No. 05-16214

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION,
Plaintiffs-Appellants,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, in his official capacity as Administrator of the United States Environmental Protection Agency,
Defendants-Appellees,

and

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, and EFFLUENT GUIDELINES INDUSTRY COALITION,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF THE FEDERAL DEFENDANTS-APPELLEES

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JOHN A. BRYSON
EILEEN T. MCDONOUGH
ALLEN M. BRABENDER
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-5316

Of Counsel:
CAROL ANN SICILIANO
POOJA SETH PARIKH
Office of General Counsel
U.S. Environmental Protection Agency
Water Law Office (2355A)
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BCT	Best Conventional Pollutant Control Technology
BAT	Best Available Technology
CWA	Clean Water Act
EPA	Environmental Protection Agency
OCE	Our Children's Earth Foundation and Ecological Rights Foundation
OCPSF	Organic Chemicals, Plastics and Synthetic Fibers

STATEMENT OF JURISDICTION

Our Children's Earth Foundation and Ecological Rights Foundation ("OCE") invoked the subject-matter jurisdiction of the United States District Court for the Northern District of California (Hon. Phyllis J. Hamilton) pursuant to 33 U.S.C. § 1365(a).[1] This provision of the Clean Water Act (CWA) allows any citizen to commence a civil action in a United States District Court against the United States Environmental Protection Agency ("EPA") "where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a), CWA § 505(a). On August 11, 2004 and May 20, 2005, the district court held that the citizen suit provision gave the district court jurisdiction over some, but not all, of OCE's asserted claims, granting summary judgment for those over which it had jurisdiction.

On June 24, 2005, OCE timely filed a notice of appeal from the district court's August 11, 2004 and May 20, 2005 orders. On October 11, 2005, OCE filed a supplemental notice of appeal amending its notice to include appeal from the district

[1]OCE, alternatively, attempted to invoke the subject matter jurisdiction of the district court under the Administrative Procedure Act. R. Ex. 3 at 0032 (citing 5 U.S.C. §§ 702, 706). The district court found, however, OCE failed to assert any claim under the APA. R. Ex. 18 at 0209-10.

court's August 15, 2005 order denying OCE's motion to transfer. This Court has jurisdiction to review these final orders pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

The CWA imposes on EPA nondiscretionary duties annually to review its existing effluent limitations guidelines and, if appropriate, revise them pursuant to the criteria outlined in the statute. *See* 33 U.S.C. § 1311(d), CWA § 301(d); 33 U.S.C. § 1314(b), CWA § 304(b). This duty to review is supplemented by EPA's nondiscretionary duty biennially to publish a plan announcing, among other things, its schedule for performing this annual review and its schedule for rulemaking for any existing effluent guideline selected for possible revision as a result of the annual review. *See* 33 U.S.C. § 1314(m), CWA § 304(m). With reference to these nondiscretionary duties, this appeal presents the following issues:

1. Whether the district court correctly found that EPA satisfied its nondiscretionary duties under CWA §§ 301(d), 304(b) and 304(m) by conducting annual reviews of all existing effluent limitations guidelines in 2003 and 2004, and by publishing a final effluent guidelines plan in September 2004.

2. Whether the district court abused its discretion by denying the motion to transfer to this Court OCE's claims challenging the substantive merits of EPA's

effluent limitations guidelines reviews and plan, where the filing of the notice of appeal deprived the district court of jurisdiction to effect the transfer, where OCE failed to file a petition for review challenging the substantive merits by the prescribed statutory deadline, and where such claims did not rest on final agency action within the meaning of the Administrative Procedure Act (APA).

3. Assuming *arguendo* that OCE's substantive challenges to EPA's effluent limitations guidelines reviews and plan seek review of final agency action within the meaning of the APA, whether judicial review of such claims is exclusively within the jurisdiction of the United States Courts of Appeals on a timely filed petition for review.

STATEMENT OF THE CASE

In this citizen suit against EPA and Stephen L. Johnson,[2] Administrator, OCE asserts that EPA failed to perform various allegedly nondiscretionary (mandatory) duties under the CWA. The original complaint, filed May 28, 2004, contained three claims. OCE's first claim for relief alleged that EPA failed to annually review all existing effluent limitations guidelines in accordance with the requirements of 33 U.S.C. § 1314(b), CWA § 304(b), and 33 U.S.C. § 1314(m)(1)(A), CWA §

[2]Pursuant to Fed. R. App. P. 43(c)(2), Stephen L. Johnson has been substituted for his predecessor Michael O. Levitt as named defendant.

304(m)(1)(A). R. Ex. 1 at 0016-18. In its second claim for relief, OCE alleged that EPA failed to review the effluent limitations based on the "best conventional pollutant control technology" (BCT) and "best available technology" (BAT) at least every five years as allegedly mandated by 33 U.S.C. § 1311(d), CWA § 301(d). *Id.* at 0018-19. The third claim for relief alleged that EPA failed to timely issue final effluent guidelines plans as required by 33 U.S.C. § 1314(m), CWA § 304(m). *Id.* at 0019-20. The original complaint asserted that the district court had jurisdiction over the claims through the CWA's citizen suit provision, 33 U.S.C. § 1365(a)(1), CWA § 505(a)(1). *Id.* at 0006.

Shortly after OCE filed its complaint, the parties filed cross motions for partial summary judgment as to OCE's third asserted claim for relief. On August 11, 2004, the district court entered an order denying OCE's motion for partial summary judgment and granting EPA's cross-motion for partial summary judgment. R. Ex. 2 at 0025. The district court rejected OCE's argument that the publication of the final effluent guidelines plan must correspond with the calendar year, holding that OCE's argument contradicted the plain language of the statute. *Id.* at 0024. The district court entered partial summary judgment in favor of EPA because it found, consistent with § 304(m)'s requirement of biennial publication, that EPA could not be compelled to

issue a final effluent guidelines plan before August 26, 2004, *i.e.*, two years after publication of the last plan. *Id.*

Following the district court's adverse ruling on the cross-motions for partial summary judgment, OCE moved for, and the district court granted, leave to file an amended complaint. R. Ex. 22 at 0252, 0253. The amended complaint, filed December 13, 2004, reasserted the three claims for relief alleged in the original complaint, including the third claim that had been rejected by the district court, and added a fourth claim for relief. R. Ex. 3 at 0050-56. The fourth claim alleged that EPA failed to publish a biennial effluent guidelines plan in accordance with the requirements of 33 U.S.C. § 1314(m), CWA § 304(m). *Id.* at 0054-55. The amended complaint also, among other things, asserted an alternative basis for judicial review by way of the APA, 5 U.S.C. §§ 702, 706, although it did not allege any claims under the APA. *Id.* at 0027, 0032, 0050-55.

After OCE filed its amended complaint, EPA filed a motion, pursuant to Fed. R. Civ. P. 12(c), asking the district court to enter judgment on the pleadings. R. Ex. 22 at 0256. OCE resisted EPA's motion for judgment on the pleadings, and filed a motion for summary judgment on its first, second and fourth claims. *Id.* at 0258. Although EPA maintained it was entitled to judgment on the pleadings as to each of

OCE's claims, it answered OCE's summary judgment motion with a summary judgment motion of its own. *Id.* at 0261.

On May 11, 2005, the district court held oral argument on the motion for judgment on the pleadings and on the cross-motions for summary judgment. *Id.* at 0264. On May 20, 2005, the district court entered judgment in favor of EPA, granting in part and denying in part the motion for judgment on the pleadings, and granting summary judgment as to the remaining issues. R. Ex. 18 at 0206. The district court found its jurisdiction was "limited to a review of the discharge of EPA's statutory duties and [did] not reach questions that would amount to a substantive review of the 2004 [Effluent Guidelines Plan]." *Id.* at 0215. The district court then analyzed those questions over which it had jurisdiction: whether EPA, by conducting the annual reviews of all existing effluent limitations guidelines in 2003 and 2004, had met its mandatory duties under § 301(d) and § 304(b); or whether, as OCE asserted, EPA could discharge its duties only by conducting those reviews in a prescribed manner – by basing the reviews on the availability of technology. *Id.* at 0213-15. The district court held that the CWA's plain language did not mandate a technology-based review or any other form of review, but rather accorded the agency broad discretion to determine *how* to conduct its reviews. *Id.* at 0214. The district court then found that

EPA had conducted annual reviews in 2003 and 2004 and, therefore, held that EPA had discharged its mandatory duties under § 301(d) and § 304(b). *Id.* at 0215. The court also found that EPA satisfied its mandatory duty under § 304(m) by publishing a biennial plan containing the requisite components. *Id.*

After OCE's filing of a notice to appeal these rulings, it filed a motion to transfer to this Court jurisdiction over the claims challenging the substantive merits of EPA's effluent limitations guidelines reviews and plan, pursuant to 28 U.S.C. § 1631. R. Ex. 22 at 0265. In an order dated August 15, 2005, the district court declined to transfer jurisdiction on the ground that the filing of the notice of appeal divested it of the authority to do so. R. Ex. 20 at 0224. On October 11, 2005, OCE supplemented its notice of appeal to include an appeal from the August 15, 2005 order. R. Ex. 19.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), CWA § 101(a). To achieve this objective, Congress prohibited the discharge of any pollutant into navigable waters except as authorized by specified sections of the Act. 33 U.S.C. §

1311(a), CWA § 301(a). One of the major strategies of the CWA is to limit the discharge of pollutants based upon the capabilities of the equipment or "control technologies" available to control those discharges. 33 U.S.C. § 1311(b)(2), CWA § 301(b)(2).

A. Technology-Based Effluent Limitations Guidelines and Standards

As part of this control strategy, EPA establishes technology-based requirements for industrial categories through national regulations known as effluent limitations guidelines and standards. *See* 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316, 1317(b) & (c); CWA §§ 301(b)(2), 304(b), 306, 307(b) & (c). Developed largely pursuant to statutory factors specified in § 304(b), these regulations are not self-implementing. Instead, they are given effect through "effluent limitations" that are incorporated under § 301(b)(2) into discharge permits. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

EPA promulgates "effluent limitations guidelines" for existing sources under § 301 and § 304. When promulgating these regulations and standards, EPA identifies the pollutants to be regulated in a particular industry category or subcategory, as well as a technology that represents the statutorily prescribed level of control for those pollutants. For existing sources that discharge toxic pollutants or certain other

pollutants directly to receiving waters, the CWA prescribes technology-based limitations based on the "best available technology economically achievable" ("BAT") for a category or class of point sources. 33 U.S.C. § 1311(b)(2)(A), (C), (D), & (F), CWA § 1311(b)(2)(A), (C), (D), & (F) 301; 33 U.S.C. § 1314(b)(2), CWA § 304(b)(2). When establishing limitations based on BAT, the statute requires EPA to consider:

> the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

33 U.S.C. § 1314(b)(2)(B), CWA § 304(b)(2)(B). EPA also examines whether the technology is "economically achievable" under § 301(b)(2)(A).

If EPA determines that a technology satisfies the statutory criteria, including economic considerations, EPA then calculates, under § 301(b)(2), the discharge limitations that correspond to the application of that technology. *See generally E.I. du Pont de Nemours & Co. v. Train ("Du Pont")*, 430 U.S. 112, 130-31 (1977). While EPA could have assigned the responsibility to calculate those limitations to individual permit writers, in the 1970s EPA chose instead to codify these discharge

limitations as part of the "guidelines for effluent limitations" promulgated as regulations for the industrial category under § 304(b). 33 U.S.C. § 1314(b), CWA § 304(b). Indeed, since the 1970s, EPA has consistently implemented § 301 and § 304 through the promulgation of consolidated "effluent limitations guidelines," rather than by establishing technology-based categorical effluent limitations independently of the effluent guidelines regulations. *See Du Pont*, 430 U.S. at 124.

In the absence of national categorical effluent limitations guidelines for the discharge of pollutants, technology-based limitations are determined by the permit writer on a case-by-case basis, in accordance with the same statutory factors that EPA would use in promulgating a national categorical rule, but applied to the particular circumstances associated with the discharge. *See* 40 C.F.R. § 125.3; *see also Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 1424-25 (9th Cir. 1988).

B. CWA Requirements for Effluent Limitations Guidelines Review and Planning

Section 304(b) of the CWA requires EPA to review each year the "guidelines for effluent limitations" applicable to existing direct dischargers and to revise such regulations "if appropriate." 33 U.S.C. § 1314(b), CWA § 304(b). Similarly, § 301(d) requires EPA to review, every five years, the effluent limitations established

under § 301(b)(2) (which likewise apply to existing direct dischargers) and to revise such limitations "if appropriate." 33 U.S.C. § 1311(b)(2), CWA § 301(b)(2). As noted above, EPA has incorporated the effluent limitations required by § 301(b)(2) into the effluent limitations guidelines regulations it promulgates under § 304(b). *See Du Pont*, 430 U.S. at 124. Therefore, through its annual review of its consolidated "effluent limitations guidelines," EPA also reviews the effluent limitations they contain, thus meeting its review requirements under § 301(d) and § 304(b) simultaneously.

Section 304(m) supplements the core review requirement of § 301(d) and § 304(b) by requiring EPA to publish a plan every two years announcing its schedule for performing this annual review and its schedule for rulemaking for any effluent limitation guideline selected for possible revision as a result of that annual review. *See* 33 U.S.C. § 1314(m)(1)(A), CWA § 304(m)(1)(A). Section 304(m) also requires the plan to identify categories of sources discharging toxic or non-conventional pollutants for which EPA has not published effluent limitations guidelines and standards under § 304(b)(2) and § 306. *See* 33 U.S.C. § 1314(m)(1)(B), CWA § 304(m)(1)(B). The plan must present a schedule for taking final action on effluent guidelines for industrial categories identified under § 304(m)(1)(B) not later than three years after

the industrial category is identified in a final plan. *See* 33 U.S.C. § 1314(m)(1)(C), CWA § 304(m)(1)(C). EPA is required to publish its effluent guidelines plan for public comment prior to the publication of its final plan. *See* 33 U.S.C. § 1314(m)(2), CWA § 304(m)(2).

II. ADMINISTRATIVE PROCEEDINGS

In both 2003 and 2004, EPA conducted two types of administrative proceedings relevant to this litigation: (1) an annual review of existing effluent limitations guidelines, and (2) publication of either a preliminary or final effluent guidelines plan. The specific sequence of proceedings can be summarized as follows: From August 2002 to December 2003, EPA conducted its 2003 annual review of existing effluent limitations guidelines. The 2003 annual review concluded with the publication of the 2003 Preliminary Plan on December 31, 2003. 68 Fed. Reg. 75,515 (Dec. 31, 2003). From January 1, 2004 to September 2, 2004, EPA conducted its 2004 annual review of existing effluent guidelines. EPA published its final effluent guidelines plan on September 2, 2004.[3] 69 Fed. Reg. 53,705 (Sept. 2, 2004). Each of these administrative proceedings is discussed in more detail below.

[3] The 2005 annual review took place between September 2, 2004 and the publication of the 2005 Preliminary Plan. *See* 70 Fed. Reg. 51042 (Aug. 29, 2005).

A. EPA's 2003 and 2004 Annual Reviews of Existing Effluent Limitations Guidelines.

Consistent with § 301(d) and § 304(b), EPA reviewed its existing effluent limitations guidelines for direct dischargers in both 2003 and 2004. Although not required to do so, EPA provided the public with notice and an opportunity to comment on the substance of its annual reviews. Specifically, in the Federal Register notice containing the 2003 preliminary § 304(m) plan, EPA published a description of the methodology and findings of its 2003 annual review, described a proposed approach for the 2004 annual review and solicited public comment on this approach. *See* 68 Fed. Reg. at 75,519-31. At the time, EPA also invited the public to submit data and information it could consider during the 2004 review. *Id.* at 75,530. Similarly, in the Federal Register notice containing the 2004 final § 304(m) plan, EPA published a description of the methodology and findings of its 2004 annual review and solicited comment on the proposed approach for the 2005 annual review. *See* 69 Fed. Reg. at 53,708-17. By soliciting public comment on the proposed approach for the upcoming review cycle, EPA was able to use these comments to inform and shape each subsequent review.[4]

[4]For example, based on public comments on the 2003 annual review, EPA
(continued...)

In the 2003 annual review, EPA first conducted a screening level review to assess the hazard associated with the pollutants discharged by each of the 56 industrial categories and 450 subcategories subject to existing effluent guidelines ("existing categories and subcategories"). 68 Fed. Reg. at 75,520. This approach allowed EPA to assess the effectiveness of the technologies currently in use by the category, based on the amount and toxicity of its discharges. EPA then ranked existing categories according to their hazard assessment in order to prioritize these categories for potential effluent guidelines revision. *Id*. at 75,521. In order to further focus its review, EPA assigned a lower priority to existing categories for which the vast majority of hazard was attributable to only a few facilities and to existing categories for which effluent guidelines had recently been promulgated (unless EPA was aware of an industrial segment experiencing significant recent growth or new pollutant of concern within that category). *See* 68 Fed. Reg. at 75,521. EPA then focused on the industrial categories that accounted for the vast majority (over 95%) of the cumulative total hazard. *See* R. Supp. Ex. 5 at 14, 44. Where EPA determined that it lacked

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[4](...continued)
refined its assessment of dioxin discharges in petroleum refining wastewaters in the 2004 review. Additionally, in response to public comments on the 2003 review, EPA reviewed the hazard associated with pollutant discharges from one subcategory of the Coastal Oil and Gas category–coastal oil and gas extraction facilities in Cook Inlet, Alaska–in its 2004 review. *See* 69 Fed. Reg. at 53,710.

sufficient data to assess the magnitude of the hazard associated with any of these categories, EPA identified these data gaps to be addressed in future annual reviews.[5] *See* 68 Fed. Reg. at 75521-22. Based on this screening-level criteria, EPA identified two categories of concern for a more detailed review in 2004: Organic Chemicals, Plastics and Synthetic Fibers (OCPSF); and Petroleum Refining. *Id.* at 75,527.

In 2004, EPA again conducted a hazard-based screening level review of all existing effluent limitations guidelines, updating its hazard data where new information was available and applying the same screening criteria it used in 2003. *See* 69 Fed. Reg. at 53708-12. In addition, EPA conducted a detailed review of the two high-hazard industrial categories prioritized in the 2003 review, gathering and analyzing additional information on hazard, technological availability and economic factors. *Id.* at 53,712-16. Based on this review, EPA identified two existing subcategories within the OCPSF and the Inorganic Chemicals categories as "appropriate" for potential effluent guidelines revision within the meaning of § 301(d) and § 304(b). *Id.* at 53,714.

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[5]In the 2003 annual review, EPA identified sixteen categories for which it lacked sufficient hazard information. *See* 68 Fed. Reg. at 75,523-24 (Table VI-1). By the end of its 2004 annual review, EPA had collected hazard information for seven of the sixteen existing categories for which it had identified data gaps in 2003. *See* 69 Fed. Reg. at 53,716-17 (Table VI-1). EPA is in the process of filling data gaps for the remaining nine categories.

In short, EPA conducted a hazard-based screening-level review of all existing categories in both 2003 and 2004, as well as a detailed review in 2004 of existing categories that appeared to pose the greatest known hazard. EPA used this multi-layered approach to prioritize its review of existing effluent limitations guidelines, and to focus on those that would present the greatest opportunities for meaningful reductions in effluent discharges through technological advancement. *See* 68 Fed. Reg. at 75,521.[6]

B. EPA's 2004 Final Effluent Guidelines Program Plan

On December 31, 2003, EPA published and sought public comments on the Preliminary Effluent Guidelines Program Plan for 2004/2005 ("Preliminary Plan"). *See* 68 Fed. Reg. at 75,515. After considering public comments on the Preliminary Plan and gathering and analyzing additional data, EPA published its Final Effluent Guidelines Program Plan for 2004 on September 2, 2004 ("Final Plan"). *See* 69 Fed.

[6]In addition to conducting a hazard-based review of all existing effluent guidelines, EPA also directly reviewed the availability of pollutant-reducing technologies for various industrial categories. Specifically, in its 2004 annual review, EPA gathered additional information on technological advances and pollution prevention options with respect to a number of existing categories. *See* 69 Fed. Reg. at 53711-12. EPA also specifically analyzed technological availability in conducting its detailed review of the OCPSF and Petroleum Refining categories in its 2004 annual review. *Id.*

Reg. at 53,705. [7] The Final Plan announced a schedule for the annual review of all existing categories in 2005 and 2006, and established a rulemaking schedule for the potential revision of the existing effluent guidelines for the two candidate subcategories identified in the § 304(b) review (Vinyl Chloride and Chlor-Alkali). *See* 69 Fed. Reg. at 53,717-21. The Final Plan also identified two potential new industrial categories discharging pollutants without nationally-applicable effluent limitations guidelines (Drinking Water Treatment and Airport Deicing), and established a schedule for effluent guidelines rulemaking for these two potential new categories within three years. *Id.*

STANDARD OF REVIEW

Because the district court disposed of OCE's claims on EPA's separately filed motions for summary judgment and for judgment on the pleadings, two standards

[7]Section 304(m) mandates biennial publication of the plan described therein. *See* 33 U.S.C. § 1314(m)(1). Accordingly, EPA issued its Final Plan in September 2004, approximately two years after issuing the previous plan in August 2002. 67 Fed. Reg. 55,012 (Aug. 27, 2002). A consent decree, which addressed both the timing and content of the plans from January 31, 1992 to December 31, 2003, governed the August 2002 plan. The consent decree was terminated on August 9, 2004. Since then, EPA has remained on an August to August cycle for publication of the § 304(m) plans and for conducting its annual reviews.

apply. The Court reviews *de novo* the district court's decision to grant a motion for summary judgment. *Thorman v. American Seafoods Co.*, 421 F.3d 1090, 1094 (9th Cir. 2005). A party is entitled to summary judgment where there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The Court also reviews *de novo* the district court's decision to grant a motion for judgment on the pleadings. *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005); *see also Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989) ("Whether a complaint alleges the failure of the Administrator to perform a nondiscretionary duty sufficient to give rise to citizen suit jurisdiction is a legal determination reviewable *de novo*."). A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss pursuant to Fed. R. Civ P. 12(b)(1). C. Wright & A. Miller, *Fed. Prac. & Proc. Civ.3d* § 1367. A motion to dismiss may be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Doe*, 419 F.3d at 1062 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

SUMMARY OF ARGUMENT

In this case, OCE attempts to use the citizen suit provisions of the CWA to obtain substantive review of EPA's implementation of the statute's effluent guidelines

review and planning requirements. OCE's attempt should be rejected. The district court properly held, first, that EPA had discharged its mandatory duties under CWA §§ 301 & 304 and, second, that OCE's substantive challenge to the adequacy of EPA's review and planning process was not a proper subject of a citizen suit under CWA § 505. The district court's decision should be upheld.

Sections 301 and 304 create a mandatory duty for EPA to annually review its existing effluent limitations guidelines – not to review them in a certain way, as OCE sought to compel. As the district court noted, the plain language of the CWA, which requires EPA annually to review its effluent limitations guidelines and revise them "if appropriate," gives EPA substantial discretion to review its effluent limitations guidelines using the approach that it deems best. Because the undisputed evidence shows that EPA conducted annual reviews of all existing effluent limitations guidelines in both 2003 and 2004, and the only question in a citizen suit under § 505 is whether EPA has acted to fulfil this duty, the district court properly granted judgment as a matter of law as to these claims.

The district court also properly granted judgment as a matter of law against OCE on its claim that EPA failed to publish timely § 304(m) plans. OCE premised its argument on the faulty assumption that § 304(m) planning must occur on a calendar year basis, when, in fact, the deadline for § 304(m) planning purposes falls

two years after the publication of the previous plan. EPA published its § 304(m) plan on September 2, 2004, approximately two years after publication of the previous plan, thereby satisfying its mandatory duty under the CWA.

Furthermore, the district court did not abuse its discretion when it declined to transfer OCE's substantive claims to this Court. The district court correctly held that the appeal divested it of jurisdiction to effect the transfer. Even if the district had jurisdiction to effect the transfer, transfer would have been improper because this Court would have jurisdiction to adjudicate the substantive claims only in a timely filed petition for review, which OCE did not file. Moreover, OCE's claims are not reviewable under the APA because they challenge broadly applicable planning mechanisms from which no legal consequences flow and therefore are not reviewable "final agency action" within the meaning of the APA.

Even if OCE's substantive claims are reviewable under the APA, the district court correctly concluded judicial review rests exclusively with the court of appeals in the first instance pursuant to CWA § 509(b)(1)(E) because OCE's challenges to the review of effluent limitations under CWA § 301(d), the review of effluent limitations guidelines under CWA § 304(b) and the preparation of an effluent guidelines plan under CWA § 304(m) are closely related to the promulgation of effluent limitations guidelines under CWA § 301 and § 306. Review of the substantive merits is beyond

the scope of this appeal, however, and must be raised in a separate petition for review. In sum, the district court's orders and judgments should be affirmed in all respects.

ARGUMENT

I. EPA FULFILLED ITS MANDATORY DUTIES UNDER THE CWA TO CONDUCT REVIEWS OF EFFLUENT LIMITATIONS GUIDELINES AND PREPARE AN EFFLUENT GUIDELINES PLAN.

Pursuant to the citizen suit provision of the CWA, OCE invoked the district court's jurisdiction to adjudicate allegations that the Administrator failed to perform mandatory duties. 33 U.S.C. § 1365(a)(2); CWA § 505(a)(2). Jurisdiction under this provision is narrow. C*f. Kennecott Copper Corp., Nevada Mines Div., McGill, Nev. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (interpreting narrowly the citizen suit provision of the Clean Air Act); *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n. 3 (4th Cir. 1992) (same).[8] In a CWA citizen suit, a party may only challenge whether the Administrator actually performed the mandatory duty, not the method by which the duty is performed. *See, e.g., City of Las Vegas v. Clark County*, 755 F.2d

[8]It is widely recognized that CWA's citizen suit provision was specifically modeled after that of the Clean Air Act ("CAA"); therefore, cases interpreting the CAA's citizen suit provision should be given considerable weight. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61-62 (1987) (citing H.R. Rep. No. 92-911, at 133 (1972) (Conf. Rep.) ("Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act"); *Texans United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 795 n. 8 (5th Cir. 2000) ("Section 505 of the CWA is a citizen suit provision specifically modeled on CAA section 304.").

697, 704 (9th Cir. 1985); *Scott v. Hammond*, 741 F.2d 992, 995 (7th Cir. 1984); *Pennsylvania Dep't of Environ. Res. v. EPA*, 618 F.2d 991, 995-96 (3d Cir. 1980); *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 286-88 (2d Cir. 1976). *Cf., e.g., Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760-61 (9th Cir. 1989) (Clean Air Act); *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989) (same); *Olijato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 664-65 (D.C. Cir. 1975) (same).

A recent U.S. Supreme Court decision reaffirms this well-established principle. In *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), the Court considered a claim brought pursuant to APA § 706(1), which is directly analogous to a claim brought pursuant to the CWA § 505(a)(2) because both provisions are designed to compel an agency to discharge a nondiscretionary duty. *Compare* 5 U.S.C. § 706(1), *with* 33 U.S.C. § 1365(a)(2). The plaintiffs sought to compel the Bureau of Land Management ("BLM") to include in its land use plan, an off-road vehicle ban for the wilderness study area in question. *Id.* at 2376-78. The plaintiffs alleged the ban was mandated by 43 U.S.C. § 1782, *id.* at 2378, which required the BLM to manage wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation of wilderness." The Court refused to allow the plaintiff to use § 706(1) to challenge the content of a particular land use plan compelled by statute. *Id.* at 2380. The Court noted, "§ 706(1) empowers a court only to compel an

agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.' . . . a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 2379 (emphasis in original) (citations omitted). Thus, with its decision in *Norton*, the Court reinforced the idea that a party seeking to compel an agency to discharge its nondiscretionary duties may only challenge whether the Administrator actually performed the duties, not the method by which the duty is performed.

OCE attempts to circumvent this well-established principle and mounts, in the context of its citizen suit, a challenge to the manner in which EPA performed its review and planning obligations. The district court refused to allow that attempt and should be affirmed because it correctly concluded that EPA discharged all duties mandated by § 301(d), § 304(b) and § 304(m).

A. In 2003 and 2004 EPA Fulfilled Its Mandatory Duty Under § 301(d) and § 304(b) To Review Effluent Limitations Guidelines.

The CWA imposes upon EPA a mandatory duty to review existing effluent limitations guidelines each year. *See* 33 U.S.C. § 1311(d), CWA § 301(d); 33 U.S.C. § 1314(b), CWA § 304(b). The review, in turn, helps EPA identify the regulations it

should consider for possible revision. The district court properly held that EPA had fulfilled this simple mandatory duty. R. Ex. 18 at 0215. In fact, OCE readily admits that EPA performed annual reviews of the existing effluent limitations guidelines in both 2003 and 2004. *See* R. Ex. 3 at 0037-43.

Rather than seeking to compel EPA to perform its annual review, OCE seeks, by way of a citizen suit, to have a judicial determination of the adequacy of its review, *i.e.*, to compel EPA to perform its annual review in accordance with the availability of technology. *See* R. Ex. 3 at 0050-53. As discussed above, this is not a proper subject of a citizen suit. *See, e.g.*, *City of Las Vegas*, 755 F.2d at 704. Because EPA performed its annual reviews of all existing effluent limitations guidelines in both 2003 and 2004, *see* 69 Fed. Reg. at 53,708-17; 68 Fed. Reg. at 75,520-27, the district court correctly concluded EPA satisfied its mandatory duties under § 301(d) and § 304(b).

B. The CWA Does Not Impose A Mandatory Duty Upon EPA To Review Its Effluent Limitations Guidelines Using A Technology-Based Approach Or Any Other Particular Approach.

OCE attempts to broaden the nature of EPA's mandatory duty by alleging not only that EPA has a mandatory duty to conduct an annual review of effluent limitations guidelines under § 301(d) and § 304(b), but also that EPA must carry out its duty in a particular way, *i.e.*, by identifying, analyzing and evaluating the

technological advances for 56 industrial categories and 450 subcategories each year. Op. Br. at 27-34. Because, as discussed above, this claim overreaches the constraints associated with claims to compel an agency to undertake a nondiscretionary act, this Court should not consider it.[9]

However, should the Court address this issue, OCE's contentions must be rejected because the plain language of § 301(d) and § 304(b) does not establish a clear-cut obligation for EPA to employ the technology-based approach favored by OCE (or any other particular approach) when conducting its effluent guideline reviews. Rather, the statutory language plainly allows EPA to choose any reasonable review approach it deems suitable to identify appropriate candidates for revision. As the district court recognized, OCE's contentions amount to an impermissible attempt to bootstrap judicial review of the substantive elements of the EPA's effluent limitations guidelines decisions into a CWA citizen suit. R. Ex. 18 at 0213.

1. Sections 301(d) & 304(b) Of The CWA Do Not Contain "Clear Cut" Obligations That Require EPA To Conduct A Technology-Based Review Of Effluent Limitations Guidelines.

[9]OCE disputes EPA's authority to consider hazard when conducting its annual review. The question whether EPA properly considered hazard or any other review criterion would be reviewable, if at all, under the APA's arbitrary and capricious standard in the court of appeals. *See* 5 U.S.C. § 706 (scope of review); *City of Las Vegas*, 755 F.2d at 704 (stating that actions within the agency's discretion are reviewable under the APA).

A mandatory duty that gives rise to jurisdiction under the CWA's citizen suit provision must be a "clear-cut" obligation that is apparent within the plain language of the statutory text over which EPA lacks discretion to implement. *See Farmers Union Cent. Exch., Inc.*, 881 F.2d at 760 (citing *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980)); *Kennecott Copper*, 572 F.2d at 1353. The burden of establishing a "clear cut" obligation lies with OCE. *See Farmers Union Cent. Exch., Inc.*, 881 F.2d at 760 (placing the burden on the plaintiff to point to the statute or regulation requiring the alleged nondiscretionary duty). OCE attempts to satisfy its burden of establishing a "clear cut" mandatory duty by having the court draw an inference from the overall statutory framework. Op. Br. at 27-28. The D.C. Circuit has specifically rejected this approach, and for good reason. *Sierra Club*, 828 F.2d at 791. A duty cannot be said to be "clear cut" if it only exists by way of inference. *Id.*

For a duty to be "clear cut," it must be readily apparent in the plain language of the statutory text. *See Farmers Union Cent. Exch., Inc.*, 881 F.2d at 760 (requiring the plaintiff to point to a statute or regulation to establish a "clear cut" duty). An examination of § 301(d) and § 304(b), the statutory provisions in question, conclusively rebuts the notion that a clear cut duty to review the effluent limitations

guidelines in any particular way exists in the statutory text. The relevant portion of § 301(d) states:

> Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

33 U.S.C. § 1311(d). The relevant portion of § 304(b) states:

> For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall–

33 U.S.C. § 1314(b). Neither section specifies in any way the criteria EPA must, or even should, use to perform the required reviews.[10] Congress' failure to specify the review criteria is an unambiguous delegation of broad discretion to EPA, not a "clear cut" obligation giving rise to a mandatory duty.

The absence of statutory criteria governing the review process contrasts directly with the statutes' specificity when discussing the factors EPA must consider when promulgating an effluent limitations guideline regulation. Section 304(b), for

[10]In fact, § 304(b) does not mention a "review" at all, although the language directing EPA to "revise, if appropriate" probably includes a duty to review the existing effluent limitations guidelines. 33 U.S.C. § 1314(b); *see also* 33 U.S.C. § 1314(m)(1)(A), CWA § 304(m)(1)(A) (describing § 304(b) as calling for "the annual review and revision of promulgated effluent guidelines).

example, requires EPA, when promulgating a regulation, to identify the degree of effluent reduction attainable through the application of varying levels of technology and to take into account for purposes of promulgating effluent limitations guidelines certain fixed factors and "such other factors as the Administrator deems appropriate." *Id.* § 1314(b)(1)(A) to (b)(4)(B). Section 301(d) is similarly specific, requiring EPA to revise "pursuant to the procedure" established in § 301(b)(2), which in turn requires point source dischargers to meet effluent limitations based on the regulations establishing effluent limitations guidelines in § 304(b). 33 U.S.C. § 1311(d), CWA § 301(d). When compared to those precise instructions, Congress' direction to EPA under § 301(d) and § 304(b) simply to "review" the effluent limitations guidelines cannot reasonably be construed as anything other than the broad grant of discretion that it is. And in no case does either statutory section establish a clear-cut obligation requiring EPA to conduct its reviews of effluent limitations guidelines in any particular manner, never mind in accordance with the technology rubric OCE demands.

2. OCE's Interpretation Contradicts The Plain Language Of The Statute.

As mentioned, OCE relies on an inference it draws from the statutory text to support the proposition that EPA must conduct its annual reviews of effluent limitations guidelines using a technology-based regime. However, to the extent an

inference can be used to establish a clear cut mandatory duty, the inference OCE wishes to draw is at odds with the plain language of the CWA. For example, § 301(d) provides that effluent limitations "shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under [§ 301(b)(2)]." 33 U.S.C. § 1311(d), CWA § 301(d). To accept OCE's argument that EPA has a nondiscretionary duty to review its effluent limitations under § 301(b)(2)'s technology-based regime would require this Court to interpret § 301(d) as if the phrase "pursuant to the procedure established under [§ 301(b)(2)]" applies both to the act of review and to the act of revision. This interpretation would thus read out the phrase "if appropriate" from the statutory text. This phrase functions as a condition precedent to the decision to revise, and linguistically separates the act of revision from the act of review – thereby making clear the phrase "pursuant to. . ." modifies only the term revision that immediately precedes it.

The Court would also need to ignore the plain language of § 304(b) to accept the inference OCE wishes it to draw.[11] OCE contends the review process under §

[11] OCE relies on an unpublished district court opinion in *Natural Res. Def. Council v. Reilly*, No. 89-2980, 1991 U.S. Dist. Lexis 5334 (D. D.C. Apr. 23, 1991). The Court should disregard the citations to this unpublished opinion for two reasons. First, the local rules forbid citation to unpublished dispositions except in circumstances not applicable here. *See* 9th Cir. R. 36-3. Second, this unpublished opinion provides no assistance to the court in analyzing the question of whether § 301(d) and § 304(b) confer upon EPA the discretion to choose its

(continued...)

304(b) is controlled by the technology-based factors outlined in § 304(b)(1)(B), § 304(b)(2)(B) and § 304(b)(4)(B). Op. Br. at 31. As the district court recognized, however, by the statute's express terms, these factors apply only to "regulations" issued under that section.[12] R. Ex. 18 at 0214. EPA's review of effluent limitations guidelines is not itself a regulation. Moreover, even as these factors apply to regulations, they are broad and flexible. The final instruction to EPA in § 304(b)(1)(B), § 304(b)(2)(B) and § 304(b)(4)(B) is to consider "such other factors as the Administrator deems appropriate." Thus, even when EPA is promulgating a new or revised effluent limitations guidelines regulation, the statute allows EPA the discretion to consider a variety of factors. To argue as OCE does that EPA's *review*

[11](...continued)
review criteria. The primary issues before the district court in *Reilly* were (1) whether § 304(m) imposed on EPA mandatory deadlines for the promulgation of new effluent limitations guidelines, *id.* at *14-*15, and (2) whether § 304(m)(1)(B) required EPA to identify "all" industries discharging toxic and non-conventional pollutants in nontrivial amounts not subjected to effluent limitations guidelines in its first § 304(m) plan. *Id.* at *16-*17. The question of whether § 301(d) and § 304(b) provided EPA with the discretion to select the criteria to review these yet to be identified guidelines was not before the court. Thus, OCE reads too much into the district court's statement that the cross-reference to § 304(b) should be understood as a congressional command to review and revise guidelines in conformity with said section. *Id.* at *19.

[12]In other words, once EPA determines in the context of an annual review that a guideline revision may be appropriate, it must conduct its rulemaking consistent with the criteria discussed in § 304(b); however, the processes EPA uses to review its guidelines to identify appropriate candidates for revision, whatever they may be, are not subject to this criteria.

obligation, in contrast, is completely constrained by the review factor of its choice defies the plain language of the CWA.

In sum, contrary to the inference OCE wishes the Court to draw, these provisions apply *only* to the promulgation of effluent limitations guidelines, and do not address how to conduct the review of effluent limitations guidelines. Thus, as the district court correctly held, § 301(d) and § 304(b) by their plain language do not mandate technology-based review, but rather confer upon the agency broad discretion to choose any reasonable review criteria it deems suitable. The district court's decision should be affirmed.[13]

3. The Legislative History Of The CWA Is Irrelevant And, In Any Case, Does Not Support OCE's Position.

Ignoring the plain language of the relevant statutory provisions, OCE grasps onto the CWA's legislative history in an effort to support its view. Op. Br. at 27. The legislative history, of course, only becomes relevant if the court concludes that congressional intent is not clear from the plain language of the statute. *See Bonneville*

[13]Even if EPA has a mandatory duty under § 301(d) and § 304(b) to review its effluent limitations guidelines in accordance with the technology-based factors of § 304(b)(2)(B), it does not necessarily follow that EPA's current approach violated this duty. Section 304(b)(2)(B) allows EPA to consider "other factors" it deems appropriate. 33 U.S.C. § 1314(b)(2)(B), CWA § 304(b)(2)(B). EPA reasonably found hazard an appropriate "other factor" to consider. Moreover, if the matter proceeded to a merits review, EPA believes it could show its approach reasonably accounted for technology through the assessment of hazard.

Power Admin. v. F.E.R.C., 422 F.3d 908, 920 (9th Cir. 2005) ("Legislative history cannot trump the statute."). Here, congressional intent is clear from the statutory language.

But, if this Court should choose to examine the legislative history, it will find the snippets of legislative history cited by OCE do not supply the requisite unambiguous expression of congressional intent. The legislative history provides nothing more than a general overview of the statutory regime; it does not in any way assist this Court in interpreting whether § 301(d) and § 304(b) mandate that EPA implement a technology-based review process.

C. EPA Fulfilled Its Mandatory Duty Under § 304(m) By Timely Publishing Effluent Guidelines Plans That Contain The Requisite Components.

The district court also correctly concluded that EPA discharged its mandatory duty under § 304(m) to publish an effluent guidelines plan. EPA fulfilled its duty by publishing a preliminary effluent guidelines plan for public notice and comment in 2003, in accordance with § 304(m)(2), *see* 68 Fed. Reg. at 75,515, and by publishing its final plan in 2004, *see* 69 Fed. Reg. at 53,705.

1. EPA Timely Met its August Deadline.

OCE had attempted to argue that EPA had not met its duty because the timing of its 2004 plan did not coincide with the beginning of the calendar year. The district

court correctly rejected this argument. OCE's argument (Op. Br. at 43-45) regarding EPA's alleged failure to publish timely § 304(m) plans rests on a faulty factual premise that assumes a year for effluent guidelines planning purposes is a calendar year. That assumption is simply contrary to the actual language of the statute. Section 304(m)(1) contains two elements that, when read together, conclusively demonstrate Congress did not intend the deadline for publication of § 304(m) plans to parallel the calendar year. The first is the designation of February 4, 1988, as the deadline for the first plan, and the second is the requirement that the plans be published biennially thereafter. 33 U.S.C. § 1314(m)(1), CWA § 304(m)(1). These elements show that, if anything, Congress intended the deadline to fall in February of even-numbered years.

EPA, however, missed the original deadline by not publishing the first plan by February 4, 1988. Because of this missed deadline, as explained in the succeeding paragraphs, EPA satisfies the congressional mandate to publish a biennial plan by adhering to an August deadline. In 2004, EPA satisfied its mandate and, contrary to OCE's assertions, the public was given an opportunity to review and comment on the plan prior to final publication.

EPA's failure to meet the original deadline resulted in litigation between the agency and citizen groups. *Natural Res. Def. Council v. Reilly*, Civ. No. 89-2980

(D.D.C., filed Oct. 30, 1989). EPA thereafter published its first § 304(m) plan on January 2, 1990. 55 Fed. Reg. 80 (Jan. 2, 1990). The citizen groups alleged that the 1990 plan did not satisfy EPA's duties under § 304(m), and in an order dated April 23, 1991, the district court agreed. In response to the district court's order, the parties entered into a consent decree that, among other things, required EPA to propose a § 304(m) plan within 90 days of entry of the consent decree, and to publish final notice of the plan within 210 days of entry. Thus, because the consent decree was entered on January 31, 1992, the deadline for action on publishing the first § 304(m) plan was August 28, 1992. The Administrator signed the plan on this date and it appeared in the Federal Register on September 8, 1992. 57 Fed. Reg. 41,000 (Sept. 8, 1992).

EPA subsequently published five § 304(m) plans under the decree. *See* 59 Fed. Reg. 44,234 (Aug. 26, 1994); 61 Fed. Reg. 52,581 (Oct. 7, 1996); 63 Fed. Reg. 47, 285 (Sept. 4, 1998); 65 Fed. Reg. 53,008 (Aug. 31, 2000); 67 Fed. Reg. 55,012 (Aug. 27, 2002). The 2002-2003 Effluent Guidelines Program Plan, which set forth a schedule for final actions to be taken between December 31, 2002, and September 4, 2004, was published on August 27, 2002. 67 Fed. Reg. 55,012 (Aug. 27, 2002). Because the statute requires biennial publication of the § 304(m) plan, the earliest mandatory deadline that could be justified for the final plan under the plain language of § 304(m) was August 27, 2004. EPA discharged its mandatory duties under §

304(m) by publishing a preliminary effluent guidelines plan for public notice and comment in 2003, *see* 68 Fed. Reg. at 75,515, and by publishing the final plan on September 2, 2004, *see* 69 Fed. Reg. at 53,705, approximately two years after publication of the last biennial plan.

2. EPA Provided the 2004 § 304(m) Plan for Public Review and Comment.

OCE alleges that EPA's 2004 § 304(m) planning process was defective because it failed to provide for public review and comment as required by § 304(m)(2). 33 U.S.C. § 1314(m)(2), CWA § 304(m)(2). OCE's allegation lacks merit because it misconstrues the timing of events.

In support of its allegation, OCE contends that EPA performed its 2004 § 304(m) planning functions in reverse order, by allegedly completing the 2004 annual review before publishing the § 304(m) plan governing such review. Op. Br. at 43. The opposite, in fact, is true. EPA's 2003 Preliminary Plan, published on December 31, 2003, governed the 2004 annual review. 68 Fed. Reg. 75,515. The 2004 annual review began immediately after publication of the Preliminary Plan on January 1, 2004, and concluded on September 2, 2004, the date of the publication of the Final Plan. EPA afforded the public an opportunity to review and comment on the Preliminary Plan as evidenced by the fifty-nine comments it received from a variety

of stakeholders. 69 Fed. Reg. at 53,712. These comments played a significant role in shaping both the 2004 annual review and the 2004 Final Plan. *Id.* Thus, contrary to OCE's assertions, EPA's practice does not thwart the public review and comment process mandated by § 304(m)(2).

3. OCE Cannot Challenge the Discretionary Content of EPA's Final Plan Through the Citizen Suit Provision.

OCE also impermissibly challenges the substance of EPA's final § 304(m) plan through the citizen suit provision in § 505.[14] Op. Br. at 36-42. These claims must be rejected because the citizen suit provision only authorizes claims alleging that EPA has failed to perform a duty that is made nondiscretionary by the CWA. *See, e.g., City*

[14]OCE's Opening Brief raises a variety of substantive issues that the district court did not resolve because it found it lacked the requisite jurisdiction to do so. These substantive issues relate to the way in which EPA conducted its annual reviews and to the content of the final § 304(m) plan, both of which, as discussed above, are committed to EPA's discretion. This Court's review does not reach those substantive issues and is limited to the issues the district court did address, *i.e.*, those properly relating to EPA's mandatory duties under the statute. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381 (9th Cir. 1988).

of Las Vegas, 755 F.2d at 704. EPA has already met the nondiscretionary duty under § 304(m) by publication of a plan that contains the elements required by § 304(m)(1). OCE's real complaint is not about whether EPA's Plan contains the requisite elements, but about the *substance* of EPA's effluent guidelines planning decisions reflected in the Final Plan. The substantive merits of EPA's decisions are outside the scope of the CWA's citizen suit provision. *Id.*

Section 304(m)(1)(A) requires EPA to publish biennially an effluent guidelines plan that contains three elements. The plan must:

> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section;
>
> (B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and
>
> (C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than . . . 3 years after the publication of the plan . . .

33 U.S.C. § 1314(m)(1)(A)-(C).

EPA discharged its mandatory duty under § 304(m) by publishing its 2004 Final Plan that contained all of the requisite elements. As required by § 304(m)(1)(A), the Final Plan provides a schedule for the next annual review of existing effluent guidelines. 69 Fed. Reg. at 53,717. The 2004 Plan also provides the schedule for the

possible revision of promulgated effluent guidelines for the two subcategories identified by EPA in its § 304(b) annual review. *Id.* In addition, as required by § 304(m)(1)(B), the Final Plan identified two point source categories for which EPA has not previously published effluent guidelines, specifically concluding that "[n]o other category met the criteria of section 304(m)(1)(B)." *Id.* Finally, as required by § 304(m)(1)(C), EPA established a schedule to complete rulemakings for these categories within three years. *Id.* at 53,719.

The real dispute here is not whether EPA's Final Plan included the limited components mandated by the statute; it is a challenge to EPA's exercise of discretion with respect to the substantive merits of the decisions reflected in the Final Plan. For example, OCE does not dispute that EPA included in its Final Plan a schedule for the review and revision of existing effluent guidelines – but rather, challenges the *adequacy* of that schedule. Op. Br. at 38, 42. Similarly, OCE does not allege that EPA failed to identify in its Final Plan potential new categories for effluent guidelines rulemaking – but rather, asserts that EPA should have identified certain industries and failed to do so. Op. Br. at 38-39. In other words, OCE is challenging EPA's exercise of discretion with respect to the content of the Final Plan, which is outside the scope of the citizen suit provision of the CWA. *See, e.g., City of Las Vegas*, 755 F.2d at 704.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO TRANSFER OCE'S SUBSTANTIVE CLAIMS TO THIS COURT BECAUSE THE DISTRICT COURT LACKED JURISDICTION TO DO SO AND, IN ANY CASE, A TRANSFER WAS NOT IN THE INTERESTS OF JUSTICE.

This Court reviews OCE's claim (Op. Br. at 52-55) that the district court erred by failing to transfer the matter to the court of appeals for an abuse of discretion. *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (reviewing the district court's refusal to transfer a case pursuant to 28 U.S.C. § 1631 for an abuse of discretion). In the district court, OCE moved to transfer its substantive challenges to EPA's effluent limitations guidelines reviews and plan to this Court for review, pursuant to 28 U.S.C. § 1631. This provision commands a court, if the interests of justice so require, to cure want of jurisdiction by transferring an action to any other court in which jurisdiction would be proper. The district court did not abuse its discretion by denying the motion to transfer because the filing of the notice of appeal divested it of jurisdiction to effect the transfer, and, in any case, transferring the case was not in the interests of justice.

A. The District Court Correctly Found It Lacked Jurisdiction Over The Motion To Transfer.

OCE filed its motion to transfer *after* it filed its notice of appeal. R. Ex. 141 at 0265. The filing of a notice of appeal generally divests the district court of jurisdiction over matters being appealed. *See Natural Res. Def. Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) ("Once a notice of

appeal is filed, the district court is divested of jurisdiction over the matters being appealed."). Therefore, because the subject matter of the motion to transfer – jurisdiction – directly related to issues on appeal, the district court correctly found that it lacked the jurisdiction to grant the motion to transfer. *Id.*

B. Even If The District Court Had Jurisdiction to Transfer, A Transfer Was Not In Interests of Justice Because This Court Has Jurisdiction To Hear The Substantive Merits Of OCE's Claims Only On Petition For Review Filed Within The 120-Day Deadline Prescribed By The CWA.

Even if the filing of the notice of appeal did not divest the court of the authority to grant the transfer, transferring the case was not in the interests of justice because this Court lacks jurisdiction to review EPA's substantive actions that are not challenged within the requisite 120-day deadline prescribed by the CWA. *See* 28 U.S.C. § 1631 (requiring proper jurisdiction in the transferee court); *see also Texas Municipal Power Agency v. EPA*, 799 F.2d 173, 174 (5th Cir. 1986) ("Statutory time limits on petitions for review of agency actions are jurisdictional in nature such that if the challenge is brought after the statutory time limit, [the court is] powerless to review the agency's action.").

OCE sought to transfer review of the substantive claims underlying its Amended Complaint to this Court . R. Ex. 141 at 0265. However, to obtain substantive review of EPA's effluent limitations guidelines and plans, OCE was required to file a petition for review in this Court under 33 U.S.C. § 1369(b)(1)(E), CWA § 509(b)(1)(E). *See Maier v. EPA*, 114 F.3d 1032, 1036-37 (10th Cir. 1997).

Section 509(b)(1) requires the petition for review to be filed within 120 days from the date EPA published its Final Plan and completed its effluent limitations guidelines reviews. 33 U.S.C. § 1369(b)(1), CWA § 509(b)(1). OCE admits more than 120 days have elapsed without it filing a petition seeking substantive review of EPA's actions. Op. Br. at 55. OCE cannot circumvent this statutory deadline by morphing its action seeking discharge of nondiscretionary duties under § 505(a)(2) into an action seeking substantive review under § 509(b)(1)(E) simply by filing a motion to transfer under 28 U.S.C. 1631. Therefore, such transfer would not be in the interests of justice because OCE's may obtain substantive review only be filing a petition for review within 120-day deadline established by § 509(b)(1).[15]

[15]If the Court the should find that OCE's substantive claims are judicially reviewable and should further find jurisdiction is proper in the court of appeals, adjudication of these claims is not proper on appeal at the present time. The claims must be adjudicated in a separate petition for review proceeding that allows EPA to compile the record on review as dictated by 28 U.S.C. § 2112 and Rules 16 and 17 of the *Federal Rules of Appellate Procedure*.

C. Even If The District Court Had Jurisdiction to Transfer, A Transfer Was Not In Interests of Justice Because Of A Lack Of Final Agency Action.

Furthermore, transferring the case was not in the interests of justice because a lack of final agency action rendered the claims unreviewable in this or any other court. Although 33 U.S.C. § 1369(b)(1)(E), CWA § 509(b)(1)(E) provides the statutory basis to seek review of EPA's actions relating to the promulgation of effluent limitations guidelines, in order to obtain judicial review OCE must also satisfy the jurisdictional provisions of the APA. *See, e.g.*, *Maier*, 114 F.3d at 1039 (reviewing EPA's actions in an action brought pursuant to § 509 under the APA); *Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994) (same); *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 691 (11th Cir. 1986) (same); *Koppers Co., Inc. v. EPA*, 767 F.2d 57, 58 (3d Cir. 1985) (per curiam) (same). A jurisdictional prerequisite to review under the APA is "final agency action."[16] *See* 5 U.S.C. § 704; *see also City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001). EPA's effluent limitations guidelines reviews and effluent guidelines plans do not fall within the statutory definition of "agency action," much less the definition of "final agency action"; therefore, OCE may not challenge such

[16]Even if the APA does not apply, OCE must show final agency action to obtain review of EPA's actions. *See Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1387 (4th Cir. 1990).

actions under the APA and, accordingly, the district court did not abuse its discretion in denying OCE's motion to transfer.

1. Effluent Limitations Guidelines Reviews and the Preparation of the Effluent Guidelines Plan Are Not "Discrete" Agency Actions.

The APA defines "agency action" as "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Quite simply, EPA's reviews and plan preparation at issue do not fall within this definition of agency action; they do not involve any part of a "rule, order, license, sanction, relief or the equivalent or denial thereof, or the failure to act." What is more, the Supreme Court held that this definition of "agency action" is limited to "circumscribed, discrete agency actions." *See Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378 (2004). This principle precludes litigants from launching broad programmatic attacks and from attempting to improve, wholesale, any agency program by court decree; it thereby permits the expert agency to work out compliance with a broad statutory mandate and avoids the injecting the court into day-to-day agency management. *Id.* at 2379-81 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)) .

Like the claims at issue in *Lujan* and *Norton*, and most recently *Center for Biological Diversity v. Venemen*, 394 F.3d 1108 (9th Cir. 2005), OCE's challenges to

EPA's effluent guidelines reviews and plan constitute broad challenges to an agency's overarching program that do not constitute "agency actions" reviewable under the APA.

a. Review of Effluent Limitations Under § 301(d) and Effluent Limitations Guidelines Under § 304(b) Is Not Discrete Agency Action Within the Meaning of the APA.

EPA's review of effluent guidelines under § 301(d) and § 304(b) is not a discrete action; rather, it is an overarching planning process, from which many different actions may flow over time. The most concrete *outcome* from effluent limitations guidelines reviews under § 301(d) or § 304(b) would be the commencement of an effluent limitations guidelines rulemaking. The new rulemaking process itself – and not the reviews or the plan – would determine whether a particular effluent guideline should be revised and, if so, what the revision should be.[17] Thus, EPA's effluent guidelines reviews are not "agency actions" as defined under the APA for the purposes of judicial review, and for this reason, the district court did not abuse its discretion by not transferring the case to the court of appeals.

[17] The decision to begin rulemaking is not subject to judicial review. *See Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 655 (7th Cir. 1986) ("When an agency has discretion as to whether or not to undertake rulemaking, the courts cannot tell it how to exercise that discretion."). Jurisdiction attaches only when the agency takes final action to either promulgate a revised guideline or to determine that revision is not warranted under the statutory standards.

b. Preparation of an Effluent Guidelines Plan under § 304(m) Is Not Discrete Agency Action Within the Meaning of the APA.

Like EPA's review of effluent guidelines under § 301(d) and § 304(b), EPA's effluent guidelines plan under § 304(m) is a programmatic planning mechanism, not a "discrete, circumscribed action." Like the land use plan at issue in *Norton,* the § 304(m) plan is simply a plan – a forward-looking statement of what EPA expects to accomplish in its effluent guidelines program, given EPA priorities and resources at the time that plan is published. EPA's effluent guidelines plan, therefore, is most accurately characterized as a broad programmatic process of priority setting and planning of actions to be taken in managing its effluent guidelines program – not a discrete agency action. As the Court emphasized in *Norton* and *Lujan*, judicial supervision of an agency at such a broad level is unwarranted absent specific authorization from Congress. *See Norton*, 124 S. Ct. at 2379-80; *Lujan*, 497 U.S. at 891. The Court in *Lujan* expressly recognized that groups such as OCE may prefer an "across-the-board" approach, but explained that the APA does not provide the courts with such extensive power. 497 U.S. at 891. The APA's limitations on reviewability of agency actions ensure that plaintiffs "cannot seek *wholesale* improvement of [an Agency] program by court decree, rather than in the offices of the

Department or the halls of Congress, where programmatic improvements are normally made." *Id*. (emphasis in original).

2. EPA's Effluent Guidelines Reviews and Plan Are Not "Final" Agency Actions Within the Meaning of the APA.

Moreover, even if EPA's effluent guidelines reviews and plans constitute "circumscribed, discrete agency actions," they are not "final," and thus not subject to judicial review. 5 U.S.C. § 704; *Lujan*, 497 U.S. at 890. As this Court has explained,

> Agency action is "final" if at least two conditions are satisfied: "First, the action must mark the 'consummation' of the agency's decisionmaking process ... – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1196-97 (9th Cir. 1997) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). EPA's effluent guidelines reviews and plan preparation meet neither criterion.[18]

[18]For the same reasons, OCE's claims are not justiciable because they are not ripe for review. The ripeness doctrine examines two factors: whether the issue is fit for judicial resolution, including whether the issue is purely legal and whether the agency action was final; and the hardship of withholding review. *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 779-780 (9th Cir. 2000). Because OCE's claims do not rest on final agency action, OCE presents no issues that are fit for resolution. *Id.*

a. EPA's Review of Effluent Limitations Under § 301(d) and Effluent Limitations Guidelines Under § 304(b) Is Not "Final" Agency Action Within the Meaning of the APA.

EPA's effluent guidelines reviews mark not the end – but the beginning – of the agency's decision-making process. EPA's review of effluent guidelines under § 301(d) and § 304(b) is an ongoing, iterative process, whereby EPA continually collects data on discharges from industrial categories and prioritizes high hazard categories for further studies or potential future effluent guidelines revision. Such frequent analyses can hardly be said to reflect a "'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78.

Moreover, these reviews are not actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* The effluent limitations guidelines review does not determine that EPA will in fact revise a particular effluent guideline: that decision is made at the conclusion of a separate rulemaking proceeding after notice and comment. Similarly, the review does not determine that EPA will *not* revise a particular effluent guideline in the future: EPA re-examines each effluent guideline in each future review to reassess the need for revision. Thus, the effluent limitations guidelines reviews under § 301(d) and § 304(b) do not constitute "final" agency action within the meaning of the APA.

b. Preparation of an Effluent Guidelines Plan under § 304(m) Is Not "Final" Agency Action Within the Meaning of the APA.

The § 304(m) plan is also not a "final" agency action. Like the effluent limitations guidelines review, the § 304(m) plan is a preliminary step in EPA's overall process of effluent guidelines program management. The plan itself has three requisite components – none of which constitutes final agency action within the meaning of the APA. 33 U.S.C. § 1314(m)(1). Specifically, the plan establishes a schedule for the review and revision of existing effluent guidelines, § 304(m)(1)(A), identifies new industrial categories for which effluent guidelines may be warranted, § 304(m)(1)(B), and presents a rulemaking schedule for these potential new categories, § 304(m)(1)(C). *See* 33 U.S.C. §§ 1314(m)(1)(A)-(C). None of these components create any binding legal obligations. Even if EPA's § 304(m) plan identifies and schedules an industrial category for effluent guidelines rulemaking, such action does not constitute a final decision to promulgate new or revised effluent guidelines, inasmuch as no guidelines can be promulgated without formal notice and comment rulemaking. The rulemaking itself, not the identification in the plan, will determine whether effluent guidelines are in fact developed for the particular category. At any point in the rulemaking process, EPA may find that promulgating new or revised effluent guidelines is not appropriate, based on factors specified in § 304(b),

and may discontinue the process at that time. Similarly, a decision by EPA not to identify a particular category for new or revised effluent guidelines is also tentative: in this biennial planning process (which includes annual publication of preliminary or final plans), EPA would continue to collect public comments and information and independently collect and analyze data, in order to assess on a biennial basis whether such guidelines were warranted.

In short, § 304(m) is simply a mechanism designed to promote regular and transparent priority-setting on the part of the agency. Accordingly, EPA's § 304(m) plan – like the land use plan in *Norton* – is simply "a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them," and therefore does not constitute final agency action. *See Norton* 124 S. Ct. at 2383. Review of EPA's effluent guidelines plan would result in precisely what the Supreme Court intended to preclude in *Lujan*: "*wholesale* improvement of [an Agency] program by court decree." *Lujan,* 497 U.S. at 891 (finding challenge to BLM's land withdrawal review program non-justiciable). Thus, OCE's claim amounts to nothing short of an attempt at wholesale improvement of EPA's effluent guidelines program through a broad programmatic challenge to EPA's effluent guidelines plan.

III. IF OCE'S CLAIMS ARE REVIEWABLE, REVIEW OF THEIR SUBSTANTIVE ELEMENTS IS EXCLUSIVELY WITHIN THE JURISDICTION OF THE COURT OF APPEALS ON A TIMELY FILED PETITION FOR REVIEW.

OCE alternatively asserts that even if EPA met its mandatory duties under the CWA by completing its effluent guidelines reviews and publishing the final plan, the district court had jurisdiction to review the substantive merits of EPA's actions pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 704. This argument must be rejected. Even if this court finds that OCE's claims challenge final agency action under the APA, review of the substantive merits of EPA's actions lies within the exclusive, original jurisdiction of this Court. As the district court found, § 509(b)(1)(E) precludes district court review of OCE's claims because the claims are "closely related" to the approval or promulgation of effluent limitations under § 301 and § 306 and therefore fall within the exclusive jurisdiction of the courts of appeals. 33 U.S.C. § 1369(b)(1)(E), CWA § 509(b)(1)(E).

Section 509(b)(1)(E) provides the courts of appeals exclusive, original jurisdiction to review EPA actions "in approving or promulgating any effluent limitation or other limitation under section [301, 302, 306 or 405]" of the CWA. *Id.* OCE argues that review of effluent limitations under § 301(d), review of effluent limitations guidelines under § 304(b), and publication of effluent guidelines plans under § 304(m) are not among those actions identified by § 509(b)(1). Op. Br. at 46-48. Such an argument, however, ignores the well-established principle that the courts of appeals have exclusive, original jurisdiction over actions "closely related" to the

approval or promulgation of effluent limitations under § 301 and § 306. *See Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 566-67 (D.C. Cir. 2002); *Maier v. EPA*, 114 F.3d 1032, 1037-38 (10th Cir. 1997); *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 402-03 (D.C. Cir. 1982); *Natural Res. Def. Council v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981); *Virginia Elec. and Power Co. v. Costle*, 566 F.2d 466, 449-51 (4th Cir. 1977); *see also* 62 A.L.R. Fed. 906 at 3(a) (1983) (collecting cases).

The courts of appeals exercise exclusive, original jurisdiction over "closely related" actions because Congress did not intend for the CWA to create an irrational bifurcated system of judicial review. *Crown Simpson Paper Co. v. Costle*, 445 U.S. 193, 197 (1980). To avoid this irrational bifurcation, courts have given § 509(b) a "practical rather than a cramped construction." *Natural Res. Def. Council*, 673 F.2d at 405. The "practical construction" doctrine is firmly entrenched in the case law of this Circuit. *See Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 876-77 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2811 (2004); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992); *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992); *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1320 (9th Cir. 1990).

As the district court found, the actions challenged by OCE are planning mechanisms closely intertwined with the approval or promulgation of effluent limitations or other limitations under § 301 and § 306, and therefore fall within the

exclusive, original jurisdiction of this Court. Indeed, OCE's challenge to EPA's review of effluent limitations under § 301(d) falls squarely within the scope of review of § 509(b)(1)(E), inasmuch as § 301(d) review can directly lead to the promulgation of effluent limitations under § 301. Similarly, EPA's annual review of these effluent limitations guidelines under § 304(b) allows EPA to identify effluent limitations guidelines – and the effluent limitations they contain – for possible revision. It is well-established that the courts of appeals have exclusive jurisdiction to review effluent limitations promulgated under § 304(b) – even though § 304(b) is not mentioned in § 509(b)(1)(E) – because of the guidelines' close relationship to § 301 effluent limitations. *Du Pont*, 430 U.S. at 124, 136. Finally, EPA's § 304(m) plan is closely intertwined with the promulgation of effluent limitations under § 301 and § 306 because it presents a schedule for the possible promulgation of new or revised effluent limitations guidelines and standards under § 301, § 304 and § 306.[19]

OCE contends that *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992) rejected the proposition that actions "functionally similar or closely related to" those listed in § 509(b)(1) are within the exclusive jurisdiction of the courts

[19]Moreover, this Court must exercise exclusive judicial review over the effluent limitations guidelines review and planning processes in order to protect its future jurisdiction over the promulgated guidelines. *See Public Utility Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985); *Telecomm. Research and Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 74 (D.C. Cir. 1984).

of appeals. Op. Br. at 46-48. OCE misunderstands the case. The question in *Longview Fibre* was whether the limitations at issue, total maximum daily loads limits, though statutorily referenced in § 303 were nevertheless promulgated under § 301. *Id.* at 1311-13. The court answered the question in the negative, holding the limitations at issue were promulgated under under § 303.[20] *Id.* at 1312-13.

Even though the total maximum daily load was established under § 303, a section not within § 509(b)(1), the industry plaintiffs argued it was functionally similar or closely related to other sections for which appeal to the court of appeals was permitted. *Id.* at 1313. The court was unwilling to extend its jurisdiction, stating if Congress intended standards promulgated under § 303 to be within those exclusively reviewable in the courts of appeals it would have said so. *Id.* at 1312-13.

The present case is factually dissimilar because it does not concern total maximum daily load limits under § 303, but rather concerns the review of effluent limitations under § 301(d), the review of effluent limitations guidelines under § 304(b), and the preparation of an effluent guidelines plan under § 304(m). It is well-

[20]The block quote from *Du Pont* cited to by OCE on page 47 of its Opening Brief, in particular the italicized language within, represents the Supreme Court's interpretation of the implication of the industry plaintiffs' argument. 430 U.S. at 124-25. It does not stand for the proposition, as OCE appears to contend, that the Court concluded § 304 guidelines are not reviewable in the court of appeals. In fact, the Court reached the opposite conclusion, finding § 304 effluent limitations guidelines are promulgated under § 301 and therefore exclusively reviewable in the court of appeals. *Id.* at 136.

established that, unlike § 303 water quality standards, § 304 effluent limitations guidelines are promulgated under § 301. *See Du Pont*, 430 U.S. at 136; *see also* 62 A.L.R. Fed. 906 at § 2 (1983) (collecting cases). Thus, while § 304 is similar to § 303 in that neither section is expressly mentioned in § 509(b)(1), judicial review of actions taken under § 304 is fundamentally different because it implicates the approval or promulgation of effluent limitations under § 301.[21]

Therefore, because OCE's objections to EPA's actions under § 301(d), § 304(b) and § 304(m) challenge actions closely related to the promulgation of effluent limitations or other limitations under § 301 and § 306, such claims are exclusively reviewable, if at all, in the court of appeals.[22] The district court thus correctly dismissed OCE's claims for lack of subject matter jurisdiction.[23]

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[21]Review of the water quality standards under § 303 is sharply different from the review effluent limitations under § 301, therefore, some rational basis exists to separate judicial review. *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976). The rational basis for separate review, however, evaporates in the case of § 304 because EPA conducts the reviews required by § 301(d) and § 304(b) in a single process. *Du Pont*, 430 U.S. at 124.

[22]Compelling public policy reasons support appellate court review when the jurisdictional prerequisites are met. *See TRAC*, 750 F.2d at 77. Because "[a]ppellate courts develop an expertise concerning the agencies assigned them for review, [e]xclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise," as well as "eliminat[ing] duplicative and potentially conflicting review, . . . and the delay and expense incidental thereto." *Id.*

[23]Even in cases, unlike this one, "where it is unclear whether review

(continued...)

[23](...continued)
jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter." *General Elec.Uranium Mgmt. Corp. v. United States Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985); *see also Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192-193 (7th Cir. 1986) ("If a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals."); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts.").

CONCLUSION

For the foregoing reasons, the district court's orders and judgments should be affirmed.[1]

Respectfully Submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JOHN A. BRYSON
EILEEN T. MCDONOUGH
ALLEN M. BRABENDER
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-5316

[1]OCE asks this Court to enter judgment establishing that EPA violated its mandatory duties under the CWA in 2003, 2004 and 2005. Op. Br. at 56. As mentioned, the entry of judgment on these claims would be improper as the substantive merits of the claims are not on appeal. Beyond that, entry of judgment as to the 2005 review would be improper because OCE did not include a challenge to the 2005 review in its First Amended Complaint. *See* R. Ex. 3 at 0051-53. This Court does not consider claims not raised in the complaint. *See Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1052 (9th Cir. 2005) (citing *McMichael v. County of Napa,* 709 F.2d 1268, 1273 n. 4 (9th Cir. 1983)).

STATEMENT OF RELATED CASES

Counsel for Federal Defendants–Appellees is unaware of any currently pending related cases within the meaning of Local Rule 28-2.6.

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Allen M. Brabender

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Local Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13, 511 words.

_____
Allen M. Brabender

CERTIFICATE OF SERVICE

I hereby certify that a two copies of the Answering Brief of Federal Defendants–Appellees has been served by regular mail, postage prepaid, this 2nd day of December, 2005, upon the following counsel of record:

Christopher A. Sproul
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121

Michael W. Graf
227 Behrens Street
El Cerrito, CA 94530

Fredric P. Andes
Carolyn Sue Hesse
Jeffrey Steward Longsworth
David T. Ballard
Barnes & Thornburg LLP
One North Wacker Drive
Chicago, IL 60606

David W. Burchmore
Jill A. Grinham
Steven C. Bordenkircher
Joseph A. Meckes
Squire, Sanders & Dempsey LLP
127 Public Square
4900 Key Tower
Cleveland, OH 44114-1304

Nicole E. Granquist
Downey Brand LLP
555 Capitol Mall
Sacramento, CA 95814-4686

_____
Allen M. Brabender