No. 05-16214

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

-v.-

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

and

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, EFFLUENT GUIDELINES INDUSTRY COALITION, and THE UTILITY WATER ACT GROUP (UWAG),
Defendants-Intervenors-Appellees.

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

FEDERAL DEFENDANTS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND RULE 35 STATEMENT

In this appeal, the panel majority departs from established precedent to hold that the U.S. Environmental Protection Agency ("EPA") has a mandatory duty under the Clean Water Act to consider specific technology-based factors when reviewing its effluent limitation guidelines for possible revision, thereby directing the manner of EPA's review, even though the majority held "the statute does not expressly and unequivocally state" the manner in which EPA must undertake such review. *Our Children's Earth Found. v. EPA*, No. 05-16214, Slip Op. at 14,232 (9th Cir. Oct. 29, 2007) (Attached). This holding warrants rehearing *en banc* because it conflicts with the precedent of the Supreme Court and at least five courts of appeals, and blurs the previously bright jurisdictional line separating those actions seeking discharge of mandatory duties from those seeking substantive review of an agency's discretionary decision-making.

Prior to the majority's decision, every court to address the question, including this Court, has held that mandatory duties giving rise to citizen suit jurisdiction must be "clear-cut" obligations or "specific, unequivocal command[s]" over which federal agencies lack discretion to implement. *See Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978); *Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *Sierra Club v. Thomas,* 828 F.2d 783, 791 (D.C. Cir. 1987); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980); *City of Seabrook v. Costle,* 659 F.2d 1371, 1374 (5th Cir. 1981); *Sierra Club v. Train*, 557 F.2d 485, 488 (5th Cir.

1977); *NRDC v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1974); *cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (APA § 706(1)).

Without discussing the relevant aspects of any of these cases, the majority departs from this precedent, allowing ambiguous statutory provisions to create mandatory duties giving rise to citizen suit jurisdiction. The majority justifies its holding by erroneously relying upon *Chevron*'s step-two. As Judge Wallace correctly notes in his dissent, the *Chevron* framework is inapplicable to mandatory duty lawsuits because the question is not whether EPA believes it has a mandatory duty to consider specific technology-based factors, but whether, objectively, the statute creates a mandatory duty. Slip. Op. at 14,243 (Wallace, J., dissenting). Beyond that, even under *Chevron*, if a court concludes that a statutory provision unambiguously imposes no duty, as the panel unanimously did here, then the court's analysis must stop and no mandatory duty exists. The majority's judgment thus turns *Chevron* on its head, and it should be reconsidered.

Moreover, the majority's decision, which holds not only that EPA must conduct its annual review but must consider certain technology-based factors when conducting those reviews, conflicts with numerous cases holding that citizen suit jurisdiction confers jurisdiction on courts only to compel agency action, not to direct the manner of that action. *See, e.g., Kennecott Copper*, 572 F.2d at 1355, and cases cited, *infra*, at 3-4. This expansion of citizen suit jurisdiction threatens to entangle the courts into the day-to-day management of federal agencies and undermine a judicial review regime carefully crafted by Congress to avoid such an entanglement. *En banc* review is thus necessary to conform to Supreme Court precedent; restore

uniformity to this Circuit's cases; avoid creating a circuit split; and ensure the continued viability of the judicial review regime of the Clean Water Act, and other similar federal statutes.

BACKGROUND

A. Citizen Suit Jurisdiction Under the Clean Water Act

Section 505 of the Clean Water Act waives the United States' sovereign immunity to allow a citizen to commence a civil action in the district court "against [EPA's] Administrator where there is alleged a failure to perform any act or duty under [the Clean Water Act] which is not discretionary with the Administrator." CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2). Consistent with the principal that waivers of sovereign immunity must be unequivocally expressed and narrowly construed, *see Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992), courts narrowly construe their jurisdiction under this "citizen suit" provision. A party may only challenge whether the Administrator actually performed the nondiscretionary ("mandatory") duty, not the method by which the duty is performed or its substance. *See, e.g., City of Las Vegas v. Clark County*, 755 F.2d 697, 704 (9th Cir. 1985); *Scott v. Hammond*, 741 F.2d 992, 995 (7th Cir. 1984); *Pennsylvania Dep't of Environ. Res. v. EPA*, 618 F.2d 991, 995-96 (3d Cir. 1980); *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 286-88 (2d Cir. 1976). *Cf., e.g., Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004) (Administrative Procedure Act); *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760-61 (9th Cir. 1989) (Clean Air Act); *Kennecott Copper*,

572 F.2d at 1355 (same); *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989) (same); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 664-65 (D.C. Cir. 1975).[1/]

Many courts, including the Supreme Court and Ninth Circuit, have held that a mandatory duty must be a "clear-cut" obligation or "specific, unequivocal command" which a federal agency lacks discretion to implement. *See Norton*, 542 U.S. at 63 ("The mandamus remedy [after which Congress modeled § 706(1)] was normally limited to enforcement of 'a specific, unequivocal command'"); *Farmers Union Cent. Exch., Inc.*, 881 F.2d at 760 ("We note that some courts have stated that only a 'clear-cut' nondiscretionary duty gives rise to section 304 jurisdiction."); *Kennecott Copper*, 572 F.2d at 1354 ("It is *clear* that the Administrator has a non-discretionary duty to make a decision regarding the state revision.") (emphasis added); *Maine*, 874 F.2d at 888 (noting its agreement with the D.C. Circuit that only "clear-cut" nondiscretionary duties give rise to citizen suit jurisdiction); *Sierra Club*, 828 F.2d at 791 ("Congress provided for district court enforcement . . . to permit citizen enforcement of clear-cut violations by polluters or defaults by the Administrator") (internal quotations omitted); *Mountain States Legal Found.*, 630 F.2d at 766 ("In our view, Congress thus restricted citizens' suits to actions seeking

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[1/]Because Congress modeled the Clean Water Act's citizen suit provision after the provision enacted in the Clean Air Act Amendments of 1970, *see Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987); *NRDC v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1974), cases interpreting the Clean Air Act are instructive. Similarly, Section 706(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), allows a citizen to maintain an action to compel agency action unlawfully withheld or unreasonably delayed, and so case law interpreting the APA's analogous provision is likewise instructive.

to enforce specific non-discretionary clear-cut requirements"); *City of Seabrook*, 659 F.2d at 1374 (finding no mandatory duty "in the absence of a clear statutory mandate"); *Sierra Club*, 557 F.2d at 488 (finding that despite use of the word "shall," statute did not indicate clear mandatory intent); *Train*, 510 F.2d at 700 ("the new provision for citizen suits . . . was hedged by limitations – the confinement to clear-cut violations by polluters or defaults by the Administrator").

To be clear-cut, the duty must be "readily-ascertainable" and not exist "only as the product of a set of inferences based upon the overall statutory scheme." *Sierra Club*, 828 F.2d at 791. That is because Congress contemplated that, in a mandatory duty action, the judiciary's only role would be to make a clear-cut factual determination of whether a statutory violation did or did not occur, *see id.*, which lessens the disruption on the Act's complex administrative process. *Kennecott Copper*, 572 F.2d at 1353. Congress consequently rested jurisdiction over these types of claims in federal district courts, which are better suited to making quick, factual determinations than federal appellate courts. *Sierra Club*, 828 F.2d at 791.

B. Procedural History

On May 28, 2004, environmental groups, including Our Children's Earth Foundation ("OCE"), filed a complaint, alleging that in 2003 and 2004, as relevant to this petition, EPA failed to satisfy its purportedly mandatory duties under CWA §§ 301(d) and 304(b) to review its effluent limitation guidelines. Section 304(b) imposes a clear-cut obligation upon EPA to review its effluent limitation guidelines "at least annually" for possible revision. CWA § 304(b), 33 U.S.C. § 1314(b).

Section 301(d) requires EPA to review its effluent limitations for possible revision at least every five years. CWA § 301(d), 33 U.S.C. § 1311(d).

It is undisputed that EPA reviewed its effluent limitation guidelines in 2003 and 2004. OCE, however, disagreed with the manner in which EPA prioritized its reviews according to environmental hazard, arguing that the statute requires consideration of technology-based factors that EPA failed to consider. EPA moved to dismiss the complaint for a lack of jurisdiction because OCE's claims amounted to a challenge to the substance of the review – not whether EPA conducted the review – and could not be addressed through a mandatory duty suit.

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

had conducted the required annual reviews in 2003 and 2004 and, therefore, held that EPA had discharged any mandatory duties under § 301(d) and § 304(b). *Id.* at 0215.

A split panel of this Court reversed and remanded on this issue. Initially, the majority held that "the district court had jurisdiction under § 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA." The majority then employed the framework from *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to determine whether EPA had a mandatory duty under § 301(d) and § 304 (b) to consider the specific technology-based factors in the review of its effluent limitations guidelines. Under the first step of the *Chevron* analysis, the majority concluded that "the statute does not expressly and unequivocally state" that EPA must use technology-based factors in its annual reviews. Slip Op. at 14,232. Finding the statutory language ambiguous, under the second step of the *Chevron* analysis, the majority held, citing the Act's overall structure and legislative history, that EPA had a mandatory duty to consider technology-based factors during the annual review of its effluent limitations guidelines. *Id.* at 14,234. The majority concluded that, "[t]o the extent the EPA has completely abandoned a technology-based review in favor of a hazard-based review, the Agency has breached its mandatory duties" and remanded to the district court the question of whether EPA considered technology. *Id.*

Judge Wallace dissented because in his view the Clean Water Act does not clearly mandate consideration of specific technology-based factors during review of the effluent limitations guidelines. *Id.* at 14,242. Because the majority correctly concluded that the Act does not unambiguously state that EPA must consider certain

technology-based factors in its review of the effluent limitation guidelines, in Judge Wallace's view, that should be the end of the matter. *Id.* at 14242-43.

ARGUMENT

I. THE MAJORITY ERRED AND CREATED AN INTRA-CIRCUIT AND INTER-CIRCUIT SPLIT BY HOLDING THAT AMBIGUOUS STATUTORY PROVISIONS MAY CREATE MANDATORY DUTIES.

Prior to the majority's decision, every court to address the question, including the Supreme Court and this Court, held, consistent with the principal that waivers of sovereign immunity must be unequivocally expressed and narrowly construed, that mandatory duties giving rise to citizen suit jurisdiction must be "clear-cut" obligations or "specific, unequivocal command[s]" over which federal agencies lack discretion to implement. *See* cases cited, *supra*, at 1. An examination of the plain language of § 301(d) and § 304(b) demonstrates that there is no "clear-cut" duty or "specific, unequivocal command" to review the effluent limitations guidelines in any particular manner. The relevant portion of § 301(d) states:

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

CWA § 301(d), 33 U.S.C. § 1311(d) (emphasis added). The relevant portion of § 304(b) states:

> For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, *if appropriate*, such regulations. Such regulations shall . . . specify factors to be taken into account in determining [effluent limitations, including

> certain technology-based factors] *and such other factors as the Administrator deems appropriate.*

CWA §§ 304(b) & (b)(1)(B), (b)(2)(B), (b)(3)(B); 33 U.S.C. § 1314(b) & (b)(1)(B), (b)(2)(B), (b)(3)(B) (emphasis added).

Although the statute specifies the factors that EPA is to consider when undertaking rulemaking, neither section specifies the factors EPA must, or even should, use to perform the required annual reviews. Under the plain language of the review provisions, EPA retains discretion over how it reviews its existing effluent guidelines to identify *appropriate* candidates for revision. As the majority itself noted, while Congress specified certain technology-based factors, among other factors EPA deems appropriate, for EPA to consider when *promulgating or revising* its effluent limitation regulations, the statutory language, in contrast, is ambiguous as to what factors govern the *review* of effluent guidelines. *See Slip Op.* at 14,232 ("the statute does not expressly and unambiguously state" that EPA's annual review must contemplate technology-based factors). Congress's decision not to specify the review criteria is an unambiguous delegation of broad discretion to EPA, not a clear-cut obligation giving rise to a mandatory duty. *See Farmers Union Cent. Exch.*, 881 F.2d at 761 ("Absent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion"). Where the statute does not unambiguously impose a mandatory duty, the majority's analysis should have ended.

II. THE MAJORITY ERRED BY USING *CHEVRON* TO CREATE MANDATORY DUTIES WHERE STATUTORY LANGUAGE IS AMBIGUOUS.

Instead of ending its analysis, the majority proceeded to analyze whether somehow, in the absence of an unambiguous mandate, the overall statutory framework and legislative history compelled the conclusion that the ambiguous statutory provisions created a mandatory duty for EPA to consider specific technology-based factors during its review. Employing the second-step of the *Chevron* framework for judicial review, the majority concluded that it did. *Chevron*'s second-step, however, is not applicable here. The *Chevron* framework applies to judicial review of an agency's interpretation of ambiguous statutes that the agency administers. *Pauley v. Beth Energy Mines, Inc.,* 501 U.S. 680, 696 (1991). In a two-step process, initially a court asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the meaning of the statute is unambiguous, then "that is the end of the matter. . . ." *Id.* If the meaning of the statute is ambiguous, then the court asks whether the agency's interpretation is a reasonable construction of the statute. *Id.* at 843. If the agency's interpretation is reasonable, the court must defer to that interpretation. *Id.*

Step-two of the *Chevron* framework simply has no relevance to mandatory duty lawsuits. That is because, as discussed above, a mandatory duty exists only where the statute specifies "clear-cut" obligations – *i.e*, where the statutory language is unambiguous. Where the statute does not unambiguously specify the factors for review, as here, there is no mandatory duty to consider technology-based or any other specific factors in conducting EPA's annual review. As Judge Wallace correctly

notes, the question is not whether EPA believes it had a mandatory duty to consider technology, but whether, objectively, the statute creates an unambiguous mandatory duty. Slip Op. at 14,243. This approach precludes using a mechanism such as *Chevron*'s step-two to draw inferences from the overall statutory framework and legislative history to establish mandatory duties. As the D.C. Circuit has stated, "it is highly improbable that a [duty] will ever be nondiscretionary, *i.e.* clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework." *See Sierra Club*, 828 F.2d at 791. Indeed, established principles of sovereign immunity clearly prohibited such inferred waivers. *See U.S. Dep't of Energy v. Ohio,* 503 U.S. 607, 619 (1992) ("A clear and unequivocal waiver of anything more cannot be found; a broader waiver may not be inferred").

The majority's application of *Chevron* here is unprecedented. Even assuming that *Chevron* somehow applies, because the majority correctly found that the plain language of the statutory provisions did not unambiguously imposed a mandatory duty, even under *Chevron* the majority's analysis should have ended.[2] *Chevron*, 467

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[2]No support exists for the majority's approach, which used *Chevron*'s second step to create a mandatory duty. The Fourth Circuit's decision in *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1992), upon which OCE relied on appeal provides no support for the majority's conclusion. In *Monongahela Power*, the Fourth Circuit noted that, consistent with *Chevron*, "*the Administrator*" could interpret an ambiguous statutory provision to impose a mandatory duty. 980 F.2d at 278 n.6. The Fourth Circuit thus addressed the question of whether EPA may interpret an *ambiguous* statutory provision to impose a mandatory duty upon itself. That situation is decidedly different from this case. The plain language of §§ 301(d) and 304(b) do not unambiguously impose any such duties and EPA has never interpreted those provisions as imposing a mandatory duty to conduct reviews applying technology-based factors.

U.S. at 842 (if the statute is unambiguous, then "that is the end of the matter"). The majority's decision thus ignores the Clean Water Act's plain language and relevant Supreme Court precedent, and should be reconsidered *en banc*.

III. THE MAJORITY ERRED AND CREATED AN INTRA-CIRCUIT AND INTER-CIRCUIT SPLIT BY ALLOWING A CITIZEN SUIT TO CHALLENGE THE MANNER OF AGENCY ACTION.

In addition, the majority failed to follow established precedent that jurisdiction under the citizen suit provision is limited to whether the mandatory duty has been performed – not whether it has been performed correctly. *See* cases cited, *supra,* at 3-4. As this Court has stated, citizen suit provisions are "intended to provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function; it was not designed to permit review of the performance of those functions, nor to permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised." *Kennecott Copper*, 572 F.2d at 1355 (citation omitted).

Here, the plain language of the statutes unambiguously requires EPA only to conduct annual effluent limitation guidelines reviews to identify appropriate candidates for possible revision. OCE, however, asked the district court, not merely to determine whether EPA actually reviewed its effluent limitation guidelines in 2003 and 2004 for possible revision, but to critique the manner in which EPA conducted those reviews, *i.e.*, in accordance with certain technology-based factors. But the Supreme Court has held that judicial review mechanisms designed to compel agencies to discharge their mandatory duties "empower[] a court only to compel an agency to perform a ministerial or non-discretionary act,' or 'to take action upon a matter,

without directing *how* it shall act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (citations omitted).[3] Therefore, OCE's lawsuit, which challenges the manner and content of EPA's annual reviews, falls outside the proper scope of a citizen suit claim and cannot be used to direct EPA *how* to conduct its reviews.

Instead, the Act makes clear that the courts of appeals have exclusive, original jurisdiction over the substance of EPA's actions "in approving or promulgating any effluent limitation or other limitation under section [301, 302, 306 or 405]" of the Act, CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), and "closely related" actions. *See, e.g., Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 566-67 (D.C. Cir. 2002); *see also* 62 A.L.R. Fed. 906, at 3(a) (1983) (collecting cases). Bifurcated review of the substance of agency decisions between the district courts and courts of appeals is strongly disfavored. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980). Thus, if OCE believes EPA acted unreasonably in *how* it conducted its annual effluent limitation guidelines reviews, the Act requires it to bring such a challenge in a timely-filed petition for review challenging discrete and final agency action in the court of appeals,[4] not in a mandatory duty lawsuit in the district court.

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[3]The majority distinguishes *Norton* by suggesting that "the statutory language in *Norton* was cast in discretionary and far broader terms than the language in the CWA. Whereas *Norton* concerned whether [BLM] was managing wilderness areas in a manner 'suitable' for preservation, [OCE] challenges the omission of specific statutorily-prescribed factors in EPA's reviews." Slip Op. at 14,238. The flaw with the majority's argument is that there are no specific statutorily-prescribed factors governing EPA's *review*, as discussed in Section I above.

[4]OCE's complaint is fundamentally flawed in that it fails to challenge "circumscribed, discrete agency action," as required by the Supreme Court. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Instead, OCE

Allowing citizens to challenge the manner of an agency's action through mandatory duty lawsuits undermines the bifurcated judicial review regime established by Congress, with potentially far-reaching effects. It could subject EPA to multiple mandatory duty suits in multiple district courts assessing the adequacy of rules of national application, and to simultaneous review in the district courts and courts of appeals. Indeed, plaintiffs already have begun to file actions in the district courts attacking rules of national application, despite the fact EPA has responded to arguments from the same parties in the court of appeals. *See Riverkeeper, Inc. v. EPA*, Civ. No. 06-12987 (S.D. N.Y.); *Conoco Philips Co. v. EPA*, No. 06-60662 (5th Cir.). The public resource implications of defending in multiple courts and implementing potentially inconsistent court decisions regarding nationally-applicable actions are substantial.

In fact, Congress recognized that an expansive reading of a district court's citizen suit jurisdiction – like the majority's reading – could severely disrupt an agency's administration of the complex statutes within its purview. *See NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) ("because of the obvious danger that unlimited public actions might disrupt the implementation of the Act and overburden

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brings a broad programmatic challenge requesting the courts to mandate what OCE believes would be wholesale improvement in EPA's annual review processes, which *Norton* plainly prohibits. *Id.* The proper course is for OCE to petition EPA to revise a *specific* effluent limitation guideline, and then, if EPA denies that petition, appeal from that discrete and final agency action. As the Supreme Court has stated, "[t]he case-by-case approach that this requires is understandably frustrating to an organization . . . [b]ut this is the traditional, and remains the normal, mode of operation of the courts." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990).

the courts, Congress restricted citizen suits to actions seeking to enforce specific requirements of the Act").[5] As the Supreme Court recently explained when discussing the APA's analogous provision, the limitation upon mandatory duty lawsuits to "specific, unequivocal command[s]," "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton*, 542 U.S. at 66. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates . . . [it would] inject[] the judge into day-to-day agency management." *Id.* at 66-67. Expanding citizen suits to cover the substance of an agency's action does exactly what Congress sought to avoid when it limited citizen suits to violations of clear-cut mandatory duties – it allows judges to direct limited agency resources, without any indication that Congress intended to withdraw the agency's discretion over how to best allocate those limited resources.

CONCLUSION

For the foregoing reasons, the Court should grant the Federal Defendants-Appellees' petition for rehearing *en banc*.

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[5]The legislative history of the Act further supports a restrictive interpretation of citizen suit jurisdiction. *See* Environmental Policy Division of the Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1970*, Vol. I, at 112, 206, 280, 355, 387 (1974).

Respectfully submitted,

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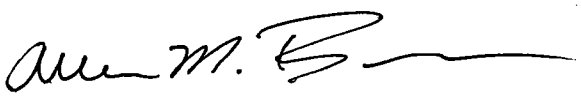

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the FEDERAL DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC, to be served by U.S. Mail, this 24th day of January 2008, upon the following:

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PANEL DECISION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL O. LEAVITT, Administrator of EPA; STEVEN L. JOHNSON,
Defendants-Appellees,

ASSOCIATION OF METROPOLITAN SEWERAGE AGNENCIES; EFFLUENT GUIDELINES INDUSTRY COALITION; THE UTILITY WATER ACT GROUP (UWAG); NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES (NACWA),
Defendants-Intervenors-Appellees.

No. 05-16214
D.C. No. CV-04-02132-PJH
OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
February 13, 2007—San Francisco, California

Filed October 29, 2007

Before: J. Clifford Wallace, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Wallace

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OPINION

McKEOWN, Circuit Judge:

In 1972 Congress passed the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act of 1972), Pub. L. No. 92-500, 86 Stat. 816 (1972), codified at 33 U.S.C. § 1251(a). Central to that legislation and later amendments is the notion that pollution discharges would be controlled through technology-based effluent limitations.

Environmental advocates, Our Children's Earth Foundation and Ecological Rights Foundation (collectively "OCE"), filed this citizen suit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, alleging that the Environmental Protection Agency ("EPA" or "the Agency") has failed to fulfill its mandate to review effluent guidelines and limitations in a timely manner and in accord with technology-based standards. Specifically, OCE claims that EPA violated its statutorily-mandated duties by abandoning *technology-based* review in favor of *hazard-based* review; neglecting to identify *new* polluting sources;

and failing to publish timely plans for future reviews. *See* CWA § 301(b), 33 U.S.C. § 1311(b); CWA § 301(d), 33 U.S.C. § 1311(d); CWA § 304(b), 33 U.S.C. § 1314(b); CWA § 304(m), 33 U.S.C. § 1314(m).[1]

A technology-based approach to water quality focuses on the achievable level of pollutant reduction given current technology, whereas a hazard-based[2] approach seeks to identify known hazards or contaminants in the water and to reduce the prevalence of those hazards. *See, e.g.*, S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. 3668, 3674-78. Although these approaches are not mutually exclusive, OCE claims that EPA jettisoned a technology-based approach altogether, thus abdicating its statutory duties.

The district court granted judgment in favor of EPA, holding that the challenged acts or omissions were discretionary. We agree that the decision whether to revise the effluent guidelines falls within EPA's discretion. We do not agree, however, that in its periodic review of the guidelines, EPA has discretion to ignore the technology-based criteria. Consequently, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

OCE's amended complaint contains four claims alleging non-compliance with what OCE characterizes as EPA's mandatory duties under the Act:

[1]Sections of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, are conventionally cited using the sections of the original Act, rather than the section numbers assigned after codification in the U.S. Code. We follow that convention here. The first time we cite to a provision of the Act, we include a preliminary parallel citation to the U.S. Code. All citations are to the CWA unless indicated otherwise.

[2]Hazard-based regulation is also referred to in the record as water-quality-based and harm-based regulation.

(1) EPA failed to review effluent guidelines based on the "best conventional pollutant technology" ("BCT") and "best available technology" ("BAT"), as mandated by § 304(b), (m);

(2) EPA failed to review existing effluent limitations as required by § 301(b), (d);

(3) EPA failed to issue timely final effluent guidelines plans as required by § 304(m)(1); and

(4) EPA failed to identify *new* polluting sources as required by § 304(m)(1)(B).

In sum, OCE argues that the CWA requires, as a non-discretionary matter, that the Agency take a particular approach to water safety regulation: technology-based review, published in a sufficiently timely fashion to afford a meaningful opportunity for notice and comment. EPA and Intervenors Effluent Guidelines Industry Coalition and Association of Metropolitan Sewerage Agencies (now known as the National Association of Clean Water Agencies) (together, "Intervenors") counter that EPA's non-discretionary duties do not extend to a particular manner of performing reviews and revisions.

We first address the argument by EPA and the Intervenors that this suit was not properly brought under the citizen suit provision of the Act, § 505(a), 33 U.S.C. § 1365(a)(2), but rather should have been brought under § 509(b)(1), 33 U.S.C. § 1369(b)(1). Then, we consider whether the district court has jurisdiction over each of OCE's four claims under § 505(a)(2). Because § 505(a)(2) jurisdiction is predicated on citizen enforcement of a non-discretionary duty, our analysis focuses on whether the claims relate to discretionary or non-discretionary duties under the Act.

ANALYSIS

I. JURISDICTION TO REVIEW AGENCY ACTION[3]

[1] The CWA contains two separate jurisdictional sections: § 505(a), known as the citizen suit provision, and § 509(b)(1), which relates primarily to challenges to promulgation of certain standards and determinations. OCE brought suit under § 505(a)(2), which permits "any citizen [to] commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[4] CWA § 505(a)(2).

[2] Alternatively, § 509(b)(1) permits suits against the EPA Administrator for review of action

> (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of

[3]The Agency's position on jurisdiction is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*.") (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

[4]OCE's amended complaint also cites the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, as an alternative basis for jurisdiction, but does not allege any claims under the APA.

> this title, and (G) in promulgating any individual control strategy under section 1314(l). . . .

Suits brought pursuant to § 509(b)(1) must be filed directly

> in the Circuit Court of Appeals of the United States for the Federal judicial district in which [petitioner] resides or transacts business. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

CWA § 509(b)(1). Section 509(b)(1) actions, as opposed to suits brought under § 505(a)(2), challenge the exercise of the Administrator's discretion in promulgating standards and issuing determinations.

[3] So long as EPA's challenged acts and omissions relate to non-discretionary duties under the Act, OCE's action was properly brought in the district court under § 505(a)(2). To the extent OCE challenges actions within the discretion of the Administrator, the district court properly refused to exercise jurisdiction under § 505(a)(2). Nonetheless, a jurisdictional defect under § 505(a)(2) does not mean that jurisdiction is proper under § 509(b)(1).

"[T]his Court has counseled against expansive application of section [509(b)]." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002). Section 509(b)(1) covers only challenges to "promulgation" or "approval" or "determinations" on permits, not failure to comply with allegedly mandated procedures, which is the thrust of OCE's suit.

Additionally, § 509(b)(1) lists a number of sections for which review obtains in the court of appeals: §§ 301, 1312,

304(*l*), 1316, 1317, 1342, and 1345. Neither §§ 304(b) or 304(m) are referenced in § 509(b)(1). Because the challenge here does not stem from the promulgation or approval of an effluent limitation or permit, we need not decide whether § 509(b) encompasses a challenge under § 304. *Compare E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) (suggesting that the EPA could collapse the limitations to be promulgated under §§ 301 and 304 into a single review), with *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1310 (9th Cir. 1992) (holding that the sections listed in § 509 are sufficiently specific that unlisted sections should not be interpreted to be covered by § 509).

[4] We thus agree with the district court that the circuit court's exclusive jurisdiction "extends only to a substantive review of the appropriateness of the guidelines actually promulgated, and not to the threshold question of whether the statutory requirements of the CWA have been met." No such promulgated guidelines or limitations are at issue here. The district court had jurisdiction under § 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA.

II. THE *CHEVRON* FRAMEWORK

In determining whether OCE's four claims challenge non-discretionary obligations under the Act, our first point of reference is the statute itself. We must first address whether Congress resolved the contested issues in the statute. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *See Chevron*, 467 U.S. at 842-43. *Chevron* deference is not due where the clear dictates of the statute counsel an interpretation different from the Agency's. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (9th Cir. 2005). We "must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

In the event that congressional intent cannot be determined or is ambiguous, the second step of the *Chevron* analysis considers whether the agency's interpretation of the statute is a reasonable one. *Id.* at 843. Even if an opposing construction of the statute is better supported by policy considerations, we do "not sit to judge the relative wisdom of competing statutory interpretations." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 134 (1985). As long as the agency's construction "is not inconsistent with the language, goals, or operation of the Act," the agency should prevail. *Id.* However, the agency "may not ignore factors Congress required be taken into account." *Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1131 (9th Cir. 2007).

Although the line between a congressional mandate and an area of agency discretion is not difficult to state, ascertaining that line is not always as easy. When Congress specifies an obligation and uses the word "shall," this denomination usually connotes a mandatory command. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). On the other hand, "[a]bsent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion." *Farmers Union Cent. Exch. v. Thomas*, 881 F.2d 757, 761 (9th Cir. 1989).

However, not every decision is so easily categorized. As the Supreme Court teaches, the decision-making process does not necessarily collapse into a single final decision. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In *Bennett*, considering a citizen suit provision parallel to that in the CWA, the Supreme Court held, "[s]ince it is the omission of these *required* procedures that petitioners complain of, their . . . claim is reviewable." *Id.* at 172 (emphasis added).

With these general principles in mind, we consider the CWA provisions relevant to each of OCE's claims to deter-

mine whether the particular claim relates to a mandatory obligation or discretionary agency function under the Act.

III. TECHNOLOGY-BASED REVIEW AND REVISION

A. HISTORY OF THE CWA AND TECHNOLOGY

By way of brief overview, when the CWA was enacted in 1972, its stated goal was the elimination of all discharges of pollutants into the Nation's waters by 1985. *See* CWA § 101(a)(1); 33 U.S.C. § 1251(a)(1). This goal was to be accomplished through ambitious technological improvements, because the previous water-quality based approach to pollutant control had been "limited in its success." S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. at 3675. In the CWA's Declaration of Goals and Policy, Congress wrote, "it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans." CWA § 101(a)(6).

The CWA formally prohibits the "discharge of a pollutant" from any source into navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *See* CWA § 301(a). NPDES permits, issued either by the EPA, or by the states in a federally-approved permitting system, are statutorily required to set forth, at the very least, "effluent limitations"—that is, certain "restriction[s] . . . on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged . . . into navigable waters." *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 491 (2d Cir. 2005) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)).

The specific effluent limitations contained in each NPDES permit are determined by the terms of more general "effluent limitation guidelines," which are separately promulgated by

the EPA. The effluent limitations and the guidelines have long been understood to be determined according to the best available or practicable technology. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 121 (explaining the technology-based character of effluent limitations and guidelines); *see also Waterkeeper Alliance*, 399 F.3d at 491 ("ELGs, [Effluent Limitation Guidelines] and the effluent limitations established in accordance with them, are technology-based restrictions on water pollution. They are technology-based, because they are established in accordance with various technological standards that the Act statutorily provides . . . .").

Since 1972 Congress has amended the CWA on a number of occasions. In the 1985 amendments, Congress reaffirmed its commitment to a technology-based approach to water quality regulation:

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

S. Comm. on Env't & Pub. Works, 99th Cong., Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 3-4 (Comm. Print 1985).

B. THE STATUTORY FRAMEWORK

[5] Three key statutory provisions of the CWA are at issue here: §§ 301(d), 304(b) and 304(m). Section 301(d) requires

EPA to review, every five years, the effluent limitations established under § 301(b)(2) and to revise such regulations "if appropriate." These processes are undergirded by a series of mandated criteria stating what the regulations "shall" contain. The mandated criteria include technology-based requirements. Sections 304(b) and (m) require an annual review of "guidelines for effluent limitations" applicable to direct dischargers and revision "if appropriate." As in § 301, § 304(b) includes mandated criteria that reference technology-based requirements, without differentiating between application of these criteria to promulgation, review or revision. Section 304(m) specifically provides for a schedule for review of the guidelines in accordance with § 304(b).

According to EPA, rather than conducting separate reviews, it consolidates effluent limitations required under § 301(d) into effluent limitation guidelines under § 304(b). As EPA puts it: "through its annual review of its consolidated 'effluent limitation guidelines' EPA also reviews the effluent limitations they contain, thus meeting its review requirements under § 301(d) and § 304(b) simultaneously."

C. CRITERIA FOR REVIEW AND REVISION

It is undisputed that EPA has an obligation to review effluent guidelines and limitations for possible revision, and that such a review is mandatory. It is also undisputed that EPA's ultimate decision *whether* to revise the guidelines and limitations is discretionary, as "appropriate." And, it is undisputed that any revision must be in accord with detailed statutory criteria that incorporate variants of the best-technology standard. What remains in dispute is whether, as part of its mandated *review* process, EPA must consider the technology-based criteria. To address this question, we begin with the statute itself.

[6] The Act imposes on EPA non-discretionary duties to review its current effluent limitations guidelines regulating

the pollutants discharged into the nation's waters, and, "where appropriate," to revise them, according to the criteria in the statute. *See* CWA §§ 301(d); 304(b), (m). Under § 304(b), "the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations." The statute goes on to provide that "[s]uch regulations shall" conform to specific criteria. The requirement of a technology-based approach to promulgation and revision of regulations runs throughout the statutory text of § 304(b).

Section 304(b)(1)(A) states:

> Such regulations shall—identify . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . .

CWA § 304(b)(1)(A).

Section 304(b)(1)(B) relates that the regulations "shall":

> specify factors to be taken into account . . . . relating to the assessment of best practicable control technology currently available . . . includ[ing] consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques . . . . and such other factors as the Administrator deems appropriate.[5]

[5]This last phrase, "and such other factors as the Administrator deems appropriate," indicates, as OCE acknowledges, that the EPA could adopt

CWA § 304(b)(1)(B).

Section 304(b)(2)(A) continues to mandate a technology-based approach, without differentiating between promulgation and revision:

> regulations shall . . . identify, . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations . . . .

CWA § 304(b)(1)(A).

Section 304(b)(4)(A) yet again requires an analysis in terms of "application of the best conventional pollutant control technology . . . ." Each of the subsections of § 304(b) includes a mandatory requirement related to technology.

[7] Under § 304(m), EPA also has an obligation to publish a biennial plan announcing a schedule for performing the annual review and for establishing rules regarding any existing effluent guideline selected for possible revision as a consequence of the annual review. Section 304(m)(1) states in full:

> (m) Schedule for review of Guidelines
>
> (1) Publication
>
> Within 12 months after February 4, 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall—

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additional factors for consideration, including harm or risk-based factors. The discretion to consider additional factors does not, however, render the mandatory factors optional.

> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section [specifying technology-based factors];
>
> (B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and
>
> (C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

CWA § 304(m)(1).

In § 301, which deals with the five year review and revision of effluent limitations, Congress wrote: "Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph." CWA § 301(d). The cross-referenced subsection (b)(2) mandates the application of technology-based criteria in determining the applicable effluent limitations.

For example, § 301(b)(2)(A) states that effluent limitations for categories other than publicly-owned treatment works "shall require application of the best available technology economically achievable . . . ." The mandated technology-based criteria run throughout the text of § 301(b). *See, e.g.*, CWA § 301(b)(1)(A) ("[E]ffluent limitations . . . shall require the application of the best practicable control technology currently available . . . ."); § 301(b)(2)(E) ("[P]ollutants identi-

fied . . . shall require application of the best conventional pollutant control technology . . . .").

Under the first step of the *Chevron* analysis, the plain language of these provisions reflects that the CWA repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the regulations, at least as one methodology among others. Further, the statute makes clear that the regulations must comport with technological criteria that change over time, suggesting logically that review and revision must attend to such criteria as well in order for the regulations and limitations to remain in compliance with the mandatory and temporally changing criteria. The statutory language is unambiguous that *revision* decisions, although discretionary as indicated by the "if appropriate" language, are constrained by the statute's mandate as to what "such regulations" "shall" accomplish. The statute states that the regulations "shall" account for the technological factors without distinguishing between promulgation and revision.

[8] While the overall structure of the Act strongly counsels that any *review* to determine whether revision is appropriate must contemplate the mandatory technology-based factors, the statute does not expressly and unequivocally state as much. Therefore, we move to the second step of the *Chevron* analysis to consider whether EPA's position that the review need not abide by the same factors governing revision and promulgation is reasonable. Our review of the statute, its purpose, and its logical construction lead us to conclude that to the extent EPA argues that it may totally ignore technology as part of its annual review, EPA's position is unreasonable. To adopt EPA's position would require us to "ignore factors Congress required to be taken into account." *Earth Island*, 484 F.3d at 1131.

Although the dissent questions the invocation of the *Chevron* framework, we note that this approach gives the EPA the benefit of any ambiguity or doubt in analyzing these inter-

locking statutory provisions. Our charge, in any event, is to interpret the statute and determine whether there is a mandatory duty. As explained below, under traditional principles of statutory construction, the result is the same.

The statute all but explicitly states that the review is governed by the revision standards. Section 304(1)(A)—pertaining to the schedule for the annual *review* of the guidelines—cross-references § 304(b), which extensively delineates the *technology-based criteria*. Under § 304(m)(1)(A) the Administrator "shall" "establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section." Since § 304(m) itself references the timing of the reviews, the cross-reference to § 304(b) cannot relate solely to timing, unless the cross-reference is mere surplusage. Similarly, § 301(d), pertaining to review and revision of effluent limitations, cross-references § 301(b)(2), which in turn mandates various technological considerations. The rule against surplusage requires that we not regard Congressional acts as meaningless and the amendment of acts as "mere surplusage." *Natural Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1978) (stating that "[in] construing a statute we are obliged to give effect, if possible, to every word Congress used"). The only reasonable interpretation of the cross-referenced provisions is that they tie the review and revision to § 304(b) and § 301(b), respectively, both of which mandate a technology-based approach.

We next look at the common sense reading of the statute. The clear purpose of review and revision is to provide for continuing regulatory compliance with the statutorily-mandated and temporally changing criteria reflecting what the regulations and limitations "shall' accomplish. If the regulations and any revision must incorporate technology-based factors, how could EPA conduct a review to assess continuing compliance with the statutorily-mandated technology-based

requirements, while ignoring technology considerations altogether? For review to meaningfully determine whether revision is appropriate, such review must attend to the statutorily-mandated technology factors that provide for what the regulations are to accomplish. It makes no sense that Congress would require promulgation and revision tethered to technology-based requirements, but would somehow silently render discretionary the choice as to whether to review in light of the statutorily-required technological criteria. If the review is not also technology-based, the review could hardly inform the discretionary decision of whether revision is in fact appropriate, thus ignoring Congress' mandate as to what the regulations and limitations "shall" accomplish. To be sure, the ultimate decisions in the review process are discretionary "as appropriate," but the foundational standard for review—the technology approach—is not optional.

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court highlighted the important distinction between a mandatory review process and an ultimately discretionary decision to take action following the review. 502 U.S. at 172. The Court considered a claim brought under the citizen suit provision of the Endangered Species Act (ESA), which, similar to CWA § 505(a), authorizes suits against the Secretary of Commerce or of the Interior "where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). Petitioners alleged that the Secretary failed to abide by the statutory mandate to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 520 U.S. at 172. The mandatory criteria to be considered by the Secretary under the ESA are followed by the statement that, except where the extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quotation marks and citation omitted).

In *Bennett*, as here, the agency argued that judicial review was not available because the Secretary had "not failed to perform any nondiscretionary duty." in light of the discretionary nature of the ultimate decision at issue. *See* 520 U.S. at 171. Rejecting that analysis, the Supreme Court concluded that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.' " 520 U.S. at 172 (citation omitted).

The challenge here mirrors that in *Bennet v. Spear*, in that OCE alleges a failure by EPA to consider particular statutorily-prescribed factors in making discretionary determinations. As the Court made plain in *Bennett*, "discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.*

Significantly, our reading of the statute comports with EPA's own earlier interpretation of its review obligations. EPA stated in its 2003 Notice in the Federal Register that "[b]ecause CWA § 304(m)(1)(A) requires EPA to review promulgated guidelines in accordance with CWA section 304(b), EPA interprets the statute to authorize EPA to employ the same factors for its annual review that it would consider in selecting BAT in a rulemaking context. EPA believes that this is a reasonable approach because the outcome of EPA's annual review is a decision . . . identifying those effluent guidelines for possible revision." *See* Preliminary Effluent Guidelines Plan for 2004-2005, 68 Fed. Reg. 250, 75515 (EPA Dec. 31, 2003). Now, EPA disavows that § 304(m) links review procedures to revision and promulgation procedures. This inconsistency in EPA's position entitles its current interpretation to less deference. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) ("Given this fluctuation . . . we decline to rely on the Forest Service's 'expertise.' ").

[9] Finally, the legislative history supports reading the review provisions as mandating consideration of technology. In adopting the legislation, the Senate Committee on Public Works Conference Report recognized that the preexisting harm-based or water-quality approach was "limited in its success." S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. at 3675.

> Officials are still working to establish relationships between pollutants and water uses. . . . The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable . . . limitations on the basis of a given stream quality . . . . The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality . . . . In order to carry out . . . this legislation, a two phase program . . . is created: the first based on best practicable technology, the second based on best available technology. In Phase I . . . all industrial pollution sources must apply the best practicable technology . . . . In Phase II . . . communities and industries will be required to apply, where the goal of no-discharge cannot be attained, the best available technology.

Id.

[10] The Committee report states that Congress intended the CWA to adopt a technology-based approach, not just with the initial regulations, but *over time* in multiple phases as technology continuously improved. Although we have not previously considered the particular question of EPA's review, in *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981), we acknowledged the technology-based requirements of the CWA: "We need not repeat here the

exhaustive discussions of the legislative history of the Act . . . . These discussions demonstrate that a fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent." If EPA dispenses with technology-based considerations altogether in deciding whether to revise the effluent limitations and guidelines, it will be unable to fulfill Congress' mandate to tie effluent regulation to technological improvements.

Despite the structure of the statute, EPA's earlier statement that its reviews under § 304 are governed by the revision criteria, and the Act's legislative history, EPA and the Intervenors argue that the technology-based approach provided for in § 304(b) applied only to the *initial* promulgation of regulations in 1972 and not to any subsequent review of those regulations or limitations. EPA seizes on the language at the beginning of § 304(b)—"the Administrator shall . . . publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations"—and claims that the mandatory language modifies only the promulgation provision, not ongoing review for possible revision. Since the mandate about what the regulations "shall" achieve does not distinguish between promulgation, review and revision, the plain language of the statute does not support EPA's position. This argument is not only strained, but it makes no sense. In short, this position is unreasonable.

As we noted earlier, many of the particular technological criteria the regulations and limitations "shall" incorporate under § 301(b) and § 304(b) are temporally changing rather than fixed in time. For instance, the statute mandates that the regulations "shall" "identify" "the degree of effluent reduction attainable through the application of the best practicable control technology currently available" and "the degree of effluent reduction attainable through the application of the best control measure and practices achievable including treat-

ment techniques" and "process and procedure innovations." CWA § 304(b)(1)(A)-(4)(B). How can the regulations continue over time to identify the level of effluent reduction attainable through the best technology and procedure innovations currently available if EPA's review does not consider post-1972 technological advances at all? It strains credulity to the breaking point that Congress would provide in such great detail relevant temporally changing technological factors, and would then permit EPA to adopt regulations and limitations that would freeze in time the technology available in 1972 or even in the 1980s.

Finally, in support of its position that a technology-based approach is discretionary, EPA also points to *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65-72 (2004), which held that a citizen suit under the APA cannot "seek wholesale improvement" of an agency "program by court decree." *Id.* at 64. We first note that OCE does not seek to "improve" EPA's review but simply to ensure compliance with objective criteria. The claim in *Norton* is also distinguishable from our case in a number of other respects. First, the statutory language in *Norton* was cast in discretionary and far broader terms than the language in the CWA. Whereas *Norton* concerned whether the Bureau of Land Management was managing wilderness areas in a manner "suitable" for preservation, OCE challenges the omission of specific statutorily-prescribed factors in EPA's reviews. Notably, in *Norton*, plaintiffs cited, in part, a *plan* rather than the statute itself as a source of the duty in question. Finally, the language in the plan took the form of "will" rather than "shall," which the Supreme Court found to lack the force of a binding commitment. *Id.* at 69. Here, as in *Bennett*, the statute mandates certain criteria that are to inform discretionary determinations as to the precise form of the regulations and effluent limitations. The overlying discretion does not render the mandated criteria discretionary.

[11] To the extent the EPA has completely abandoned a technology-based review in favor of a hazard-based review,

the Agency has breached its mandatory duties under §§ 301(d) and 304(b), (m). Although the EPA may determine in its exercise of discretion that no revision is appropriate, in conducting its review to reach that decision, the Agency must attend to the technology-based factors specifically prescribed by the CWA.

[12] Because the district court determined that EPA had no mandatory duty with respect to review requirements, the court did not consider whether EPA breached that duty. At this stage of the proceedings and on this record, however, it is not clear whether the EPA has in fact abandoned the mandatory technology-based approach altogether. While OCE claims that EPA has abandoned this duty, EPA counters that in fact it adopted a technology-based approach in addition to a harm-based approach.[6] Because this central dispute is unresolved, we remand to the district court for further proceedings.

IV. PUBLICATION SCHEDULE PROPOSED BY OCE

[13] Section 304(m) requires biennial publication of a plan for scheduling annual review and revision of the guidelines. The plan must provide for public review and comment prior to final publication. *See* CWA § 304(m)(2). OCE argues that the plan should be synchronized with the annual review, but as the district court correctly held, the Act does not require this degree of harmonization.

[14] The statute requires only that the EPA abide by the time limitations requiring biennial publication. Nowhere does the statute require that the EPA synchronize its publication

[6]For example, OCE claims that EPA has abandoned a technology-based review, citing EPA's own description of its annual review, which states, "EPA did not . . . conduct a comprehensive screening-level review of the availability of treatment or process technologies." EPA now disputes this characterization, claiming in its brief that "[i]n addition to conducting a hazard-based review, EPA also directly reviewed the availability of pollutant-reducing technologies for various industrial categories."

with the calendar year. OCE objects that use of the word "plan" implies that it be published before the described events take place. Although this argument has logical appeal, it is insufficient to trump the text of the statute, and the deference owed to the EPA under *Chevron*.

[15] As long as the EPA meets the statutorily-prescribed deadlines, and affords opportunity for notice and comment, it has satisfied its mandatory duties under § 304(m). The publication schedule preferred by OCE is not mandated by the statute, and thus is not amenable to challenge under § 505(a)(2).

V. IDENTIFICATION OF NEW POLLUTING SOURCES

OCE also argues that EPA has failed to identify new categories of industry discharging toxic and nonconventional pollutants not covered by existing effluent guidelines. The district court found that in 2005 EPA identified only two new sources for which no guidelines then existed. According to OCE, following EPA's 2003 review, EPA proposed not to schedule promulgation of any new effluent guidelines.

[16] Under § 304(m)(1)(B), the Administrator "shall" devise a plan which "shall—identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published." *Id.* The Administrator is also required to schedule publication of effluent guidelines for the categories identified under § 304(m)(1)(B). *See* CWA § 304(m)(1)(C).

[17] The statute does not require that the Administrator identify *all* or *any* existing categories of sources, only that the Administrator identify currently unregulated categories. The Senate Committee Report on the 1985 Amendments states: "Guidelines are required for any category of sources discharging significant amounts of toxic pollutants. In this use, 'significant amounts' does not require the Administrator to make

any determination of environmental harm; any non-trivial discharges from sources in a category must lead to effluent guidelines." S. Comm. on Env't & Pub. Works, 99th Cong., Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 25 (Comm. Print 1985). The Senate Committee Report suggests that it is at least within the discretion of the Administrator to determine whether particular discharges are non-trivial, and hence require new effluent guidelines.

[18] Applying *Chevron* deference, we hold that the identification of new categories is a non-discretionary duty, but that the precise number and kind of such categories identified is discretionary with the Administrator. The statutory language and the legislative history do not command otherwise. Since EPA did identify two new categories of sources during the period in question here, OCE's challenge to the sufficiency of new source identification is not properly brought under § 505(a)(2).

VI. MOTION TO TRANSFER

After filing a notice of appeal to this court, OCE filed a motion to transfer its claims to this court as if they were originally filed here under § 509(b)(1). The district court did not abuse its discretion in refusing to transfer claims to this court after the notice of appeal had been filed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (holding that once a notice of appeal is filed, the district court is divested of jurisdiction over the matter being appealed); *see also Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (a challenge to the district court's refusal to transfer claims under 28 U.S.C. § 1631 is reviewed for an abuse of discretion).

CONCLUSION

On remand, the district court has jurisdiction to consider whether EPA is undertaking the mandated technology-based

review provided for under the Act. The district court properly dismissed OCE's claims regarding the scheduling of plan publication and identification of new polluting sources, and did not abuse its discretion in refusing to transfer OCE's claims to this court. The case is remanded for further proceedings to determine whether EPA has in fact breached its non-discretionary duties under §§ 301 and 304.

REVERSED and **REMANDED** for further proceedings as to the claims challenging EPA's alleged abandonment of a technology-based approach; **AFFIRMED** as to the plan publication claim, new sources claim, and refusal to transfer under 28 U.S.C. § 1631. Each party shall bear its own costs on appeal.

WALLACE, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the CWA does not unambiguously state that the EPA must conduct a technology-based review of its effluent guidelines. Because the CWA does not clearly mandate a particular method of review, I would hold that the district court properly refused to exercise jurisdiction.

Environmental advocates OCE brought suit under section 505(a)(2) of the CWA. This section provides jurisdiction in the district court for any claims alleging "a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." CWA § 505(a)(2). We have recognized that only "clear-cut" non-discretionary duties give rise to jurisdiction under this section. *See Farmers Union Cent. Exch., Inc.*, 881 F.2d 757, 760 (9th Cir. 1989). We have further emphasized that section 505(a)(2) was "intended to provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function," and was not intended to "permit

the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (quoting *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313, 321 (W.D. Wis. 1975).

I am not convinced that *Chevron* analysis is appropriate for this case. We are not trying to determine whether we should defer to the EPA's interpretation of the statute. We are merely trying to determine whether, objectively, the statute creates a mandatory duty, and whether plaintiffs could therefore challenge the EPA's failure to perform that duty in the district court. In other words, it is not a question of whether the *EPA* thinks the statute is mandatory, it is a question of whether we do. With the *Chevron* confusion eliminated, this becomes a relatively straightforward case.

It is undisputed that under the CWA, the EPA has an obligation to review periodically its effluent guidelines and limitations. It is further undisputed that the EPA has an obligation to utilize technology-based criteria when it exercises its discretion to *revise* the guidelines and limitations. Nothing in the CWA, however, specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach. At most, the statutory provisions and legislative history are ambiguous. Because the CWA does not create a clear-cut, mandatory duty on the part of the EPA, I would affirm the district court's determination that it lacked jurisdiction under 505(a)(2).

I join the majority in holding that the district court properly dismissed OCE's remaining claims. I also join in holding that the district court did not abuse its discretion in refusing to transfer OCE's claims to this court.