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ACTIVISTS SEEK HIGH COURT REVIEW OF LANDMARK EFFLUENT STANDARDS CASE

Environmentalists are asking the Supreme Court to review whether EPA has a mandatory duty to review effluent discharge standards based on technology limits, rather than considering the risk of discharges, after a three-judge appellate panel reversed its holdings on the issue.

The reversal “now leaves judicial power so truncated as to allow EPA the latitude to administer the [Clean Water Act (CWA)] in a fashion grossly at odds with clear congressional intent . . .,” Our Children’s Earth Foundation (OCE) argues in its Aug. 21 /cert /petition. “This radical truncation of judicial review must be rejected.” /The petition is available on [InsideEPA.com./](http://InsideEPA.com/)

In 2007, the U.S. Court of Appeals for the 9th Circuit ruled 2-1 in /Our Children’s Earth Foundation, et al. v. EPA, et al./ that EPA has a non-discretionary duty under the CWA to consider technology-based factors when determining whether to revise effluent limitations guidelines (ELGs). The court said “the overall structure of the Act strongly counsels that any review to determine whether revision is appropriate must contemplate the mandatory technology-based factors” outlined in section 304(b) and 301(b). The court, however, found that “the statute does not expressly and unequivocally state as much” (/Water Policy Report/, Nov. 12).

Earlier this year, EPA petitioned the appellate court for a rehearing, saying the decision “conflicts with the precedent of the Supreme Court and at least five courts of appeals, and blurs the mandatory duties from those seeking substantive review of an agency’s discretionary decision-making” (/Water Policy Report/, March 17).

In late May, the 9th Circuit granted the rehearing but also issued a new opinion that reversed several aspects of the 2007 ruling, now known as /OCE I./

This second ruling, known as /OCE II/, “created an intra- and inter-circuit split in authority in erroneously holding, contrary to its ruling in /OCE I/, that traditional principles of statutory construction and/or the framework for judicial review set forth in /Chevron U.S. A., Inc. v. NRDC/ . . . cannot be used to determine whether a statute imposes a mandatory duty on an administrative agency,” activists say in the Supreme Court petition.

The 9th Circuit in */OCE I/* reached its conclusion that EPA has a mandatory duty to consider technology-based factors using both traditional principles of statutory construction and the second step of the */Chevron/* framework, which determines whether the agency's interpretation of an ambiguous statute is reasonable or permissible. For example, the 9th Circuit in */OCE I/* said “[i]t 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.”

In */OCE II/*, the court reaffirmed that the CWA plainly intended EPA to review and consider the capabilities of pollution reducing technologies in promulgating ELGs, and that the CWA plainly mandates that EPA revise ELGs to keep pace with technological innovation allowing for greater pollution reduction.

But the court reversed */OCE I/* based on a conclusion that the CWA “does not expressly and unequivocally state” that EPA must consider CWA section 304(b)'s technology-based factors or otherwise consider the capabilities of currently available technologies in deciding whether to update ELGs. The court further held that it could only find that EPA had a mandatory duty to consider CWA section 304(b)'s technology-based factors if the act's language contained such a facially unequivocal command.

Activists argue that prior to */OCE II/* no appellate court had held that courts may not employ traditional statutory construction tools and/or a */Chevron/* second step analysis to determine whether an agency's statutory obligations are mandatory.

Environmentalists also say the 9th Circuit erroneously relied on a 1987 D.C. Circuit ruling, */Sierra Club v. Thomas/*, to reverse */OCE I/*. While the D.C. Circuit did hold that it could not infer a mandatory duty from the overall scheme of specific Clear Air Act provisions, the court did not find that it is always improper to construct a mandatory duty using traditional statutory construction tools, activists say.

“In contrast to */Thomas/*, upholding Petitioners' claim in this case does not require transforming all administrative actions into mandatory duties,” activists say. “Petitioners here argue only that EPA must consider certain criteria, set out by Congress in CWA section 304(b), in performing ELG reviews that the CWA mandates be performed by a date certain: once every year.”

EPA is scheduled to reply to the petition Oct. 22.

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