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NO, YOU CAN'T: THE NINTH CIRCUIT SAYS "NO" TO CHANGE

*Natural Resources Defense Council v. Environmental Protection Agency*¹

I. INTRODUCTION

One advantageous attribute shared by many administrative agencies is an ability to respond quickly and effectively to changing circumstances. And when an agency initially responds to changed circumstances, it is often forced to do so without the benefit of clear legislative guidance. In these situations, agency determinations shouldn't be considered static. Rather, agency decisions in these circumstances are obviously more fluid in nature. And in fact, the Supreme Court has signaled its support for the proposition that it is permissible for agency positions to fluctuate and change over time.²

However, as a result of the fluid nature of agency decisions, agencies may take policy positions that are at odds with a previous position. It is only natural that an agency, in determining the wisdom of its policy in light of changed circumstances, will sometimes promulgate new rules and regulations that conflict with previously established rules and regulations.

In crafting regulations that result in conflicting positions, the agency is undoubtedly determining policy "winners" and policy "losers." And the scorned party often seeks judicial review of the administrative action. In reviewing an agency's conflicting positions, the reviewing court is forced to determine the degree of change that the court will tolerate.

*Natural Resources Defense Council v. E.P.A.*³ is a perfect example of the scenario described above. Prior to the instant decision, the Environmental Protection Agency (hereinafter "EPA") reached a decision that effectively made permit requirements for construction activities

¹ 526 F.3d 591 (9th Cir. 2008).

² See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984). "An initial agency interpretation is not carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuous basis." *Id.*

³ *Natural Res. Def. Council*, 526 F.3d at 591.

associated with oil and gas exploration and production less stringent. The Natural Resources Defense Council (hereinafter “NRDC”) challenged EPA’s determination and contended that EPA’s decision was contrary to Congressional intent. Additionally, NRDC argued that EPA’s action would be detrimental to water quality. This note examines both the decision and the analysis employed by the Ninth Circuit in reaching its conclusion. More importantly, this note discusses the implications of the holding and examines the degree of flexibility the Ninth Circuit is willing to offer to administrative agencies in the face of conflicting agency determinations.

II. FACTS AND HOLDING

In June of 2006, EPA promulgated a final rule modifying its interpretation of the Clean Water Act (hereinafter “CWA”) in response to Congress’ adoption of the Energy Policy Act of 2005.⁴ EPA’s modified interpretation resulted in the exclusion of “construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities” from the National Pollutant Discharge Elimination System (hereinafter “NPDES”) permit requirement.⁵ Furthermore, EPA’s modified interpretation continued to exclude oil and gas-related construction activities from the NPDES permit requirement even if these sites discharged storm water containing sediment levels which contributed to a violation of a water quality standard.⁶

Prior to EPA’s modification, EPA had required some of these sites to obtain certain NPDES permits.⁷ EPA had specifically required large oil and gas-related construction sites to obtain a NPDES permit because EPA

⁴ *Id.* at 600; *see also* Energy Policy Act of 2005, Pub.L. No. 109-58, § 323, 119 Stat. 694 (codified as amended at 33 U.S.C. § 1362(24) (2005)).

⁵ *Natural Res. Def. Council*, 526 F.3d at 600 (citing 40 C.F.R. § 122.26(a)(2)(ii) (2006)).

⁶ *Id.* (citing 40 C.F.R. § 122.26(a)(2)(ii) (2006)).

⁷ *Id.* at 597 (citing National Pollutant Discharge System Permit Application Regulations for Storm Water Discharges, 55 Fed.Reg. 48,033-34 (Nov. 16, 1990)). However, the permit requirement only applied to oil and gas-related construction sites that were five acres or larger in size. *Id.* at 595.

believed that storm water discharges containing sediment had a negative impact on water quality.⁸ Furthermore, EPA had intended to eventually expand the permit requirement to include all oil and gas-related construction activities, regardless of size.⁹

NRDC filed its petition challenging EPA's modified interpretation on June 23, 2006.¹⁰ NRDC and the other petitioners specifically asserted that EPA's exclusion of oil and gas-related construction activities from the NPDES permit requirement was contrary to Congressional intent and constituted an impermissible interpretation of the Energy Policy Act's amendments to the CWA.¹¹

In response, EPA contended that its modified interpretation was a codification of Congress' unambiguous intent to exclude oil and gas-related construction activities from the NPDES permit requirement.¹² EPA further asserted that, even if Congressional intent was ambiguous, its interpretation was reasonable and permissible.¹³ Specifically, EPA contended that its interpretation was reasonable because Congress had prohibited EPA from requiring an NPDES permit for storm water discharges from construction activities at oil and gas sites unless the site discharged storm water contaminated with certain materials.¹⁴ EPA noted that sediment was noticeably absent from Congress' list of possible contaminants. And because sediment is the pollutant most closely associated with construction activities, EPA contended that Congress' omission from the list of possible contaminants was not accidental.¹⁵

⁸ *Id.* at 597.

⁹ *Id.* at 598 (citing National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed.Reg. 68,722 (Dec. 8, 1999)).

¹⁰ *Id.* at 601.

¹¹ *Id.*; see also Brief of Petitioners at 36-38, *Nat. Res. Def. Council v. E.P.A.*, 526 F.3d 591 (9th Cir. 2008) (No. 06-73217). The additional petitioners include Amigos Bravos, the Powder River and OGAP. Brief of Petitioners at 4.

¹² *Nat. Res. Def. Council*, 526 F.3d at 600-01; Brief of Respondent at 25-26, *Nat. Resource Def. Council v. E.P.A.*, 526 F.3d 591 (9th Cir. 2008) (No. 06-73217).

¹³ *Nat. Res. Def. Council*, 526 F.3d at 601; Brief of Respondent, *supra* note 12, at 44.

¹⁴ *Nat. Res. Def. Council*, 526 F.3d at 601; Brief of Respondent, *supra* note 12, at 44-45.

¹⁵ *Nat. Res. Def. Council*, 526 F.3d at 601; Brief of Respondent, *supra* note 12, at 44-45.

Pursuant to federal statute, any interested private party may initiate judicial review of designated actions of EPA's Administrator.¹⁶ Thus, the Ninth Circuit Court of Appeals had the authority to directly review EPA's action.¹⁷ Additionally, the court found that the associations, petitioning on behalf of their members, satisfied association standing requirements.¹⁸

The court noted that the applicable standard of review was dictated by the Administrative Procedure Act.¹⁹ Specifically, the Administrative Procedure Act permitted the court to "set aside agency action...found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."²⁰

After applying this standard, the court held that the promulgated rule, which excluded oil and gas-related construction activities from the NPDES permit requirement even if the sites' storm water discharges contained levels of sediment that would contribute to a violation of a water quality standard, was arbitrary and capricious and constituted an impermissible construction of the CWA.²¹

III. LEGAL BACKGROUND

A. Statutory Framework: The Clean Water Act

In an effort to protect the environmental integrity of the nation's waters, Congress amended the CWA in 1972.²² In furtherance of its

¹⁶ *Nat. Res. Def. Council*, 526 F.3d at 601 (citing 33 U.S.C. § 1369(b)(1)(F)); see *Nat. Res. Def. Council v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992) (recognizing that the cited section authorizes appellate review of EPA rules governing permit procedures.)

¹⁷ *Nat. Res. Def. Council*, 526 F.3d at 601; see 33 U.S.C. § 1369(b)(1) (200).

¹⁸ *Nat. Res. Def. Council*, 526 F.3d at 602. In order to establish standing, the associations had to demonstrate that the association's members would have standing to sue in their own right and "the interests at stake are germane to the organization's purpose and neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." *Id.* at 601-02 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

¹⁹ *Id.*

²⁰ *Id.* (quoting 5 U.S.C. § 706(2)(A)(2000).

²¹ *Id.* at 608.

²² *Id.* at 594 (citing 33 U.S.C. § 1251(a) (2000)).

stated objective, Congress empowered EPA to conduct the NPDES.²³ Congress tempered the seemingly broad grant of regulatory authority by requiring strict compliance with the CWA's provisions.²⁴ One such provision required a permit for the discharge of any pollutant from any point source.²⁵

Congress further amended the CWA by enacting the Water Quality Act of 1987 (hereinafter "WQA").²⁶ The WQA established a new regulatory scheme for storm water runoff.²⁷ However, one significant exemption provided that the EPA administrator could not require a NPDES permit for storm water runoff from oil, gas and mining operations if the runoff was composed entirely of flows which were from conveyances of precipitation and the runoff precipitation was not "contaminated by contact with, or do[es] not come into contact with, any overburden, raw material, intermediate products, finished product, by product or waste product."²⁸

When it enacted the CWA, Congress established a two-step procedure for implementing the new storm water runoff scheme.²⁹ Congress intentionally designed the staggered implementation procedure to allow EPA to focus on the most serious problems first.³⁰ Thus, the NPDES permit process as it related to industrial activity was intended to be implemented first.³¹ In the first phase, EPA clarified the conditions that would constitute 'contamination' in the context of storm water discharges from "oil or gas exploration, production, processing, or treatment operation, or transmission facilit[ies]."³² EPA further noted that any storm water discharge from one of the specified sites that "contributed to a violation of a water quality standard" would nullify the original

²³ *Id.* (citing 33 U.S.C. § 1342(a)-(b) (2000)).

²⁴ *Id.* (citing 33 U.S.C. § 1311(a) (2000)).

²⁵ *Id.* (citing 33 U.S.C. § 1342 (2000)).

²⁶ *Id.* (citing Pub.L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.)).

²⁷ *Id.*

²⁸ *Id.* (quoting 33 U.S.C. 1342(l)(2)(2000)).

²⁹ *Id.* at 595 (citing 33 U.S.C. 1342(p)(2000)).

³⁰ *Id.* (citing 133 Con. Rec. 991 (1987)).

³¹ *Id.*

³² *Id.* at 598 (citing 40 C.F.R. § 122.26(c)(1)(iii) (1990)).

exemption and trigger the permit requirement.³³ Also, EPA determined that construction activities related to oil and gas exploration, production and processing were required to obtain the necessary NPDES permit as the activities were outside the scope of the original exemption for oil and gas-related sites.³⁴ At this time, however, EPA only applied the permit requirements to those construction sites that disturbed more than five acres.³⁵

In 1999, EPA moved to the second phase of the implementation of the NPDES permit requirements.³⁶ In Phase II, EPA expanded the permitting requirement to construction sites that disturbed between one and five acres.³⁷ However, these smaller sites had until March 10, 2003 to obtain the required NPDES permit.³⁸

In 2002, prior to the permit deadline, EPA re-examined its previous treatment of construction activity related to oil and gas sites under the NPDES and determined that approximately 30,000 oil and gas sites could be affected by the permit requirement.³⁹ In order to further consider this additional information, EPA postponed the deadline by which the smallest sites were required to obtain a NPDES permit.⁴⁰

While EPA was in the process of determining an appropriate course of action, Congress intervened with additional amendments to the

³³ *Id.* at 598 (citing 40 C.F.R. § 122.26(c)(1)(iii)(C) (1990); *see also* 40 C.F.R. § 122.26(c)(1)(iii)(A)-(B) (2006)(providing two other circumstances that would require the operator to obtain a NPDES permit).

³⁴ *Natural Res. Def. Council*, 526 F.3d at 598 (citing 55 Fed.Reg. 49,990, 48,029 (Nov. 16, 1990)). EPA specifically found that construction related to the specified operations are likely to discharge contaminated storm water runoff. NPDES Phase I Storm Water Rule, 55 Fed.Reg. 48,029 (Nov. 16, 1990).

³⁵ *Nat. Res. Def. Council*, 536 F.3d at 595.

³⁶ *Id.* at 598. (citing National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed.Reg. 68,722 (Dec. 8, 1999)).

³⁷ *Id.*

³⁸ *Id.* (citing 64 Fed.Reg. 68,840 (Dec. 8, 1999)).

³⁹ *Id.* (citing NPDES Phase II Storm Water Rule 67 Fed.Reg. 79,828 (Dec. 30, 2002)).

⁴⁰ *Id.* (citing Deferral Rule, 68 Fed.Reg. 11,325 (Mar. 10, 2003)). After the first postponement, EPA again moved the permit deadline until June of 2006. *Id.* (citing 70 Fed.Reg. 11,560 (Mar. 9, 2005)).

CWA that Congress included as part of the Energy Policy Act of 2005.⁴¹ When it enacted the Energy Policy Act, Congress altered the definition of “oil and gas exploration, production, processing, or treatment operations, or transmission facilities” in an effort to bring related construction activities within the scope of the original exemption.⁴²

With oil and gas facility-related construction sites clearly exempt from the requirement of obtaining a NPDES permit, EPA then determined that once these sites were exempt from the NPDES requirement, they could not be required to obtain a permit even if their storm water discharges included sediment levels that would contribute to a violation of a water quality standard.⁴³ EPA incorporated this reasoning into a final rule that it promulgated in June of 2006.⁴⁴ Thus, the final rule provided that storm water discharges originating at oil and gas-related construction activities were exempt from the NPDES permit requirement, even if the storm water discharge contained sediment levels that would contribute to a violation of a water quality standard.⁴⁵

B. The Analytical Framework: Chevron and the Ninth Circuit

Chevron v. Natural Resources Defense Council is widely viewed as the single-most influential administrative law-related Supreme Court decision.⁴⁶ In the instant case, the Ninth Circuit’s decision rests largely on an application of principles found in the *Chevron* decision.⁴⁷

⁴¹ *Id.* at 599. (citing Pub.L. No. 109-58, 119 Stat. 694 (codified as amended at 33 U.S.C. § 1362(24)(2000))).

⁴² *Id.*

⁴³ *Id.* at 600 (citing 40 C.F.R. § 122.26(a)(2)(ii) (2006)).

⁴⁴ *Id.*

⁴⁵ *Id.*; see also 40 C.F.R. § 122.26(a)(2)(ii) (2006).

⁴⁶ See Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN L. REV. 657, 687 (2004) (listing *Chevron* as the most influential case out of sample of 221 administrative law cases).

⁴⁷ See, e.g. *Natural Res. Def. Council*, 526 F.3d at 602-03 (citing *Chevron* as dictating the standard of review and citing *Chevron* seven times).

In *Chevron*, NRDC challenged EPA's interpretation of the Clean Air Act.⁴⁸ Thus, the United States Supreme Court was forced to determine the permissibility of EPA's interpretation.⁴⁹

In *Chevron*, EPA was contemplating various approaches to the regulation of industrial pollution.⁵⁰ EPA originally opted to implement one of the more restrictive approaches.⁵¹ However, less than one year later, a new administration took office and decided to reverse course by implementing a different regulatory scheme.⁵² NRDC challenged the reversal and asserted that the new interpretation was "contrary to the terms, legislative history, and purposes of the amended Clean Air Act."⁵³

The Supreme Court began its analysis by describing the manner in which a court should review an agency's interpretation of a statute.⁵⁴ The Court noted that a reviewing court should first look to Congressional intent and determine whether Congress has unambiguously resolved the issue.⁵⁵ If Congress has not clearly resolved the issue, the Supreme Court noted that the second step in the analysis is to determine whether the agency's interpretation is permissible.⁵⁶

The Court also specifically noted that in reviewing an agency's interpretation of a statute, a court should not substitute the agency's decision with its own "unless it appears from the statute or the legislative history that the accommodation is not one Congress would have sanctioned."⁵⁷ Furthermore, the Court noted that there was a long, established history of judicial deference to agency determinations.⁵⁸

⁴⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984).

⁴⁹ *Id.* (noting that the Court's task was to determine whether EPA's interpretation was a reasonable construction of the Clean Air Act).

⁵⁰ *Id.* at 856-57 (citing 44 Fed.Reg. 51934 (Jan. 16, 1979)).

⁵¹ *Id.* at 857 (noting that this approach would bring in more sources for review).

⁵² *Id.* at 857-58.

⁵³ *Id.* at 842.

⁵⁴ *Id.* at 842-43.

⁵⁵ *Id.*

⁵⁶ *Id.* at 843.

⁵⁷ *Id.* at 845 (citing *U.S. v. Shimer*, 367 U.S. 374 (1961)).

⁵⁸ *See id.* at 844-45.

In applying its own test, the Supreme Court dismissed each one of NRDC's contentions in turn.⁵⁹ In doing so, the Court clearly deferred to the agency's interpretation.⁶⁰ The Court specifically noted that courts should defer to agency decisions that involve complex, technical regulatory schemes, conflicting policies and detailed and reasonable agency consideration.⁶¹ Finally, the Court noted that agency decisions are not "carved in stone" and that an agency must continuously evaluate the "wisdom of its policy."⁶²

The Ninth Circuit itself has recognized that courts should generally defer to agency determinations.⁶³ In fact, the Ninth Circuit recently noted that *Chevron* deference applies to "an agency's reversal of opinion."⁶⁴ Specifically, the Ninth Circuit has indicated that inconsistent agency decisions are entitled to less deference, but "an agency's interpretation is...nevertheless entitled to deference, so long as the agency acknowledges and explains the departure from its prior views."⁶⁵

IV. INSTANT DECISION

⁵⁹ *See id.* at 861-62 (refuting NRDC's contention that Congress intended a more restrictive definition); *Id.* at 864 (rejecting NRDC's contention that the legislative history indicated that Congress intended a more restrictive definition); *Id.* at 865-66 (rejecting any policy-oriented judicial review).

⁶⁰ *Id.* at 865-66 (

"When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones...").

⁶¹ *Id.* at 866.

⁶² *Id.* at 863-64.

⁶³ *See Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1034 (9th Cir. 2007); *New Edge Network, Inc. v. F.C.C.*, 461 F.3d 1105, 1113 (9th Cir. 2006); *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990).

⁶⁴ *New Edge Network, Inc.*, 461 F.3d at 1113.

⁶⁵ *Seldovia Native Ass'n Inc.*, 904 F.2d at 1346 (quoting *Mobil Oil Co. v. E.P.A.*, 871 F.2d 149, 152 (D.C. Cir. 1989)).

A. *Chevron: The Analytical Framework*

The Ninth Circuit Court of Appeals began its analysis of the challenged rule by noting that issues of an agency's statutory interpretation are governed by the two-step test established in *Chevron*.⁶⁶ As previously mentioned, the first step in determining the permissibility of an agency's statutory interpretation is to determine whether Congress has unambiguously expressed its intent on the issue.⁶⁷ If Congress has not expressed a clear intent, the second step is to determine whether the agency's interpretation is based on a permissible construction of the statute.⁶⁸ The second step in the *Chevron* test can be further divided depending on the nature of Congress' delegation to the agency.⁶⁹ If the delegation is explicit, the court will invalidate the agency's interpretation only if it is arbitrary and capricious.⁷⁰ However, if Congress' delegation is merely implicit, then the court will defer to the agency's interpretation so long as it is reasonable.⁷¹

B. Step One: Congressional Intent

The Court began its analysis of Congressional intent by first examining the statute's language and history.⁷² The Court noted that the statute in question, § 402(l)(2) of the CWA, initially provided an exemption from the NPDES permit requirement for certain oil and gas-related facilities.⁷³ In the amended version, Congress expanded the definition of "oil and gas exploration, production, processing, or treatment

⁶⁶ *Natural Res. Def. Council v. E.P.A.*, 526 F.3d 591, 602 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

⁶⁷ *Id.* (citing *Chevron*, 467 U.S. at 843).

⁶⁸ *Id.* (citing *Chevron*, 467 U.S. at 843).

⁶⁹ *Id.*

⁷⁰ *Id.* (citing *Chevron*, 467 U.S. at 843-44).

⁷¹ *Id.* (citing *Chevron*, 467 U.S. at 844).

⁷² *Id.* at 603.

⁷³ *Id.* (citing 33 U.S.C. § 1342(l)(2)(2000)). In the original version of § 402(l)(2), the following were not required to obtain a NPDES permit: mining operations, oil and gas exploration, production, processing, treatment operations, transmission facilities. 33 U.S.C. § 1342(l)(2)(2000). However, the exclusion was contingent on the discharge consisting of precipitation runoff that did not become "contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products..." *Id.*

operations or transmission facilities” to include related construction activities.⁷⁴ After noting this change, the Court then observed that the amended language did not indicate whether Congress intended that the NPDES exemption include storm water discharges contaminated only with sediment.⁷⁵ The Court ultimately interpreted § 402(l)(2) as indicating that those sites included in the expanded definition of oil and gas-related facilities are exempt from the NPDES permit requirement unless the storm water discharge comes into contact with any of the items delineated in the statute.⁷⁶ The Court then concluded that Congressional intent as to whether sediment should be included as one of the specified contaminants was ambiguous.⁷⁷

Turning to the legislative history associated with § 402(l)(2), the Court noted each party’s proposed interpretation⁷⁸ but nonetheless determined that the legislative history did not indicate that Congress intended to exempt storm water discharges contaminated with sediment from the NPDES permit requirement.⁷⁹ The Court then concluded that “Congress was silent” and therefore it became necessary for the Court to apply the second step of the *Chevron* test to the agency’s interpretation.⁸⁰

C. Step Two: Permissibility of Statutory Interpretation

The Court began by noting that it was bound to uphold the decision of the agency unless the Court finds that the decision was arbitrary and

⁷⁴ *Natural Res. Def. Council*, 526 F.3d at 603 (citing Pub.L. No. 109-58, § 323, 119 Stat. 694 (codified as amended at 33 U.S.C. § 1362)).

⁷⁵ *Id.*

⁷⁶ *Id.* The contaminants listed in the statute that would, in effect, trigger the NPDES permit requirement include: overburden, raw material, intermediate products, finished products, by products and waste products. 33 U.S.C. § 1342(l)(2) (2000).

⁷⁷ *Natural Res. Def. Council v. E.P.A.*, 526 F.3d 591, 603-04 (9th Cir. 2008). NRDC asserted that Congress intended ‘waste product’ to include sediment. Brief of Petitioner, *supra* note 11, at 28.

⁷⁸ *Natural Res. Def. Council*, 526 F.3d at 604-05; see Brief of Petitioner, *supra* note 11, at 28-29; see Brief of Respondent, *supra* note 12, at 39-42.

⁷⁹ *Natural Res. Def. Council*, 526 F.3d at 604-05.

⁸⁰ *Natural Res. Def. Council*, 526 F.3d at 605.

capricious.⁸¹ The Court then listed several factors that the Court could consider in examining the permissibility of EPA's interpretation including: the plain and sensible meaning of the statute, the statutory provision in relevant context, legislative purpose and intent, and the consistency of the agency's position over time.⁸² The Court further noted that, pursuant to U.S. Supreme Court precedent, an agency interpretation that conflicts with a previous interpretation deserves less deference than an agency interpretation that is in accordance with previous interpretations.⁸³

The majority then quoted EPA's modified interpretation of § 402(l)(2) and EPA's justification for its revision.⁸⁴ The Court concluded that EPA's modified interpretation was arbitrary and capricious because of the agency's changed position on what constitutes "contamination" under § 402(l)(2) of the CWA.⁸⁵

The Court justified its conclusion by first illustrating the manner in which oil and gas facilities would be treated under EPA's prior interpretation.⁸⁶ Under EPA's previous interpretation, if an oil and gas facility discharged storm water that contained so much sediment that the discharge violated a water quality standard, then the facility would have to obtain a permit.⁸⁷ The Court then noted that EPA modified its

⁸¹ *Id.*

⁸² *Id.* (citing *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1022 (9th Cir. 2005); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)).

⁸³ *Id.* (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987)).

⁸⁴ *Id.* at 605-06(citing 71 Fed.Reg. at 898 Jan 6. 2006); 40 C.F.R. § 122.26(a)(2)(ii) (2006)). EPA's revised interpretation provided that a NPDES permit wouldn't be required for the specified sites, if the storm water discharge consisted only of sediment, even if the sediment contributed to a violation of a water quality standard. 71 Fed. Reg. at 898. EPA stated that its interpretation was reasonable in light of Congress' expansion of the 402(l)(2) exemption. 71 Fed.Reg. 33634. Furthermore, EPA contends that because construction activities are no longer required to obtain an NPDES permit and sediment is the pollutant most commonly associated with construction activity, it is reasonable to infer that sediment discharges aren't "contaminated" for NPDES permit purposes. 71 Fed.Reg. 33,634 (June 12, 2006).

⁸⁵ *Natural Res. Def. Council*, 526 F.3d at 606.

⁸⁶ *Id.*

⁸⁷ *Id.*; see also 40 C.F.R. § 122.26(c)(1)(iii)(C) (1990).

interpretation based only on a Congressional amendment that does not mention either sediment or EPA's previous interpretation of § 402(1)(2).⁸⁸

The Court then examined two of EPA's arguments for its prior interpretation.⁸⁹ EPA first argued that the previous interpretation was a "rule of administrative convenience."⁹⁰ Finally, EPA argued that prior to the Energy Policy Act of 2005 and its CWA amendments, EPA had never considered how to treat sediment under existing regulations.⁹¹

The Court dismissed both of EPA's arguments by referring to EPA statements prior to the enactment of the Energy Policy Act of 2005.⁹² For example, EPA had previously referred to potential serious water quality impacts caused by storm water discharges containing sediment.⁹³ Additionally, the Court quoted several statements attributable to EPA that indicated EPA considered storm water discharges of sediment to have significant adverse impacts on water quality.⁹⁴ Specifically, EPA had indicated in statements made when it promulgated Phase I and Phase II storm water rules, that it was concerned that storm water discharges containing sediment would negatively impact the environment in statements made when it promulgated Phase I and Phase II storm water rules.⁹⁵ Thus, the Court concluded that these statements demonstrate both that EPA's previous interpretation was not merely a rule of administrative convenience and that EPA clearly considered how sediment should be treated prior to the Energy Policy Act of 2005.⁹⁶

The Court further found that, in light of EPA's "complete departure" from its previous interpretation, EPA's modified interpretation was arbitrary and capricious.⁹⁷ The Court felt that its conclusion found additional support in the fact that neither the amendment, the statutory

⁸⁸ *Natural Res. Def. Council*, 526 F.3d at 606-07.

⁸⁹ *Id.* at 607.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (quoting 55 Fed.Reg. at 48,033-34).

⁹⁴ *Id.* (quoting 55 Fed.Reg. at 48,033-34).

⁹⁵ *Id.* (citing 55 Fed.Reg. at 48,033-34).

⁹⁶ *Id.*

⁹⁷ *Id.* at 607-08.

definitions nor the statutory exemption contained any reference to sediment.⁹⁸

D. Dissent

The dissent also approached the question of whether EPA's statutory interpretation was permissible by applying the two-step process developed in *Chevron*.⁹⁹ In applying the first step, the dissent agreed with the majority's conclusion that the plain language of § 402(1)(2) does not resolve the issue.¹⁰⁰ Furthermore, the dissent acknowledged that the legislative history associated with § 402(1)(2) does not resolve the issue.¹⁰¹

However, in applying the second step of the *Chevron* test, the dissent declined to find EPA's interpretation arbitrary and capricious.¹⁰² The dissent began its analysis by restating the majority's argument and noting that the majority justified its conclusion largely because EPA revised its interpretation.¹⁰³ Specifically, the majority opinion based its finding that EPA's interpretation was arbitrary and capricious on EPA's "inconsistent and conflicting position[s]."¹⁰⁴

The dissent then pointed to both Ninth Circuit and Supreme Court decisions where the courts had found that revised agency interpretations were permissible.¹⁰⁵ Furthermore, the Ninth Circuit had previously acknowledged that agency interpretations that conflict with previous interpretations, although entitled to less deference, are still "entitled to deference so long as the agency acknowledges and explains the departure..."¹⁰⁶

⁹⁸ *Id.* at 608.

⁹⁹ *Id.* (Callahan, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* (characterizing his conclusion as according "EPA's permissible interpretation appropriate deference.")

¹⁰³ *Id.* (citing *id.* at 606 (majority opinion)).

¹⁰⁴ *Id.* (citing *id.* at 607 (majority opinion)).

¹⁰⁵ *Id.* at 608-09.

¹⁰⁶ *Id.* at 609 (quoting *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1036 (9th Cir. 2007)).

The dissent argued that EPA provided a sufficient explanation of its departure from its previous position.¹⁰⁷ The dissent specifically noted EPA's explanation that it would be inconsistent with the Energy Policy Act amendments, which codified a permit exemption for oil and gas-related construction activities, to require a permit for the discharge of sediment, the pollutant most commonly associated with construction.¹⁰⁸ Additionally, the dissent recognized that EPA had previously associated construction permits with discharges of sediment.¹⁰⁹

The dissent also argued that EPA's original interpretation was less than a "rigid position" because EPA had indicated that it intended to consider additional information.¹¹⁰ Furthermore, the dissent noted that when Congress adopted the Energy Policy Act, EPA was required to "conduct a fresh analysis" of the permit exemption.¹¹¹ The dissent ultimately contended that the CWA gave EPA the authority to create a comprehensive NPDES permit system in light of all of the various considerations before the agency.¹¹² Therefore, according to the dissent, EPA was acting within the scope of its authority, its modified interpretation was a reasonable policy decision, and therefore the Court should defer to the agency's determination.¹¹³

V. COMMENT

A. The Law of Unintended Consequences

The Ninth Circuit's ruling in *Natural Resources Defense Council v. E.P.A.* is undoubtedly a short-term victory for environmental interests. It effectively prevents EPA from providing a NPDES permit exemption to oil and gas-related construction sites if those sites discharge storm water

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 610 (citing 42 Fed.Reg. 42,654 (June 24, 2004)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (noting that EPA indicated that it intended to examine the impact on the oil and gas industry, the impact on other CWA provisions, and the appropriate NPDES permit requirement for small construction of oil and gas exploration and production facilities).

¹¹¹ *Id.* at 609.

¹¹² *Id.*

¹¹³ *Id.* at 610-11.

runoff that contains too much sediment. However, environmental groups would be wise to postpone the “Mission Accomplished” declaration until the long-term effects of the instant decision can be better determined.

The dissent dutifully noted that the majority concluded that EPA’s revised interpretation was arbitrary and capricious because of the agency’s conflicting and changing positions.¹¹⁴ If the dissent’s characterization of the majority’s analysis is accurate and the majority opinion is truly concluding that conflicting agency determinations result in arbitrary and capricious agency action, then the significance of the instant decision cannot be overstated.

Again, the outcome in the instant decision was favorable for environmental interests. It reversed EPA action that would have had an adverse impact on water quality. However, in the future, the roles could be reversed. And, in that particular scenario, environmental groups would likely argue that an agency’s changed position does not result in arbitrary and capricious agency action while industrial groups will be able to cite the instant decision as standing for the contrary.

To illustrate the point, consider that in January a new President will assume the role of Chief Executive. In that capacity, the new President and his administration will have to choose whether to accept or reject the environmental policies of the Bush administration. If the next administration wishes to reverse the environmental policies of the last eight years, either the administration or Congress must explicitly instruct the agency to reverse course. In the absence of such authority, Congress and the administration subject the agency determination to the possibility that a court would find the agency’s reversal arbitrary and capricious.

Environmental groups likely have many policies of the Bush Administration that they would like to see reversed.¹¹⁵ For example, in 2007, the United States Fish and Wildlife Service removed the protected status of the gray wolf which resulted in several states implementing wolf

¹¹⁴ *Id.* at 608.

¹¹⁵ *See, e.g.* Natural Resources Defense Council, *The Bush Record*, <http://www.nrdc.org/bushrecord/default.asp> (last updated in 2005).

hunting as a means of population control.¹¹⁶ Although a federal court recently overturned the decision, the agency has indicated that it will continue efforts to delist the gray wolf.¹¹⁷ If the next administration wants to “completely depart” from the United States Fish and Wildlife Service’s decision to delist the gray wolf, the instant decision could potentially act as a barrier.

Again, many environmental groups would like to see this policy, and others like it, reversed. But the instant decision effectively handicaps the next administration’s agencies. And the Supreme Court has recognized that previous policy determinations should not handicap administrative agencies in this manner.¹¹⁸ In *Chevron*, the Supreme Court stated that agency determinations are “not instantly carved in stone.”¹¹⁹ Furthermore, the Court noted that an agency must consider “varying interpretations and the wisdom of its policy on a continuing basis.”¹²⁰ Here, EPA didn’t carve its previous interpretation in stone, but the Ninth Circuit did.

Again, the instant decision stands for the proposition that EPA cannot change its mind without explicit authority. The instant decision acts as an obstacle in the path of a more environmentally-friendly EPA if it seeks to depart from previous policy positions. In the future, environmental advocates will likely ask courts to uphold agency actions that are a “complete departure” from the agency’s previous interpretation. Whether courts will adopt the reasoning of the majority in the instant decision remains to be determined.

B. Arbitrary and Capricious?

In addition to its failure to consider the future consequences of its holding, the Ninth Circuit fails to adhere to Supreme Court precedent in

¹¹⁶ Tom Meersman, *Gray Wolf Gets Back on the Protected List*, MINNEAPOLIS STAR-TRIBUNE, Sept. 30, 2008 available at <http://www.startribune.com/local/29898014.html?page=1&c=y>.

¹¹⁷ *Id.*

¹¹⁸ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984).

¹¹⁹ *Id.* at 863.

¹²⁰ *Id.* at 863-64.

reaching its decision. For example, the majority quotes the Supreme Court's explanation that "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."¹²¹

It is worth noting that the Supreme Court stated only that an agency's revised interpretation was entitled to *less* deference. The corollary to that rule is that, at a minimum, the revised agency interpretation is nonetheless entitled to *some* deference. Arguably, the majority in the instant decision fails to defer to the agency's determination in any meaningful way. In fact, the majority barely addresses EPA's explanation for its departure from its previous interpretation. EPA provided the following statement in support of its revised interpretation:

[N]ow that Congress has broadened the 402(l)(2) exemption to include construction activities at oil and gas field operations, EPA believes that discharges of sediment are not necessarily indicative of such contact [with raw material, intermediate products, finished product, byproduct or waste products]. Sediment is the pollutant most commonly associated with construction activity. Hence, exempting storm water discharges of sediment from oil and gas construction sites from NPDES permitting requirements reflects a reasonable (and EPA believes, the best) interpretation of Congressional intent...¹²²

The majority summarily dismissed EPA's justification by noting that the Congressional amendment to section 402(l)(2) failed to mention either sediment or EPA's previous interpretation.¹²³ Furthermore, the majority failed to address EPA's contention that an exemption for construction activities, by implication, creates an exemption for sediment, which EPA

¹²¹ Nat. Res. Def. Council v. E.P.A., 526 F.3d 591, 605 (9th Cir. 2008) (quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987)).

¹²² *Id.* at 606 (quoting 71 Fed.Reg. at 33,634 (June 12, 2006)).

¹²³ *Id.* at 606-07.

contends is the pollutant most commonly associated with construction activities.¹²⁴

Thus, the Court seems to declare that any agency determination that conflicts with a previous agency determination is arbitrary and capricious *per se*, if Congress did not explicitly authorize the departure.

A rule of *per se* arbitrary and capriciousness is not what the Supreme Court has sanctioned, even in the context of changes in an agency's position.¹²⁵ The Supreme Court has clearly indicated that, if Congress' intent is ambiguous, an agency determination is entitled to deference.¹²⁶ The Ninth Circuit itself recognizes that every agency determination, including a determination that conflicts with a previous position, is entitled to some level of deference.¹²⁷ Commentators have long recognized that courts owe some minimal level of deference to administrative decisions.¹²⁸ Thus, the dissent seems to reach the conclusion most consistent with Ninth Circuit and Supreme Court precedent; "[B]ecause EPA's 'interpretation is at least as plausible as competing ones,' this court should defer to its construction."¹²⁹

VI. CONCLUSION

It is easy to characterize the Ninth Circuit's holding and analysis in *Natural Resources Defense Council v. E.P.A.* as a tremendous victory for

¹²⁴ *Id.* at 606.

¹²⁵ *See, e.g.* *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal").

¹²⁶ *Id.* at 740-41 (noting that the Court "accord[s] deference to agencies under *Chevron*...because of a presumption that Congress, when it left ambiguity in a statute, meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

¹²⁷ *Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1036 (9th Cir. 2007) ("[A]n agency's 'new' position is entitled to deference 'so long as the agency acknowledges and explains the departure from its prior views'" (citing *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990)).

¹²⁸ *See* Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, 23 NAT. RESOURCES & ENV'T 13, 17 (2008).

¹²⁹ *Nat. Res. Def. Council v. E.P.A.*, 526 F.3d 591, 611 (9th Cir. 2008) (quoting *Good Samaritan Hosp. v. Shala*, 508 U.S. 402, 417) (1993).

environmental interests. Once the proverbial dust settles, NRDC wins and industrial groups lose. Water quality is preserved at the expense of industrial interests. Oil and gas-related construction sites must obtain NPDES permits if its storm water discharges contain too much sediment.

But, as the old adage goes, one should be careful of what one wishes for. The Ninth Circuit's decision stands for the proposition that once an agency has made an initial determination, the agency would be acting arbitrarily and capriciously if it were to reverse course without explicit authority. In present circumstances, environmental advocates might find the Ninth Circuit's approach desirable, despite the fact that its analysis is inconsistent with both Ninth Circuit and Supreme Court precedent. However, circumstances change. It is very likely that issues dealing with agency interpretations of Congressional intent will rise again. Perhaps at that time, environmental advocates will wish administrative agencies were not constrained by the Ninth Circuit's holding that "complete departures" from previous agency determinations are arbitrary and capricious.

R. CALEB COLBERT