

## *Environment—Water*

### **EPA's Review of Effluent Guidelines Must Adhere to Technology-Based Approach**

**T**he Environmental Protection Agency must consider new technology in deciding whether to revise Clean Water Act effluent guidelines, the U.S. Court of Appeals for the Ninth Circuit held Oct. 29 (*Our Children's Earth Foundation v. Environmental Protection Agency*, 9th Cir., No. 05-16214, 10/29/07).

The statute "repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the regulations," and EPA's position that it can ignore technology in its annual review process unreasonably divorces issuance of the guidelines from their review, Judge M. Margaret McKeown said.

Environmental groups sued EPA, alleging that the agency abandoned technology-based review and instead adopted hazard-based review, thus violating its statutory duties. The court explained that technology-based review aims at a level of pollutant reduction that can be achieved with current technology; the hazard-based alternative focuses on identifying known contaminants in the water and trying to reduce their prevalence.

The district court ruled in EPA's favor after finding that the disputed agency actions were discretionary, not mandatory. On appeal, the Ninth Circuit agreed that "the decision whether to revise the effluent guidelines falls within EPA's discretion." However, the agency is not free to "ignore the technology-based criteria" in its periodic review of the guidelines, the court said.

Applying the deference framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the Ninth Circuit looked at a sequence of CWA provisions relating to the effluent limitations on quantities, rates, and concentrations of various pollutants that are the basis for permits issued under the statute's National Pollutant Discharge Elimination System. The court pointed out that these limitations "are determined by the terms of more general 'effluent limitation guidelines,' " issued separately by EPA.

**Interlinked Statutory Process.** Three CWA sections came into play in the court's analysis: Section 301(d) directs EPA to review every five years the effluent limitations set under Section 301(b)(2) and to revise them "if appropriate." This review "shall" contain criteria that include technology-based requirements.

Section 304(b) requires EPA to engage in annual review of guidelines for effluent limitations that apply to direct dischargers and to revise these guidelines "if appropriate." The court pointed out that, again, technology-based requirements are part of the process. For example, Section 304(b) states that "regulations shall . . . identify . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations" and refers to "application of the best conventional pollutant control technology." The court also noted that the statute does not distinguish between "application of these criteria to promulgation, review or revision."

Section 304(m) orders EPA to publish a biennial plan setting out a schedule for performing the annual review

and for establishing rules as to existing effluent guidelines selected for possible revision as a result of the annual review.

EPA interpreted these combined directives to allow consolidation of effluent limitations and effluent limitation guidelines. Thus, in the agency's view, it can kill two birds with one stone, so to speak, by reviewing the effluent limitations in its annual review of the guidelines, thereby complying with both Section 301(d) and Section 304(b) in one process.

The court determined that the statutory test "is unambiguous that revision decisions, although discretionary as indicated by the 'if appropriate' language, are constrained by the statute's mandate as to what 'such regulations' 'shall' accomplish." However, it said, although "the overall structure of the Act strongly counsels that any review to determine whether revision is appropriate must contemplate the mandatory technology-based factors, the statute does not expressly and unequivocally state as much." This "ambiguity" led the court to *Chevron's* second step—evaluating the reasonableness of EPA's interpretation.

The CWA sections at issue cross-reference one another, and the "only reasonable interpretation" is that "they tie the review and revision to § 304(b) and § 301(b), respectively, both of which mandate a technology-based approach," the court said.

**Common-Sense Interpretation.** A common-sense reading supports this view, the court said. "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," it said. "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," it said.

On this point, the court likened the case to *Bennett v. Spear*, 520 U.S. 154 (1997), in which citizen groups contended that the affected federal agency failed to consider particular statutorily prescribed criteria in making certain habitat determinations. The Supreme Court stated in its opinion that "discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking."

Legislative history also favors reading the CWA to require EPA to consider technology both in first announcing effluent limitations and guidelines and in deciding whether to revise them, the court said. Congress clearly sought to link effluent regulation to technological improvements, the court said. "It strains credulity to the breaking point that Congress 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 [date of the statute's enactment] or even in the 1980s," the court said.

Observing that it is not clear at this point whether EPA has completely abandoned the technology-based approach in favor of a hazard-based formula, the court remanded to the district court to address the issue.

Judge Dorothy W. Nelson joined the opinion, but Judge J. Clifford Wallace, dissenting in part, said the statute does not obligate EPA "to review the effluent guidelines and limitations using a technology-based ap-

proach." He also questioned the use of *Chevron* analysis in the case.

Christopher Sproul, Environmental Advocates, San Francisco, argued for the plaintiff. Assistant Attorney General Sue Ellen Wooldridge, Washington, D.C., argued for the agency.

Full text at <http://pub.bna.com/lw/0516214.pdf>.

## Foreign Affairs—Sovereign Immunity

### FSIA Commercial Activity Exception Applied To Foreign-Based Suit Against Bank of China

A federal district court in Utah properly ruled that it lacked jurisdiction under the commercial activity exception to the Foreign Sovereign Immunities Act to hear most of the claims brought against the Bank of China that grew out of an embezzlement scheme primarily conducted abroad, the U.S. Court of Appeals for the Tenth Circuit held Oct. 24 (*Orient Mineral Co. v. Bank of China*, 10th Cir., No. 05-4037, 10/24/07).

While Judge David M. Ebel said jurisdiction was proper over claims arising from a \$400,000 transfer to a Utah Bank, he also said that most of the other activities did not have a sufficient nexus to this country. The court rejected the position of two other circuits that the third clause of the commercial activity exception applies only where the foreign sovereign's commercial activity has a "legally significant" direct effect in the United States.

Orient Mineral Co. is a Nevada company that sought to acquire gold mining properties in China. In furtherance of this venture, it became involved with Yue Xiaquan, a Chinese citizen. Wilson, the president of Orient Mineral, Yue, and a Chinese entity formed a joint venture, Wil-Bao Mineral Co., under Chinese law to acquire the properties.

Orient Mineral convinced McKee, a U.S. citizen, to fund the venture with \$3 million. The venture was risky, however, and McKee asked for conditions, including having one of his people, Jones, on the Oriental Mining board to protect his investment. Jones was given exclusive authority over the Wil-Bao funds, and his approval was needed for any expenditure over \$5,000.

Several bank accounts were established in China. Yue, acting as Wil-Bao's general manager, helped set up the accounts at the Bank of China's "sub-branch" in Lingbao. The Bank of China was wholly owned and operated by the People's Republic of China at the time.

When Jones and other officials from Orient Mineral went to China to establish the bank accounts, Yue was the interpreter for both sides. He did not inform the bank of Jones' exclusive control over the funds and Yue opened accounts over which he would have access.

After the American contingent left China, Yue conducted a number of transactions to convert the funds to his own use, including sending \$400,000 to a Utah bank for his wife's benefit. He was convicted of embezzlement and sentenced to 12 years in Chinese prison.

Orient Mineral and Wil-Bao sued the bank, Yue, and his wife in federal court in Utah, asserting breach of contract and tort claims. The bank asserted sovereign immunity, and the district court ruled that it had subject matter jurisdiction only over the claims that were based