

12-10-04

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

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

12 Plaintiffs,)

13 v.)

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

18 Defendants.)

Civil Action No.
04-2132 (PJH)

E-Filing

19 **JOINT STIPULATION FOR SCHEDULING ORDER + ORDER:**

20
21 Plaintiffs Our Children's Earth Foundation and Ecological Rights Foundation) (jointly
22 referred to as "the Foundations"), Defendants United States Environmental Protection Agency
23 and Michael O. Leavitt, Administrator (jointly referred to as "EPA"), and Intervenor-Defendant
24 Association of Metropolitan Sewerage Agencies ("AMSA"), hereby stipulate to the following
25 schedule and respectfully request that the Court enter the stipulation as an order.

26 1. On September 10, 2004, the Court entered an order staying this matter pending a
27 final decision by the Ninth Circuit Court of Appeals on the petition filed by the Foundations.
28 The order required that, if the Ninth Circuit ruled before December 6, 2004, the parties were to
submit a proposed briefing schedule.

1 summary judgment.

2 So Stipulated and Agreed on December 10, 2004:

3 FOR PLAINTIFFS

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18 PURSUANT TO STIPULATION, IT IS SO ORDERED.

19
20 
21 PHYLLIS J. HAMILTON
UNITED STATES DISTRICT JUDGE

22 DATED: 12-10-04

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12-10-04

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11 ECOLOGICAL RIGHTS FOUNDATION
and OUR CHILDREN'S EARTH FOUNDATION

12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 OUR CHILDREN'S EARTH FOUNDATION and
16 ECOLOGICAL RIGHTS FOUNDATION

17 Plaintiffs,

18 v.

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

22 Defendants.

) Case No. C 04-2132 PJH

) PLAINTIFFS' NOTICE OF FILING
) FIRST AMENDED COMPLAINT
) FOR DECLARATORY AND
) INJUNCTIVE RELIEF PURSUANT
) TO STIPULATION

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1 PLEASE TAKE NOTICE that Plaintiffs Our Children's Earth Foundation and Ecological
2 Rights Foundation ("Plaintiffs") hereby file their First Amended Complaint in the above-entitled
3 action pursuant to the Stipulation filed by the parties and signed by the Court on December 10,
4 2004. *See* Federal Rules of Civil Procedure (FRCP) 15(a.) Plaintiffs' First Amended Complaint
5 adds to Plaintiffs' existing case a new cause of action and allegations regarding EPA's new
6 Effluent Guidelines Plan for 2004/2005 issued on September 2, 2004. *See* 69 Fed. Reg. 53705.
7 Respectfully submitted this 13th day of December, 2004.

8 By: /s/ Christopher Sproul
9 Christopher Sproul
10 Attorney for Plaintiffs
11 Ecological Rights Foundation and
12 Our Children's Earth Foundation
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18 ECOLOGICAL RIGHTS FOUNDATION
19 and OUR CHILDREN'S EARTH FOUNDATION

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

22	OUR CHILDREN'S EARTH FOUNDATION and)	Case No. C 04-2132 PJH
23	ECOLOGICAL RIGHTS FOUNDATION)	
24)	
25	Plaintiffs,)	FIRST AMENDED COMPLAINT
26)	FOR DECLARATORY AND
27	v.)	INJUNCTIVE RELIEF
28)	
29	UNITED STATES ENVIRONMENTAL)	CLEAN WATER ACT AND
30	PROTECTION AGENCY and MICHAEL)	ADMINISTRATIVE PROCEDURE
31	LEAVITT,)	ACT CASE
32	as Administrator of the United States Environmental)	
33	Protection Agency,)	
34)	
35	Defendants.)	

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

3 **INTRODUCTION**

4 1. Plaintiffs bring this action under section 505(a)(2) of the Clean Water Act (CWA), 33
5 U.S.C. § 1365(a)(2), which authorizes citizens to bring civil actions against the EPA
6 Administrator for failure to perform any non-discretionary CWA duty, and under the
7 Administrative Procedure Act (APA) provisions that permit aggrieved parties to seek judicial
8 review of federal agency actions, 5 U.S.C. § 702 and 5 U.S.C. § 706. Plaintiffs seek relief from
9 the failure of Defendants U.S. Environmental Protection Agency and Michael Leavitt,
10 Administrator of the U.S. Environmental Protection Agency (collectively, “EPA” or
11 “Defendants”) to conduct an annual review of Effluent Limitation Guidelines (“Effluent
12 Guidelines”) in accord with CWA sections 304(b) and 304(m)(1)(A); 33 U.S.C. §§ 1314(b),
13 (m)(1)(A). Plaintiffs further seek relief from Defendants’ failure to review Effluent Limitations
14 every five years as required by CWA section 301(d), 33 U.S.C. § 1311(d). Plaintiffs also seek
15 relief from Defendants’ failure to adopt Effluent Guidelines Plans governing their annual review
16 and promulgation of Effluent Guidelines in accord with the deadlines established by CWA section
17 304(m).

18 2. Plaintiffs also seek relief from the Defendants’ adoption of an Effluent Guidelines Plan
19 under Clean Water Act (“CWA”) section 304(m), 33 U.S.C. § 1314(m), which does not comply
20 with EPA’s CWA obligations for such Plan. CWA section 304(m) requires EPA to publish an
21 Effluent Guidelines Plan every two years. 33 U.S.C. § 1314(b). CWA section 304(m)(1)(A)
22 requires such Plans to establish a schedule for the annual review and revision of Effluent
23 Guidelines in accord with CWA sections 304(b). 33 U.S.C. §§ 1314(b), (m)(1)(A). CWA
24 section 304(m)(1)(B) requires such Plans to identify categories of industries discharging toxic or
25 nonconventional pollutants for which Effluent Guidelines have not previously been published. 33
26 U.S.C. § 1314(m)(1)(B). CWA section 304(m)(1)(C) requires such Plans to establish a schedule
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1 for promulgation of Effluent Guidelines for categories of industry for which EPA has not
2 previously promulgated Effluent Guidelines. 33 U.S.C. § 1314(m)(1)(C). On September 2, 2004,
3 EPA published an Effluent Guidelines Plan for calendar years 2004 and 2005 (“the EGP”). 69
4 Fed. Reg. 53705. The EGP fails to meet any of the requirements for an Effluent Guideline Plan
5 established by CWA section 304(m). The EGP fails: (1) to establish a legally adequate schedule
6 for the annual review and revision of promulgated Effluent Guidelines, (2) to identify all
7 categories of industries now known to EPA to be discharging toxic or nonconventional pollutants
8 for which Effluent Guidelines have not previously been published, and (3) to establish a schedule
9 for promulgation of Effluent Guidelines for any categories of industry for which EPA has not
10 previously promulgated Effluent Guidelines.

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

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

11 5. EPA has established Effluent Guidelines for fifty-six categories and over 450
12 subcategories of industry. CWA sections 304(b) and 304(m)(1)(A) mandate that EPA review *all*
13 of these Effluent Guidelines annually to determine whether technological advance or changed
14 economic circumstances warrants their revision. In 2003, however, EPA did not analyze nor
15 reach conclusions concerning whether technological improvements or change in the economic
16 feasibility of pollution control has occurred within *any* of the classes and categories of industries
17 addressed by existing Effluent Guidelines. Instead, in 2003, EPA conducted a largely
18 unsuccessful attempt to rank the relative environmental risks posed by the discharges from
19 different categories of industrial dischargers. EPA then used this environmental risk ranking to
20 select only two of the fifty-six categories of Effluent Guidelines for further review in 2004.

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

16 7. EPA’s unlawful methodology for review of Effluent Guidelines in 2003 has necessarily
17 translated into on-going violation of EPA’s mandatory statutory duty to review Effluent
18 Guidelines in 2004 given EPA’s decision to make its 2004 review of Effluent Guidelines the
19 second half of a two-year review begun in 2003. EPA used the unlawful screening of Effluent
20 Guidelines it performed in 2003 to decide essentially to review a small subset of Effluent
21 Guidelines in 2004 for: (a) the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF)
22 industrial category set forth at 40 C.F.R. part 414, (b) the Petroleum Refining category set forth
23 at 40 C.F.R. part 419, (c) for oil and gas production and exploration facilities in Cook Inlet,
24 Alaska, a subcategory of Effluent Guidelines set forth at 40 C.F.R. part 435, Subpart D). This is
25 unlawful as, one, the CWA requires EPA to review *all* existing Effluent Guidelines annually and
26 two, EPA employed impermissible and arbitrary and capricious criteria in selecting these
27

1 categories for review.

2 8. The CWA also requires EPA to review and revise as appropriate Effluent Limitations
3 required by CWA section 301(b)(2) "at least every five years." CWA § 301(d), 33 U.S.C. §
4 1311(d). EPA's Effluent Guidelines regulations also establish Effluent Limitations within the
5 meaning of CWA section 301(b)(2). Thus, EPA necessarily employs the same methodology in
6 reviewing Effluent Limitations that it employs in reviewing its Effluent Guidelines. Accordingly,
7 EPA's review of Effluent Limitations has generally been unlawful for much the same reasons its
8 review of Effluent Guidelines has been unlawful. Most obviously, EPA's determination not to
9 review any Effluent Limitations regulations promulgated since 1996 is directly contrary to CWA
10 section 301(d)'s obligation to review Effluent Limitations required by CWA section 301(b)(2) "at
11 least every five years."

12 9. The CWA also requires EPA to publish Effluent Guidelines Plans biennially setting
13 forth a schedule for the review and revision of existing Effluent Guidelines and a schedule for the
14 promulgation of new Effluent Guidelines. CWA § 304(m), 33 U.S.C. § 1314(m). EPA is
15 required to take and respond to public comment before adopting such Plans to allow the public an
16 opportunity to influence EPA's subsequent conduct governed by the Plans. CWA § 304(m)(2),
17 33 U.S.C. § 1314(m)(2). EPA has adopted and intends to continue a pattern and practice of
18 issuing its Effluent Guideline Plans well after the commencement of the time period ostensibly
19 covered by the Plans, however. Thus, EPA has routinely lacked final Effluent Guideline Plans
20 that have been subject to public review and comment during a substantial portion of EPA's
21 Effluent Guidelines review.

22 10. Therefore, Plaintiffs seek declaratory relief establishing that EPA's practices in
23 reviewing Effluent Guidelines and Effluent Limitations and in publishing Effluent Guidelines Plans
24 are unlawful. Plaintiffs further seek injunctive relief compelling EPA to review Effluent
25 Guidelines and Effluent Limitations and to publish Effluent Guidelines Plans in accordance with
26 the requirements of the CWA.

1 11. Plaintiffs further seek declaratory relief establishing that EPA's adoption of the EGP
2 is contrary to law and that the EGP does not meet the requirements for an Effluent Guidelines
3 Plan established by CWA section 304(m). Plaintiffs further seek injunctive relief compelling EPA
4 to revise the EGP and, in conjunction with future two-year planning cycles, to adopt Effluent
5 Guidelines Plans which fully comport with CWA section 304(m).

6 **JURISDICTION**

7 12. This Court has subject matter jurisdiction over the claims for violations of the CWA
8 set forth in this Complaint pursuant to CWA section 505(a)(1), 33 U.S.C. § 1365(a)(1), and 28
9 U.S.C. section 1331 (an action for declaratory, injunctive and other relief arising under the
10 Constitution and laws of the United States). This Court further has subject matter jurisdiction
11 pursuant to Title 28 United States Code section 1331 because this case involves a civil action
12 arising under the laws of the United States, specifically 5 U.S.C. section 702, which authorizes
13 any person aggrieved by an agency action under a relevant statute to seek judicial review; and 5
14 U.S.C. section 706, which authorizes a reviewing court to compel an agency to take an action
15 that has been unlawfully withheld or unreasonably delayed, and to set aside agency actions that
16 are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
17 law.

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

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

2 **VENUE**

3 15. Venue in the United States District for the Northern District of California is proper
4 under 28 U.S.C. section 1391(e) because defendant EPA's main office for EPA Region 9 is
5 located at 75 Hawthorne Street, San Francisco, California. In addition, EPA's inaction or
6 misconduct in reviewing and updating Effluent Guidelines and Effluent Limitations and adopting
7 legally inadequate Effluent Guidelines Plan has caused injury to Plaintiffs by leading to the
8 improper and unduly lenient regulation of the pollutant discharge from various point sources of
9 pollution located within the Northern District of California.

10 **INTRADISTRICT ASSIGNMENT**

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

17 **THE PARTIES**

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

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

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

23 **LEGAL AND FACTUAL BACKGROUND**

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

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

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

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

22 23. Effluent Guidelines and related technology-based Effluent Limitations represent the
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24
25 ¹ *But see* CWA § 301(b)(2)(C), (D), (E) (stating that the deadlines by which Effluent
26 Limitations shall be “achieved” are “no later than three years after the date *such limitations are*
27 *promulgated under section 1314(b) of this title* [CWA section 304(b)],” thus implying that
Effluent Guidelines regulations promulgated under CWA § 304(b) are necessarily also Effluent
Limitations under CWA § 301(b).

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

10 24. EPA has promulgated Effluent Guidelines and Effluent Limitations for fifty-six classes
11 and categories and over 450 subcategories of industrial water polluters, which represents some,
12 but not all of the classes and categories of industrial water polluters in the United States.

13 25. CWA section 304(b) requires EPA to revise Effluent Guidelines annually, if
14 appropriate. 33 U.S.C. § 1314(b). CWA section 304(m)(1)(A) further requires EPA to publish a
15 plan which establishes a schedule for the annual review of existing Effluent Guidelines. 33 U.S.C.
16 § 1314(m)(1)(A). Taken together, these provisions require EPA to review existing Effluent
17 Guidelines annually to determine whether they should be revised.

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

14 27. In addition, CWA section 301(d) specifies that EPA must review all BAT-based and
15 BCT-based Effluent Limitations required by CWA section 301(b)(2) "at least every five years."
16 33 U.S.C. § 1311(d). EPA must also revise these Effluent Limitations "if appropriate."

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

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

25 29. On December 31, 2003, EPA published in the Federal Register the results of its
26 annual review of Effluent Guideline regulations for calendar year 2003. *See* 68 Fed. Reg. 75515
27

1 (“EPA December 2003 Notice”). The EPA December 2003 Notice indicated that EPA had
2 adopted a biennial review process, under which EPA would review Effluent Guidelines in two
3 year increments, with a screening level analysis in the first year and a detailed analysis of two
4 selected Effluent Guidelines in the second year. The EPA December 2003 Notice summarized
5 EPA’s screening level analysis for 2003, which constituted EPA's annual review of Effluent
6 Guidelines for 2003. EPA indicated that it would perform the second half of this review, the
7 more detailed analysis of two selected Effluent Guidelines, in 2004.

8 30. In 2003, as EPA explained in the EPA December 2003 Notice, EPA devised four
9 factors to employ in screening which of its fifty-six categories of Effluent Guidelines it would
10 review in more detail in 2004. EPA identified "Factor 1" as:

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

13 EPA identified "Factor 2" as:

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

18 EPA identified "Factor 3" as:

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

21 EPA identified "Factor 4" as:

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

26 68 Fed. Reg. 75520-21.

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

1 at 75521-22.

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

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

18 34. EPA employed two sources of information to perform its analysis in 2003 of its
19 Factor 1: EPA Toxics Release Inventory (TRI) Data and three year old OECA Permit
20 Compliance System (PCS) Data generated in 2000. EPA conceded, however, that both of these
21 data sources are incomplete and do not accurately characterize the range of health and
22 environmental risks posed by categories of industry discharging pollutants to surface waters. *See,*
23 *e.g.*, 68 Fed. Reg. 75525; *see also* EPA, Factor 1 Analysis: Human Health and Environmental
24 Impacts ("Factor 1 Report") at 2-2 to 2-8; 3-2, 3-3; EPA, Description and Results of EPA
25 Methodology to Synthesize Screening Level Results for the Effluent Guidelines Program Plan for
26 2004/2005 ("Methodology Memo") at 15 (EPA stating that "reported discharges in PCS and TRI
27
28

1 do not represent a national estimate of pollutant discharges for a variety of reasons”). Indeed,
2 EPA encountered so many difficulties and imprecision with available data that EPA could not
3 reliably have used its 2003 Factor 1 analysis to reach meaningful conclusions about the relative
4 environmental and human health impacts of water pollutant discharges from specific industries.

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

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

11 36. In 2004, EPA continued to thwart the central Congressional purpose behind CWA
12 sections 304(b) and 304(m)(1)(A) of having EPA regularly and *systematically* review the
13 technological and economic feasibility of requiring the Nation’s industries further to reduce their
14 discharges of water pollutants.

15 37. On September 2, 2004 EPA published the results of its 2004 annual review of
16 Effluent Guidelines in the Effluent Guidelines Plan for 2004/2005 (as defined above, “the EGP”).
17 69 Fed. Reg. 53705. The EGP indicates that EPA completed its 2004 review of Effluent
18 Guidelines by the end of August 2004. The EGP further indicates that EPA completed its entire
19 review of Effluent Guidelines in 2004 *before* publishing any plan setting forth a schedule for this
20 review of 2004 Effluent Guidelines. Thus, EPA conducted its 2004 annual review of Effluent
21 Guidelines without any Effluent Guidelines Plan in place to govern or schedule this review.

22 38. As reflected in the EGP, in 2004, with the possible exception of one subcategory of
23 the over 450 subcategories of industry covered by existing Effluent Guidelines, EPA did not
24 review in any detailed or meaningful fashion whether it would be technically and economically
25 feasible for any categories of industry covered by EPA’s existing Effluent Guidelines to reduce
26 their pollutant discharges below the levels set by those Guidelines. As a result, EPA was unable
27

1 to reach any valid conclusions, even tentative or preliminary, about whether it would be
2 appropriate to revise any but one subcategory of its existing Effluent Guidelines.

3 39. In 2004, EPA's ostensible "review" of Effluent Guidelines consisted essentially of a
4 continuation of its largely unsuccessful attempt in 2003 to rank the relative environmental risks
5 posed by the discharges from different categories of industrial dischargers. EPA was unable,
6 however, to reach any supportable, meaningful conclusions about the relative risks posed by such
7 discharges.

8 40. In 2004, EPA focused primarily on reviewing its Effluent Guidelines for two
9 categories of industry: (1) the OCPSF industrial category and (2) the Petroleum Refining
10 industrial category. As part of its review of the OCPSF Effluent Guidelines, EPA also reviewed a
11 subcategory of the Inorganic Chemicals industry, chlor-alkali operations (EPA's existing
12 Guidelines for the Inorganic Chemicals industry category are codified at 40 C.F.R. part 415).
13 EPA also reviewed one provision in the Effluent Guidelines for the Coastal Subcategory of the Oil
14 and Gas Extraction Effluent Guidelines which governs the discharge of produced water, drilling
15 fluid, and cuttings from oil and gas production and exploration facilities in Cook Inlet, Alaska
16 (EPA's existing Guidelines for this subcategory are codified at 40 C.F.R. part 435, Subpart D).
17 None of even this "focused" review analyzed in any meaningful fashion whether it would be
18 technically and economically feasible for categories of industry to reduce their pollutant discharge,
19 with one possible exception. With one exception, EPA did not offer any conclusions, even
20 tentative and preliminary, about whether these categories of industry would be technically and
21 economically able to reduce their pollutant discharges. (EPA did state that it evaluated
22 technological and economic factors for Cook Inlet oil and gas facilities and concluded based on
23 these factors that it would not be appropriate to schedule Guidelines for such facilities for
24 revision).

25 41. In sum, in 2004, EPA conducted its ostensible "review" of Effluent Guidelines as
26 follows: (1) EPA did not consider the two main factors that the CWA mandates EPA to consider
27

1 in reviewing effluent guidelines: technical feasibility of reducing pollutant discharge and economic
2 feasibility of reducing pollutant discharge, (2) EPA did not review the technical and economic
3 feasibility of pollutant reduction for categories of industry whose discharges EPA deemed to pose
4 relatively less health and environmental risks than other categories, (3) EPA did not review certain
5 Effluent Guideline categories based on findings that the water pollution problems potentially
6 caused by an industry are being dealt with more “efficiently” by other regulatory and non-
7 regulatory means, including voluntary efforts of industry, (4) EPA did not review any Effluent
8 Guidelines promulgated since 1996, (5) EPA did not review certain Effluent Guideline categories
9 based on a finding that there are only a few facilities in an industry discharging pollutants or
10 pollutants that pose risks to water quality, and (6) EPA changed the annual review specified by
11 CWA sections 304(b) and 304(m)(1)(A) into a two year, phased review conducted over 2003 and
12 2004.

13 42. EPA improperly truncated its review of Effluent Guidelines in 2003 and 2004 because
14 it devote insufficient resources to meet its statutory review obligations. In 2003 and 2004, EPA
15 sharply reduced the amount of employee hours and other agency resources committed to review
16 and/or revision of Effluent Guidelines compared to the amount of time and resources EPA had
17 previously devoted to review of Effluent Guidelines. Specifically, EPA’s Office of Water
18 managers OW decided to cut the EPA Engineering and Analysis Division staff assigned to
19 Effluent Guidelines from 55 to 35 and to move these staff to other EPA divisions and programs.
20 In 2005 and future years, EPA intends to continue with a sharply scaled-back review and/or
21 revision of Effluent Guidelines to accommodate diversion of agency time and resources into other
22 EPA programs. This diversion of resources prompted the EPA Inspector General to note in a
23 critical report, “In late 2003, Office of Water management decided to reprogram Agency
24 resources, moving staff away from the effluent guidelines program to other programs. These
25 decisions are being made without sufficient understanding of how they will effect the
26 environment.” EPA Office of Inspector General, *Effectiveness of Effluent Guidelines Program*

1 *for Reducing Pollutant Discharges Uncertain*, Report No. 2004-P-00025 (Aug. 24, 2004).

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

3 43. The methodology that EPA has adopted for review of its Effluent Guideline
4 regulations is necessarily EPA's methodology for reviewing Effluent Limitations promulgated
5 under CWA section 301(b), given that EPA has but one set of regulations serving as both Effluent
6 Guidelines and Effluent Limitations--the EPA regulations set forth at 40 C.F.R. parts 405-71.
7 Thus, when EPA decided in 2003 and 2004 not to review Effluent Guidelines promulgated since
8 1996, EPA necessarily also determined not to review Effluent Limitations promulgated since
9 1996. EPA further determined to review Effluent Limitations in the same manner that it reviewed
10 Effluent Guidelines in 2003 and 2004. Thus, EPA in 2003 and 2004 did not review the technical
11 and economic feasibility of requiring industries to meet revised BCT-based and BAT-based
12 Effluent Limitations that are five years old or older, as required by CWA section 301(d), 33
13 U.S.C. § 1311(d).

14 **E. EPA's Inadequate and Unlawful Effluent Guidelines Plan for 2004/2005**

15 **1. The EGP's Unlawful Provisions for Review and Revision of Effluent Guidelines**
16 **in 2004 and 2005**

17 44. As noted *supra*, the EGP after-the-fact sets out EPA's "plan" and "schedule" for its
18 already completed review of Effluent Guidelines in 2004. Thus, the EGP states EPA's plan to
19 have conducted its 2004 review of Effluent Guidelines in the fashion described *supra*.

20 45. The EGP thus sets forth a "plan" for a review of Effluent Guidelines in 2004 that
21 conflicts in several ways with CWA sections 304(b) and 304(m). Whereas CWA sections 304(b)
22 and 304(m) required EPA to review all its Effluent Guidelines in 2004 to determine whether it is
23 appropriate to revise any of them, EPA's review method for 2004 set forth in the EGP did not
24 constitute a legally sufficient review of any of EPA's Effluent Guidelines (with the possible
25 exception of the Effluent Guidelines for the oil and gas production and exploration facilities in
26 Cook Inlet, Alaska set forth at 40 C.F.R. part 435, Subpart D).

27 46. To have completed an annual review of Effluent Guidelines meeting the requirements

1 of CWA sections 304(b) and 304(m), EPA would necessarily have reached legally justifiable
2 determinations whether any of its Effluent Guidelines need revision. To determine whether to
3 revise its existing Effluent Guidelines, EPA necessarily must determine whether these Effluent
4 Guidelines adequately perform what Effluent Guidelines are supposed to do: officially define the
5 level of pollutant reduction attainable if industries apply, (1) best practicable control technology
6 currently available (BPT), (2) best conventional pollutant control technology (BCT), and (3) best
7 available technology economically achievable (BAT). CWA § 304(b); 33 U.S.C. § 1314(b).
8 Thus, EPA cannot reach conclusions, even tentative, as to whether it is appropriate to revise
9 Effluent Guidelines without reaching supportable conclusions about whether existing Effluent
10 Guidelines reflect *current* technical feasibility of reducing pollutant discharge and *current*
11 economic feasibility of reducing pollutant discharge. With the possible exception of Cook Inlet
12 oil and gas facilities, the EGP did not direct EPA to analyze and reach even tentative conclusions
13 concerning the technical feasibility of reducing pollutant discharge and economic feasibility of
14 reducing pollutant discharge for any category of industry covered by existing Effluent Guidelines.

15 47. The EGP directed EPA in 2004 to rule out review of the technical and economic
16 feasibility of pollutant reduction for categories of industry whose discharges EPA deemed to pose
17 relatively less health and environmental risks than other categories. In effect, the EGP thus
18 directed EPA not to review the Effluent Guidelines or to schedule the revision of Effluent
19 Guidelines for such categories of industry. A review of Effluent Guidelines, to be legally
20 sufficient, cannot fail to consider the technical and economic feasibility of pollutant reduction, and
21 any “review” which fails to consider these factors is not a “review” within the meaning of CWA
22 section 304(b) and 304(m). In addition, the relative health and environmental risk posed by
23 discharges is not a legitimate criteria for EPA to consider in reviewing Effluent Guidelines to
24 determine whether to revise such Effluent Guidelines. Congress has not authorized EPA to forgo
25 revising Effluent Guidelines for an industry on the basis that an industry poses less environmental
26 risk than another industry. The relative risk of discharges is not part of Congress’ criteria for
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1 determining BPT, BCT, or BAT and thus this relative risk is not a legitimate consideration in
2 determining whether it is appropriate to revise existing Effluent Guidelines.

3 48. The EGP directed EPA to rule out review or revision of Effluent Guidelines, at least
4 in part, based on findings that the water pollution problems potentially caused by an industry are
5 being dealt with more “efficiently” by other regulatory and non-regulatory means, including
6 voluntary efforts of industry. Congress has not authorized EPA to consider the effectiveness of
7 other means besides Effluent Guidelines, including voluntary pollution reductions, in determining
8 what constitutes BPT, BCT, or BAT. Thus, EPA may not take into account the effectiveness of
9 other means besides Effluent Guidelines at reducing water pollution in reviewing and determining
10 whether existing Effluent Guidelines appropriately define BPT, BCT and BAT.

11 49. The EGP directed EPA to rule out review or revision of Effluent Guidelines
12 promulgated since 1996. Congress has mandated, however, that EPA review Effluent Guidelines
13 annually, and thus EPA may not properly determine that it can skip review or revision of some of
14 its Effluent Guidelines for eight years.

15 50. The EGP directed EPA to rule out review or revision of Effluent Guidelines based on
16 a finding that there are only a few facilities in an industry discharging pollutants or pollutants that
17 pose risks to water quality. Congress, however, does not allow EPA to skip setting Effluent
18 Guidelines for any identifiable class or category of industries that discharge pollutants from point
19 sources on the basis that there are only a few facilities in that class or category.

20 51. The EGP directed EPA to review its Effluent Guidelines for the OCPSF industrial and
21 the Petroleum Refining industrial categories over a two year period (2003 and 2004) before
22 reaching any conclusions, even tentative, about whether it is appropriate to revise these Effluent
23 Guidelines. CWA sections 304(b) and 304(m), however, mandate an “annual” review.

24 52. The EGP does not set a schedule for the revision of the Effluent Guidelines for the
25 OCPSF industrial and the Petroleum Refining industrial categories due to EPA’s determination
26 that review of the Effluent Guidelines for these categories would not be appropriate. EPA
27

1 determined that it could rule out revision of the Effluent Guidelines for these categories because,
2 ostensibly, there are only a few facilities in these categories discharging pollutants at levels EPA
3 deemed likely to risk adverse water quality impacts or because these categories of industry create
4 less relative risk of environmental harm compared to other industries that discharge water
5 pollutants. EPA did not determine, with administrative record support, that it is not technically or
6 economically feasible for these industries to reduce their pollutant discharges below levels that
7 Effluent Guidelines currently defines as BPT, BCT, and BAT. Indeed, the administrative record
8 supports the converse finding, that BPT, BCT and BAT for these industries should be defined to
9 impose greater restrictions on the discharge of pollutants for these industries.

10 53. The EGP further sets out EPA's plan for its review of existing Effluent Guidelines in
11 2005. The EGP states EPA's plan to conduct the same sort of assessment of relative
12 environmental risk posed by discharges from categories of industry regulated by existing Effluent
13 Guidelines that EPA performed in 2003. The EGP states EPA's plan to use this risk assessment
14 in the same fashion as the 2003 risk assessment, to select a small subset of Effluent Guidelines for
15 more detailed subsequent review. The EGP's planned approach to EPA's 2005 review of
16 Effluent Guidelines is thus unlawful for the same core reason that EPA's 2003 and 2004 reviews
17 were unlawful. Under CWA sections 304(b) and 304(m), EPA may not skip examining the
18 technical and economic feasibility of imposing more stringent Effluent Guidelines on a class or
19 category of industry on the basis that a class or category poses relatively less risk of
20 environmental harm than another.

21 54. The EGP further sets forth EPA's schedule for revision of existing Effluent
22 Guidelines. The EGP ostensibly indicates that EPA will start "a rulemaking" in March 2005 for
23 revised Effluent Guidelines for the vinyl chloride and chlor-alkali subcategories of the OCPSF and
24 Inorganic Chemicals industrial categories. The EGP indicates that EPA expects to issue
25 information requests to industry pursuant to its authority under CWA section 308 at that time.
26 The EGP only further indicates that EPA expects to take "several years" to gather, validate, and
27

1 analyze the data. The EGP further indicates that any point EPA may decide that revision to the
2 Effluent Guidelines for these subcategories is not appropriate and elect not to propose new rules
3 revising these Effluent Guidelines or otherwise terminate any on-going rulemaking. Such vague
4 and indeterminate outline of EPA's future timetable for action on revision of the Effluent
5 Guidelines for these subcategories does not constitute a "schedule for the revision" of Effluent
6 Guidelines within the meaning of CWA section 304(m)(1)(A).

7 **2. The EGP's Legally Inadequate Identification of New Categories of Industry**

8 55. As noted *supra*, CWA section 304(m)(1)(B) requires EPA's Effluent Guideline Plans
9 to identify categories of sources discharging toxic or nonconventional pollutants for which EPA
10 has not yet published Effluent Guidelines. CWA section 304(m)(1)(C) further requires EPA's
11 Effluent Guideline Plans to establish a schedule for promulgation of Effluent Guidelines for such
12 categories within three years after EPA has identified these categories.

13 56. The EGP identifies two new categories of industry: Airport De-Icing Operations and
14 the Drinking Water Supply and Treatment industrial sectors. There is ample evidence in the
15 administrative record, however, that there are several more categories of industries discharging
16 toxic or nonconventional pollutants for which EPA has not yet published Effluent Guidelines.
17 Accordingly, the EGP fails to meet CWA section 304(m)(1)(B)'s mandatory duty that EPA
18 identify all such categories of industry known to EPA.

19 57. In the EGP, EPA has avoided identifying new categories of sources by labeling clearly
20 identifiable and distinct groupings of industry as "subcategories" rather than employing the
21 statutory term "classes and categories." This is impermissible as what EPA has denominated
22 "subcategories" of industrial dischargers are functionally the same as "classes and categories."
23 The subcategories are like-grouped industrial facilities with similar products and wastewaters,
24 making it possible and logical for EPA to define for them the pollution reduction attainable via the
25 application of BAT, BPT and/or BCT. Accordingly, these subgroupings are indistinguishable
26 from "classes and categories" as the latter term is used in CWA section 304(b). The CWA
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1 provides no basis for EPA to establish ‘subcategories’ of pollution discharges, and thus EPA has
2 no basis for defining such categories of discharge in a manner which avoids EPA’s obligation
3 under CWA sections 304(m)(1)(B) and (C).

4 58. The EGP’s failure to identify these “subcategories” as new source categories is
5 inconsistent with EPA’s own regulations and with the federal government’s SIC Code
6 classification system and policy. EPA regulations establish specific effluent guidelines for each
7 subcategory of industry and different BAT, BPT and BCT limitations for different point source
8 subcategories. *See e.g.*, 40 C.F.R. part 419, subparts A-E (Subcategories under Petroleum
9 Refining). In so doing, EPA has implicitly recognized that a subcategory is a functionally distinct
10 category of industrial polluter, with different production methods, different pollutant discharges,
11 different treatment options, and different financial feasibility circumstances. Also, many of the
12 industries that EPA proposes to characterize as subcategories not requiring identification under
13 CWA section 304(m)(1)(B) have separate SIC codes. SIC codes were established by the SIC
14 Codes Interdepartmental Committee on Industrial Statistics, established by the Central Statistical
15 Board of the United States "to develop a plan of classification of various types of statistical data
16 by industries and to promote the general adoption of such classification as the standard
17 classification of the Federal Government." *See <http://www.census.gov/epcd/www/naicsdev.htm>*
18 Accordingly, the federal government has a well established policy of recognizing sectors with
19 differing SIC codes as separate and distinct classes or categories of industry. Thus, EPA’s
20 subcategories should be treated as classes and categories of industry within the meaning of CWA
21 section 304(b) and section 304(m)(1)(B).

22 59. The EGP’s failure to identify subcategories of industry as categories under CWA
23 section 304(m)(1)(B) further has led EPA to violate CWA section 304(m)(1)(C). CWA section
24 304(m)(1)(C) obligates EPA to set a schedule in the EGP for the promulgation of Effluent
25 Guidelines within three years for all classes and categories properly identified pursuant to CWA
26 section 304(m)(1)(B). All groupings of industry EPA labels as a “subcategory” should be
27

1 identified pursuant to CWA section 304(m)(1)(B) and EPA should then set schedules for
2 promulgating Effluent Guidelines for these subcategories within three years. Because EPA has
3 not identified subcategories pursuant to CWA section 304(m)(1)(B), EPA has also impermissibly
4 failed to set a schedule for the promulgation of Effluent Guidelines for those categories of
5 industry it deems to be “subcategories.”

6 60. In the EGP, EPA further eliminated certain new source categories from identification
7 under CWA section 304(m)(1)(B) based on various unlawful grounds. EPA has acknowledged
8 numerous categories of industry that discharge water pollutants for which EPA has failed to
9 promulgate effluent guidelines. *See* 68 Fed. Reg. 75526-27; EPA Factor 1 Report at B-3, Table
10 B-2: Toxic-Weighted Pound Equivalents Discharges by Industries Not Regulated by Existing
11 Effluent Guidelines. Indeed, public commentors on EPA’s draft strategy for Effluent Guideline
12 revision identified thirteen potential new categories of industries for promulgation of new Effluent
13 Guidelines. EPA improperly decided, however, that it has wide discretion to under CWA section
14 304(m)(1)(B) to identify only those industries that it deems pose a relatively higher risk of adverse
15 environmental impact if left unregulated by Effluent Guidelines. EPA thus improperly and
16 unlawfully declined to identify clearly identifiable, distinct categories of industry that discharge
17 toxic or nonconventional pollutants to waters of the United States based on its findings that these
18 industries pose relatively less risk to the environment than others, consist only of a few facilities
19 that discharge such pollutants to waters of the United States, or discharge mostly conventional
20 pollutants rather than toxic or nonconventional pollutants.

21 **F. EPA’s Failure to Adopt Final Effluent Guidelines Plans Before the Time Period the**
22 **Plans Govern**

23 61. CWA section 304(m) requires EPA to publish Effluent Guidelines Plans biennially,
24 after providing for public review of and comment on a proposed plan. As noted, EPA did not
25 publish an Effluent Guidelines Plan for 2004/2005 until September 2, 2004, eight months into
26 2004. 69 Fed. Reg. 53705.

27 62. EPA has a continuing pattern and practice of finalizing the two year plans required

1 under CWA section 304(m) long after the commencement of the two year period covered by each
 2 individual plan. The dates that EPA had to have published its Effluent Guidelines Plans to have
 3 plans in place to govern on-going review of Effluent Guidelines, the date that EPA actually did so,
 4 and the corresponding Federal Register citation where the Plans were published is as follows:

5 Deadlines for Publishing Plans Dates of Actual Publication Fed. Reg. Citation

6 Feb. 4, 1988	Jan. 2, 1990	55 Fed. Reg. 80
7 Dec. 31, 1991	Sept. 8, 1992	57 Fed. Reg. 41000
8 Dec. 31, 1993	Aug. 26, 1994	59 Fed. Reg. 44234
9 Dec. 31, 1995	Oct. 7, 1996	61 Fed. Reg. 52581
10 Dec. 31, 1997	Sept. 4, 1998	63 Fed. Reg. 47285
11 Dec. 31, 1999	Aug. 31, 2000	65 Fed. Reg. 53008
12 Dec. 31, 2001	Aug. 27, 2002	67 Fed. Reg. 55012
13 Dec. 31, 2003	Sept. 2, 2004	69 Fed. Reg. 53705

14 Furthermore, EPA has delayed the effective dates of its Effluent Guidelines Plans even after
 15 publishing them. EPA published its 2000-2001 plan on August 31, 2002, but it did not make the
 16 plan effective until October 2, 2000. 65 Fed. Reg. 53008.

17 63. In the EGP, EPA states that its pattern and practice of issuing its Effluent Guidelines
 18 Plans every other year *after* completing the review of Effluent Guidelines in even-numbered years
 19 that is governed by the plans is lawful and appropriate. EPA indicates its intention to continue
 20 this approach in future planning cycles.

21 **FIRST CLAIM FOR RELIEF**

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

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

25 64. Plaintiffs reassert and reallege paragraphs 1 through 63 above.

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

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

5 66. In determining whether it is appropriate to revise Effluent Guidelines, EPA must
6 taken into account specified statutory factors related to the technical and economic feasibility of
7 reducing pollutant discharge. These specific statutory factors are listed *supra* in paragraph 26.

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

24 68. In 2004, EPA failed to comply with its CWA mandatory duties by impermissibly
25 limiting its 2004 review to the three categories of Effluent Guidelines that it selected as priorities
26 based essentially on its improper review of Effluent Guidelines conducted in 2003. Thus, EPA’s
27

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

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

15 **SECOND CLAIM FOR RELIEF**

16 Violation of the CWA
33 U.S.C. § 1311(d)

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

19 70. Plaintiffs reassert and reallege paragraphs 1 through 69 above.

20 71. Clean Water Act section 301(d) specifies that EPA must review all BAT-based and
21 BCT-based Effluent Limitations required by CWA section 301(b)(2) "at least every five years."
22 33 U.S.C. § 1311(d). EPA's regulations set forth at 40 C.F.R. part 405-71 establish both Effluent
23 Guidelines and Effluent Limitations within the meaning of CWA section 301(b)(2). Thus, EPA
24 has a mandatory duty to review the BAT and BCT portions of these Effluent Guideline/Limitation
25 regulations at least every five years. EPA has not done so for most categories of point source
26 pollutants for over a decade. Moreover, EPA has expressly stated that it declined in 2003 and
27 2004 to decline to review any Effluent Guideline/Limitation regulation that was promulgated since

1 1996. This approach is, however, unlawful under CWA section 301(d), 33 U.S.C. § 1311(d).

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

12 **THIRD CLAIM FOR RELIEF**

13 Violation of the CWA
33 U.S.C. § 1314(m)

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

16 73. Plaintiffs reassert and reallege paragraphs 1 through 72 above.

17 74. CWA section 304(m) requires EPA to publish a biennial plan which (1) establishes a
18 schedule for EPA's annual review of Effluent Guidelines, (2) identifies categories of industries
19 which are not subject to existing Effluent Guidelines and which discharge toxic or
20 nonconventional pollutants, and (3) sets a schedule for promulgation of new Effluent Guidelines
21 for newly identified categories of industry discharging toxic or nonconventional pollutants which
22 are not subject to existing Effluent Guidelines. CWA § 304(m); 33 U.S.C. § 1314(m). As noted,
23 EPA did not publish an Effluent Guidelines Plan for 2004/2005 until September 2, 2004, eight
24 months into 2004. 69 Fed. Reg. 53705.

25 75. EPA has a continuing pattern and practice of finalizing the two year plans required
26 under CWA section 304(m) long after the commencement of the two year period covered by each
27 individual plan.

1 76. In the EGP, EPA states that its pattern and practice of issuing its Effluent Guidelines
2 Plans every other year *after* completing the review of Effluent Guidelines in even-numbered years
3 that is governed by the plans to be lawful and appropriate. EPA indicates its intention to continue
4 this approach in future planning cycles.

5 77. EPA's failure to publish EGPs in a timely manner, before the commencement of the
6 period they govern, frustrates Congress' intent under CWA section 304(m) that EPA prepare
7 biennial plans, adopted only after taking and considering public comment, that set forth EPA's
8 proposed schedule for reviewing existing Effluent Guidelines, that identify new categories of
9 industry to be regulated under Effluent Guidelines, and that set a schedule for EPA to promulgate
10 new Effluent Guidelines. 33 U.S.C. § 1314(m). Plaintiffs are therefore entitled to declaratory
11 relief that EPA's practice of not adopting EGPs until well after the period they are meant to cover
12 has commenced is unlawful under the CWA. Plaintiffs are further entitled to injunctive relief
13 ordering EPA to issue final EGPs before the period they cover has commenced.

14 **FOURTH CLAIM FOR RELIEF**

15 Violation of the CWA
16 33 U.S.C. § 1314(m)

17 **Request for Declaratory Relief and Injunction to Compel EPA To Adopt an Effluent Guidelines Plan**
18 **in Accordance with Sections 304(m) of the CWA**

19 78. Plaintiffs reassert and reallege paragraphs 1 through 77 above.

20 79. CWA section 304(m) requires EPA to publish a biennial plan which (1) establishes a
21 schedule for EPA's annual review and revision of Effluent Guidelines, (2) identifies categories of
22 industries which are not subject to existing Effluent Guidelines and which discharge toxic or
23 nonconventional pollutants, and (3) sets a schedule for promulgation of new Effluent Guidelines for
24 newly identified categories of industry which are not subject to existing Effluent Guidelines. 33
25 U.S.C. § 1314(m). The EGP, however, fails: (1) to establish a legally adequate schedule for EPA's
26 annual review and revision of Effluent Guidelines, (2) to identify categories of industries which are
27 not subject to existing Effluent Guidelines and which discharge toxic or nonconventional pollutants,
28 and (3) to set a legally adequate schedule for promulgation of new Effluent Guidelines for newly

1 identified categories of industry which are not subject to existing Effluent Guidelines.

2 80. Plaintiffs are therefore entitled to declaratory relief that the EPA's publication of the EGP
3 is an action contrary to law and that the EGP does not meet the obligations for an Effluent Guidelines
4 Plan set forth in CWA section 304(m). Plaintiffs are further entitled to injunctive relief ordering EPA
5 to complete and issue an EGP for 2004/2005 that fully meets the obligations of CWA section 304(m)
6 and to cease and desist in the future from issuing Effluent Guidelines Plans which reflect the improper
7 methodology for review of Effluent Guidelines reflected in the EGP.

8 **REMEDY**

9 81. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of law, other
10 than the relief sought in this Complaint, because there is no other mechanism for compelling EPA to
11 take the action necessary under the CWA in reviewing Effluent Guidelines annually, in reviewing
12 BAT-based and BCT-based Effluent Limitations at least every five years, and in preparing Effluent
13 Guidelines Plans on a timely basis and in conformance with the requirements of CWA sections
14 301(d), 304(b) and 304(m)(1)(A), 33 U.S.C. §§1311(d), 1314(b), (m)(1)(A). Without an order from
15 this Court, EPA will not promptly act to comply with its mandatory duties required by the CWA.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs seek the following relief:

18 82. An injunction pursuant to the CWA, 33 U.S.C. § 1365(a) and the APA, 5 U.S.C. §§
19 706(1) and (2), ordering Defendants:

- 20 a. to commence review of Effluent Guidelines in conformance with the CWA;
21 b. to commence review of BAT-based and BCT-based Effluent Limitations in conformance
22 with the CWA;
23 c. to prepare its EGPs pursuant to CWA section 304(m) in conformance with the CWA.

24 83. A declaratory judgment pursuant to the CWA, 33 U.S.C. § 1365(a), 5 U.S.C. section
25 2201, and the APA, 5 U.S.C. section 706(2), establishing that EPA's practices for reviewing Effluent
26 Guidelines and Effluent Limitations and adopting Effluent Guideline Plans as described herein are
27

1 unlawful;

2 84. An award of attorneys fees and costs to the Plaintiffs pursuant to the CWA, 33 U.S.C.
3 § 1365(d) and/or pursuant to the APA, 5 U.S.C. § 504; and

4 85. Such other and further relief as this Court deems just and proper.

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

6 86. Based on Plaintiffs' knowledge to date, pursuant to Civil Local Rule 3-16, the
7 undersigned certifies that, as of this date, other than the named parties, there is no such interest to
8 report.

9 Respectfully submitted this 10th day of December, 2004,

10
11 By: /s/ Christopher Sproul
12 Christopher Sproul
13 Attorney for Plaintiffs
14 Ecological Rights Foundation and
15 Our Children's Earth Foundation
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