

Ruling May Force Strict Technology Approach in EPA Effluent Reviews
Inside EPA
November 12, 2007

An appeals court ruling backing environmentalists' claims over the inadequacy of EPA reviews of technology-based limits on industrial discharges could force the agency to make major changes to the way it determines which industry sectors merit new or revised effluent limitation guidelines (ELGs).

In an Oct. 29 ruling in *Our Children's Earth Foundation, et al. v. EPA, et al.*, which partially overturns a lower court decision, the U.S. Court of Appeals for the 9th Circuit says the Clean Water Act (CWA) requires EPA to use technology-based criteria when conducting annual reviews of ELGs, rather than the hazard-based approach EPA prefers.

EPA and industry intervenors had argued -- and a lower court agreed -- that the agency has discretion to determine how to review the adequacy of ELGs, which are technology-based regulations to control industrial wastewater discharges.

A technology-based approach focuses on the achievable level of pollution reduction based on the latest controls available, whereas a hazard-based approach does not study relevant technology, instead identifying known hazards or contaminants in the water and seeking to reduce their prevalence.

In a 2-1 decision, the 9th Circuit agreed with environmentalists that the CWA requires ELG reviews to be technology-based. "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," Circuit Judge M. Margaret McKeown writes in an opinion joined by Circuit Judge Dorothy W. Nelson. /Relevant documents are available on InsideEPA.com.

"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," McKeown writes.

However, Circuit Judge J. Clifford Wallace offered a dissenting opinion agreeing with the district court that nothing in the CWA specifically obligates EPA to review ELGs using a technology-based approach.

"We're elated," an environmentalist source says. "We think [the decision] is huge. EPA is required to do a technology-based review."

An EPA official was unable to comment on the ruling at press time because he had not been briefed on the decision. Industry sources were also unavailable for comment.

The 9th Circuit ruling comes as EPA recently released its preliminary 2008 ELG plan, in which the agency defends its use of a hazard-based approach to reviewing ELGs.

“As was the case in previous annual reviews, EPA was unable to gather the data needed to perform a comprehensive screening-level analysis of the availability of treatment or process technologies to reduce toxic pollutant wastewater discharges beyond the performance of technologies already in place for all of the 56 existing industrial categories,” the plan says.

In the plan, EPA says it believes its hazard-based approach is useful for assessing the effectiveness of existing technologies because it focuses on the amount and significance of pollutants that are still discharged following existing treatment, and thereby allows the agency to assess indirectly the possibility that further significant reductions could be achieved through new technology.

But the environmentalist source says EPA could easily switch to a technology-based approach by reviewing discharge permits to see where advanced technologies are being used successfully to reduce pollution further. EPA’s hazard-based system, which relies on data from the Toxic Release Inventory and the CWA Permit Compliance System, “is just shy of utterly useless” because EPA lacks good data, the source says.

In finding that EPA must use the technology-based approach in its ELG reviews, the 9th Circuit says it makes no sense that Congress would require ELGs to incorporate technology-based factors but allow EPA to conduct a review that ignores technology considerations altogether.

EPA and the industry intervenors argued the technology-based approach applied only to the initial promulgation of ELG regulations in 1972 and not to any subsequent review. But the 9th Circuit says the plain language of the CWA does not support EPA’s position. “This argument is not only strained, it makes no sense. In short, this position is unreasonable.

“It strains credulity to the breaking point” that Congress would provide great detail in the CWA about how technology changes over time, “and then would then permit EPA to adopt regulations and limitations that would freeze in time the technology available in 1972 or even the 1980s,” the decision continues.

The appellate court also says it gave EPA’s position less deference than it usually would because EPA has publicly changed its position on the standard of ELG review. In the agency’s 2003 ELG plan, EPA said it employs the same factors for its annual review that it would consider in selecting a best achievable technology in the rulemaking context. But now EPA disavows that the CWA provisions in section 304(m) requiring annual review of ELGs also requires a technology-based approach. “This inconsistency in EPA’s position entitles its current interpretation to less deference,” the court says.

However, the court did remand a key issue back to the lower court.

Because the lower court determined that EPA had no mandatory duty with respect to review requirements, the appeals court did not consider whether the agency had 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,” the 9th Circuit says. While environmentalists claim that EPA has abandoned this duty, EPA counters that in fact it has adopted a technology-based approach in addition to a harm-based approach. “Because this central dispute is unresolved, we remand to the district court for further proceedings,” the decision says.

Source: Water Policy Report via InsideEPA.com

*Date: November 12, 2007 *

*Issue: Vol. 16, No. 23 *

© Inside Washington Publishers