

No. 05-16214

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH
FOUNDATION and ECOLOGICAL RIGHTS FOUNDATION

Appellants,

v.

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

Appellees.

Brief of Amici Natural Resources Defense Council and Waterkeeper Alliance
in support of Appellants,
Our Children's Earth Foundation and Ecological Rights Foundation

Melanie Shepherdson, Esq.
Natural Resources Defense Council
1200 New York Avenue
Suite 400
Washington, DC 20005
(T) (202) 289-6868

Jeffrey Odefey, Esq.
Waterkeeper Alliance
828 South Broadway
Suite 100
Tarrytown, NY 10591
(T) (914) 674-0622

Attorneys for Amici Natural Resources Defense Council, Inc.
and Waterkeeper Alliance, Inc.

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Pursuant to Fed. R. App. P. 26.1, Amicus Natural Resources Defense Council, Inc. states that it is a not-for-profit corporation existing under the laws of the State of New York. There is no parent company or publicly held company that has a 10% or greater ownership interest in the Natural Resources Defense Council, Inc.

Pursuant to Fed. R. App. P. 26.1, Amicus Waterkeeper Alliance, Inc. states that it is a not-for-profit corporation existing under the laws of the State of New York. There is no parent company or publicly held company that has a 10% or greater ownership interest in Waterkeeper Alliance, Inc.

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STATEMENT OF INTEREST

The Natural Resources Defense Council, Inc. ("NRDC") is a national, non-profit environmental organization incorporated under the laws of the State of New York, with offices in New York, Washington, D.C., San Francisco, and Santa Monica. NRDC has over six hundred fifty thousand members nationwide. NRDC is dedicated to the preservation, protection, and defense of the environment and natural resources and advocates for effective implementation and enforcement of the CWA on behalf of its members. Since the 1970s NRDC has been actively engaged in advocating for development of strong technology-based standards to control and reduce the discharge of pollutants into our waters.

Waterkeeper Alliance, Inc. is an international environmental organization that connects and supports local Waterkeeper programs to provide a voice for waterways and communities worldwide. Each of these programs, in turn, is an independent, locally based advocacy group working to protect and restore watersheds in their home communities. Of our 132 member programs, 14 are located in California, including San Francisco Baykeeper, Sacramento/San Joaquin Deltakeeper and Petaluma Riverkeeper, all located in the district where this action was originally filed. Waterkeeper Alliance supports these members by administering the trademarks covering the above names, by providing a centralized access point for sharing scientific, legal and administrative resources with

Waterkeeper programs across the nation, by expanding on local Waterkeeper abilities to affect environmental compliance and policy on a national level, by sponsoring educational and capacity building programs for member organizations, and by providing legal support to member programs.

Both NRDC and Waterkeeper Alliance, and their respective members, are adversely impacted by the continued contamination of our nation's waterways by industrial pollutants. This contamination, though of widely varied types, is routinely and widely responsible for beach closures, swimming prohibitions, fishing advisories, and the loss of commercial, recreational, or spiritual use of waterways that, under law, are to be protected for the use and enjoyment of all citizens. The regulation, and elimination, of these harmful discharges was entrusted to EPA by Congress in the Clean Water Act, initially adopted in 1972 and subsequently amended. EPA's failure to comply with the charge given it by Congress has resulted in continued delays towards the goal of eliminating the discharge of pollutants into waters of the United States. EPA's Effluent Guidelines Plan for 2004 and 2005 reflects a continuing failure of the Agency to engage in meaningful review and improvement of the core standards which implement Congress' express desire to use best available water pollution control technologies to reduce or eliminate water pollution.

SUMMARY OF ARGUMENT

I. EFFLUENT LIMITATIONS WERE CREATED BY CONGRESS TO PROTECT OUR NATION'S WATERS AGAINST HARMFUL POLLUTION.

In the 1972 Clean Water Act, Congress adopted a system for controlling discharges of pollution through permits structured around technology-based effluent limitations. The statute's framers intended that these standards would become increasingly more stringent over time and specifically rejected the harm-based approach that characterized earlier failed attempts to stem water pollution, and which characterizes EPA's approach in its current effluent guidelines development plan.

Effluent limitations continue to play a pivotal role in efforts to reduce or eliminate water pollution. State pollution control agencies, which are the primary authorities for much of the administration and enforcement of the Clean Water Act, rely upon EPA's expertise in order to establish limits in their own water pollution control permits. EPA has likewise stressed the importance of effluent limitations as a necessary tool in its efforts to rein in continuing discharges of harmful contaminants.

II. EPA HAS FAILED TO DEVELOP OR UPDATE EFFLUENT LIMITATIONS AS REQUIRED BY CONGRESS.

This history of EPA's compliance with Congressional directives to develop and update effluent limitations is one of delay and frustration. As a result of the agency's intransigence, there are no effluent limitations for many industries that discharge harmful pollutants to our nation's waters. EPA's failure to revise previously developed limitations has frustrated the goals of the Clean Water Act by allowing numerous industries to operate under effluent limitations that are twenty or thirty years old.

III. EPA'S FAILURE TO DEVELOP OR REVISE ELGS CONTRIBUTES SUBSTANTIALLY TO WATER POLLUTION.

The obsolescence of numerous effluent limitations has tangible impacts on the quality of waters in the United States. EPA, in the Effluent Limitation Development Plan at issue in this case, has relied on data from the Toxic Releases Inventory. This data allows EPA to rank the top thirteen industrial discharges of toxic water pollution. However, only one of effluent limitations for these industries has been substantially updated in the past fifteen years. Twelve of the thirteen industries are wholly or substantially regulated by effluent limitations that are twenty years old or more.

Furthermore, industries which are significant sources of pollution continue to escape EPA's regulatory gaze. For example, despite a mandatory duty to do so,

EPA has not developed effluent limitations for the coal bed methane production industry or the construction and development industry. EPA has failed to develop technology-based effluent limitations for this industry. In 2004, EPA opted to withdraw its proposed effluent limitations for this industry, opting instead to promulgate no technology-based standards to address this source of pollution.

IV. THE PUBLIC IS HARMED BY EPA'S FAILURE TO DEVELOP AND UPDATE EFFLUENT LIMITATIONS FOR POINT SOURCES.

Where EPA fails to implement or revise effluent limitations, permit writers either rely on their "best professional judgment" or on outdated limits that fail to reflect the pollutant control potential of more recent technology. This situation creates disconcerting variation between pollutant control regulation between states and the allowance of discharges that threaten the public health and the environment.

ARGUMENT

I. EFFLUENT LIMITATIONS CONTINUE TO PLAY A VITAL ROLE IN PROTECTING OUR NATION'S WATERS AGAINST HARMFUL POLLUTION.

Prior to 1972, the federal government generally allowed state and local regulators to set water quality and pollution abatement standards. This system failed to address the need for effective controls on water pollution. As the Fifth Circuit explained, Congress became:

dissatisfied...with the division of responsibility for setting standards between federal and state water pollution control agencies, with the EPA's dilatory pace, and with the ponderous federal enforcement procedure.

Chemical Manufacturer's Ass'n v. EPA, 870 F.2d 177, 195 (1989). As a result, Congress enacted the Federal Water Pollution Control Act Amendments in 1972, commonly referred to as the Clean Water Act ("CWA").

Although the CWA "launche[d] a multipronged attack on the problem of water pollution, it relie[d] primarily on" the establishment of national "effluent limitations – restrictions on the quantity of pollutants that may be discharged into the nation's waters – to attain its goals." *NRDC v. Train*, 510 F.2d 692, 695 (D.C. Cir. 1975) (footnote omitted). Minimum nationwide technology-based pollution control standards were one of the "three essential elements" of the 1972 Clean Water Act. Senate Consideration of the Report of the Conference Committee, October 4, 1972, *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, at 162 (1973). Congress feared that decentralized, inconsistent standards would prompt a race-to-the-bottom in which states would adopt lax pollution control to keep businesses from relocating to other states with less restrictive discharge requirements. Senate Debate on S. 2770, Nov. 2, 1971, *reprinted in* 1972 Leg. Hist. at 1405. National effluent limitation guidelines ("ELGs") and new source performance standards ("NSPS") were the safeguard

against that problem. *NRDC v. Reilly*, 1991 U.S. Dist. Lexis 5334, * 2 (D.D.C. Apr. 23, 1991) (“Congress envisioned that the federally issued effluent limitations would constitute a regulatory floor below which permit standards could not fall.” (footnote omitted)).

The core of the Act’s technology-based approach to eliminating water pollution rests on EPA’ development of effluent limitation guidelines. ELGs must “identify in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable...and specify factors to be taken into account in determining the control measures and practices applicable to point sources” within industrial categories. 33 U.S.C. § 1314(b).

ELGs are the rulemaking device prescribed by the CWA to set national effluent limitations for categories and subcategories of point sources. ... These limitations are technology-based rather than harm-based; that is, they reflect the capabilities of available pollution control technologies to prevent or limit different discharges rather than the impact that those discharges have on the waters.

Texas Oil & Gas Ass’n v. EPA, 161 F.3d 923, 927 (5th Cir. 1998).

The intended effect of the Clean Water Act permit and ELG process is to gradually reduce pollution to the point of elimination. See 33 U.S.C. § 1251(a). This scheme uses increasingly more stringent effluent limitation guidelines and

NPDES permits to ratchet surface water pollution down to zero. As explained by the D.C. Circuit:

[T]he most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology-forcing.... The essential purpose of this series of progressively more demanding technology-based standards was not only to stimulate but to press development of new, more efficient and effective technologies. This policy is expressed as a statutory mandate, not simply as a goal.

NRDC v. EPA, 822 F.2d 104, 123-24 (D.C. Cir. 1987) (emphasis added).

ELGs are more than just abstract federal regulations. They establish the minimum requirements for NPDES permits drafted by permit writers in state agencies. In this way, the expertise of the federal pollution control agency, EPA, provides tangible guidance to state officials charged with implementing the Clean Water Act's regulatory scheme. In turn, the public and the natural resources enjoyed by all Americans benefit from uniform pollution controls.

States have recognized the value of nationally uniform ELGs set by EPA. For example, the states of New York and Connecticut intervened in a case against EPA for its failure to promulgate ELGs for the construction and development industry, stating,

[p]romulgation of construction effluent guidelines and standards is important to New York and Connecticut to set a nationwide floor for pollution control that will protect their

waters from pollutant discharges from construction and development activity in upstream states, where, in the absence of such guidelines and standards, less protective stormwater discharge standards may govern.

Complaint in Intervention, *NRDC v. EPA*, No. CV04-8307 GHK (RCx) (C.D. Cal. March 8, 2005).

In previous litigation concerning EPA's duties under section 304(m) of the CWA, the states of Arizona, California, Connecticut, Florida, Indiana, Maine, Massachusetts, Mississippi, New Mexico, New York, Ohio, and Pennsylvania submitted an amicus curiae brief, which explained how it is difficult for states to meet their obligations under the CWA in the absence of effluent guidelines:

In the absence of Federal Effluent Limitations, States have no choice but to establish, on a permit-by-permit basis, their own technology-based effluent limitations using "Best Professional Judgment." This method demands a tremendous commitment of time, expense and expertise, which the States can ill afford....In addition, in the absence of Federal Effluent Limitations, States face economic pressures not to develop their own stringent limitations for fear of losing industry to States with more lax limitations.

Memorandum of Amicus Curiae States in Support of Plaintiffs' Motion for Partial Summary Judgment, *NRDC v. Reilly*, 1991 U.S. Dist. Lexis 5334 (D.D.C. Apr. 23, 1991).

The importance of effluent limitations and effluent limitation guidelines has not diminished over the thirty year history of the Act. Along with the NPDES

permit that they inform, they remain the primary tool for placing limits on pollution discharges from point source dischargers.¹ Indeed, EPA recently stated that “[t]hese national industrial regulations are estimated to result in the removal of over 690 billion pounds of pollutants each year, and substantially contribute to improvements in the quality of water nationwide. EPA Presentation, Public Meeting for the 2006 Preliminary Effluent Guidelines Program Plan, September 20, 2005, at 8. While some progress has been made in stemming the discharge of pollutants to our waters, there is much work to be done, and far greater efforts are needed to move dischargers toward the next technologically feasible level of pollutant elimination or control. Despite the visible attention currently focused on controlling stormwater runoff from urban areas and agricultural fields, “old fashioned” industrial point sources remain a significant factor in 21st century water pollution in the United States.

The following examples illustrate the significance of point sources as ongoing sources of harmful pollution to waterbodies that provide recreational outlets and drinking water supplies to our communities:

- According to EPA’s “National Water Quality Inventory: 2000 Report,” industrial point sources contribute to the impairment of 26.3%, or 4,116

¹ “Point source” dischargers are facilities that add pollutants to waterbodies through “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well” etc. Clean Water Act § 502(14), 33 U.S.C. §1362(14).

square miles, of impaired estuaries in the United States. *Id.* at 31, and Appendix A, Table C-5 available at <http://www.epa.gov/305b/2000report/>.

- Industrial point sources are among the leading sources of pollution to impaired shorelines, causing or contributing to 17.6% of impaired shoreline miles. *Id.* at 39, and Appendix A, Table C-9.
- Point source discharges of toxic chemicals, petroleum products, nutrients and other industrial pollutants threaten the integrity and safety of public drinking water supplies in Albuquerque, Atlanta, Baltimore, Chicago, Detroit, Houston, Los Angeles, New Orleans, Newark, Philadelphia, Phoenix, and Washington, D.C. NRDC, “What’s on Tap; Grading Drinking Water in U.S. Cities,” (June 2003) at 39-42, available at <http://www.nrdc.org/water/drinking/uscities/contents.asp>.

II. EPA IS NOT DEVELOPING ELGS AS REQUIRED BY CONGRESS.

Unfortunately, EPA’s implementation of the CWA has not been smooth and timely. As a result, NRDC has had to turn to the courts every step of the way to force the agency to comply with basic mandates of the CWA. Indeed, when the first set of statutory deadlines passed in the 1970s without EPA publishing a single effluent guideline, NRDC sued EPA. *See NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1975). The case resulted in a consent decree requiring EPA to adhere to a strict schedule to develop 21 ELGs. EPA promulgated ELGs for 24 industrial categories

following the 1976 consent decree resolving *NRDC v. Train* and the adoption of the 1977 amendments to the CWA. However, between 1985 and 1989 when EPA was no longer under a court ordered schedule, the agency only developed one ELG. In 1989, after the initial deadline under section 304(m) of the CWA passed and EPA failed to develop a sufficient plan for promulgating new and revised ELGs and did not commit to a timeline for finalizing any standards, NRDC sued the agency again to force EPA to comply with the CWA's requirements. *See NRDC v. Reilly*, 1991 U.S. Dist. Lexis 5334 (D.D.C. 1991). Once again, the agency was put on a strict schedule in a consent decree to develop a series of 18 ELGs over ten years. *See Consent Decree, NRDC v. Reilly*. Under the terms of the consent decree, EPA had an obligation to finalize, on average, two ELGs each year. *See id.* EPA's obligations under the consent decree terminated in 2004. Unfortunately, after EPA completed its obligations under the *NRDC v. Reilly* consent decree, the agency divested resources and staff from the office responsible for the development of ELGs. *See* "EPA Change in Priorities Prompts Reorganization of Water Office Staff, *Inside EPA* (April 9, 2004). Indeed, while EPA finalized one ELG every six months from 1995 to 2004, EPA will neither revise *any* existing ELGs, nor develop *any* new ELGs in 2005. *See* Notice of Availability of Preliminary 2006 Effluent Guidelines Program Plan, 70 Fed. Reg. 51042 (Aug. 29, 2005).

EPA has been equally intransigent in its efforts to review and update ELGs after their issuance. Over the past thirty years, EPA has promulgated ELGs (or in some instances, effluent limitations as pretreatment standards) for 57 industry categories. Of the first round of guidelines issued in the 1970s, relatively few have been updated by the Agency, despite the statutory mandate of CWA § 301(d) and the continuous evolution of pollution control technologies. All together, seventeen industries are wholly or partially regulated by ELGs issued in the 1970s that have either *never* been updated, or were last updated ten or more years ago. *See, e.g.*, 40 C.F.R. Parts 411, 417, 418, 421, 422, 424, 426, 427, 428, 436, 446, 447, 443, 454, 457, 458, 459, 460.

The same dereliction of duty applies to the ELGs issued in the 1980s following *NRDC v. Train*. Once again, of the numerous category or subcategory ELGs issued during this decade, twenty-eight have never been updated, or were most recently revised ten or more years ago. *See* 40 C.F.R. Parts 405, 406, 407, 408, 409, 410, 413, 414, 415, 418, 419, 420, 421, 423, 425, 429, 433, 434, 440, 461, 463, 464, 465, 466, 467, 468, 469, and 471.

EPA's lack of commitment to the "technology forcing" aspect of effluent limitations development and revision continues into the twenty-first century. While the agency has issued a series of new ELGs during the past five years, it has updated its effluent limitation guidelines for only six industry subcategories. *See,*

e.g., 40 C.F.R. §§ 420.33, 420.43., 432.63, 432.73, 432.83, 432.93, 432.103, 435.13, and 435.43.

III. EPA HAS ABJECTLY FAILED TO FULFILL ITS OBLIGATION UNDER SECTION 304 OF THE CWA.

A. Industries Covered By Existing Outdated ELGs Contribute Substantially to the Pollution of Our Waters.

As we explained above, a number of the ELGs EPA developed in the 1970s and 1980s have not been updated. The toxic release inventory data reveals that industries with outdated ELGs also contribute substantially to water pollution. Only one of the effluent limitations for the top thirteen industrial discharges of toxic contaminants has been substantially updated in the past fifteen years. In fact, twelve of these thirteen industries are wholly or substantially regulated by effluent limitations that are twenty years old or more.

Top Ten Toxic Release Inventory Industries

Point Source Category	TWPE Rank	Total TWPE¹	Percent of Total TWPE	ELG Date
Pulp, paper and paperboard	1	4,815,081	40.20%	1998 (40 CFR Part 430)
Steam electric power generation	2	2,418,762	20.19%	1983 (40 CFR Part 423)
Organic chemicals, plastics and synthetic fibers	3	1,265,295	10.56%	1987 (40 CFR Part 414)
Petroleum refining	4	696,201	5.81%	1985 (40 CFR Part 419)
Nonferrous metals manufacturing	5	514,219	4.29%	1984, 1985, 1987, 1988 or 1990 (40 CFR Part 421)
Ore mining and dressing	6	473,093	3.95%	1982

				(40 CFR Part 440)
Inorganic chemicals	7	422,265	3.53%	1982 (40 CFR Part 415)
Rubber Manufacturing	8	175,691	1.47%	1975 (40 CFR Part 428)
Textile mills	9	156,847	1.31%	1982 (40 CFR Part 410)
Fertilizer manufacturing	10	150,198	1.25%	1977, 1978, 1979, 1980, 1986 (40 CFR Part 418)
Pesticide chemical manufacturing	11	109,317	0.91%	1993 or 1996 (40 CFR Part 455)
Plastic molding and forming	12	97,762	0.82%	1984 (40 CFR Part 463)
Porcelain Enameling	13	92,228	0.77%	1985 (40 CFR Part 466)

1. TWPE : Toxic Weighted Pound Equivalents

Source for TWPE Data: United States Environmental Protection Agency, Public Meeting for the 2006 Preliminary Effluent Guidelines Program Plan, September 20, 2005.

B. EPA Still Has Not Developed ELGs For Industries With Significant Discharges of Pollutants.

The parties apparently dispute whether EPA has complied with its mandatory duty under section 304(m)(1)(B) of the CWA to identify all industries discharging toxic or nonconventional pollutants into our waters for which ELGs have not been issued and to promulgate ELGs for all those discharging in more than trivial amounts.² See S. Rep. No. 50, 99th Cong. 1st Sess. 25 (1985).

However, neither party's briefings fully describe the number or character of industries not regulated by ELGs or fully discuss the legal issues surrounding this duty. Briefing was limited to Plaintiffs' arguments that EPA's risk-based

² Conventional pollutants are defined as total suspended solids, biological oxygen demand, pH, fecal coliform, and oil and grease. 33 U.S.C. §1314(a)(4); 40 C.F.R. §401.16

assessments are invalid and that EPA's attempts to avoid doing a new ELG by inappropriately subcategorizing industries were unlawful.

We further note that the district court did not rule on this issue. The district court found that "EPA has met all the requirements for the annual guideline review, biennial report, and five-year limitations review." District Court opinion at 10. However, the court's opinion does not squarely address whether EPA has fulfilled its obligations under section 304(m) to identify industrial categories that do not have ELGs and to establish a schedule for the promulgation of new ELGs for those categories. Under these circumstances, it is appropriate for the Court to reserve judgment on this issue.

Below, we highlight two industries, coal bed methane and construction and development, which are growing sectors that contribute significantly to water pollution, and for which there are effective control technologies. Neither of these industries was presented in briefings filed with the court below, and EPA has failed to develop nationally baseline technology standards through an ELG.

1. Construction and Development

In contrast, the existence of this mandatory duty, and EPA's failure to fulfill it, have been fully briefed in a case currently pending before the Central District of California. *See NRDC v. EPA*, C.D.Cal. No. CV 04-8307 GHK (RCx). This case surrounds EPA's failure to promulgate effluent limitations for construction and

development point sources which discharge polluted stormwater. “Stormwater runoff is one of the most significant sources of water pollution in the nation.”

Environmental Defense Center v. EPA, 344 F.3d 832, 840 (9th Cir. 2003).

“Uncontrolled storm water discharges from areas of urban development and construction activity negatively impact receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife and humans.” National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Stormwater Discharges; Final Rule, 64 Fed. Reg. 68722, 68724 (Dec. 8, 1999).

Stormwater discharges from construction activities can “severely compromise[]” water quality. *Id.* at 68728. After protective ground cover is removed, construction sites discharge sediment, which is itself a Clean Water Act pollutant (as “total suspended solids” or “TSS”), as well as other pollutants, including nutrients, metals and organic compounds, to the waters of the United States. *Id.* “It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use.” *Id.* at 68729. In 2002, EPA determined that sediment deposition was the second most prevalent pollutant in rivers and streams and the third most prevalent in lakes, ponds and reservoirs.

EPA, National Water Quality Inventory: 2000 Report at 13 and 21, EPA-841-R-02-001 (Aug. 2002).

Post-construction stormwater discharges from developed areas are also a major source of water pollution. “Urbanization alters the natural infiltration capability of the land and generates a host of pollutants...thus causing an increase in storm water runoff volumes and pollutant loadings. 1999 Preamble and Rule, 64 Fed. Reg. at 68725. Stormwater discharges from residential, commercial, light industrial or other developed areas carry significant levels of total suspended solids, metals, microorganisms such as fecal coliform, and organic chemicals and compounds such as oil and grease. *Id.* at 68725, 68727. In 2002, EPA determined that urban runoff and stormwater system discharges were the leading source of water quality impairment in ocean shoreline waters, the second leading source of water quality impairment in estuaries, and the third leading source of such impairment in lakes, ponds and reservoirs. EPA, National water Quality Inventory: 2000 Report at 22, 30, EPA-841-R-02-001 (Aug. 2002).

2. Coal Bed Methane

The extraction of methane gas from coal beds requires pumping millions of gallons of groundwater to the surface. The water is removed to release the gas that is then collected at the surface. Many coal bed methane (“CBM”) operations discharge produced water to the surface. The discharge of such massive amounts

of contaminated water on the surface causes a variety of adverse environmental impacts. Produced water from CBM wells has a high salinity content (measured as electrical conductivity or total dissolved solids), which reduces the productivity and yield of crops, increases runoff and erosion, and degrades aquatic habitat by increasing temperature and sedimentation, resulting in reducing populations and diversity of fish and other aquatic life. *See, e.g.,* Judy Pasternak, “Coal-Bed Methane Puts Basic Needs of Water, Energy at Odds,” *Los Angeles times* (March 27, 2001), at A5; Bureau of Land Management, *Draft Environmental Impact Statement for Oil and Gas Production in the Powder River Basin* (February 2002), at 3-47; J. David Allen, Professor, School of Natural Resources & Environment, *Comments on Draft Environmental Impact Statement and Draft Planning Amendment for the Powder River Basin Oil and Gas Project* (2002), at 3; George Wuerthner and Reed Noss, *Final Comments on Powder River Basin EIS* (2002), at 7.

The number of CBM wells has increased dramatically in recent years. In 1997 there were 360 producing wells in Wyoming’s Powder River Basin. Gary Bryner, “Coalbed Methane Development in the Intermountain West: Primer,” in *Coalbed Methane Development in the Intermountain West*. Natural Resources Law Center, University of Colorado School of Law (2002), at 1. The Bureau of Land Management (“BLM”) forecasts 51,000 wells in the Powder River Basin operating

and producing gas by 2010. Bureau of Land Management, Draft Environmental Impact Statement for Oil and Gas Production in the Powder River Basin (February 2002). Production from 51,000 coalbed methane wells is projected to result in 255 billion gallons of wastewater produced and discharged annually. Thomas Darin, "Waste or Waster? – Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains: A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quantity Legal Issues in Utah, New Mexico, Colorado, Montana, and Wyoming," 17 *Journal of Env'tl Law and Litigation* 281, 320 (Fall 2002).

CBM wells are now prevalent in a number of states across the country, including Montana, Wyoming, Utah, Arizona, New Mexico, Colorado, Kansas, Oklahoma, Texas, Iowa, Missouri, Illinois, North Dakota, Kentucky, Tennessee, Alabama, and Michigan. Judy Pasternak, "Coal-Bed Methane Puts Basic Needs of Water, Energy at Odds," *Los Angeles times* (March 27, 2001), at A5. Reports also indicate potential for expansion of the industry into Louisiana, Mississippi, Arkansas, Ohio, Pennsylvania, West Virginia, and Alaska. *See id.* Considering the rapid expansion of the industry, projections for further industry growth, and the wide geographic range of CBM sites, permits based on best professional judgment are inadequate to regulate pollution from this industry. Instead of leaving it up to the states and EPA regions to develop permits with disparate controls with varying

effectiveness, EPA headquarters should develop a national ELG based on best available technology economically achievable (“BAT”) and new source performance standards (“NSPS”) for the coalbed methane industry.

IV. THE PUBLIC IS HARMED BY EPA’S FAILURE TO DEVELOP AND UPDATE EFFLUENT LIMITATIONS FOR POINT SOURCES.

NPDES permitting programs control pollution from new facilities, and reduce the impact of older operations as they are modified, where strong effluent limitations force industries to reduce or eliminate their discharges, as permitted by modern technology. Unfortunately, many important effluent limitations have not been updated since they were enacted; it is not unusual for these standards to reflect technologies that are decades old.

The following are but a few examples of the challenges faced by Waterkeeper Alliance programs in their efforts to control pollution from point sources for which effluent limitation guidelines have not been issued, or have not been updated in many years:

- The Upper Chattahoochee Riverkeeper, in Atlanta, consistently reviews all proposed new and modified NPDES permits for industrial facilities in its watershed, providing formal written comments that stress the need for pollution control measures that reflect current technological performance standards. They have pursued enforcement against violators of these

standards to protect the river from contamination by toxics, excess nutrients, etc. In 1998 the organization lobbied successfully for phosphorus limits in an NPDES permit issued by the State of Georgia to a poultry processing facility. At the time, EPA had not developed effluent limitations for this category of point sources. In fact, the Agency did not promulgate such limitations until 2004, and even then, did not include phosphorus limitations. *See* 40 C.F.R. §§ 432.113 and 432.123.

- San Diego Baykeeper has documented the extensive damage to the marine ecosystem caused by the South Bay Power Plant in San Diego Bay. This damage is a result of high levels of copper, zinc, chlorine, turbidity and heat in the discharge from the plant. San Diego Baykeeper's response to this situation involves using the NPDES permit process to compel the installation upgraded pollution control technologies. The effluent limitations for Steam Electric Power Generating Stations were last revised in 1983 and do not contain any limitations on zinc discharges, and outmoded limitations on copper and chlorine. *See* 40 C.F.R. § 423.13. EPA does not currently plan to revise the effluent limitations or effluent limitations guidelines for power plants, limiting the ability of state agencies to issue NPDES permits with limits that reflect the capabilities of modern technology.

➤ The San Francisco Regional Water Quality Control Board has issued an NPDES permit that allows a petroleum refinery to discharge dioxin at a level five times that previously deemed safe by the Board. San Francisco Baykeeper has taken legal action to challenge this permit. The effluent limitations for this point source category were issued in 1985 and have not been amended or altered in the past twenty years. Because these ELGs contain no limitation on dioxin discharges, *see* 40 C.F.R. Part 419, the Regional Board created an **ad hoc** permitting scheme that simply allowed the refinery to keep discharging dioxin at current levels, rather than implementing either technology based or water quality based or water quality based permit limits, as required by the Act. The existence of up-to-date, and meaningful, effluent limitations likely would have foreclosed this polluter-friendly flexibility, and required that the Board adhere to a more stringent standard.

In other instances where there is no effluent limitation for a particular point source, or when the decades-old effluent limitation fails to establish a performance standard on a particular pollutant, “best professional judgment,” remains the default standard for permit writers. Resorting to “best professional judgment” permit writing often leads to subjective, non-uniform controls that allow for different levels of pollutant discharge and technology that vary from state to state.

This inconsistency, and the resulting “race to the bottom,” was one of the most significant problems that Congress sought to remedy through the passage of the Clean Water Act in 1972. *See* 92 Cong. House Debates 1972, 10783, 1972 Clean Water Act Legislative History, v.9 at 10774.

Continued reliance on this **ad hoc** process for regulating discharges undermines the Clean Water Act’s imperative for “a commitment [by an industrial category] of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges.” *NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987).

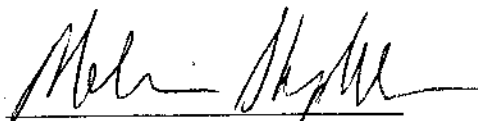
The intent of Congress was that the NPDES permit scheme would constantly evolve to embody increasingly stringent effluent limitations. The most critical aspect of Best Available Technology, for example, is that it is a “technology forcing” standard, compelling polluting industries to meet ever more stringent limitations on the path towards complete elimination of water pollution. *Id.* (“The BAT standard must establish effluent limitations that utilize the latest technology to reach ‘the greatest attainable level of effluent reduction which could be achieved.’”)

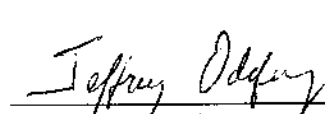
CONCLUSION

The pollution control improvements available because of advances in technology in recent decades have the potential to dramatically improve water

quality in our waterbodies, while protecting human health and the environment resources shared by all Americans. The Clean Water Act clearly compels EPA to regularly revisit the effluent limitations and effluent limitation guidelines that it has established for various categories of point sources. CWA § 301(d), 33 U.S.C. § 1311(d). The statute also mandates that EPA shall seek out new technologies, as they become available, to address discharges from point source categories for which it has yet to develop effluent limitations and effluent limitation guidelines. CWA § 304(m)(1)(B), 33 U.S.C. § 1314(m)(1)(B). EPA's fulfillment of these obligations is necessary in order to secure the increasingly cleaner, healthier lakes, rivers, streams, and seashores upon which our communities depend. The judgment of the district court should be reversed.

Respectfully submitted this 17th day of October, 2005.


Melanie Shepherdson, Esq.
Natural Resources Defense Council
1200 New York Avenue
Suite 400
Washington, DC 20005
(T) 202.289-6868
(F) 202.289-1060

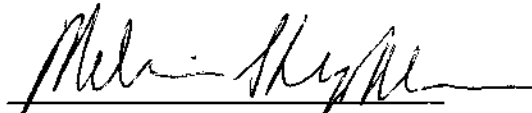
 by M.S.
Jeffrey Odefey, Esq.
Waterkeeper Alliance
828 South Broadway
Suite 100
Tarrytown, NY 10591
(T) 914.674-0622
(F) 914.674-4560

CERTIFICATE OF COMPLIANCE

I, Melanie Shepherdson, Attorney for Amicus Natural Resources Defense Council, do hereby certify that the foregoing brief complies with the type-volume limitations set forth in FRAP 32(a)(7). This brief has been prepared using Microsoft Word 2003, Times New Roman font with 14-point type space. The total number of words in the foregoing brief, excluding the Cover, Rule 26.1 Corporate Disclosure Statement, Table of Contents, Table of Authorities, Certificate of Compliance, and the Certificate of Service, is 5332.

CERTIFICATE OF COMPLIANCE

I, Melanie Shepherdson, Attorney for Amicus Natural Resources Defense Council, do hereby certify that the foregoing brief complies with the type-volume limitations set forth in FRAP 32(a)(7). This brief has been prepared using Microsoft Word 2003, Times New Roman font with 14-point type space. The total number of words in the foregoing brief, excluding the Cover, Rule 26.1 Corporate Disclosure Statement, Table of Contents, Table of Authorities, Certificate of Compliance, and the Certificate of Service, is 5332.

A handwritten signature in black ink, appearing to read 'Melanie Shepherdson', is written over a horizontal line.

Melanie Shepherdson

Counsel for Amicus Natural Resources Defense Council

ADDENDUM

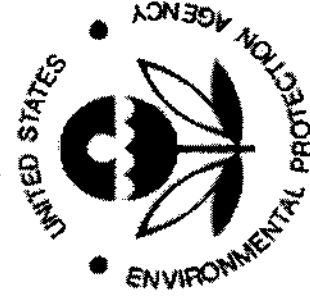
ADDENDUM

EPA Presentation, Public Meeting for the 2006 Preliminary Effluent Guidelines Program Plan, September 20, 2005.

Consent Decree, *NRDC v. Reilly*, 1991 U.S. Dist. Lexis 5334 (D.D.C. 1991).

“EPA Change in Priorities Prompts Reorganization of Water Office Staff, *Inside EPA* (April 9, 2004).

Public Meeting for the 2006 Preliminary Effluent Guidelines Program Plan



U.S. Environmental Protection Agency
EPA Headquarters, Washington, DC
September 20, 2005; 9AM – 12PM

Public Meeting Overview

- Overview of effluent guidelines and standards (ELGs) and the planning process
- Discussion of the EPA's 2005 annual review of ELGs and industrial categories without ELGs
- Overview of the industry sectors EPA identified for detailed studies in 2006 annual review and additional data needs
- Highlight EPA voluntary pollution prevention programs
- Answer questions from the audience

Public Meeting Schedule

Topic*	Time	Speaker
Introduction	9 – 9:10 AM	Ephraim King
Overview of ELGs and 2006 Preliminary Plan	9 – 10:00 AM	Carey Johnston
EPA Voluntary Programs:		
Performance Track	10 – 10:30 AM	Dan Fiorino
Design for the Environment (DfE)	10:30 – 11 AM	Clive Davies
Open Session	11 – 12 PM	

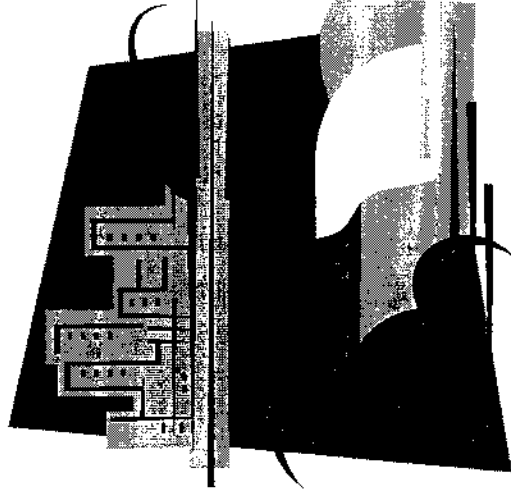
*** Note:** Questions are encouraged!

For Further Information...

- **Website:** <http://www.epa.gov/guide/plan.html>
- **Docket:** Most record documents, including all public comments, can be viewed online at:

<http://www.epa.gov/edockets>
(Docket #OW-2004-0032)
- **Contacts:**
 - Carey Johnston, Project Lead, 202-566-1014, johnston.carey@epa.gov
 - Jan Matuszko, Asst. Project Lead, 202-566-1035, matuszko.jan@epa.gov

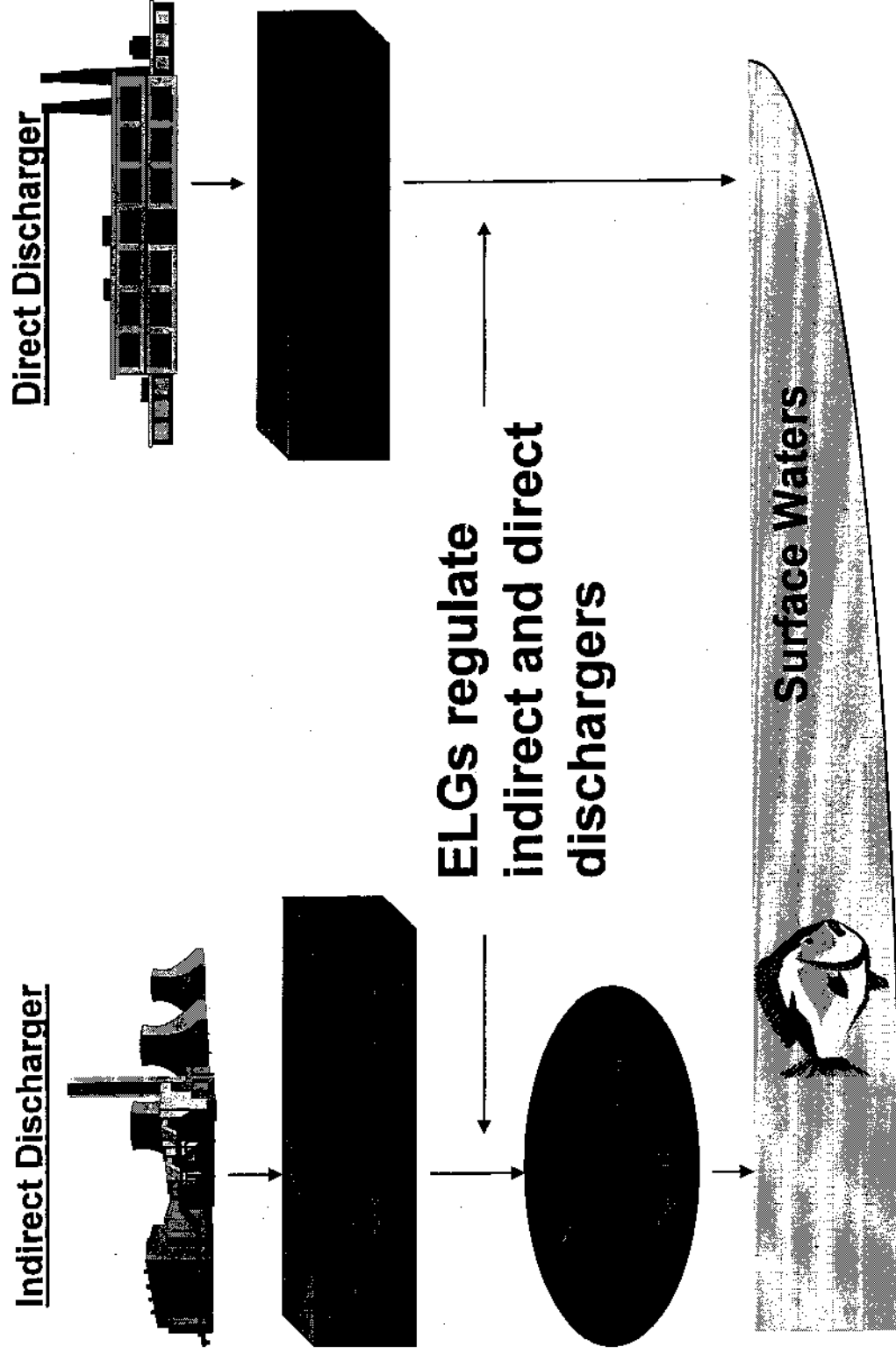
I. Overview of Effluent Guidelines and Standards (ELGs) and Effluent Guidelines Planning



What are Effluent Limitations Guidelines and Standards (ELGs)?

- National industrial wastewater regulations for both direct and indirect dischargers
- Industry Specific (e.g., metal finishing, iron and steel)
- Technology-based limitations and standards (however, specific technology not mandated)
- Economically Achievable
- ELGs are incorporated into NPDES permits (direct dischargers) or into controls set by POTWs (indirect dischargers)

What are Effluent Guidelines?



What are Effluent Guidelines and Standards?

- EPA has published effluent guidelines for 56 major industrial categories (over 450 subcategories) since the passage of the 1972 Clean Water Act
- These national industrial regulations are estimated to result in the removal of over 690 billion pounds of pollutants each year, and substantially contribute to improvements in the quality of water nationwide
- Limits on industrial indirect dischargers designed to prevent the discharge of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of publicly owned treatment works (POTW)
- General Pretreatment Regulations (40 CFR 403) set the framework for the implementation of categorical (technology-based) pretreatment standards

Effluent Guidelines Planning: Direct Dischargers

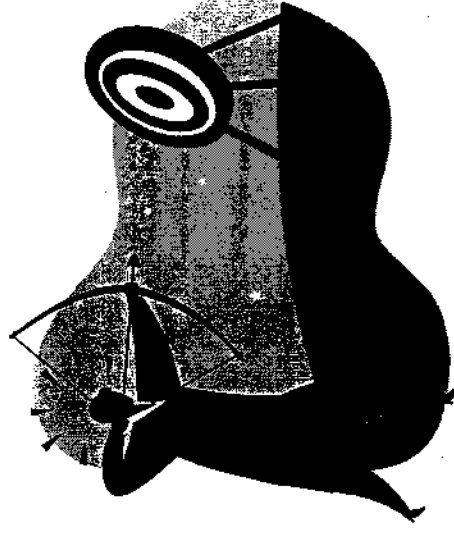
- The 1987 Clean Water Act Amendments added Section 304(m), which re-enforced Congress' intent that effluent guidelines keep pace with pollution prevention and treatment technology
- EPA must review all promulgated effluent guidelines annually
- Every other year: after proposal and public comment, EPA must publish a two-year plan for the guidelines program which:
 - Identifies and establishes a schedule for any effluent guidelines revisions
 - Identifies any industries not currently subject to effluent guidelines that discharge nontrivial amounts of toxics and establishes a schedule to take final action within three years

Effluent Guideline Planning: Indirect Dischargers

- For indirect dischargers, Clean Water Act requires:
 - Promulgation of pretreatment standards if there is pass through or interference at POTWs
 - Annual review of existing categorical pretreatment standards to identify candidates for revision
 - No publication requirement
 - As good government practice, we include findings in the Preliminary and Final Plans
 - Previous plans included review of existing pretreatment standards
 - 2006 Preliminary Plan also includes findings for potential new categories

Effluent Guidelines Planning: Goals

- Involve stakeholders from the start of the Plan
- Assure transparent decision-making
- Evaluate sound information against broad and balanced decision criteria



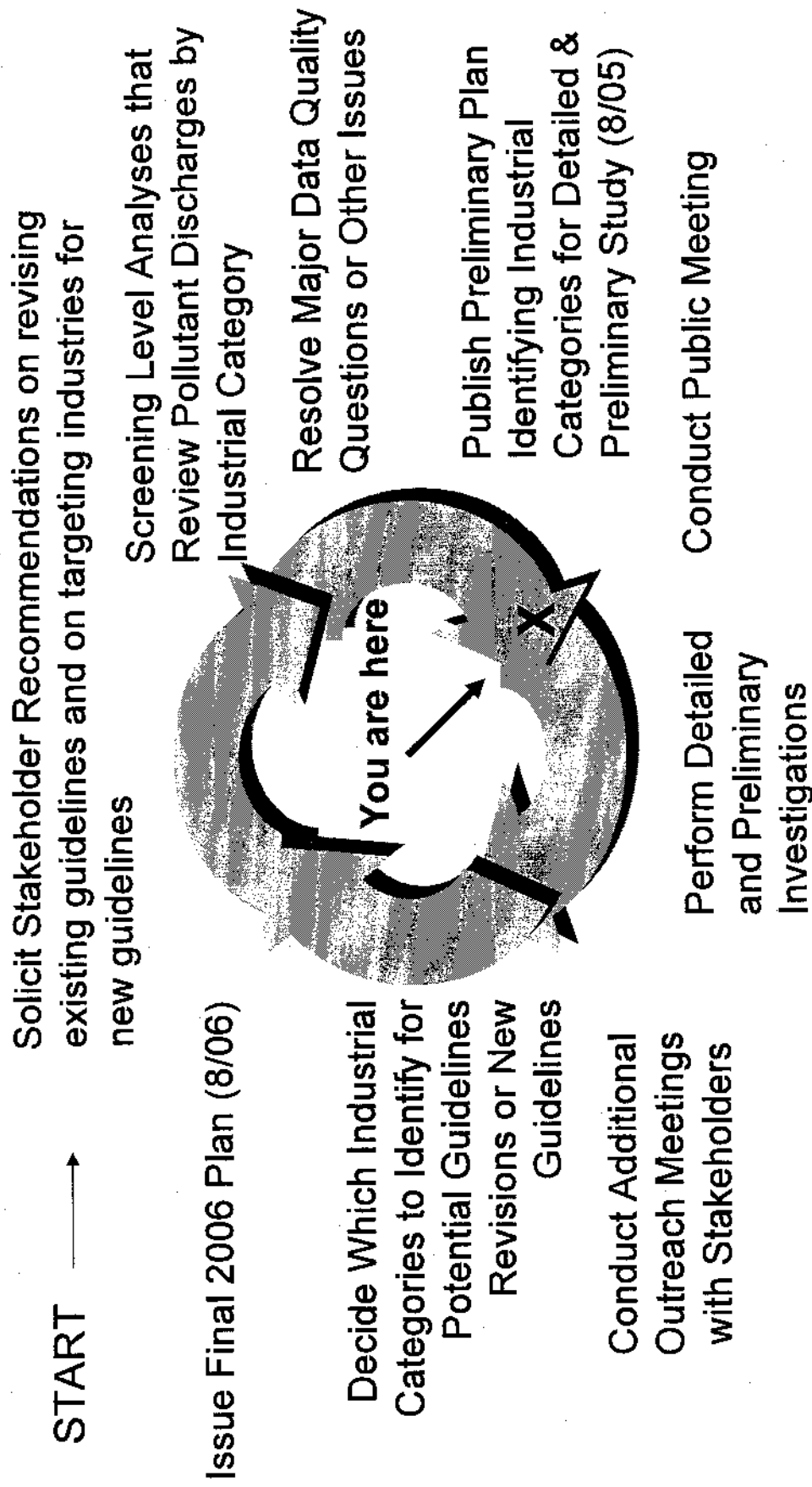
Review of Existing Effluent Guidelines: Factors

- Pollutant discharges by industrial category
- Current and potential technology and pollution prevention options by industrial category
- Economic considerations – growth, affordability
- Implementation/efficiency considerations of revising existing effluent guidelines or publishing new effluent guidelines

Review of Existing Effluent Guidelines: Phased Process

- Screening level review to identify categories needing further investigation
- Prioritizing candidates using selection criteria
- In-depth review to characterize industry categories
- Decide on course of action
- Present decisions in final Plan

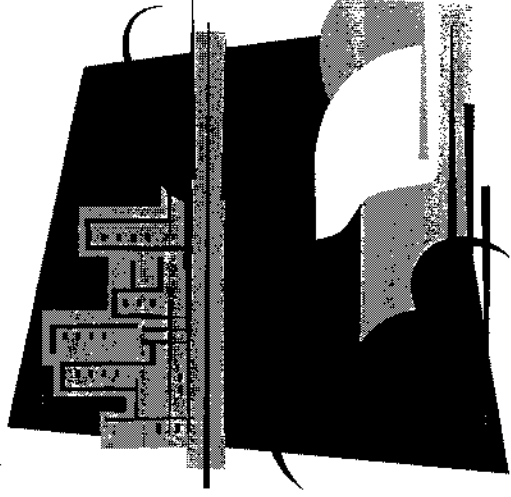
Process for 2006 Reviews and Plan



Final 2004 Plan (September 2, 2004)

- Two industries selected for potential revision of existing effluent guidelines (ELGs):
 - Vinyl chloride sector of organic chemicals; and
 - Chlor alkali sector of inorganic chemicals
- Petroleum refining identified in preliminary 2004 Plan for detailed review but not selected for an ELG rulemaking in the Final 2004 Plan
 - Estimated discharges much lower than appeared in initial data; at or below treatable levels
- Two industrial categories identified for potential new rulemaking:
 - Airport deicing operations; and
 - Drinking water supply and treatment facilities

II. Overview of the 2005 Annual Reviews and the 2006 Preliminary Plan (Published on August 29, 2005)



What Does the Preliminary 2006 Plan Do?

- Describes the factors and methodology EPA used in conducting its annual reviews and developing the preliminary plan
- Presents the results of EPA's 2005 annual review of existing effluent guidelines and pretreatment standards
- Identifies industrial categories for further study and additional data needs and analyses
- Solicits public comment

Screening Level Review for 2005

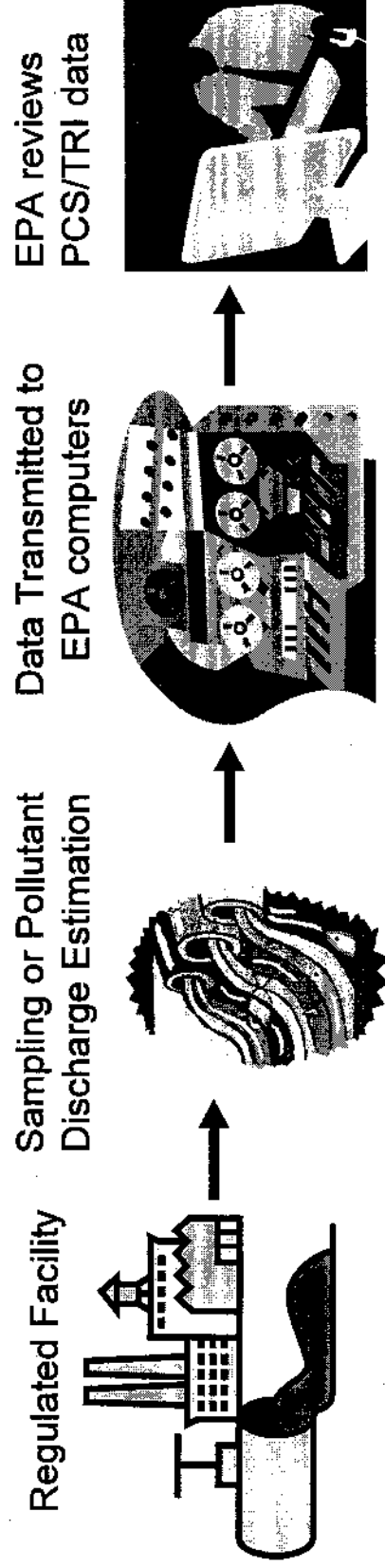
- Pollutant discharge estimates were a major factor in our 2005 screening level review of existing effluent guidelines and pretreatment standards
 - Used 2002 pollutant data from the Permit Compliance System (PCS) and Toxics Release Inventory (TRI) to estimate pollutant discharges (pounds) for an industrial category; and
 - Used Toxic Weighting Factors to convert “pounds” to “toxic pounds” – some measure of the relative toxicity of a pollutant to human health and the environment
- Performed data quality reviews on pollutants or facilities that were major contributors to the toxic pounds discharged for an industrial category
 - Data completeness
 - Reasonableness review of reported pollutants and the pollutant loadings
- Also considered other factors raised by stakeholders - often revolved around efficiency and implementation of a specific effluent guidelines

Screening Level Review for 2005 (cont.)

- The screening level review also excluded the following industrial subcategories from further review:
 - Subcategories currently subject to an effluent guidelines rulemaking
 - Subcategories for which effluent guidelines regulations were promulgated or revised within the last seven years
- EPA also separated the toxic pollutant discharges associated with a single facility that dominates (>95%) an entire industrial category but continued to analyze the remaining toxic pollutant discharges for the category.
 - In this case, the pollutant issue of the dominant facility may not represent the entire category
 - EPA will review these facilities for potential additional technology-based controls via BPJ permitting controls in the 2006 annual review

Screening Level Review for 2005 (cont.)

- Data from TRI, PCS, and the U.S. Census were the major sources of data used in the 2005 annual review
- These data sources have sufficient data to support a national comparison and prioritization of the 56 existing industry categories.
- Industry-supplied information
- Literature
- Permitting authorities



Data/Methodology Challenges

- Facilities
 - No central database for indirect dischargers
 - Primary industry SIC classifications do not directly correspond to an ELG category or wastewater generating operations
- Pollutants:
 - PCS only contains information for regulated pollutants for only ~10% of direct discharging industrial facilities
 - TRI reporters often estimate pollutant discharges (e.g., using method detection level) or report releases as ranges
 - Lack of toxic weighting factors for some reported pollutants
 - Nutrients not fully addressed through toxic weighting factors
 - Non-process events (e.g., oil spills) included in environmental release estimates
 - All data is reviewed for quality and accuracy - significant effort!

Data/Methodology Challenges (cont.)

- Technology:
 - No central database for technology for each industrial category
 - Current treatment-in-place and technology performance data is not readily available
- Environmental Impacts
 - Lack of data prevents the assessment of potential environmental impacts from industrial discharges
 - Some preliminary screening analyses can be done with nutrient modeling for a industries undergoing detailed review

Identifying and Prioritizing Categories for Detailed Studies or Additional Study

- Calculate two measures of loadings (or toxic weighted pound equivalents) for a category using data in PCS and TRI
 - TRI loadings reflect direct and indirect dischargers
- Develop a single loading for each category by adding the toxic weighted pound equivalents (TWPE) calculated with PCS data and TRI data
 - May double count some pollutants at some facilities
 - However, this approach focuses our resources on categories that rank high using both data sources or which have high TWPE in only one source
- Prioritized the 13 categories cumulatively discharging 95% of total TWPE for further review
- Prioritized the Top 2 categories for detailed studies:
 - Pulp, Paper, and Paperboard
 - Steam Electric Power Generation
- Prioritized the remaining 11 categories for additional study

Combined TRI and PCS TWPE Loadings

Point Source Category	TRI TWPE	PCS TWPE	Total TWPE	% of Total TWPE	Cumulative % of Total TWPE	Rank
Pulp, paper and paperboard ¹	3,181,631	1,633,450	4,815,081	40.20%	40.20%	1
Steam electric power generation ¹	804,471	1,614,291	2,418,762	20.19%	60.40%	2
Organic chemicals, plastics and synthetic fibers ²	644,411	620,884	1,265,295	10.56%	70.96%	3
Petroleum refining ²	498,127	198,073	696,201	5.81%	76.77%	4
Nonferrous metals manufacturing ¹	63,694	450,525	514,219	4.29%	81.07%	5
Ore mining and dressing ¹	66,544	406,548	473,093	3.95%	85.02%	6
Inorganic chemicals ¹	282,570	139,696	422,265	3.53%	88.54%	7
Rubber Manufacturing	173,304	2,386	175,691	1.47%	90.01%	8
Textile mills ¹	32,762	124,085	156,847	1.31%	91.32%	9
Fertilizer manufacturing ¹	6,403	143,795	150,198	1.25%	92.57%	10
Pesticide chemical manufacturing	18,137	91,180	109,317	0.91%	93.48%	11
Plastic molding and forming	97,297	466	97,762	0.82%	94.30%	12
Porcelain Enameling	88,749	3,478	92,228	0.77%	95.07%	13

¹Additional review for 2004 Plan

²Detailed study for 2004 Plan

Source: TRI and PCS Data, 2002.

New Effluent Guidelines Evaluation: Possible Identification of New Categories of Direct Dischargers

- EPA must identify potential new categories of point sources directly discharging toxic or non-conventional pollutants :
 - Legislative history says EPA must address “significant” or “nontrivial” discharges.
 - If identified, EPA must establish a schedule for taking final action within 3 years
- Our evaluation includes the following questions:
 - Is this a new category or is this a new subcategory of an existing ELG?
 - Are facilities in this category direct dischargers?
 - Does this category, as a whole, discharge non-trivial amounts of toxic or non-conventional pollutants?

Findings of New Effluent Guidelines Evaluation

- Tobacco Products Processing (SIC 21)
 - Identified in comments to the preliminary 2004 plan
 - Sparse data in PCS and TRI
- EPA will complete a detailed study for this industrial sector for the final Plan
- This detailed study will include site visit and sampling data recently collected by EPA

New Pretreatment Standards Evaluation: Possible Identification of New Categories of Indirect Dischargers

- EPA stakeholders identified the following indirect dischargers for this review:
 - Food Service Establishments
 - Industrial Laundries
 - Photoprocessing
 - Printing and Publishing
 - Hospitals
 - Independent and Stand Alone Laboratories
 - Offices and Clinics of Dentists
 - Industrial Container and Drum Cleaning (ICDC)
 - Veterinary Care Services
 - Health Care Services

New Pretreatment Standards Evaluation: Possible Identification of New Categories of Indirect Dischargers

- Is there pass-through?
 - For most industries, we did not calculate the actual amount of pass through. Instead, we looked at one or more of the following:
 - Potential pass through based on the total annual TWPE *per facility*
 - Potential pass through at national level based on total annual TWPE for all indirect dischargers in an industrial category
- Is there interference?
 - Evaluated anecdotal and qualitative information
- If potential pass through/interference: then look at “appropriate factors”:
 - Amount of wastewater pollution discharged and relative toxicity
 - Whether other regulatory tools (e.g., local limits set by POTWs, voluntary initiatives) would be more appropriate
 - Cost effectiveness (\$/TWPE) of potentially available technology options

Findings of New Pretreatment Standard Evaluation: National Categorical Pretreatment Standards May Not Be Necessary

- Pass through potential (measured as total annual TWPE discharged per facility) represents few toxics per facility – therefore, national regulation is not warranted at this time

Food Service Establishments

Industrial Laundries

Photoprocessing

Printing and Publishing

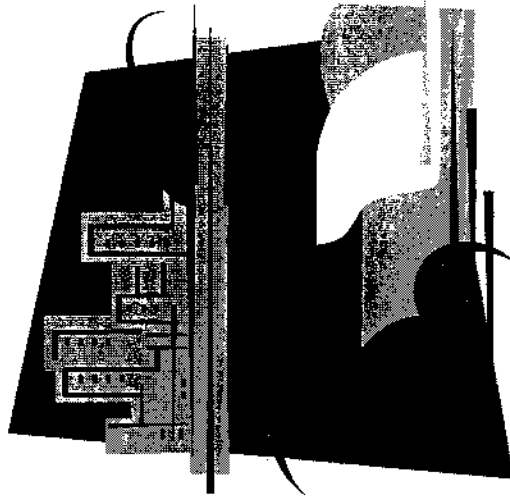
- Interference from conventional-type pollutants can be adequately addressed by Part 403 requirements and enforcement

Food Service Establishments

Findings of New Pretreatment Standard Evaluation: Additional Data Collection or Analysis May Be Necessary

- Recommend grouping the following industrial sectors into a possible "Health Services Industry" category:
 - Independent and Stand Alone Medical and Dental Laboratories
 - Offices and Clinics of Doctors of Medicine
 - Offices and Clinics of Dentists
 - Nursing and Personal Care Facilities
 - Veterinary Care Services
 - Hospitals (existing ELG for hospitals – no pretreatment standards)
- Limited data in PCS and TRI
 - All or nearly all of these facilities discharge to POTWs
 - Pollutants of concern can include silver, phenols, barium, acetone, and mercury
 - Hospital industry current subject to 1998 EPA/Industry MOU and recent Regional enforcement initiatives to promote EMS
- Industrial Container Drum Cleaning (ICDC)
 - Conducting formal pass through analysis using information from a 2002 detailed study

III. Data Gathering Activities and Analyses for the 2006 Annual Reviews and Final 2006 Plan



Detailed Studies

- Confirm problem, identify possible solutions
- Detailed verification of TRI- and PCS-reported discharges
 - Communication with facilities and trade associations
 - Identification and review of additional data sources
- Identification of process source(s) of discharged pollutants
- Identification of potential control alternatives
 - In-plant pollution control alternatives, feasibility, cost
 - End-of-pipe treatment, feasibility, cost
 - Other control strategies
- Generally use information collected in detailed studies to make a determination in final plan whether category should be selected for revision

Preliminary Category Review

- Similar to detailed studies
- Verification of TRI- and PCS-reported discharges
 - Communication with facilities
 - Limited identification and review of additional data sources
- Preliminary identification of process source(s) of discharged pollutants
- Limited identification of potential control alternatives
- Preliminary Category review may lead to many outcomes:
 - Additional study not warranted
 - Detailed study warranted
 - Rulemaking to potentially revise effluent guidelines is warranted

Detailed Study – Pulp & Paper

- Phase I – 78 bleached papergrade kraft and sulfite mills
 - Effluent guidelines last revised on April 15, 1998
 - Limits for TCDD, TCDF, chloroform, and chlorinated phenolic compounds at the bleach plant
 - Limits for AOX at the final effluent
- Phase III – 4 dissolving kraft and dissolving sulfite mills
 - In 2004 plan, EPA determined no ELGs due to small number of facilities
 - Support individual permit writers with technical support
- Phase II – 170 mills
 - Pulping; secondary (recycled) fiber; paper and paperboard from purchased pulp

Detailed Study – Pulp & Paper

- Cover both Phase I & Phase II
- Phase I & Phase II mills reported discharges of “dioxin & dioxin-like compounds” to TRI in 2002
 - 2.81 million TWPE (66.4 grams various congeners)
- Phase I mills in PCS in 2002 showed discharges of TCDD and TCDF
 - 1.37 million TWPE (0.9 gram TCDD)
 - EPA notes that one mill accounted for more than 99 percent of the PCS dioxin discharges for this industrial category in 2002 and has since stopped discharging dioxin
- Other pollutant releases
 - Polycyclic aromatic compounds
 - Metals (manganese, lead, zinc, mercury)
 - Nitrate

Detailed Study – Pulp & Paper

Key Questions

- Are pulp and paper mills generating and discharging TCDD and TCDF?
 - From bleaching?
 - From other sources?
- Have the 1998 ELGS been incorporated into NPDES permits and pretreatment agreements?
- What other toxic pollutants are discharged by pulp and paper mills?
 - What are the sources of these pollutants?

Detailed Study – Pulp & Paper Information Collection & Outreach

- EPA met with AF&PA and NCASI:
 - AF&PA members provided EPA with 48 NPDES permits for Phase I mills (representing 63% of the Phase I mills in the industry).
 - NCASI provided written documentation and data on the details of TRI release estimates and PCS errors
- Contacting states and regions for additional permits, fact sheets, and permit application monitoring data.
- Collecting case-study reports of mill upgrades.
- Reviewing technical literature for documentation of non-bleaching sources of toxic wastewater pollutants.

Detailed Study – Steam Electric

- Effluent guidelines and standards first promulgated for the Steam Electric Point Source Category in 1974. Significant revisions in 1982
- Guidelines are applicable to discharges from steam electric generating units that are primarily engaged in generating electricity for distribution and sale and that use fossil-type or nuclear fuels
- Regulates *traditional utilities* and some *non-utilities*. SIC 4911 and 493

Detailed Study – Steam Electric

Key Issues/Questions

- Evaluate applicability of electric generators currently not regulated
 - Industrial non-utilities (steam electric facilities co-located with manufacturing/commercial facilities)
 - Facilities using generation technology other than steam electric and other fuels
- Identify sources of pollutants of concern
 - TRI/PCS Data—arsenic, boron, metals, and chlorine
 - Are there industry trends that may impact loadings?
- Identify applicable pollutant control technologies
 - High flows and low concentrations may limit treatment options

Detailed Study – Steam Electric Information Collection and Outreach

- Analyzing 2002 Data from PCS, TRI, and DOE's Energy Information Administration (EIA)
- Augmenting above with data collected for section 316(b) rulemaking
- Reviewing data collected by Utility Water Act Group (UWAG) for the 2006 Plan
- Other sources of information including, industry trade associations and other industry sources, other EPA Offices, technical literature, State and Regional contacts, and NPDES permits

Detailed Study – Tobacco Products

- SIC Code 21 – Tobacco Products Processing
 - Tobacco (chewing and smoking)
 - Stemming and redrying
 - Cigarettes
 - Cigars
- Approximately 114 facilities; 9 of which have NPDES permits
- No existing effluent guidelines
- Extremely little data in TRI or PCS
- EPA concluded in the final 2004 Plan that it had insufficient information to determine if discharges from this industrial sector were significant and warranted identification

Detailed Study – Tobacco Products

Key Questions

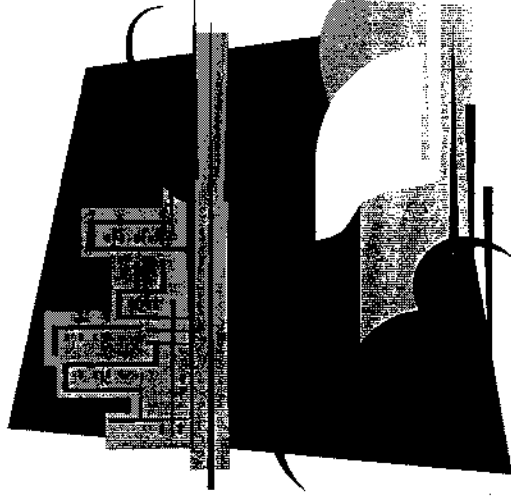
- Identification of discharging facilities
 - Direct
 - Indirect
- Identification of pollutants discharged and in what quantities and from which industrial sectors
- Information and data on the fate and affects of nicotine discharges to surface waters
- Data on the treatment effectiveness of POTWs in removing nicotine from tobacco products processing wastewaters

Detailed Study – Tobacco Products

Information Collection & Outreach

- Outreach and information requests to most significant companies (90% of U.S. market)
 - Phillip Morris USA, RJ Reynolds, Lorillard Tobacco Company, Dimon International
 - Philip Morris, RJ Reynolds, and Dimon have provided extensive information on processes, pollutant discharges and existing permits
- Based on information collected to date, we believe that cigarette plants (including mfg reconstituted tobacco sheet) are the largest generators and dischargers of wastewater
- Next Steps:
 - Review site visits and wastewater characterization sampling data to understand wastewater generation, quality, and treatment
 - Contacts to State and POTWs to obtain existing permits and to identify any concerns

IV. Considering Voluntary Reductions



Voluntary Loading Reductions

EPA encourages voluntary efforts, especially those that:

- Are widely adopted within an industry
- Result in significant reductions in toxic and non-conventional pollutant discharges to surface waters

Select EPA Voluntary Programs



Performance Track Program
Dan Fiorino, Program Director



Design for the Environment
Clive Davies, Program Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendant,

and

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

Intervenor-Defendants,

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

CONSENT DECREE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Definition of Terms

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

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

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

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

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

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

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

Effluent Guidelines Currently Under Development

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

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

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

Studies

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

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

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

Additional Effluent Guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

304(m) Plans

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

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

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

Special Task Force

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

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

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

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

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

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

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

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

Modification of this Decree

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

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

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

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

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

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

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

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

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

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

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

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

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

Termination of this Decree

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

Savings provisions

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

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

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

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

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

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

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

Signature of the Parties

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

Done this ____ day of _____, 1992.

BY THE COURT:


District Judge

Approved by Counsel for the Parties:

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

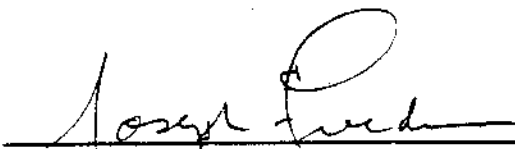
BARRY M. HARTMAN
Acting Assistant Attorney General
Environment & Natural Resources
Division

Date: _____



THOMAS PACHECO
DAVID DANA
Attorneys
Environmental Defense Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

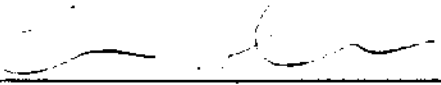
Date: 1/27/92



SUSAN G. LEPOW
JOSEPH FREEDMAN
DAVID B. SANDALOW
Office of General Counsel
U.S. Environmental Protection
Agency
401 M Street, SW
Washington, D.C. 20460


NATURAL RESOURCES DEFENSE COUNCIL, INC.
PUBLIC CITIZEN

Date: _____



ERIC R. GLITZENSTEIN
Harmon, Curran, Gallagher &
Spielberg
2001 S St., NW #430
Washington, D.C. 20009-1125

Date: _____



ROBERT ADLER
Senior Attorney
Natural Resources Defense Council
1350 New York Ave., N.W.
Washington, D.C.

Rule 108(k) List of Persons To Be Served With Notice Of Entry

Eric R. Glitzenstein
Diane Curran
Harmon, Curran, Gallagher
and Spielberg
Suite 430
1001 S Street, N.W.
Washington, D.C. 20009

Robert W. Adler
Jessica C. Landman
Natural Resources Defense Council
Suite 300
1350 New York Ave., N.W.
Washington, D.C. 20005

Katherine A. Meyer
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

James R. Walpole
Russell S. Frye
Chadbourne & Parke
Suite 900
1101 Vermont Ave., N.W.
Washington, D.C. 20005

Cynthia H. Evans
American Paper Institute and
National Forest Products Association
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Theodore L. Garrett
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

David Zoll
Vice President - General Counsel
Cell Perelman
Chemical Manufacturers Association
1501 M Street, N.W.
Washington, D.C. 20036

Margaret A. Handler
250 Park Avenue
16th Floor
New York, NY 10177

Nancy Crisman
McKenna, Shea & Crisman
Suite 602
1200 19th Street, N.W.
Washington, D.C. 20036

Thomas H. Pacheco
Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

Joseph Freedman
United States Environmental
Protection Agency
Office of General Counsel (LE-132W)
401 M Street, S.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Joint Motion for Entry of Consent Decree, Consent Decree, and Rule 108(k) List was served by first class mail, postage pre-paid, or by personal delivery, on January 31, 1992, upon the following:

Eric R. Glitzenstein
Diane Curran
Harmon, Curran, Gallagher
and Spielberg
Suite 430
2001 S Street, N.W.
Washington, D.C. 20009

Robert W. Adler
Jessica C. Landman
Natural Resources Defense Council
Suite 300
1350 New York Ave., N.W.
Washington, D.C. 20005

Katherine A. Meyer
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Washington, D.C. 20036

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1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

David Zoll
Vice President - General Counsel
Dell Perelman
Chemical Manufacturers Association
2501 M Street, N.W.

Washington, D.C. 20036

Margaret A. Handler
250 Park Avenue
16th Floor
New York, NY 10177

Nancy Crisman
McKenna, Shea & Crisman
Suite 602
1200 19th Street, N.W.
Washington, D.C. 20036

Joseph Freedman
United States Environmental
Protection Agency
Office of General Counsel (LE-132W)
401 M Street, S.W.
Washington, D.C. 20460



THOMAS H. PACHECO
Attorney, Department of Justice
Environment and Natural Resources
Division

P.O. Box 23986
Washington, D.C. 20026-3986
Telephone: (202) 786-4784

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EPA CHANGE IN PRIORITIES PROMPTS REORGANIZATION OF WATER OFFICE STAFF

Date: April 9, 2004 -

EPA's shift in priorities from effluent guidelines development to water quality standards and watershed-based approaches is prompting significant personnel shifts within the Office of Science & Technology (OST) -- a key department within the Office of Water, sources say.

Meanwhile, the Office of Wetlands, Oceans & Watersheds is also undergoing significant changes, as several division directors and deputy division directors are leaving the office.

EPA is transferring at least 20 employees from OST's Engineering & Analysis Division (EAD) to other parts of the water office because EPA is completing a raft of technology-based water pollution control rules, called effluent guidelines, required by a 1992 consent decree with the Natural Resources Defense Council (NRDC).

But NRDC alleges in comments filed on EPA's proposed effluent guideline plan that it does not address the group's original concerns and could violate the Clean Water Act (CWA). The group further suggests that scaling back EAD would hinder future development of guidelines.

EPA acting water chief Ben Grumbles told *Inside Washington Publishers* the changes are occurring because of a "strategic and cooperative shift" in water office priorities. "Effluent guidelines are still important, but we're now placing a greater emphasis on water quality standards and watershed-based approaches," Grumbles said.

An OST source says many of the EAD staff will be assigned to the OST's Standards & Health Protection Division, which oversees water quality standards development.

An EAD source says the transfers will occur this year, in three phases. Some shifts began late last month and the rest will occur this summer and fall.

EPA's increased focus on water quality standards is reflected in the agency's fiscal year 2005 budget request. EPA proposed transferring \$3.5 million from the Environmental Program & Management fund for effluent guideline development to "support high priority work such as water quality monitoring, permitting and coastal activities," according to EPA's budget justification.

"By the end of FY 2004, the Agency is scheduled to complete the last of nearly 20 effluent guidelines that had been subject to court-ordered deadlines," the budget justification states. "In FY 2005, the Agency does not anticipate the same number of rulemaking starts as previously experienced under the consent decree."

Instead, EPA's FY05 budget justification says the agency will focus on a number of water quality objectives, including strengthening the water quality standards program; improving water quality monitoring; developing effective watershed plans and total maximum daily loads; implementing effective nonpoint source programs; strengthening the National Pollutant Discharge Elimination System permitting program; and effectively managing infrastructure assistance programs.

The agency also will focus on implementing its Strategy for Water Quality Standards and Criteria, published in August 2003, which identifies "ten highest priority actions" EPA must accomplish to strengthen water quality standards, according to EPA sources and the agency's budget justification.

While some EPA sources say they support the agency's change in priorities, other stakeholders say they have serious concerns that EAD will be left with few resources to complete its existing duties under the effluent guidelines program as required under section 304(m) of the CWA. "I think the dismantling and redeployment of EAD staff is irresponsible and premature," former EAD employee George Jett wrote in comments on the agency's 2004/2005 effluent guidelines plan. "Redeployment of 20 of the 55 staff members will irreparably change their lives, and the Agency's ability to satisfy the requirements of section 304(m)." *The comments are available on InsideEPA.com.*

Section 304(m) requires EPA to establish a schedule for reviewing and revising existing effluent guidelines as well as identifying new industry sectors that the effluent guidelines program should regulate.

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