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# NGOs Win Recent Challenge on Permits for Industrial Facilities when EPA Overlooks Factors in the CWA Statute

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Administrative deference is a fundamental tenet of environmental law. A recent decision in *Los Angeles Waterkeeper v. Pruitt*, however, provides an important reminder that agency deference is bound by the four corners of the underlying statute. In this case, a district judge in the Central District of California awarded judgment to two environmental NGOs by compelling the EPA to exercise powers granted under the Clean Water Act's residual designation authority (RDA), precluding the EPA from considering other factors not prescribed by the statute.

The decision is interesting because the Clean Water Act (CWA) RDA is something of a regulatory backwater, and it highlights an important practice-pointer going forward, which is that addressing explicit factors set forth in a statute matter more than broader agency policy preferences.

There are two takeaways for the regulated community:

1. In a world of decreasing deference to agency policy determinations, the words Congress chose to use in crafting the relevant statute matters.

2. Where particular regulatory determinations matter for your business, it's important to be cognizant of whether the particular agency decision considers or relies upon the factors Congress determined were important when it crafted statutes. The more tenuous the connection between the administrative prounoucement or decision and the underlying statute, the greater the potential risk becomes for a business to rely upon or make a business decision based upon such prouncement/decision.

Here, the district court granted summary judgment to the plaintiffs for two reasons: first, because the EPA's decisions that the waterways were impaired and that the involved facilities were contributing to the impairment compelled permitting under CWA. Second, because there was no statutory hook under the CWA, the EPA had no basis to consider whether other federal, state, or local programs adequately addressed the involved issues.

## Relevant Law

The *Los Angeles Waterkeeper* decision turns on the plain language of the CWA statute. The EPA's "residual designation authority" dates back to the Water Quality Act of 1986, which was intended to focus the EPA's CWA efforts on regulating discharges that posed the greatest threat to the health of U.S. waters. The relevant part of the Water Quality Act sets forth categories of discharges for which federal CWA permits were required, for example, discharges associated with industrial activity and discharges from big city sanitary sewer systems. It also includes the following catch-all:

A discharge for which the Administrator [the EPA] or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

In the words of a different court, this provision gives "discretion to develop a program that distinguishes between those stormwater discharges that require regulation and those that do not." *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 330 (D. Vt., 2004) *aff'd* 139 Fed. Appx. 338 (2nd Cir. 2005). The regulation defining what constitutes an "industrial activity," 40 C.F.R. § 122.26(b)(14), specifies what sorts of facilities are "industrial;" when this definition was established in 1990, the EPA rejected comments that all "commercial" facilities should be regulated. When that decision was reviewed in 2003, the Ninth Circuit explicitly approved the EPA's rationale that "EPA believes that permitting authorities should have flexibility to regulate only those categories of sources contributing to localized water quality impairments . . . . If sufficient . . . data becomes available in the future, the permitting authority could at that time designate a category of sources or individual sources on a case-by-case basis." *Environmental Defense Center v. EPA*, 344 F.3d 842, 858-860 n.39 (9th Cir. 2003) (quoting 64 Fed. Reg. 68780).

Nevertheless, at that time, the EPA committed to further study on the issue, as was required by Section 402(p)(5). (*See id.*) If the studies demonstrated that such sites should be regulated, the EPA was required to regulate them under Section 402(p)(6).

## The *Los Angeles Waterkeeper* Decision

The EPA's stormwater regulations provide that any person may petition the agency "to require a National Pollutant Discharge Elimination System (NPDES) permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard." 40 C.F.R. § 122.26(f)(2). Pursuant to that regulation, the *Los Angeles Waterkeeper* plaintiffs submitted two petitions to EPA Region 9 related to waterways near Los Angeles, which oversees Clean Water Act compliance in California. There was no dispute in the case that both waterways were expected to be polluted for years to come and that the pollution could present a risk to human health and the environment. Plaintiffs' petitions requested that the EPA determine that currently unpermitted stormwater discharges from privately-owned commercial, industrial, and institutional (CII) sources are contributing to violations of water quality standards in the watersheds, and therefore require NPDES permits under the Water Quality Association (WQA).

The EPA denied the petitions, concluding that requiring additional NPDES permits was unnecessary even though discharges from CII sources were "contributing to water quality impairments." The EPA's decision was premised on three other kinds of permits, *i.e.* those issued to municipal sanitary sewers, a NPDES permit issued to the state department of transportation, and statewide permits available to industrial dischargers.

The involved groups filed a citizen suit challenging this determination on the grounds that the EPA

was obligated to require permits for CII dischargers in the watershed given its determinations that the involved CII discharges were harming the health of waterways the EPA found impaired. This decision serves as another signal that the EPA and other agencies' deference will likely continue to be regularly cross-checked by NGOs seeking to heighten regulation.



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