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## Natural Resources Defense Council v. Environmental Protection Agency: A Call For Evenhanded Application of the Clean Water Act of 1972

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## NOTE

# *NATURAL RESOURCES DEFENSE COUNCIL V. ENVIRONMENTAL PROTECTION AGENCY:*

## A CALL FOR EVENHANDED APPLICATION OF THE CLEAN WATER ACT OF 1972

### INTRODUCTION

Imagine a stream running between two open fields. On one field, the local municipality is constructing a neighborhood park. On the other, a private energy company is constructing an oil well field to extract oil from the ground. In both cases, bulldozers and earthmovers are moving dirt around the site.<sup>1</sup> Now imagine that muddy water is running off of both sites and into the stream. The sediment contained within the muddy water starts to settle out and fill in the stream.<sup>2</sup> This eventually reduces

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<sup>1</sup> See Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category 73 Fed. Reg. 72,562, 72,564 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450) (“Construction activity typically involves site selection and planning, and land-disturbing tasks such as clearing, excavating and grading.”).

<sup>2</sup> See National Pollutant Discharge Elimination System Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,728 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)). This document provides support for the EPA’s Phase II regulation of storm water discharges through the NPDES Program. With regard to impacts to streams associated with construction site runoff, the EPA notes that “[i]ntroduction of coarse sediment (coarse sand or larger) or a large amount of fine sediment is also a concern because of the potential of filling lakes and reservoirs (along with the associated remediation costs for dredging), as well as clogging stream channels.” *Id.*

the habitat for aquatic species and could result in fish dying.<sup>3</sup> Even though both sites are allowing muddy water to enter the stream, only the local municipality constructing the neighborhood park would be in violation of the Clean Water Act of 1972 (“CWA”). The municipality would be required to obtain a permit with the Environmental Protection Agency (“EPA”) that would regulate any pollutant, including sediment, coming off its construction site. Even though the private energy company is polluting the stream in the same manner, the company would be exempt from the CWA permitting requirements.

In 2006, the EPA created a permit exemption for oil and gas construction sites if the only thing coming off the site was sediment.<sup>4</sup> As a result, the hypothetical private energy company would have been allowed to pollute the stream with the sediment from its construction site. It is unfair that one construction site can get away with polluting a stream while another construction site, with similar discharges, has to comply with the CWA requirements. The EPA has a duty to apply its regulations under the CWA evenhandedly.<sup>5</sup> If the EPA treats like cases differently without support for the distinction, then the EPA would fail to meet one of its obligations under the CWA—to prohibit unlawful discharges without a permit—and would not be performing its duties under the CWA.

In *Natural Resources Defense Council v. EPA* (“*NRDC v. EPA*”), the Natural Resources Defense Council (“NRDC”) challenged the EPA’s permit exemption for oil and gas construction sites as a violation of the CWA, claiming that the exemption was inconsistent with the CWA’s goal of protecting the nation’s waters.<sup>6</sup> The United States Court of Appeals for the Ninth Circuit held that the EPA’s rule was arbitrary and capricious in light of the EPA’s consistent, long-standing position of

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<sup>3</sup> See *id.* at 68,728-29 (“Large inputs of coarse sediment into stream channels initially will reduce stream depth and minimize habitat complexity by filling in pools”).

<sup>4</sup> *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 600 (9th Cir. 2008). The EPA created a permit exemption for oil and gas construction sites after the passage of the Energy Policy Act of 2005, in which Congress amended the definition of oil and gas exploration and production to include construction sites. The EPA believed that Congress amended the definition in order to extend existing exemptions for oil and gas operations to oil and gas construction sites. *Id.*

<sup>5</sup> See *Distrigas of Mass. Corp. v. Fed. Power Comm’n*, 517 F.2d 761, 765 (1st Cir. 1975) (“[An administrative agency] has a duty to define and apply its policies in a minimally responsible and evenhanded way.”).

<sup>6</sup> *NRDC 2008*, 526 F.3d at 601 (“NRDC and the other petitioners contend that [the] EPA’s final rule and regulation, which exempts from NPDES permitting the runoff of sediment-laden storm water from oil and gas construction activities, contravenes Congressional intent and constitutes an impermissible interpretation of section 402(l)(2) of the CWA, as amended by the Energy Policy Act of 2005.”).

requiring permits for sediment discharges.<sup>7</sup> In addition, the Ninth Circuit supported its reasoning with the fact that Congress did not specifically mention the term “sediment” in the relevant statute or discuss what should or should not be exempt from permitting.<sup>8</sup>

This Note argues that the Ninth Circuit correctly held that the permit exemption was arbitrary and capricious not only because the EPA changed its long-standing position on what it considered a contaminant, but also because the permit exemption was manifestly contrary to the CWA, as it allowed discharges of a known pollutant to go unregulated from oil and gas construction sites. The permit exemption also lacked a permitting scheme to ensure oil and gas construction sites were indeed exempt. However, the court failed to address the EPA’s attempt to carve out an exemption for one segment of the construction industry, oil and gas, and not for the rest of the construction industry. By not addressing this issue, the court has left the door open for the EPA to create exemptions that give preference to certain segments of the industry, but not to others in similar situations.

Part I of this Note provides a brief overview of the CWA; a description of how sediment is regulated under the CWA; an explanation of the existing exemption for oil and gas operations; and a summary of the *Chevron* deference test, which the Ninth Circuit used to analyze the EPA’s statutory interpretation of section 402(l)(2) of the CWA. Part II summarizes the facts, procedural history, and majority and dissenting opinions in *NRDC v. EPA*. Part III explains that the Ninth Circuit correctly held that the EPA’s permit exemption was arbitrary and capricious. Part IV argues that the Ninth Circuit failed to address the EPA’s impermissible attempt to carve out an exemption for oil and gas construction sites and not to other construction sites without support for treating these like cases differently. By not addressing this issue, the court left the door open for the EPA to attempt to create similar exemptions without consideration of whether it gives preferential treatment to one group and not to another group in a similar situation.

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<sup>7</sup> *Id.* at 607-08 (“[W]e conclude that [the] EPA’s inconsistent and conflicting position regarding the discharge of sediment-laden storm water from oil and gas construction sites causes its interpretation of amended section 402(l)(2) . . . to be arbitrary and capricious.”); *see also id.* at 602 (stating that the EPA’s permit exemption would be reviewed under the Administrative Policy Act, codified at 5 U.S.C. §§ 701-06, which states that the court shall “set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance to law.”). “Arbitrary” is defined as “founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious.” BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>8</sup> *NRDC 2008*, 526 F.3d at 608.

## I. BACKGROUND

*NRDC v. EPA* involved a challenge to the EPA's permit exemption for oil and gas construction activities with sediment-only discharges.<sup>9</sup> To gain a general understanding of the issue, the following section will provide a brief overview of the following: the purpose of the CWA; the impacts of construction site sediment on the nation's waters; the application of section 402 of the CWA to oil and gas sites; and the *Chevron* deference test, under which the Ninth Circuit reviewed the EPA's permit exemption for oil and gas construction sites.

### A. PURPOSE OF THE CLEAN WATER ACT

Congress enacted the CWA in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."<sup>10</sup> The CWA makes "discharge of pollutants" unlawful except when discharges are in compliance with specified sections of the CWA.<sup>11</sup> Congress expressly gave the EPA authority to administer the CWA.<sup>12</sup> Thus, Congress gave the EPA the authority to use its best professional judgment and expertise to implement the CWA in accordance with congressional goals for the CWA.<sup>13</sup>

In carrying out the CWA, the EPA must minimize the amount of pollutants that enter the nation's waters.<sup>14</sup> One way the EPA does this is by requiring potential polluters to obtain permits that would allow

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<sup>9</sup> *Id.* at 594. NRDC contended that the permit exemption was unlawful under the CWA and asked the Ninth Circuit to vacate the rule. *Id.*

<sup>10</sup> 33 U.S.C.A. § 1251(a) (Westlaw 2008); Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category 73 Fed. Reg. 72,562, 72,564 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450).

<sup>11</sup> 33 U.S.C.A. § 1362(12) (Westlaw 2008) ("discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source); 33 U.S.C.A. § 1362(6) (Westlaw 2008) ("pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water); 33 U.S.C.A. § 1311(a) (Westlaw 2008) (referencing specific sections of the CWA that would permit pollutant discharges so long as discharges were in compliance with the conditions set forth in the specified sections; any discharges not in compliance with these sections are unlawful).

<sup>12</sup> 33 U.S.C.A. § 1251(d) (Westlaw 2008) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.").

<sup>13</sup> See *NRDC 2008*, 526 F.3d at 595 n.4 (quoting a conference report stating that the "determination of whether storm water is contaminated is within the Administrator's discretion").

<sup>14</sup> See 33 U.S.C.A. § 1251(a), (d) (Westlaw 2008) (designating the EPA as the Administrator of the CWA). The EPA, therefore, must administer the CWA consistent with the objectives of the CWA.

discharge of pollutants with certain limitations.<sup>15</sup> Section 402 of the CWA describes the National Pollutant Discharge Elimination System (“NPDES”) Program.<sup>16</sup> The EPA controls discharge of pollutants from “point sources” into bodies of water through this program.<sup>17</sup> The EPA requires dischargers to obtain NPDES permits, also referred to as storm water discharge permits, in order to regulate pollutant discharges.<sup>18</sup>

### *1. Construction Site Sediment*

“Sediment is, by weight, the greatest pollutant of water resources.”<sup>19</sup> The EPA had expressed concern that construction activities, although temporary in nature, were a major source of water quality issues that required oversight and enforcement.<sup>20</sup> The EPA asserted that construction sites “contribute more sediment to streams than previously deposited [naturally] over several decades.”<sup>21</sup> When developing regulations to control construction site discharges, the EPA referred to several studies that documented the magnitude of sediment deposition

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<sup>15</sup> 40 C.F.R. § 122.1(b)(1) (Westlaw 2009) (“The NPDES program requires permits for the discharge of ‘pollutants’ from any ‘point source’ into ‘waters of the United States.’”).

<sup>16</sup> See generally 33 U.S.C.A. § 1342(a)-(q) (Westlaw 2008) (outlining, among other things, who can issue permits that allow discharge of pollutants, who can administer the NPDES program, limitations on permit requirements, and how certain activities would be permitted).

<sup>17</sup> 33 U.S.C.A. § 1362(14) (Westlaw 2008) (defining “point source” to mean any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged).

<sup>18</sup> 40 C.F.R. § 122.1(b)(1) (Westlaw 2009) (requiring storm water permits for pollutant discharges into “waters of the United States”).

<sup>19</sup> G. ALLAN BURTON, JR., & ROBERT E. PITT, *STORMWATER EFFECTS HANDBOOK – A TOOLBOX FOR WATERSHED MANAGERS, SCIENTISTS, AND ENGINEERS* 32 (2002), available at <http://www.epa.gov/ednrmrl/publications/books/handbook/hirezhandbook.pdf>.

<sup>20</sup> See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,033 (Nov. 16, 1990) (codified at 40 C.F.R. § 122.26(c)(1)(iii) (2006)).

<sup>21</sup> *Natural Res. Def. Council v. EPA* (NRDC 1992), 966 F.2d 1292, 1306 (9th Cir. 1992); see also National Pollutant Discharge Elimination System Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,728-29 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)) (referencing several reports and studies supporting the EPA’s statements that streams were affected by construction activity that led to stream impairment); Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category 73 Fed. Reg. 72,562, 72,564 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450) (“Construction activity typically involves site selection and planning, and land-disturbing tasks such as clearing, excavating and grading. Disturbed soil, if not managed properly, can be easily washed off-site during storm events. Although streams and rivers naturally carry sediment loads, discharges from construction activity can elevate these loads to levels above those in undisturbed watersheds.”).

into streams.<sup>22</sup> One study documented that construction sites contributed nineteen times the sediment contributed by agricultural areas.<sup>23</sup> Sediment discharges have been shown to extend far downstream from the actual construction sites.<sup>24</sup> Because the impacts of sediment include stream degradation, loss of fish habitat, increased flooding, and negative impacts to recreation,<sup>25</sup> the EPA requires a permit for a construction site if the activity involves disturbance of one acre of land or more.<sup>26</sup> The NPDES permit requires that sediment controls be in place to minimize sediment from running off the construction site and into a waterway.<sup>27</sup>

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<sup>22</sup> See National Pollutant Discharge Elimination System Regulations (NPDES) for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,729 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)) (“A highway construction project in West Virginia disturbed only 4.2 percent of a 4.72-square-mile basin, but resulted in a three-fold increase in suspended sediment yields . . . . During the largest storm event, it was estimated that 80 percent of the sediment in the stream originated from the construction site. . . . A 1970 study determined that sediment yields from construction areas can be as much as 500 times the levels detected in rural areas.”).

<sup>23</sup> *Id.* (citing a monitoring study of sediment loads from three residential construction sites as compared to an agricultural area).

<sup>24</sup> *Id.* (referencing a study that documents the impact of construction site sediment approximately 5.6 kilometers downstream from the construction site).

<sup>25</sup> See David L. Hatchett, *Regulation of Construction Site Stormwater Runoff: We Can Do Better Than This*, 29 IND. L. REV. 153, 155 (1995) (“The direct economic impacts of sedimentation include water storage loss, flooding, dredging costs, water treatment and use, and damage to fisheries. Water-based recreation also suffers damage from sedimentation . . . due to destruction of fish habitat, siltation of recreation activities, and eutrophication of water ways.”); see also NPDES Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. at 68,728-29 (“Large inputs of coarse sediment into stream channels initially will reduce stream depth and minimize habitat complexity by filling in pools.”).

<sup>26</sup> 40 C.F.R. § 122.26(b)(15)(i) (2006). See Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category 73 Fed. Reg. 72,562, 72,571 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450) (“Typically, construction activities involve clearing the land of vegetation, digging, earth moving and grading, followed by the active construction period when the affected land is usually left denuded and the soil compacted, often leading to an increase in the peak discharge rate and the total volume of storm water discharged and higher rates to erosion. . . . Where the soil surface is unprotected, soil and sand particles may be easily picked up by wind and/or washed away by rain or snow melt.”); see also National Pollutant Discharge Elimination System Permit (NPDES) Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,992 (Nov. 16, 1990) (codified at 40 C.F.R. § 122.26(c)(1)(iii) (2006)) (“Even a small amount of construction may have a significant negative impact on water quality in localized areas.”).

<sup>27</sup> See Effluent Limitations Guidelines and Standards, 73 Fed. Reg. at 72,565. The EPA requires that a discharger develop and implement a storm water pollution prevention plan that describes what control measures the discharger will be implementing to minimize discharges from the construction sites. In addition, the EPA requires dischargers to monitor, inspect and report releases of hazardous substances. *Id.*

## 2. Oil and Gas Exploration and Production

Congress recognized that oil and gas operators expended resources toward implementing best management practices on their sites to minimize pollutant discharges.<sup>28</sup> Therefore, Congress did not want to burden oil and gas operators with a permit requirement.<sup>29</sup> Congress also saw a potential drain on the EPA's staff resources if the EPA were required to permit all oil and gas operators.<sup>30</sup> In consideration of these two factors, Congress allowed the EPA to create a NPDES permit exemption for *uncontaminated* storm water runoff from oil and gas operations.<sup>31</sup>

The EPA outlined when a discharge from an oil or gas operation would be considered a "contaminant" that triggered the NPDES permit requirement.<sup>32</sup> The exemption stated that the Administrator would not require a permit for storm water discharges from oil and gas exploration and production sites that "are not contaminated by contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations."<sup>33</sup>

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<sup>28</sup> NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. at 48,029 ("Congress also recognized that there are numerous situations in the mining and oil and gas industries where storm water is channeled around plants and operations through a series of ditches and other structural devices in order to prevent pollution of the storm water by harmful contaminants. From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit."); *see also id.* at 48,034 ("Techniques to prevent or control pollutants in storm water discharges from construction are well developed and understood. A primary control technique is good site planning. A combination of nonstructural and structural best management practices are typically used on construction sites. Relatively inexpensive non-structural vegetative controls, such as seeding and mulching, are effective control techniques. In some cases, more expensive structural controls may be necessary, such as detention basins or diversions.").

<sup>29</sup> *Id.* at 48029 ("From the standpoint of resource drain on both EPA as the permitting agency and potential permit applicants, the conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit.").

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ("[S]ection 402(I)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from these facilities. . . . Storm water discharges that are not contaminated by contact with any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations will not be required to obtain a storm water discharge permit.").

<sup>32</sup> 40 C.F.R. § 122.26(c)(1)(iv) (2006) ("The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.").

<sup>33</sup> 33 U.S.C.A. § 1342(I)(2) (Westlaw 2009).



The EPA required an NPDES permit when an oil and gas operation either released a reportable quantity of oil or hazardous substances in storm water or if the discharge “contribute[d] to a violation of a water quality standard.”<sup>34</sup>

The exemption was limited to oil and gas operation activities, while oil and gas construction sites were required to obtain an NPDES permit.<sup>35</sup> However, the EPA discovered that this permit requirement would impact up to 30,000 oil and gas construction sites, which was more than the EPA intended to cover.<sup>36</sup> The EPA found that the permit requirement would have a significant economic impact on these sites and wanted to evaluate the magnitude of impact.<sup>37</sup> Consequently, the EPA did not require oil and gas construction sites disturbing one or more acres to obtain a permit until it completed its impact study.<sup>38</sup>

## B. STATUTORY INTERPRETATION UNDER THE *CHEVRON* DEFERENCE TEST

The Administrative Procedure Act (“APA”) established the framework for judicial review of agency actions.<sup>39</sup> The APA states, in

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<sup>34</sup> 40 C.F.R. § 122.26(c)(1)(iii) (2006) (“The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility: (A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or (B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or (C) Contributes to a violation of a water quality standard.”).

<sup>35</sup> *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 597 (9th Cir. 2008); see 33 U.S.C.A. § 1362(24) (Westlaw 2008) (“The term ‘oil and gas exploration, production, processing, or treatment operations or transmission facilities’ means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.”); see also U.S. ENVIRONMENTAL PROTECTION AGENCY, INDUSTRIAL STORMWATER FACT SHEET SERIES, SECTOR I: OIL AND GAS EXTRACTION FACILITIES (2006), available at [http://www.epa.gov/npdes/pubs/sector\\_i\\_oilgas.pdf](http://www.epa.gov/npdes/pubs/sector_i_oilgas.pdf) (Construction activities at an oil and gas facility include installing access roads, drill pads, mud/reserve pits, personnel quarters, surface impoundments, storage tanks, and pipelines.).

<sup>36</sup> *NRDC 2008*, 526 F.3d at 598 n.10 (noting the EPA’s initial assumption that only a few oil and gas construction sites would be affected by the permit requirement on the presumption that most of these sites disturbed less than one acre).

<sup>37</sup> *Id.* at 598.

<sup>38</sup> *Id.* (The EPA deferred the application of the permit requirement to oil and gas construction sites for a total of three years and three months in order to collect information about oil and gas construction sites and analyze the economic impact the permit requirement had on these activities.).

<sup>39</sup> 5 U.S.C.A. § 706 (Westlaw 2009).

part, that

[t]he reviewing court shall— hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .<sup>40</sup>

To determine if an agency's action is arbitrary, capricious, or an abuse of discretion, the United States Supreme Court established what is referred to as the *Chevron* deference test in 1984 when it decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>41</sup> In step one, a court must look at the plain language of the statute and the legislative history to see if Congress unambiguously expressed its clear intent as to how the statute is to be interpreted by the administering agency.<sup>42</sup> If the court finds that Congress has not clearly addressed the specific issue in question within the statute, it analyzes the agency's interpretation under step two.<sup>43</sup>

In *Chevron* step two, the court looks at whether the administering agency's interpretation was a permissible one under the statute.<sup>44</sup> The court cannot substitute its own interpretation of the statute.<sup>45</sup> Rather, the court must determine whether the agency's statutory interpretation was reasonable, within its authority provided by Congress, and not contrary

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<sup>40</sup> 5 U.S.C.A. § 706(2)(A)-(D) (Westlaw 2009).

<sup>41</sup> Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1236-37 (2007). This article describes the first deference test the U.S. Supreme Court established in 1944 in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The *Skidmore* test provided that deference to an administrator would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. The Court further stated that each statutory interpretation case must stand on its own facts, thereby allowing the court to be in a position to interpret the statute for the case at bar as opposed to deferring to the administrator's interpretation. *Id.*

<sup>42</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.").

<sup>43</sup> *Id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ("[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.").

to congressional goals for the statute.<sup>46</sup> If the court finds that an agency's statutory interpretation satisfies either step of the *Chevron* deference test, the court will defer to the agency's interpretation.<sup>47</sup>

The Supreme Court recognized that there were times when Congress purposely writes an ambiguous statute.<sup>48</sup> The Court understood that Congress intended for the administering agency, which Congress designated as the administrator of the statute, to fill the gap between the ambiguous statute and the congressional goals of the statute.<sup>49</sup> Simply put, the agency's interpretation is given controlling weight unless found to be arbitrary, capricious, or manifestly contrary to the congressional intent of the statute.<sup>50</sup>

The Supreme Court asserted that an agency interpretation of a relevant provision that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.<sup>51</sup> Yet the Supreme Court recognized that "the mere fact that an agency interpretation contradicts a prior position is not fatal."<sup>52</sup> The agency must justify its change in position with reasoned analysis.<sup>53</sup> A court cannot reasonably find that an agency has acted within its delegated powers if that agency's assertions lack support.<sup>54</sup> Additionally, failing to provide an implementable permitting scheme to verify compliance provides support for an argument that an agency's action is

<sup>46</sup> *Id.* at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation [was] not one that Congress would have sanctioned.") (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

<sup>47</sup> *See id.* at 843-44 (presenting the two step deference test).

<sup>48</sup> *Id.* at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 844.

<sup>51</sup> *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 605 (9th Cir. 2008) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987)).

<sup>52</sup> *Id.* at 608 (Callahan, J., dissenting) (quoting *Smiley v. Citibank* 517 U.S. 735, 742 (1996)).

<sup>53</sup> *Id.* at 609 (Callahan, J., dissenting) ("Courts will accord *Chevron* deference to an agency's revised interpretation of a statute if the agency justifies that revision with 'reasoned analysis.'").

<sup>54</sup> *See, e.g., Natural Res. Def. Council v. EPA (NRDC 1992)*, 966 F.2d 1292, 1305 (9th Cir. 1992) (stating, in the context of review of the EPA's permit exemption for light industries, which was not extended to the entire industry class, that "[w]ithout supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress").

arbitrary and capricious.<sup>55</sup>

Although Congress gives an administrating agency discretion to use its expertise in interpreting and implementing a statute, this is not a license for the agency to treat similar cases differently.<sup>56</sup> The U.S. Court of Appeals for the District of Columbia explained that

[a]n agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases . . . . The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard.<sup>57</sup>

Therefore, when an agency fails to evenhandedly apply a requirement in two cases that are “functionally indistinguishable,” the agency’s actions are deemed arbitrary and capricious.<sup>58</sup>

## II. *NATURAL RESOURCES DEFENSE COUNCIL v. ENVIRONMENTAL PROTECTION AGENCY*

In *NRDC v. EPA*, the Ninth Circuit considered whether the EPA’s permit exemption for oil and gas construction sites that had sediment-only discharges was in violation the CWA.<sup>59</sup> The court held that the EPA’s creation of the permit exemptions was arbitrary and capricious because the exemptions were a “complete departure” from the EPA’s long-standing position that oil and gas construction site sediment was a

<sup>55</sup> See *id.* The court stated that the EPA’s proposed exemption should have required a light industry self-report in order to demonstrate that its facility did not have “actual exposure” to storm water and would not require a permit to discharge. Alternatively, the EPA would have to physically go to light industrial sites to verify that these sites were indeed exempt from the permit requirements. However, the Ninth Circuit found that the proposed regulation failed to contemplate the likelihood that either the light industry would self-report or that the EPA would physically verify compliance. This further supported the Ninth Circuit’s decision that the EPA’s proposed exemption for light industry was arbitrary and capricious. *Id.*

<sup>56</sup> See *United States v. Diapulse Corp. of Am.*, 748 F.2d 56, 62 (2d Cir. 1984) (rejecting the Food and Drug Administration’s refusal to allow the marketing of Diapulse’s medical device while allowing the marketing of another company’s device that was roughly identical to Diapulse’s device, and insisting that the Food and Drug Administration apply the same legal standards to Diapulse afforded to Diapulse’s competitors); see also *Distrigas of Mass. Corp. v. Fed. Power Comm’n*, F.2d 761, 765-66 (1st Cir. 1975) (“While the Agency has broad powers to regulate, and in so doing to choose between rulemaking and individual decisional processes, it also has a duty to define and apply its polices in a minimally responsible and evenhanded way.”).

<sup>57</sup> *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996).

<sup>58</sup> *Id.*

<sup>59</sup> *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 594 (9th Cir. 2008) (NRDC challenged the permit exemption as an unlawful interpretation of the amended section 402(I)(2) of the CWA.).

contaminant that must be regulated.<sup>60</sup>

### A. FACTS AND PROCEDURAL HISTORY

The EPA was in the midst of assessing the economic impact of the NPDES permit requirement on oil and gas construction activities when Congress enacted the Energy Policy Act in 2005.<sup>61</sup> The Energy Policy Act represents a comprehensive national energy policy that addresses every form of energy.<sup>62</sup> The goal of the Act was to “encourage energy efficiency and conservation, promote alternative and renewable energy sources, reduce our dependence on foreign sources of energy, and increase domestic production.”<sup>63</sup> With regard to oil and gas activities, Congress sought to reduce impediments to domestic oil and gas exploration and production.<sup>64</sup> As a result, Congress amended the definition of oil and gas exploration and production in section 402(l)(2) of the CWA to include construction activities.<sup>65</sup> Congress revised the definition as follows:

The term “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means all field activities or operations associated with exploration, production,

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<sup>60</sup> *Id.* at 607.

<sup>61</sup> *Id.* at 598 (The EPA postponed the application of the NPDES permit requirements to oil and gas construction sites until June 12, 2006—three years and three months after the effective date of the permit requirement—in order to assess the economic impact the permit requirement would have on these sites); see Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>62</sup> Legislation Committee, *Committee Report*, 27 ENERGY L.J. 349, 349 (2006) (providing a brief summary of each Title contained in the Energy Policy Act).

<sup>63</sup> U.S. Department of the Interior, *Implementing the Energy Policy Act at the Department of the Interior*, <http://www.doi.gov/iepa/> (last visited Dec. 9, 2008) (stating that the Department of the Interior will play a major role in meeting the goals and objectives of the Energy Policy Act because eighty-six sections of the Energy Policy Act require the Department of the Interior to take action).

<sup>64</sup> See Legislation Committee, *Committee Report*, 27 ENERGY L.J. 349, 353 (2006) (“Similarly, Section 323 of EPAAct of 2005 changes the definition of oil and gas exploration and production in the Federal Water Pollution Control Act, also removing an impediment to exploration and production of natural gas. EPAAct 2005 also creates a royalty-in-kind program, which would permit the Department of the Interior to receive royalties for production of natural gas on federal lands in kind rather than in cash. This important provision should make major strides in reducing the disputes between natural gas producers and the federal government with regard to the valuation of natural gas produced on federal lands. Over time this program, once implemented, should reduce the recurrent litigation between producers and the government.”); see also Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land, 67 Fed. Reg. 79,828, 79,829 (Dec. 30, 2002) (codified at 40 C.F.R. pt. 122 (Westlaw 2009)) (determining that approximately 30,000 oil and gas construction sites were required to obtain NPDES permits and that the compliance cost would range from \$1,206 to \$8,709).

<sup>65</sup> 33 U.S.C. § 1362(24) (Westlaw 2008); *NRDC 2008*, 526 F.3d at 599.

processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, *whether or not such field activities or operations may be considered to be construction activities.*<sup>66</sup>

The EPA codified storm water permit exemptions for oil and gas operations based upon the original definition in section 402(I)(2) of the CWA, which did not include construction activities.<sup>67</sup> Although the storm water permit exemption language remained unchanged by the Energy Policy Act, the EPA reevaluated this exemption in light of the amended definition of oil and gas exploration and production.<sup>68</sup>

In June 2006, the EPA published the permit exemption amending the NPDES permit requirements for oil and gas construction sites.<sup>69</sup> The permit exemption provided that oil and gas construction activities were eligible for NPDES permit exemptions if those activities resulted in sediment-only discharges, even if there was a water quality violation.<sup>70</sup> The EPA reasoned that sediment alone was not necessarily indicative of “contamination through contact with raw material, intermediate products, finished product, byproduct or waste products.”<sup>71</sup> The EPA further stated that if sediment came in contact with any of these named materials, with a result of either reportable quantities requiring notification or a water quality standard violation for a pollutant other than sediment, the EPA would require an NPDES permit.<sup>72</sup>

<sup>66</sup> 33 U.S.C. § 1362(24) (Westlaw 2008) (emphasis added).

<sup>67</sup> 40 C.F.R. § 122.26(c)(1)(iii) (2006) (providing NPDES permit requirement triggers for oil and gas exploration facilities).

<sup>68</sup> *NRDC 2008*, 526 F.3d at 599 (“In January 2006, [the] EPA gave notice of proposed rule-making that would modify [the] EPA’s NPDES storm water permit regulations to reflect the Energy Policy Act’s change to the definition of oil and gas operations and facilities and the related impact on section 402(I)(2).”).

<sup>69</sup> *Id.* at 600 (“In June 2006, EPA promulgated the challenged final rule-entitled ‘Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities’—codifying changes to the CWA resulting from the Energy Policy Act of 2005.”).

<sup>70</sup> *Id.* (“[The] EPA cannot require permits for storm water discharges comprised solely of sediment from oil and gas construction activities, even if such discharges contribute to a violation of a water quality standard.”).

<sup>71</sup> *Id.* (quoting Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,628, 33,361 (codified at 40 C.F.R. § 122.26(a)(2)(ii)).

<sup>72</sup> Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,628, 33,634 (June

The NRDC, along with the Oil and Gas Accountability Project, Amigos Bravos, and Powder River Basin Resource Council, challenged the EPA's permit exemption as an impermissible interpretation of section 402(l)(2).<sup>73</sup> The Ninth Circuit granted review under its authority for appellate review of the EPA rules governing the underlying procedures.<sup>74</sup>

## B. THE NINTH CIRCUIT DECISION

A panel of the Ninth Circuit, in a 2-1 decision, held that the EPA's statutory interpretation of section 402(l)(2), as amended by the Energy Policy Act of 2005, was arbitrary and capricious because of the EPA's change in position regarding what constitutes a "contaminant" in relation to oil and gas activities.<sup>75</sup> The majority vacated the EPA's rule and remanded the matter back to the agency for further proceedings consistent with the court's opinion.<sup>76</sup> The dissent, however, stated that the EPA acted within its authority when it reassessed the permit exemption in light of Congress's intent to provide more exemptions for oil and gas activities to meet the goals of the Energy Policy Act.<sup>77</sup>

### 1. Majority

The Ninth Circuit majority used the *Chevron* deference test to determine whether to give deference to the EPA's NPDES permit exemption for oil and gas construction activities.<sup>78</sup> In *Chevron* step one, the court evaluated whether Congress expressly intended to exempt oil and gas construction activities from NPDES permitting when such activities discharged only sediment.<sup>79</sup>

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12, 2006) (codified at 40 C.F.R. § 122.26(c)(1)(iii) (2006)) ("Sediment could, however, serve as a vehicle for discharges of other pollutants, such as oil or grease or hazardous substances (e.g., heavy metals) and if a [reportable quantity] is exceeded or a water quality standard violated for such other pollutants, such contamination would trigger permitting requirements.").

<sup>73</sup> *NRDC 2008*, 526 F.3d at 601.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 607-08 (asserting that the permit exemption was inconsistent and in conflict with the EPA's long-standing position on sediment-laden storm water).

<sup>76</sup> *Id.* at 608.

<sup>77</sup> *Id.* at 611 (Callahan, J., dissenting) ("Not only was EPA's interpretation in flux at the time it promulgated the storm water discharge rule, but it was guided by its interpretation of Congress's intent in the Energy Policy Act to provide greater exemptions with regard to the discharge of sediment from oil and gas construction activities.").

<sup>78</sup> *Id.* at 602 (stating the Ninth Circuit's standard of review).

<sup>79</sup> *Id.* at 526 F.3d at 603 ("First, we must determine whether Congress . . . unambiguously intended to exempt from NPDES permitting requirements for oil and gas construction activities the discharge of storm water runoff contaminated solely with sediment.").

The EPA argued that it was Congress's intent to allow such exemptions for oil and gas construction activities.<sup>80</sup> In support of its contention, the EPA referred to statements made by members of Congress who had opposed the amendment to section 402(l)(2) of the CWA.<sup>81</sup> The EPA specifically relied on Senator Jim Jeffords's explanation that storm water discharges typically contained "pollutants such as oil and grease, chemicals, nutrients, metals, bacteria, and particulates."<sup>82</sup> The EPA stated that the senator's description was synonymous with sediment.<sup>83</sup> The EPA argued that the opposition's statements confirmed Congress's intent to exempt storm water discharges from oil and gas related construction activities, regardless of sediment's impact on water quality.<sup>84</sup> The court was not persuaded by this argument and noted that statements made by opponents, like Senator Jeffords, were not authoritative.<sup>85</sup>

The court found that the plain language of section 402(l)(2) did not expressly state that exempting sediment-only discharges was Congress's intent.<sup>86</sup> In addition, the court stated that Congress did not explicitly mention the word "sediment" in the amended definition of oil and gas exploration and production.<sup>87</sup> Furthermore, there was limited legislative history on this section, which did not specifically address whether "sediment" discharges should be exempt from permit requirements.<sup>88</sup> As a result, the court found that Congress was silent on the issue of exempting sediment-only discharges from oil and gas construction

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<sup>80</sup> *Id.* at 604 (referring to the legislative history of the amendment to section 402(l)(2) of the CWA).

<sup>81</sup> *Id.* (stating that the EPA noted that one of the reasons the opponents of the Energy Policy Act voted against it was because it exempted from CWA regulations the storm water discharges from oil and gas construction sites).

<sup>82</sup> *Id.*; see also 151 CONG. REC. S9335-01, S9349 (daily ed. July 29, 2005) (statement of Sen. Jeffords). Senator Jeffords of Vermont opposed § 323 of the Energy Policy Act, stating that this section "changes how the Environmental Protection Agency is able to regulate oil and gas construction activities under the Phase I and Phase II of the Clean Water Act Storm water Program." Further, Senator Jeffords stated that exempting oil and gas construction activities from storm water permitting would negatively impact water quality and biological resources in our nation's waters. Finally, Senator Jeffords recommended that the EPA should continue to require discharge permits to oil and gas construction sites consistent with requirements for other types of construction activities.

<sup>83</sup> *NRDC 2008*, 526 F.3d at 604.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 605 ("[S]tatements by opponents are among the least authoritative, as they are meant to defeat the bill in question and do not 'represent the considered and collective understanding of those Congressmen' who passed the bill into law.").

<sup>86</sup> *Id.* at 603 (stating that section 402(l)(2) did not specifically mention the term "sediment").

<sup>87</sup> *Id.* at 608.

<sup>88</sup> *Id.* at 604.



activities from permit requirements.<sup>89</sup> Therefore, the Ninth Circuit concluded that *Chevron* step one was not satisfied.<sup>90</sup>

The court then proceeded to step two of the *Chevron* deference test, analyzing the EPA's statutory interpretation to determine whether it was a permissible reading of the statute.<sup>91</sup> The EPA argued that because sediment was most commonly associated with construction site discharges, Congress must have intended to exempt construction-related sediment.<sup>92</sup> The EPA argued that if this were not the case, the amendment would be meaningless.<sup>93</sup> However, the EPA conceded that it had not considered exempting sediment-only discharges from NPDES permit requirements prior to the Energy Policy Act of 2005.<sup>94</sup> Moreover, the agency admitted that it previously required storm water permits for sediment discharges that violated water quality limitations even if the sediment was uncontaminated.<sup>95</sup> Lastly, the EPA argued that requiring permits for sediment discharges was a "rule of administrative convenience" because it had presumed that sediment runoff from oil and gas construction sites *likely* came in contact with pollutants.<sup>96</sup>

The court found the EPA's arguments "unpersuasive in light of EPA's own statements during its rule-making process prior to the passage of the Energy Policy Act."<sup>97</sup> The court's finding was based upon the agency's long-standing position that oil and gas construction sites were prime candidates for storm water permitting because of the serious water quality impacts associated with the sediment-laden discharges.<sup>98</sup> In addition, the court used the EPA's past findings that construction activities resulted in greater sediment runoff than agriculture and

<sup>89</sup> *NRDC 2008*, 526 F.3d at 605 ("Because we conclude that Congress was silent on the issue, we move to *Chevron* step two.").

<sup>90</sup> *Id.* at 605 ("Because we conclude that Congress was silent on the issue, we move to *Chevron* step two.").

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 605-06 (The EPA reasoned that because Congress broadened the existing exemptions in section 402(l)(2) for construction sites, it "believe[d] that discharges of sediment [were] not necessarily indicative of such contact [with raw material, intermediate products, finished product, byproduct or waste products].").

<sup>93</sup> *Id.* at 606.

<sup>94</sup> *Id.* ("[The] EPA concedes that, prior to the Energy Policy Act amendment to the CWA, if a gas and oil facility discharged storm water runoff contaminated only with sediment resulting in a water quality violation, that facility did not meet the conditions for permit exemption under 402(l)(2) and thus was required to apply for a permit.").

<sup>95</sup> *Id.* at 606.

<sup>96</sup> *Id.* at 607 (indicating that the pollutants of concern at an oil and gas construction site include overburden, raw material, intermediate products, finished product, byproduct, or waste products).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

forestlands as additional support for its conclusion.<sup>99</sup> The court also disagreed with the EPA's statement that this was a rule of mere administrative convenience because of the EPA's prior statements about sediment.<sup>100</sup> Finally, the court found that because of the agency's long-standing concern over sediment-laden storm water discharges, and studies supporting its concerns, the EPA was compelled to regulate sediment discharges under the CWA.<sup>101</sup>

As a result, the court found that the EPA's statutory interpretation of section 402(l)(2) represented a "complete departure" from what the EPA considered to be a contaminant from oil and gas construction sites.<sup>102</sup> Therefore, the court held that the EPA's statutory interpretation of section 402(l)(2), as amended by the Energy Policy Act of 2005, was arbitrary and capricious.<sup>103</sup>

## 2. Dissent

Circuit Judge Consuelo Callahan dissented. Judge Callahan agreed that Congress did not expressly state its intent to exempt sediment-only discharges from NPDES permitting in either the plain language of section 402(l)(2) or its legislative history.<sup>104</sup> The dissent also agreed that the validity of the EPA's permit exemption depended on the result of the second step of the *Chevron* deference test.<sup>105</sup> However, the dissent asserted that the majority's analysis under step two was incorrect.<sup>106</sup>

The dissent rejected the majority's reasoning that the EPA's permit exemption was arbitrary and capricious simply because the EPA had a long-standing position that sediment discharges that violated water quality standards required an NPDES permit.<sup>107</sup> Judge Callahan stated that

<sup>99</sup> *Id.* ("[S]ediment runoff rates from construction sites are typically 10 to 20 times that of agricultural lands . . . [and] 1,000 to 2,000 times that of forest lands.").

<sup>100</sup> *Id.* ("In light of [the] EPA's prior statements, it can hardly be said that EPA's previous stance was merely a 'rule of administrative convenience' or that [the] EPA never considered how sediment alone should be treated prior to the Energy Policy Act of 2005.").

<sup>101</sup> *Id.* at 607.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 608 (Callahan, J., dissenting) (agreeing with the majority's analysis under step one of the *Chevron* deference test).

<sup>105</sup> *Id.* (Callahan, J., dissenting) ("[A]s the majority correctly concludes, this dispute must be resolved at step two of the *Chevron* analysis.").

<sup>106</sup> *Id.* (Callahan, J., dissenting) ("I respectfully part course with the majority and accord [the] EPA's permissible interpretation appropriate deference.").

<sup>107</sup> *Id.* at 610 (Callahan, J., dissenting) (stating reasons the majority's conclusions were incorrect).

there appears to be no authority that would compel [the] EPA to stay its hand until Congress specifically amended the ambiguous exemption at section 402(l)(2) to include the word “sediment.” Second, the mere fact that [the] EPA revisited the exemption after passage of the Energy Policy Act does not render the results of its analysis arbitrary.<sup>108</sup>

The dissent went on to explain that prior to the passage of the Energy Policy Act, the EPA had not committed to a rigid position regarding sediment discharges related to oil and gas construction sites.<sup>109</sup> The dissent opined that the EPA acted within its authority when revisiting its statutory interpretation of section 402(l)(2) of the CWA.<sup>110</sup> The dissent concluded that the EPA’s interpretation was at least as plausible as competing ones and the court should have deferred to the agency’s interpretation of section 402(l)(2) of the CWA as amended by the Energy Policy Act.<sup>111</sup>

### III. THE EPA’S INTERPRETATION OF CWA SECTION 402(L)(2) WAS ARBITRARY AND CAPRICIOUS BECAUSE IT WAS A COMPLETE DEPARTURE FROM THE EPA’S LONG-STANDING POSITION THAT SEDIMENT DISCHARGES MUST BE REGULATED

The Ninth Circuit panel based its decision on the fact that the permit exemption was a complete departure from the EPA’s long-standing position that sediment was a contaminant that invoked the NPDES permit requirement.<sup>112</sup> The court’s decision was correct because sediment is a pollutant under the CWA; therefore, the EPA is compelled to regulate sediment discharges through NPDES permits.<sup>113</sup> The permit exemption would have allowed sediment discharges from an oil and gas construction site to go unregulated, which would have gone against the CWA provision that prohibits discharge of pollutants without a permit.<sup>114</sup>

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<sup>108</sup> *Id.* (Callahan, J., dissenting).

<sup>109</sup> *Id.* (Callahan, J., dissenting).

<sup>110</sup> *Id.* at 610-11 (Callahan, J., dissenting).

<sup>111</sup> *Id.* at 611 (Callahan, J., dissenting).

<sup>112</sup> *Id.* at 607 (majority opinion).

<sup>113</sup> See Effluent Limitation Guidelines and Standards for the Construction and Development Point Source Category, 73 Fed. Reg. 72,562, 72,571 (proposed Nov. 28, 2008) (to be codified at 40 C.F.R. pt. 450) (“The most prominent and most widespread pollutant discharged from [construction and development] sites is sediment.”); see also *NRDC 2008*, 526 F.3d at 607 (stating that the court recognized the EPA’s reports and studies supporting the fact that construction site discharges contribute a significant amount of pollutants that the EPA was compelled to regulate).

<sup>114</sup> 33 U.S.C.A. § 1342(a) (Westlaw 2008) (“[T]he Administrator may . . . issue a permit for

## A. THE PERMIT EXEMPTION CONTRAVENED THE GOALS OF THE CWA

The EPA's permit exemption must comport with the CWA's overarching goal.<sup>115</sup> For instance, in *American Mining Congress v. EPA*, the Ninth Circuit reviewed the EPA's regulation that required storm water discharge permits for inactive mining operations.<sup>116</sup> The plaintiffs argued that the language in the statute clearly regulated only discharges from industrial activity.<sup>117</sup> Since inactive mines were no longer active industrial sites, the plaintiffs asserted that a discharge permit was not required.<sup>118</sup> However, the statute stated that permits were required for "discharge[s] associated with industrial activity."<sup>119</sup> The EPA argued that discharges from past mining activities were associated with industrial activity<sup>120</sup> and noted that some inactive mining sites still represented a significant source of contamination that required regulating.<sup>121</sup>

The Ninth Circuit found that it was reasonable for the EPA to require discharge permits for inactive mining operations.<sup>122</sup> The court found the EPA's decision stemmed from the undisputed fact that there was ongoing contamination from these sites.<sup>123</sup> The court went on say that the EPA further limited the scope of regulation of inactive mines to sites where discharges likely became contaminated through association

discharge of a pollutant."); see 33 U.S.C.A. § 1251(a) (Westlaw 2008).

<sup>115</sup> See 33 U.S.C.A. § 1251(d) (Westlaw 2008). Congress named the EPA the Administrator of the CWA. As such, the EPA is charged with implementing the CWA in accordance with the stated congressional goal of the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." *Id.*

<sup>116</sup> *Am. Mining Cong. v. EPA*, 965 F.2d 759, 764 (9th Cir. 1992) ("Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), authorizes [the] EPA to require a permit for any storm water discharge 'associated with industrial activity.' AMC contends that [the] EPA's regulation of discharges from inactive mines under this section contravenes Congress' intent.").

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (explaining that the plain language of the statute regulated "industrial activity" and that since there was no "activity" at an inactive mine, the statute would not apply).

<sup>119</sup> *Id.* (emphasis added).

<sup>120</sup> *Id.* (explaining that "past industrial activity . . . including mines, may be 'associated with' that industrial activity, and referencing 40 C.F.R. § 122.26(b)(14), which defines "discharge associated with industrial activity" as discharges from "areas where significant industrial activity has taken place in the past and significant materials remain and are exposed to storm water").

<sup>121</sup> *Id.* at 765.

<sup>122</sup> See *id.* at 765 ("We conclude that [the] EPA's regulation meets the reasonableness standard.").

<sup>123</sup> See *id.* (referencing the EPA's statement that mining sites represented a significant source of contaminated storm water runoff, which was well documented and was an assertion that AMC did not challenge).

with industrial activity.<sup>124</sup> Finally, the court held that the EPA's interpretation was consistent with the overall goals of the CWA because Congress intended to give the EPA authority to adopt an orderly permitting process to address the major contributors of pollutants.<sup>125</sup>

In *NRDC v. EPA*, unlike in *American Mining Congress*, the permit exemption for oil and gas construction sites was contrary to the overall goals of the CWA. As the Ninth Circuit acknowledged, the EPA had a long-standing position that sediment was a pollutant under the CWA and was compelled to regulate it.<sup>126</sup> When the EPA promulgated its regulations for construction site discharges, it stressed the harm to the waterways that results from these types of discharges.<sup>127</sup> The EPA has even provided data demonstrating the amount of sediment deposited into streams from construction activity as compared to other types of land uses.<sup>128</sup> Based on scientific data and studies, the EPA concluded that construction site discharges must be regulated through NPDES permits.<sup>129</sup>

Even though the EPA knew (and previously admitted) this area needed regulation, it likely created a new exemption for oil and gas construction sites to meet Congress's goal for the Energy Policy Act.<sup>130</sup> One of the goals of this Act was to increase domestic production of energy supplies in order to decrease the nation's dependence on foreign supplies.<sup>131</sup> A way to meet this goal is to relieve the energy producers

<sup>124</sup> *Id.* at 765-66.

<sup>125</sup> *Id.* at 766.

<sup>126</sup> *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 607 (9th Cir. 2008).

<sup>127</sup> See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,992 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122-124 (Westlaw 2009)) (stating that "[e]ven a small amount of construction may have a significant negative impact on water quality in localized areas").

<sup>128</sup> See *id.* With regard to construction site sediment, the EPA has stated that construction sites contribute "10 to 20 times that of agricultural lands" and "1,000 to 2,000 times that of forest lands." *Id.*

<sup>129</sup> See *id.* at 48,033-34 ("EPA is convinced that because of the impacts of construction discharges that are directly to waters of the United States, such discharges should be addressed by permits issued by Federal or NPDES State permitting authorities. It is evident from numerous studies and reports submitted under section 319 of the CWA that discharges from construction sites continue to be a major source of water quality problems and water quality standard violations. Accordingly EPA is compelled to address these source[s] under these regulations and thereby regulate these sources under a nationally consistent program with an appropriate level of enforcement and oversight.").

<sup>130</sup> See Legislation Committee, *Committee Report*, 27 ENERGY L.J. 349, 353 (2006) ("Similarly, Section 323 of EPAct of 2005 changes the definition of oil and gas exploration and production in the Federal Water Pollution Control Act, also removing an impediment to exploration and production of natural gas.").

<sup>131</sup> Justin Stole, *The Energy Policy Act of 2005: The Path to Energy Autonomy*, 33 J. LEGIS. 119, 128 (2006) ("[T]he long-awaited Act includes provisions that aim to '[d]ecrease . . . America's

from certain environmental compliance requirements placed on their construction sites. For example, in order to reduce impediments to oil and gas production, Congress revised the definition for oil and gas exploration and production in the CWA to include construction sites.<sup>132</sup> Congress did this in order to extend the *existing* exemptions for oil and gas operations to oil and gas construction sites.<sup>133</sup> However, Congress did not authorize the EPA to allow pollutants to go unregulated in order to meet the goals of the Energy Policy Act.<sup>134</sup>

By allowing an oil and gas construction site to discharge sediment without a permit, the EPA would in effect authorize discharges of a known pollutant. The existing permit exemption for oil and gas operations did not include exemptions for sediment-only discharges.<sup>135</sup> Rather, the EPA created a new exemption in order to make it feasible for oil and gas construction sites to be exempt from storm water permit requirements.<sup>136</sup> Yet the EPA failed to refute its own statements that sediment was a contaminant under the CWA and must be regulated.<sup>137</sup> The EPA also did not offer supporting evidence that sediment, alone,

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dangerous dependence' on Middle Eastern oil, promote new 'nuclear and hydropower production,' and supply 'leadership in energy conservation.'").

<sup>132</sup> See Legislation Committee, *Committee Report*, 27 ENERGY L.J. 349, 353 (2006).

<sup>133</sup> See *Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591, 603 (9th Cir. 2008) ("The plain language of section 402(l)(2) of the CWA, as affected by the Energy Policy Act, does not indicate whether or not Congress intended that the NPDES permit exemption cover storm water discharges contaminated solely with sediment. Neither CWA section 402(l)(2) nor section 323 of the Energy Policy Act of 2005 mention the term 'sediment.' The statutory language of section 402(l)(2) merely indicates that oil and gas operations or facilities, which now include construction activities, are exempt from NPDES permitting requirements so long as the storm water runoff from those activities is not contaminated with, or does not come in contact with, certain statutorily undefined contaminants: overburden, raw material, intermediate products, finished product, byproduct, or waste products.").

<sup>134</sup> See 33 U.S.C.A. § 1362(24) (Westlaw 2008) Congress amended the definition of oil and gas exploration and production to include construction activities. No additional guidance was provided by Congress in either the amended section of the CWA or the legislative history of the Energy Policy Act; see also *NRDC 2008*, 526 F.3d at 608 ("[T]he statutory exemption (402(l)(2)) [did not] make any mention at all of 'sediment'—or of whether it was covered or not.").

<sup>135</sup> See *NRDC 2008*, 526 F.3d at 603 (explaining that Congress did not expressly mention the word sediment when amending CWA section 402(l)(2) or section 323 of the Energy Policy Act of 2005, and that the existing exemption for oil and gas exploration and production facilities does not mention the word "sediment").

<sup>136</sup> See *id.* at 606 ("Thus, EPA argues that, because 'sediment is the pollutant most commonly associated with construction activities,' Congress must have meant to exempt all construction-related sediment with it made construction activities eligible for the exemption, or else the amendment would be effectively meaningless.").

<sup>137</sup> See *id.* at 607 (explaining that the EPA's numerous reports and studies support the fact that construction site discharges impact water quality and concluding that the EPA must regulate these discharges).

would not impact the nation's waters.<sup>138</sup> Creating exemptions for construction site sediment would frustrate the objective of the CWA, which includes the express prohibition of the discharge of any pollutant without a permit.<sup>139</sup>

#### B. THE PERMIT EXEMPTION LACKED A PERMITTING SCHEME TO ENSURE COMPLIANCE WITH THE CWA

The exemption was also arbitrary and capricious because the EPA did not provide a permitting scheme to ensure an oil and gas construction site would have fallen within the storm water permit exemption.<sup>140</sup> Without an adequate permitting scheme, the EPA cannot ensure that an oil and gas company would apply for a permit if its construction site sediment came into contact with contaminants typically found at these sites.<sup>141</sup> This scenario is similar to the EPA's previously proposed exemption from storm water permitting requirements for light industries so long as there was no actual exposure to storm water.<sup>142</sup> In 1992, the Ninth Circuit found that the EPA lacked an adequate permitting scheme to ensure that a light industrial facility was not actually exposed to storm water and exempt from permitting.<sup>143</sup> The court found the permit exemption to be arbitrary and capricious, and noted that the only way that the EPA would be assured that a light industry was exempt was if the facility self-reported or if the EPA conducted its own inspections of

<sup>138</sup> See *id.* ("EPA also argues that it never previously considered, until the 2005 amendment, how sediment alone should be treated under existing regulations.")

<sup>139</sup> See 33 U.S.C.A. § 1251(a) (Westlaw 2008) ("The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); see also 33 U.S.C.A. § 1311(a) (Westlaw 2008) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.")

<sup>140</sup> Cf. *Natural Res. Def. Council v. EPA (NRDC 1992)*, 966 F.2d 1292, 1305 (9th Cir. 1992). The Ninth Circuit struck down an NPDES permit exemption for light industries. One of the reasons included the lack of a permitting scheme that would ensure a light industry was within the permit exemption. The court doubted that a light industrial facility would have self-reported to the EPA that their facility was exempt. In addition, the court doubted that the EPA would verify whether a light industrial facility was indeed exempt. Because there was no assurance that a light industrial site would apply for a permit if there were actual exposure to storm water, the Ninth Circuit found the permit exemption for light industries arbitrary and capricious. *Id.*

<sup>141</sup> See generally 33 U.S.C.A. § 1342(f)(2) (Westlaw 2009) (identifying the contaminants typically found at an oil and gas site).

<sup>142</sup> *NRDC 1992*, 966 F.2d at 1304-05 (holding that the permit exemption was arbitrary and capricious because the EPA created the exemption without substantiated support for its assumptions that light industrial facilities (i.e., facilities that are comparable to retail, commercial or service industries such as manufacturers of pharmaceuticals, paints, varnishes, fabrics, paper board, jewelry, and toys) typically occur indoors and that exposure to storm water would therefore be minimal).

<sup>143</sup> *Id.* at 1305.

these facilities.<sup>144</sup>

Without a well-thought-out permitting scheme to ensure compliance with a permit exemption, a potential loophole would be created that would allow unlawful discharges to go unregulated. For example, in *Waterkeeper Alliance, Inc. v. EPA*, environmental groups challenged the EPA's regulation of water pollutants from concentrated animal feeding operations ("CAFO").<sup>145</sup> One of the many challenges involved the storm water permit exemption for agriculture storm water discharge,<sup>146</sup> which did not require storm water permits for any "precipitation-related discharge of manure, litter, or any process washwater from land areas under control of a CAFO" when the CAFO's methods were consistent with nutrient management plans.<sup>147</sup> In other words, if a CAFO operator properly managed the land application of manure, litter, or process washwater, it would not be liable for rainwater that carried these constituents off the site.<sup>148</sup> Therefore, the CAFO operator would be exempt from permit requirements.<sup>149</sup>

*Waterkeeper Alliance, Inc.*, argued that agricultural storm water runoff from CAFO sites should be regulated because CAFO discharges were a regulated point source under the CWA.<sup>150</sup> The Second Circuit rejected this argument because agriculture storm water was explicitly excluded from the definition of point source in the CWA.<sup>151</sup> The court said that Congress's goal was not to hold a CAFO liable for discharges that were caused by nature.<sup>152</sup> As a result, the court held that this

<sup>144</sup> *Id.* (stating that the regulations did not contemplate how the EPA would ensure compliance and finding it unlikely that the two options would be implemented by the EPA).

<sup>145</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 497 (2d Cir. 2005) (challenging the CAFO rule, the permitting scheme, the types of discharges subject to regulation under the CAFO rule, and the effluent limitation guidelines in the CAFO rule).

<sup>146</sup> *Id.* at 506.

<sup>147</sup> *Id.* at 507.

<sup>148</sup> *Id.* at 509 ("[W]here a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharged that is primarily the result of 'precipitation.'").

<sup>149</sup> *See id.* at 507 ("[T]he Rule, like the Clean Water Act itself, carves out an exception where the discharge in question is 'an agricultural storm water discharge,' [40 C.F.R. § 122.23(e)] a category of discharges that the Act exempts from regulation. . . .").

<sup>150</sup> *Id.* ("[T]he Clean Water Act's definition of 'point source' requires regulation of *all* CAFO discharges, notwithstanding the fact that agricultural storm water discharges are otherwise deemed exempt from regulation.").

<sup>151</sup> *Id.* at 507 (pointing out that the Clean Water Act's definition of "point source" does not include agricultural storm water discharges).

<sup>152</sup> *Id.* The court stated that it was reasonable to conclude that Congress, by excluding agricultural storm water discharges from the definition of the term "point source," affirmed the impropriety of imposing permit requirements when agriculture-related discharges were not a result of the CAFO operator's doing but was a result of weather. In addition, the Second Circuit noted that



exception was a permissible interpretation of the CWA.<sup>153</sup>

One critic of the agricultural storm water exemption stated that this exemption created a potential loophole for manure discharges because the exemption lacked provisions for enforcement and monitoring by the EPA.<sup>154</sup> This exemption put the onus on the CAFO to develop a management plan for the land application of manure, litter, or washwater such that discharges would be minimal.<sup>155</sup> However, there was “no guarantee that a government agency would ever review [these plans].”<sup>156</sup> In effect, the EPA presumed that the CAFO would develop a comprehensive management plan that would allow a CAFO to fall within the agriculture storm water discharge exemption.<sup>157</sup> Without adequate review of these plans and strict enforcement by the EPA, there is a potential that unauthorized discharges will occur from CAFO sites.<sup>158</sup>

A similar loophole would be present with the oil and gas construction site permit exemption. Unlike the storm water discharge exemption for CAFO sites, however, the EPA did not require a management plan to control sediment from coming in contact with the known contaminants from an oil and gas construction site.<sup>159</sup> In addition, the exemption did not include monitoring or reporting requirements to ensure that only uncontaminated sediment was being discharged.<sup>160</sup> As a result, a presumption was created that oil and gas companies would be

there was no legislative history that contradicts this assertion. *Id.*

<sup>153</sup> *Id.* at 509.

<sup>154</sup> Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367, 390 (2002) (asserting that the CAFO rule had “inefficient reporting and monitoring requirements, and [that] the absence of the permitting authority in the plan development process serves to weaken the effectiveness of the regulations and opens the door to unregulated discharges through the agricultural storm water exemption”).

<sup>155</sup> *See id.* at 390-91 (referencing the preamble to the CAFO regulation that states that CAFO operators are “ultimately responsible for developing and implementing effective [Permit Nutrient Plans]”).

<sup>156</sup> *See id.* at 391.

<sup>157</sup> *Id.* (arguing that CAFO owners and operators are required to develop a plan to manage nutrient application on their sites in order to qualify for the exemption, and recognizing that there is no guarantee that such a plan would be reviewed by any government agency).

<sup>158</sup> *Id.* at 390 (“[T]he absence of the permitting authority in the plan development process serves to weaken the effectiveness of the regulations and opens the door to unregulated discharges through the agricultural storm water exemption.”).

<sup>159</sup> *See* Natural Res. Def. Council v. EPA (*NRDC 2008*), 526 F.3d 591, 600 (9th Cir. 2008). The challenged part of the exemption in 40 C.F.R. § 122.26(a)(2)(ii) states: “Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provision of paragraph (c)(1)(iii)(C) of this section.” 40 C.F.R. § 122.26(c)(1)(iii)(C) provides that a permit is required when the discharge “[c]ontributes to a violation of a water quality standard.”

<sup>160</sup> *See NRDC 2008*, 526 F.3d at 600.

forthcoming and seek a storm water permit if sediments at its construction sites came into contact with contaminants.<sup>161</sup>

Without strict enforcement, like providing an adequate permitting scheme, there would be no incentive for the oil and gas companies to monitor sediment discharges from their construction sites to ensure they are within the exemption.<sup>162</sup> This would open the door to unauthorized contaminated sediment discharges from these sites in violation of the CWA.<sup>163</sup> Because sediment is a recognized pollutant, the EPA is compelled to regulate it.<sup>164</sup> By opening the door to potential abuse by the oil and gas companies, the EPA would not be appropriately regulating pollutant discharges. This would be manifestly contrary to the EPA's responsibility under the CWA to prohibit discharges of pollutants without a permit.<sup>165</sup>

#### IV. ALTHOUGH THE NINTH CIRCUIT DECISION WAS CORRECT, THE COURT FAILED TO ADDRESS THE EPA'S ATTEMPT TO CARVE OUT AN EXEMPTION FOR ONLY ONE SEGMENT OF THE CONSTRUCTION INDUSTRY

Within the *Chevron* step two analysis, the Ninth Circuit failed to address the EPA's attempt to carve out an exemption for one segment of the construction industry that did not extend to other segments of the construction industry. The EPA must apply its regulations evenhandedly in order to pass the "arbitrary and capricious" standard.<sup>166</sup> Treating like cases differently must be either authorized by Congress or supported by evidence.<sup>167</sup> The EPA previously created permit exemptions applicable

<sup>161</sup> Cf. *Natural Res. Def. Council v. EPA (NRDC 1992)*, 966 F.2d 1292, 1305 (9th Cir. 1992) (expressing doubt over whether a light industry would be forthcoming in demonstrating that its site was exempt and over whether the EPA would inspect the site to see if the light industrial site was within the permit exemption).

<sup>162</sup> Cf. Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367, 390 (2002) (stating that CAFO operators must develop a plan demonstrating how they will prevent waste runoff in order to be exempt from permit requirements, and arguing that the lack of a permitting authority to ensure compliance with the exemption requirements will weaken the regulation and open the door for discharges to go unregulated).

<sup>163</sup> Cf. *id.* (arguing that discharges will go unregulated if there is no permitting scheme to provide some oversight by a governmental agency).

<sup>164</sup> *NRDC 2008*, 526 F.3d at 607.

<sup>165</sup> See 33 U.S.C.A. § 1311(a) (Westlaw 2008) (stating that pollutant discharges are prohibited unless such discharges are in compliance with the named sections of the CWA).

<sup>166</sup> See *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (holding that when an administering agency fails to evenhandedly apply a requirement in two cases that are functionally indistinguishable, the agency's actions are deemed arbitrary and capricious).

<sup>167</sup> See, e.g., *Natural Res. Def. Council v. EPA (NRDC 1992)*, 966 F.2d 1292, 1304-05 (9th

to one group and not to others that were similar in nature without justification.<sup>168</sup> The Ninth Circuit struck down this preferential treatment as arbitrary and capricious.<sup>169</sup> Despite the court's holding against preferential treatment in the EPA's permit exemption, the EPA created a permit exemption applicable only to oil and gas construction and not to other types of construction, such as housing developments. This action constitutes impermissible preferential treatment.

#### A. THE EPA ACTED OUTSIDE ITS DUTIES WHEN IT FAILED TO APPLY THE PERMIT EXEMPTION EVENHANDEDLY

"The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard."<sup>170</sup> Courts have found that an administering agency acts arbitrarily when it fails to apply its regulations evenhandedly. For example, in *Independent Petroleum Ass'n of America v. Babbitt*, the U.S. Court of Appeals for the District of Columbia struck down the Department of the Interior's ("DOI") decision to collect royalties from settlement payments that a gas producer received when releasing a pipeline company from its contract.<sup>171</sup> Royalties to DOI were due when gas was physically removed from the ground and sold.<sup>172</sup> The court emphasized that the trigger for payment of royalties was when there was actual gas production.<sup>173</sup> The court found that settlement payments were analogous to take-or-pay payments with respect to collection of royalties.<sup>174</sup> Take-or-pay payments were made when a pipeline company failed to purchase gas and were not linked to physical extraction of gas.<sup>175</sup> Because there was no physical extraction of gas, the DOI did not require royalties on take-or-pay payments.<sup>176</sup> Similarly, the court found no link between the physical gas extractions

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Cir. 1992). The EPA's permit exemption for light industries was not extended to the entire industry class. The court stated that "[w]ithout supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress." *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Indep. Petroleum*, 92 F.3d at 1260.

<sup>171</sup> *Id.* at 1250.

<sup>172</sup> *See id.* at 1259 (referencing *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159 (5th Cir.), in which the Fifth Circuit held that no royalties were due on settlement payments or take-or-pay payments because gas was not physically severed from the ground at the time of payment).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1260.

<sup>175</sup> *Id.* at 1253.

<sup>176</sup> *See id.* ("No royalty is due on take-or-pay payments unless and until gas . . . is actually produced and taken.")

and settlement payments.<sup>177</sup> The D.C. Circuit held that the DOI's decision was arbitrary and capricious because the DOI failed to demonstrate how settlement payments were functionally different from take-or-pay payments that would support royalties in conjunction with settlement payments.<sup>178</sup>

Similarly, in 1992 the Ninth Circuit rejected the EPA's attempt to exempt light industries from permit requirements because the EPA failed to support its distinction between light and heavy industries.<sup>179</sup> This is the same case in which the Ninth Circuit found that the EPA lacked an adequate permitting scheme to ensure a light industry was in compliance with the permit exemption. The EPA required permits for light industrial activities only if the work areas or materials were actually exposed to storm water.<sup>180</sup> The EPA assumed that because light industrial activities primarily occurred indoors, exposure to storm waters would be minimal.<sup>181</sup> However, the Ninth Circuit found that the EPA failed to support its contention that light industry facilities would have minimal exposure to storm water.<sup>182</sup> In addition, the EPA provided no supporting evidence for its assumptions that light industries should be treated differently from other industries, which were subject to permit requirements.<sup>183</sup> Without support for its contentions, the court was unable to conclude that the EPA was acting within its duties.<sup>184</sup> As a result, the Ninth Circuit held the EPA's actions in distinguishing light industrial activities from other industrial activities and providing storm water permitting exemptions were arbitrary and capricious.<sup>185</sup>

In the present case, the EPA never explained why oil and gas construction sites were significantly different from other types of construction sites in a way that would justify exempting the former, but not the latter, from permit requirements for sediment-only discharges.<sup>186</sup>

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<sup>177</sup> *Id.* at 1260.

<sup>178</sup> *Id.*

<sup>179</sup> *Natural Res. Def. Council v. EPA (NRDC 1992)*, 966 F.2d 1292, 1305 (9th Cir. 1992) (holding the EPA's exemption for light industries was arbitrary and capricious).

<sup>180</sup> *Id.* at 1304.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1305.

<sup>183</sup> *Id.* at 1305 ("Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about . . . this group of facilities is arbitrary and capricious.")

<sup>184</sup> *Id.* at 1305.

<sup>185</sup> *Id.*

<sup>186</sup> *NRDC et al.'s Response to Petition for Rehearing, Natural Res. Def. Council v. EPA (NRDC 2008)*, 526 F.3d 591(9th Cir. 2008) (No. 06-73217), available at [http://www.epa.gov/npdes/pubs/oilandgas\\_nrdcbrief.pdf](http://www.epa.gov/npdes/pubs/oilandgas_nrdcbrief.pdf) (referring to the EPA's findings and

The EPA conceded that construction activity was industrial in nature and that it was not free to create permit exemptions for these activities.<sup>187</sup> The EPA had even gone so far as to recognize oil and gas construction sites as prime candidates for NPDES permit for having serious water quality impacts.<sup>188</sup> Yet despite these prior statements, the EPA remained silent as to why oil and gas construction sites should be treated differently from other types of construction sites where storm water discharge permits were required for sediment-only discharges. Without support for the distinction, the EPA had not acted within its lawful duties under the CWA. In addition, unless otherwise refuted by the EPA, sediment-only discharges from an oil and gas construction site and any other construction site are indistinguishable and must be regulated evenhandedly.<sup>189</sup>

#### B. THE NINTH CIRCUIT HAD A DUTY TO STOP THE EPA FROM TREATING LIKE CASES DIFFERENTLY

The court has a judicial duty to stop agencies from arbitrarily treating similarly situated cases differently.<sup>190</sup> A court must consider how an agency's regulation or action is applied among an entire class in order to determine if the agency acted arbitrarily. In doing so, the court must require that the agency provide support for its decision to treat like cases differently before the court can extend deference to the agency.<sup>191</sup> For example, in *Distrigas of Massachusetts Corp. v. Federal Power Commission*, the U.S. Court of Appeals for the First Circuit vacated the Federal Power Commission's action that required Distrigas to comply with the Commission's reporting requirements for its liquefied natural gas ("LNG") transaction.<sup>192</sup> The court found that the Commission

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statements that sediment causes serious water quality problems).

<sup>187</sup> *NRDC 1992*, 966 F.2d at 1306.

<sup>188</sup> *NRDC 2008*, 526 F.3d at 607.

<sup>189</sup> *See* *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) ("The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard.").

<sup>190</sup> *See* 5 U.S.C.A. § 706(2)(A)-(D) (Westlaw 2009) (outlining when the reviewing court must find an agency's action as unlawful, which include actions that are arbitrary, capricious, or an abuse of discretion).

<sup>191</sup> *See* *Distrigas of Mass. Corp. v. Fed. Power Comm'n*, 517 F.2d 761, 766 (1st Cir. 1975) (vacating the Commission's decision to deny the petitioner's request because the Commission offered no explanation as to why it approved one request and denied a similar request).

<sup>192</sup> *See id.* at 765 (referencing the Commission's prior authorization of applying section 2.68 of the Commission's General Policies and Interpretations, which stated that the Commission would provide minimal oversight over the reporting requirements for emergency gas sales, to LNG transactions before and around the time of this case).

exempted similar LNG transactions from the Commission's reporting requirements around the same time that the Commission denied Distrigas's request.<sup>193</sup> However, the Commission offered no explanation as to why it approved similar requests but denied Distrigas's request to be exempt from reporting requirements.<sup>194</sup> The court stated that this action "resulted in inconsistent treatment of similarly situated parties to the detriment of [Distrigas]."<sup>195</sup> The First Circuit held that the Commission could exclude LNG transactions from reporting requirement exemptions so long as the Commission sets forth policies with sufficient clarity for the exclusion and must apply its regulations evenhandedly.<sup>196</sup>

In *NRDC v. EPA*, the Ninth Circuit should have admonished the EPA to ensure its regulations or exemptions are applied consistently and evenhandedly. This is an important consideration in this case because this was the second time that the EPA attempted to carve out an exemption for one segment of an industry while not extending it to the rest of the industry. Because the Ninth Circuit failed to address the lack of evenhanded application of the exemption, the door is open for the EPA to take a similar action in the future.

The EPA must consider whether its regulations are evenly applied among similarly situated groups.<sup>197</sup> With regard to the hypothetical example at the beginning of this Note, the local municipality would be expending its resources to comply with storm water permit requirements in order to minimize sediment from running off the site and into the stream. Yet the private energy company, which is also discharging sediment from its site, would not have to spend time and money fulfilling permit requirements as a result of the EPA's permit exemption for oil and gas construction sites. This situation does not make sense from a practical point of view. In addition, the permit exemption confers a benefit onto one party to the detriment of another. In situations like these, courts must require administrating agencies to apply their regulations evenhandedly to prevent this type of impermissible treatment. In the future, if the EPA opts to distinguish one group from

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<sup>193</sup> *See id.* ("The Commission has construed the regulation in other instances in precisely the opposite manner from here. Thus it has authorized applying section 2.68 to LNG transactions in letter rulings issued before at about the same time, and after the contrary ruling in this case.").

<sup>194</sup> *Id.* at 766 ("But the Commission has presented no information as to how or why those cases differed from the instant ones.").

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* ("If with respect to future transactions the Commission wishes to exclude LNG from the operation of section 2.68, it may do so by promulgating a new or revised rule setting forth its policies with sufficient clarity to ensure evenhanded treatment.").

<sup>197</sup> *See id.* at 765 ("[An administrative agency] has a duty to define and apply its policies in a minimally responsible and evenhanded way.").

another when enacting its regulations, it must provide support for this action in order to meet the “arbitrary and capricious” standard.<sup>198</sup>

## V. CONCLUSION

The Ninth Circuit rightly struck down the EPA’s permit exemption for oil and gas construction sites as arbitrary and capricious primarily because the EPA attempted to change its long-standing position that sediment is a pollutant that must be regulated. The permit exemption was also contrary to the goal of the CWA of preventing unlawful discharge of known pollutants. Furthermore, the EPA lacked a permitting scheme that would ensure compliance with the CWA.

Although not addressed by the Ninth Circuit, another reason the EPA’s permit exemption was arbitrary and capricious is that it carved out an exemption for oil and gas construction sites without support as to why the exemption was not extended to other construction sites. By failing to address this issue, the court may have left the door open for the EPA to attempt to create similar permit exemptions without considering if it is applying the exemptions evenhandedly. The court has a duty to stop an administrative agency from treating like cases differently. Therefore, the court must be deliberate in analyzing the fairness aspect of any permit exemptions to ensure administrating agencies, like the EPA, apply their regulations evenhandedly.

\*MARY LIM

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<sup>198</sup> See *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (asserting that treating like cases differently is arbitrary and capricious).

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