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December 31, 2007

Re: Comments on Preliminary Effluent Guidelines Program Plan for 2008, Docket ID No. EPA-HQ-OW-2006-0771

Assistant Administrator Benjamin H. Grumbles
Water Docket
U.S. Environmental Protection Agency
Mail Code: 4203M
1200 Pennsylvania Avenue, NW.
Washington, DC 20460
Attention Docket ID No. EPA-HQ-OW-2006-0771

Dear Assistant Administrator Grumbles:

In response to the Public Notice published at 72 Fed. Reg. 61335 (Oct. 30, 2007), Ecological Rights Foundation (ERF) and Our Children's Earth Foundation (OCE) hereby provide comments to the U.S. Environmental Protection Agency (EPA)'s 2008 Preliminary Effluent Guidelines Program Plan("the EGP"). ERF and OCE believe that the EGP as proposed violates CWA section 304(m)(1)[1] and CWA section 301(d)[2] in four key respects. Specifically, the EGP fails:

(1) to provide for a technology-based annual review of *all* the effluent guidelines EPA has promulgated for fifty-six classes and categories and approximately 450 subcategories of industry ("effluent guidelines") and revision of such effluent guidelines in accord with CWA section 304(b)[3] as mandated by CWA section 304(m)(1)(A);[4]

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[1] 33 U.S.C. § 1314(m)(1).

[2] 33 U.S.C. § 1311(d).

[3] 33 U.S.C. § 1314(b).

[4] 33 U.S.C. § 1314(m)(1)(A).

(2) to identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under CWA sections 304(b)(2) and 306[5] have not previously been published as mandated by CWA section 304(m)(1)(B);[6]

(3) to establish a schedule for promulgation of effluent guidelines for categories of sources for which effluent guidelines have not previously been published as mandated by CWA section 304(m)(1)(C)[7] (such schedule was supposed to provide for promulgation of effluent guidelines no later than 4 years after February 4, 1987, for categories identified in EPA's 1988 EGP, and 3 years after the publication of the plan for categories identified in later published plans); and

(4) to provide for review and revision of effluent limitations established pursuant to CWA section 301(b)(2) ("effluent limitations" or "limitations") every five years as mandated by CWA section 301(b)(2).[8]

OCE and ERF urge EPA to revise the EGP to correct these deficiencies and to comply with EPA's mandatory CWA duties to review, revise and promulgate existing and new effluent guidelines and limitations.

The EGP continues to reflect and provide for the same methodology of reviewing and revising existing and promulgating new effluent guidelines and limitations reflected in EPA's recent proposed and final effluent guidelines program plans, including EPA's Preliminary Effluent Guidelines Program Plan for 2004/2005 ("Preliminary 2004 EGP") and EPA's Final Effluent Guidelines Program Plan for 2004/2005 ("Final 2004 EGP"). On March 18, 2004, OCE and ERF provided extensive comments on the Preliminary 2004 EGP, which are attached and incorporated herein by reference. OCE and ERF now raise the same objections to EPA's methodology specified in the EGP for reviewing and revising existing and promulgating new effluent guidelines and limitations as OCE and ERF raised in their March 2004 comments on the Preliminary 2004 EGP.

In the EGP, as was true of the Preliminary 2004 EGP and Final 2004 EGP, EPA has impermissibly truncated its mandatory duty under CWA section 304(b) and (m)(1)(A) to review all effluent guidelines in six specific manners: (1), by failing to gather and/or analyze

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[5] 33 U.S.C. §§ 1314(b)(2), 1316.

[6] 33 U.S.C. § 1314(m)(1)(B).

[7] 33 U.S.C. § 1314(m)(1)(C).

[8] 33 U.S.C. § 1311(b)(2).

information sufficient to make reasoned conclusions concerning the technological and economic feasibility of more stringent effluent guidelines, (2) by improperly relying on its evaluation of the health and environmental risks posed by different industries to decide to review only a subset of its effluent guidelines, (3) by impermissibly declining to review effluent guidelines on the basis that the water pollution problems potentially caused by that industry are being dealt with more "efficiently" by other regulatory and non-regulatory means, (4) by impermissibly truncating review of effluent guidelines on the basis that they have been promulgated within the past seven years, (5) by impermissibly declining to review effluent guidelines based on a finding that there are only a few facilities in that industry discharging pollutants or pollutants that pose risks to water quality, and (6) by determining that EPA may make the annual review specified by CWA sections 304(b) and (m) into a multi-year phased review.

In addition, even if EPA could properly employ a hazard screening methodology for reviewing effluent guidelines, EPA's current hazard screening methodology continues to be so plagued by data limitations and other flaws as to provide no reasonable basis for EPA to rank the relative water pollution hazards posed by industries' discharges.

In the EGP, EPA has further failed to comply with its duties under CWA section 304(m)(1)(B) and 304(m)(1)(C) to identify all classes and categories of industry discharging toxic or nonconventional pollutants for which effluent guidelines have not previously been published and then to schedule the final promulgation within three years of new effluent guidelines for these categories. One, EPA may not lawfully avoid its duty to review the effluent limitations of new categories of point sources by labeling these sources "subcategories" rather than employing the statutory term "classes and categories." Two, EPA may not reserve for itself the discretion not to promulgate a new effluent guideline within three years for any class or category of industry identified pursuant to CWA section 304(m)(1)(B).

EPA's Approach Is Contrary to Recent Court Rulings

On October 29, 2007, the U.S. Court of Appeals for the Ninth Circuit effectively held EPA's methodology of reviewing and revising existing effluent guidelines and limitations specified in EPA's recent proposed and final effluent guidelines program plans and now reflected in the EGP to be unlawful. *See Our Children's Earth Foundation, et al. v. U.S. Environmental Protection Agency*, No. 05-16214.

Under its current effluent guidelines and limitations review methodology, EPA does not gather and then consider the information needed for it to determine whether its existing effluent guidelines and limitations still accurately define the best available technology economically

achievable (BAT),[9] the best practicable control technology currently available (BPT),[10] and the best conventional pollutant control technology (BCT) for *all* the industries regulated by these guidelines and limitations.[11] Specifically, EPA's methodology does not involve EPA discerning whether technological innovation and/or changed economic circumstances makes it feasible for any of these industries to reduce their pollutant discharges below that required by EPA's existing effluent guidelines and limitations. Instead, EPA has determined that it will not gather or analyze the information needed to make this determination unless the industry in issue is one of the small subset of industries that EPA deems to be posing the greatest ecological risk of harm, compared to the other industries regulated by effluent guidelines and limitations. This methodology necessarily means that if a particular industry is never consider by EPA to be among the greatest risk producers, EPA will *never* review whether technological change and/or economic innovation would allow that industry to reduce its pollutant discharges, i.e., would warrant redefinition of BAT, BPT, and/or BCT for that industry.

As the Ninth Circuit held in *Our Children's Earth Foundation*, this is improper. EPA lacks the discretion to decide, for any subset of the industries regulated by effluent guidelines and limitations, that it will not analyze whether technological change and/or economic innovation would allow that industry to comply with more stringent effluent guidelines and limitations. In expressly rejecting EPA's contention that it need not consider the same technology-based criteria in performing its annual review of effluent guidelines and five-year review of limitations that it must consider when promulgating or revising these guidelines and limitations, the Court observed:

> 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 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.
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> . . . . How can the regulations [EPA's effluent guidelines] continue over time to identify the level of effluent reduction attainable if EPA's review does not consider post-1972 technological advances at all? It strains credulity to the breaking point that Congress

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[9] S*ee* CWA § 301(b)(2), 33 U.S.C. § 1311(b)(2)).

[10] *See* CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

[11] S*ee* CWA § 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E).

> 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.

Our Children's Earth Foundation, slip op. at 14234, 14238.

ERF and OCE urge EPA to heed the Ninth Circuit's ruling and to adopt a revised EGP which specifies the CWA-mandated consideration of the technological factors specified in CWA sections 304(b) and 301(b).

The EGP further unlawfully continues to decline to mandate the promulgation of new effluent guidelines within three years for any category of industry discharging toxic or nonconventional pollutants for which effluent guidelines have not previously been published. CWA section 304(m)(1)(B) requires EPA to identify categories of industries discharging toxic or nonconventional pollutants for which effluent guidelines have not previously been published. 33 U.S.C. § 1314(m)(1)(B). CWA section 304(m)(1)(C) further requires EPA to establish a schedule for final promulgation within three years of effluent guidelines for such new categories of industry. 33 U.S.C. § 1314(m)(1)(C). Indeed, the U.S. District Court for the Central District of California recently ruled that EPA has a duty to promulgate effluent guidelines within three years for new categories identified in an effluent guidelines plan. *See NRDC et al. v. EPA*, 437 F.Supp.2d 1137 (C.D. Cal. 2006). ERF and OCE urge EPA to heed this court ruling and the plain dictates of the CWA and to adopt a revised EGP which sets a three-year schedule for final promulgation of new effluent guidelines for all categories of industry identified by EPA as discharging toxic or nonconventional pollutants.

Conclusion

Similar to EPA's other recent effluent guidelines plans, the EGP proposes effluent guidelines and limitations review and development at a snail's pace. EPA is not respecting Congressional intent in its approach. As one Court of Appeals has explained, Congress intended the CWA's effluent guidelines and limitations provisions and EPA's implementation of these provisions to force technological innovation that would curb industrial pollutant discharges:

> [T]he most salient characteristic of [the CWA] 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.

NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987); *see also NRDC v. Train*, 510 F.2d 692, 695-97 (D.C. Cir. 1974).

In the EGP, EPA has scheduled not a single new revision of existing effluent guidelines and limitations and not a single new effluent guideline or limitation for currently unregulated industries. To paraphrase the Ninth Circuit, it strains credulity to conclude that this appropriately reflects the "technology-forcing" scheme enacted by Congress. Most of EPA's existing effluent guidelines are decades old. Surely, it is unreasonable to conclude that EPA's existing effluent guidelines reflect the current state of pollutant reduction technology, much less serve to spur innovation of new technologies.

ERF and OCE urge EPA to halt its deviation from Congressional intent, first by devoting the resources necessary to complete in 2008 a technology-based assessment of existing effluent guidelines and limitations and second by scheduling the promulgation of revised effluent guidelines and limitations for all industries whose current guidelines and limitations do not now appropriately define BAT, BCT and BPT. Third, EPA should schedule the promulgation within three years of new effluent guidelines for all industries discharging toxic or nonconventional pollutants for which guidelines under CWA sections 304(b)(2) and 306 have not previously been published.

Sincerely,

Christopher a. Sproul

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