No. 05-16214

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and
MICHAEL LEAVITT, Administrator,
Appellees.

On Appeal from the U.S. District Court
for the Northern District of California

BRIEF OF INTERVENOR-APPELLEE THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Clean Water Agencies (NACWA) makes the following disclosure:

NACWA does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of NACWA's stock. NACWA states that its voting members include numerous local governments and governmental agencies that own and operate wastewater treatment plants throughout the United States.

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JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based upon CWA § 505(a)(1), which authorizes any citizen to commence a civil action against the Administrator of EPA when there is alleged a failure to perform an act or duty under the CWA that is not discretionary with the Administrator, and confers jurisdiction upon the District Courts "to order the Administrator to perform such act or duty." Appellants' contention that jurisdiction was also conferred upon the District Court by §§ 702 and 706 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 706, was in error because APA review is available only where there is no other adequate remedy in a court, and is thus precluded by the availability of review in the Courts of Appeals pursuant to CWA § 509(b). *See Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975). Jurisdiction under 28 U.S.C. 1331 is similarly precluded, under the Supreme Court's ruling in *Middlesex County Sewerage Authority v. National Sea Clammers Assn'n*, 453 U.S. 1, 21 (1981), which held that Congress intended to limit federal court access to enforce the CWA to the express enforcement provisions of the Act.

Because the Appellants have never filed an original petition for review with this court pursuant to CWA § 509(b), jurisdiction in this Court is restricted to a review of the District Court's decision pursuant to 28 U.S.C. § 1291. *See Pete Wilson, Governor v. A.H. Belo Corp.*, 87 F.3d 393 (9th Cir. 1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court lacked jurisdiction to engage in a substantive review of the manner in which EPA plans and conducts its periodic review of Effluent Limitation Guidelines under Clean Water Act §§ 301 and 304, and properly granted summary judgment to the Appellees on the question whether EPA had performed its mandatory duties under the Act.
2. Whether this Court should review the substance of EPA's actions relating to the Effluent Limitation Guidelines program despite the Appellants' failure to file a timely Petition for Review as required by CWA § 509(b).
3. Whether Clean Water Act §§ 301(d), 304(b) or 304(m) impose any specific requirements on the manner in which EPA performs its periodic review (as opposed to revision) of existing Effluent Limitation Guidelines or any specific deadline for the issuance of its biennial Effluent Guidelines Plan.

STATEMENT OF THE CASE

On December 31, 2003, Defendant-Appellee the U.S. Environmental Protection Agency (EPA) published a Notice in the Federal Register which (1) presented the results of its 2003 annual review of effluent guidelines promulgated under Clean Water Act (CWA) § 304(b), 33.U.S.C. 1314(b)[1] (required annually by CWA §§ 304(m)(1)(a)) and (2) solicited public comment on its preliminary Effluent Guidelines Program Plan for 2004/2005 (required every two years by CWA § 304(m)(2)). 68 Fed. Reg. 75515 (December 31, 2003). EPA announced in the Notice that it was proposing to follow a schedule whereby, in odd-numbered years, EPA would coordinate its annual review under CWA § 304(m)(1)(A) with the preliminary Effluent Guidelines Program Plan that EPA must publish for public review and comment under CWA § 304(m)(2). In even-numbered years, EPA would coordinate its annual review with publication of the final Plan.

On May 28, 2004, instead of filing a petition for review of EPA's actions in the Court of Appeals pursuant to CWA § 509(b), the Appellants filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Northern District of California pursuant to CWA § 505(a)(2). The Complaint alleged that EPA had failed to perform its mandatory duties to (1) review effluent guidelines

[1] Sections of the Clean Water Act, 33, U.S.C. 1251 *et seq.* are conventionally cited by reference to the sections of the original Act, rather than to the section numbers assigned after codification in the U.S. Code. That convention is followed herein.

annually in accordance with CWA §§ 304(b) and (m); (2) review effluent limitations every five years in accordance with CWA § 301(d); and (3) publish a biennial Plan that establishes a schedule for the annual review of existing effluent guidelines, identifies additional categories of industry not subject to existing guidelines and sets a schedule for the publication of new guidelines for those industries. By way of relief, the Complaint sought (1) an injunction pursuant to CWA § 505(a) ordering EPA to commence review of effluent guidelines and effluent limitations according to a schedule set by the court and to prepare its biennial Plan in conformance with the CWA; (2) a declaratory judgment pursuant to CWA § 505(a) that EPA's practices for reviewing effluent guidelines and effluent limitations and adopting its biennial Plan were unlawful; and (3) an award of attorneys fees pursuant to CWA § 505(d).

On August 11, 2004, the court below issued an Order granting summary judgment to EPA on the Appellants' third claim, ruling that CWA § 304(m) requires only that EPA's Plan be published biennially, and does not require that the Plan be issued at the beginning of the calendar year or synchronized with the Agency's annual review.

On September 2, 2004, EPA published a Notice in the Federal Register which (1) described the results of its 2004 annual review of effluent guidelines

under CWA § 304(b), and (2) presented its final Effluent Guidelines Program Plan for 2004/2005 under CWA § 304(m). 69 Fed. Reg. 53705 (September 2, 2004).

On December 13, 2004, instead of filing a petition for review of EPA's 2004 annual review or EPA's final 2004/2005 Plan in the Court of Appeals pursuant to CWA § 509(b), Appellants filed an Amended Complaint for Declaratory and Injunctive Relief in the District Court pursuant to CWA § 505(a)(2). In addition to the three claims for relief in the original Complaint, the Amended Complaint added a fourth claim alleging that EPA's 2004/2005 biennial plan failed to comply with the requirements for such plans in CWA § 304(m) and reflected an improper methodology for review of effluent guidelines.

On May 20, 2005, the court below issued an Order granting EPA and Intervenors' motions for summary judgment on the question whether EPA had discharged its mandatory duties under the CWA, and granting in part EPA's motion for judgment on the pleadings on the grounds that the District Court's jurisdiction is limited to a review of the discharge of EPA's statutory duties and does not reach questions that would amount to a substantive review of the 2004/2005 biennial Plan.

SUMMARY OF ARGUMENT

Appellant's case must fail because it is undisputed that EPA has, in fact, undertaken each of the actions that the Appellants claim the Agency had a mandatory duty to perform. Whether or not those actions were performed adequately or in the manner that the Appellants believe (incorrectly) the Clean Water Act (CWA) requires are questions that were not within the limited jurisdiction of the District Court granted by CWA § 505(a), and are not properly before this Court today. Appellants failed to file appeals of those actions with this Court within the 120 day statutory deadline set forth in CWA § 509(b), and because strict compliance with that deadline is a jurisdictional prerequisite to any substantive review of EPA's actions by this Court, this Court should decline to consider the bulk of the arguments set forth in the Appellants' brief.

Even if this Court did reach the substantive questions posed by the Appellants, those arguments are without merit because the Clean Water Act does not specify a deadline for the issuance of EPA's biennial effluent guidelines plan, and does not impose detailed criteria for the review (as opposed to the revision) of existing effluent guidelines and effluent limitations.

ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER CLAIMS THAT WERE NOT PROPERLY RAISED AND ARGUMENTS THAT WERE NOT ADDRESSED BY THE COURT BELOW

The CWA contains two separate and mutually exclusive provisions for judicial review. *E.I. du Pont de Nemours & Co. v. Train,* 528 F.2d 1136, 1137 (4th Cir. 1975). CWA § 505(a) authorizes any citizen to commence a civil action against the Administrator of EPA when there is alleged a failure to perform an act or duty under the CWA that is not discretionary with the Administrator, and it confers jurisdiction upon the District Courts "to order the Administrator to perform such act or duty." CWA § 509(b), on the other hand, provides for judicial review in the Courts of Appeals of various types of actions undertaken by the Administrator, including actions in "approving or promulgating any effluent limitation or other limitation under sections 301, 302, 306 or 405." Petitions for review of EPA actions under CWA § 509(b)(1) must be filed in the appropriate Court of Appeals within 120 days from the date of the action being challenged.

As explained in greater detail below, actions in District Court under CWA § 505(a) are confined to the question whether or not EPA has failed to perform a nondiscretionary duty, and cannot be used to review the *manner* in which that duty is performed or to challenge the *substance* or *content* of the Agency's action. *City of Las Vegas v. Clark County*, 755 F.2d 697, 704 (9th Cir. 1985); *Scott v. City of*

Hammond, 741 F.2d 992, 995 (7th Cir. 1984); *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 288 (2nd Cir. 1986).

The Appellants in this case have never asserted a claim under CWA § 509(b) and have failed to comply with that section's mandatory and jurisdictional requirement to file a petition with the Court of Appeals within 120 days of the actions in dispute. The only claims alleged by the Appellants in the case below were raised under CWA § 505(a), and even if those claims are transferred to this Court as the Appellants have requested, they would not thereby be converted into a different type of claim – one for substantive review of Agency action under CWA § 509(b) – that was never alleged in the Complaint below.

Contrary to the assertion in Appellants' Brief, at 51, the Appellants also failed to raise any cognizable claim under the Administrative Procedure Act (APA), although their Amended Complaint added citations to several sections of the APA as an alternative basis for jurisdiction in the District Court. Even if the Appellants had properly alleged a claim for relief under the APA, moreover, such a claim would be precluded by the availability of review in the Courts of Appeals under CWA § 509(b). *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975); *Allegheny County Sanitary Authority v. EPA*, 732 F.2d 1167, 1176-77 (3rd Cir. 1984); *Sun Enterprises*, *supra*, 532 F.2d at 288.

Because the District Court properly found that it lacked jurisdiction to entertain the Appellants' substantive objections to the manner in which EPA had performed the actions required by CWA §§ 301(d), 304(b) and 304 (m), and because the Appellants have not filed an original petition for review under CWA § 509(b), this Court should not consider the bulk of the arguments set forth in the Appellants' Brief. *See Scott v. City of Hammond, supra,* 741 F.2d at 996 (declining to construe a complaint as one for APA review because it was drafted as a citizen's suit to require performance of a nondiscretionary duty). Where a District Court has properly dismissed claims attacking the merits of an administrative agency action for want of jurisdiction over those claims, this Court has ruled that it will similarly decline to address the merits of those claims even though they might have been raised in a direct petition for review. *Pete Wilson, Governor v. A.H. Belo Corp.*, 87 F.3d 393 (9th Cir. 1996). Thus, although the Appellants in *Wilson* devoted the great bulk of their briefs to attacking the merits of the agency's action, this Court held that the only issue before it was whether the District Court had jurisdiction to review the Agency's action, and not whether that action was substantively correct. *Id.* at 400.

II. THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN THE APPELLANTS' SUBSTANTIVE CHALLENGE TO THE MANNER IN WHICH EPA PERFORMED ITS DUTIES UNDER CWA §§ 301(d), 304(b) and 304(m), AND ITS DECISION SHOULD BE AFFIRMED

The court below correctly determined that it lacked jurisdiction under CWA § 505(a) to consider the Appellant's substantive objections to the manner in which EPA had performed its duties under CWA §§ 301(d), 304(b) and 304(m). It has been clearly established since the Supreme Court's ruling in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) that exclusive jurisdiction to review all EPA actions relating to the review and approval of effluent limitations and guidelines resides in the Courts of Appeals, pursuant to CWA § 509(b). Appellants' suggestion that their fatal error in bringing the wrong claims in the wrong court should be excused because the CWA's jurisdictional provisions are "complex and difficult," Appellants' Brief at 53, cannot be taken seriously in light of the fact that the Courts of Appeals have been unanimous in their understanding of the proper forum for such actions for nearly the past three decades.

A. APPELLANTS MISREPRESENT THE SUPREME COURT'S HOLDING IN *DU PONT* AND IGNORE SUBSEQUENT CASE LAW ESTABLISHING THAT ALL EPA ACTIONS RELATING TO THE PROMULGATION OF EFFLUENT LIMITATION GUIDELINES ARE REVIEWABLE SOLELY BY THE COURT OF APPEALS

Appellants suggest in their Brief that the Supreme Court's decision in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) "supports that court of

appeals jurisdiction extends *only* over those EPA actions expressly enumerated in CWA § 509(b)(1), and not to any other actions, no matter how closely related" to those listed. Appellant's Brief at 47-48 (emphasis in original). This argument turns the holding of *du Pont* on its head, and misrepresents the Supreme Court's analysis of the both the ELG program and the jurisdictional provisions of the CWA.

Appellants' argument is founded on the misapprehension that the Supreme Court held that EPA regulations had to be effluent limitations under CWA § 301 rather than effluent guidelines under CWA § 304 to be reviewable in the Courts of Appeals. Appellants' Brief at 47. To the contrary, while the Supreme Court suggested that, "if" the regulations at issue were merely § 304 guidelines, review could "probably" be brought in the District Court (if one followed the Eighth Circuit's approach in *CPC Int'l v. Train,* 515 F.2d 1032, 1038 (1975)), it also observed that the Courts of Appeals might still have ancillary jurisdiction to review the regulations because of their "close relationship" with § 301 effluent limitations. 430 U.S. at 125. In the end, the Supreme Court found it unnecessary to choose between these theories because it recognized that the regulations at issue (like all of those subsequently promulgated by EPA) were actually a hybrid derived from both § 301 and § 304, which EPA referred to as "effluent limitation guidelines"

(ELGs), and that they were unquestionably reserved for appellate court review. *Id.* at 122.[2]

As the Supreme Court recognized, this hybrid approach to ELG rulemaking stemmed from EPA's recognition that the "ambitious" deadlines imposed by Congress could not be met if it attempted to adopt § 304 effluent guidelines and § 301 effluent limitations in separate proceedings. *Id.* "Because the process proved more time consuming than Congress assumed when it established this two-stage process, EPA condensed the two stages into a single regulation." *Id.* at 124. Furthermore, because these hybrid regulations are typically promulgated in the same proceeding as new-source standards under § 306 (which are expressly reserved for appellate court review in § 509), the Supreme Court held that that they should be reviewed in the Court of Appeals. *Id.* at 136-7 (noting that "we have no doubt that Congress intended review of the two sets of regulations to be had in the same forum").

[2] EPA's hybrid, or "shortcut," approach to the promulgation of effluent limitation guidelines was upheld by the D.C. Circuit in *American Frozen Food Institute v. Train*, 539 F.2d 107, 131 (D.C. Cir. 1976) ("we conclude that the Administrator's decision to issue "guidelines" under § 304 and "effluent limitations" under § 301 through the same procedures, on the same day, and in the same document was a permissible interpretation of the statute which we are required to accept"). EPA has followed this same procedure in subsequent rulemaking for almost 30 years. All of the "Effluent Limitation Guidelines" are codified together at 40 CFR Parts 400-471.

Prior to the Supreme Court's ruling in *du Pont*, only the Eighth Circuit had suggested that effluent limitation guidelines were reviewable in District Court. The Third, Fourth, Seventh, Tenth and District of Columbia Circuits had already concluded that review was confined to the Courts of Appeals. *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *E.I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975); *American Petroleum Institute v. Train*, 526 F.2d 1343 (10th Cir. 1975); *American Frozen Food Institute v. Train*, 539 F.2d 107 (D.C. Cir. 1976). Following *du Pont*, the Eighth Circuit reversed its position, recognizing that the Supreme Court, "contrary to our holding in *CPC*, ruled that effluent guidelines for existing sources are reviewable in the courts of appeals." *American Association of Meat Processors v. Costle*, 556 F.2d 875 (8th Cir. 1977). Indeed, while noting that prior to *du Pont* there had been "substantial uncertainty as to the proper forum in which to seek review of existing source effluent guidelines," the Eighth Circuit even went so far as to recall its mandate in one recent case dismissing a petition for review of such guidelines. *Id.* at 877, n.2.

The Appellants' characterization of the Supreme Court's decision *du Pont* is therefore directly at odds with the actual holding of that case and with its impact on all subsequent effluent guidelines litigation, which has been uniformly conducted in the Courts of Appeals. *See generally*, Annot., *Availability of Court of Appeals*

Review, under § 509(b)(1)(E) of Federal Water Pollution Control Act (33 U.S.C.A. § 1369(b)(1)(E)), of Action by Administrator of Environmental Protection Agency in Approving or Promulgating Effluent and Other Limitations, 62 A.L.R. Fed. 906 (1983). A partial list of the post-*du Pont* cases involving ELG review includes: *American Petroleum Inst. v. U.S. EPA*, 858 F.2d 261 (5th Cir. 1988) (oil and gas industry); *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482 (5th Cir. 1988) (electric utility industry); *American Petroleum Inst. v. EPA*, 787 F.2d 965 (5th Cir. 1986) (oil and gas industry); *Kennecott Copper Corp. v. EPA*, 780 F.2d 445 (4th Cir. 1985) (nonferrous metals manufacturing industry); *Cerro Copper Products Co. v. Ruckelshaus*, 766 F.2d 1060 (7th Cir. 1985) (copper-forming industry); *Reynolds Metals Co. v. U.S. EPA*, 760 F.2d 549 (4th Cir. 1985) (metal and brewing industries); *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983) (electroplating industry); *American Petroleum Inst. v. EPA*, 661 F.2d 340 (5th Cir. 1981) (oil and gas industry); *American Paper Inst. v. EPA*, 660 F.2d 954 (4th Cir. 1981) (paper industry); *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, (9th Cir. 1980) (seafood processing industry); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) (organic pesticide industry); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978) (pulp and paper industry); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284 (3d Cir. 1977) (iron and steel industry).

Appellants' contention that *du Pont* supports the principle that Court of Appeals jurisdiction does not extend to actions "closely related" to those expressly enumerated in § 509 is, thus, completely at odds with the holding in that case. In fact, the Supreme Court's decision in *du Pont* actually sustained a decision by the Fourth Circuit Court of Appeals affirming the district court's dismissal of a challenge to certain effluent limitation guidelines for lack of subject matter jurisdiction. In the decision that was sustained by the Supreme Court, the Fourth Circuit had explained that:

> The only question presented in this appeal is whether the district courts have jurisdiction to review effluent limitations regulations issued by the Administrator to control effluent discharges from existing plants. A necessary corollary is whether the courts of appeals have jurisdiction under § 509 of the Act, 33 USC § 1369(b)(1), to review, on direct petition for review, regulations for existing plants, *for if we have the jurisdiction, the district courts do not*.

E.I. du Pont de Nemours & Co. v. Train, 528 F.2d 1136, 1137 (4th Cir. 1975) (emphasis added). In reaching its conclusion that jurisdiction properly resided in the Court of Appeals, the Fourth Circuit found it unnecessary to assume that the subject regulations had been promulgated under the authority of § 301:

> Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives. If § 301 is to be viewed in the manner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, "guidelines for effluent limitations" must be promulgated under § 304(b). Construed in this

> light, any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.

Id. at 1141.

Similarly, in the present case, the Courts of Appeals have exclusive jurisdiction to review EPA's action in reviewing and deciding whether or not to revise the existing effluent limitation guidelines under CWA §§ 301 and §§ 304, as well as EPA's actions in issuing its biennial Plan for such review under CWA § 304(m), because each of those actions is closely related to the attainment of the objectives set forth in § 301. Consequently, the District Court's ruling in this case that it lacked jurisdiction to conduct a substantive review of the Appellant's First, Second and Fourth claims for relief was proper and should be sustained. Moreover, because the Appellants' arguments concerning the adequacy of EPA's actions were not considered by the court below, and Appellants have not filed a petition for review of those actions in this Court, those arguments cannot be addressed in the context of this appeal.

B. THE LEGISLATIVE HISTORY OF CWA § 304 PROVIDES CONCLUSIVE EVIDENCE THAT CONGRESS INTENDED THE COURT OF APPEALS TO HAVE EXCLUSIVE JURISDICTION OVER EPA'S ACTIONS IN REVIEWING AND REVISING EXISTING EFFLUENT LIMITATIONS AND GUIDELINES

There is very little legislative history relating to the enactment of CWA § 304(m) in 1987. What little there is (in the Conference Committee Report

accompanying S. 1128), is essentially a restatement of the contents of that provision, which gives no indication of the forum contemplated for judicial review of EPA's action in publishing its biennial plan for review and revision of existing effluent guidelines. S. Rep. 99-1004, 99th Cong., 2d Sess. 36 (1986), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* (Committee Print compiled for the Senate Committee on Environment and Public Works) 725 (1988).

However, Congress had previously addressed the need for EPA review and revision of existing effluent guidelines in the 1977 CWA amendments. At that time, Congress made an explicit, unequivocal legislative statement that EPA's review of existing effluent guidelines, and its determination whether or not to revise such guidelines, would be subject to judicial review in the Court of Appeals rather than in District Court. This statutory pronouncement was not codified in the CWA, but it is preserved as a "Note" at the end of CWA § 304. It was enacted as § 73 of Pub. L. 95-217, the statute which embodied all of the 1977 CWA amendments. That section states, in full:

EXISTING GUIDELINES

> SEC § 73. Within 90 days after the date of enactment of this Act, the Administrator shall review every effluent guideline promulgated prior to the date of enactment of this Act which is final or interim final (other than those applicable to industrial categories listed in table 2 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives) and which applies to those pollutants identified pursuant to section 304(a)(4) of the Federal Water Pollution Control

> Act. The Administrator shall review every guideline applicable to industrial categories listed in such table 2 on or before July 1, 1980. Upon completion of each such review the Administrator is authorized to make such adjustments in any such guidelines as may be necessary to carry out section 304(b)(4) of such Act. The Administrator shall publish the results of each such review, including, with respect to each such guideline, the determination to adjust or not to adjust such guideline. Any such determination by the Administrator shall be final except that if, ***on judicial review in accordance with section 509 of such Act***, it is determined that the Administrator either did not comply with the requirements of this section or the determination of the Administrator was based on arbitrary and capricious action in applying section 304(b)(4) of such Act to such guideline, the Administrator shall make a further review and redetermination of any such guideline.

Act Dec. 27, 1977, P.L. 95-217, § 73, 91 Stat. 1609, *reprinted in* 3 *A Legislative History of the Clean Water Act of 1977* (Committee Print compiled for the Senate Committee on Environment and Public Works), 47 (1978) (emphasis added). It is clear from the reference in this provision to CWA § 509 that Congress expected not just the guidelines themselves, but EPA's "review" and "determination" whether or not to revise such guidelines, to be reviewed by the Courts of Appeals. CWA § 509 authorizes review only in the Courts of Appeals, while jurisdiction is conferred upon the District Courts only in CWA § 505.

One other aspect of the legislative history of the 1977 CWA amendments demonstrates that Congress was fully aware that the Supreme Court's recent decision in the *duPont* case (issued on February 23, 1977) had firmly established Court of Appeals jurisdiction over EPA's promulgation and review of effluent

guidelines. Section 18 of the House Bill, H.R. 3199 (as introduced on February 7, 1977), would have added a new item (G) to CWA § 509(b)(1) to expressly provide for review of EPA's actions "in promulgating or revising guidelines for effluent limitations under section 304(b)." *1977 Legis. Hist.* vol. 4, p. 1162 (emphasis added). According to the House Report, H. Rep. No. 95-139, 95th Cong., 1st Sess. (1977), *reprinted in 1977 Legis. Hist.* vol. 4, p. 1221:

> The sole purpose of this amendment is to clarify the intent of Congress that regulations and guidelines issued under section 304(b) of Public Law 92-500 would be reviewed in the U.S. Courts of Appeals pursuant to section 509(b)(1) since issuance of such regulations is an action which leads directly to effluent limitations under section 301 of Public Law 92-500.

However, by the time the Conference Report was issued (on December 6, 1977), the Supreme Court had issued its decision in *du Pont* and, according to the Conference Committee, this provision was "omitted as unecessary." H. Rep. No. 95-830, 95th Cong., 1st Sess. 112, *reprinted in 1977 Legis. Hist.* vol. 4, p. 296.

Thus, although it found a formal revision to the judicial review provisions in CWA § 509 to be unnecessary in the wake of *du Pont*, it was clearly the intent of Congress that any action relating to the promulgation of ELGs – including their subsequent review and any determination whether or not to revise them – should be reviewed in the Court of Appeals. Because the grant of jurisdiction to the Court of Appeals is exclusive, *American Petroleum Inst. v. Train,* 526 F.2d 1343, 1344 (10th Cir. 1975), the District Court properly concluded that it lacked jurisdiction to

entertain the substantive claims raised by the Appellants in the proceedings below. The District Court's decision should be affirmed, and the Appellants' attempt to raise new arguments in this Court should be rejected.

C. APPELLANT'S ARGUMENTS CONCERNING THE SCOPE OF THE DISTRICT COURT'S AUTHORITY UNDER CWA § 505 ARE NOT SUPPORTED BY THE APPLICABLE CASE LAW

Appellants' arguments concerning the scope of the District Court's jurisdiction under CWA § 505(a) are without merit. Appellants' Brief seriously mischaracterizes the governing law when it claims that the District Court's authority to compel the performance of a nondiscretionary duty under CWA § 505(a)(2) codifies traditional mandamus principles under which "courts review whether an agency has performed a mandatory duty *in total and in the manner required*." Appellants' Brief at 50 (emphasis in original). The actual holding of the decision to which the Appellants refer, *Florida PIRG v. EPA*, 386 F.3d 1070, 1088 (11th Cir. 2004), was that EPA can only satisfy a mandatory duty by discharging that obligation "in the manner *specifically* required by the statute" (emphasis added). Appellants' omission of the word "specifically" is telling, because in this case the CWA does not establish any specific requirements governing EPA's review of existing ELGs or its determination whether or not to revise those ELGs.

Appellants' citation to the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) in this context is even more misleading, because what *Norton* said is that the traditional practice of judicial review achieved through the so-called prerogative writs – primarily writs of mandamus – "was normally limited to enforcement of a *specific, unequivocal command*." *Id.* at 2379. Construing the courts' analogous authority under APA § 706

(1), the Supreme Court found that it empowers a court only "to take action upon a matter, without directing *how* it shall act." *Id.* (emphasis in original). According to the Supreme Court, this limitation "precludes the kind of broad, programmatic attack" the Supreme Court rejected in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1971). In *Lujan*, the Court had rejected a challenge to the Bureau of Land Management's land withdrawal review program, stating that "respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* at 891, *quoted in Norton*, 124 S. Ct. at 2380 (emphasis in original). Similarly, in *Norton*, the Supreme Court concluded that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the

agency to act, *but has no power to specify what the action must be*." 124 S. Ct. at 2380 (emphasis added).

The Supreme Court's decision in *Norton* thus prohibited the District Court from granting the type of relief that was sought by the Appellants in this case. The Appellants' Amended Complaint sought to have the District Court order EPA to "*systematically* review" existing effluent limitation guidelines under CWA §§ 304(b) and 304(m). Amended Complaint at ¶ 36 (emphasis in original). Appellants further alleged that EPA must take into account all of the statutory factors relating to the technical and economic feasibility of reducing pollutant discharge in determining whether it is appropriate to revise existing guidelines under § 304(b). Amended Complaint at ¶ 66. Finally, Appellants sought injunctive relief ordering EPA to cease and desist from issuing ELG plans that reflected an "improper methodology" for review of effluent guidelines. Amended Complaint at ¶ 80.

As the Supreme Court observed in *Norton*, the failure to revise plans "in the proper fashion," was not a failure to act that could be addressed by the District Court pursuant to either CWA § 505 or APA § 706. 124 S. Ct. 2372, 2380 (quoting *Lujan*, 497 U.S. at 891). Consequently, what the Appellants sought in their Amended Complaint was precisely the kind of relief which they could not obtain. The bulk of the factual allegations therein related to the allegedly

"inadequate review" of effluent guidelines in 2003 and 2004, ¶¶ 28-42; the "inadequate review" of effluent limitations in 2003 and 2004, ¶ 43; and the "inadequate and unlawful" effluent guidelines Plan for 2004/2005, ¶¶ 44-60. The majority of the factual and legal background described in Appellants' Memoranda to the court below, and most of the voluminous Exhibits attached thereto, were similarly focused on alleged deficiencies in the *manner* in which EPA's review and planning process was conducted. The fact that the annual reviews and the biennial plans were actually performed by EPA and were published in the Federal Register was not in dispute. The Court below therefore acted properly in granting judgment to the Defendant on each of the Plaintiffs claims, and its ruling should be upheld.

III. EPA'S ADMINISTRATION OF THE EFFLUENT GUIDELINES PROGRAM IS FULLY CONSISTENT WITH THE CLEAN WATER ACT'S REQUIREMENTS

As argued above, this Court should decline to consider the Appellants' substantive arguments concerning the adequacy of EPA's effluent guidelines program, because the Appellants' claims were not properly raised and its arguments were not addressed by the court below. Nevertheless, even if the Appellants' failure to file a timely petition for review is excused by this Court, and its claims are deemed to be transferred from the court below, the arguments set forth in the Appellants' brief must fail. EPA has fully complied with the applicable statutory requirements to review effluent guidelines annually in

accordance with CWA § 304(b); to review effluent limitations every five years in accordance with CWA § 301(d); and to publish a biennial effluent guidelines plan in accordance with the requirements of CWA § 304(m).

It is not disputed by the Appellants that EPA has, in fact, published in the Federal Register its annual reviews of the effluent limitations guidelines (ELGs) for 2003 and 2004. 68 Fed. Reg. 75520 (Dec. 31, 2003) and 69 Fed. Reg. 53705 (Sept. 2, 2004). Pursuant to the hybrid rulemaking procedure recognized by the Supreme Court in *E.I. du Pont de Nemours v. Train*, 430 U.S. 113 (1977), those actions encompassed the agency's review of both the § 301(d) effluent "limitations" and the § 304(b) effluent "guidelines." It is also undisputed that EPA has published its biennial effluent guidelines plan for 2004 and 2005. 69 Fed. Reg. 53705 (Sept. 2, 2004). The essence of the Appellants' argument, therefore, is that the *manner* in which EPA has performed the requirements of CWA §§ 301(d), 304(b) and 304(m) is "inadequate." However, the Appellants' expansive interpretation of what the statute requires is contradicted by the plain language of the relevant statutory provisions as well as by substantial by practical and policy considerations. In light of those considerations, the Agency's interpretation of what the statute requires is reasonable, and it is entitled to substantial deference by this Court.

A. THE CLEAN WATER ACT DOES NOT REQUIRE ANY SPECIFIC PROCEDURE FOR THE PERIODIC REVIEW OF EFFLUENT LIMITATIONS UNDER § 301(d) OR EFFLUENT GUIDELINES UNDER § 304(b)

Section 301(d) of the CWA states that:

> 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.

Contrary to the Appellants' interpretation of the statute, the only nondiscretionary duty imposed upon EPA in this section is that effluent limitations shall be "reviewed" every five years. The duty to "revise" such limitations arises only if EPA determines that revision is "appropriate," which is a determination that is placed squarely within the administrative discretion of the Agency. More importantly, there are no specific procedures specified for the process of review. The phrase "pursuant to the procedure established under such paragraph" clearly modifies the word "revised," and not the word "reviewed" (which is modified only by the phrase "at least every five years").

Section 304(b) states that:

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

Once again, the only nondiscretionary duty imposed by this section is to publish guidelines for effluent limitations.[3] The duty to revise such guidelines annually thereafter arises only if EPA determines that revision is "appropriate."

The requirement for annual "review" of effluent limitations established under § 304(b) arises (if at all) only from the additional provisions added to § 304(m) by the 1987 CWA amendments. That section provides, in relevant part, that:

> (1) PUBLICATION. Within 12 months after the date of the enactment of the Water Quality Act of 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall--
>
> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section . . . .

Here again, the only clearly nondiscretionary duty imposed by this section is to "publish . . .a plan" which shall "establish a schedule." Whether or not this section creates a duty to conduct the "annual review and revision" of the 304(b) guidelines separate and apart from the duty already imposed in 304(b) itself is open to debate. Appellants contend that it does, and that the phrase "in accordance with subsection (b)" means that all of the factors enumerated in §§ 304(b)(1)(A) through

[3] The remainder of § 304(b) dictates that "such regulations" shall "identify" certain control measures and the degree of effluent reduction attainable through the application of different levels of technology (§§ 301(b)(1)(A), (2)(A), (3) and (4)(A)) and "specify factors" to be taken into account in the application of those technologies (§§ 301(b)(1)(B), (2)(B) and (4)(B)).

304(b)(4)(B) must be applied to both the process of "review" and the process of "revision." However, as noted above, § 304(b) clearly states that those factors shall be addressed in the "regulations" containing the effluent guidelines, and that such regulations shall be revised "if appropriate." There is absolutely nothing in either § 304(b) or § 304(m) that establishes any specific procedure that EPA must follow in making the initial determination whether to revise or not revise its existing guidelines.

EPA has concluded that §§ 304(b) and 304(m) require it to perform an annual review of existing effluent guideline regulations, but that such review shall be conducted in accordance with the screening procedures which it has outlined in its most recent biennial Plan. 69 Fed. Reg. 53705, 53708-10 (Sept. 2, 2004). EPA's interpretation of §§ 301(d), 304(b) and 304(m) is reasonable and is consistent with the plain language of the statute.

B. APPELLANTS' RELIANCE ON *DICTA* FROM THE D.C. DISTRICT COURT'S INTERLOCUTORY RULING IN *NRDC v. REILLY* IS MISPLACED

Appellants rely heavily on the unpublished, interlocutory Memorandum Order issued by the D.C. District Court in *NRDC v. Reilly*, 1991 U.S. Dist. LEXIS 5334 (D.D.C. Apr. 23, 1991). Appellants' Brief at 31 and 50. However, this opinion is neither precedential nor persuasive, since it focused primarily on whether 304(m) did or did not impose certain mandatory *deadlines* (for

promulgating guidelines, conducting an annual review and issuing a biennial plan), and not on the substantive procedures that must be followed in the process of reviewing existing guidelines. 1991 U.S. Dist LEXIS 5334, at *14-*26. Appellants read far too much into the court's *dicta* to the effect that the cross-reference in § 304(m) to § 304(b) should be understood as a Congressional command to review and revise guidelines "in conformity with the parameters set out at length in § 304(b)," because the substance of the agency's review process *was not even at issue* before the court. Appellants' Brief at 31. Moreover, as explained above, the plain language of the statute does not support the notion that all of the detailed parameters in §§ 304(b)(1)(A) through 304(b)(4)(B) should be applied to the process of "review," as opposed to the process of "revision."

C. PRACTICAL AND POLICY CONSIDERATIONS MILITATE AGAINST THE APPELLANTS' EXPANSIVE INTERPRETATION OF THE CLEAN WATER ACT'S REQUIREMENTS

Appellants' argument that the CWA requires EPA to consider all of the technical and economic factors enumerated in §§ 304(b)(1)(A) through 304(b)(4)(B) in its annual review of existing effluent limitation guidelines essentially means that the agency would have to repeat the entire process of effluent guideline development on an annual basis. The sheer impossibility of such an undertaking militates against the Appellants' interpretation of the Act's requirements.

One highly respected commentator has aptly described the process of ELG development as follows:

> The development of technology standards was the most Herculean task ever imposed on an environmental agency. EPA had literally to master the economics, engineering, and technology of every industrial process in the most industrialized and fastest-growing economy in world history. It had to learn state-of-the-art and potential alternative technologies for each process. It had to be able to defend its technology-forcing conclusions against the most experienced engineers, economists, and lawyers money could buy. Every draft standard EPA proposed was subject to intense scrutiny, lobbying, and opposition from the affected industry and, within the limits of its resources, at least one organization.

Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ELR 10528, 10537 (September, 1991). It has also been estimated that, from start to finish, the process of developing a single ELG typically takes five years or more. P. Evans, *The Clean Water Act Handbook*, 22 (1994). The ELGs for the pulp and paper industry challenged in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), for example, were the result of a rulemaking process that developed over six years, illustrating what the court described as "the overwhelming technical and litigative burden shouldered by the Agency under the Act." *Id*. at 1021 n.3

Appellants are correct in observing that Congress was frustrated in 1987 with the slow pace at which effluent guidelines had been promulgated. Appellants' Brief at 9. Indeed, of the 29 industrial categories established in 1977 for which guidelines were required to be promulgated, 5 still remained to be completed in

1987. S. Rep. 99-50, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 2 *A Legislative History of the Water Quality Act of 1987* (Committee Print compiled for the Senate Committee on Environment and Public Works) 1424 (1988). But if the purpose of Congress in passing the amendments that added § 304(m) to the CWA in 1987 was to speed up the process of guideline development, it would not have imposed a new burden on EPA to go back and completely revise the guidelines that had already been developed – a process that would unquestionably have the effect of slowing down, rather than accelerating, the ELG program. Indeed, since it was well known that the process of developing a single effluent limitation guideline consumed as much as five years, such a requirement would have brought the entire ELG program to a grinding halt. Such could not have been the intent of Congress.

Instead, EPA's interpretation of § 304(m), as reflected in the program for screening level review set forth in the agency's 2004/2005 effluent guidelines plan, represents a reasoned and practical interpretation of that provision. This view of the agency charged with administering the statute is entitled to considerable deference; the court need not find that it is the only permissible construction that EPA might have adopted, but only that EPA's understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. *Chemical Manufacturers Ass'n v. NRDC,* 470 U.S. 116,

125 (1985)(citing *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975); and *Chevron U. S. A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

CONCLUSION

For each of the foregoing reasons, this Court should affirm the District Court's Order granting EPA's and Intervenor's motions for summary judgment on the question whether EPA had discharged its mandatory duties under the CWA, and granting in part EPA's motion for judgment on the pleadings on the grounds that the District Court's jurisdiction does not extend to a substantive review of the manner in which those duties were performed. In the event that this Court elects to consider the Appellants' substantive arguments concerning the adequacy of EPA's effluent guidelines program, it should find that the Agency has implemented that program in a manner that is consistent with the plain language of the statute.

November 23, 2005

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B) because:

1. This brief contains 7,401 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Intervenor-Appellee The National Association of Clean Water Agencies by electronic mail, per agreement of the parties, to the following persons on this 23rd day of November 2005:

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