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Via certified mail and electronic mail

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
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Re: Effluent Guidelines Program Plan 15 Decisions Not to Revise Water Pollution Standards for Petroleum Refineries, Chemical and Plastics Plants, Fertilizer Manufacturing, Pesticides Manufacturing, and Nonferrous Metal Manufacturing

Dear Administrator Regan:

The Environmental Integrity Project (“EIP”) writes on behalf of the Waterkeeper Alliance, Center for Biological Diversity, Clean Water Action, Food & Water Watch, Bayou City Waterkeeper, Black Warrior Riverkeeper, Environment America, Healthy Gulf, Tennessee Riverkeeper, San Antonio Bay Estuarine Waterkeeper, San Francisco Baykeeper, and Surfrider Foundation (collectively, “Petitioners”) regarding the failure of the U.S. Environmental Protection Agency (“EPA”) to update the decades old technology-based effluent limitations guidelines and effluent limits (collectively referred to as “ELGs”) and pretreatment standards for some of the nation’s largest industrial sources of nutrient and toxic pollution—petroleum refineries; organic chemicals, plastics, and synthetic fibers manufacturing; inorganic chemicals manufacturing; fertilizer manufacturing; pesticide chemicals manufacturing; plastics molding and forming facilities; and nonferrous metals manufacturing—as required under the Clean Water Act.¹

The Effluent Guidelines Program Plan 15 (“Plan 15”) decisions not to revise the ELGs and pretreatment standards for these seven industrial point source categories are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” under the Administrative Procedure Act and Clean Water Act.² EPA’s current review and decision-making process is fundamentally flawed and inconsistent with its statutory obligations, as well as inefficient. Today, Petitioners are filing a petition for judicial review of EPA’s most recent decisions not to revise the ELGs and pretreatment standards for these seven industrial point

¹ EIP and sixty other organizations raised significant concerns with EPA’s failure to revise the ELGs for these and other industrial point source categories in September of 2021. *See* Letter to Michael Regan from EIP et al. (Sept. 22, 2021), <https://environmentalintegrity.org/wp-content/uploads/2021/09/2021.09.22-EPA-ELG-letter-FINAL.pdf>.

² 5 U.S.C. § 706(2)(A).

source categories pursuant to Section 509(b) of the Clean Water Act in the U.S. Court of Appeals for the Ninth Circuit (“Petition”).³

The ELGs and pretreatment standards are the foundation of the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES), and discharge limitations that represent modern wastewater treatment controls are essential to achieving the statutory goal of reducing and, eventually, eliminating water pollution.⁴ Petitioners applaud the long-overdue actions that EPA is taking to reduce pollution discharges from coal-fired power plants, slaughterhouses, and some sources of per- and polyfluorinated substances (“PFAS”). However, for each point source category, the law requires that EPA (1) review and revise, if appropriate, the effluent limitation guidelines annually and (2) review and revise, if appropriate, the effluent limits at least once every five years.⁵ EPA is falling far short of meeting its annual and five-year review and revision duties mandated by law. The Clean Water Act charged EPA with establishing pollution limits based on the best available treatment methods, and then reviewing these limits annually and every five years to keep pace with advances in technologies to reduce—and ultimately eliminate—water pollution from industrial sources. ELGs for 40 of the 59 industries, however, were last updated 30 or more years ago, and 17 of those date back to the 1970s.

The ELGs and pretreatment standards are key to achieving the goals of the Clean Water Act. Before 1972, the Federal Water Pollution Control Act used the water quality of specific water bodies as the primary way to control pollution.⁶ This approach did not work, and in 1972, the Senate Committee on Public Works concluded that the program “has been inadequate in every vital respect.”⁷ The 1972 Amendments to the Federal Water Pollution Control Act, popularly known as the Clean Water Act, deliberately ended this approach and made technology-based effluent limitations and guidelines the centerpiece of the law.⁸ These ELGs must be incorporated into CWA permits for point-source discharges of pollution, with the ultimate goal of completely eliminating the discharge of pollutants into navigable waters.⁹

To ensure that EPA continued to update ELGs and pretreatment standards to keep pace with advances in treatment technology, Congress mandated that EPA regularly review the ELGs and pretreatment standards for revision.¹⁰ When EPA reviews ELGs for revision, its discretionary decisions 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.”¹¹ The Ninth Circuit has stated that “the overall structure of the Act strongly suggests that any review to determine whether revision is appropriate should contemplate the mandatory technology-based factors.”¹² In a unanimous decision in 2019, the Fifth Circuit emphasized that “[t]he Act therefore mandates a system in

³ Petition for Review, *Waterkeeper All., et al. v. U.S. Env’tl. Protection Agency* (9th Cir. filed Apr. 11, 2023) (Exhibit A).

⁴ See 33 U.S.C. § 1251(a).

⁵ *Id.* §§ 1314(b), 1311(d).

⁶ *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202 (1976).

⁷ *Id.*

⁸ *Id.*

⁹ 33 USC §§ 1342, 1251(a)(1).

¹⁰ 33 U.S.C. §§ 1311(d), 1314(b), 1314(g), 1314(m), 1317(b)(2).

¹¹ *Our Children’s Earth Foundation v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008).

¹² *Id.*

which, as available pollution-control technology advances, pollution-discharges will tighten.”¹³ EPA cannot satisfy this mandate without systematically investigating and evaluating improvements in pollution control technology when it conducts the ELG and effluent limit reviews that are required by statute for each industrial point source category.¹⁴

Nor can EPA brush off this obligation by juggling the costs and benefits of regulating one waste stream versus another. In the same decision, the Fifth Circuit also held that “no [statutory] factor allows the agency to consider the amount of pollutants generated by [sic] one wastestream relative to other streams. Nor does any factor allow the agency to consider whether less stringent regulation of one wastestream may be set off against the benefits of regulating other streams more strictly.”¹⁵

The Plan 15 decisions not to revise the ELGs and pretreatment standards for petroleum refineries, chemical and plastics plants, fertilizer and pesticides manufacturing facilities, and nonferrous metals manufacturing facilities are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. These point source categories are large sources of water pollution, dumping billions of gallons of wastewater into our rivers, streams, and lakes each year. Yet the ELGs for these point source categories are decades old and, in many cases, do not limit discharges of nutrient pollution or toxics like benzene, mercury, polycyclic aromatic hydrocarbons (PAHs), selenium, per- and polyfluoroalkyl substances (PFAS), and heavy metals in accordance with the Clean Water Act.¹⁶

¹³ *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1005 (5th Cir. 2019).

¹⁴ *Id.*; *Our Children’s Earth*, 527 F.3d at 851.

¹⁵ *Sw. Elec. Power Co.*, 920 F.3d at 1026 (internal citations omitted).

¹⁶ *See, e.g.*, Environmental Integrity Project, *Oil’s Unchecked Outfalls* (Jan. 2023) (documenting unregulated pollutants in petroleum refinery discharges), <https://environmentalintegrity.org/reports/oils-unchecked-outfalls/>; EPA, *Review of Nutrients in Industrial Wastewater Discharge* (Dec. 2020) (concluding that at least 35 industrial categories are significant sources of nitrogen and/or phosphorus but lack ELGs), <https://www.regulations.gov/document/EPA-HQ-OW-2018-0618-0659>; EPA, *Detailed Study of the Petroleum Refining Category—2019 Report*, at 5-1, 5-2 (Sept. 2019) (identifying additional pollutants of concern associated with Petroleum Refining), <https://www.epa.gov/sites/default/files/2019-10/documents/petro-refining-elg-study-2019.pdf>; EPA, *Technical Support Document for the 2004 Effluent Guidelines Program Plan*, EPA-821-R-04-014, at 6-60 (Aug. 2004) (identifying pollutants associated with the manufacture of chlorine and ethylene dichloride and the chlor-alkali process, including dioxins, mercury and sulfide), https://www.epa.gov/sites/default/files/2015-11/documents/2004_effluent-guidelines-plan_tsd.pdf; Center for Biological Diversity, *Petition To Revise The Clean Water Act Effluent Limitations Guidelines and Standards For The Petro-Plastics Industry Under The 40 C.F.R. Part 419 Petroleum Refining Industrial Category (Cracking and Petrochemicals Subparts) and Part 414 Organic Chemicals, Plastics, and Synthetic Fibers Industrial Category*, at 13 (June 23, 2019) (documenting additional pollutants from OCPSF sector, including in stormwater), https://www.biologicaldiversity.org/campaigns/ocean_plastics/pdfs/CWA-Petro-Plastics-Petition-to-EPA-6-23-19.pdf.

Despite extensive data documenting advances in wastewater treatment controls for nutrient and toxic pollution over the past several decades, EPA has not updated the ELGs and pretreatment standards for these seven industrial categories:

Industrial Category	Promulgation	Revision	Age (Years)
Inorganic Chemicals	1974	1984	39
Plastics Molding & Forming	1984	Never	39
Petroleum Refining	1974	1985	38
Fertilizer Manufacturing	1974	1986	37
Nonferrous Metals Manufacturing	1976	1990	33
Organic Chemicals & Plastics	1987	1993	30
Pesticide Chemicals	1978	1998	25

EPA’s Plan 15 review of the ELGs and pretreatment standards for these point source categories, as well as prior reviews, is completely untethered from the Clean Water Act and failed to consider the statutory mandate for ELGs and pretreatment standards—that they represent, at a minimum, the best available technology to reduce and, ultimately, eliminate all pollutants in all wastestreams.¹⁷ Further, the screening level analyses that EPA relied upon to reject revisions to the ELGs and pretreatment standards are not connected to the statutory factors EPA must consider when making revision decisions, significantly underestimate pollution from the point source categories, and contain numerous and significant errors.¹⁸ EPA also ignored information that the current ELGs no longer reflect the best available technology in some instances.¹⁹

EPA’s failure to keep ELGs and pretreatment standards up to date with modern technology has harmful consequences for downstream communities and the environment.

These badly outdated standards mean more pollution from industrial sources is pouring into waterways than if EPA complied with its obligations under the Clean Water Act to update standards on a regular basis. Not surprisingly, approximately 50% of U.S. river and stream miles and lake acres that have been assessed fail to meet water quality standards because they are impaired by pollution, which means half of the country’s assessed waterways do not support intended uses like aquatic life and drinking water.²⁰

EPA’s abdication of its statutory obligations to reduce water pollution from these industrial sources disproportionately harms low-income communities, communities of color, and indigenous communities. According to EPA, 65% of facilities classified by EPA as Petroleum

¹⁷ 33 U.S.C. §§ 1311(b)(2), -(d).

¹⁸ See Final Plan 15.

¹⁹ *Id.*

²⁰ Environmental Integrity Project, *The Clean Water Act at 50: Promises Half Kept at the Half-Century Mark*, at 3 (Mar. 17, 2022), available at <https://environmentalintegrity.org/wp-content/uploads/2022/03/Revised-CWA-report-3.29.22.pdf>.

Refineries, 64% of Plastics Moldings and Forming facilities, 63% of Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) facilities, 67% of Inorganic Chemical manufacturers, 66% of Pesticides manufacturers, and 55% of Fertilizer manufacturers are located within one mile of areas at the 80th or higher national percentile for one or more of the environmental justice indexes of EJScreen, EPA's environmental justice mapping and screening tool.²¹

Communities living near these facilities bear the brunt of unchecked water pollution, and communities with environmental justice concerns may depend upon safe and healthy waterways to a greater extent than the general population.²² For example, low-income communities, communities of color, and indigenous communities are more likely to rely on fishing to meet their needs for food,²³ are less likely to be able to afford expensive drinking water bills to treat contaminated water supplies,²⁴ and may rely more on urban waters for swimming and wading.²⁵ When EPA fails to update ELGs for these industrial categories, the result is more pollution discharged into already overburdened communities.

In addition, communities are left without key tools to protect their health and waterways when EPA does not establish and update technology-based limits for these large sources of pollution because states are unlikely to set these limits in individual permits for facilities. In other words, polluters are, effectively, given a free pass to pollute our waterways.

In conclusion, EPA's Plan 15 decisions not to revise the ELGs and pretreatment standards for petroleum refineries, chemical and plastics plants, fertilizer manufacturing, pesticides manufacturing, and nonferrous metals manufacturing are "arbitrary, capricious, an abuse of discretion or otherwise inconsistent with the law" under the Administrative Procedure Act and the Clean Water Act. EPA simply cannot fulfill its mandate of setting increasingly protective, technology-based pollution limits for these and other industrial categories if EPA does not regularly review whether existing limits reflect best available technology and other recent technology. EPA can adopt and implement more efficient review processes that meet its obligations under the Clean Water Act and leverage resources and data to ensure the ELGs and pretreatment standards keep pace with advances in treatment technology.

²¹ U.S. Environmental Protection Agency, <https://echo.epa.gov/facilities/facility-search>.

²² See, e.g., National Environmental Justice Advisory Council, *Fish Consumption and Environmental Justice*, at 2 (Nov. 2002), https://www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.

²³ *Id.*; see also Elizabeth Shapiro-Garza et al., *Subsistence Fish Consumption on the Lower Cape Fear River, Summary of Research, 2016 – 2022* 16 (June 2022), https://sites.nicholas.duke.edu/superfundcec/files/2022/10/Subsistence-Fish-Consumption-on-the-lower-Cape-Fear-River_report.pdf.

²⁴ Patricia A. Jones & Amber Moulton, *The Invisible Crisis: Water Unaffordability In The United States*, 6, 21 (May 2016), <https://uswateralliance.org/sites/uswateralliance.org/files/Invisible%20Crisis%20-%20Water%20Affordability%20in%20the%20US.pdf>.

²⁵ Shelby Dax Fisher- Garibay, *Urban Waterways, E. coli Levels, and the Surrounding Communities: An Examination of Potential Exposure to E. coli in Communities* 9 (2020), https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1606836406924766&disposition=inline.

We would welcome any opportunity to discuss the claims we have raised in the Petition, along with the evidence we have gathered to support them.

Sincerely,

/s/ Jennifer Duggan

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATERKEEPER ALLIANCE, CENTER)
FOR BIOLOGICAL DIVERSITY,)
CLEAN WATER ACTION, FOOD)
& WATER WATCH, SURFRIDER)
FOUNDATION, ENVIRONMENT)
AMERICA, BAYOU CITY)
WATERKEEPER, BLACK WARRIOR)
RIVERKEEPER, HEALTHY GULF,)
SAN ANTONIO BAY ESTUARINE)
WATERKEEPER, TENNESSEE)
RIVERKEEPER and SAN FRANCISCO)
BAYKEEPER,)

Plaintiffs,)

v.)

U.S. ENVIRONMENTAL PROTECTION)
AGENCY and MICHAEL S. REGAN,)
Administrator, in his official capacity as)
Administrator of the United States)
Environmental Protection)
Agency)

Defendants.)

No. _____

PETITION FOR REVIEW

PETITION FOR REVIEW OF AN ACTION
BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Pursuant to Clean Water Act Section 509(b)(1), 33 U.S.C. § 1369(b)(1),
Federal Rule of Appellate Procedure 15, and Ninth Circuit Local Rule 15-1,
Waterkeeper Alliance, Center For Biological Diversity, Clean Water Action, Food

& Water Watch, Healthy Gulf, Environment America, Surfrider Foundation, Bayou City Waterkeeper, Black Warrior Riverkeeper, San Antonio Bay Estuarine Waterkeeper, Tennessee Riverkeeper, and San Francisco Baykeeper (“Petitioners”) petition the United States Court of Appeals for the Ninth Circuit for review of the final actions of Respondents U.S. Environmental Protection Agency (“EPA”) and EPA Administrator Michael S. Regan in Effluent Guidelines Program Plan 15 determining that revision of the effluent limitations, effluent limitation guidelines, standards of performance for new sources, and promulgation of pretreatment standards is not appropriate at this time for the Petroleum Refining, 40 C.F.R. Part 419; the Inorganic Chemicals Manufacturing, 40 C.F.R. Part 415; the Organic Chemicals, Plastics, and Synthetic Fibers (“OCPSF”), 40 C.F.R. Part 414 (with the exception of per-and polyfluoroalkyl substances (“PFAS”) discharged from PFAS manufacturing facilities);¹ the Fertilizer Manufacturing, 40 C.F.R. Part 418; the Pesticide Chemicals, 40 C.F.R. Part 455; the Plastics Molding and Forming, 40

¹ To the extent that Final Plan 15 constitutes a final agency decision that revision of the OCPSF effluent limits, effluent limit guidelines, and pretreatment standards to limit the wastewater discharge of PFAS from PFAS manufacturing facilities is appropriate, Petitioners do not seek judicial review of this decision. *See* EPA, Effluent Guidelines Program Plan 15 at 7-3.

C.F.R. Part 463; and the Nonferrous Metals Manufacturing, 40 C.F.R. Part 421 industrial point source categories.

EPA announced this action in a Federal Register notice published at 88 Fed. Reg. 6258 (Jan. 31, 2023), titled “Effluent Guidelines Program Plan 15” (Exhibit A). EPA published Plan 15 on its website on January 19, 2023 (Exhibit B). EPA’s docket number for Plan 15 is EPA-HQ-OW-2021-0547.

Specifically, Petitioners bring this challenge under 33 U.S.C. § 1369(b)(1)(A) (promulgation of standards of performance under 33 U.S.C. § 1316); 33 U.S.C. § 1369(b)(1)(C) (promulgation of pretreatment standards under 33 U.S.C. § 1317); 33 U.S.C. § 1369(b)(1)(E) (promulgation of effluent limitations or other limitations under 33 U.S.C. §§ 1311, 1312, and 1316). Petitioners allege that EPA’s decisions in Plan 15 not to revise the effluent limitations, effluent limitation guidelines, standards of performance for new sources, and pretreatment standards for the seven industrial point source categories identified above, made pursuant to 33 U.S.C. §§ 1311, 1312, 1316, and 1317 are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” under the federal Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Petitioners have standing to seek judicial review of this decision because they and their members have been injured by EPA’s Plan 15 decisions not to revise

the effluent limitations, effluent limitation guidelines, standards of performance for new sources, and promulgation of pretreatment standards for the seven industrial point source categories identified above, and those injuries can be redressed by a favorable decision by this Court. Examples are described in the attached declarations. *See Exhibit C.*

Respectfully submitted on the eleventh of April, 2023.

s:/ Jennifer Duggan

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