Effluent Guidelines/Clean Water Act: Federal Appellate Court Addresses Argument that United States Environmental Protection Agency Should Have Updated Standards for Seven Industries



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") addressed in a June 18th Opinion an issue involving the Clean Water Act Effluent Limit Guidelines ("ELGs"). *See Waterkeeper Alliance, et al., v. United States Environmental Protection Agency, et al.*, No. 23-636.

The Ninth Circuit addressed a Petition for Review ("Petition") of the United States Environmental Protection Agency's ("EPA") decision refusing to revise ELGs for seven source categories ("Seven Industrial Categories").

By way of background, Section 304(m) of the Clean Water Act requires that EPA biennially publish a plan for new and revised effluent limitation guidelines, after public review and comment. Section 301(b) of the Clean Water Act authorizes EPA to promulgate national categorical standards or limits to restrict discharges of specific pollutants on an industry-by-industry basis. These effluent limits are incorporated into a point source discharger's National Pollutant Discharge Elimination System Permit as a baseline minimum requirement.

Clean Water Act effluent limits are derived from research regarding pollution control technologies used in the industry. The analysis will include the degree of reduction of the pollutant that can be achieved through the use of various levels of technology. The applicable standard is dictated by the kind of pollutant discharge (i.e., toxic, conventional, or non-conventional) and whether a new or existing point source is involved.

Industrial categories are often divided into subcategories. Effluent limits/conditions for the subcategories will be tailored to the performance capabilities of the wastewater treatment or control technologies used by the subcategory.

EPA's development of categorical limits is an ongoing process. The agency continues to promulgate categorical standards for facilities that have not been addressed. More relevant, in this instance, is the fact that the Clean Water Act requires that existing categorical standards be assessed to determine if

revisions are warranted. The rationale for a change to an existing standard will often be the need to incorporate evolving technology developments.

Waterkeeper Alliance and other environmental organizations submitted a Petition challenging EPA's decision not to revise the ELGs for seven specific source categories (i.e., the Seven Industrial Categories). Specifically, the Petitioners argued that EPA's decision in Program Plan 15 refusing to revise the referenced ELGs was arbitrary and capricious because they were alleged to be substantially out of date.

The relevant industries include:

- Petroleum Refining
- Organic Chemicals, Plastics, and Synthetic Fibers Manufacturing
- Inorganic Chemical Manufacturing
- Fertilizer Manufacturing
- Pesticide Chemical Manufacturing
- Plastics Molding and Forming Facilities
- Nonferrous Metals

The Ninth Circuit first held that EPA's decision refusing to revise the ELGs in Program Plan 15 constituted final agency action. As a result, it was therefore deemed reviewable under the Administrative Procedure Act. An intervenor's argument that the Court lacked jurisdiction was rejected, stating that the Ninth Circuit had jurisdiction under Section 509(b)(1) of the Clean Water Act.

EPA's argument that it was not required to revise every outdated ELG was accepted by the Ninth Circuit. In other words, the federal agency has some discretion in undertaking a periodic review of ELGs. Nevertheless, the Ninth Circuit held that EPA acted in a manner arbitrary and capricious by refusing to revise the ELGs for the Seven Industrial Categories.

The rationale put forth for this conclusion included:

- Failure to properly consider advances in pollution control technology.
- Failure to properly consider pretreatment standards and guidelines applicable to indirect dischargers.
- Failure to properly consider information relating to pollutants not currently covered by the applicable ELGs.

A copy of the Opinion can be downloaded here.