis added). EPA is, again, impermissibly re-writing the statute. *E.g., Dole*, 494 U.S. at 35, 42-43.

E. *EPA Has Failed To Publish Timely Effluent Guideline Plans.*

CWA § 304(m)(1) requires EPA every two years to publish a "plan" that includes a "schedule" for EPA's effluent guidelines review. CWA § 304(m)(2) further mandates that EPA "shall provide for public review and comment on the plan *prior* to final publication" (emphasis added).

In 2004, EPA completed its annual review of effluent guidelines and *then published* the effluent guidelines plan governing that already completed review. R. Ex. 7 at 0101. EPA similarly intends to complete its 2006 annual review of effluent guidelines first and then adopt the plan to schedule that review *after the review is over*–and to continue in this vein in the future. R. Ex. 21 at 0238. EPA has thus, in effect, decided not to have plans in place to govern half of its annual reviews of effluent guidelines. This practice violates CWA section 304(m)'s requirement to have effluent guidelines plans in place to guide EPA reviews of effluent guidelines.

EPA's unlawful practice thwarts the public comment mandate imposed by Congress and mandated by EPA regulations. 40 C.F.R. §§ 25.8, 25.10, 25.2 (mandating that EPA consider whether public comments warrant change in EPA proposed action); *see generally* 40 C.F.R. §§ 25.1-25.14. Of what use are public comments on how EPA should "plan" its annual reviews of effluent guidelines and

EPA's "response" to such comment after EPA has completed its reviews? Obviously, EPA cannot modify proposed actions in response to public comment that are already taken. Members of the commenting public further would be denied their due process rights to challenge reviews before they are undertaken in accord with EPGs if the EPGs are published after the reviews are over. Such a regime is contrary to fundamental principles of administrative law and due process requiring meaningful opportunity for the public to comment and agencies to consider such comments before acting. *See e.g., Wroncy v. Bureau of Land Management*, 777 F. Supp. 1546, 1549 (D. Ore. 1991).

In specifying that EPA publish a "plan" to "schedule" its reviews of effluent guidelines, EPA logically created a mandatory deadline for those plans publication: no later than the date that the reviews governed by the plans begin. The commonly understood English language definition of a "plan" and/or a "schedule" is of something issued *before* the events scheduled and otherwise governed.[21] *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225-34 (1994) (statutory terms are presumed to have ordinary dictionary meaning); *Park*

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[21] A "plan" is "any detailed scheme, program, or method worked out *beforehand* for the accomplishment of an object." A "schedule" is "a program of *forthcoming* events or appointments . . . a production plan allotting work *to be done* and specifying deadlines." American Heritage Dictionary of the English Language, New College Edition (emphasis added).

'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). EPA conducts its annual reviews on a calendar year schedule and publishes its plans every even-numbered year, meaning EPA must have these plans in place before January 1 of each even-numbered year. *See, e.g.*, *In re Center for Auto Safety,* 793 F.2d at 1348-49 (statutory deadlines may be inferred from agency convention).

II. *The District Court Should Have Exercised Jurisdiction over All OCE's Claims.*

A. *CWA Section 509(b) Does Not Assign Courts of Appeals Exclusive Original Jurisdiction over Any of OCE's Claims.*

The District Court assumed only partial jurisdiction over OCE's claims pursuant to CWA § 505(a)(2), holding that CWA § 509(b)(1) assigned jurisdiction over part of OCE's case exclusively to the courts of appeals. The District Court acknowledged that CWA § 505(a)(2) grants district court jurisdiction over claims for EPA breach of mandatory CWA duty, but erroneously held that such § 505(a)(2) jurisdiction does not extend to OCE's challenges of EPA's "substantive decisions" at issue in this case. R. Ex. 18 at 0212.

Neither the text of nor case law interpreting CWA § 509(b)(1) distinguishes

between "substantive" and other types of EPA actions in assigning jurisdiction to the courts of appeals. Instead, CWA § 509(b)(1) assigns court of appeals jurisdiction to review agency actions, substantive or otherwise, under specific sections of the CWA. The actions identified by CWA § 509(b)(1) *do not include* review of the three EPA actions at issue here: review of effluent guidelines under CWA § 304(b), promulgation of EGPs under CWA § 304(m), and review of effluent limitations under CWA § 301(d). Under controlling 9th Circuit precedent, Plaintiffs' challenges to each of these actions was thus properly brought to district court. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

The District Court nonetheless found exclusive courts of appeals jurisdiction to review these actions because EPA actions under CWA § 301 are reviewable in the courts of appeals and EPA actions under CWA § 301 and § 304 are "intertwined." R. Ex. 18 at 0212. *Longview Fibre*, however, rejected (at EPA's urging) that courts of appeals have jurisdiction to review EPA actions not expressly listed in CWA § 509(b)(1) when such actions are "functionally similar or closely related to" actions that are listed in CWA § 509(b)(1). 980 F.2d at 1314. Applying the maxim *expressio unius est exclusio alterius*, the Ninth Circuit deemed CWA § 509(b)(1)'s detailed listing of EPA actions reviewable by the

courts of appeals excludes court of appeals review of any other EPA actions under the CWA:

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

Id. at 1313; *accord Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431-32 (9th Cir. 1991); *Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003).

The District Court's contrary reliance on *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 is misplaced. *E.I. du Pont* actually supports the *Longview Fibre* rule. In *du Pont*, the Court deemed that EPA regulations had to be effluent limitations under CWA § 301 rather than effluent guidelines under CWA § 304 to be reviewable in the courts of appeals:

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

430 U.S. at 124-25 (emphasis added).[22] Thus *du Pont* supports that court of

[22] In a footnote, the Supreme Court noted "It has been suggested, however, that even if the EPA regulations are considered to be only § 304 guidelines, the Court of Appeals might still have ancillary jurisdiction to review them because of

appeals jurisdiction extends *only* over EPA actions expressly enumerated in CWA § 509(b)(1), and not to any other actions, no matter how closely related to EPA actions listed in CWA § 509(b)(1).

Similarly another case relied upon by the District Court, *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 511-14 (2d Cir. 2005), found exclusive court of appeals jurisdiction not because EPA's challenged actions were closely related to EPA actions listed under CWA § 509(b)(1), but because those actions *were listed under CWA § 509(b)(1)*. In *Waterkeeper*, the court of appeals asserted jurisdiction to review EPA promulgation of regulations which, in keeping with EPA's now standard approach, served as both effluent limitations under CWA § 301 and effluent guidelines under CWA § 304. *Id*. The *Waterkeeper* decision thus provides no support for a finding that an EPA action which is not listed in CWA § 509(b)(1) can be within the court of appeals' exclusive jurisdiction.

While OCE is challenging EPA's failure to review and decide whether to revise effluent limitations pursuant to CWA § 301(d), this does not create court of appeals jurisdiction. CWA § 509(b)(1) makes final agency action in *promulgating*

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their close relationship with the § 301 effluent limitations . . . which are directly reviewable in the Court of Appeals." *Id*. The Court, however, did not endorse this theory and instead held that it had to find that the EPA regulations in issue were effluent limitations under CWA § 301 rather than only effluent guidelines under CWA § 304 to be reviewable in the courts of appeals.

effluent limitations under CWA § 301 reviewable in the courts of appeals. A *review* of regulations or adopting a plan for reviewing such regulations is not the same action as *promulgation* of regulations, hence not within court of appeals' jurisdiction. *See Chemical Mfrs. Ass'n*, 870 F.2d at 266 (CWA § 509(b)(1)(E) assigns jurisdiction to court of appeals to review *only* EPA promulgation of effluent limitations, not EPA delay in revising effluent limitations).

In sum, the EPA actions at issue here are *not* actions listed in CWA § 509(b)(1), leaving no basis for court of appeals' exclusive original jurisdiction.

B. *CWA § 505(a)(2) Grants District Court Jurisdiction over OCE's Claims*.

As noted, the District Court partially agreed with OCE that it had jurisdiction to hear OCE's claims concerning EPA mandatory CWA duties to review effluent guidelines and limitations and to prepare EGPs under CWA § 505(a)(2). R. Ex. 18 at 0212-03. While the District Court was correct to find some CWA § 505(a)(2) jurisdiction,[23] the District Court erred in its determination of the extent of EPA's mandatory CWA duties reviewable in district court under CWA § 505(a)(2).

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[23] *See*, *e.g.*, *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

The District Court essentially found that its jurisdiction was limited to reviewing whether EPA has acted at all (1) to perform some sort of annual review of effluent guidelines and five year review of effluent limitations, (2) make some decision, no matter how ill-considered, whether to revise the guidelines and limitations, and (3), publish some sort of EGP every two years. The District Court found it lacked jurisdiction to consider OCE's arguments that while EPA had taken some actions toward reviewing its effluent guidelines and limitations and had published documents entitled EGPs, EPA had violated CWA directives on how to conduct its reviews and what to include in EGPs:

> At the hearing, it became evident that plaintiffs recognize that the EPA has complied at some basic level with these [CWA] requirements [to review effluent guidelines and limitations and publish EGPs], and they object to the method by which EPA did so, arguing that it is contrary to the purpose of the CWA to replace a technology-based review with a hazard-based review, and that the rules promulgated [by EPA] have the effect of exempting certain categories of water pollution entirely from review. *Those questions, would be answered by a substantive review of the 2004 EGP, which this court has no jurisdiction to conduct.*

R. Ex. 18 at 0215.

The District Court overlooked that CWA § 505(a)(2), like the APA, 5 U.S.C. § 706(1), codifies traditional mandamus principles under which courts review whether an agency has performed a mandatory duty *in total and in the manner required. See e.g.*, *Florida PIRG*, 386 F.3d at 1088; *Norton v. Southern*

Utah Wilderness Alliance, 124 S. Ct. 2373, 2378-80 (2004). As explained in Section I. above, EPA has not completed reviews of effluent guidelines and limitations nor published EGPs in the manner required by the CWA. EPA has thus breached mandatory CWA duties, creating proper district court jurisdiction under CWA § 505(a)(2).

C. *Alternatively, the APA and 28 U.S.C. § 1331 Grant District Court Jurisdiction.*

Assuming *arguendo* that OCE's claims only challenge discretionary EPA action in reviewing and deciding whether to revise effluent guidelines and limitations and adopting EPGs, district court jurisdiction over OCE's claims would still be proper under the APA and 28 U.S.C. § 1331. District courts have jurisdiction under the APA to review EPA's discretionary CWA actions other than the narrow class of actions made reviewable only in the courts of appeals. *See City of Las Vegas,* 755 F.2d at 704; *Scott*, 741 F.2d at 995. As argued in section II.A. above, the EPA actions at issue are not within this narrow class. The District Court erroneously found that OCE could not rely on the APA and 28 U.S.C. § 1331 as an alternative basis for jurisdiction because OCE's First Amended Complaint did not state claims under the APA. The First Amended Complaint plainly did so. *See* First Amended Complaint ¶¶ 1, 12, 64, 70, 73, 78, 82-84.

III. *If the District Court Lacked Jurisdiction over OCE's Claims, these Claims Should Be Deemed Transferred to this Court.*

Following the District Court's Judgment for EPA, the District Court denied OCE's motion to transfer OCE's claims to the Ninth Circuit which the District Court had determined to be within exclusive court of appeals jurisdiction. The District Court erroneously held that OCE's Notice of Appeal deprived the District Court of jurisdiction to hear OCE's transfer motion. R. Ex. 20. While this Court would be correct to reverse the District Court's ruling on OCE's transfer motion,[24] this Court in any case may and should on its own authority transfer the claims in issue if it agrees with the District Court's interpretations of CWA § 509(b)(1)

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[24] OCE's Notice of Appeal transferred jurisdiction to this Court *solely over the claims OCE could appeal*. *Department of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1120-21 (9th Cir. 2002), *cert. dismissed, City of Hawthorne v. Cal. Dept. of Toxic Substances*, 539 U.S. 911 (2003). If the District Court was correct that it *never had* jurisdiction over the claims OCE sought to transfer to this Court, OCE could not, of course, have appealed these claims, and the Notice of Appeal could not have transferred jurisdiction over them to this Court.

Furthermore, the judge-made rule that a notice of appeal generally terminates district court jurisdiction over claims appealed is meant only to promote judicial economy. The rule has many recognized exceptions, including retention of district court jurisdiction whenever provided for by statute. *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1987). 28 U.S.C. § 1631 expressly provides a limited grant of power to all federal courts to order transfer of claims over which they have no jurisdiction--this is the very purpose of the statute. *E.g.*, *Hempstead v. U.S. EPA*, 700 F.2d 459, 462 (8th Cir. 1986). Thus OCE's notice of appeal could not and did not have deprived the District Court of that statutory authority to transfer the claims in issue to this Court.

jurisdiction. *McCauley v. McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987); (transferee court of appeals may order a case transferred to itself under 28 U.S.C. § 1631 when it is the court of proper jurisdiction).

28 U.S.C. § 1631 mandates transfer of cases when a party has misfiled suit in a federal court lacking jurisdiction when another federal court has jurisdiction instead if: (1) the claims misfiled in the transferring court would have been timely if they had been filed instead in the transferee court and (2) transfer is in the interest of justice. *McCauley*, 814 F.2d at 1351-52; *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). 28 U.S.C. § 1631 precludes the harsh result of a litigant choosing the wrong federal court due to justifiable uncertainty as to which court has jurisdiction and then being barred by the statute of limitations from refiling in the correct court. In such circumstances, transfer is necessarily in the interest of justice. *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964-65 (9th Cir. 2004); *Rodriguez-Roman v. INS*, 98 F.3d 416, 421-24 (9th Cir. 1996); *Trustees for Alaska v. DOI*, 919 F.2d 119, 123 (9th Cir. 1990); *McCauley*, 814 F.2d at 1351-52; *Hempstead*, 700 F.2d at 462-63.

According to this Court, CWA § 509(b) creates a "regulatory scheme so complex and difficult" that interested parties must typically "hire a horde of lawyers" to discern what court they should be in. *Longview Fibre*, 980 F.2d at

1313-14. Accordingly, if any of OCE's claims were within this Court's CWA § 509(b) jurisdiction, hence misfiled in the District Court, OCE's mistake was justifiable.

Though OCE timely filed in District Court, the 120-day statute of limitations imposed by CWA § 509(b) would preclude OCE from re-filing some of these claims in this Court. OCE's claims include challenge to EPA's failure to adopt legally adequate EGPs. OCE's original complaint, filed in May 2004, sought relief from EPA's failure to yet adopt an EGP for 2004. After EPA published its EGP for 2004 on September 2, 2004, OCE promptly sought leave to amend its complaint and was granted leave to amend its complaint on December 13, 2004, within 120 days of EPA's September 2, 2004 publication of the EGP. Thus, OCE's challenge first to EPA's failure to timely adopt the 2004 and 2005 EGP and then to EPA's adoption of an inadequate EGP would have been timely had it been filed in a court of appeals rather than district court.

OCE's District Court claims further include challenge to EPA's failure to review its effluent guidelines and limitations. OCE's original complaint claimed that EPA was not conducting its yet uncompleted 2004 review of its effluent guidelines and limitations as required by the CWA. After EPA published notice in the Federal Register on September 2, 2004 that it had completed this 2004 review,

OCE sought and was granted leave to amend its complaint to allege that EPA's completed 2004 review was unlawful. OCE was granted leave within 120 days of EPA's completion of its 2004 review. Thus, OCE's challenge first to EPA's on-going 2004 review of effluent guidelines and limitations and then to EPA's completed 2004 review would have been timely had it been filed in a court of appeals rather than district court.

More than 120 days has elapsed since EPA published the 2004 EGP and completed its 2004 review of effluent guidelines and limitations. The 120-day statute of limitations imposed by CWA § 509(b) would thus bar OCE from filing a new original Ninth Circuit action now to challenge these EPA actions. In such circumstance, transfer is mandated in the interests of justice to avoid the harsh result of OCE, justifiably uncertain as to where to file and after having timely filed in district court, now being barred by the statute of limitations from refiling some of its claims in this Court.[25] *Rodriguez-Roman*, 98 F.3d at 423-24; *Oil Chemical and Atomic Workers v. Skinner*, 724 F. Supp. 1264, 1268-69 (N.D. Cal. 1989); *Hempstead*, 700 F.2d at 462-63.

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[25] This is particularly true given that OCE previously filed two Petitions for Review to the Ninth Circuit seeking clarification on the jurisdictional issues before the 120 statute of limitations had run, which the Court declined to provide. *See OCE et al. v. EPA et al.*, Case No. 04-74291.

CONCLUSION

This Court should reverse the District Court's grant of judgment on the pleadings and summary judgment for EPA and remand with instructions to enter summary judgment granting OCE declaratory relief establishing:

1. In 2003, 2004 and 2005, EPA violated its mandatory duties under CWA §§ 304(b), (m) and 301(d) when it ruled out examining nearly all of its effluent guidelines and limitations to determine whether they still set appropriate technology-based standards on the basis that EPA need only update BPT, BCT and BAT standards when EPA finds that water pollutant discharges from a given industry poses the most significant relative environmental harm risk. EPA's 2003, 2004 and 2005 reviews of effluent guidelines and effluent limitations did not comply with CWA §§ 304(b), (m) and 301(d) because EPA did not, in accord with the Effluent Guidelines Criteria of CWA §§ 304(b)(1)(B), (b)(2)(B), (b)(4)(B), review and then determine whether its existing effluent guidelines and limitations still appropriately define BPT, BCT and BAT.

2. In 2003, 2004 and 2005, EPA further violated its mandatory duties under CWA §§ 304(b), (m) and 301(d) when it ruled out reviewing effluent guidelines and limitations to determine whether they still reflect BPT, BAT, and BCT on the basis that: (1) there was a lack of available risk assessment data for an industry,

(2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility by facility basis because there were only a few facilities in the industry or (4) an effluent guideline for the industry had been promulgated within the past seven years. None of these reasons is a permissible basis for EPA to decline to perform the technology-based review required by CWA §§ 304(b), (m) and 301(d) and the Effluent Guidelines Criteria.

3. EPA's 2004 EGP violated EPA's mandatory duties under CWA § 304(m)(1) to publish an effluent guidelines plan which (1) identifies new categories of industry discharging toxic and nonconventional pollutants which are not regulated by existing effluent guidelines, and (2) schedules the promulgation within three years of new effluent guidelines for these latter industries. EPA may not decline to identify currently unregulated categories of industry discharging toxic and nonconventional and schedule promulgation of new effluent guidelines for such categories on the basis that EPA finds that (a), the industry's discharge pose little environmental risk, (b), regulation of the industry is better handled by some other aspect of the CWA or by voluntary industry action, or (c), the industrial sector is an unregulated "subcategory" of a larger category of industry that includes other "subcategories" that are regulated by existing guidelines.

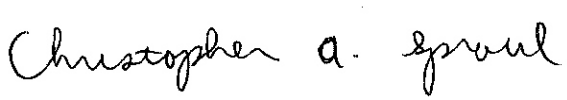
4. EPA's 2004 EGP violated its mandatory duty under CWA § 301(m)(1)(C) to set a schedule for promulgating final new effluent guidelines for newly identified, currently unregulated categories of industrial water polluters within three years when EPA indicated it may in the future terminate rulemaking for such new industries.

5. By publishing its 2004 EGP well into the planning period ostensibly "scheduled" by the 2004 EGP, EPA violated its mandatory duty under CWA § 301(m) to publish a plan governing its effluent guidelines review.

The Court should further direct the District Court on remand to conduct additional proceedings to determine the appropriate scope of injunctive relief.

In ordering reversal, the Court should find erroneous the District Court's holding that some of OCE's claims are within this Court's original jurisdiction. Alternatively, the Court should exercise its original jurisdiction under CWA § 509(b)(1) to enter an order granting the declaratory relief outlined above and order additional proceedings before this Court on injunctive relief.

Respectfully submitted this 11th day of October 2005,



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In accord, with FRAP 32(a)(7), counsel certifies that the word count for this brief is 13,262.