IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL; WATERKEEPER ALLIANCE,

Plaintiffs-Appellees,

STATE OF CONNECTICUT; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; STATE OF NEW YORK,

Plaintiff-Intervenors-Appellees,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; STEPHEN L. JOHNSON,

Defendants-Appellants

NATIONAL ASSOCIATION OF HOME BUILDERS; ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Defendant-Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(HON. GEORGE H. KING)

BRIEF FOR THE STATE APPELLEES

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PRELIMINARY STATEMENT

This is a citizen suit under the Clean Water Act ("CWA"). Under § 304(m) of the CWA, the United States Environmental Protection Agency ("EPA") must promulgate technology-based effluent reduction standards, known as effluent limitation guidelines ("ELGs") and new source performance standards ("NSPSs"), for any category of sources that it has identified as discharging toxic or nonconventional pollutants. Although EPA has identified stormwater runoff from construction and development activities as discharging significant amounts of toxic and nonconventional pollutants, it has not promulgated ELGs or NSPSs for that category.

Plaintiffs the Natural Resources Defense Council and the Waterkeeper Alliance (the "Citizens"), joined by plaintiffs-intervenors the State of New York, the New York State Department of Environmental Conservation, and the State of Connecticut (the "States"), brought this citizen suit against EPA in the United States District Court for the Central District of California. The National Association of Home Builders and the Associated General Contractors of America ("Industry") intervened as defendants. Plaintiffs alleged that EPA failed to perform its nondiscretionary duty to promulgate ELGs and NSPSs for construction and development activities. The district court (King, J.) granted partial summary judgment to plaintiffs on that claim and entered a permanent injunction requiring EPA to promulgate those standards.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under CWA § 505(a), 33 U.S.C. § 1365(a), over the claim alleging that EPA failed to perform its nondiscretionary duty to promulgate ELGs and NSPSs for construction and development activities. On December 5, 2006, the district court entered a permanent injunction and partial final judgment on that claim. See Fed. R. Civ. P. 54(b).

On January 30, 2007, EPA and Industry timely appealed. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over these appeals under 28 U.S.C. §§ 1291 and 1292(a).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court had jurisdiction under the citizen-suit provision of CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), over the claim alleging that EPA failed to perform a nondiscretionary duty under CWA § 304(m), 33 U.S.C. § 1314(m), to promulgate ELGs and NSPSs to control stormwater pollution from construction and development activity.

2. Whether New York and Connecticut have standing to challenge EPA's failure to promulgate construction and development ELGs and NSPSs given that (1) stormwater discharges resulting from inadequate permitting controls for construction sites in upstream States contribute to impairment of water quality in New York and Connecticut; and (2) EPA's failure to promulgate nationwide effluent guidelines forces New York and Connecticut to devote

administrative resources to achieving compliance with minimum water-quality standards under the CWA and to developing permitting standards for construction and development sites.

3. Whether EPA has a nondiscretionary duty to promulgate construction and development ELGs and NSPSs, where EPA identified construction and development activities as a source category that discharges toxic or nonconventional pollutants in its 2000 effluent guidelines plan, and CWA § 304(m) provides that EPA shall set a date for the promulgation of effluent guidelines for an identified category that is no later than three years after the date that EPA publishes the plan identifying the category.

STATEMENT OF THE CASE

A. The Clean Water Act

1. Background

In the early 1970s, Congress found that America's waters were "severely polluted," S. Rep. No. 92-414, at 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674, and "in serious trouble," H. Rep. No. 92-911, at 66 (1972), reprinted in 1 1972 Leg. Hist. 753, 753.[1] It responded by enacting the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act established a "national

[1] "1972 Leg. Hist." refers to Environmental Policy Division, Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print. 1973).

goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

To achieve these objectives, the CWA created a permitting program known as the national pollutant discharge elimination system ("NPDES"). 33 U.S.C. § 1342. The NPDES program bars any discharge of pollutants from a "point source"[2] to the waters of the United States unless the discharge meets CWA requirements, including the requirement to have a NPDES permit authorizing the discharge. 33 U.S.C. §§ 1311, 1314, 1342. The CWA gives EPA and approved States the power to issue such permits. See 33 U.S.C. § 1342(a),(b).

Congress intended that the issuance of NPDES permits by EPA and other permitting authorities be guided by nationwide minimum standards for categories of point sources. Congress viewed a national minimum baseline for pollution control standards as essential to preventing a "race to the bottom" between States hoping to attract business and industry through weaker pollution control standards. Senate Consideration of the Report of the Conference Committee (Oct. 4, 1972), reprinted in 1 1972 Leg. Hist. 161, 162 (describing uniformity as an "essential element" of the CWA); Senate Debate on S. 2770 (Nov. 2, 1971), reprinted in 2 1972 Leg. Hist. 1253, 1405 (discussing the "race to the bottom" problem); see also 118 Cong. Rec. 33,697 (1972) ("effluent

[2] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

limitations applicable to individual point sources within a given category or class [should] be as uniform as possible"); id. at 33,696 (Conference Committee sought "to maintain uniformity within a class and category of point sources").

To achieve this national minimum level of pollution control, Congress charged EPA to promulgate ELGs and NSPSs, which are technology-based requirements regarding effluent reduction for particular categories of point-source dischargers. ELGs apply to sources of pollution already in existence, while NSPSs apply to "new sources," meaning those sources constructed after EPA has proposed an NSPS applicable to that source category. 33 U.S.C. § 1316(a)(2). Because it is generally easier to implement pollution controls on new sources than on previously constructed sources, NSPSs are usually more stringent than ELGs. See 33 U.S.C. § 1314(b)(2) (setting forth standards for ELGs); 33 U.S.C. § 1316(a)(1) (same, as to NSPSs). After ELGs and NSPSs are promulgated for a category of point sources, EPA and state NPDES permitting authorities translate them into effluent limitations that are incorporated as discharge conditions in NPDES permits issued to particular sources within the category.[3]

[3] Compare 33 U.S.C. § 1314(b) (setting forth the process for promulgating ELGs), with 33 U.S.C. § 1311(b) (describing effluent limitations); see also E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 116-17 (1977) (describing the relationship between ELGs and effluent limitations).

2. Section 304(m) of the CWA

Congress originally intended that EPA promulgate ELGs for twenty-seven enumerated source categories by October 1973 (one year after the CWA's passage), and that it promulgate ELGs for non-enumerated industrial source categories no later than December 1974. NRDC v. Train, 510 F.2d 692, 705, 707 (D.C. Cir. 1974). As to new sources, Congress required EPA to publish an initial list of categories by mid-December 1973 and to promulgate NSPSs for any category on that original list or any later revised list within one year of the category's inclusion on the list. 33 U.S.C. § 1316(b).

The CWA also provided that, in the "interim period" before nationwide ELGs and NSPSs were promulgated, EPA and state permitting authorities would issue NPDES permits that included "such conditions as [the permitting authority] determine[d] [were] necessary to carry out the provisions" of the CWA. H. Rep. No. 92-911, at 126 (1972), reprinted in 1 1972 Leg. Hist. 753, 813. Such permits are known as "best professional judgment" permits. Congress did not intend that best-professional-judgment permits would be a permanent element of the NPDES program, but instead meant for them to serve as a stopgap only until EPA promulgated ELGs and NSPSs. See Train, 510 F.2d at 709.

However, EPA failed to promulgate ELGs and NSPSs in accordance with congressional expectations. By the mid-1980s, Congress expressed "frustrat[ion]" with the EPA's "slow pace" in promulgating such standards. S. Rep. No. 99-50, at 3 (1985),

reprinted in 2 1987 Leg. Hist. 1420, 1424.[4] In 1987, Congress addressed this problem by adding a new provision to the CWA, section 304(m), which was designed to ensure that EPA would promulgate the overdue ELGs and NSPSs — at least for categories of sources that discharge toxic or nonconventional pollutants. Water Quality Act of 1987, Pub. L. No. 100-4, § 308(f), 101 Stat. 40 (1987) (codified at 33 U.S.C. § 1314(m)).

In pertinent part, § 304(m) requires EPA to publish in the Federal Register every two years a plan that (1) "identif[ies] categories of sources discharging toxic or nonconventional pollutants for which guidelines under [CWA §§ 304(b)(2) and 306] have not previously been published"; and (2) "establish[es] a schedule for promulgation of effluent guidelines [for the identified categories], under which promulgation of such guidelines shall be no later than . . . 3 years after the publication of the plan." 33 U.S.C. § 1314(m)(1)(B),(C).

The Senate report addressing § 304(m) emphasized that effluent guidelines are mandatory for every source category that discharges toxic or nonconventional pollutants in more than de minimis amounts: "Guidelines are required for any category of sources discharging significant amounts of toxic pollutants. In this use, 'significant amounts' does not require [EPA] to make any determination of environmental harm; any non-trivial discharges

[4] "1987 Leg. Hist." refers to Environmental Policy Division, Congressional Research Service, A Legislative History of the Water Quality Act of 1987 (Comm. Print 1988).

from sources in a category must lead to effluent guidelines." S. Rep. No. 99-50, at 24-25 (1985), reprinted in 2 1987 Leg. Hist. at 1445-46.

B. The Environmental Impact of Stormwater Pollution from Construction and Development Activities

As this Court has recognized, "[s]tormwater runoff is one of the most significant sources of water pollution in the nation." Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 840 (9th Cir. 2003). Stormwater pollution occurs when rain or snowmelt flows across the land and carries contaminants such as sediment, nutrients (including phosphorus and nitrogen), metals, pathogens, oxygen-demanding materials, and floatable trash into stormdrains or other conveyances that discharge the contaminants into waterbodies. National Pollutant Discharge Elimination System, 64 Fed. Reg. 68,722, 68,724 (Dec. 8, 1999) [hereinafter "1999 Rule"].

EPA has concluded that stormwater discharges from construction and development activities in particular can "severely compromise[ ]" water quality. 1999 Rule, 64 Fed. Reg. at 68,728. According to the agency, if not adequately controlled, "storm water discharges from areas of urban development and construction activity negatively impact receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife, and humans." Id. at 68,724.

Construction activity removes protective ground cover from sites, thereby allowing rainfall and snowmelt to erode material from the bare ground and transport it into waterbodies. EPA has estimated that there are hundreds of thousands of construction sites in the United States in any given year,[5] and has determined that "erosion rates from construction sites are much greater than from almost any other land use." 1999 Rule, 64 Fed. Reg. at 68,729. Part of the eroded material is sediment, which is often measured as "total suspended solids," and is considered a "conventional pollutant." 33 U.S.C. § 1314(a)(4). The presence of sediment in stormwater flow can cause siltation of waterbodies and other environmentally and economically costly harms. 1999 Rule, 64 Fed. Reg. at 68,728-68,729.

EPA has also recognized that eroded material in construction-site stormwater runoff contains other substances classified as "toxic" or "nonconventional" pollutants. These include "nutrients [e.g., phosphorus and nitrogen], metals, and organic compounds." 1999 Rule, 64 Fed. Reg. at 68728. In 1999, EPA acknowledged that construction site runoff "can contribute high loadings of nutrients and metals to receiving streams."[6] EPA explained that "[w]ater

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[5] EPA, Development Document for Final Action for Effluent Guidelines and Standards for the Construction and Development Category 37, EPA-821-B-04-001 (Mar. 2004), available at http://www.epa.gov/waterscience/guide/construction/devdoc/final/complete_construction_tdd.pdf.

[6] Effluent Guidelines Plan Update and Notice of Public Meeting, 64 Fed. Reg. 15,158, 15,158 (Mar. 30, 1999).

quality impairment results" because a number of toxic and non-conventional pollutants "are preferentially absorbed" by material in fine sediment. 1999 Rule, 64 Fed. Reg. at 68,728. Thus, the process of "erosion . . . , sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients . . . , metals, and organic compounds into aquatic systems." Id. Indeed, "[e]stimates indicate that 80 percent of the phosphorous and 73 percent of the Kjeldahl nitrogen in streams is associated with eroded sediment." Id. In 2005, a year after this litigation was filed, EPA reaffirmed these views, observing that "[m]etals, phosphorous, nitrogen, hydrocarbons and pesticides are commonly found in urban sediments."[7]

EPA has further found that stormwater discharges from developed land — that is, from areas where construction has been completed — are a major source of water pollution: "Urbanization alters the natural infiltration capability of the land and generates a host of pollutants . . . thus causing an increase in storm water runoff volumes and pollutant loadings." 1999 Rule, 64 Fed. Reg. at 68,725. Post-construction stormwater discharges from developed areas carry significant levels of total suspended solids, nutrients, metals, microorganisms (such as fecal coliform), and organic chemicals and compounds (such as oil and grease). Id. at

[7] EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas at 5-3 (Nov. 2005), available at http://www.epa.gov/owow/nps/urbanmm/.

68,725, 68,727-68,728.[8] In 2002, EPA determined that urban runoff and stormwater system discharges were a leading source of water quality impairment.[9]

Technologies and practices to control urban stormwater pollution exist and are in use nationwide. EPA has catalogued a wide variety of existing construction-site stormwater pollution control measures.[10] EPA has also recognized that there are numerous methods for controlling post-construction stormwater pollution from developed areas. 1999 Rule, 64 Fed. Reg. at 68,760.

C. EPA's Failure to Promulgate ELGs and NSPSs for Construction and Development Activities.

On March 30, 1999, EPA announced that it was undertaking a rulemaking to address stormwater runoff from construction and development activities. Effluent Guidelines Plan Update and Notice of Public Meeting, 64 Fed. Reg. 15,158 (Mar. 30, 1999). On August 31, 2000, EPA published its final effluent guidelines plan for 2000, which listed construction and development activities as a

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[8] See also EPA, Environmental Assessment for Proposed Effluent Guidelines and Standards for the Construction and Development Category at 2-8 to -11 (June 2002), available at http://www.epa.gov/waterscience/guide/construction/envir/C&D_Envir_Assessmt_proposed.pdf.

[9] EPA, National Water Quality Inventory: 2000 Report at 13, 21-22, 30, EPA-841-R-02-001 (Aug. 2002), available at http://www.epa.gov/305b/2000report.

[10] EPA, Development Document for Proposed Effluent Guidelines and Standards for the Construction and Development Category § 5, EPA-821-R-02-007 (June 2002), available at http://www.epa.gov/waterscience/guide/construction/devdoc/C&D_DevDoc_proposed.pdf.

point-source category requiring ELGs and NSPSs under CWA § 304(m). Effluent Guidelines Plan, 65 Fed. Reg. 53,008, 53,011 (Aug. 31, 2000). EPA set a deadline of March 2002 for proposing regulations for the construction and development category, and a deadline of March 2004 for taking final action on that proposal. Id.[11]

On June 24, 2002, EPA published a proposed rule for construction and development activities. See Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Category; Proposed Rule, 67 Fed. Reg. 42644, 42648 (June 24, 2002) [herinafter "Proposed Rule"]. Rather than set out a single proposal, however, the proposed rule described three "options" that EPA was considering. "Option 1" was to promulgate enforcement-related inspection and certification requirements without promulgating substantive ELGs and NSPSs. Id. at 42,660/2. "Option 2" was to promulgate substantive ELGs and NSPSs in addition to the enforcement-related inspection and certification requirements. Id. at 42,660/2-3. "Option 3" was to "establish no new requirements," including no ELGs or NSPSs, for construction and development activities. Id. at 42,660/2.

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[11] EPA included the construction and development sector in its 2000 guidelines plan pursuant to a federal consent decree (see A.E.R. 90-111). EPA entered into that consent decree after a district court ruled that EPA had violated a nondiscretionary duty under section 304(m)(1)(B) to identify in its guidelines plans categories of sources for which it had not yet promulgated ELGs and NSPSs. See NRDC v. Reilly, No. 89-2980, 1991 U.S. Dist. LEXIS 5334, at *19-*26 (D.D.C. Apr. 23, 1991). In accordance with the consent decree, EPA's schedule for promulgating ELGs and NSPSs for the construction and development category went beyond the three-year period set forth in CWA § 304(m).

On April 26, 2004, EPA published its final action under the caption "Proposed Rule; Withdrawal." See Withdrawal, 69 Fed. Reg. 22,472. EPA chose "Option 3," and accordingly "withdr[ew] the proposed effluent limitations and new source performance standards that [it had] proposed." 69 Fed. Reg. at 22,473. As the reason for this action, EPA asserted that nationwide ELGs and NSPSs would impose excessive compliance costs and that state and local programs already in place were adequate to control stormwater runoff from construction and development activity. See id. at 22,477-22,479. EPA also took the position that construction and development sites are not "new sources" and, therefore, that the CWA did not require NSPSs for such sites. Id. at 22,480. EPA thus opted not to establish nationwide ELGs and NSPSs for construction and development sites, but rather "to allow technology-based permit requirements to continue to be established based upon the best professional judgment of [each NPDES] permit authority." Proposed Rule, 67 Fed. Reg. at 42,650.

D. Proceedings Below

On October 5, 2004, the Citizens filed this action in the United States District Court for the Central District of California pursuant to the CWA's citizen-suit provision, 33 U.S.C. § 1365(a)(2) (Appellants' Excerpts of Record ["A.E.R."] 47-63). The complaint challenged EPA's failure to promulgate construction and development ELGs and NSPSs, despite its obligation to do so

under CWA § 304(m) (A.E.R. 48-49). On March 16, 2005, the district court granted the States leave to intervene as plaintiffs and granted Industry leave to intervene as defendants.

EPA and Industry moved to dismiss the action for lack of subject matter jurisdiction, arguing that the case should have been brought under CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), which provides for original jurisdiction in the court of appeals where a case seeks review of the EPA's actions "in approving or promulgating any effluent limitation or other limitation." On August 29, 2005, the district court denied the motion, finding that "EPA's decision not to issue ELGs or NSPSs does not constitute an approval or promulgation" of limitations within the meaning of § 509(b)(1)(E) (A.E.R. 2). The district court further found that it had jurisdiction under the citizen-suit provision of CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), because plaintiffs alleged that EPA had failed to perform a nondiscretionary duty to promulgate construction and development ELGs and NSPSs (A.E.R. 5 n.2).

The Citizens and the States moved for partial summary judgment on their nondiscretionary duty claim. On June 28, 2006, the district court granted that motion (A.E.R. 6-43). In doing so, the court first concluded that the Citizens and States had standing to bring the claim, finding that all plaintiffs had sufficiently established injury-in-fact, causation, and redressability (A.E.R. 4-19).

On the merits, the court held that CWA § 304(m) creates a nondiscretionary duty for EPA to promulgate ELGs and NSPSs for source categories identified in a guidelines plan (A.E.R. 29-43). The district court reached this decision based on a careful analysis of the text of CWA § 304(m), the congressional purpose underlying the provision, and the CWA's broader statutory scheme. The court also noted the "unambiguous" statements in the legislative history showing that Congress intended that promulgation of ELGs and NSPSs be mandatory for any category of sources that discharge nontrivial amounts of toxic and nonconventional pollutants (A.E.R. 34).

Finally, the district court rejected the argument of EPA and Industry that EPA's nondiscretionary duty to promulgate construction and development ELGs and NSPSs was extinguished when EPA failed to include construction and development activities in its 2004 guidelines plan (A.E.R. 43-46). On that point, the court held that "the duty to promulgate — and the time frame within which it is to take place — is triggered by a category's first inclusion in a section [304(m)] plan" (A.E.R. 45). Accordingly, the court held that "EPA may not evade its duty to promulgate ELGs and NSPSs for categories listed in a section [304(m)] plan by the simple expedient of removing them from subsequent plans" (A.E.R. 46).

On December 5, 2006, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b) on the nondiscretionary duty claim (A.E.R. 339). The judgment enjoined

EPA to promulgate construction and development ELGs and NSPSs within three years (A.E.R. 340). These appeals followed.

SUMMARY OF ARGUMENT

The district court had jurisdiction over the claim alleging that EPA failed to comply with its nondiscretionary duty to promulgate ELGs and NSPSs for construction and development activities. CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), grants the district courts exclusive jurisdiction over actions where "there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is not discretionary with the Administrator." Plaintiffs make exactly such an allegation here: they contend that EPA failed to perform its nondiscretionary duty to promulgate ELGs and NSPSs for construction and development activities, as required by CWA § 304(m). There is no basis for appellants' contention that the claim could be brought only in a circuit court under CWA § 509(b)(1)(E), which provides for jurisdiction in the courts of appeals to review the appropriateness of ELGs and NSPSs (or other limitations) that EPA has actually promulgated. That section does not apply because EPA promulgated no limitations here, and plaintiffs' claims do not seek review of the substance of any EPA limitation or other regulation. Rather, they challenge EPA's total failure to promulgate construction and development ELGs and NSPSs.

Moreover, there is no foundation for Industry's objection to the States' standing, which EPA has not joined. Industry's

assertion that the States cannot bring a parens patriae action against the federal government is contrary to the Supreme Court's recent decision in Massachusetts v. EPA, 127 S. Ct. 1438 (2007), which held that States can assert such claims where federal statutes afford them that right. In addition, the States have made the required showings of injury-in-fact, causation, and redressability. The States submitted unrebutted declarations demonstrating that EPA's failure to promulgate construction and development ELGs and NSPSs contributes to excessive upstream pollutant discharges that harm the States' water quality. EPA's failure to act also increases the States' administrative burden in administering the NPDES program by requiring them to develop and refine permitting standards for reduction of stormwater pollution from construction and development activities.

On the merits, the district court correctly held, based on the statutory text, purpose, and legislative history, that CWA § 304(m), 33 U.S.C. § 1314(m), imposes on EPA a nondiscretionary duty to promulgate ELGs and NSPSs for construction and development activities. In its 2000 guidelines plan, EPA identified construction and development as a source category discharging toxic or nonconventional pollutants. Section 304(m) provides that EPA shall promulgate ELGs and NSPSs for an identified source category no later than three years after publication of the plan identifying that category. The legislative history of § 304(m) confirms that promulgation of ELGs and NSPSs is mandatory for any source category

that discharges toxic and nonconventional pollutants. Appellants' contention that § 304(m) created nothing more than a procedural planning obligation — a paperwork exercise — and establishes no substantive requirement that EPA actually promulgate effluent guidelines for identified categories cannot be squared with the plain language of the statute and the unambiguous intent of Congress.

ARGUMENT

POINT I

THE DISTRICT COURT HAD JURISDICTION TO DETERMINE WHETHER EPA FAILED TO PERFORM A NONDISCRETIONARY DUTY TO PROMULGATE CONSTRUCTION AND DEVELOPMENT ELGs AND NSPSs

The jurisdictional issue in this appeal involves two specific grants of jurisdiction in the CWA: (1) § 505(a)(2), which provides for exclusive district court jurisdiction over claims alleging that EPA has failed to perform a nondiscretionary duty under the Act; and (2) § 509(b)(1)(E), which provides for original jurisdiction in the courts of appeals over petitions to "review" EPA's "action . . . in approving or promulgating any effluent limitation or other limitation" under enumerated sections of the Act.

The line that separates these two provisions here is clearly established. When, as in this case, a suit alleges that EPA failed entirely to promulgate a type of regulation that the CWA requires the agency to promulgate, the suit belongs in the district court under § 505(a)(2). By contrast, when a party challenges the

appropriateness of a regulation that EPA has actually promulgated, which plaintiffs here do not, the action must be filed directly in a circuit court under § 509(b)(1)(E).

A. Plaintiffs' Nondiscretionary Duty Claim Falls Within § 505(a)(2)'s Exclusive Grant of District Court Jurisdiction.

CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), authorizes any citizen to bring an action in district court "alleg[ing] a failure of [EPA] to perform any act or duty under [the CWA] which is not discretionary with the [agency]." The subsection further provides that "[t]he district courts shall have jurisdiction . . . to order [EPA] to perform such act or duty." Plaintiffs' claim falls squarely within the subsection's plain language: it alleges that EPA failed to perform its nondiscretionary duty to promulgate construction and development ELGs and NSPSs under CWA § 304(m), and seeks an order compelling EPA to perform that duty (see A.E.R. 47-88).

In Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984), moreover, this Court specifically held that claims challenging EPA's failure to comply with a mandatory duty to promulgate ELGs must be brought in the district court under § 505(a)(2). 749 F.2d at 558-59. There, certain parties filed a petition for review directly in this Court under CWA § 509(b)(1), asserting a number of claims relating to the EPA's issuance of permits for placer mining. One of the claims challenged EPA's failure to promulgate industry-

wide ELGs for placer mines. While exercising jurisdiction over the petitioners' other claims, this Court severed the claim challenging EPA's failure to promulgate ELGs, which it held had to be filed in the district court as a citizen suit under § 505(a)(2)'s "exclusive" grant of jurisdiction.[12] See id. at 558-59.

EPA and Industry try to complicate the matter by adding qualifications and conditions that are not found in § 505(a)(2). But this Court recently confirmed that the jurisdictional question under § 505(a)(2) is as straightforward as the statutory language suggests: "So long as EPA's challenged acts and omissions relate to non-discretionary duties under the Act, [an] action [is] properly brought in the district court under § 505(a)(2)." Our Children's Earth Found. v. EPA, No. 05-16214, 2007 U.S. App. LEXIS 25299 (9th Cir. Oct. 29, 2007). Thus, it makes no difference that EPA's failure to promulgate ELGs and NSPSs here resulted from an affirmative decision based on an administrative record, not merely inaction. A suit challenging EPA's failure to promulgate NSPSs for closed and abandoned coal mines, for example, fell under

[12] Other circuit courts have also recognized that a challenge to EPA's failure to promulgate ELGs or NSPSs at all for a source category must be filed in district court. See Pa., Dep't of Envtl. Res. v. EPA, 618 F.2d 991, 995 (3d Cir. 1980) (suit challenging EPA's failure to issue NSPSs for closed or abandoned coal mines should have been filed in district court); Armco, Inc. v. EPA, 869 F.2d 975, 981-82 (6th Cir. 1989) (suit challenging EPA's failure to issue sludge-removal regulations belonged in district court); see also Maier v. EPA, 114 F.3d 1032, 1038-39 (10th Cir. 1997) (challenge to "EPA's refusal to promulgate regulations at all, or its failure to do so by a date certain set by law" falls under § 505(a)(2)).

§ 505(a)(2), even though the issue had been discussed in a rulemaking proceeding and the agency had decided on the record to defer the promulgation. See Pa., Dep't of Envtl. Res., 618 F.2d at 995. Because plaintiffs challenge EPA's failure to perform its nondiscretionary duty to promulgate construction and development ELGs and NSPSs, the district court had exclusive jurisdiction over the claim.

B. Section 509(b)(1) Does Not Apply, Because the Claim Does Not Stem From EPA's Promulgation or Approval of an Effluent Limitation or Other Limitation.

This Court has held that § 505(a)(2) and § 509(b)(1) "d[o] not overlap." Trustees for Alaska, 749 F.2d at 559. Accordingly, the fact that this claim lies at the heart of § 505(a)(2) alone demonstrates that it is outside of § 509(b)(1). See also Maier v. EPA, 114 F.3d 1032, 1038 (10th Cir. 1997) (noting that court of appeals had jurisdiction over claim under § 509(b)(1) only if claim did not "fall[ ] within that class of nondiscretionary duties for which jurisdiction has been granted to the district court"). That conclusion is further confirmed by examining the text of § 509(b)(1).[13]

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[13] In Our Children's Earth Foundation, this Court emphasized that even if district court jurisdiction is lacking under § 505(a)(2) because a matter is found to be discretionary with EPA, that "does not mean that jurisdiction is proper under § 509(b)(1)." 2007 U.S. App. LEXIS 25299, at *8. For the reasons explained in the text, § 509(b)(1) does not apply here. Therefore, if this Court finds that jurisdiction is lacking under § 505(a)(2), the case should be remanded for the district court to consider

(continued next page...)

Section 509(b)(1) does not provide broadly for circuit court review of all EPA actions or decisions under the CWA, or even of all such actions or decisions based upon an administrative record. The subsection's language, rather, is precise and limited: It "specifically grants courts of appeals jurisdiction to review only certain EPA actions taken with respect to each of the requirements of the [CWA]." Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431-32 (9th Cir. 1991) (emphasis added). Given the subsection's textual specificity, this Court has cautioned against an "expansive application" of its terms. League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002); see also Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992) (rejecting the argument that § 509(b)(1) should be "construed liberally"); see generally Ariz. State Dep't of Pub. Welfare v. Dep't of Health, Educ., & Welfare, 449 F.2d 456, 463 (9th Cir. 1971) (courts of appeals "have only the jurisdiction specifically conferred upon them by acts of Congress").

Here, appellants rely on § 509(b)(1)(E), which grants the courts of appeals jurisdiction to "review [EPA's] action . . . in approving or promulgating any effluent limitation or other limitation under section [301, 302, 306, or 405 of the CWA]." In essence, this subsection covers claims seeking "substantive review

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plaintiffs' claim under the Administrative Procedure Act alleging that EPA's action was arbitrary and capricious, as to which jurisdiction lies in the district court under 28 U.S.C. § 1331.

of the appropriateness of . . . guidelines actually promulgated" by EPA. Our Children's Earth Found., 2007 U.S. App. LEXIS 25299, at *9; see also id. (subsection 509(b)(1)(E) does not apply where "[n]o . . . promulgated guidelines or limitations are at issue"). For two distinct reasons, plaintiffs' claims do not fit this description. First, EPA did not approve or promulgate any effluent limitation or other limitation in 2004. Instead, EPA withdrew all proposed regulations and opted not to establish any "new requirements." See Withdrawal, 69 Fed. Reg. at 22,473; Proposed Rule, 67 Fed. Reg. at 42,660. Second, plaintiffs do not seek review of the substance of any EPA limitation, but merely challenge EPA's total failure to promulgate ELGs and NSPSs for construction and development activities, as required by the CWA.

EPA and Industry rely heavily on the Tenth Circuit's decision in Maier, but that case accords fully with the above analysis. In Maier, a party filed a petition for review in the circuit court challenging the EPA's failure to revise an existing ELG for publicly owned water treatment works based on new information. Examining its own jurisdiction sua sponte, the Tenth Circuit held that the petition for review was the appropriate form of action because the claim challenged "the substance of a regulation that the agency ha[d] already promulgated." 114 F.3d at 1038; see also id. (noting that petitioner was "essentially challenging the sufficiency of the EPA's [existing] regulation"). The court noted that the CWA permits a party to challenge an EPA regulation on the

ground that it has become inadequate in light of new information, and held that the fact that the petition styled the action a challenge to EPA's failure to revise the regulation did not alter the jurisdictional analysis. Here, plaintiffs' claim cannot be described as a challenge to the substance of any existing regulation. It is solely a challenge to EPA's failure to promulgate ELGs and NSPSs for the construction and development category.

Appellants' various efforts to shoehorn the present suit into the terms of § 509(b)(1)(E) do not withstand scrutiny. For example, EPA's assertion that in 2004, it "approve[d]" the continued use of previously promulgated regulatory provisions requiring NPDES permits for construction sites (EPA Br. at 20-23) is both inaccurate and immaterial. First, EPA did not "approve" the permitting regulations in 2004. The continued existence of those regulations was not at issue in the rulemaking. The permitting regulations were in force and effect long before the rulemaking and would have continued in force under any of the three "options" that EPA considered.

Even if EPA had "approved" those regulatory provisions, it would not matter because plaintiffs do not challenge any aspect of them. Indeed, plaintiffs fully agree that such permits should be required. They simply contend that the discharge conditions in such permits should be set according to national ELGs and NSPSs, as Congress required in 1972 and 1987, rather than through

individualized "best professional judgment" determinations, which Congress meant to be only an interim arrangement.

Industry's suggestion that review lies in the court of appeals because EPA "promulgat[ed] Option 3" fares no better. Ind. Br. at 29. Even if Option 3 had been "promulgated" (which it was not), Option 3 is not "an effluent limitation or other limitation," as is required for jurisdiction to lie under § 509(b)(1)(E). A "limitation . . . must have bite" and "must at least control the states or . . . permit holders." Am. Paper Inst., Inc. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989). EPA's declaration that it was choosing Option 3 does not qualify as a "limitation" because it "require[s] nothing" of regulated entities and "imposes no obligations enforceable by EPA." Westvaco Corp. v. EPA, 899 F.2d 1383, 1388 (4th Cir. 1990). Industry is likewise incorrect in asserting that plaintiffs challenge "the substance" of Option 3, Ind. Br. at 33, because Option 3 has no substance.

Contrary to appellants' assertions (EPA Br. at 25-26; Ind. Br. at 31-32, 34), Crown Simpson Paper Co. v. Costle, 445 U.S. 193 (1980), provides no support for their position. In that case, the Supreme Court held that EPA's veto of a state-issued NPDES permit was reviewable under a neighboring provision, § 509(b)(1)(F), which applies to review of EPA action "in issuing or denying any permit." See Costle, 445 U.S. at 195. The Court found that the challenge to EPA's veto fell within the statutory language because the "precise effect" of EPA's veto was to "deny" a permit. Id. at 196. Here,

the practical consequence of EPA's action was not the approval or promulgation of any limitation, but the complete absence of construction and development ELGs or NSPSs. Furthermore, deferring management of pollution reduction to individualized permit decisions, as EPA did here, is the precise opposite of establishing nationwide standards through issuance of ELGs and NSPSs, as the CWA mandates.

To sustain appellants' objection to jurisdiction would require not a "practical" construction of the Act's jurisdictional provisions, see EPA Br. at 26, but a radical rewriting of them. And as the district court correctly noted (see A.E.R. 3), had Congress intended § 509(b)(1)(E) to cover negative actions, such as rejecting or withdrawing proposed regulations, Congress could have drafted the subsection to use the broader "any determination" language found in § 509(b)(1)(B) and (D).

EPA and Industry also cite this Court's decision in Environmental Defense Center, 344 F.3d 832 (EPA Br. at 26; Ind. Br. at 32-33), but that case has no bearing on this issue. There, without analysis, this Court exercised jurisdiction under § 509(b)(1) to review a permitting regulation that EPA had actually promulgated. See 344 F.3d at 843. Here, by contrast, no EPA regulation is under review. Moreover, in Environmental Defense Center, there was no allegation that EPA had failed to perform a nondiscretionary duty, so § 505(a)(2) was not implicated.

C. Appellants' Remaining Arguments Against District Court Jurisdiction Are Meritless.

EPA and Industry's other arguments provide no basis for questioning the district court's jurisdiction here. In particular, their policy arguments cannot overcome the plain language of the relevant statutory provisions or this Court's prior decisions interpreting them. In any event, appellants' policy concerns are greatly exaggerated. Finding district court jurisdiction here would not result in duplicative review of an administrative record. See EPA Br. at 35; Ind. Br. at 34-35. The issue in this case is whether the relevant statute — the CWA — imposes a nondiscretionary duty, not whether agency action was arbitrary and capricious based on the administrative record.

Contrary to EPA's contentions (EPA Br. at 37), any risk that multiple district courts might reach inconsistent decisions is mitigated by principles of claim preclusion and intervention, as the States' intervention in this case demonstrates. Moreover, there are mechanisms to transfer to a single district actions filed in multiple district courts. See, e.g., 28 U.S.C. § 1404(b). And the risk of inconsistent decisions, such as it may be, exists in many nondiscretionary duty cases. Congress nonetheless granted the district courts exclusive jurisdiction over that category of cases.

There is likewise no merit to the argument that jurisdiction to compel promulgation of ELGs and NSPSs should lie exclusively in the courts of appeals because review of the ELGs and NSPSs themselves, if and when they were promulgated, would lie

exclusively in the courts of appeals. See EPA Br. at 34-35. The same was true in Trustees for Alaska, yet this Court squarely held that the district courts have exclusive jurisdiction over a claim to compel the promulgation of ELGs for a particular source category. 749 F.2d at 558-59. This, too, merely reflects the jurisdictional scheme that Congress created under the CWA.

Finally, the numerous cases appellants cite that involve other federal statutes with broadly worded jurisdictional grants (EPA Br. at 27-29, 34-35; Ind. Br. at 30, 34-35) afford no guidance in construing the CWA's highly specific jurisdictional provisions.

POINT II

THE STATES HAVE STANDING TO SUE IN THIS ACTION

There is no basis for Industry's claim that the States lack standing to sue. Ind. Br. at 56-58. Although EPA also took this position in the lower court, it has wisely abandoned the position on appeal in the wake of Massachusetts v. EPA, 127 S. Ct. 1438, issued after the district court's ruling here. In Massachusetts, the Supreme Court recognized States' standing to bring parens patriae actions against EPA to compel compliance with federal environmental statutes. 127 S. Ct. at 1455. Here, the States have standing to sue EPA both in a parens patriae capacity based on their quasi-sovereign interests and also, as found by the district court, based on their own proprietary interests.

To establish Article III standing, a litigant must show that (1) it has suffered a concrete and particularized injury that is either actual or imminent; (2) the injury is traceable to the defendant; and (3) it is likely that a favorable decision will redress that injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The States have standing to sue in a parens patriae capacity in this case based on their quasi-sovereign interests in protecting the quality of their waters for the health and safety of their citizens. Industry argues as a threshold matter that a State can never bring a parens patriae suit against the federal government (Ind. Br. at 56-57), citing a footnote in Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n.16 (1982). This argument is foreclosed, however, by Massachusetts, in which the Supreme Court specifically repudiated that understanding of Snapp, and held that a State may bring a parens patriae action against the federal government to enforce a right under federal law. See 127 S. Ct. at 1455.

In the district court, the States submitted unrebutted declarations that establish the requirements of injury, causation, and redressability as to its quasi-sovereign interests, which are entitled to "special solicitude in [the] standing analysis." Id. at 1454-55; see also id. at 1454 ("Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal

jurisdiction.”). The States’ declarations show that EPA’s failure to issue ELGs and NSPSs for construction and development activities contributes to excessive pollution from upstream out-of-state construction and development sites. That, in turn, causes degradation of water quality in New York and Connecticut, particularly in Lake Champlain and the Long Island Sound. (A.E.R. 177-179, 294, 296-305)

Industry does not dispute that these upstream discharges exist and cause harm to the waters of New York and Connecticut. Industry contends only that the States have not excluded the possibility that the discharges result from permit noncompliance, rather than the nonexistence of nationwide effluent guidelines to serve as standards for permit issuance. See Ind. Br. at 58. This argument rests on an overly demanding conception of the causation prong of the standing analysis. The causation prong is “not equivalent to a requirement of tort causation.” Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000). It necessitates only a showing that the injury is “fairly traceable” to the challenged conduct. Lujan, 504 U.S. at 560.

The States’ declarations meet this test by identifying deficiencies in the permits used for construction sites in upstream States, showing that these deficiencies contribute to excessive pollutant discharges into the waters of New York and Connecticut, and showing that the deficiencies are attributable at least in part to the absence of nationwide minimum EPA standards (see A.E.R. 178-

179). Congress found a causal connection between the absence of EPA standards and the excessive discharge of pollutants when it enacted the CWA, concluding that nationwide effluent reduction standards in the form of ELGs and NSPSs are essential to effectively combating water pollution. See supra, at 4-5; see also Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 984 (9th Cir. 1994). Given the States' unrebutted proof establishing that some of the pollution received from out-of-state upstream sites results from the inadequacy of permitting standards, it is irrelevant whether permit noncompliance also contributes to the problem.

On the question of redressability, Industry is incorrect in asserting that the States must show that the specific content of any ELGs or NSPSs, when ultimately promulgated, is likely to redress their injuries. See Ind. Br. at 58. To the contrary, the States' challenge under CWA § 505(a)(2) to EPA's failure to perform its duty to promulgate ELGs and NSPSs for construction and development activities is the assertion of a procedural right accorded under federal law, which is subject to relaxed requirements of redressability. See Massachusetts, 127 S. Ct. at 1453. Accordingly, the States need not address the likely content of any future ELGs or NSPSs, but must show only that there is "some possibility that the requested relief" will prompt agency action that could redress their injuries. Id. And it is enough that promulgation of construction and development ELGs and NSPSs could be "a small incremental step" toward protecting the States' waters.

Id. at 1457. Under these standards, it is clear that an order compelling EPA to promulgate construction and development ELGs and NSPSs would carry the possibility of redressing the States' injuries. See also Alaska Ctr., 20 F.3d at 984 (finding redressability prong satisfied where plaintiffs sought to compel EPA to address water pollution in manner specifically contemplated by Congress).

The States also have standing based on their own proprietary interests, as the district court found (see A.E.R. 20). First, harm to a State's environment constitutes a proprietary, as well as a quasi-sovereign, injury. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1198-99 (9th Cir. 2004) ("impaired air quality" is a proprietary injury). Additionally, the States suffer injury to their proprietary interests when action or inaction by the federal government makes it "more difficult and onerous" for States to comply with federal environmental laws. West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004).

As to this second category of proprietary injury, Industry ignores the States' showing that excessive pollution from upstream construction sites has contributed to the violation of water quality standards in Lake Champlain and the Long Island Sound. This has triggered the States' duties under CWA § 303(d) and (e), 33 U.S.C. § 1313(d),(e), to promulgate "total maximum daily loads" for pollutant discharges into those water bodies and to engage in administrative planning to remediate them. (A.E.R. 298-304)

Contrary to Industry's suggestion, these administrative burdens apply under CWA § 303 to all States with heavily polluted waters, whether or not they have chosen to operate their own NPDES permitting programs under CWA § 402.

Furthermore, Industry presents a false choice in arguing that the States' expenditure of additional administrative resources in operating their NPDES permitting programs is attributable to their own decision to serve as permitting authorities, not to EPA's failure to promulgate ELGs and NSPSs. See Ind. Br. at 57. The States have chosen to administer their own NPDES permit programs, as the CWA allows, to play a larger role in the protection of their waterways. While the operation of the NPDES program by its nature requires the expenditure of resources, EPA's failure to perform its duty to promulgate ELGs and NSPSs has added to the administrative burden and cost of the States' programs by, for example, forcing the States to spend time and money developing and refining permit conditions themselves (see A.E.R. 177-179). As the district court held, it was "EPA's decision to forgo national guidelines and standards, not the States' initial action in setting up NPDES programs, [that] burdens the States with the ongoing expense of refining their own standards in response to changing conditions and information" (A.E.R. 21). These indirect financial burdens represent concrete injuries to the States' proprietary interests sufficient to support standing to sue, see Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984), and these injuries would be

redressed by a decision compelling EPA to promulgate the required ELGs and NSPSs.

Industry's argument that plaintiffs fail to satisfy the "zone of interests" test (Ind. Br. at 59) is misplaced because that test does not apply here. The "zone of interests" doctrine is a general prudential limitation on standing that may be negated by a particular congressional authorization to sue. Bennett v. Spear, 520 U.S. 154, 163-64 (1997). This Court has held that the citizen-suit provision of CWA § 505(a) does just that, and thereby "extends standing to the outer boundaries" set by Article III. Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000). For the reasons explained above, the States meet the constitutional minimum requirements for standing.

POINT III

EPA FAILED TO PERFORM ITS NONDISCRETIONARY DUTY TO PROMULGATE CONSTRUCTION AND DEVELOPMENT ELGs AND NSPSs

It is undisputed that EPA's 2000 guidelines plan identified construction and development activities as a source category that discharges toxic or nonconventional pollutants. It is also undisputed that EPA nonetheless decided not to promulgate ELGs and NSPSs for that source category. Because CWA § 304(m) mandates that EPA promulgate ELGs and NSPSs for any source category it has identified as discharging toxic or nonconventional pollutants, the agency has failed to perform a nondiscretionary duty under the Act.

Accordingly, the district court correctly granted partial summary judgment.

A. Section 304(m) Requires EPA to Promulgate ELGs and NSPSs for Categories Identified as Dischargers of Toxic or Nonconventional Pollutants.

Statutory interpretation begins, of course, with the language of the statute. Children's Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999). CWA § 304(m)(1) requires EPA to publish a guidelines plan every two years. The statute mandates that in that plan, EPA "shall" (1) identify "categories of sources discharging toxic or nonconventional pollutants" for which ELGs and NSPSs have not yet been promulgated; and (2) "establish a schedule for promulgation of effluent guidelines for [those] categories, under which promulgation of such guidelines shall be no later than . . . 3 years after the publication of the plan."

This statutory text refutes appellants' contention that EPA retains discretion not to promulgate ELGs and NSPSs for a source category that it has identified as discharging toxic or nonconventional pollutants. The subsection is unmistakably cast in mandatory language, repeatedly using the word "shall." See Pierce v. Underwood, 487 U.S. 552, 569-70 (1988); Idaho Conservation League v. Russell, 946 F.2d 717, 720 (9th Cir. 1991). By its terms, the statutory text requires EPA to establish a timeline for the "promulgation of effluent guidelines," not for EPA to decide whether to promulgate such guidelines. Furthermore, the explicit

requirement that EPA set a date, not more than three years out, by which promulgation of ELGs and NSPSs shall occur is flatly inconsistent with appellants' position that such promulgation need not occur at all.

This conclusion is supported by the object and policy of the CWA as a whole. See Children's Hosp. & Health Ctr., 188 F.3d at 1096. The CWA established a goal of eliminating all discharges of pollutants into the Nation's waters by 1985. CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1). As explained supra at 3-5, Congress viewed the promulgation of ELGs and NSPSs for source categories as essential to achieving the nationwide floor for pollution control that was necessary to restore and maintain the quality of the Nation's waters. In particular, Congress enacted § 304(m) in 1987 due to frustration with EPA's "slow pace" in promulgating effluent guidelines after the CWA's initial passage. Against this background, it makes no sense to suggest that § 304(m) requires EPA only to publish a schedule for promulgating ELGs and NSPSs, without requiring EPA actually to promulgate them.

If any doubt remained, the legislative history underlying § 304(m) would dispel it. See Children's Hosp. & Health Ctr., 188 F.3d at 1096 (legislative history may be used as an aid to interpretation in cases of ambiguity). The Senate report on the subsection, which appellants' briefs fail to mention, states unequivocally that effluent guidelines are mandatory for every source category that discharges toxic or nonconventional pollutants

in more than de minimis amounts: "Guidelines are required for any category of sources discharging significant amounts of toxic pollutants. In this use, 'significant amounts' does not require [EPA] to make any determination of environmental harm; any non-trivial discharges from sources in a category must lead to effluent guidelines." S. Rep. No. 99-50, at 24-25 (1985), reprinted in 2 1987 Leg. Hist. at 1445-46 (emphases added). Accordingly, when, as here, EPA has identified a source category in a guidelines plan as one that discharges toxic or nonconventional pollutants in nontrivial amounts, it must promulgate ELGs and NSPSs for that source category. As the district court observed, "to read [§ 304(m)] as requiring merely a schedule for, but not actual, promulgation of ELGs runs altogether counter to this unambiguous expression of congressional intent" (A.E.R. 34).

B. Section 304(m)'s Nondiscretionary Duty Is Fully Consistent with the Section's Character as a Planning Mechanism.

EPA and Industry emphasize that CWA § 304(m) creates a planning mechanism designed to afford EPA a measure of flexibility. EPA Br. at 39-46; Ind. Br. at 39-41. That is true up to a point. But the subsection also, and entirely consistently, imposes certain mandatory duties as to which EPA has no discretion. The relevant duty here is that when EPA has identified a source category as one that discharges toxic or nonconventional pollutants, it must promulgate ELGs and NSPSs for that source category.

EPA attributes undue significance to § 304(m)'s reference to a "plan," in contrast to certain other CWA sections that mandate promulgation of ELGs or NSPSs for enumerated source categories without using "plan" language. See EPA Br. at 39-40. In particular, EPA refers to an uncodified provision enacted as § 301(f) of the 1987 amendments, which required EPA to promulgate effluent guidelines for a handful of enumerated source categories by a date certain.

The use of "plan" language in § 304(m) reflects that the subsection, unlike the uncodified provision, does not address just a few specifically identified source categories, but an unknown number of unenumerated source categories that discharge toxic or nonconventional pollutants. Given the nature and scope of EPA's task, the planning component of § 304(m) makes perfect sense. Congress reasonably determined that EPA may need some time to identify those source categories that exist and discharge toxic or nonconventional pollutants. Congress also reasonably afforded EPA some flexibility in scheduling the promulgation of guidelines for the source categories it has identified, cabined by the three-year outside time limit the statute establishes.[14] But the statute also unmistakably provides that once EPA has identified a particular

[14] Because § 304(m)(1)(C) establishes the three-year outside deadline, Industry's cases addressing statutes that fail to specify a date certain for agency action are inapposite. See Ind. Br. at 36-39 (citing Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987); Envtl. Def. Fund v. Thomas, 870 F.2d 892, 897 n.1 (2d Cir. 1989)).

source category as discharging toxic or nonconventional pollutants, it has no discretion to decline altogether to promulgate ELGs and NSPSs for that category.

Despite their claims, EPA Br. at 43-44; Ind. Br. at 42-43, EPA and Industry obtain no support from the Supreme Court's decision in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) ("SUWA"). SUWA did not hold that a document captioned a "plan" can never reflect mandatory duties, and this Court has ruled to the contrary. See NRDC v. Sw. Marine, Inc., 236 F.3d 985, 999 (9th Cir. 2000) (CWA stormwater pollution prevention plan); McCarthy v. Thomas, 27 F.3d 1363, 1365 (9th Cir. 1994) (state implementation plan under the Clean Air Act). Rather, SUWA addressed the highly specific situation in which the federal Bureau of Land Management includes statements in a land-use plan about what it "will do" in managing over a million acres of federal lands far into the future. 542 U.S. at 70, 72. The Court held that such statements do not give rise to enforceable mandatory duties, observing that a BLM land-use plan "is generally a statement of priorities." Id. at 71. The Court contrasted the land-use plans with "a specific statutory command requiring an agency to promulgate regulations by a certain date." Id.

Here, the mandatory duty arises not from EPA's own statements in a guidelines plan about what it "will" do, but from the statutory prescription in § 304(m) as to what EPA "shall" do. See Our Children's Earth Found., 2007 U.S. App. LEXIS 25299, at *32

(distinguishing SUWA where plaintiff relied on a statute framed in "shall" language, rather than an agency's own plan using the word "will"). Thus, this case involves precisely the sort of specific statutory command that SUWA described as the paradigm of a duty-creating provision. That is particularly clear in light of the unequivocal statement in the legislative history that EPA must promulgate guidelines for any category discharging toxic or nonconventional pollutants. EPA may prefer to view its guidelines plan as "simply a forward-looking statement of what [the agency] expects to accomplish in its effluent guidelines program," EPA Br. at 44, but Congress conceived of the process quite differently.

Appellants' reliance on NRDC v. Train, 510 F.2d 692, 711, is likewise misplaced. In that case, the D.C. Circuit suggested in dictum that there might be an extremely narrow circumstance in which EPA was not obligated under the broader CWA § 304(b) to promulgate effluent guidelines for an industrial source category — i.e., as to "marginal classes of point sources containing a limited number of diverse dischargers for which guidelines would serve . . . no purpose." 510 F.2d at 710. No one could contend that construction and development sites are such a "marginal class"; EPA itself has determined that hundreds of thousands of such sites exist each year,[15] and has acknowledged that they collectively

[15] See EPA, Development Document for Final Action for Effluent Guidelines and Standards for the Construction and Development Category 37, EPA-821-B-04-001 (Mar. 2004), available at http://www.epa.gov/waterscience/guide/construction/devdoc/final/complete_construction_tdd.pdf.

constitute one of the most important sources of water pollution in the United States.[16] In any event, Train predates the enactment of § 304(m), which focuses specifically on those source categories that discharge toxic or nonconventional pollutants and makes the promulgation of ELGs and NSPSs mandatory for any such source category. Similarly, even if as EPA claims (EPA Br. at 41), its initial nondiscretionary duty to promulgate ELGs under § 304(b) had been "temporally limited" to the one-year period following October 1972 (and it was not), that temporal limitation would have been superseded by the enactment of § 304(m) in 1987.

EPA and Industry also contend that § 304(b), by setting out statutory factors to be used in establishing effluent guidelines, necessarily affords EPA discretion not to promulgate guidelines at all if it can identify no technology that satisfies those factors. EPA Br. at 44-45; Ind. Br. at 37-40. This argument proves too much, since EPA and Industry both acknowledge that other CWA provisions create mandatory duties requiring EPA to promulgate effluent guidelines for certain source categories. See EPA Br. at

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[16] See EPA, National Water Quality Inventory: 2000 Report at 13, 21, EPA-841-R-02-001 (Aug. 2002) (sediment deposition was the second most prevalent pollutant in rivers and streams and the third most prevalent in lakes, ponds, and reservoirs), available at http://www.epa.gov/305b/2000report; EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas at 8-2 (Nov. 2005), EPA-841-B-05-004 ("Runoff from construction sites is by far the largest source of sediment in urban areas under development . . . . Water quality impacts include unwanted biological growth caused by excess nitrogen and phosphorus . . . ."), available at http://www.epa.gov/nps/urbanmm/pdf/urban_ch08.pdf.

39-40 (conceding that § 301(f) of the 1987 amendments creates a mandatory duty); Ind. Br. at 38 (conceding that CWA § 304(b) creates a mandatory duty as to twenty-seven enumerated source categories). The § 304(b) factors apply in those contexts as well. Thus, it cannot be that those factors preclude the existence of a mandatory duty to promulgate effluent guidelines. Moreover, appellants offer no response to the district court's observation that § 304(b)(2) directs EPA to base guidelines on "the best available technology," which requires only a relative assessment of the technological options available and could not preclude the promulgation of guidelines altogether (A.E.R. 38).

Finally, there is no merit to EPA's half-hearted claim that it is entitled to deference under Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984), for an interpretation of § 304(m) that it expressed in its 2004 final guidelines plan. See EPA Br. at 46-47. In that plan, EPA construed the statute, as it does in its appellate brief, to permit the agency to decline to promulgate effluent guidelines for source categories identified as discharging toxic or nonconventional pollutants. See Notice of Availability of 2004 Effluent Guidelines Program Plan, 69 Fed. Reg. 53,705, 53,719 (2004) ("2004 Guidelines Plan"). As a general rule, however, Chevron deference is appropriate only for the results of notice-and-comment rulemaking or formal adjudication. United States v. Mead Corp., 533 U.S. 218, 230 (2001) (the "overwhelming number of . . . cases applying Chevron deference have reviewed the fruits of

notice-and-comment rulemaking or formal adjudication"). Here, EPA did not set forth its interpretation of § 304(m) in its proposed guidelines plan for 2004. See Preliminary Effluent Guidelines Program Plan for 2004/2005, 68 Fed. Reg. 75,515 (Dec. 31, 2003). Therefore that interpretation was not subject to the notice-and-comment procedures prescribed under CWA § 304(m)(2), 33 U.S.C. § 1314(m)(2). For this reason, Chevron deference should be denied.

In any event, Chevron deference does not apply where, as in this case, the agency's interpretation of the statute is contrary to clear congressional intent, as reflected in the statutory text, the object and policy of the statute, and the legislative history. See Alaska v. Babbitt, 72 F.3d 698, 701 (9th Cir. 1995) (Chevron analysis "consider[s] whether Congress has directly spoken to the precise question at issue either in the statute itself or the legislative history." [internal quotation marks omitted]); Ortiz v. Meissner, 179 F.3d 718, 723-24 (9th Cir. 1999) (court must consider "the aims" of the statute as well as the text); Am. Mining Cong. v. EPA, 965 F.2d 759, 765 (9th Cir. 1992) (in reviewing EPA rule under Chevron, court must "examine the legislative history to determine whether Congress expressed a clear intent").

Even if congressional intent were not clear, deference would be inappropriate because EPA's interpretation of § 304(m) is irrational, as the district court recognized (see A.E.R. 39). When Congress enacted § 304(m) in 1987, Congress was frustrated that EPA had not timely promulgated effluent guidelines. To conclude that

Congress created only a planning process that imposed no actual obligation to promulgate guidelines – in other words, a meaningless paperwork exercise – requires one to believe that Congress enacted a statute that did nothing to fix the problem that motivated its action.[17]

C. EPA Did Not Extinguish Its Duty by Omitting the Construction and Development Category from Recent Guidelines Plans.

As shown above, Congress intended that promulgation of ELGs and NSPSs be mandatory for any source category that discharges toxic or nonconventional pollutants. This forecloses EPA's primary position, reflected in its April 2004 final action for the construction and development category, that it has discretion to decide not to promulgate effluent guidelines at all for source categories it has identified as dischargers of toxic or nonconventional pollutants. It would be equally contrary to congressional intent to endorse EPA's after-the-fact effort to achieve the same result by a different route – that is, by simply omitting construction and development activities from its September

[17] The Court should not consider EPA's argument that new construction and development sites are not "new sources," because appellants did not raise it below and did not properly argue it here. See EPA Br. at 42 n.13 (merely referencing Federal Register notice). In any event, EPA's apparent position that construction sites cannot be "new sources" because they are not "construct[ed]" within the meaning of CWA § 306 is contrary to the statute and common sense, and therefore entitled to no deference. Construction sites are themselves constructed; they require the installation of roads, work facilities, and other structures, and the demolition and removal of boulders, trees, and other materials.

2004 guidelines plan and from subsequent plans. See EPA Br. at 48-53; Ind. Br. at 19-27.

1. EPA has not amended its 2000 guidelines plan, which is the plan that triggers its duty to promulgate.

EPA's omission of the construction and development category from later guidelines plans does nothing to change the fact that in its 2000 guidelines plan, EPA identified the category as one discharging toxic or nonconventional pollutants. The district court correctly held that EPA's duty to promulgate ELGs and NSPSs for a source category, and the time frame in which it must occur, is triggered by "a category's first inclusion in a section [304(m)] plan" (A.E.R. 45). That is clear from the subsection's text, which requires a guidelines plan to "establish a schedule for promulgation of effluent guidelines [for categories identified in the plan], which shall be no later than . . . 3 years after the publication of the plan." Because the three-year statutory deadline for promulgation is set by the publication date of the plan that first identifies the category, later guidelines plans are irrelevant to the existence of the duty to promulgate.

Here, EPA's final guidelines plan for 2000, published after public notice and comment as required by § 304(m)(2), identified the construction and development category as one discharging toxic or nonconventional pollutants as to which no ELGs or NSPSs had been promulgated. EPA never reopened proceedings related to the 2000

guidelines plan, assuming for the sake of argument that it could do so. Because EPA has not amended the plan that triggers its nondiscretionary duty to promulgate, that duty remains in effect.

2. The CWA does not authorize EPA to reconsider its identification of source categories.

If EPA had tried to amend its 2000 guidelines plan, notwithstanding the plan's "final publication" following public review and comment, see CWA § 304(m)(2), it would have lacked authority to do so. Section 304(m) contains no provision that authorizes EPA to "de-list" a source category from a guidelines plan. This is in contrast to § 112(c)(9) of the Clean Air Act, 42 U.S.C. § 7412(c)(9), which expressly authorizes EPA to delete a source category from its list of sources of air pollution, provided that specific criteria are satisfied.

Given the absence of any express statutory authorization, EPA falls back on a general principle that an agency has authority to reconsider its own decisions. See EPA Br. at 51. But endorsing that principle broadly here would frustrate Congress's intent to require effluent guidelines for all source categories that discharge nontrivial amounts of toxic or nonconventional pollutants. See Macktal v. Chao, 286 F.3d 822, 825-26 (5th Cir. 2002) (addressing whether upholding agency authority to reconsider earlier order would frustrate statutory goals). As the district court correctly noted, allowing EPA to defeat its nondiscretionary duty to promulgate by de-listing a source category would thwart the

congressional purpose to "prod the EPA into more speedy" promulgation of ELGs and NSPSs (A.E.R. 44-45).[18]

EPA and Industry assert that § 304(m) implicitly allows EPA to de-list a category because it is "readily foreseeable" that during several years of rulemaking after a category is listed, EPA might discover information that could call into question the decision to list the category. EPA Br. at 48; see also Ind. Br. at 40-41. But it is implausible to think that Congress contemplated that EPA would list a category in a final guidelines plan, after notice and comment, based on a finding that the category discharged nontrivial amounts of toxic or nonconventional pollutants, only to discover later that this was not the case.

Moreover, EPA's own cases recognize that an agency's usual authority to reconsider its decisions is contingent on its giving "proper notice of its intent" to do so. Dun & Bradstreet Corp. Found. v. U.S. Postal Serv., 946 F.2d 189, 193 (2d Cir. 1991). EPA gave no such notice here. According to EPA, it "removed" the construction and development category from its final 2004 guidelines plan because it "realized" that the category failed "to meet the listing criteria under § 304(m)(1)(B)." EPA Br. at 49-50; see also 2004 Guidelines Plan, 69 Fed. Reg. at 53,718. However,

[18] EPA's hypothetical about a scrivener's error is beside the point. See EPA Br. at 51. If a published guidelines plan were to fail to reflect the agency's actual identification of source categories due to a drafting error, EPA presumably could correct that error. That is entirely different, however, from allowing EPA to de-list a source category after it has admittedly identified the category as one discharging toxic or nonconventional pollutants.

EPA's proposed 2004 plan included nothing on that subject; it merely noted that an effluent guidelines rulemaking was then underway for the construction and development category. See Preliminary Effluent Guidelines Program Plan for 2004/2005, 68 Fed. Reg. 75,515, 75,519 (Dec. 31, 2003). EPA thus afforded no advance indication that it proposed to "remove" the construction and development category from its 2004 plan for failure to meet "listing criteria," let alone that it believed this action would extinguish any duty to promulgate ELGs and NSPSs for the construction and development category.[19]

3. EPA has not found that construction and development discharges only trivial amounts of toxic and nonconventional pollutants.

Appellants incorrectly suggest that EPA's subsequent guidelines plans include findings that the construction and development category does not discharge nontrivial amounts of toxic or nonconventional pollutants, within the meaning of § 304(m)(1)(B). See EPA Br. at 49-50; Ind. Br. at 19-27. They cite, in particular, EPA's statement in its 2004 guidelines plan that discharges from construction sites consist "predominately" of

[19] An agency also must undertake any reconsideration "within a reasonable time period." Dun & Bradstreet, 946 F.2d at 193. In this case, EPA's final 2004 guidelines plan was published after the three-year statutory time limit for promulgating construction and development ELGs and NSPSs had already expired, and after EPA had already taken final action as to the construction and development category that it believed was sufficient to discharge the duty arising from its identification of the category in its 2000 guidelines plan.

conventional pollutants, in this case total suspended solids. 2004 Guidelines Plan, 69 Fed. Reg. at 53,718.[20] But a finding that conventional pollutants predominate in construction and development discharges says nothing about whether the discharges also contain nontrivial amounts of toxic or nonconventional pollutants. The Earth's atmosphere, for example, is "predominately" nitrogen (78 percent), but also contains "nontrivial" amounts of oxygen (21 percent).[21]

Industry, but not EPA, claims that EPA's findings are entitled to Chevron deference (Ind. Br at 21), but such deference does not apply to agency determinations based upon the wrong standard. See Friends of Yosemite Valley v. Norton, 348 F.3d 789, 799 (9th Cir. 2003); Sokol v. Kennedy, 210 F.3d 876, 879-80 (8th Cir. 2000). And once again, EPA's findings, such as they are, were not subjected to public notice and comment.

To the extent that Industry relies on a stray sentence in EPA's April 2004 rule withdrawal stating that the agency did "not have data indicating that [toxic and nonconventional] pollutants

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[20] The Federal Register notice for EPA's 2006 guidelines plan states that the discharges consist "almost entirely" of conventional pollutants, but the underlying EPA memorandum states merely that the discharges consist "largely" of such pollutants. Compare Notice of Availability of Final 2006 Effluent Guidelines Program Plan, 71 Fed. Reg. 76,644, 76,664/3 (Dec. 21, 2006), with Memorandum from Jan Matuszko to Public Docket, Dec. 11, 2006, Document No. EPA-HQ-OW-2004-0032-2705, available at http://www.regulations.gov/fdmspublic/component/main.

[21] EPA, Air Pollution Control Orientation Course, available at http://www.epa.gov/apti/course422/ap2.html (last visited November 5, 2007).

are found in construction site runoff nationwide," Withdrawal, 69 Fed. Reg. at 22,480, Industry's reading of that sentence is contradicted by other EPA statements. In a 1999 notice, EPA stated that construction sites "can contribute high loadings of nutrients and metals [both nonconventional pollutants] to receiving streams." Effluent Guidelines Plan Update, 64 Fed. Reg. 15,158, 15,158 (Mar. 30, 1999). In late 2005, over a year after publication of its final 2004 guidelines plan, EPA again affirmed that construction site sediment discharges contain toxic and nonconventional pollutants, stating that "[m]etals, phosphorous, nitrogen, hydrocarbons and pesticides are commonly found in urban sediments." EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas at 5-3 (Nov. 2005), available at http://www.epa.gov/owow/nps/urbanmm/index.html. These unequivocal EPA statements refute any contention that EPA ever purported to find, contrary to all common sense,[22] that sediment discharges from construction and development sites do not contain nontrivial amounts of toxic or nonconventional pollutants.

In addition to resting on purported findings that EPA has not made, Industry's contention that plaintiffs' claims are moot (Ind. Br. at 25-27) is legally incorrect. Industry cites cases holding that litigation becomes moot when an agency voluntarily corrects an

[22] See, e.g., W.K. Purves, et al., Life: The Science of Biology at 636, 638-39, 644 (Sinauer Associates, Inc. 2001) (biology textbook teaching that soil is the source from which plants obtain essential nutrients such as nitrogen and phosphorus, which are classified as nonconventional pollutants).

error complained of by a litigant or voluntarily provides the relief requested by the litigant. See, e.g., Ctr. for Biological Diversity v. Lohn, 483 F.3d 984, 988 (9th Cir. 2007); Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin., 175 F.3d 1156, 1163 (9th Cir. 1999). EPA has done neither here. It is undisputed that EPA has not promulgated ELGs and NSPSs for the construction and development category, and the only issue is whether the agency has a nondiscretionary duty to do so. If EPA does, plaintiffs must prevail. If EPA does not, whether because of any subsequent findings or another reason, plaintiffs' claim fails on the merits, not for mootness.

CONCLUSION

This Court should affirm the district court's permanent injunction and partial final judgment, entered December 5, 2006.

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November 9, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, Richard P. Dearing, Assistant Solicitor General in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,288 words, excluding exempted portions, and complies with the type-volume limitations of Rule 32(a)(7)(B).

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STATEMENT OF RELATED CASES

Two related cases are currently pending before this Court. In August 2004, the Citizens filed in this Court a protective petition for review of EPA's withdrawal of the proposed ELGs and NSPSs for the construction and development category. That petition is pending as Docket No. 04-74479. A few days later, the States filed a similar protective petition in the Second Circuit, which was transferred to this Court pursuant to 28 U.S.C. § 2112. That petition is pending as Docket No. 04-75831. This Court has stayed the two petitions pending resolution of this action.

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