

## Ninth Circuit Affirms District Court Mandate that EPA Issue Regulations Pursuant to Clean Water Act

On September 18, 2008, the U.S. Court of Appeals for the Ninth Circuit upheld a decision by the United States District Court for the Central District of California requiring the United States Environmental Protection Agency (“EPA”) to promulgate effluent limitations guidelines (“ELGs”) and new source performance standards (“NSPSs”) for pollution discharges caused by the construction and development industry. *Natural Resources Defense Counsel v. United States Environmental Protection Agency* (“*NRDC v. EPA*”) (9th Cir. Sept. 18, 2008). The States of Connecticut and New York, along with the New York State Department of Environmental Conservation, intervened on behalf of the plaintiffs, Natural Resources Defense Council (“NRDC”) and Waterkeeper Alliance, while the National Association of Home Builders and Associated General Contractors of America intervened on behalf of EPA. The appellate court’s ruling upholds the district court’s permanent injunction, requiring that EPA promulgate the guidelines by December 1, 2009.

### BACKGROUND ON EFFLUENT LIMITATION GUIDELINES, NEW SOURCE PERFORMANCE STANDARDS AND EPA’S DECISION NOT TO PROMULGATE STANDARDS

The Clean Water Act (“CWA”) was designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In furtherance of this objective, the CWA prohibits the “discharge of any pollutant,” defined as “any addition of any pollutant to navigable waters from any point source.” CWA § 301(a); § 502(12). Despite the general prohibition on the discharge of pollutants, the CWA also established a permitting system that authorizes the discharge of some pollutants, called the National Pollution Discharge Elimination System (“NPDES”). See CWA § 402. Under the NPDES, EPA and approved states may issue permits for the discharge of pollutants that meet the requirements outlined in Section 402. Those permits use “effluent limitations” that restrict the type and quantity of pollutants that may be released.

The specific effluent limitations in an NPDES permit are determined according to general ELGs and NSPSs, separately promulgated by EPA. CWA § 304(b); § 306(b). ELGs and NSPSs are technology-based restrictions on water pollution to reduce pollution based on current technological capabilities. ELGs apply to existing sources of pollution, while NSPSs apply to new sources of pollution. CWA § 304(b); CWA § 306(a)(2). Specifically, Section 304(m) of the CWA requires that every two years EPA publish a plan that identifies categories of sources of pollutants for which ELGs and NSPSs have not yet been published, and then promulgate effluent guidelines for those categories no more than three years after the publication of the plan.

In March of 1999, EPA announced that it was undertaking rulemaking to address pollution from storm water discharge associated with construction activities. The proposed regulation would regulate storm water runoff during all stages of construction and would affect home builders and developers of commercial and industrial land. In 2000, EPA published its final notice of an effluent guideline plan which listed construction activities

as a point-source category requiring guidelines under Section 304(m). Those guidelines would then eventually have been implemented in NPDES permits, replacing the interim limitations imposed by the various NPDES administrators using their best professional judgment. In 2002, EPA issued a proposed rule to address storm water discharge from construction sites. However, in April 2004, EPA withdrew its proposal to promulgate ELGs, reasoning that existing standards were sufficient and that additional standards would be too costly. Subsequently, EPA removed the construction industry point-source category from its plans and claimed that it had mistakenly identified the category under in its 2002 plan.

### DISTRICT AND APPELLATE COURT DECISIONS

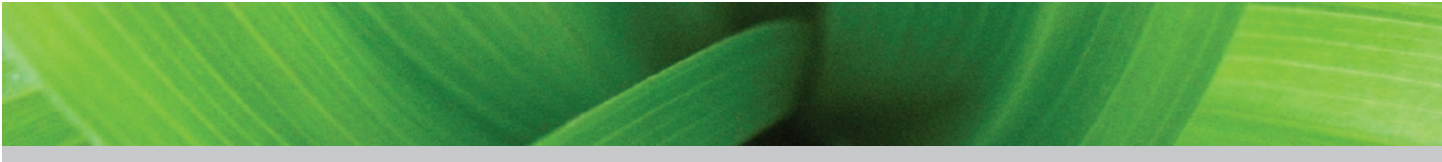
NRDC and the state intervenors challenged EPA's decision to withdraw issuing ELGs and NSPSs for the construction industry. EPA and the industry intervenors unsuccessfully attempted to have the suit dismissed on jurisdictional and standing grounds. The district court granted the plaintiffs' motion for partial summary judgment on the basis that EPA failed to comply with the CWS by not performing a non-discretionary duty to promulgate ELGs and NSPSs for the construction industry.

The Ninth Circuit affirmed. The court agreed that the district court had jurisdiction over the lawsuit, and that the plaintiffs and the state intervenors each had Article III standing. Next, the Ninth Circuit also affirmed the district court's granting of summary judgment in favor of the plaintiffs and upheld the permanent injunction. The court examined the language of the CWA and concluded that the language is clear: the EPA must promulgate ELGs and NSPSs for point-source categories it lists in any plan published under Section 304(m). The statute states plainly that EPA "shall establish a schedule" under which the ELGs and NSPSs are promulgated "no later than . . . 3 years after the publication of the plan." CWA 304(m)(1). The Ninth Circuit found this language "unequivocal" in articulating Congress' intent to require that EPA promulgate guidelines. *NRDC v. EPA* (9th Cir. Sept. 18, 2008).

Furthermore, the Ninth Circuit concluded that EPA's nondiscretionary duty to promulgate the ELGs and NSPSs exists notwithstanding the EPA's subsequent unilateral decision to remove the construction point-source category from its plans. Unlike the Clean Air Act, which expressly grants EPA the authority to delist source categories, the CWA does not explicitly grant the EPA the authority to do so. Moreover, CWA Section 304(m) provides that EPA must provide for public review and comment on a plan prior to final publication. Thus, Congress determined that by the time a point-source category is published, the category has already been reviewed by EPA which has made the determination whether to list the category. Accordingly, the Ninth Circuit held that EPA's reading of the statute to allow for its unilateral delisting of a point source category previously listed to be an impermissible interpretation of the CWA.

### IMPLICATIONS

The Ninth Circuit's decision indicates that the construction industry point-source should still be considered a listed category under the CWA. The district court emphasized that once limitations have been established



by EPA, the state permit programs will apply them in NPDES permits to achieve the statutory goal of uniform effluent limitations. *NRDC v. EPA* (C.D. Cal. June 27, 2006). The district court also criticized the ongoing practice of issuing permits based on “best professional judgment” and noted that unpromulgated ELGs do not reduce pollution discharges, which is the fundamental purpose of the CWA. *Id.* Assuming EPA chooses not to pursue review of this decision, it will be required to publish ELGs and NSPSs for construction and development point sources, and those guidelines will be uniform in NPDES permits issued across the country.

Once implemented, the increased permitting and regulation may increase construction costs at sites and projects that involve clearing, grading, excavating or stockpiling of fill material on one or more acres of land. However, states have already been issuing construction NPDES permits for some time containing standards based on the “best professional judgment” of the administrators. The industry intervenors voiced concerns in their reply brief to the Ninth Circuit that EPA-mandated ELGs will eliminate flexibility in the guidelines made necessary by precipitation-related discharges and soil types that vary widely across the country and for which no single technology can apply. However, it is possible that EPA’s ELGs and NSPSs will be very similar to the guidelines already contained in the permits.

Finally, this decision highlights the continued trend of courts in holding EPA accountable for performing non-discretionary duties. The court’s recognition of EPA’s mandatory duty to promulgate ELGs for every identified point-source category may have a cooling effect on its identification of point-source categories in future bi-annual plans, and may also prompt EPA to issue ELGs for other identified point-source categories for which it has not done so.

#### FOR ADDITIONAL INFORMATION

For additional information on this case, or to discuss potential implications of the decision, please contact Sam Kalen in our Washington, D.C. office at (202) 298-1826 or John Iani in our Seattle, Washington office at (206) 829-1812.

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